One Size Does Not Fit All: Alternatives to the Federal Rules of Evidence

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The Federal Rules of Evidence have been so successful that many people equate them to the whole field of evidence law. But this is a false equivalence. Our world is complicated, diversified, and dynamic. So, too, is evidence law, which is like a rainforest in which the Federal Rules are simply the largest tree, not a forest unto themselves. In fact, the Federal Rules of Evidence are limited in their applicability due to three fundamental assumptions: the presence of a jury trial, an adversarial process, and witness oral testimony. The universe of dispute resolution, however, extends far beyond a contour that is covered by these three assumptions.

This Article illustrates the dominance of the Federal Rules of Evidence since their launch, explains why the Rules do not fit in numerous dispute-resolution contexts outside common-law jury trials, and shifts attention to three featured alternative evidence systems (whether extant or in draft form) from other parts of the world. These evidence systems look structurally and logically different from the Federal Rules but fit well in their own contexts. Such comparative analysis brings out important evidence-rulemaking themes that are traditionally underexplored by U.S. evidence scholars and legislators.

On the eve of the fiftieth anniversary of the Federal Rules of Evidence, the author stands at the crossroads of evidence-law development and projects that its next era will necessitate going back into the forest to explore different sets of evidence rules suitable in different dispute resolution settings. Such a shift will help release evidence law from the traditional trap of the common-law jury, significantly expand space for its continual growth, and further develop the law in a sophisticated, diversified way with built-in flexibility.

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INTRODUCTION

Once upon a time, evidence law was remarkably diverse. For centuries, beginning in the late Middle Ages, common-law evidence was a creature of the judiciary, evolving from case to case and from treatise to treatise.[1] Numerous evidence theories emerged over these years. In England, these ranged from Sir Geoffrey Gilbert's treatise *The Law of Evidence*, first published in 1754 and known for the "best evidence rule,"[2] to Jeremy Bentham's 1827 oppositional theory of "free proof," which argued that "almost every rule that has ever been laid down on the subject of evidence" is "repugnant to the ends of justice."[3] In the United States, conversely, James Bradley Thayer and John Henry Wigmore introduced the "jury control theory" in the 1890s and 1900s—the notion that evidentiary rules were needed to prevent the likely

1. *See* John H. Langbein, *Historical Foundations of the Law of Evidence: A View from the Ryder Sources*, 96 COLUM. L. REV. 1168, 1170–71 (1996). Toward the end of the Middle Ages, the common law jury evolved from a body of private citizens that adjudicated cases based on facts known personally to them (the so-called "self-informed jury") into a body that based its decisions mostly on evidence given publicly before a judge (the "instructional jury"). *Id.* In the sixteenth century, the instructional mode of jury trials was firmly in place. *Id.* at 1171. No longer self-informing, the "passive jury required a courtroom instructional proceeding at which outside witnesses could inform them." *Id.* The trial judge heard the same testimony as the jurors, and so he was able to rule on the evidence. *Id.* Common law evidence can be traced back to the years 1500–1700 and was hardened in the late eighteenth century. *Id.*

2. *See* GEOFFREY GILBERT, THE LAW OF EVIDENCE (London, His Majesty's L. Printers, 1st ed. 1754) (The essence of Gilbert's "best evidence" principle is that secondary documentation will not be acceptable evidence when the preferred, original document is available).

3. 6 JEREMY BENTHAM, *Rationale of Judicial Evidence Specially Applied to English Practice*, *in* THE WORKS OF JEREMY BENTHAM 189, 204 (Russell & Russell, Inc. 1962) (1827).

failings of juries[4]—while Edmund M. Morgan, a few decades later, critiqued this stance: "[T]he dictum of the great Thayer that the English law of evidence is 'the child of the jury' is, it is suggested with the greatest deference, not more than a half-truth."[5]

Historically, there were also numerous efforts to codify evidence law. Most famous among these was the 1872 *Indian Evidence Act*, drafted by English lawyer James Fitzjames Stephen, which displaced a caste-based justice system in India and continues to exist today in India, Pakistan, Bangladesh, and certain other former British colonies.[6] In the United States, early attempts at codifying common-law evidence were plentiful but often failed to be adopted: Edward Livingston's Louisiana Code of Evidence (1830), the New York Code of Evidence (1849, 1886, 1887, and 1900), the Model Code of Evidence (1942), and the Uniform Rules of Evidence (1953).[7] Only the last of these would be adopted, and only in four states.[8]

And so, the early development of evidence law was organic, dynamic, diversified, and chaotic, just like the ecosystem of a rainforest.[9] But then the Federal Rules of Evidence arrived in 1975, and

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4. JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 266, 508–09 (Boston, Little, Brown, and Co. 1898) ("[O]ur law of evidence is a piece of illogical, but by no means irrational, patchwork; not at all to be admired, nor easily to be found intelligible, except as a product of the jury system, . . . where ordinary, untrained citizens are acting as judges of fact."); JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW 630–38 (Little, Brown, and Co. 1904); *see also* Eleanor Swift, *One Hundred Years of Evidence Law Reform: Thayer's Triumph*, 88 CALIF. L. REV. 2437 (2000); Zhuhao Wang, *The Peculiarity of American Evidence Law: An Outsider's Observation and Reflection*, 26 INT'L J. EVIDENCE & PROOF 271, 273–74 (2022).

5. Edmund M. Morgan, *The Jury and the Exclusionary Rules of Evidence*, 4 U. CHI. L. REV. 247, 258 (1937) (emphasis omitted); *see also* Swift, *supra* note 4, at 2455–61 (describing the scholarship of Wigmore and Morgan).

6. *See* JAMES FITZJAMES STEPHEN, REPORT OF THE SELECT COMMITTEE TO DEFINE AND AMEND THE INDIAN LAW OF EVIDENCE (1871), *reprinted in* EVIDENCE, PROOF, AND FACTS: A BOOK OF SOURCES 65, 65–69 (Peter Murphy ed., 2003) (reproducing Mr. Stephen's "presenting of the Report of the Select Committee on the Bill to define and amend the Law of Evidence"); Ronald J. Allen, Timothy Fry, Jessica Notebaert & Jeff VanDam, *Reforming the Law of Evidence of Tanzania (Part Two): Conceptual Overview and Practical Steps*, 32 B.U. INT'L L.J. 1, 2 (2014) (explaining that the Tanzania Evidence Act draws heavily from the Indian Evidence Act); Begum Asma Siddiqua, Development of the Law of Evidence in Pakistan and Bangladesh with Special Reference to Witness Testimony (1994) (Ph.D. thesis, University of London) (ProQuest) (noting the 1872 Indian Evidence Act's status as "the guiding law of evidence in India and Bangladesh").

7. *See* Barbara C. Salken, *To Codify or Not to Codify—That Is the Question: A Study of New York's Efforts to Enact an Evidence Code*, 17 PACE L. REV. 171, 183–86 (1997).

8. *Id.* at 186 ("In the end, only four states accepted the Uniform Rules: Kansas (1964), California (1965), New Jersey (1967) and Utah (1971). Yet it would be wrong to say that the Uniform Rules had no impact; they did become the basis for many of the Federal Rules of Evidence." (footnotes omitted)).

9. Note: My "rainforest" metaphor was originally inspired by Ronald J. Allen's May 2017 lecture at China University of Political Science and Law in Beijing, China, on the topic of "Rationality, the Taming of Complexity, and the Future of Evidence Science," in which Professor

the world of evidence law suddenly quieted down. The Federal Rules embodied centuries of evidentiary traditions and ideas, and have been dominant in evidence legislation, practice, scholarship, and teaching for nearly half a century since their launch. Without a doubt, the Federal Rules have accomplished a lot, representing the most comprehensive, sophisticated, tested system of evidence law to date in human history. As impressive as the Federal Rules are, however, a single tree does not make a forest. In numerous realms of dispute resolution, the Federal Rules still do not apply or are an awkward fit.[10] Moreover, with the launch of the Federal Rules, the momentum of evidence-law development seemingly slowed down quite a bit. In the words of Judge Richard Posner, evidence law has entered a "dogmatic slumber."[11] Recently, one evidence scholar even shouted out: "The jurisprudential evolution of evidence law is dead."[12]

Having arrived at the fiftieth anniversary of the Supreme Court's original adoption of the Federal Rules of Evidence, we are standing now at the crossroads of evidence law's fate. The Federal Rules are simply not as applicable to our current legal system as they were when they were adopted. How to continually and sustainably develop the law in the next fifty years has certainly become an emergent and important topic for law reformers.

This Article argues that the jurisprudence of evidence law is not dead, and that the Federal Rules of Evidence are not the beginning of the end of evidence law's development. In fact, the problem is that in the past fifty years, the field's attention and resources were overly focused on the Federal Rules. If we move our gaze away from the Federal Rules and adopt a bird's-eye view, we can once again catch glimpse of the surrounding forest, realize that the world of evidence law is (always) much larger than the contours of the Federal Rules, and see the vast space available to further develop the law in contexts that the Federal Rules do not traditionally cover. Law reformers should constantly think beyond the Rules and adopt a flexible attitude, while the development of evidence law should return to a pluralistic mode.

Part I of this Article illustrates the dominance of the Federal Rules of Evidence in four major aspects. Part II discusses the three fundamental assumptions (jury trial, adversarial system, and witness

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Allen compared "static closed systems vs. dynamic, complex adaptive systems" as "tree farms vs. rain forests." Unlike tree farms, tropical rainforests are formed through natural bottom-up processes, growing without a central purpose, richer in species, more robust, and more systematic. The legal system (as a complex adaptive system) is more like a rainforest rather than a tree farm.

