

# EVIDENCE, (IN)EFFICIENCY, AND FREEDOM OF PROOF: A PERSPECTIVE FROM ENGLAND AND WALES

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## INTRODUCTION

In his interesting article, *Inefficient Evidence*,<sup>1</sup> Professor Alex Stein defends a new approach to the question of how a legal system might undertake evidence sorting in determining whether a particular class or category of evidence should be declared inadmissible notwithstanding its relevancy. I have read Professor Stein’s article as an academic lawyer working on evidence law in England, with particular reference to criminal cases,<sup>2</sup> and the following comments should be seen in that light. For example, my knowledge of U.S. evidence law, against the general background of which Stein sets his arguments, is considerably more limited than my knowledge of the law of evidence as it applies in criminal cases in England and Wales, on which knowledge I draw in the pages that follow.

Borrowing from an approach “widely used in statistics, science, and engineering,”<sup>3</sup> Stein argues that only evidence satisfying an adequate signal-to-noise (or SNR) ratio should be admitted for consideration by the fact finders. Thus, “‘signal’ refers to information reliable enough to allow the fact finders to determine the probability of the underlying allegation,” while “[i]nformation not allowing the fact finders to make a reliable determination of the relevant probability is ‘noise.’”<sup>4</sup> Noisy evidence is

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1. Alex Stein, *Inefficient Evidence*, 66 ALA. L. REV. 423 (2015).

2. Writing in 1997, Twining accurately observed (William Twining, *Freedom of Proof and the Reform of Criminal Evidence*, 31 ISRAEL L. REV. 439, 442 n.12 (1997)): “Most courses on the Law of Evidence in England concentrate very heavily on criminal evidence (there is not much civil evidence law left to teach) and increasingly the literature treats criminal and civil evidence separately.”

3. Stein, *supra* note 1, at 425.

4. *Id.* at 424–25.

probabilistically ambiguous.<sup>5</sup> “When the noise mutes the signal, the information becomes inefficient and the court should not admit it into evidence.”<sup>6</sup> What is crucial, under this approach, is the *range of probabilities* to which the particular evidence gives rise. If that range is short (or, in other words, the probabilities are clustered—for example, 40%, 50%, and 60%), then the evidence will have a high SNR because the

signal will be much greater than the noise. Information that gives rise to a clustered probability—high, low, or in-between—therefore always qualifies as good evidence. This information will help fact finders reach the right decision and will virtually never mislead them. Hence, it is efficient and courts should always admit it into evidence.<sup>7</sup>

If, on the other hand, the range is wide (or, in other words, the probabilities are dispersed—for example, 10%, 50%, and 90%), then the relevant SNR will be low and, being inefficient, the evidence should be deemed inadmissible.

### I. RANGES OF PROBABILITIES

Stein’s arguments, as I have described them thus far, are clearly novel and bring a fresh perspective to bear on fundamental questions of evidence doctrine. At the most basic level, Stein’s thesis serves as a reminder that a central concern of the law of evidence is with the approach that it should take to differing perceptions of the extent to which a particular piece of evidence might be considered to indicate the probability of the underlying allegation. Stein’s view is that, if such perceptions are sufficiently consistent, then the evidence should be admitted. The apparent simplicity of this seems to me to mask the reality that it is precisely the question of whether there is such consistency that will generate debate. How are we to determine whether the relevant range of probabilities is short rather than wide? Any attempt at probabilistic calculations (or estimations) in the context of evidence law is fraught with difficulty.<sup>8</sup> For example, even such a basic concept as the relevancy of evidence—defined as its “tendency to make a fact more or less probable than it would be without the

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5. *Id.* at 432.

6. *Id.* at 425.

7. *Id.* at 426.

8. Note, however, that “[w]hen policymakers cannot determine the relevant probabilities even roughly, they should assume that these probabilities can be any. Evidence that gives rise to these indeterminable probabilities will consequently be identified as extremely noisy.” *Id.* at 436 n.41.

evidence”<sup>9</sup>—may generate controversy. Relevancy, the South African Law Reform Commission has explained, is ultimately “determined by each presiding officer’s common sense which is shaped by his or her own personal experience and therefore has the potential to be discriminatory.”<sup>10</sup>

Perhaps, however, it is possible to overplay any criticism that Stein’s thesis does not point in the direction of clear or simple solutions. Even if his article does not go much further than reminding us, in a novel fashion, that it is because there is legitimate debate about ranges of probabilities that there is legitimate debate about whether particular rules of evidence are justified, then it will have performed a valuable function.

