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BOOK REVIEW

Foundations of Evidence Law* by A. Stein

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> In one of our classics of literature, *Alice in Wonderland*, one of the characters is the Cheshire Cat who keeps appearing and disappearing and fading away, so that sometimes one could see the whole body, sometimes only a head, sometimes only a vague outline and sometimes nothing at all, so that Alice was never sure whether or not he was there or, indeed, whether he existed at all. In practice, our rules of evidence appear to be rather like that.[1]

Almost exactly half way through his *Foundations of Evidence Law,* Alex Stein makes a central point in his overall argument: 'Many scholars and practitioners perceive the contemporary evidence rules as disintegrated vessels navigating in an ocean of free proof.'[2] Rules of evidence are commonly presented as exceptions, often atavistic exceptions, to a general reliance on human cognitive capacities in adjudicative fact finding. Rather than join in what he sees as the general abolitionist trend to removing the last of those disintegrated vessels, Stein sets out instead to present in this book an integrated, foundational theory of evidence law. A risk associated with presenting a systematic theory, as Stein does, is that it opens a large number of fronts on which the account may be examined, and may therefore be subject to attack. The reviewer therefore treads a fine line between examining the quality of the various aspects of the account, and unintentionally being perceived as commencing such an attack. In this review, I present a summary of *Foundations*, and then examine three areas that I believe to be central to understanding Stein's argument: first, the attempt to combine doctrinal evidence law, the New Evidence Scholarship and social values into a single evidential theory; second, finding the balance between certainty and equity in adjudicative fact finding; third, *Foundations*' potential as a general rather than a special theory of evidence law.

Summary of *Foundations*

Stein's argument might be summarized very briefly as follows. The goal of adjudicative fact finding is rectitude of decision. This goal is pursued on a rationalist basis.[3] The function of evidence law has

* Hereafter '*Foundations*'.

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1 TWINING, W. (2006) *Rethinking Evidence,* 2nd edn. Cambridge: Cambridge University Press, p. 211.

2 *Foundation,* p. 110.

3 TWINING, W. The rationalist tradition of evidence scholarship. *Rethinking Evidence* (TWINING ed.). (n. 1) p. 35. Rationalist here refers to an English, empirical rationalist tradition, established by philosophers such as Locke and Hume, rather than to the Continental rationalist tradition, exemplified by people such as Descartes and Kant.

generally (but erroneously) been considered to be the facilitation of this pursuit of truth.[4] However, in a state of evidential uncertainty, adjudicators must arrive at findings of fact which carry with them a risk of error. That apportionment is not a question of epistemology but of political morality, and the correct function of evidence law is that apportionment of the risk of error. The gradual abolition of rules of evidence means that individual adjudicators (such as trial judges) are increasingly able to allocate the risk of error as they see fit, but there is no moral, political or economic justification for this authorization.[5]

Chapter 1 (Groundwork) identifies the domains of evidence law discussed in the book. The fundamental distinction here is between the law's fact-finding objectives and other non-evidential objectives promoted through rulings on evidence. To be properly evidential, a rule must promote one of three utilitarian objectives: (1) enhancement of accuracy in fact finding or, in other words, minimization of the risk of error; (2) minimization of the expenses that fact-finding procedures and decisions incur and (3) apportionment of the risk of error with the consequent risk of a wrong decision between the parties to litigation.[6] These rules of evidence should be kept conceptually distinct from associated rules, such as evidential privileges, that are designed to promote social goals other than risk allocation.[7] There are no free standing rules of evidence, not associated with any of the law's three fact-finding objectives.[8] None of the litigants therefore has a right to demand the reduction of private costs (substantive and procedural) irrespective of the social good. Stein recognizes that there may be non-utilitarian factors in a legal system that may provide tensions in their relationship to his three utilitarian evidential objectives. He also acknowledges that not all his readers will accept these objectives, at least at this stage, but he hopes to demonstrate that these objectives are correct.

