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Exporting the Hearsay Provisions of the Federal Rules of Evidence,

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EXPORTING THE HEARSAY PROVISIONS OF THE FEDERAL RULES OF EVIDENCE

Roger C. Park*

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INTRODUCTION

The Federal Rules of Evidence (the “Federal Rules”) are the product of careful, painstaking work. The core rules were all drafted simultaneously by one body, the Advisory Committee. The drafters, distinguished members of the Advisory Committee, produced rules that are relatively clear and consistent, with only occasional quirks.¹ While there have been

* James Edgar Hervey Professor of Law, U.C. Hastings College of Law. I would like to thank Professors Ronald J. Allen, Dale Nance, Aviva Orenstein, and the other participants in the Conference on the Foundations of the Law of Evidence and their Implications for Developing Countries held in Chicago, Illinois on November 21 and 22, 2014. I would also like to thank Andrew Demirchyan for able research assistance.

¹ For a brief description of the background of the Federal Rules of Evidence, see STEPHEN A. SALTZBURG ET AL., *FEDERAL RULES OF EVIDENCE MANUAL* 1-4 (7th ed. 1998). The most notorious idiosyncrasy was the classification of admissions as “not hearsay.” Seeking to make a point about the purpose of hearsay exceptions, the drafters of the Federal Rules of Evidence decided to place certain statements that were offered for their truth in a supplemental category of statements that were “not hearsay” instead of classifying them as hearsay falling under an exception. For criticism of this quirk, see Sam Stonefield, *Rule 801(d)’s Oxymoronic ‘Not Hearsay’ Classification: The Untold Backstory and a Suggested Amendment*, 5 *FED. CTS. L. REV.* 1 (2011).

subsequent changes, the basic text and structure have remained the same. A multi-year restyling project improved the clarity of the rules, and the restyled rules became effective in 2011.² The sole purpose of the project was to make the rules easier to understand without changing their substance.³ The drafters in the restyling project were advised and influenced by experts on “plain language” drafting.⁴ The plain language of the restyled rules produced a model for evidentiary rules that is generally considered superior to its original version.⁵ Despite the care and consistency that went into the plain language restyling project, there are reasons to hesitate before adopting the Federal Rules as a model for hearsay evidence. The primary reason is that the federal ban on hearsay was designed for use in a broader procedural system whose features determine what types of hearsay evidence are allowed.⁶

This Article consists of four Parts. Part I explains the institutional context of the hearsay rule in the United States. Part II analyzes the rationale for dispensing with the hearsay rule in systems with no jury trials. Part III considers the hearsay rule in the proposed Tanzania Evidence Act (“Proposed TEA”).⁷ Finally, Part IV adds additional comments based on the assumption that Tanzania decides to use the Federal Rules model despite the fact that Tanzania does not have a jury trial system. It argues that the original version of the hearsay provisions of the Federal Rules would be a better model than the version that emerged from Congress.

² The restyling of the Federal Rules of Evidence was preceded by a restyling of the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, and the Federal Rules of Appellate Procedure. See Robert L. Hinkle, *Questions and Answers: The Hon. Robert L. Hinkle Discusses Recently Restyled Federal Rules of Evidence*, 9 FED. EVIDENCE REV. 225, 229 (2012).

³ *Id.*

⁴ There was opposition to this revision from those who thought it was not worth the trouble and that familiar language should be retained. For more on the restyling project, see *id.* An example of the care used by the restylers was the standardization of terms mandating action—for example, replacing the term “shall” with more precise terms. *Id.* For elaboration by one of the plain language scholars who advised the restyling projects, see Joseph Kimble, *The Many Misuses of Shall*, 3 SCRIBES J. LEGAL WRITING 61 (1992).

⁵ See generally Hinkle, *supra* note 2.

⁶ *Id.*

⁷ Proposed Final Draft: Tanzania Evidence Act 2014 (2014) [hereinafter Proposed Tanzania Evidence Act], available at <http://www.bu.edu/ilj/reforming-the-law-of-evidence-of-tanzania-part-three>.

I. THE INSTITUTIONAL CONTEXT OF THE AMERICAN HEARSAY RULE

Several features of the American system increase the need for rules limiting the admission of hearsay evidence.⁸ First, the American system is adversarial—some would say hyper-adversarial.⁹ The fact that lawyers define the issues, choose the evidence to be presented, and play the dominant role in preparing and examining witnesses creates a need for rules that prevent substituting live testimony for hearsay evidence in order to gain a strategic advantage.¹⁰

Second, the trial by jury is still an option in most federal cases, and the hearsay rule is linked to the institution of jury trials.¹¹ Commentators have often argued that the ban on hearsay makes no sense in the absence of a jury because juries are more susceptible to the prejudicial effects of hearsay evidence.¹² In the United States, the hearsay ban is often loosened when adjudicators sit without a jury, for example, in administrative law adjudications, in arbitration, or in courts of limited jurisdiction.¹³ Many commentators are skeptical about the effect of the rule against hearsay in non-jury trials for the following reasons. First, the judges that preside over bench trials are exposed to the hearsay evidence during the evidentiary screening process. Second, appellate courts generally defer in

⁸ For thoughtful commentary on the effect of the adversarial system on evidence law, bifurcation, jury trial, and concentration of proceedings, see MIRJAN R. DAMAŠKA, *EVIDENCE LAW ADRIFT* (1997).