## II. PRACTICAL IMPLICATIONS

Stein’s article does, however, go further than that. It seeks to defend the need for a large legal system to

macromanage evidence. American courts process millions of cases every year. This unparalleled volume of litigation makes it imperative for our system to minimize the total cost of errors and error-avoidance in fact-finding. To achieve this socially beneficial result, the system must get rid of inefficient evidence: one that increases the cost of fact-finding without significantly improving the accuracy of court decisions. The system therefore will do well to suppress all evidence that has a low SNR.<sup>11</sup>

Thus, in the light of SNR analysis, “the law [should] make [rules of admissibility] in relation to *categories of evidence* instead of asking judges to carry out a *cost–benefit analysis of individual items of evidence*. The resulting saving of adjudicative expenses makes these [rules] efficient from an economic standpoint.”<sup>12</sup> To illuminate this point, Stein contrasts a legal system with a caseload of one million cases a year (“System L”) with another, otherwise identical, system with a caseload of one-tenth of that number (“System S”). “Because *System S*’s caseload is relatively light, it can afford expending some of its resources on the integration of noisy evidence in adjudicative fact-finding,”<sup>13</sup> although this system “may still

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9. FED. R. EVID. 401(a).

10. S. AFRICAN LAW REFORM COMM’N, REVIEW OF THE LAW OF EVIDENCE (HEARSAY AND RELEVANCE) para. 3.28 (2008). See also, for discussions of the controversial questions surrounding the relevancy of sexual history evidence, Aileen McColgan, *Common Law and the Relevance of Sexual History Evidence*, 16 OXFORD J. LEGAL STUD. 275 (1996); Liat Levanon, *Sexual History Evidence in Cases of Sexual Assault: A Critical Re-Evaluation*, 62 U. TORONTO L.J. 609 (2012).

11. Stein, *supra* note 1, at 428–29.

12. *Id.* at 428 (emphasis added).

13. *Id.* at 433.

find it economically necessary to set up [evidence-sorting] rules.”<sup>14</sup> By contrast, the admission of noisy evidence “would drive *System L* into serious diseconomies of scale. To avoid these diseconomies, *System L* would do well to keep noisy evidence away from courts.”<sup>15</sup> In such a system, it would not be cost-effective to allow the fact finders to evaluate a piece of evidence if the noise mutes the signal.<sup>16</sup> “The more cases there are to process, the greater the system’s need to macromanage evidence in order to avoid diseconomies of scale. For a system that manages multiple trials, screening out inefficient evidence by applying the SNR principle is simply a plain economic necessity.”<sup>17</sup>

A considerable part of Stein’s article is then devoted to demonstrating that this, indeed, is the approach that is generally taken in U.S. law. In other words, SNR analysis already “lies at the heart of our evidence system,”<sup>18</sup> as “[t]olerating [inefficient] evidence would make our fact-finding system slow and ineffectual.”<sup>19</sup> From the perspective of a non-expert on U.S. law, I find Stein’s illustrations illuminating, but I do not feel sufficiently qualified to comment on them in any detail here. However, they provide much food for thought for me as a lawyer in England and Wales, which has just under one-fifth of the population of the United States.<sup>20</sup> Might England and Wales be a jurisdiction where there is—in contrast with the position in the United States—greater justification for *micromanagement* of evidence in the form of more reliance on “a cost-benefit analysis of individual items of evidence,”<sup>21</sup> and correspondingly, less reliance on rules of admissibility governing categories of evidence? Is England and Wales closer, in this respect, to “System S” than to the United States? Certainly, a hallmark of the contemporary law of evidence in England and Wales, and in a number of other Commonwealth jurisdictions such as Canada, is decreasing reliance on categorical rules and the emergence of

a principled approach that emphasizes consistency in the application of evidence law with its underlying policies. The principled approach entails a general preference for flexible

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14. *Id.* at 435 n.40.

15. *Id.* at 434.

16. *See id.* at 436.

17. *Id.* at 442.

18. *Id.* at 435.