Chapter 2 (Epistemological Corollary) seeks to identify the principal characteristics of adjudicative fact finding and its epistemological background. The chapter's argument can be usefully divided into seven parts: (1) adjudication is an instantiation of practical reasoning, in that the adjudicator must come to a decision, even in the face of uncertainty; (2) rules of adjudication may therefore be desired for goals additional to accurate fact determination; (3) 'evidence' is an item of information that evidences additional information, based on generalizations; (4) adjudication must be capable of justification, and cannot rest on 'tacit knowledge'; (5) each party is required to produce the best evidence available; (6) probabilistic reasoning can be adequately expressed using aleatory (Pascalian) reasoning and (7) adjudicative fact finding rests on rationalist foundations, and scepticism can be rejected. Some of these parts are given far more space by Stein than others. For example, (1) and (2) each take about a page, while (6) takes almost 16 pages.

Chapter 3 (Understanding the Law of Evidence) identifies the defining characteristics of adjudicative fact finding and the fundamental function of evidence law, which is apportioning the risk of error under uncertainty, rather than facilitating the discovery of the truth. Stein does this by considering two paradoxes ('Lottery'[9] and 'Preface'[10]) and four legal forms of these

[4] *Foundations*, p. x.
[5] Ibid., p. xi.
[6] Ibid., p. 1.
[7] Ibid., p. 1.
[8] Ibid., pp. 11–12.
[9] KYBURG, H. (1961) *Probability and the Logic of Rational Belief*. Middletown, CT: Wesleyan University Press, p. 197; *Foundations*, p. 67.
[10] MAKISON, D. (1965) The paradox of the preface. *Analysis*, **25,** 205; *Foundations*, p. 68.

('Gatecrasher',[11] 'Blue Bus',[12] 'Prisoners in the Yard'[13] and 'Two Witnesses'[14]). The Lottery paradox concerns an agent with a box of 1000 lottery tickets, one of which is a winning ticket. The paradox exposes an important aspect of the probabilistic deduction problem, namely the creation of knowledge from ignorance. This aspect of the problem manifests itself in the extension of the generalization 'these tickets are losers' to every single ticket. In the Preface paradox, an author writes a book accommodating a well-researched empirical project, and warns in the preface that she makes no guarantee that the book is error free. The reader therefore treats every page as containing an error. Stein's solution to these paradoxes is that a group statistic, or any type of covering uniformity, is not applicable to an instant case unless there is case-specific evidence. This is Stein's 'Principle of Maximal Individualization'. This evidence provides weight, and it is weight that ties generalizations to the facts of a case, in order to achieve accurate fact finding.[15] The paradoxes can be seen as arising from the unwarranted transformation of a properly evidenced estimate of probability that attaches to a general category of events into an unevidenced probability estimate that attaches to an individual event. In doing so, the numerical probability estimate does not change, but its propositional content and evidential weight do.[16] Bare facts (rudimentary evidence) do not enable fact finding, since they do not go beyond themselves. To discover new information, the fact finder must also have access to an inferential category of evidence, such as generalizations, that reach beyond the bare facts to a greater significance.[17] The perennial incompleteness of rudimentary evidence and generalizations makes fact-generating arguments inherently speculative. It is always possible to argue that if a missing piece of evidence were available, then the fact finder would use a different covering uniformity.

Chapter 4 (Evidence Law: What is it for?) argues against the current trend towards increasingly free evaluation of evidence (free proof) and criticizes conventional evidence doctrine for insufficiently regulating adjudicative fact finding. Stein proposes that the rise of free proof in the Anglo-American legal world, particularly in UK, derives from a greater empirical optimism in practical matters, and the rejection of the moral truths that operate in evidential presumptions. While characterizing free proof as continental,[18] Stein sees its English champion as Bentham, who proposed that forensic fact finding should be modelled on the 'family tribunal'. The difficulty with this family tribunal model, Stein suggests, is that while we might expect members of the family to cooperate, and waive some of their individual interests for the good of the family, it is much less reasonable to expect or require people to do this in the context of the state. We therefore need to restore political moral values into evidential rules, to take the place of the moral values implicit in Bentham's family tribunal. Stein does not challenge the rise of epistemological optimism, but he does challenge the separation of the moral from the epistemological in adjudicative fact finding.[19] Fact finding is ultimately part of the general logical faculty, which law cannot and should not control. However, the law

[11] COHEN, L. (1977) *The Probable and the Provable*. Oxford: Oxford University Press, pp. 74–75; *Foundations*, p. 78.