10. Part II of this Article is dedicated to illustrating this point.

11. United States v. Boyce, 742 F.3d 792, 801 (7th Cir. 2014) (Posner, J., concurring).

12. G. Alexander Nunn, *The Living Rules of Evidence*, 170 U. PA. L. REV. 937, 938 (2022).

oral testimony) underlying the Federal Rules and demonstrates that when one or more of these three assumptions are missing in a context, the Federal Rules are a mismatch. In other words, as dominant as the Federal Rules are, one size does not fit all. Part III introduces three alternative evidentiary systems from other parts of the world, all of which are structurally distinct from the Federal Rules: the *Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia*, the *IBA Rules on the Taking of Evidence in International Arbitration*, and the *Guidelines for the Application of Evidence Provisions of the People's Court in China*. These systems have been neglected by the mainstream of American evidentiary jurisprudence but fit well and appear promising in their own contexts (various important nonjury proceedings).

I. DOMINANCE OF THE FEDERAL RULES OF EVIDENCE

In 1961, the Judicial Conference of the United States assembled a special committee to examine the desirability of codifying common-law rules of evidence for the federal courts.[13] Soon after, Chief Justice Earl Warren established the first Advisory Committee on the Federal Rules of Evidence ("FRE").[14] The Advisory Committee, a team of sixteen U.S. judges, lawyers, and scholars, proposed its first draft evidentiary code in 1970.[15] Following a series of revisions, the Supreme Court sent the draft to Congress for approval in 1972.[16] Two years later, after extensive negotiations, revisions, and adjustments, Congress adopted the FRE.[17] The Rules took effect the following year, in 1975.[18] With that, the FRE quickly became a paradigm of evidence law, an honor that they continue to hold nearly half a century later. Their dominance is evident in four key ways.

First, although the FRE were designed to apply to proceedings in U.S. federal courts, their popularity is far reaching both domestically and internationally. Since 1975, the vast majority of states in the

13. *See* Michael Teter, *Acts of Emotion: Analyzing Congressional Involvement in the Federal Rules of Evidence*, 58 CATH. U. L. REV. 153, 158 (2008).

14. *See* CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5006 (2d ed. 1977) (describing the establishment of the first Advisory Committee on rules of evidence).

15. *See Minutes of the May 21-26, 1970 Meeting of the Advisory Committee on Rules of Evidence*, ADVISORY COMM. ON RULES OF EVIDENCE (1970), https://www.uscourts.gov/sites/default/files/fr_import/EV05-1970-min.pdf [https://perma.cc/AU4M-K2QE] (minutes detailing provisions of the proposed code).

16. Order, Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183 (1972) (setting forth the draft rules of Supreme Court).

17. *See* Teter, *supra* note 13, at 159.

18. Swift, *supra* note 4, at 2462.

United States have adopted the FRE as their own state law, with or without local variations.[19] U.S. courts-martial incorporated the Rules into the Military Rules of Evidence as well, with some changes to accommodate military situations.[20] Even a number of states' administrative courts have adopted the FRE, despite the Rules being widely recognized as an awkward fit for administrative proceedings.[21] Outside the United States, the FRE also led to a trend of codification of evidence rules, especially among common-law countries. To name a few, Canada consolidated its federal evidence rules in 1985; Australia moved toward a uniform evidence law in 1995; and New Zealand codified its laws of evidence in 2006.[22] In the past few decades, even civil-law countries, which traditionally follow the principle of free evaluation of evidence and have no evidence statutes, have seen unprecedented efforts directed toward the study of the FRE and the development of their own evidence law, using the FRE as an initial template.[23] Here,

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19. New York and California are among the very few states that have not adopted the FRE. Most of New York's evidentiary rules are not codified. *See History of the Guide to NY Evidence*, NYCOURTS.GOV, https://www.nycourts.gov/JUDGES/evidence/0-TITLE_PAGE/HISTORY/Guide-History.shtml (last visited Sept. 7, 2023) [https://perma.cc/7HSG-ZDFR] ("New York is one of the very few states that does not have a statutory code of evidence."). California, conversely, enacted its own evidentiary statute, the California Evidence Code, in 1965. Cobey-Song Evidence Act, ch. 299, § 2 (1965).

20. *See* Fredric I. Lederer, *The Military Rules of Evidence: Origins and Judicial Implementation*, 130 MIL. L. REV. 5, 12 (1990) (emphasizing the modifications and redrafting of the Rules for the military).

21. For example, traditionally, most workers' compensation courts have not applied rules of evidence to their (administrative) proceedings. A number of jurisdictions, however, have chosen to adopt the FRE, often with modification, including Alabama, Colorado, Georgia, Montana, Rhode Island, and Tennessee, among others. *See* TERRY A. MOORE, ALABAMA WORKERS' COMPENSATION § 25:7 (2d ed. 2023) ("[T]he rules of evidence generally applicable to civil actions operate equally in workers' compensation cases."); COLO. REV. STAT. ANN. § 8-43-210 (2023) ("[T]he Colorado rules of evidence and requirements of proof for civil nonjury cases in the district courts shall apply in all hearings."); GA. CODE ANN. § 34-9-102(e)(1) (2023) ("The rules of evidence pertaining to the trial of civil nonjury cases in the superior courts of Georgia shall be followed unless otherwise provided in this chapter."); MONT. CODE ANN. § 39-71-2903 (2022) ("The workers' compensation judge is bound by common law and statutory rules of evidence."); RHODE ISLAND WORKERS COMPENSATION COURT, RULES OF PRACTICE § 2.21 (2013) ("The testimony of all parties and witnesses before a Judge shall be given under oath or affirmation and governed by the Rhode Island Rules of Evidence except as modified by these Rules."); TENN. CODE ANN. § 50-6-239(c)(1) (2023) ("The Tennessee Rules of Evidence and the Tennessee Rules of Civil Procedure shall govern proceedings at all hearings before a workers' compensation judge unless an alternate procedural or evidentiary rule has been adopted by the administrator.").

22. *See* Canada Evidence Act R.S.C., 1985, c. C-5; *Evidence Act 1995* (Cth) (Austl.); Evidence Act 2006 (N.Z.).

23. *See* Jia Li & Zhuhao Wang, *A Trail to Modernity: Observations on the New Developments of China's Evidence Legislation Movement in a Global Context*, 21 IND. J. GLOB. LEGAL STUD. 683, 685–86 (2014) ("Recent components of the [evidence legislation] movement [in China, a traditional civil law country,] include two sets of significant proposed judicial interpretations: The first set, . . . the *Uniform Provisions of Evidence of the People's Courts (Proposal for Judicial Interpretations and Drafting Commentary)* . . . , resembles the FRE in [several] significant

some borrowing is perhaps understandable, since the FRE are currently the world's most well-developed, proven system of evidentiary rules. So, "they may offer greater sophistication and conceptual clarity than starting from scratch."[24]

Second, even for dispute resolutions that clearly do not apply the FRE, the Rules' gravity still exists, creating a shadow effect.[25] Essentially, parties may reach an out-of-court deal influenced by the knowledge that certain crucial evidence would be admitted or excluded according to the FRE if their case were to proceed to trial. For example, the value of settling a civil case may vary dramatically depending on whether a defendant's subsequent remedial measure or offer to pay the plaintiff's medical bills would be excluded at trial.[26] "In criminal cases, nothing influences the plea-bargaining process more than pretrial rulings by the trial judge on evidentiary matters, such as whether a defendant's confession or criminal history will be admitted at trial."[27] Even in arbitration hearings that do not apply the FRE, most arbitrators and representing lawyers are largely familiar with the Rules and can still utilize the Rules to assess the weight of the evidence presented.[28]

Third, the power to shape and evolve evidence law has nowadays been concentrated in the hands of the FRE's Advisory Committee. The centuries-long tradition of developing evidence law on a case-by-case basis ceased with the codification of the FRE.[29] Even though judges continue to have power to interpret and resolve conflicts within the evidence rules via their judicial discretion, they no longer have the power to change or create new rules.[30] Rather, the Advisory Committee

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aspects . . . ." (footnotes omitted)). *See generally* MIRJAN R. DAMAŠKA, EVIDENCE LAW ADRIFT (1997) (analyzing evidence codes' manifestations in civil law countries).

24. Edward K. Cheng, *Thinking Beyond the Federal Rules*, 23 EVIDENCE SCI. (China) 632, 637 (2015).

25. *See* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 994 (1979); *see also* Zhuhao Wang, *The Fate of Evidence Law: Two Paths of Development*, 24 INT'L J. EVIDENCE & PROOF 329, 335–36 (2020) (describing the effects of the subliminal influence of the FRE).

26. *See* FED. R. EVID. 407, 409; *see also* STEPHEN C. YEAZELL & JOANNA C. SCHWARTZ, CIVIL PROCEDURE 33–34 (11th ed. 2023) (discussing the dominant influence of trial on pretrial behaviors including settlements).

27. Laird C. Kirkpatrick, *Evidence Law in the Next Millennium*, 49 HASTINGS L.J. 363, 366 (1998); *see also* FED. R. EVID. 404, 410, 801(d)(2)(A).

28. *See* Alfred G. Feliu, *Evidence in Arbitration: A Guide for Litigators*, *in* AAA HANDBOOK ON COM. ARB. 267, 267 (2d ed. 2010) (acknowledging that some litigators also "dabble in arbitration").