⁹ See Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 NOTRE DAME L. REV. 403, 425 (1992).

¹⁰ This might occur when the lawyer who benefits from a witness's statements prefers that the witness not be cross-examined, and the other lawyer is afraid to call the witness for cross-examination because doing so might just elicit testimony favorable to the other side. Or the party might prefer a hearsay witness to tell another's story because of the other witness's greater credibility. The prospect that a court could reject such a witness provides an incentive to seek out the declarant. See DAMAŠKA, *supra* note 8, at 85. Party control also makes it easier for lawyers to object to evidence because in a lawyer-dominant system, the objection is not seen as a criticism of the court's evidence-gathering choices.

¹¹ See generally CHARLES ALAN WRIGHT & MARY KAY KANE, *FEDERAL PRACTICE AND PROCEDURE* § 102 (3d ed. 2013) (estimating that about half of all federal civil actions that go to trial are tried to a jury).

¹² See Kenneth Culp Davis, *Hearsay in Nonjury Cases*, 83 HARV. L. REV. 1362, 1365 (1970); see also Frederick Schauer, *On the Supposed Jury-dependence of Evidence Law*, 155 U. PA. L. REV. 165 (2006) (generally supporting the proposition that hearsay is not necessary in the absence of a jury).

¹³ See Richard J. Pierce, Jr., *Use of the Federal Rules of Evidence in Federal Agency Adjudications*, 39 ADMIN. L. REV. 1, 5 (1987); see also *Bennett v. Nat'l Transp. Safety Bd.*, 66 F.3d 1130, 1137 (10th Cir. 1995). Agencies that allow free use of hearsay sometimes prohibit using it as the sole basis for decision making. See Elliot B. Glicksman, *The Modern Hearsay Rule Should Find Administrative Law Application*, 78 NEB. L. REV. 135, 139-40 (1999).

great measure to judges' decisions on the admissibility of hearsay evidence in bench trials.¹⁴ In common-law jurisdictions outside the United States, the decline in jury trials has been accompanied by the abolition or diminution of rules that exclude hearsay.¹⁵ Part II of this Article will explain in more detail the importance of limiting the admissibility of hearsay in jury trials.

Despite the expansion of discovery and other pretrial proceedings, American trials are generally uninterrupted—once the trial begins, judges prefer proceeding through the trial without long adjournments.¹⁶ As a result, when one party introduces new evidence of which the opposing party is unaware—an inevitable occurrence as new evidence comes to light—the opposing party has little time to verify this evidence. In jurisdictions that are more willing to grant adjournments to verify newly introduced evidence, there is less of a need for a rule against hearsay.¹⁷

In the American system, appellate review is primarily designed to correct errors of law, not to correct mistakes in factfinding.¹⁸ Appellate courts defer to the trial judges and juries' findings of fact, assuming the truth of testimony that favors the prevailing party before determining whether the evidence is sufficient to support the verdict.¹⁹ Moreover, juries are not required to explain the reasoning behind their factual conclusions, thus depriving the appellate court of the opportunity to critique factfinders' reasoning.²⁰ Overreliance on hearsay is not normally a ground for reversal under American law, so long as the hearsay evidence was admissible under the particular jurisdiction's rules of evidence.²¹ If

¹⁴ Commentators have often noted that American judges do not strictly apply the hearsay rule in non-jury trials. See, e.g., Schauer, *supra* note 12, at 177 (“[I]t is ubiquitous that judges, magistrates, arbitrators, masters, and diverse other adjudicators, when sitting without a jury, will typically . . . allow hearsay evidence to be offered, announcing that such evidence will be given exactly the weight its intrinsic probative value deserves. . .”).

¹⁵ See Civil Evidence Act, 1995, c. 38, § 1 (U.K.) (abolishing the hearsay rule in civil cases); Civil Evidence Act, 1988, c. 32, § 1 (Scot.) (abolishing the hearsay rule in civil cases); *Commonwealth Evidence Act 1995* §§ 63, 65 (Austl.) (broad exception). For an account of other liberalizations of the hearsay rule in common law jurisdictions, see David Alan Sklansky, *Hearsay's Last Hurrah*, 2009 SUP. CT. REV. 1 (2009).

¹⁶ See DAMAŠKA, *supra* note 8.

¹⁷ See *id.* at 58-73.

¹⁸ See generally FED. R. CIV. P. 52(a)(6) (factual findings of a trial judge must be respected unless “clearly erroneous”); *Anderson v. City of Bessemer*, 470 U.S. 564, 573-74 (1985); Martin B. Louis, *Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question, and Procedural Discretion*, 64 N.C. L. REV. 993, 993-98 (1986).

¹⁹ See WRIGHT & KANE, *supra* note 11.

²⁰ See Louis, *supra* note 18, at 993-98.