19. *Id.* at 443.

20. In 2013, 57 million (*Population Estimates for UK, Mid-2013*, OFFICE FOR NATIONAL STATISTICS, <http://www.ons.gov.uk/ons/rel/pop-estimate/population-estimates-for-uk—england-and-wales—scotland-and-northern-ireland/2013/index.html> (last visited November 5, 2014)), in contrast to 316 million (*U.S. and World Population Clock*, U.S. CENSUS BUREAU, <http://www.census.gov/popclock/> (last visited November 5, 2014)).

21. Stein, *supra* note 1, at 428.

principles over strict rules. It requires evidence doctrines to be framed and applied in a way that is centered on the interests and values at stake in the evidence problem.<sup>22</sup>

Professor Colin Tapper has noted, in a style remarkably similar to Stein's, that "[t]he absence of clear rules for the judges to apply will tend to multiply and prolong arguments in favour of, or against, the use of particular pieces of evidence,"<sup>23</sup> and that "[o]verall it is hard to escape the conclusion that principles are resorted to just because they exist at such a high level of generality that they can easily be agreed in advance, but at the expense of potential disagreement at the point of their application to particular situations."<sup>24</sup> Supporters of the principled approach, however, are prepared to accept any increased "inefficiency" that might accompany it in return for its perceived benefits: "If the principled approach prevents judges from thoughtlessly applying rules they do not understand, that is a good outcome, even if it comes at some cost in terms of predictability and procedural efficiency."<sup>25</sup>

Certainly, there are regular indications in England and Wales of ambivalence, if not outright hostility, towards evidentiary rules regarded as unduly complex or technical.<sup>26</sup> Indeed, rules of admissibility have tended to become increasingly flexible and open-textured, an example being those governing the admissibility of evidence of bad character in criminal cases, contained in particular provisions of the Criminal Justice Act 2003.<sup>27</sup> At the foundation of these rules is the loose definition of evidence of bad

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22. Lisa Dufraimont, *Realizing the Potential of the Principled Approach to Evidence*, 39 *QUEEN'S L.J.* 11, 13 (2013).

23. Colin Tapper, *The Law of Evidence and the Rule of Law*, 68 *CAMBRIDGE L.J.* 67, 69 (2009).

24. *Id.* at 73.

25. Dufraimont, *supra* note 22, at 27.

26. For example, writing extrajudicially, Lord Justice Auld described the provisions of the Youth Justice and Criminal Evidence Act 1999 prescribing special measures for vulnerable and intimidated witnesses as "extraordinarily complicated and prescriptive. I can only assume that those drafting them have no idea of what judges and criminal practitioners have to cope with in their daily work of preparing for and conducting a criminal trial or of what they need as practical working tools for the job. Simple and more flexible rules . . . are what are needed . . ." LORD JUSTICE AULD, *REVIEW OF THE CRIMINAL COURTS OF ENGLAND AND WALES*, ch. 11 para. 126 (2001). Another example may be provided by the interpretation of section 41 of the same Act, which governs the admissibility of sexual history evidence. This provision contains the relevant test for the admissibility of sexual history evidence, setting out four specific situations in which leave to introduce such evidence may be granted. Yet the House of Lords in *R v. A.*, [2001] UKHL 25, not uncontroversially, invoked section 3 of the Human Rights Act 1998, which requires legislation to be interpreted compatibly with the European Convention on Human Rights if possible, to hold—in effect—that section 41 could be interpreted flexibly if this was necessary to guarantee the defendant a fair trial under article 6 of the Convention. The consequence of this decision is that sexual history evidence will be admissible if its admissibility is considered necessary to ensure a fair trial, even if, on a literal reading, the test for admissibility articulated in the relevant legislation is not satisfied. The dislike of any strictures that are considered unduly prescriptive is again apparent.