29. *See* Paul R. Rice, *Advisory Committee on the Federal Rules of Evidence: Tending to the Past and Pretending for the Future?*, 53 HASTINGS L.J. 817, 827 (2002).

30. The Supreme Court of the United States made this point clear in *Green v. Bock Laundry Machine Co.*, 490 U.S. 504 (1989) and in *Bourjaily v. United States*, 483 U.S. 171 (1987).

holds the key to any evidentiary rule change.[31] The members of the Committee have become the new gatekeepers, and their interpretation of the Rules determines the mainstream view.[32]

Finally, from a pedagogical perspective, for most law students studying the FRE is the only way to understand and master evidence law. In return, most people think that evidence law equates to the FRE. Nowadays, most teaching materials printed in evidence-law textbooks and most lecture topics in evidence-law classrooms focus on the FRE. Structurally, they all have very similar patterns, mapping the same logical flow of the FRE.[33] By contrast, only minimal time is devoted in a typical U.S. evidence-law course to non-FRE topics, such as case law, state regulations, practices of taking evidence in other countries and international tribunals, or the nature of juridical proof. If the world of evidence law is a rainforest, then without a doubt the FRE are the most gorgeous tree in it. But too much attention is focused on this one tree, and we miss the forest of possibilities that is evidence law.

II. ONE SIZE DOES NOT FIT ALL

As dominant and influential as the FRE are, these rules do not fit everywhere. Rather, they are contextual, resting on a number of structural and cultural assumptions.[34] The single most fundamental assumption is the jury. It has been an open secret that jury distrust animates U.S. evidence law like nothing else,[35] and the Federal Rules are primarily designed for jury trials.[36] Most rules in the FRE are admissibility rules, which presume a bifurcated system with a

31. *See* Nunn, *supra* note 12, at 957 (explaining the powers of the FRE committee).

32. *See* Rice, *supra* note 29, at 832–34 (highlighting the impact of the committee's oversight).

33. *See* Swift, *supra* note 4, at 2449 ("The vast majority of printed material in current evidence casebooks, and the vast majority of time spent in the classroom, focus on the broad exclusionary rules that constrain the admission of items of proof and, of course, their exceptions.").

34. Cheng, *supra* note 24, at 638.

35. *See* WIGMORE, *supra* note 4, at 632–33. According to Wigmore, certain fundamental principles underlying the artificial rules of evidence were highly important, but their importance was attributable almost entirely to the existence of the jury. *Id.* Juries, because of their cognitive and epistemic failings, could hardly be trusted to apply the more scientific principles of proof directly and thus needed rules of evidence to steer them in the right direction. *Id.*

36. *See* Henry Zhuhao Wang, *Rethinking Evidentiary Rules in an Age of Bench Trials*, 13 U.C. IRVINE L. REV. 263, 298–301 (2022):

> One obvious illustration is that a keyword search of "jury" or "juror" in the text of the current version of the FRE finds *thirty-six* mentions, whereas a search for "bench" in the same text gets *zero* results. Even though "judge" is mentioned seven times in the current version of the FRE, only one instance remotely relates to bench trials, and often the role of the judge who is mentioned is to screen dangerous evidence before it reaches the jury.

gatekeeper (the judge), who screens the evidence, and a fact finder (the jury), which weighs only the screened evidence.[37]

The second fundamental assumption embedded in the FRE is the adversarial system. These rules are complex, in part because they were designed not for laypersons to use in daily life but for competing attorneys to use when facing off against each other.[38] Trained attorneys are expected to have a high level of familiarity with the FRE and to skillfully apply these rules when challenging and testing the strength of the evidence presented by the opposing side at trial.[39] And the Federal Rules sometimes operate to protect this opportunity for adversarial testing. For example, hearsay evidence is presumptively inadmissible.[40] Therefore, witnesses with personal knowledge normally testify live in the courtroom, where they can be subjected to cross-examination by the opposing party.[41]

A third, related, fundamental assumption in the FRE "is the preference for, if not the glorification of, in-court, oral testimony" by witnesses.[42] The trial process is essentially a show of witnesses being directed and cross-examined as they describe their personal observations, provide opinions of character, offer scientific explanations, and, sometimes, narrate their own story.[43] Indeed, even for documentary and other physical evidence, trials almost always still rely on witnesses to authenticate the evidence and provide descriptions.[44]

When all three of these assumptions are met, the FRE are generally a good fit. When dispute-resolution mechanisms miss one or more of these assumptions, however, the FRE are a mismatch. For example, in bench trials, the judge occupies both gatekeeper and fact

37. *Id.* at 301–03 (describing the role of the judge to screen dangerous evidence from the jury).

38. *See* Andrew C. Budzinski, *Overhauling Rules of Evidence in Pro Se Courts*, 56 U. RICH. L. REV. 1075, 1076 (2022).

39. *Id.* at 1085 ("As a result, court rules and case law combine to form a procedural regime that assumes each party will have a competent, effective lawyer from start to finish."); *see also* Jessica K. Steinberg, *Demand Side Reform in the Poor People's Court*, 47 CONN. L. REV. 741, 743–44 (2015) ("Although never made explicit, the system, in effect, depends upon the skill of an attorney to transform a party's grievance into a highly stylized set of allegations, evidence, and arguments, upon which a judge or jury can base a ruling.").

40. FED. R. EVID. 802.

41. *See* Morgan, *supra* note 5, at 253 (discussing the importance of lack of opportunity of cross-examination in rejecting hearsay evidence).

42. Cheng, *supra* note 24, at 638–39.

43. *See* FED. R. EVID. 607–609, 701–704.

44. *See* Edward K. Cheng & G. Alexander Nunn, *Beyond the Witness: Bringing a Process Perspective to Modern Evidence Law*, 97 TEX. L. REV. 1077, 1077 (2019) ("Documentary or physical evidence rarely stands on its own."). But note, in reality, for civil litigations, there are far more summary-judgment decisions than there are actual trials, and for summary-judgment motions, all the evidence will be presented in non-oral form—affidavits, deposition transcripts, documents, etc.

finder roles, making admissibility rules somewhat anomalous.[45] Logically, "[t]here is less need for the gatekeeper to keep the gate when the gatekeeper is keeping the gate only for himself."[46] And practically, psychological studies have shown consistently that humans have trouble "unringing the bell" after hearing inadmissible evidence.[47] Thus, although the Federal Rules do technically apply in both bench and jury trials, in practice, this is rarely the case. So goes the cliché that judges in bench trials are wont to say, "I'll let the evidence in and just give it the weight it deserves."[48]

The FRE are also ill-fitting and unrealistic for use by unrepresented litigants in pro se courts, simply because these rules are too complex for laypersons to apply and comply with at trial.[49] "Pro se litigation has grown consistently and enormously over the past few decades" in the United States, especially in state civil courtrooms.[50] These courts, however, face something of a "Goldilocks" problem: adoption of the FRE means that pro se litigants will typically struggle, access to justice will be hindered, and judges will face problems in administration; yet to abandon the Rules means to "let it all in" (i.e., free proof), which arguably takes things too far.[51]

Last but not least, in less formal venues of dispute resolution—settlements and arbitrations of civil disputes and plea bargaining of criminal cases—the FRE are often expressly not applicable.[52] This is partly because these settings' flexibility and efficiency demand more documentary evidence and less live-witness testimony, partly because there is no jury or bifurcation between gatekeeper and fact finder, and partly because parties in these settings are usually more collaborative, less adversarial.[53]

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45. Wang, *supra* note 36, at 301–03.

46. United States v. Brown, 415 F.3d 1257, 1269 (11th Cir. 2005).

47. *See, e.g.*, Daniel M. Wegner, *Ironic Processes of Mental Control*, 101 PSYCH. REV. 34, 34 (1994) (describing the human phenomena wherein attempting to change one's mind about an event or concept engrains said concept).

48. Frederick Schauer, *On the Supposed Jury-Dependence of Evidence Law*, 155 U. PA. L. REV. 165, 165–66 (2006).

49. *See* Budzinski, *supra* note 38, at 1076.

50. *Id.* at 1075.

51. *See* Edward K. Cheng, Heidi H. Liu & Henry Z. Wang, *The "Goldilocks" Problem: Rethinking the Evidence Rules in Workers' Compensation Courts*, LEX & VERUM (forthcoming 2023).

52. *See* Laird C. Kirkpatrick, *Scholarly and Institutional Challenges to the Law of Evidence: From Bentham to the ADR Movement*, 25 LOY. L.A. L. REV. 837, 838 (1992) ("Advocates claim that ADR proceedings are able to provide greater speed and efficiency in the resolution of disputes as well as lower costs, in part because they are not subject to legal 'technicalities' such as the rules of evidence.").

53. *See generally* Henry Zhuhao Wang, *Alternative Evidence Rules for Arbitration*, 24 NEV. L.J. (forthcoming 2024).

Therefore, evidence law clearly faces an awkward situation: although the FRE perfectly match with traditional trial settings, jury trials have been vanishing for decades and represent only a very small percentage of dispute resolutions today.[54] In the meantime, as dominant and influential as the FRE are, these evidentiary rules are barely applicable in nonjury proceedings.[55] For the vast majority (ninety-seven percent or more) of dispute resolutions, orthodox evidence law seems to have no answer.[56] But is this the whole reality? Not exactly.