[12] *Smith v Rapid Transit* 58 N.E. 2d 754 (1945); KAHNEMAN, D., SLOVIC, P. & TVERSKY, A. (eds) (1982) *Judgment under Uncertainty: Heuristics and Biases*. Cambridge: Cambridge University Press, pp. 156–159; COHEN, L. (1981) Can human irrationality be experimentally demonstrated? *Behavioural and Brain Sciences*, **4**, 317; *Foundations*, pp. 61–62.

[13] NESSON, C. (1979) Reasonable doubt and permissive inferences: the value of complexity. *Harvard Law Review*, **92**, 1187, 1192–1193; *Foundations*, p. 78.

[14] COHEN (n. 11), pp. 1–39; *Foundations*, pp. 79–80.

[15] Ibid., p. 72.

[16] Ibid., p. 92.

[17] Ibid., p. 93.

[18] Ibid., p. 108.

[19] Ibid., p. 117.

should regulate the non-epistemological question of how risk should be allocated. There are three types of risk-allocating activity: (1) formulation of the general standards and burdens of proof that set the appropriate probability thresholds for factual findings; (2) determination of the quantitative sufficiency of the entire evidential base and (3) determination of qualitative sufficiency (or adequacy) of each individual item of evidence that joins the evidential base.

The consequence of this would appear to be that evidence law is not ultimately about epistemology but about political morality, in that it tells us how society is to resolve disputes in a state of evidential uncertainty: 'Morality picks up what the epistemology leaves off. This motto summarizes the principal thesis of this entire book.'[20] Adjudicative discretion should be replaced by clear rules of evidence, whether produced by the judiciary or legislature, based on principles of political morality. By 'morality' or 'political morality', Stein is referring to the values that society seeks to promote. By making explicit what these principles of morality are, we can begin to understand how to adjust the rules of evidence to support these principles, rather than rebuild from scratch. Since evidence law governs uncertainty at a social level, rules of admissibility rather than judicial discretion are for Stein a good thing. There should be a standard approach within a legal system to the allocation of risk, rather than leaving the decision to the discretion of individual fact finders. The Benthamite principle that we should 'gather all relevant information that can practically be obtained' as a means of maximizing the likelihood of accurate fact determination is fallacious, since it assumes, without warrant, that there is a linear relationship between the amount of information available and the accuracy of the decision. It is only correct to say that complete information gives complete accuracy.

Chapter 5 (Cost–Efficiency) proposes that adjudicative fact finding needs to be cost-efficient, by which Stein means that fact finders need to minimize the total cost of errors and error avoidance. There are two principle obstacles to attaining this goal: the divergence between the private and social benefits that adjudication engenders and the possession of private information by civil litigants and criminal defendants. The cost-efficiency doctrine accommodates four categories of rules: (1) decision rules determine the burdens and standards of proof; (2) process rules determine what evidence is admissible and what fact-finding methodologies are allowed; (3) credibility rules elicit credibility signals from litigants with private information, apportioning the risk of errorand (4) the evidential damage doctrine places the risk of error on the litigant best positioned to minimize the risk.

Chapters 6 and 7 consider the application to criminal and civil litigation of the theory provided in chapters 1–5. Chapter 6 (Allocation of Risk of Error in Criminal Trials) is concerned principally with the concept of reasonable doubt, while Chapter 7 (Allocation of Risk of Error in Civil Litigation) discusses fairness, efficiency and equality between the parties. While the first five chapters present the core of Stein's closely knit argument, and so must be read together and in order, chapters 6 and 7 can then be read in any order.

Squaring the circle: combining doctrinal evidence law, the New Evidence Scholarship and social values

On a cursory read, *Foundations* would appear to be another contribution to the 'New Evidence Scholarship'. By this I mean a body of scholarship that focuses on factual inference and proof in

[20] Ibid., p. 12.

legal settings, devoting a considerable amount of attention to the logic of inference about factual hypothesis, and making significant use of formal probability theory and statistical methods. Conventional evidence concerns, such as rules of admissibility, are excluded from its considerations.[21] We have indicative signs of the New Evidence Scholarship, such as the near-mandatory discussion of probability theories (chapter 2), the fascination with paradoxes (chapter 3), the extensive use of formulae (chapter 5) and the pervading sense that all evidential questions might correctly be expressed in utilitarian terms. In itself, this would be a solid piece of such scholarship, developing firmly on what has gone before.