²¹ See *id.*

U.S. appellate courts were to review factfinding in trial courts more comprehensively, mistakes as a result of reliance on weak evidence could be corrected on appellate review, thus lessening the need for a categorical ban on hearsay evidence.²²

The rule against hearsay in the Federal Rules is mitigated by procedural doctrines.²³ These doctrines insulate judges from reversals that might otherwise occur when judges admit or exclude hearsay. Thus, as a practical matter, judges may admit more hearsay evidence than the Federal Rules allow.²⁴ In bench trials, an erroneous decision to admit hearsay will not automatically lead to reversal on appeal if other evidence supported the verdict, provided that the trial judge did not affirmatively rely on the inadmissible hearsay as the sole basis for his or her decision.²⁵ Even in jury trials, the harmless error doctrine often prevents reversal

²² The combined absence of a jury and presence of appellate review of factual findings is a reason why the hearsay rule and similar exclusionary rules are usually not applied in American administrative law proceedings. See Richard J. Pierce, Jr., *Use of the Federal Rules of Evidence in Federal Agency Adjudications*, 39 ADMIN. L. REV. 1, 19 (1987) (citations omitted) ("In a jury trial, there is little choice but to ask trial judges to resolve close evidentiary disputes through application of complicated and detailed exclusionary rules, and thereby to take the risk of a new trial or of a decision that is not based on all reliable evidence. In Dean Calabresi's words, juries are "irresponsible" decisionmakers in the sense that they are not required to explain the bases for their decisions, including particularly the evidentiary bases for their findings of fact. Thus, if we want to preclude juries from basing findings on evidence considered unreliable by judges, we can do so only by precluding their exposure to that evidence in the first place. The considerations are entirely different in agency adjudications. Agencies and ALJs are required to state the bases for their findings of fact. Their findings are then subject to judicial review under the substantial evidence standard. If an agency finding is based on unreliable evidence, the agency's action is reversed. Thus, there is a mechanism available in agency adjudications independent of rulings on the admissibility of evidence to insure that agency findings are based only on reliable evidence.").

²³ See *Louis*, *supra* note 18, at 1042.

²⁴ See *id.*

²⁵ As one prominent treatise notes, "[T]he appellate courts indulge the gracious presumption that the trial judge relied only on the evidence that was properly admitted in making findings." WRIGHT & KANE, *supra* note 11, § 102 (citing *Plummer v. W. Int'l Hotels Co.*, 656 F.2d 502, 505 (9th Cir. 1981)).

In the trial of a nonjury case, it is virtually impossible for a trial judge to commit reversible error by receiving incompetent evidence, whether objected to or not. An appellate court will not reverse a judgment in a nonjury case because of the admission of incompetent evidence, unless all of the competent evidence is insufficient to support the judgment or unless it affirmatively appears that the incompetent evidence induced the court to make an affirmative finding which would not otherwise have been made.

See *Builders Steel Co. v. Comm'r of Internal Revenue*, 179 F.2d 377, 379 (8th Cir. 1950).

where additional evidence is sufficient to support the verdict.²⁶ Moreover, appellate courts review the trial judges' decisions to admit certain evidence for abuse of discretion. Thus, errors that do not amount to abuse are not grounds for reversal.²⁷ The rise of administrative forms of adjudication, and the shifting of cases away from traditional courts to mediation and arbitration, has also softened the impact of the hearsay rule.²⁸ In systems that lack these mitigating factors, the American rule against hearsay may be rigid and disruptive, leading to more appeals and reversals.

Finally, judges may correct egregious unfairness by ruling that a codified evidentiary rule yield to constitutional imperatives.²⁹ Constitutional provisions, such as the Confrontation Clause, impose limits on the admission and exclusion of hearsay in criminal cases.³⁰ This constitutional backdrop is a safety net that reduces reliance on the code as a bulwark against unfairness to criminal defendants.

II. ARE THE HEARSAY PROVISIONS OF THE FEDERAL RULES AN APPROPRIATE MODEL FOR NON-JURY SYSTEMS?

Taking away the jury is in itself enough to justify a departure from the rule against hearsay. Judges, who benefit from expert knowledge of hearsay evidence, are less likely to allow such evidence to prejudice their judgments. However, this assumption about judges is, at best, a subsidi-

²⁶ For a catalogue of doctrines that prevent reversal for error in admitting hearsay, see generally G. Michael Fenner, *Law Professor Reveals Shocking Truth about Hearsay*, 62 UMKC L. REV. 1 (1993). On harmless error, see *id.* at 52-55; see also Eleanor Swift, *The Hearsay Rule at Work: Has It Been Abolished De Facto by Judicial Decision?*, 76 MINN. L. REV. 473, 473-80 (1992) (noting the effect of doctrines such as harmless error in reducing judicial supervision, but also noting that the reversal rate on hearsay grounds is similar to the reversal rate on other grounds); cf. Roger C. Park, *Hearsay, Dead or Alive*, 40 ARIZ. L. REV. 647, 648 (1998) (examining a sample of cases in which hearsay was mentioned as one ground for reversal in about one percent of all appellate reversals).