III. ALTERNATIVES TO THE FEDERAL RULES

If we zoom out of the United States and search for alternative evidence regimes (whether currently in effect or as a promising draft), we do indeed find various models that have developed in other parts of the world in recent years—models that are seemingly very different from the FRE in text, structure, and inner logic, and that operate in completely different dispute-resolution settings. These alternatives are worth a close look. This Article surveys just three that appear especially promising.

A. Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia

The International Criminal Tribunal for the former Yugoslavia ("ICTY"), an ad hoc court located in The Hague, Netherlands, was a body of the United Nations established in 1993 to prosecute war crimes committed during the Yugoslav Wars of 1991 to 2001.[57] In its twenty-

54. *See* Shari Seidman Diamond & Jessica M. Salerno, *Reasons for the Disappearing Jury Trial: Perspectives from Attorneys and Judges*, 81 LA. L. REV. 119, 122 (2020) ("[T]he percentage of civil cases disposed of by jury trial decreased from approximately 5.5% in 1962 . . . to 0.8% by 2013. Likewise, the percentage of federal criminal cases disposed of by jury trial decreased from approximately 8.2% in 1962 . . . to 3.6% by 2013.").

55. But note, in summary judgement motions of civil cases, "[a] party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence." FED. R. CIV. P. 56(c)(2).

56. *See* Kenneth Culp Davis, *An Approach to Rules of Evidence for Nonjury Cases*, 50 A.B.A. J. 723, 724 (1964) ("We sometimes pretend to have rules of evidence designed for nonjury trials, even though we have developed no such rules . . . . Not only is our law of evidence geared to the jury system, but so is our legal literature and nearly all our thinking about evidence problems.").

57. A total of 161 persons were indicted, and the final judgment of the ICTY was issued in November 2017. *The ICTY Renders Its Final Judgment in the Prlić et al. Appeal Case*, INT'L CRIM. TRIB. FOR THE FORMER YUGOSLAVIA (Nov. 29, 2017), https://www.icty.org/en/press/the-icty-renders-its-final-judgement-in-the-prli%C4%87-et-al-appeal-case [https://perma.cc/HQF3-KVMY]. The ICTY formally ceased to exist on December 31, 2017. *Id.* Residual functions of the ICTY, including oversight of sentences and consideration of any appeal proceedings, initiated on July 1, 2013, are under the jurisdiction of a successor body, the International Residual Mechanism

five years of existence, a total of eighty-six judges were appointed to the Tribunal from fifty-two United Nations member states, including both common-law and civil-law jurisdictions.[58] In 1994, in accordance with Article 15 of its statute, the ICTY adopted its Rules of Procedure and Evidence ("RPE"), a set of rules drafted and regularly updated by the Tribunal judges in order to safeguard fair and expedient trials.[59] Importantly, while the RPE were created for the ICTY, they are also an important reference for other international criminal courts.[60]

The RPE at the ICTY were developed through experimentation and experience. The ICTY has often been described as *sui generis* (of its own kind, unique), a hybrid international procedure combining aspects of the common-law and civil-law systems, but distinct from both.[61] Because the procedures of the ICTY were created within a previously unoccupied space (with the exception of the dated, limited precedents of the Nuremberg and Tokyo tribunals), the RPE's drafters could, and did, draw up the rules largely on a blank slate.[62] Over the years, ICTY judges have repeatedly amended the rules to reflect lessons learned along the way and to develop a mechanism to address the procedural and evidentiary challenges facing international criminal tribunals.[63]

Compared to the FRE, the RPE lacks all three fundamental assumptions—jury trial, adversarial system, and a preference for oral testimony. First, the nature of proceedings at the ICTY is a bench trial. In each case, three judges of a trial chamber are assigned to hear evidence put forth by the prosecution and defendant and to determine the guilt or innocence of the accused.[64] Second, the RPE's evolution has

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for Criminal Tribunals ("MICT"), also located in The Hague, Netherlands. *See* INT'L CRIM. TRIB. FOR THE FORMER YUGOSLAVIA, https://www.icty.org/ (last visited Aug. 10, 2023) [https://perma.cc/6NLP-AQXG]; *see also About*, INT'L RESIDUAL MECHANISM FOR CRIM. TRIBS., https://www.irmct.org/en/about (last visited Aug. 10, 2023) [https://perma.cc/N65Z-82J3].

58. *See Former Judges*, INT'L CRIM. TRIB. FOR THE FORMER YUGOSLAVIA, https://www.icty.org/en/sid/10572 (last visited Aug. 10, 2023) [https://perma.cc/63KU-JFHY]; *The Judges*, INT'L CRIM. TRIB. FOR THE FORMER YUGOSLAVIA, https://www.icty.org/en/about/ chambers/judges (last visited Aug. 10, 2023) [https://perma.cc/6WDK-AJYH].

59. *See* Int'l Crim. Trib. for the Former Yugoslavia, Rules of Procedure and Evidence, at 1, U.N. Doc. IT/32 (1994).

60. *See* Hervé Ascensio, *The Rules of Procedure and Evidence of the ICTY*, 9 LEIDEN J. INT'L L. 467, 467 (1996).

61. *See* Alex Whiting, *The ICTY as a Laboratory of International Criminal Procedure*, *in* THE LEGACY OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 83, 83 (Bert Swart, Alexander Zahar & Göran Sluiter eds., 2011) (veering from "any given domestic design" and noting that the lack of clear international procedural precedent have prompted academics to view the ICTY rules as *sui generis*).

62. *See id.* at 85 (explaining how a lack of ready defendants to set the evidentiary context enabled the drafters to write ICTY rules "on a blank slate").

63. *See id.*

64. There are a total of three trial chambers and an appeals chamber at the ICTY. *Chambers*, INT'L CRIM. TRIB. FOR THE FORMER YUGOSLAVIA, https://www.icty.org/en/about/chambers (last

been described as a gradual shift from a common-law emphasis toward a civil-law one, or a move toward "managerial judging."[65] Although ICTY judges come from a variety of legal systems and bring to the Tribunal a wealth of legal expertise and a rich diversity of experiences and perspectives, they were initially more inclined to follow common-law adversarial principles, largely due to the precedence set by the Nuremberg and Tokyo trials.[66] Such an inclination was well captured in the early development of the RPE. For example, according to Rule 85, "Presentation of Evidence" (adopted in 1994), evidence was to be presented in a certain sequence: examination in chief, cross-examination, re-examination, rebuttal, and rejoinder.[67] Because of the scale, complexity, and international nature of cases at the ICTY, however, a full adversarial model would be very time consuming, even lasting for many years.[68] As a result, the practice of the ICTY has evolved from those early rules to incorporate more civil-law inquisitorial principles.[69] Last but not least, at the ICTY, the *need* to ensure that all available evidence is considered by the trial chamber is high.[70] As a former trial attorney at the ICTY, Alex Whiting, put it:

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visited Aug. 10, 2023) [https://perma.cc/V87E-3AD4] (detailing the responsibilities of the Tribunal's President, Vice President, and judges). "Each [t]rial [c]hamber is composed of three permanent judges and a maximum of six *ad litem* judges." *Id.* "*Ad litem* judges are appointed by the UN Secretary-General at the request of the President of the Tribunal to sit on one or more specific trials, allowing for efficient use of resources in accordance with the court's changing caseload." *Id.*; *see also Organisational Chart*, INT'L CRIM. TRIB. FOR THE FORMER YUGOSLAVIA, https://www.icty.org/en/about/tribunal/organisational-chart (last visited Aug. 10, 2023) [https://perma.cc/3ECM-GS83].

65. Patricia M. Wald, *Running the Trial of the Century: The Nuremberg Legacy*, 27 CARDOZO L. REV. 1559, 1577 (2006) ("[T]he judges formulated a detailed code of rules and procedures, attempting to meld elements of both the common law and civil systems, but based largely on the *adversarial* Anglo-Saxon model. Those rules were amended about thirty times over the next decade with increasing input from the civil law side.") (emphasis added); Maximo Langer, *The Rise of Managerial Judging in International Criminal Law*, 53 AM. J. COMPAR. L. 835, 837 (2005) (explaining how a managerial judging approach best describes the ICTY's current procedures).

66. *See* Michael Bazyler, *Nuremberg's Legacy: The UN Tribunals for Yugoslavia and Rwanda and the International Criminal Court*, *in* HOLOCAUST, GENOCIDE, AND THE LAW: A QUEST FOR JUSTICE IN A POST-HOLOCAUST WORLD 235, 237, 252 (2016) ("The Nuremberg paradigm has become the 'gold standard' by which any significant domestic prosecution of state actors for international crimes is evaluated.").

67. Int'l Crim. Trib. for the Former Yugoslavia, Rules of Procedure and Evidence, at 88, U.N. Doc. IT/32/Rev.50 (2015).

68. *See* Whiting, *supra* note 61, at 95 ("A central and enduring critique of the cases at the ICTY (and at other international criminal tribunals) is that the trials are too slow, too long, and inefficient.").

69. *See* Prosecutor v. Tadić, Case No. IT-94-1-T, Separate and Dissenting Opinion of Judge McDonald on Prosecution Motion for Production of Defence Witness Statements, ¶ 34 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 27, 1996) ("The International Tribunal has ten rules of evidence which are designed only to provide the framework for the conduct of the proceedings.").