But this reading of *Foundations* would be to do Stein an injustice, because what he has done here is attempt the monumental task of combining the contributions of the New Evidence Scholarship with those of doctrinal evidence lawyers and those who see evidence as encapsulating social values.[22] Even works of partial synthesis are rarely encountered,[23] and so Stein is to be congratulated on not only making an attempt to square the whole circle, but on making such a credible attempt. What Stein is proposing is that while all fact finding is rationalist, one of the defining characteristics of adjudicative fact finding is that the necessary uncertainty that it entails is managed through moral decisions. These moral decisions are the basis on which the rules of evidence, studied by doctrinal lawyers, operate. The primary criterion against which to evaluate the rules of evidence is therefore not, as we have come to expect, whether they further the goal of accurate fact finding, but whether they manage risk in the way that the moral values require.

This solution does still possibly require some areas of refinement, however. In particular, Stein makes a clear distinction between evidential rules and evidence-related rules. While the former promote objectives intrinsic to fact finding, the latter further extrinsic values and objectives. Among the evidential rules, the majority would appear to be moral in nature, determining how risk should appropriately be allocated as a result of incomplete evidence. These risk-allocating rules therefore also further values and objectives. While this is certainly conceptually elegant at first glance, it raises two issues warranting clarification.

The first issue is how we should decide whether a rule of evidence is really evidential, or simply evidence-related. One example is that there is no simple answer as to whether the inadmissibility of evidence obtained under torture reflects concern at an unacceptably high risk of inaccuracy, or the unconscionability of admitting evidence obtained in this manner.[24] Another example is the rules surrounding the testimony of spouses. Spouses have historically been incompetent to testify in English criminal evidence, and they remain non-compellable to this day. Do these rules reflect distrust of the reliability of spousal testimony, or do they instead represent society's protection of the marital

[21] LEMPERT, R. (1986) The new evidence scholarship: analyzing the process of proof. *Boston University Law Review*, **66**, 439; TILLERS, P. (2003) *Scattered Background Material for the 2003 Konstanz Lectures*. http://tillers.net/uncertainlaw/handout.htm (5 November 2006).

[22] For example, AIGLER, R. & YATES, I. (2003) The triangle of culture, inference and litigation system. *Law Probability and Risk*, **2**, 137.

[23] For example, DAMAŠKA, M.(2003) Epistemology and legal regulation of proof. *Law Probability and Risk*, **2**, 117; JACKSON, J. (2005) The effect of human rights on criminal evidentiary processes: towards convergence, divergence or realignment? *Modern Law Review*, **68**, 737.

[24] *A and Others v Secretary of State for the Home Department* [2004] EWCA Civ 1123, [2005] UKHL 71; DWYER, D. (2005) Closed evidence, reasonable suspicion and torture: *A and Others v Secretary of State for the Home Department*. *Evidence and Proof*, **9**, 126.

relationship, by excluding the possibility of placing a person in the position of either potentially testifying against her spouse, or else perjuring herself?[25]

The second issue for clarification is whether the morality that risk-allocating evidential rules promote is qualitatively the same as or different to the morality promoted by evidence-related rules? For example, if the rule against evidence obtained under torture is concerned with distributing risk, then one of the values that it ultimately promotes is that the coercive power of the state can only be used against the individual where there is reliable evidence, that places conviction 'beyond reasonable doubt'. This has at least some qualitative similarities with an explanation that one of the evidence-associated values promoted by the rule is that there are limits on how the state can exercise its coercive power to obtain evidence.

These two issues gain increased importance in light of Stein's reaffirmation of the conventional principle that rules of evidence are adjective, and so do not constitute free-standing rights that can, by themselves, form the basis of an action.[26] Evidence-related rules might be capable of being expressed as substantive rights, but not risk-allocating evidential rules. This is presumably how Stein would accommodate the developing opinion in common law jurisdictions that legal professional privilege is a rule of substantive law,[27] 'a fundamental human right long established in the common law.'[28] The right for a person to be consulted about decisions that affect her might also be seen as free standing.[29] This right is capable of forming the grounds of an action in English administrative law, as a substantive form of procedural impropriety.[30] The right is deeply embedded in the western legal tradition. Van Rhee, e.g. draws our attention to a sixteenth century civil procedure text, which emphasizes the divine origins of this right: 'God did not want to condemn Adam without first summoning him … and without having heard him ….'[31] One of the strengths of *Foundations* is its frequent use of concrete supporting examples, including cases, from Anglo-American law. However, other examples do exist that suggest that some of the clear lines drawn in the conceptual framework may blur in practice.[32]