27. *See generally* MIKE REDMAYNE, *CHARACTER EVIDENCE IN THE CRIMINAL TRIAL* (2015).

character as, in essence, “evidence of, or of a disposition towards, misconduct . . . , other than evidence which . . . has to do with the alleged facts of the offence with which the defendant is charged,”<sup>28</sup> with “misconduct,” in turn, being defined loosely as “the commission of an offence or other reprehensible behaviour.”<sup>29</sup>

Open-texturedness of concepts and rules does not, however, necessarily imply arbitrariness. This is well illustrated by the rules governing the admissibility of hearsay evidence in criminal cases, which are also contained in provisions in the Criminal Justice Act 2003.<sup>30</sup> The traditional approach of treating hearsay evidence as inadmissible, subject to exceptions, has been maintained, although the available exceptions are now more flexible, and significantly, there is—for the first time in England and Wales—an exception analogous to the “residual exception” contained in rule 807 of the U.S. Federal Rules of Evidence. This exception, contained in section 114(1)(d) of the Act of 2003, allows hearsay evidence to be admitted if “the court is satisfied that it is in the interests of justice for [the evidence] to be admissible.”<sup>31</sup> Section 114(2) further provides that, in deciding whether a hearsay statement should be admitted in evidence “in the interests of justice” under section 114(1)(d),

the court must have regard to the following factors (and to any others it considers relevant)—

- (a) how much probative value the statement has (assuming it to be true) in relation to a matter in issue in the proceedings, or how valuable it is for the understanding of other evidence in the case;
- (b) what other evidence has been, or can be, given on the matter or evidence mentioned in paragraph (a);
- (c) how important the matter or evidence mentioned in paragraph (a) is in the context of the case as a whole;
- (d) the circumstances in which the statement was made;
- (e) how reliable the maker of the statement appears to be;
- (f) how reliable the evidence of the making of the statement appears to be;
- (g) whether oral evidence of the matter stated can be given and, if not, why it cannot;
- (h) the amount of difficulty involved in challenging the statement;

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28. Criminal Justice Act, 2003, § 98.

29. *Id.* at § 112.

30. See generally Andrew L.-T. Choo, *Criminal Hearsay in England and Wales: Pragmatism, Comparativism, and Human Rights*, 17 CAN. CRIM. L. REV. 227 (2013); J.R. SPENCER, *HEARSAY EVIDENCE IN CRIMINAL PROCEEDINGS* (2d ed. 2014).

31. Criminal Justice Act § 114(1)(d).

(i) the extent to which that difficulty would be likely to prejudice the party facing it.<sup>32</sup>

This is a very detailed collection of—mandatory—factors. Moreover, the Court of Appeal has been careful to emphasize that section 114(1)(d) should not be resorted to lightly<sup>33</sup> and should not, in particular, be utilized to undermine the principle that first-hand evidence is to be preferred to hearsay evidence:

Both the interests of justice test and section 114(2)(g) command attention to the question whether oral evidence can be given, rather than reliance be placed on the hearsay statement. We would expect that before reaching the conclusion that it is in the interests of justice to admit a hearsay statement, the Judge must very carefully consider the alternatives. The alternatives may well include the bringing of an available, but reluctant, witness to court. It by no means follows in practice that [such] a witness . . . will in fact refuse to give evidence if brought to court. If he may do so, then consideration will also need to be given to whether justice would better be served by putting him before the jury so that they can see him, with the possibility of applying to cross-examine him upon the previous statement, rather than simply putting in that statement for evaluation in the abstract by the jury.<sup>34</sup>

Again, in *R v. T.*,<sup>35</sup> the Court of Appeal demonstrated its preparedness to subject issues raised by section 114(1)(d) to rigorous scrutiny. In a trial for assault occasioning actual bodily harm, evidence of the complainant's witness statements and of a recording of her emergency telephone call to the police was admitted under section 114(1)(d). The Court of Appeal held that the evidence had been incorrectly admitted, criticizing in particular the trial judge's treatment of sections 114(2)(c) and 114(2)(g):

In our judgment, this is a case . . . in which the live evidence of the complainant could have been available at the trial . . . . [I]f reasonable steps had been taken, she could in all probability have been located and a witness summons issued and served. There was no reason to believe that the complainant would not have complied with a witness summons.

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32. *Id.* at § 114(2).

33. See *R v. D.*, [2010] EWCA (Crim) 1213, [17]; *R v. Z.*, [2009] EWCA (Crim) 20, [20]; *R v. Y.*, [2008] EWCA (Crim) 10, [62]; *Sak v. Crown Prosecution Serv.*, [2007] EWHC (Admin) 2886, [20].

34. *R v. Y.*, [2008] EWCA (Crim) 10, [60].