70. Whiting, *supra* note 61, at 86.

> The limited tools of the ICTY have sometimes made it impossible to have the best evidence imaginable, or even the kinds of evidence ordinarily available in a domestic court, and have instead necessitated a determination about what kinds of evidence, and what reliability-determining mechanisms, are sufficient to identify reliable evidence to prove guilt beyond a reasonable doubt.[71]

Since the RPE were developed in a drastically different context from the FRE, they have features that the Federal Rules do not have, and the rationales behind those features are worth highlighting.

First, the title of the rules—*The Rules of Procedure and Evidence of the ICTY*—explicitly indicates that the RPE are a combination of procedural and evidentiary rules. Likewise, the body of the rules is structured according to the sequence of a case proceeding (pretrial, trial, and appellate stages), in contrast with the FRE, which are an evidence code focusing on the admissibility of evidence at the trial stage. The RPE's expanded arrangement may sound odd in the United States, but it is quite common in civil-law countries.[72] Why? Because it reflects a twofold reality that has seldom been addressed in common-law jurisprudence: certain evidentiary matters are, in fact, both evidentiary and procedural,[73] and evidentiary matters can be embedded in virtually the whole process of a lawsuit, including pretrial and after-trial stages.[74] But why do the FRE not come to the same arrangement? That is probably due to the FRE's foundational assumption of jury trials. A designated jury starts its work at the beginning of a trial and finishes its duty by announcing a verdict at the trial's end; the jury trial also maintains a clear separation of work between the presiding judge and the jury, with the former dealing with procedural matters and the latter focusing on evaluating evidence admitted.[75] Thus, it makes sense for an evidence code designed for jury trials, like the FRE, to focus narrowly on the trial stage and avoid procedural rules.

A second feature of the RPE is that it bifurcates the fact-finding process of a bench trial, separating the pretrial judge, who screens the

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71. *Id.* (emphasis omitted).

72. In civil law countries such as Germany, France, and China, evidence-related rules are scattered in their codes of civil procedure, criminal procedure, and so forth. *See* Li & Wang, *supra* note 23, at 684 ("Although the concept of codification originated in the civil law system, most civil law countries do not appear interested in creating a statute specifically for evidence. Rather, in most civil law countries, the rules governing evidence are typically scattered among various procedural statutes." (footnotes omitted)).

73. For example, it is debatable in common law countries as to whether burdens of proof, standard of proof, or the examination of evidence are evidentiary or procedural issues. However, this is not a problem in civil law countries, since all these subjects are addressed in one code of law.

74. For example, both discovery at the pretrial proceeding and sentencing at the posttrial stage involve evidentiary issues.

75. *See Learn About Jury Service*, U.S. COURTS, https://www.uscourts.gov/services-forms/jury-service/learn-about-jury-service (last visited Aug. 10, 2023) [https://perma.cc/G7SW-NCWR].

evidence, from the trial chamber, where the evidence is evaluated. According to Rule 65 *ter* of the RPE, "The Presiding Judge of the Trial Chamber shall . . . designate from among its members a Judge responsible for the pretrial proceedings."[76] This arrangement of the RPE is both special and meaningful: special because it belies the common understanding that bifurcating fact-finding in a bench trial is practically impossible;[77] and meaningful because it makes possible the significant number of admissibility rules in the RPE, which depend on such a bifurcated system in order to function effectively.[78] A pretrial judge might also help improve the efficiency of the trial process by establishing and then executing a work plan to ensure that the parties are ready for trial and that their evidence is lined up.[79] Of course, to maintain this bifurcated setting in daily judicial fact-finding would have a high cost in personnel and funding. But as an ad hoc tribunal of the United Nations, with relatively sufficient talent and funds but a limited caseload, the ICTY can afford this luxury.

Last, compared to the FRE, the RPE have a much more generous policy toward admitting rather than excluding evidence, particularly in admitting written statements and transcripts in lieu of witnesses' oral testimony.[80] This featured arrangement (or "culture") of the RPE is

76. Int'l Crim. Trib. for the Former Yugoslavia, Rules of Procedure and Evidence, at 58, U.N. Doc. IT/32/Rev.50 (2015).

77. Wang, *supra* note 36, at 302 ("But, given the independence of trial judges and extremely limited judicial resources, it would be fanciful to expect to see two judges working in tandem in a bench trial anytime soon."); *see, e.g.*, Schauer, *supra* note 48, at 202 (describing extreme change in the institutional design of the trial as "so unlikely in the foreseeable future").

78. *See* Jennifer L. Mnookin, *Bifurcation and the Law of Evidence*, 155 U. PA. L. REV. PENNUMBRA 134, 145 (2006) ("[T]rial by judge—especially if we do not reinvigorate the commitment to a bifurcation between umpire and adjudicator—invites a significant rethinking of both the [admissibility] rules of evidence and their purposes.").

79. *See* Int'l Crim. Trib. for the Former Yugoslavia, Rules of Procedure and Evidence, at 58, U.N. Doc. IT/32/Rev.50 (2015) ("The pretrial Judge shall, under the authority and supervision of the Trial Chamber seised of the case, coordinate communication between the parties during the pretrial phase."). In particular, Rule 65 *ter* (B) states, "The pretrial Judge shall ensure that the proceedings are not unduly delayed and shall take any measure necessary to prepare the case for a fair and expeditious trial." *Id.* In (D)(ii), it requires that "[t]he pretrial Judge shall establish a work plan indicating, in general terms, the obligations that the parties are required to meet pursuant to this Rule and the dates by which these obligations must be fulfilled." *Id.* And in (L)(i), the Rule states, "[T]he pretrial Judge shall submit to the Trial Chamber a complete file consisting of all the filings of the parties, transcripts of status conferences and minutes of meetings held in the performance of his or her functions pursuant to this Rule." *Id.* at 62.

80. *See id.* at 91, 96 (enabling judges to admit "any relevant evidence" with "probative value"). In particular, Rule 92 *bis* (A) of the RPE stipulates that a Trial Chamber may dispense with the attendance of a witness in person and instead admit the evidence of the witness in the form of a written statement or a transcript of evidence, with a precondition that the evidence given by the witness shall not go to prove the acts and conducts of the accused as charged in the indictment. *Id.* at 96. Under Rule 92 *bis* (A)(i), a written statement or transcript can be admitted in lieu of oral testimony if it satisfies certain factors: is cumulative in nature; relates to historical, political, or military background; consists of general or statistical analysis of the ethnic composition of the

partly due to its input from civil-law inquisitorial practices.[81] But more importantly, the scarcity of evidence at the ICTY (in contrast with the scale, complexity, and international nature of its cases), as well as its limited tools of enforcement, demand that the ad hoc Tribunal consider all available evidence.[82] The RPE are shaped not just by what is ideal in terms of evidence, but by what is *possible* under the circumstances.[83] Crimes tried before international tribunals often cover numerous years of conflict, involve several locations and incidents, and relate to specific historical, political, or military circumstances.[84] In addition, witnesses can be few in number and might also fear testifying due to threats, intimidation, bribery, or coercion from external sources, especially in their home countries.[85] Therefore, rather than relaxing the standard and burdens of proof to allow convictions to become possible, the RPE

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population in places to which the indictment relates; concerns the impact of crimes on the victims; relates to the character of the accused; or concerns factors taken into account to determine a final sentence. *Id.*

To further ease the strict adherence to common-law principles, in particular, the rule that documents should be admitted in connection with the testimony of witnesses. Rule 89(C) states that when the relevance and reliability of a document is sufficiently apparent, its admission may be justified without connecting it to witness testimony. *Id.* at 91.

Under Rule 92 *ter*, a Trial Chamber may admit, in whole or in part, the evidence of a witness in the form of a written statement or transcript from another proceeding before the Tribunal. *Id.* at 98. Under Rule 92 *quarter* (A), an ICTY Trial Chamber also has the power to admit the written statements of persons who are unavailable because they have died, can no longer be traced, or are unable to testify by reason of bodily or mental condition. *Id.*

81. Note: There is a lively debate, however, among international criminal law scholars about the legitimacy of tribunals moving towards a more "inquisitorial," paper-based form of trial. Not everybody thinks this development is attractive. *See, e.g.*, Peter Murphy, *No Free Lunch, No Free Proof: The Indiscriminate Admission of Evidence Is a Serious Flaw in International Criminal Trials*, 8 J. INT'L CRIM. JUST. 539, 556–57 (2010) (referencing Judge Antonio Cassese's view that the ICTY has adopted an adversarial approach rather than the inquisitorial one seen in many European jurisdictions).

82. *See* Whiting, *supra* note 61, at 86 ("The limited tools of the ICTY have sometimes made it impossible to have . . . the kinds of evidence ordinarily available in a domestic court . . . .").

83. *See id.* at 85 (acknowledging ICTY judges must accommodate the lack of strong evidence-gathering mechanisms by answering questions about the reliability and sufficiency of evidence).

84. *See* Richard May & Marieke Wierda, *Evidence before the ICTY*, *in* ESSAYS ON ICTY PROCEDURE AND EVIDENCE IN HONOUR OF GABRIELLE KIRK MCDONALD 249, 249–50 (Richard May, David Tolbert, John Hocking, Ken Roberts, Bing Bing Jia, Daryl Mundis & Gabriël Oosthuizen eds., 2001):

> [I]t is important to note that trials before the International Tribunal are of a different scope to those before a domestic court. Typically, those before a domestic court deal with an isolated incident, whereas those before the International Tribunal may cover a number of years of conflict and involve many locations and incidents. This was true of the war crimes trials which followed the Second World War. . . . While the scope of the modern trials may not be as broad, essentially their nature is the same. The result is that the trials are long and complex.