Stein does concede that his theory does not account for how we might reconcile the 'clash between utilitarianism and Kantian morality.'[33] Kantian fairness arguments treat a person's right as valuable in itself, rather than as an instrument that the person can use strictly for the attainment of

[25] For example, DWYER, D. (2003) Can a marriage be delayed in the public interest so as to maintain the compellability of a prosecution witness? *R (on the application of the Crown Prosecution Service v Registrar General of Births, Deaths and Marriages*. *Evidence and Proof*, **7**, 191.

[26] *Foundations*, p. 18, including an argument for how the U.S. Supreme Court should have decided *Carmell v Texas*, 529 U.S. 513 (2000) in terms of Stein's theory.

[27] *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* [2002] HCA 49.

[28] *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2002] UKHL 21, [2003] 1 AC 563, at [10]; affirmed in *Three Rivers DC v Bank of England (No. 6)* [2004] UKHL 48, [2004] 3 WLR 1274.

[29] TRIBE, L. (1998) *American Constitutional Law*, 2nd edn. Mineola, NY: Foundation Press, pp. 666–667.

[30] CRAIG, P. (2003) *Administrative Law*, 5 edn. London: Sweet and Maxwell, pp. 444–445. There does not appear to be an equivalent provision in English private law, where the Civil Procedure Rules 1998 give a wide discretion to judges in case management, including the power to give summary judgment (Part 24), and to make orders 'without notice' (i.e. without notice to the affected party) (Part 23).

[31] WIELANT, P. (1573) *Practijke Civile*. Antwerp: Henrick van der Loe, p. 18, para XXI.4. quoted in VAN RHEE, C. (2000) Civil procedure: a European Ius Comune? *European Review of Private Law*, **8**, 589.

[32] DAMAŠKA, M. (1997) Rational and irrational proof revisited. *Cardozo Journal of International and Comparative Law*, **5**, 25.

[33] *Foundations*, p. 17.

some general social goal. These 'rights as trumps'[34] provide the individual with protection against certain allocations of risk, for her own well being, irrespective of social consequence. Stein is sceptical about the existence of these rights because of the cost that they incur, and because it is difficult to justify one free-standing right (such as the right to be heard) outweighing another right (such as justice without delay) where there are no accuracy-maximizing issues involved.[35] These objections, however, might be seen simply as a demonstration that free-standing evidential rights do not fit within Stein's model of what should constitute rules of evidence. Stein leaves the resolution of this clash to others: 'Analysis of this clash is a job for ethical theories, and its normative resolution is an objective for meta-ethics. For obvious reasons, these issues are not part of this book's agenda.'[36] This is a disappointing point at which to draw the line, since one of the key points on which some readers might disagree is whether we can treat adjudicative fact finding as ultimately a utilitarian exercise.

Certainty and equity in evidence

From an evidence lawyer's perspective, one of the most striking features of *Foundations* is the argument that the purpose of the rules of evidence is not to increase accuracy in fact finding, but to manage the risk of inaccuracy. Because decisions about how the effects of inaccuracy fall are ultimately questions of political morality, Stein argues strongly that these decisions should be authoritatively decided, e.g. by the legislature or *stare decisis*. These rules are principally in the area of admissibility, but also include rules such as corroboration requirements and evidential presumptions.[37] This is an area of Stein's argument that I would suggest might require very careful consideration, if only because Stein would reverse the general trend of rationalist evidence reform and scholarship of the last two centuries towards simplification.[38]