²⁷ See Fenner, *supra* note 26, at 55-57.

²⁸ See Ronald J. Allen, *The Evolution of the Hearsay Rule to a Rule of Admission*, 76 MINN. L. REV. 797, 800 (1992).

²⁹ See U.S. CONST. amend. VI; Crawford v. Washington, 541 U.S. 46 (2004).

³⁰ See *id.* (reversing on the grounds that the admission of the hearsay statement under the exception for declarations against interest violated the Sixth Amendment right to confront witnesses); see also Bullcoming v. N.M., 131 U.S. 2705 (2011) (reversing on the grounds that the admission of a laboratory blood alcohol report under the exception for business records violated the Sixth Amendment right to confront witnesses); Chambers v. Miss., 410 U.S. 284 (1973) (reversing on the grounds that under the facts of the case, the exclusion of evidence, including the exclusion of hearsay, violated the defendant's constitutional right to present a meaningful defense).

ary justification.³¹ There are four reasons that the rule against hearsay should not apply in the absence of a jury.

First, the jury system bifurcates trials, making it possible for the presiding judge to exclude hearsay without the trier of fact ever knowing. In non-bifurcated trials, judges are exposed to hearsay when deciding whether to exclude it and thus will likely be influenced by it. Where the excluded hearsay provides independent corroboration of admissible evidence, the hearsay evidence will likely have some probative effect.³² Demanding that judges disregard hearsay would often require them to make a finding of fact that is contrary to what they believe about a case, which is cognitively and morally difficult even for judges. Therefore, if judges in bench trials are exposed to admissible and inadmissible hearsay evidence, the rule against hearsay and its many exceptions no longer serve to prevent prejudicial decision-making.

Further, in the Federal Rules, the rule against hearsay's rigidity is moderated by the residual exception, which provides for the admissibility of certain kinds of trustworthy hearsay.³³ A broad residual exception to the hearsay ban is conceivably advantageous in a jury trial if having an experienced judge preside over the trial improves the jury's decision-making abilities. However, in bench trials, a rule that provides that hearsay is not admissible unless it is trustworthy is not necessary because, in any case, judges will ignore hearsay that they believe to be untrustworthy and rely on trustworthy hearsay only.³⁴

Second, taking away the jury diminishes the parties' ability to control the process of proof. The unitary judge necessarily has a stronger influence on sources of proof. In bench trials, judges are no longer just umpires who rule on procedural issues while yielding to the jury's factfinding authority. Judges in bench trials have sole responsibility for accurate factfinding, which encourages them to interact directly with the

³¹ For discussion and citation of authority, see generally Schauer, *supra* note 12. Schauer himself is skeptical about this position, doubting the superior cognitive abilities of judges and arguing that hearsay exclusion may encourage the parties to present better evidence in bench trials as well as in jury trials. *Id.* at 187.

³² For a convincing example of excluded evidence that would be hard to ignore, see Jennifer L. Mnookin, *Bifurcation and the Law of Evidence*, 155 U. PA. L. REV. PENNUMBRA 134, 136-37 (2007).

³³ FED. R. EVID. 807.

³⁴ Of course, a residual exception can have some effect if it has requirements other than trustworthiness, such as notice. See *id.* at 885-86. The Federal Rules of Evidence have a notice requirement that is only sporadically enforced in the federal courts. See *id.* at 887-88. The proposed Tanzania Evidence Code allows judges to excuse notice. Proposed Tanzania Evidence Act, *supra* note 7, § 9.1; see also Joseph W. Rand, *The Residual Exceptions to the Federal Hearsay Rule: A Futile and Misguided Attempt to Restrain Judicial Discretion*, 80 GEO. L.J. 873 (1992).

parties and use their influence to control the production of evidence.³⁵ This limits the necessity of the hearsay rule, which exists partially to prevent adversaries from using inferior second-hand evidence for strategic reasons.³⁶

Third, in trials without a jury, judges are able to produce written findings that summarize the evidence, describe inferences, and justify the findings of fact that serve as the basis of their decisions.³⁷ In contrast, lay jurors are not asked to write a reasoned explanation of the basis for their factual findings.³⁸ Therefore, judges must control the evidence to which the jury is exposed in order to increase the legitimacy of the legal proceedings and prevent findings of fact that are based on prejudicial evidence.

Finally, without a jury, there is no need for rigid rules designed to limit judicial discretion and maximize jury power.³⁹ As previously explained, the Advisory Committee designed the residual exception to the rule against hearsay to allow for the admission of trustworthy hearsay under certain conditions.⁴⁰ Additionally, the Federal Rules include three dozen more specific categorical exceptions to the rule against hearsay.⁴¹ Without a jury, there is no need to supplement the broad residual exception with these three dozen complicated categorical exceptions. The categorical exceptions do not limit judges' power to determine whether to *receive*

³⁵ See Walter Sinnott-Armstrong, *Which Evidence Law? A Response to Schauer*, 155 U. PA. L. REV. PENNUMBRA 129, 131-32 (2007).

