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## RESPONSE

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### THE LAW OF EVIDENCE AND THE PRACTICE OF THEORY

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In response to Alex Stein, *The New Doctrinalism: Implications for Evidence Theory*, 163 U. Pa. L. Rev. 2085 (2015).

Theoretical inquiries into the nature and functions of legal doctrine typically focus on adjudication. These inquiries explore, for example, whether and the extent to which doctrine constrains decisionmaking, as well as when and how often it dictates unique outcomes.<sup>1</sup> Relatedly, they also explore the extent to which legal reasoning is “autonomous”—that is, whether doctrine guides decisionmaking and dictates outcomes without reliance on nonlegal normative sources.<sup>2</sup> In his insightful article, Professor Alex Stein picks up the other end of the theoretical stick and discusses the extent to which doctrine on the *law* of evidence should guide and constrain the practice of *theorizing* about evidence.<sup>3</sup>

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<sup>1</sup> For an excellent discussion on the subject, see Brian Leiter, *Legal Formalism and Legal Realism: What Is the Issue?*, 16 LEGAL THEORY 111, 123-32 (2010).

<sup>2</sup> See, e.g., *id.* (evaluating different perspectives on whether judges’ legal analyses are autonomous).

<sup>3</sup> Alex Stein, *The New Doctrinalism: Implications for Evidence Theory*, 163 U. PA. L. REV. 2085, 2086 (2015).

In his characteristically deep and bracing style, Stein argues that evidence doctrine places significant constraints on evidence theory.<sup>4</sup> He then goes on to chastise a number of prominent scholars (Louis Kaplow, Amos Tversky and Daniel Kahneman, and Ronald Dworkin) for failing to adhere to these constraints.<sup>5</sup> I am sympathetic to several aspects of Stein's analysis, although in some cases for different reasons than those he articulates. Rather than focus on areas of overlapping agreement, however, this Response aims to situate Stein's arguments within the domain of evidence theory more generally, and then to raise some doubts about one of the principles he articulates. My hope is that providing this wider lens will clarify and illuminate not only Stein's specific claims, but also the general relationship between evidence law and evidence theory. Perhaps this treatment will even shed light on some of the broader questions raised in the *University of Pennsylvania Law Review's* symposium on legal doctrine.

Part I of this Response discusses evidence theory. Part II explicates Stein's methodology. Part III questions Stein's case-specificity principle.

## I. EVIDENCE SCHOLARSHIP AND THE ROLES OF THEORY

Modern evidence scholarship has benefitted tremendously in recent decades from an interdisciplinary and theoretical focus.<sup>6</sup> Theoretical evidence scholarship, in analyzing the law of evidence and the process of legal proof, still focuses to a large extent on evidence *doctrine*—but it does so by applying insights drawn from different intellectual fields. The relationship between evidence theory and evidence doctrine, however, is not always clear. Indeed, evidence theorists explore a host of different normative, explanatory, and descriptive projects, and they seek answers to myriad different questions.<sup>7</sup>

Some distinctions will provide a sense of the landscape and a framework for exploring Stein's analysis.

<sup>4</sup> See *id.* at 2095 (“The three principles of the law of evidence [case-specificity, cost-minimization, and equal-best] also impose limits on the claims that scholars can plausibly make about evidentiary rules.”).

<sup>5</sup> See *id.* (“These theories anomalously purport to remodel our system of evidence while holding the substantive law constant. In what follows, I call this wrong-headed methodology ‘antidogmatism.’”). See generally *id.* at 2096-99 (critiquing Kaplow's proposal to redesign the burden of proof); *id.* at 2100-03 (critiquing Tversky and Kahneman's views on probabilistic rationality); *id.* at 2103-07 (criticizing Dworkin's morality-based principles as impractical).

<sup>6</sup> For a discussion of this interdisciplinary and theoretical turning point in evidence scholarship, see Richard Lempert, *The New Evidence Scholarship: Analyzing the Process of Proof*, 66 B.U. L. REV. 439, 439-50 (1986).

<sup>7</sup> For an overview, see Michael S. Pardo, *The Nature and Purpose of Evidence Theory*, 66 VAND. L. REV. 547, 548-53 (2013).

### A. *Translational versus Conceptual*

One aspect of evidence theory involves trying to relate knowledge generated by other academic fields to aspects of the evidentiary proof process. Often, these *translational* applications require difficult work to determine what may or may not be inferred about legal evidence and proof from other disciplines' insights. A second kind of theorizing—related to but distinct from the first type—is *conceptual* in nature. This kind of theorizing involves providing a theory, conception, or account of the structure and nature of the evidentiary proof process. Commonly, conceptual theorizing provides a theory, conception, or account of a discrete aspect of the process such as a particular rule, concept, or type of evidence.<sup>8</sup>

### B. *Descriptive or Explanatory versus Normative*

Theoretical evidence scholarship may serve a *descriptive* or *explanatory* function, in which its success depends on whether it adequately depicts the underlying phenomena it is aiming to describe or explain. Or it may serve a *normative* function by providing a standard of correctness. But “normative” is ambiguous and needs to be clarified with two further distinctions.