Stein's presentation of free proof unfortunately does not distinguish between the different ways in which the term may be used, and the various paths along which different forms of free proof have developed. Free proof may refer to freedom to admit any evidence deemed relevant (*liberté des preuves*) or freedom to evaluate that evidence in whatever way the tribunal deems fit (*liberté d'apprèciation*).[39] Twining has further added freedom to decide according to criteria of one's choice and freedom from hierarchical (appellate) controls over fact finding.[40] Continental free proof emerged in post-revolutionary France, largely as a reaction against the proto-rationalist system of legal proof. Legal proof had strict rules on what forms of evidence would be sufficient, alone or in combination, to constitute a full proof. Perhaps the most prominent feature of legal proof was the high evidential value placed on evidence obtained under torture.[41] In practice, however, free proof

[34] DWORKIN, S. (1984) Rights as Trumps. *Theory of Rights* (J. WALDRON ed.). Oxford: Oxford University Press, p. 153.
[35] *Foundations*, pp. 31–33.
[36] Ibid., p. 17.
[37] Ibid., p. 106.
[38] Ibid., p. xi.
[39] MARGOT, P. (1998) The role of the forensic scientist in an inquisitorial system of justice. *Science and Justice*, **38**, 71; RASSAT, M.-L. (1993) Forensic Expertise and the Law of Evidence in France. *Forensic Expertise and the Law of Evidence* (J. NIJBOER, C. CALLEN & N. KWAK eds). Amsterdam: Royal Netherlands Academy of Arts and Sciences, 54, p. 55; DAMAŠKA, M. (1995) Free proof and its detractors. *American Journal of Comparative Law*, **43**, 343.
[40] TWINING, W. (1997) Freedom of proof and the reform of criminal evidence. *Israel Law Review*, **31**, 439, 448.
[41] For example, LANGBEIN, J. (1977) *Torture and the Law of Proof*. Chicago: University of Chicago Press.

continues to be tempered by legal proof. In France, there are today at least three ways in which the evaluation of evidence is constrained. First, fact finding is guided by obligations[42] and legal presumptions.[43] Secondly, findings of fact must be justified (*raisonée*), and the findings of courts of first instance are reviewable on the facts on appeal. Because career progression within the professional magistracy is affected by the extent to which a judge's decisions are overturned on appeal, judges at first instance have a strong incentive to follow the guidance of higher courts on how facts are to be assessed.[44] Thirdly, the possibility remains open that one of the parties might take a decisory oath.[45] There are also some constraints on free admission of evidence. In particular, rules on testimonial competence prevent certain parties who might be deemed, financially or morally, to have an interest in the outcome of a case from testifying.[46] In Anglo-American evidence, on the other hand, the emphasis has been on regulating admissibility, with a largely free scope for evaluation.[47] Findings of fact by first instance judges will only rarely be reviewed, and jury findings cannot be subject to scrutiny of any sort. The rules on corroboration are one of the few areas in which freedom of evaluation has been constrained.

Stein presents free proof as a model in which the tribunal of fact, confident of its own epistemic competence and rejecting the imposition of fixed moral values embodied in risk allocation rules, receives whatever evidence it deems relevant, and gives that evidence whatever weight it chooses. For Stein, it is unconstitutional to allow individual tribunals to undertake such an important balancing act between individuals and between the individual and the state, and therefore argues strongly for certainty in the admissibility and evaluation of evidence. The flip side of that argument is that situations readily arise where meritorious civil claimants or criminal victims can evidence their claim by everyday standards of proof, but not by legal standards, while guilty defendants can evade conviction on pure evidential technicalities. This is at least analogous to the parallel versions of justice provided by the common law and equity. Equity will not suffer a wrong to be without a remedy, and so if the party cannot find a common law right, or cannot provide the evidence required to support that right, then equity will intervene in certain circumstances. The use of judicial discretion in relation to the admissibility and evaluation of evidence may go beyond simple analogy between the common law and equity. It has been suggested elsewhere that Anglo-American adjective law, which is now essentially common to both common law and equitable forms of substantive law, is influenced far more by equitable principles than by the common law.[48]

The effect of a rigid approach to evidence is greater certainty: a party will have a very good idea before any litigation commences of what evidence will be admitted, and what weight will be given to that evidence. On the one hand, this certainty is a virtue. One of the precepts of the Rule of Law is that

[42] *Code Civilie* arts. 1317–1369.

[43] *Code Civile* art. 1350.

[44] DAMAŠKA, M. (1986) *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process*. New Haven: Yale University Press, p. 49.