35. [2011] EWCA (Crim) 2341.

Thus the important factor set out in section 114(2)(g) should have led to the response that the oral evidence of the complainant could have been given, and if it was unavailable that was through the failure of the prosecution to take reasonable steps to secure the attendance of the complainant.

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... There was no evidence that the complainant could not be traced: the implication of the finding that no reasonable steps had been taken to trace her was that she could have been traced. In stating that she would in any event have refused to give evidence through fear of the appellant the judge was speculating . . . .

It was also necessary for the judge to consider paragraph (c) of section 114(2). The evidence in question could not have been more important in the context of the case as a whole. Without it the prosecution could not continue. It was virtually the entirety of the prosecution case. Only in rare circumstances, if any, can it be right to allow evidence of this importance to be adduced when there has been a failure to take reasonable steps to secure the attendance of the witness. There was no justification for it to be admitted in the present case.

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In our judgment, the judge failed to place proper weight on the matter listed in section 114(2)(c) and his consideration of the factor in paragraph (g) was flawed.<sup>36</sup>

Thus, the vagueness of the concept of the “interests of justice” notwithstanding, a certain robustness in the application of the test—the courts being assisted here by the detailed mandatory criteria articulated in section 114(2)—is evident in the case law.

The English courts’ dislike of the perceived inflexibility of bright-line tests is illustrated by the approach taken to the interpretation of article 6(3)(d) of the European Convention on Human Rights, which is effectively “incorporated” into the domestic law of the United Kingdom by the Human Rights Act 1998. Article 6(3)(d), which—crudely—may be considered the European equivalent of the Sixth Amendment Confrontation Clause, guarantees a person charged with a criminal offence the right “to examine or have examined witnesses against him.”<sup>37</sup> It will be well known to U.S. evidence scholars that the bright-line test for the interpretation of the Confrontation Clause announced by the U.S. Supreme Court in *Crawford v.*

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36. *Id.* at [12]–[13], [15], [16], [18].

37. European Convention on Human Rights and Fundamental Freedoms art. 6(3)(d), Nov. 4, 1950, E.T.S. No. 5.

*Washington* was motivated by a rejection of the idea of contextual determinations of reliability:

Reliability is an amorphous, if not entirely subjective, concept. There are countless factors bearing on whether a statement is reliable . . . . Whether a statement is deemed reliable depends heavily on which factors the judge considers and how much weight he accords each of them. Some courts wind up attaching the same significance to opposite facts.<sup>38</sup>

By contrast, in England and Wales, a different approach is taken. In essence, while there is a very strong presumption that article 6(3)(d) will be violated by the admission in evidence of a hearsay statement that constitutes the sole or decisive evidence against the defendant, this presumption can be dislodged by the existence of sufficient counterbalancing measures, in particular measures that allow the reliability of the evidence to be properly assessed, with the court ultimately having to be satisfied that the evidence is sufficiently reliable to be admitted.<sup>39</sup>

In sum, a legal system's rejection of a primarily categorical approach to evidence sorting does not imply that SNR analysis is not undertaken at any stage at all. What it means is that—possibly at the cost of efficiency, or possibly not<sup>40</sup>—courts are required to assume greater responsibility for performing cost-benefit analyses of evidence in individualized contexts. Evidence sorting becomes increasingly a matter for the courts rather than being a matter to be pre-determined strictly by the law of evidence. Traditional macromanagement of evidence is downplayed in favour of increased micromanagement. In undertaking such micromanagement responsibilities, courts might well find that SNR analysis proves to be a useful tool to deploy.

### III. “FREE PROOF”

“Free proof” is not a term of art, but is generally used to signify “the freedom of adjudicators (and others involved in reasoning about questions of fact) from technical or artificial constraints on the use of ordinary

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38. 541 U.S. 36, 63 (2004).

39. “The task of the court is to be sure that there are sufficient counterbalancing measures in place (including measures that permit a proper assessment of the reliability of that evidence fairly to take place) and to permit a conviction to be based on it only if it is sufficiently reliable given its importance in the case.” *R v. Riat*, [2012] EWCA (Crim) 1509, [86]; *see also* *R v. Horncastle*, [2009] UKSC 14; *Al-Khawaja and Tahery v. United Kingdom*, 2011 Eur. Ct. H.R. 2127.