85. *See* Mark B. Harmon & Fergal Gaynor, *Prosecuting Massive Crimes with Primitive Tools: Three Difficulties Encountered by Prosecutors in International Criminal Proceedings*, 2 J. INT'L CRIM. JUST. 403, 407–08, 421–22 (2004) (discussing the importance of protecting the identities and testimonies of confidential witnesses at ICTY).

require ICTY judges to weigh and evaluate a broader range of less direct evidence than would ordinarily be available in a domestic courtroom, while ensuring that convictions are still supported by proof beyond a reasonable doubt. Of course, this arrangement means that the ICTY also relaxed the right of the criminal defendant to, for example, cross-examine adverse witnesses, which would lead to a constitutional crisis were they to be implemented in the United States. Nonetheless, the ICTY is not under the spell of the Sixth Amendment of the U.S. Constitution,[86] and is therefore free to do what is most appropriate for its needs.

B. IBA Rules on the Taking of Evidence in International Arbitration

Just as the ICTY's RPE offer a design for international criminal tribunals, the field of international civil and commercial dispute resolutions also has a specialized set of evidentiary rules, the *IBA Rules on the Taking of Evidence in International Arbitration* ("IBA Rules of Evidence"), which have gained global popularity in recent years.[87] Designed as guidelines of best practice for parties in international arbitrations, the IBA Rules of Evidence, first enacted in 1999, were prepared by a drafting committee of the International Bar Association,[88] a group of leading commercial arbitration practitioners from both civil and common-law traditions.[89]

Traditionally, the common practice in arbitrations is that formal rules of evidence (e.g., the FRE) do not apply and the arbitral parties

86. *See generally* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .").

87. *See* Arb. Comm., *IBA Rules on the Taking of Evidence in International Arbitration*, INT'L BAR ASS'N 5 (2021), https://www.ibanet.org/MediaHandler?id=def0807b-9fec-43ef-b624-f2cb2af7cf7b [https://perma.cc/UHJ7-6SP6]. Also note that unless a U.S. contracting party has incredible leverage, virtually every major transnational commercial contract including a U.S. party contains a clause specifying that dispute resolution will be by arbitration. *See* Thomas J. Stipanowich, *Arbitration: The "New Litigation"*, 2010 U. ILL. L. REV. 1, 6, 9–11 (discussing the expansion of arbitration in the United States beginning in the twentieth century). Why? Because the consensus in the rest of the world is that U.S. evidence rules (i.e., Federal Rules of Evidence) are too rigid and that our pretrial discovery rules are too burdensome.

88. The International Bar Association (IBA), founded in 1947, is a bar association of international legal practitioners, bar associations, and law societies. *About the IBA*, INT'L BAR ASS'N, https://www.ibanet.org/About-the-IBA (last visited Aug. 10, 2023) [https://perma.cc/M4Y9-7TSL]. The IBA currently has a membership of more than 80,000 individual lawyers and 190 bar associations and law societies. *Id.* Its global headquarters are in London, and it has regional offices in Washington, D.C., Seoul, and São Paulo. *See Contact the IBA*, INT'L BAR ASS'N, https://www.ibanet.org/Contact-the-IBA (last visited Aug. 10, 2023) [https://perma.cc/7V8Z-56JQ].

89. The IBA Rules of Evidence were initially prepared by a Working Party of the Arbitration Committee of IBA in 1999, revised by a Review Subcommittee in 2009, and further revised by a Task Force in 2020. *See* Arb. Comm., *supra* note 87, at 5. Unless otherwise stated, the IBA Rules of Evidence being discussed in this article means the 2020 revision of the Rules.

are free to agree on how evidence should be adduced, presented, and evaluated by the tribunal.[90] This practice reflects two core values of arbitration: efficiency and flexibility.[91] The only mention of evidence in the U.S. Federal Arbitration Act is in Section 10(a), which states that an arbitration award may be vacated where arbitrators refused "to hear evidence pertinent and material to the controversy."[92]

So, why have the IBA Rules of Evidence received wide acceptance? Their success is largely due to two features that the FRE do not have. First, unlike the FRE, which are a set of rules designed for use in U.S. federal courts, the IBA Rules are specifically aimed at addressing evidentiary issues in *transnational* dispute resolutions.[93] They respond to a special need to harmonize the taking of evidence in international arbitrations when the arbitral parties are from different legal traditions.[94] Without getting too far off course, it can be observed that customs of evidence practice vary significantly between civil-law and common-law traditions when it comes to the production and presentation of documentary evidence,[95] the admission of oral

90. *See* Paul Radvany, *The Importance of the Federal Rules of Evidence in Arbitration*, 36 REV. LITIG. 469, 497 (2016). Almost always, the rules governing arbitration explicitly state that the formal rules of evidence are not binding. *See, e.g.*, *Patent Arbitration Rules*, AM. ARB. ASS'N 11 (2005), https://www.adr.org/sites/default/files/Patent%20Arbitration%20Rules%20Sep%2015%2C%202005.pdf [https://perma.cc/68XE-3T5Z]. Rule 30 of the American Arbitration Association ("AAA") Patent Arbitration Rules states, "[C]onformity to legal rules of evidence shall not be necessary." *Id.* Case law similarly confirms that the formal rules of evidence are not binding in arbitration. *See, e.g.*, Rosensweig v. Morgan Stanley & Co., 494 F.3d 1328, 1333 (11th Cir. 2007) (stating that arbitrators "enjoy wide latitude in conducting an arbitration hearing" and "are not constrained by formal rules of procedure or evidence" (citation omitted)); Sunshine Mining Co. v. United Steelworkers of Am., 823 F.2d 1289, 1295 (9th Cir. 1987) ("Arbitrators may admit and rely on evidence inadmissible under the Federal Rules of Evidence.").

91. *See* Stipanowich, *supra* note 87, at 1–2, 29 (stating "[t]he most important difference between arbitration and litigation—and the fundamental value of arbitration—is the ability of users to tailor processes to serve particular needs" and describing arbitration as "more flexible" and "more efficient"); Gregg A. Paradise, Note, *Arbitration of Patent Infringement Disputes: Encouraging the Use of Arbitration Through Evidence Rules Reform*, 64 FORDHAM L. REV. 247, 264 (1995) ("[A]rbitration is completely flexible.").

92. 9 U.S.C. § 10(a)(3).

93. *See* Arb. Comm., *supra* note 87, at 4 (explaining that the drafters of the IBA Rules of Evidence, the Arbitration Committee, focus "on the laws, practice and procedures relating to the arbitration of transnational dispute").

94. *See id.* at 7 ("These IBA Rules . . . are intended to provide an efficient, economical and fair process for the taking of evidence in international arbitrations, *particularly those between Parties from different legal traditions*." (emphasis added)).

95. Since judicial fact finders in the civil-law system are mostly highly educated and trained judges (in contrast with the lay jurors of the common-law system), civil law gives much emphasis to written evidence and documents. *See* Anna Magdalena Kubalczyk, *Evidentiary Rules in International Arbitration—A Comparative Analysis of Approaches and the Need for Regulation*, 3 GRONINGEN J. INT'L. L. 85, 88–89 (2015). This is because there is less need for oral explanation of the evidence to the judges during hearings. *See id.* at 89 ("[C]ivil law gives much emphasis to written evidence and documents since there was no need for oral explanation of the evidence to the judges during the hearings, as opposed to the common law jury.").

testimony[96] from lay and expert witnesses,[97] and the actual conduct of evidentiary hearings,[98] as well as the role of the tribunal, the role of counsel, and the conduct of the proceedings.[99] Such differences can lead to serious conflicts and misunderstandings in international arbitrations. The main goal of the IBA Rules of Evidence is thus to bridge the gap between different legal systems and their respective procedures for the taking of evidence. They offer a broadly accepted combination of common-law and civil-law practices, and a well-established compromise between different views of how evidence might be taken in international arbitration. For example, Article 3 of the IBA Rules governs the production of documents, reflecting the centrality of documentary evidence in arbitration fact-finding. Such a culture of preferring documentary evidence to witness oral testimony comes from the civil-law tradition.[100] Nonetheless, Article 3's content is mainly about the discovery of documents, which is a feature of the common-law tradition.[101] Still, the IBA Task Force's official *Commentary on the IBA Rules of Evidence* states that "[e]xpansive American—or English—style discovery is generally inappropriate in international arbitration.

96. As opposed to the civil-law system, the common-law system is mostly oriented toward oral evidence and hearings, as the oral discussion and assessment of evidence permits the jury to fully understand and evaluate it. *See id.* at 88. Also, oral evidence allows the adversarial counsels to have more room to act at trial. *See id.* at 90 (In common law systems, "hearings permit legal counsel to express fully their tactical and strategic capacities.").

97. In the common-law tradition, experts are usually appointed by the parties, whereas in the civil-law tradition experts are appointed by the judge, either upon request of the parties or within the authority of the judge to act ex officio. *See id.* at 92.

98. Hearings and trials are much longer in common-law countries, where they have the crucial job of allowing counsels to fully present and examine evidence, make arguments, and express their tactical and strategic capacities. *See id.* at 90. To the contrary, hearings in civil-law countries are a less central part of the proceedings. *Id.* "Where the crucial facts can be established based on contracts or other documentary evidence, the hearing can be totally omitted. Whenever there is still a need for oral submissions and evidence, the hearing is conducted, however, in much shorter time limits in comparison to the common law tradition . . . ." *Id.*

99. In the common-law tradition, interlocutory proceedings are separated from the final hearing, as all the information needs to be presented to the jury at trial. *See id.* at 88 ("A . . . result of the adversarial approach and the presence of the jury is the division of interlocutory proceedings and the final hearing."). In contrast, in the civil-law tradition, as the professional judges are also the fact finders, there is no need to separate the stages of the proceedings into the pre-hearing and final hearing phases. *See id.* at 89 ("[A]s according to the inquisitorial approach the judge is also the fact finder, there is no need to separate the stages of the proceedings into the pre-hearing and hearing phases.").