[45] Such oaths remain available in France, Italy and Spain and the Netherlands: CAPPELLETTI, M. & PERILLO, J. (1965) *Civil Procedure in Italy*. Martinus Nijhoff Den Haag, pp. 204–211. BEARDSLEY, J. (1986) Proof of fact in French civil procedure. *American Journal of Comparative Law*, **34**, 459, 472. Decisory oaths were abolished in England in 1824: *R* v *Williams* (1824) 2 Barnewall and Cresswell 538, 107 ER 483.

[46] These were abolished in England during the course of the 19th century.

[47] For analysis of the use of presumptions in English criminal law, see ROBERTS, P. & ZUCKERMAN, A. (2004) *Criminal Evidence*. Oxford: Oxford University Press, pp. 329–344.

[48] VAN RHEE (n. 31); WEINSTEIN, J. & HERSHENOV, E. (1991) The effect of equity on Mass Tort Law. *Illinois Law Review*, 269.

individuals can know what the law is, so that they can determine how best to conduct their interests in society. However, the rule that *nullum crimen nulla poena sine praevia lege poenali* may be the friend of the malefactor as well as of the innocent. The move towards free proof, based on the discretion of the tribunal of fact, may therefore be seen as an attempt to ensure that the technicalities of evidence shall not protect the guilty in the instant case. In *Hayter*,[49] e.g. a case not considered by Stein, the House of Lords was asked to consider whether in a joint trial of two or more defendants for a joint offence, a jury is entitled to consider first the case in respect of defendant A, which is solely based on his own out of court admissions, and then to use their findings of A's guilt, and the role A played, as a fact to be used evidentially in respect of co-defendant B. The majority of the House of Lords held that the jury was entitled to consider such evidence.[50] An anomalous situation was created in *Hayter* where, if A and B had been tried separately, then A's conviction would have been admissible against B under s 74(1) of the Police and Criminal Evidence Act 1984, but because A and B were tried together, A's confession might have been considered to be inadmissible hearsay against B.

Special and general theories of evidence

The political morality on which Stein bases his analysis in *Foundations* is utilitarianism. This approach is taken as a given (the legal system has a 'utilitarian urge' we are told[51]), without preliminary justification. By utilitarianism, Stein means the maximization of accurate fact determination, minimization of aggregate substantive and procedural cost and the minimization of total cost of error and error avoidance. He does recognize that we may not agree with him, at least at the outset,[52] and also allows that utilitarianism may not be the only ethical system that one might wish to work with.[53] So in the first instance, we can read *Foundations* to see whether, assuming utilitarianism to be valid, this is a successful application of utilitarianism to adjudicative fact finding. Stein does work hard, particularly in chapters 5–7, to demonstrate successfully that his theory remains robust, even if we vary the parameters of our calculus of social goods in fact finding. Subsequently, we might also read *Foundations* to see whether it would hold as well with a different ethical system.

Stein's theory is a special theory, in that it is concerned specifically with the mechanics of Anglo-American evidence law from a utilitarian perspective. Stein justifies his use of one legal family in his Preface, where he explains that he is providing a normative theory based on an account of the general features of Anglo-American law.[54] But he asks, 'Why hang the normative on the descriptive and risk the accusation that an "ought" is derived from an "is"?'[55] Because, he answers, we need a set of incontrovertible foundational factors in order to have a meaningful normative discussion. These factors include the objectives and institutional set-up of a specific legal system.[56] Examples of foundational factors for Stein are impartial adjudication, rationality, justification for adjudicative

[49] *R v Hayter* [2005] UKHL 6.

[50] DWYER, D. (2005) The admissibility of a confession against a co-defendant. *Modern Law Review*, **68**, 839.

[51] *Foundations*, p. 1.

[52] Ibid., p. 2.

[53] Ibid., p. 106.

[54] Ibid., p. ix.

[55] Ibid.