#### 1. Evaluative versus Regulative

A normative theory may serve an *evaluative* function by providing criteria for justifying or critiquing particular evidentiary rules or applications. Alternatively, it may serve a *regulative* function by providing considerations for guiding and constraining judges' decisions. For example, a theory of relevance could be used by a judge to decide whether evidence is or is not relevant (the theory would serve a *regulative* function), or by a scholar or reviewing court to endorse or reject that underlying judgment (the theory would serve an *evaluative* function).

#### 2. Conditional versus Unconditional

Another distinction between normative theories relies on whether they take certain values or goals as given. *Conditional* normative theorizing begins with certain goals or values as given and then proceeds to argue that a particular evidentiary theory or conception is better than alternatives at achieving those values or goals. *Unconditional* normative theorizing proceeds by arguing

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<sup>8</sup> See *id.* at 574–612 (discussing examples of conceptual theorizing).

that a particular theory or conception ought to be adopted because it instantiates desirable values or goals.

## II. STEIN'S METHODOLOGY

Stein identifies three “organizing principles” that animate the law of evidence.<sup>9</sup> He argues that they explain and justify evidence doctrine.<sup>10</sup> His three organizing principles are (1) “case-specificity,” which “requires that courts decide cases on the basis of case-specific evidence, as opposed to generalizations and statistical distributions”; (2) “cost-minimization,” which instructs courts to minimize “the cost of error in factfinding and the cost of avoiding that error”; and (3) “equal-best,” which “requires that courts afford every person the maximal feasible protection against adjudicative error and that this protection be equal for all parties in civil trials and across all criminal defendants.”<sup>11</sup>

Where do these principles come from? According to Stein, the principles originate in “epistemology, economics, and morality.”<sup>12</sup> Although ideas from these domains inform evidence doctrine, Stein argues that the principles go through a process of “selection, adjustment, and integration” by lawmakers and that they are “formulated and continually refined by common law courts as they go from case to case.”<sup>13</sup> The principles “have a common goal: implementing people’s substantive entitlements and liabilities as fairly and as efficiently as possible.”<sup>14</sup> Given the integration between evidence and substantive law, Stein contends that scholars must respect the three principles, unless their normative pronouncements include remaking the entire legal system from the ground up.<sup>15</sup>

The organizing principles that Stein identifies are not themselves formal elements of evidence doctrine. They follow from Stein’s *interpretation* of evidence doctrine.<sup>16</sup> In other words, they are themselves an example of evidence

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<sup>9</sup> Stein, *supra* note 3, at 2085.

<sup>10</sup> *See id.* at 2088 (“These principles explain and justify the existing allocation of the burdens of proof, admissibility rules, and corroboration requirements.”).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 2087, 2090.

<sup>14</sup> *Id.* at 2090.

<sup>15</sup> *See id.* at 2095 (“What scholars cannot plausibly do is promote an evidentiary reform that parts company with the three principles of the law of evidence. . . . [But m]y methodological injunction does not ban wholesale reform proposals that purport to remodel our entire legal system together with the three evidentiary principles.”).

<sup>16</sup> *See id.* at 2085 (describing the three principles as an “interpretive claim”). Stein develops his interpretive claims about evidence doctrine in more detail in ALEX STEIN, FOUNDATIONS OF EVIDENCE LAW (2005).

theory. How exactly should we understand Stein's theorizing? Methodologically, Stein appears to be offering a Dworkinian "constructive interpretation" of evidence doctrine: he attempts to articulate principles that fit and explain evidence doctrine, on the one hand, and also justify it (or portray it in its best moral light), on the other.<sup>17</sup> He extracts principles from current doctrine, and he then uses those principles as a normative standard to critique inconsistent rules or practices (as he does in his book) or to critique inconsistent theory (as he does in his Article).<sup>18</sup>

We can classify Stein's constructive interpretation using several of the distinctions outlined in Part I above. He blends normative, descriptive, and explanatory aspects. Stein's normative vision is a *conditional* one, conditioned on the complex matrix of normative considerations already embodied in current doctrine. Stein's targets (i.e., Kaplow, Tversky and Kahneman, and Dworkin), however, attempt to *translate* insights from other intellectual domains while bypassing existing evidence doctrine. Stein gives three examples of their "antidocrinalism" in evidence theory: Kaplow on burdens of proof, Tversky and Kahneman on statistical evidence, and Dworkin on adjudicative errors.<sup>19</sup> To be brief, I will focus on Stein's second example and his case-specificity principle.<sup>20</sup>