³⁶ Walter Sinnott-Armstrong notes the following:

Consider the hearsay rule's effect of compelling the parties to search for "more rather than less direct accounts, and to locate and bring forward the most immediate and cross-examinable witnesses." It is not clear that judges need to be restricted by a hearsay rule in order to compel the parties in this way. After all, judges are judges. They can openly demand such evidence from the bench, or they can just make it clear that, as a matter of policy, they will put much more weight on direct evidence and cross-examinable witnesses. Lawyers will have to respond or lose. Hence, it is not clear how much this rationale for a hearsay rule extends to bench trials.

Id.

³⁷ Cf. FED. R. CRIM. P. 26.2(c). Rule 26.2(c) of the Federal Rules of Criminal Procedure states the following:

If the party who called the witness claims that the statement contains information that is privileged or does not relate to the subject matter of the witness's testimony, the court must inspect the statement in camera. After excising any privileged or unrelated portions, the court must order delivery of the redacted statement to the moving party. If the defendant objects to an excision, the court must preserve the entire statement with the excised portion indicated, under seal, as part of the record.

Id.

³⁸ See generally *id.*

³⁹ See FED. R. EVID. 807.

⁴⁰ See generally *id.* 801-803.

⁴¹ See *id.* 803.

hearsay where there is a broad residual exception based on trustworthiness.⁴² Rather, the categorical exceptions reduce judicial discretion in jury trials by preventing judges from *excluding* hearsay. There is no need to have this safeguard in the absence of a jury trial.

Categorical exceptions that reduce judicial discretion to exclude hearsay evidence make sense only in the context of a system that values the role of the jury in the decision-making process. If juries make the important findings of fact, jury autonomy must be protected from incursions by the judge. One way to protect jury autonomy is to curtail judicial discretion in determining whether to exclude certain pieces of hearsay evidence.⁴³ Specific categorical exceptions to the rule against hearsay serve this purpose: they limit judicial discretion to exclude hearsay.⁴⁴

Where there is no jury to protect, there is no reason to supplement the residual exception with categorical exceptions. Although the categorical exceptions require the judge to “admit” hearsay evidence that falls within the categories, a judge who believes that the hearsay evidence is untrustworthy may admit the evidence and then disregard it.⁴⁵ At most, the categorical exceptions set forth a nonbinding message encouraging the judge in a bench trial to consider certain kinds of hearsay as being above the common run.⁴⁶ The importance of the categorical exceptions as a limit on arbitrary judicial discretion is vastly reduced in a regime where the judge is the factfinder.⁴⁷

In short, the rule against hearsay does not make sense in a trial-by-judge regime. First, the ban cannot be supported on the assumption that jurors are incompetent to properly weigh the importance of hearsay evidence. Second, excluding hearsay has little effect when the judge and the factfinder are the same person. Third, because of the influence that judges exercise during the process of approving evidence, there is less danger that lawyers will strategically use hearsay evidence to deprive the factfinder of more valuable evidence. Fourth, because judges may be required to explain decisions, assessing output is an alternative to trying to control input.⁴⁸ Finally, the value of complicated, detailed exceptions as a check on potential abuse of a judge’s discretion is reduced or eliminated in unitary proceedings. Therefore, in the absence of a jury, there is

⁴² See *id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ See generally *id.*

⁴⁸ At best, the message of the hearsay rule might be transformed into what Damaska calls “continental systems,” which typically tell the judge the following about hearsay evidence: “Use original sources of information whenever they are reasonably available. When you feel you must rely upon a derivative source, explain in a written opinion the reasons that impelled you to give credence to information that is usually of inferior value.” DAMASKA, *supra* note 8, at 16.

less need to protect the factfinder from the potential problems that arise from the admission of hearsay evidence.⁴⁹

III. APPLICATION TO THE PROPOSED TANZANIA EVIDENCE ACT

The drafters of the Proposed TEA acknowledge the merit of a rule that generally admits hearsay,⁵⁰ but they opted for a ban-with-exceptions approach in order to minimize departure from existing evidence law.⁵¹ For the foregoing reasons, there is not much difference between the two approaches in a non-jury system with a broad residual exception. Under either approach, judges will ignore hearsay that they distrust and rely on hearsay that they trust. The difference between the two approaches may depend upon the degree to which the flexible notice requirement of the residual exception in the Proposed TEA promotes the admissibility of hearsay evidence.⁵²

Even if the residual exception is generously applied, the specific exceptions can be seen as providing guidelines to judges about especially reliable hearsay. However, when the categorical exceptions fail to restrict judicial discretion, one must question whether these exceptions serve as adequate guidelines. An imperfect exception, such as the excited utterance exception, makes more sense when the rigidity of the exception

⁴⁹ It is true that the Federal Rules of Evidence do not distinguish between bench trials and jury trials, but other procedural doctrines minimize the influence of the hearsay rules in bench trials, so it hardly makes any difference. *See* Proposed Tanzania Evidence Act, *supra* note 7.

⁵⁰ According to the Proposed TEA, "[t]he arguments in favour of general admissibility are compelling, however, and should be taken into account when considering the approach to hearsay evidence that the United Republic employs in the future." *Id.* at 41.