[56] For most of *Foundations*, there appears to be an implicit assumption that the foundational factors of all the legal systems within the Anglo-American legal family are the same. It is not the case, however, that the rules of evidence based on those foundational factors are common between the systems. For example, Stein suggests (pp. 194–195) that there are differences between English and American understandings of 'hearsay'.

decisions, the problem of uncertainty, the risk of error and therefore allocation of risk of error. Stein is surely correct that a viable normative discussion requires foundational factors. A theory of evidence which had to allow for the possibility that the tribunal might not be impartial and rational, might not be required to justify its conclusions or might not operate in epistemic uncertainty would have to be couched so broadly that it would be unlikely to come to make many, if any, meaningful propositions. But are these factors distinctively Anglo-American, or might the author have been more bold in setting the scope of his thesis? The foundational factors listed[57] could not reasonably be considered to be distinctively Anglo-American. The foundational factors listed on p. ix of the Preface almost certainly apply to all legal systems within the western legal tradition, and most if not at all of these properties appear in major non-western legal traditions.[58] As with many legal theorists,[59] there might be a suspicion that Stein is playing safe with the scope of his theory. He is an Israeli trained lawyer based in New York, with a PhD from University College London, and so would appear to sit firmly within the common law tradition. He may therefore not have wished to venture into the potentially hazardous territory of other legal traditions. In the same way that it would be interesting to see how Stein's theory operates if one applies an ethical system other than utilitarianism, it would similarly be interesting to apply it to the workings of another legal system, such as the French.

Conclusion

Stein's overall argument is an ambitious one, and it is at times very densely constructed in order to squeeze into a mere 244 pages. This need to be concise has its advantages and its disadvantages. On the one hand, Stein and his reader cover an enormous range of material in a very short space, in order to lay a foundational theory. This small book might therefore be read by a wider range of people than if it were a more substantial volume (or set of volumes). On the other hand, the book requires careful reading and re-reading to identify and consider all the strands of ideas within it. Points are raised in a few paragraphs or pages that could readily justify expansion to a chapter or even volume in their own right. The possible differences between professional and lay adjudicative fact finders, e.g. which are potentially very important to Stein's argument about the role of legal rules of evidence, is considered in only two paragraphs.[60] Stein's solutions to the 'Lottery' and 'Preface' paradoxes are central to his argument for the 'Principle of Maximal Individualization'. The paradoxes and solutions are presented over 14 pages,[61] but each of the two main paradoxes has been the subject of extensive analysis in philosophy,[62] extending in some instances to dedicated volumes. Alternative possible

[57] Ibid., p. ix.

[58] See AIGLER, R. & YATES, I. (2003) The triangle of culture, inference and litigation system. *Law Probability and Risk*, **2**, 137.

[59] With a few notable exceptions, such as Mirjan Damaška and Patrick Glenn.

[60] *Foundations*, pp. 139–140.

[61] Ibid., pp 67–80.

[62] For the Lottery Paradox, see e.g. DEROSE, K. (1996) Knowledge, assertions and lotteries. *Australasian Journal of Philosophy* **74**, 568; FOLEY, R. (1992) The epistemology of belief and the epistemology of degrees of belief. *American Philosophical Quarterly*, **29**, 111; HUNTER, D. (1996) On the relation between categorical and probabilistic belief. *Noûs*, **30**, 755; NELKIN, D. (2000) The lottery paradox, knowledge, and rationality. *Philosophical Review* **109**, 373; HAWTHORNE, J. (2004) *Knowledge and Lotteries* Oxford: Oxford University Press; WILLIAMSON, T. & DOUGEN, I. Generalizing the lottery paradox. forthcoming in *British Journal for the Philosophy of Science*. For the Preface Paradox, see e.g. RYAN, S. (1991) The preface paradox. *Philosophical Studies*, **64**, 293; DOUVEN, I. (2003) The preface paradox revisited. *Erkenntnis*, **59**, 389; EVNINE, S. (1999) Believing conjunctions. *Synthese*, **118**, 201.

solutions are not presented, and there is no analysis of what the implications for Stein's theory might be if an alternative possible solution were to be accepted.

Alex Stein has provided us with an extremely thoughtful and thought-provoking, theory of evidence law. Both his objective and his conclusions are bold, and the reader is forced at every stage in the argument to consider whether she accepts the line that Stein takes, and why. Even if one does not accept that Stein's theory is uniquely correct, it is difficult not to accept that it is at least valid.[63] A lot has been packed into *Foundations*, and its contents need to be carefully unpacked and studied. The book also provides rich materials for further evidence scholarship, and will no doubt form the subject of many seminars.

[63] *Foundations*, p. 138.