<sup>17</sup> Indeed, in a review of his book, I referred to Stein as the "Ronald Dworkin of evidence law" and noted other similarities. Michael S. Pardo, *The Political Morality of Evidence Law*, 5 INT'L COMMENT. ON EVIDENCE 1, 1 (2007) (reviewing STEIN, *supra* note 16), available at <http://ssrn.com/abstract=1032710>, archived at <http://perma.cc/TF5A-DTZX>. For explanation and examples of "constructive interpretation," see RONALD DWORIN, LAW'S EMPIRE 52, 238-58 (1986).

<sup>18</sup> See STEIN, *supra* note 16, at 139 ("My descriptive argument holds that these principles explain many of the existing evidentiary rules and doctrine. My normative theory holds that evidence law ought to afford formal recognition to these principles and apply them across the board.")

<sup>19</sup> See *supra* note 5 and accompanying text. Stein's critiques focus on RONALD DWORIN, A MATTER OF PRINCIPLE 72-103 (1985); Louis Kaplow, *Burden of Proof*, 121 YALE L.J. 738 (2012); Amos Tversky & Daniel Kahneman, *Evidential Impact of Base Rates*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 153, 153-58 (Kahneman et al. eds., 1982).

<sup>20</sup> Stein's critique of Kaplow for ignoring the relationship between evidence and substantive law is persuasive. For additional critiques of Kaplow's proposal, see Ronald J. Allen & Alex Stein, *Evidence, Probability, and the Burden of Proof*, 55 ARIZ. L. REV. 557, 579-93 (2013); Edward K. Cheng & Michael S. Pardo, *Accuracy, Optimality, and the Preponderance Standard*, 14 LAW, PROBABILITY & RISK (forthcoming 2015) (manuscript at 4-12), available at <http://ssrn.com/abstract=2547348>, archived at <http://perma.cc/KL8T-MB7D>.

By contrast, Stein's critique of Dworkin's distinction between "deliberate" injustice (for example, convicting a defendant when there is a reasonable doubt) and "accidental" injustice (for example, erroneously convicting an innocent defendant when there was no reasonable doubt based on the evidence) is puzzling. See Stein, *supra* note 3, at 2104-07. Acts of "deliberate" injustice would also appear to violate Stein's "equal-best" principle, which "requires that courts afford every person the maximal feasible protection against adjudicative error." *Id.* at 2088. Moreover, Dworkin's distinction also appears to mirror Stein's distinction between errors supported by evidence and "unevidenced"

### III. CASE-SPECIFIC EVIDENCE?

Stein criticizes scholars who argue that legal factfinders incorrectly ignore “naked statistical evidence.”<sup>21</sup> He discusses Tversky and Kahneman’s example of an experiment in which subjects ignored the distribution of cab colors in the town (eighty-five percent green and fifteen percent blue) in assigning liability.<sup>22</sup> I sympathize with some of Stein’s critique,<sup>23</sup> but I am also skeptical of case-specificity as an evidentiary principle. The principle states that “courts decide cases on the basis of case-specific evidence, as opposed to generalizations and statistical distributions.”<sup>24</sup> My doubts follow from three considerations.

First, the *epistemic* quality of evidence does not track the general-specific distinction. Sometimes generalizations will be quite probative (more so than specific evidence) in proving specific events: DNA evidence, when presented as the probability that a profile would match a randomly selected member of a population, is one such example. And sometimes, of course, generalizations will not be nearly so probative. Allowing parties to introduce the most probative evidence that supports their version of what happened (in whatever form and at whatever level of generality) aligns with the fundamental evidentiary goal of accuracy. Statistical evidence should not necessarily be disregarded or excluded as irrelevant by factfinders; its probative value will depend on what factfinders can reasonably infer from the statistics about the specific events in a given case.

Second, the distinction between case-specific and nonspecific evidence is not clear. “Blue Cab”-type cases are easy to classify. But the lines Stein draws elsewhere, and the criteria he proposes for drawing the distinction, do not

errors. See STEIN, *supra* note 16, at 85 (explicating a possible “unevidenced” error in a hypothetical involving blue and green buses). In short, it still seems like Stein is the Dworkin of evidence law. See *supra* note 17.

<sup>21</sup> See Stein, *supra* note 3, at 2100-03 (criticizing Tversky and Kahneman); see also *id.* at 2094 (noting that Stein’s case-specificity principle undergirds “[t]he common law rule that prohibits courts from basing their decisions on naked statistical evidence”).