⁵¹ The Proposed TEA notes that "the DC [Drafting Committee] has not implemented this kind of reform in the Act, which maintains that hearsay evidence is generally inadmissible except for the enumerated exceptions, as doing otherwise would represent a substantial departure from the TEA." *Id.*

⁵² The residual exception of the proposed Tanzania Evidence Act allows judges to admit evidence not covered by other exceptions if judges find it to be reliable. *Id.* at 49-50. Guidance is given in assessing reliability by listing three non-exclusive factors relating to the motives and perception of the declarant and the likelihood that the testifying witness accurately perceived the statement. The notice requirement provides as follows:

Parties that seek to admit evidence under this provision must notify the court and all opposing parties of their intent to do so before the start of trial. When justice so requires, a court may admit evidence under this Section where such notice has not been given. If evidence is admitted without notice, the court shall take such action as is necessary to avoid undue prejudice to the opposing party. *Id.*; *cf.* Civil Evidence Act, 1995, § 2 (U.K.) ("A failure to comply [with the notice requirement] does not affect the admissibility of the evidence but may be taken into account by the court . . . as a matter adversely affecting the weight to be given to the evidence.").

restricts judicial discretion. Otherwise, general guidelines such as the ones set forth in the British Civil Evidence Act of 1995 may be more appropriate.⁵³ General guidelines could caution against reliance on hearsay evidence that appears to be prepared for litigation in the following situations: (1) when the declarant could have easily been called to testify; (2) when the hearsay has multiple levels; (3) when the hearsay is not corroborated; or (4) when there is a danger that one party may have caused the other party's witness to be unavailable. Reversals could therefore be based on overreliance on hearsay instead of the erroneous admission of hearsay.⁵⁴ Even in the absence of set rules about the sufficiency of evidence, comprehensive judicial review of the reasonableness of factfinding would ameliorate the effects of a rule that does not categorically control the admissibility of hearsay.

This Article does not explore the special problems that hearsay evidence poses in criminal cases. In the United States, the Confrontation Clause provides protection even where rules against hearsay may not.⁵⁵ In the absence of a Confrontation Clause equivalent, a ban on certain types of hearsay would still provide some protection against prejudice even in the absence of a jury. Rules that require lawyers to call live witnesses could have the beneficial effect of exposing abuse to the public. Live testimony could be required instead of accusatory out-of-court statements if the declarant is able to testify. The argument for requiring live testimony is strongest where one party claims that the other coerced a witness to obtain favorable out-of-court statements.

⁵³ Compare the British guidelines for consideration of hearsay in civil cases. The guidelines provide that courts should consider: whether it would have been reasonable for the party using the hearsay to have produced live testimony; whether the statement was made when memory was fresh; whether the evidence involves hearsay within hearsay; whether any person involved had a motive to misrepresent; whether the statement was edited or influenced by another; and whether there is reason to believe that there was an attempt to prevent proper evaluation of the weight of the out-of-court statement. See Civil Evidence Act, § 4 (U.K.); see also ADRIAN KEANE & PAUL McKEOWN, *THE MODERN LAW OF EVIDENCE* 352 (10th ed. 2014).

⁵⁴ Decisions of the European Court of Human Rights are a possible source of inspiration. The relevant decisions interpret Article 6 of the European Convention on Human Rights, which deals with the right of the accused to examine prosecution witnesses. See Roger W. Kirst, *Hearsay and the Right of Confrontation in the European Court of Human Rights*, 21 Q.L.R. 777 (2003). In *Al-Khawaja v. United Kingdom* the Court stated that “where a conviction is based solely or decisively on the evidence of absent witnesses, the Court must subject the proceedings to the most searching scrutiny.” 49 Eur. Ct. H.R. 1 (2011). Applying that scrutiny, the Court determined that as to one of the defendants, the United Kingdom had breached Article 6 of the Convention.

⁵⁵ See, e.g., *Crawford v. Washington*, 541 U.S. 46 (2004).

IV. IF THE FEDERAL RULES ARE THE MODEL, WHICH VERSION SHOULD BE USED?

Which version of the Federal Rules would serve as the best model for a country like Tanzania? The Federal Rules were originally drafted by an Advisory Committee and then promulgated by the Supreme Court under its rulemaking authority.⁵⁶ Congress prevented that version of the rules from entering into force.⁵⁷ Congress examined the Advisory Committee's draft rules before enacting its own evidentiary statutes, which restricted the use of hearsay.⁵⁸ The Advisory Committee's original version dealt with more kinds of hearsay and would thus serve as a better model, especially in a judicial system where some of the institutional protections discussed in Part II are missing. The original version included the following provisions.

A. *Prior Statements of Witnesses*

The original version of the Federal Rules of Evidence allowed prior inconsistent statements to be used as substantive evidence.⁵⁹ However, the current Federal Rules only allow for the admission of prior inconsistent statements as substantive evidence if the statements were made: (1) subject to the penalty of perjury, and (2) in a judicial proceeding.⁶⁰ When the out-of-court declarant testifies as a witness in court, the main concern of the hearsay rule is mitigated.⁶¹ The declarant may be cross-examined about both his or her present testimony and about any prior statements that he or she may have made.⁶² Thus, it seems only reasonable to allow the declarant and other witnesses to testify about the declarant's prior out-of-court statements. If inconsistent statements may be introduced as

⁵⁶ See generally SALTZBURG ET AL., *supra* note 1.