100. *See, e.g.*, Zhuhao Wang & David R. A. Caruso, *Is an Oral-Evidence Based Criminal Trial Possible in China?*, 21 INT'L J. EVIDENCE & PROOF 52, 63 (2017) "("There is a strong impression that Chinese judges and procurators generally consider that written testimony is more accurate and reliable than in court witness testimony.").

101. *See, e.g.*, Stephen N. Subrin, *Discovery in Global Perspective: Are We Nuts?*, 52 DEPAUL L. REV. 299, 300 (2002) ("When one is called 'nuts,' it can also mean one is acting in an unusual way, different from the way that others act. From a comparative law perspective, we really are different in our approach to discovery.").

Rather, requests for documents to be produced should be carefully tailored to issues that are relevant and material to the determination of the case."[102] It is important to note that the search for a common ground between common-law and civil-law traditions is quite challenging, and the IBA Rules of Evidence are still far from a perfect model.[103] Nonetheless, they are one of the first efforts in human history to explore evidence law at the global level.

Second, unlike the FRE, which are formal, prescriptive rules, the IBA Rules of Evidence are a *soft law*: the parties and arbitral tribunals retain the right to adapt the IBA Rules with variations in order to meet the needs of the arbitration at hand. In the preamble, the Rules make it clear that:

> [T]hey are designed to supplement the legal provisions and the institutional, ad hoc or other rules that apply to the conduct of the arbitration. . . . Parties and Arbitral Tribunals may adopt the IBA Rules of Evidence, in whole or in part, to govern arbitration proceedings, or they may vary them or use them as guidelines in developing their own procedures. The Rules are not intended to limit the flexibility that is inherent in, and an advantage of, international arbitration, and Parties and Arbitral Tribunals are free to adapt them to the particular circumstances of each arbitration.[104]

This "soft law" feature of the IBA Rules is largely due to the nature of arbitration as a private agreement and the importance of

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102. Arb. Comm., *Commentary on the Revised Text of the 2020 IBA Rules on the Taking of Evidence in International Arbitration*, INT'L BAR ASS'N 8 (2021), https://www.ibanet.org/MediaHandler?id=4F797338-693E-47C7-A92A-1509790ECC9D [https://perma.cc/7U9S-UCN6].

Other examples of harmonization in the IBA Rules of Evidence includes the pairing of Article 5, "Party-Appointed Experts," which is from the common-law tradition, and Article 6, "Tribunal-Appointed Experts," which is from the civil-law tradition. *See* Arb. Comm., *supra* note 87, at 16–20 (Articles 5 and 6 of the IBA Rules of Evidence); *see also* Kubalczyk, *supra* note 95, at 92 (describing how the common-law and civil traditions differ in the appointment of expert witnesses). And Article 9, "Admissibility and Assessment of Evidence," draws from both traditions: while the admissibility of evidence is a featured issue in the common-law tradition, the assessment of evidence (i.e., rules on weight of evidence) is the focus of trial judges in the civil-law tradition. *See* Arb. Comm., *supra* note 87, at 22–24 (Article 9 of the IBA Rules of Evidence); *see also* Kubalczyk, *supra* note 95, at 88–90 (explaining that the common-law system "obligates the parties to present all the relevant evidence in their possession," while the civil-law system focuses on the judge "investigat[ing] the case, establish[ing] all the facts and the law").

103. In fact, the task of finding a balance in evidentiary rules that will not favor any single legal tradition (or jurisdiction) is very difficult. Although a significant number of the drafters of the IBA Rules of Evidence were from civil-law jurisdictions and the Rules have tragically so far not gotten the attention they deserve in the United States, several civil-law loyalists have called the Rules "[c]reeping Americanisation of international arbitration." Guilherme Rizzo Amaral, *Prague Rules v. IBA Rules and the Taking of Evidence in International Arbitration: Tilting at Windmills*, KLUWER ARB. BLOG (July 5, 2018), https://arbitrationblog.kluwerarbitration.com/2018/07/05/prague-rules-v-iba-rules-taking-evidence-international-arbitration-tilting-windmills-part/ [https://perma.cc/G8QT-E864].

104. Arb. Comm., *supra* note 87, at 7; *see also id.* at 8–9 (Article 1, "Scope of Application," of the IBA Rules).

party autonomy in contract formation.[105] Treating evidentiary rules as a soft law helps maintain the flexibility and efficiency of arbitration. But why should this approach be limited to arbitration? Evidentiary rules that function as a soft law are potentially useful for other dispute resolutions as well for two key reasons. First, this model captures what is already a common practice. Take bench trials, for example: although the FRE (formal rules) technically do apply here just as in jury trials,[106] in practice, bench trial judges often only loosely apply them as they see fit.[107] And second, is it not a fact that the parties of a given dispute, not the rulemakers of evidence law, know best the conditions of their own evidence? Treating evidentiary rules as a soft law would preserve, to a certain extent, the parties' autonomy in deciding how to present their own evidence in a dispute resolution.[108]

C. Guidelines for the Application of Evidence Provisions of the People's Court in China (GAE)

Now let us shift attention from the international arena to individual nations and the counterpart of common-law traditions: civil-law jurisdictions. Although the concept of codification originated in the civil-law system, civil-law countries traditionally do not have statutes specifically for evidence.[109] "Judges in civil-law countries generally follow the principle of free evaluation of evidence (or [free proof]), which is highly discretionary."[110]

China is a particularly interesting case because it seems to be headed toward breaking with this "free proof" tradition. "Like in other civil-law countries, the code-based legal system in China . . . does not have an evidence statute."[111] Rather, Chinese evidence rules are scattered across various procedural codes.[112] Nonetheless, since the

105. *See* Stipanowich, *supra* note 87, at 1–2 ("Provisions for binding arbitration of disputes are now employed in virtually all kinds of contracts . . . . The most important difference between arbitration and litigation—and the fundamental value of arbitration—is the ability of users to tailor processes to serve particular needs.").

106. *See* FED. R. EVID. 101, 1101.

107. *See* Wang, *supra* note 36, at 272 ("[I]n practice, American trial judges often only loosely apply the rules of evidence when they sit without a jury.").

108. Note: Nonetheless, the distinction between "soft law" and the FRE may be less clear than it appears to be, given that parties in a U.S. litigation can generally stipulate to facts and waive most of their evidentiary objections to particular forms of proof if they wish to. Thus, parties already have the flexibility to bargain away objections and streamline the proof process concerning items that are not the core of their disputes with each other.

109. *See* Li & Wang, *supra* note 23, at 684.

110. *Id.*

111. *Id.* at 685.

112. *Id.* at 686–87.

beginning of the twenty-first century, Chinese courts, practitioners, and scholars have advocated for specialized evidence legislation, prompting some scholars to refer to these collective efforts as China's "evidence legislation movement."[113] There are two deeply rooted reasons behind this unprecedented movement, one internal and the other external. The internal catalyst derives from a pledge by the Chinese judicial system to prevent wrongful convictions.[114] With the deepening of China's judicial reform since the 1980s, a number of serious wrongful-conviction cases were uncovered and exposed on social media in the late 1990s and early 2000s, which severely shook public confidence in the Chinese judicial system.[115] Leading critics in China blamed "an unsound system of evidence rules as a key reason for such miscarriages of justice."[116] Thus, calls to reform Chinese evidence legislation became urgent. The external catalyst, on the other hand, derives from China's economic reform and opening since 1979, which has kept China in a wave of globalization that is about not only the movement of goods, services, and capital, but also the global flow of ideas, including modern concepts of evidence law.[117] Such legal globalization (mainly from the FRE's impact) has become a growing influence on the reform of evidence legislation in China.[118]

The evidence legislation movement has been fruitful: in the past two decades, China has issued numerous judicial interpretations of evidence law, amendments to existing procedural law, and experimental drafts of evidence statutes.[119] Among these, a leading model code is the 2020 *Guidelines for the Application of Evidence Provisions of the People's Court* ("GAE"), a product of joint efforts by the

113. *Id.* at 685.

114. *See* Zhuhao Wang & Jia Li, *Interactions Between National Judicial Practice and Supranational Legal Values: Reflections on China's Evidence Legislation Development*, 2 CHINA LEGAL SCI. 118, 125–26 (2014) (describing "the Chinese people's deep loathing and apprehension of wrongful verdicts" and discussing a statement by the Vice Chief Justice of the Supreme People's Court regarding the "unprecedented challenges" recurring wrongful convictions have placed on China's judicial authority).

115. *See id.* at 125–26 (discussing the "She Xianglin Case in 1994, the Du Peiwu Case in 1998 and the Zhao Zuohai Case in 2010," which "all showed adjudicating errors in the fact-finding process"); Huang Shiyuan, *Chinese Wrongful Convictions: Discovery and Rectification*, 80 U. CIN. L. REV. 1195, 1212 (2012) (noting the importance of the internet in the rectification of the She Xianglin and Zhao Zuohai cases).