<sup>22</sup> *Id.* at 2100-02. In the experiment, a witness (who has an eighty percent probability of being accurate) identifies a green cab. *Id.* at 2100. Subjects typically assign liability to the “Green Cab” company. *Id.* But according to Tversky and Kahneman, subjects should consider both statistics (the distribution of cabs, as well as the witness’s probability of being accurate) and choose not to assign liability to the “Green Cab” company, because, under Bayes’s Theorem, the probability that the defendant cab was green is just 0.41. *Id.*

<sup>23</sup> See, e.g., Ronald J. Allen & Michael S. Pardo, *The Problematic Value of Mathematical Models of Evidence*, 36 J. LEGAL STUD. 107, 109-10 (2007) (explaining the “deep conceptual problem . . . of reference classes” that plagues evidentiary probability assessments); Michael S. Pardo & Ronald J. Allen, *Juridical Proof and the Best Explanation*, 27 LAW & PHIL. 223, 258-61 (2008) (discussing the same reference-class problem in the context of the “Blue Cab” hypothetical).

<sup>24</sup> Stein, *supra* note 3, at 2088.

seem intuitive or obvious. Why, for example, is character evidence not case-specific,<sup>25</sup> while habit and routine-practice evidence (which are typically admitted) are case-specific? Each of these categories involves drawing inferences about specific events from general patterns of prior behavior. Why is an inadmissible hearsay statement (“My friend Erik said he saw the defendant steal a watch”) not case-specific, while hearsay that merits an exception (e.g., “My friend Erik just told me on the phone that he just saw the defendant steal a watch”) is case-specific?<sup>26</sup> Both statements describe specific events. At root, it seems like case specificity is at best a matter of degree and does not provide a clear distinction between permissible and impermissible types of evidence.

Third, and most importantly, the effort to prevent factfinders from relying on non-case-specific generalities is doomed to fail. Much of the “evidence” or information on which cases are decided resides in the minds of factfinders (judges and jurors).<sup>27</sup> If evidence were solely admissible trial evidence, then the applicable legal rules plus the admissible evidence would by themselves dictate outcomes. But this scenario is rarely the reality; when it is, the case should have never gone to trial.<sup>28</sup> Trial outcomes are determined by the admissible evidence *in combination with* the collective knowledge and beliefs of the decisionmakers (judges and jurors). The decisionmakers’ collective knowledge and beliefs will include rough generalities about the world that are (1) not case-specific but are still (2) used to draw inferences about the specific

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<sup>25</sup> See *id.* at 2094 (noting how the case-specificity principle works to suppress evidence of a person’s character).

<sup>26</sup> For other examples, see Pardo, *supra* note 17, at 22-25.

<sup>27</sup> This point connects with the theme of this symposium. Realist insights about the judicial mind’s role in adjudication of legal issues also apply to judges and juries as factfinders. The caricature of legal formalism as a “mechanistic” deduction from rules and facts, see Leiter, *supra* note 1, at 111 (referring to this conception of legal formalism as “Vulgar Formalism”), has an analog on the fact-finding side of adjudication. The analogous caricature is that factfinding involves mechanically deducing verdicts from evidentiary rules and admissible evidence. This conception is rarely if ever accurate in cases with enough genuine dispute to make it to trial.

<sup>28</sup> Civil cases without genuine factual disputes based on admissible evidence—i.e., those in which no reasonable jury could disagree—should be resolved with summary judgment or judgment as a matter of law. See FED. R. CIV. P. 50, 56. Similarly, criminal cases should not go to trial when there is insufficient evidence from which a reasonable jury could find guilt beyond a reasonable doubt. See FED. R. CRIM. P. 29; *Jackson v. Virginia*, 443 U.S. 307, 324 (1979) (holding that criminal defendants merit habeas corpus relief when “it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt”). Because of these procedural devices, cases raising genuine disputes will be the ones that proceed to trial. These cases, therefore, will be precisely those in which something more than the admitted evidence by itself is needed to resolve the factual disputes. Criminal defendants present a special case. They may proceed to trial even when, based on the evidence, guilt appears to be the only reasonable conclusion. The possibility of jury nullification, however, renders even these cases ones in which more than deduction based on the evidence may be necessary.

events being litigated—precisely the situation Stein decries. It is not clear why it is legitimate for factfinders to rely on these generalizations, while it is illegitimate for parties to provide such generalizations, even when they are empirically well-established.

In sum, these doubts question both the descriptive accuracy and the normative desirability of the case-specificity principle. To the extent one shares these doubts, one should also question whether the principle constrains, or ought to constrain, theorizing about the law of evidence.

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