⁵⁷ See generally *id.*

⁵⁸ See generally *id.*

⁵⁹ See Rule 801: Note by Federal Judicial Center, *reprinted in* ROGER C. PARK & RICHARD D. FRIEDMAN, *CASES AND MATERIALS ON EVIDENCE* 1171 (12th ed. 2013).

⁶⁰ FED. R. EVID. 801(d)(1)(A) allows prior inconsistent statements to be used as substantive evidence only when the prior statement was made in testimony given subject to the penalty of perjury in a legal proceeding. *Id.* Other inconsistent statements are admissible when used to impeach a witness, on the theory that statements used for that purpose are not hearsay because they are not being offered for the truth of the matter asserted. See ROGER PARK & TOM LININGER, *THE NEW WIGMORE, A TREATISE ON EVIDENCE: IMPEACHMENT AND REHABILITATION* § 5.5 (2012). Before Congress changed the rule, it provided that prior inconsistent statements were generally admissible as substantive evidence. See GLEN WEISSENBERGER & JAMES J. DUANE, *THE FEDERAL RULES OF EVIDENCE: RULES, LEGISLATIVE HISTORY, COMMENTARY AND AUTHORITY* 909-11 (6th ed. 2009).

⁶¹ See SALTZBURG ET AL., *supra* note 1.

⁶² See *id.*

substantive evidence, they may be used to support a verdict and not merely to impeach.

Prior consistent statements should be admissible as substantive evidence for the same reason: judges can examine the consistent statements and exercise their discretion to exclude frivolous statements. It is worth noting that a recent amendment to Rule 801(d)(1)(B) (effective December 1, 2014) will broaden the admissibility of these statements in federal courts.

B. *Prior Testimony*

The Federal Rules also include a limited exception to the introduction of former testimony.⁶³ For the exception to apply, the declarant must be unavailable, the prior testimony must have been subject to cross-examination, and the cross-examiner must have had a similar motive to cross-examine as the party against whom the testimony is now being offered.⁶⁴ Moreover, in a criminal case, the party against whom the testimony is offered in the later trial must be the same person as the party who had the right to cross-examine in the prior trial.⁶⁵ In a civil case, the requirement is less strict; the exception applies when the party who previously had the right to cross-examine is either the same person or a “predecessor in interest” of the party against whom the testimony is now being offered.⁶⁶ The “same party or predecessor” requirement was added by Congress; the original rule only required that the prior cross-examiner have a similar motive.⁶⁷ The additional requirement was supported on adversarial grounds.⁶⁸

It is important to note that having a broad exception for former testimony depends upon many features of local procedure, including whether former testimony (e.g., former cross-examination) is reliably recorded. Competent court reporters and electronic recording devices could be reliable sources of former testimony. This Article assumes the feasibility of producing an accurate account of the former testimony at a later trial.

⁶³ FED. R. EVID. 804(b)(1).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ See Rule 804: Note by Federal Judicial Center, *reprinted in* PARK & FRIEDMAN, *supra* note 59, at 1213 (describing how the original rule was changed by Congress).

⁶⁸ See Rule 804: Report of House Committee on the Judiciary, *reprinted in* PARK & FRIEDMAN, *supra* note 59, at 1218. The Report stated that the Committee considered it unfair to “impose upon the party against whom the hearsay evidence is being offered responsibility for the manner in which the witness was previously handled by another party.” *Id.*

C. *Statements by Unavailable Declarants*

One of the peculiar features of the American hearsay rule is that it sometimes excludes statements by declarants who are unavailable to testify.⁶⁹ While these statements would often be admissible under specific hearsay exceptions or under the residual exception, there is no general exception for statements made by unavailable declarants.⁷⁰

This rule of exclusion can only be justified by assuming that the factfinder is incompetent or that one of the parties in the adversarial process is scheming to make one of the declarants unavailable. In other words, the exception is justified when the factfinder is so incompetent in evaluating hearsay that it is preferable to keep the factfinder in the dark than risk exposing the factfinder to the statements made by declarants whose truthfulness the factfinder will not be able to evaluate properly. It would thus be better not to hear a statement from a declarant who has not been cross-examined. Alternately, this rule may be based on the fear that an adversary may covertly succeed in making a declarant unavailable in order to prevent his or her testimony (if the scheme were detected, the hearsay would be admissible on forfeiture grounds).⁷¹ These fears are less pronounced in a less adversarial system or in a system without trials by jury.