116. Wang & Li, *supra* note 114, at 126.

117. *See, e.g.*, TERENCE C. HALLIDAY & BRUCE G. CARRUTHERS, BANKRUPT: GLOBAL LAWMAKING AND SYSTEMIC FINANCIAL CRISIS 250–53 (2009) (describing China's shift from a command economy to a market economy).

118. *See* Li & Wang, *supra* note 23, at 693–95 (explaining that in framing the 2008 and 2012 Chinese evidence provisions, the drafters married local Chinese traditions and characteristics with inspiration from other legal systems).

119. *Id.* at 688–91.

Supreme People's Court of China, leading Chinese evidence scholars, and ten pilot courts across the nation.[120] The GAE contain hallmarks of modern evidence law (terminology, methodology, and legal principles) that are regularly seen in the common-law system, especially in the FRE. Yet, the GAE retain characteristics of the Chinese legal system and Chinese cultural traditions. Below are two features that the FRE do not have.

First, one fundamental assumption embedded in the GAE is that trial judges, just like any other human beings, have cognitive and epistemic limitations and failings and thus need systematic rules of evidence to guide them in accurate fact-finding. As then-Vice Chief Justice of the Supreme People's Court of China, Deyong Shen, the leading expert of the GAE's drafting team, stated in the Preamble of the Guidelines,

> [Chinese] Judges made mistakes in fact-finding largely due to their imperfect capabilities in assessing evidence presented at trial. The Guidelines (i.e., GAE) should be used as fundamental training materials for [Chinese] judges in order to systematically increase their knowledge of evidentiary science, improve quality of adjudication, and thus promote justice and rule of law.[121]

Such an open and candid acknowledgment of the limited capacity of trial judges in fact-finding is a major improvement in judicial civilization. Historically—and still today, as a stubborn tradition in both common-law and civil-law countries—the belief is widespread that judges, unlike laypeople, have a superior sense of epistemic rationality. As Frederick Schauer observed,

> [W]e assume that judges are less prone than juries to the cognitive and decision-making failures we worry about in jurors, possibly because judges are smarter, possibly because they are better educated, possibly because of their greater experience in hearing testimony and finding facts, and almost certainly because of their legal training and legal role-internalization.[122]

According to this logic, evidentiary rules are for less capable people (e.g., laypeople in a jury trial), not for judges sitting on the bench. Such "epistemic exceptionalism"[123] has long hindered the development of evidence rules for bench trials in common-law countries, as well as evidence law more generally in civil-law countries. In recent years, however, numerous social-science studies have found that judges as

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120. DEYONG SHEN, GUIDELINES FOR THE APPLICATION OF EVIDENCE PROVISIONS OF THE PEOPLE'S COURT (人民法院诉讼证据规定适用指南) (2020).

121. *Id.* at 5. Also on page 1, Justice Shen stated that "GAE could help improve the capacities of judges in assessing the authenticity of evidence and discovering the truth of the case at issue."

122. Schauer, *supra* note 48, at 188 (footnotes omitted).

123. *See* James R. Steiner-Dillon, *Epistemic Exceptionalism*, 52 IND. L. REV. 207, 209 (2019) (explaining that though judges are exceptional as compared to the general population in some facets, they are still susceptible to cognitive illusions, implicit biases, and fallacies).

triers of fact are, just like lay jurors, susceptible to cognitive illusions, fallacies, and implicit biases.[124]

Another feature of the GAE is that they are structured according to the so-called "life process" of evidence: evidence collection, production, examination, and evaluation.[125] Unlike the FRE, which focus on the admissibility of evidence at trial and are thus a results-oriented, static evidence law, the GAE cover all stages of evidence being processed in litigation, which reflects the dynamic flow of evidence. Such an arrangement has numerous benefits. One essential advantage is that it connects important pretrial evidence issues with trial evidence issues, and significantly expands the space to further develop evidence law. The GAE cover crucial pretrial evidence issues that the FRE leave unaddressed, like evidence generation, collection, transfer, storage, and inspection.[126] Each of these pretrial procedures directly affects the authenticity and reliability of evidence presented at trial—two aspects of evidence that judicial fact finders weigh heavily when evaluating evidence.[127] Moreover, by tying issues of pretrial and trial evidence together, the GAE emphasize the "traceability of evidence," an important concept that has already been broadly adopted in modern industries like engineering technology and food safety.[128] For example, regarding key materials in the engineering industry, it is important not only to keep samples but also to ensure that the whole process is traceable.[129] In terms of food safety, current best practices are targeted

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124. *See, e.g.*, Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 816 (2001). The authors found that judges "appear to be just as susceptible as other decision makers to three of the [five] cognitive illusions we tested: anchoring, hindsight bias, and egocentric bias." *Id.*

125. *See* Junwei Feng, *Theoretical Explanation of the "Life Process" of Criminal Evidence*, 231 CHINA LEGAL SCI. 263, 272 (2023) (explaining standard practices used in the Chinese "life process" of criminal evidence).

126. Note: Although these pretrial evidence issues are not covered by the FRE, the Federal Rules as a set do cover them in some detail, at least for civil cases. *See, e.g.*, FED. R. CIV. P. 26-37.

127. The emphasis of the GAE on regulating pretrial evidence issues reflects the unique culture of Chinese litigations, especially in criminal proceedings. Unlike traditional civil-law and common-law countries, where the trial is the indisputable central stage in adjudicating a case and the judicial system is independent of the prosecution, in China the court system, prosecution, and law enforcement are related, and all belong to the same government organ. Thus, most criminal cases in China have already been determined in pretrial proceedings, and the trial itself becomes more or less a symbolic process. In this context, to keep law enforcement and the prosecution accountable in handling the evidence of a given case, it is necessary for evidence law to address the pretrial stages.

128. For another example of law that ties pretrial and trial evidence issues together, see ELI-UNIDROIT MODEL EUROPEAN RULES OF CIVIL PROCEDURE: FROM TRANSNATIONAL PRINCIPLES TO EUROPEAN RULES OF CIVIL PROCEDURE 136–73 (Eur. L. Inst. & UNIDROIT eds., 2021).

129. *See, e.g.*, Tarun Kumar Agrawal, Vijay Kumar, Rudrajeet Pal, Lichuan Wang & Yan Chen, *Blockchain-Based Framework for Supply Chain Traceability: A Case Example of Textile and Clothing Industry*, COMPUTS. & INDUS. ENG'G, April 2021, at 1, 11.

at forming a farm-to-table, whole-process food supervision system.[130] Even law-enforcement reforms often require that the entire process of law enforcement be recorded and archived, so as to realize traceable policing management.[131] In these examples, traceability ensures that objectives of safety and quality are met. Nonetheless, the concept of traceability of evidence has not traditionally received much attention in evidence law.[132] By tracking evidence generation, collection, preservation, and other links before trial, the GAE are designed to ensure that the source of evidence is clear and that the circulation of evidence is legitimate.

CONCLUSION

Without a doubt, the Federal Rules of Evidence achieved unprecedented success. Nonetheless, that does not mean that one size fits all. It is not an exaggeration to say that the FRE are designed for common-law jury trials. This Article discusses three alternative models of evidence regimes built for legal systems that lack the common-law jury. Such comparative analysis brings out important evidence rulemaking themes that are traditionally underexplored by U.S. evidence scholars and legislators, such as the development of evidentiary rules beyond the trial stage, the feasibility of fusing together common-law and civil-law traditions of taking evidence for international-level dispute resolutions, the promotion of evidence rules as "soft law" guidance rather than as hard law, the cost and benefit of merging evidentiary and procedural rules, and the possibility of developing civil- and criminal-evidence rules separately rather than as a uniform code of evidence.[133] Our world is complex and diverse. So is

130. *See, e.g.*, AM. SOC'Y FOR MICROBIOLOGY, *Global Food Safety: Keeping Food Safe from Farm to Table* (2010) (explaining that each step in the food production and consumption process is critical in improving overall food safety).

131. *See* Feng, *supra* note 125, at 274 (emphasizing the importance of criminal evidence traceability in maintaining a court's legitimacy); Mary D. Fan, *Justice Visualized: Courts and the Body Camera Revolution*, 50 U.C. DAVIS L. REV. 897, 931–32 (2017) (finding that most enforcement activities are required to be recorded by police departments with publicly available recording policies).

132. The only place in the FRE that is remotely related to "traceability of evidence" is Rule 901, Authenticating or Identifying Evidence, in which establishing "chain of custody" is a recommended but not necessary way to authenticate real evidence.

133. Note: For example, the U.K.'s *Police and Criminal Evidence Act 1984* (PACE), which applies to criminal proceedings in England and Wales, contains several important evidentiary provisions, notably § 76 (regarding confessions) and § 78 (regarding exclusion on grounds of unfairness). *See* PAUL ROBERTS & ADRIAN ZUCKERMAN, CRIMINAL EVIDENCE 191–215 (3d ed. 2022) (expanding on how PACE has made certain types of evidence admissible which had previously been held inadmissible at common law); *cf.* Ion Meyn, *Why Civil and Criminal Procedure Are So Different: A Forgotten History*, 86 FORDHAM L. REV. 697, 725 (2017) (explaining that the

evidence law. As well written and influential as the FRE are, they do not cover the entire rainforest; they are just one tree. The next era of evidence-law development will necessitate going back to the forest in all its complexity and diversity to further explore and grow the law in a sophisticated way with built-in flexibility.

development of the federal criminal rules of procedure were informed by the federal civil rules of procedure to varying degrees).