There are several possible models for creating a broad exception for statements made by unavailable declarants. For example, one Massachusetts hearsay statute (based on the "Thayer rule") allows for the admission of the declaration of a deceased person in civil cases if the judge finds that the deceased person made the declaration in good faith and with personal knowledge.⁷² The Model Evidence Code would have also allowed for the admission of hearsay based upon the unavailable declarant's personal knowledge.⁷³ Neither of these provisions would require a judicial determination that the out-of-court declarant's statement is trustworthy.⁷⁴ The Massachusetts approach is safer if one fears that adversaries will keep declarants out of court because they believe that, in their particular cases, hearsay evidence will be more convincing than live testimony from a weak witness.

The original Federal Rules provided a model for statements made by unavailable declarants. That version had an exception, later eliminated by Congress, for a statement of recent perception, defined as a

statement, not in response to the instigation of a person investigating, litigating, or settling a claim, which narrates, describes, or

⁶⁹ See FED. R. EVID. 804.

⁷⁰ See *id.*

⁷¹ On forfeiture, see *id.* 804(b)(6); see also *Giles v. California*, 554 U.S. 353, 366 (2008).

⁷² See MASS. GEN. LAWS ANN. ch. 233, § 65 (West 2000).

⁷³ MODEL EVID. CODE 503(a), 18 A.L.I. PROCEEDINGS 90-134 (1941).

⁷⁴ *Id.*

explains an event or condition recently perceived by the declarant, made in good faith, not in contemplation of pending or anticipated litigation in which he was interested, and while his recollection was clear.⁷⁵

D. *The Residual Exception*

The Federal Rules contain a residual exception that allows for the admission of trustworthy hearsay even if that hearsay evidence does not fit into a specific exception.⁷⁶ The original version of the exception that the Supreme Court promulgated would have allowed hearsay statements to be admitted if they contained “circumstantial guarantees of trustworthiness” that were “comparable” to those of the categorical exceptions.⁷⁷ Congress added additional requirements, principally that the hearsay evidence be “more probative on the point for which it is offered” than other evidence that could reasonably be obtained, and that pre-trial notice be given, which includes the particulars of the statement and the name and address of the declarant.⁷⁸

The above discussion suggests that a broad trustworthiness-based residual exception, accompanied by class exceptions, reaches results in non-jury cases that are broadly similar to the results that would be reached if the code provided that hearsay was not a basis for objection. Since I favor the latter result in non-jury civil cases, then of course I like the idea of having a broad residual exception leading to the same result.

E. *Protection of Fundamental Rights in Criminal Cases*

As previously mentioned, the Federal Rules were drafted against the background of constitutional provisions that protect criminal defendants by placing limits on the admission or exclusion of hearsay in criminal cases. In jurisdictions that lack similar protections, drafters will need to accommodate for the protections that the United States provides in the Constitution.

Consider, for example, the business records exception to the rule against hearsay. This exception is broad enough to admit the documents of entities that specialize in the production of evidence for use in criminal cases, such as crime labs.⁷⁹ The public records exception could also provide similar grounds for admission of crime-lab documents.⁸⁰ However, construed narrowly, the public records exception may limit the admissibility of law enforcement records.⁸¹ The Proposed TEA does not incor-

⁷⁵ See H.R. Rep. No. 93-650, at 6 (1973); H.R. Doc. No. 93-46, at 145 (1973).

⁷⁶ FED. R. EVID. 807.

⁷⁷ See generally SALTZBURG ET AL., *supra* note 1, at 1930-43.

⁷⁸ See *id.*

⁷⁹ See FED. R. EVID. 803(6).

⁸⁰ See *id.* 803(8).

⁸¹ See *id.*

porate those limits.⁸² More importantly, the residual exception in the Proposed TEA could result in the admission of evidence that the trial judge considers to be trustworthy without giving the defendant the opportunity to cross-examine declarants who are available and could easily be called to testify. In American courts, these shortcomings in the protections of the accused would be offset by the exclusion of hearsay under the Sixth Amendment's right to confrontation.⁸³

Because protective evidentiary rules would need to be fashioned with full knowledge of relevant procedural and social issues in Tanzania, it would be presumptuous of this Article to suggest specific provisions. However, possible approaches may include rules that limit the use of accusatory out-of-court statements where declarants could feasibly be produced for live testimony. A more narrow provision might require that the accused raise credible evidence of abusive practices, such as coercion in obtaining statements, as a basis for requiring the testimony of available declarants.

CONCLUSION

It is difficult to make general statements about whether the Federal Rules of Evidence are an appropriate model for rules concerning hearsay without an in-depth understanding of a country's judicial and political system. However, where features of the American system that justify the exclusion of hearsay are absent, a more permissive approach to the admission of hearsay is appropriate. In systems that do not have jury trials, it would be preferable to abolish the hearsay rule and rely upon other safeguards. Where a jurisdiction seeks to use the Federal Rules as a model, rulemakers should consider the provisions that allow the selective use of hearsay evidence, which the Advisory Committee drafted and the Supreme Court of the United States promulgated, rather than the more restrictive counterparts that Congress later enacted.

⁸² See Proposed Tanzania Evidence Act, *supra* note 7, § 4.3(1).

⁸³ U.S. CONST. amend. VI; *see, e.g.*, Crawford v. Washington, 541 U.S. 46 (2004).