40. Might grappling with complex rules of evidence actually decrease efficiency in some instances? Or, at least, might any efficiency gains be neutralized?

practical reason in argumentation.”<sup>41</sup> The concept of free proof therefore reflects “the principle that all evidence should be admitted in an indiscriminate fashion and assessed for weight later at the point of deliberation”;<sup>42</sup> the essence of the concept is the free admissibility of evidence for consideration by the fact finders. In his article, Stein notes that “[m]any scholars” have advocated the adoption of a regime of free proof, with such scholars “argu[ing] that sorting evidence into ‘reliable’ and ‘unreliable’ categories is futile, as evidence ought to be evaluated on a case-by-case basis rather than categorically.”<sup>43</sup> This observation is true as far as it goes: in a system that embraces free proof, all evidence-sorting rules that pre-determine the admissibility of particular *categories* of evidence—apart from any such rules as may be considered to have the determination of relevancy as their rationale—are clearly redundant. The important point to note, however, is that rejection by a legal system of the a priori categorization of evidence for admissibility purposes does not necessarily imply its acceptance or adoption of the concept of free proof. Any perception that a priori evidence-sorting rules are “futile” may be attributable simply to the view that such rules do not work well and that it is therefore much more effective to leave evidence sorting to courts to undertake in the context of particular cases. It would be very possible in theory—and indeed in practice—for a particular legal system to reject firmly both categorical evidence-sorting rules as well as the concept of free proof, relying on rigorous evidence sorting by its courts to prevent evidence from reaching the fact finders too readily. Freedom for fact finders in evaluating evidence, and freedom for courts from technical constraints in determining its admissibility in the first place, are not the same and should not be conflated.

Of particular interest to me, for obvious reasons, is Stein’s further suggestion that free proof, or at least something approaching it, has become a hallmark of the legal system of England and Wales: “England—the birthland of evidence sorting rules—did away with most of them and effectively allows fact finders to engage in a free evaluation of evidence.”<sup>44</sup> This comes across to me as somewhat overstated. It is true, as seen in the preceding section, that the importance of evidence-sorting rules has progressively diminished in criminal trials in England and Wales, but it may be more difficult to accept that *most* of them have now disappeared. It is also true that, in recent times, criminal trials in England and Wales have

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41. Twining, *supra* note 2, at 452.

42. Peter Murphy, *No Free Lunch, No Free Proof: The Indiscriminate Admission of Evidence Is a Serious Flaw in International Criminal Trials*, 8 J. INT’L CRIM. JUST. 539, 551–52 (2010).

43. Stein, *supra* note 1, at 440.

44. *Id.* at 440–41.

seen a movement away from the technique of limiting the access of fact finders to evidence by excluding it and towards a reliance on educating fact finders by giving them cautionary instructions or warnings about evidence that they have heard.<sup>45</sup> There is a

general principle . . . that a “special warning” is necessary if experience, research or common sense has indicated that there is a difficulty with a certain type of evidence that requires giving the jury a warning of its dangers and the need for caution, tailored to meet the needs of the case. This will often be the case where jurors may be unaware of the difficulty, or may insufficiently understand it.

The strength of the warning and its terms will depend on the nature of the evidence, its reliability or lack of it, and the potential problems it poses. For instance, it has been recognised that identification of a suspect by voice is less reliable than visual identification evidence, and accordingly usually requires a warning that is couched in stronger terms . . . .<sup>46</sup>

An excellent example of diametrically opposed approaches to a specific evidentiary problem is provided by the treatment of evidence of “the defendant’s accomplice who testifies against the defendant.”<sup>47</sup> Stein notes that there is, in “[m]ost states (but not the federal system)”<sup>48</sup> in the United States, “an important rule of criminal procedure”<sup>49</sup> consisting of a requirement that such evidence be corroborated as a pre-condition to its admissibility. According to Stein,

[t]he reason for having this requirement must by now be clear. An accomplice to the alleged crime is a well-informed insider who knows most of the crime’s details, if not all of them. This knowledge enables the accomplice to develop a false, but entirely believable, self-serving account of the relevant events, which the defendant will find difficult to refute. For that reason, uncorroborated testimony of the defendant’s accomplice can have any probability between [0% and 100%]. . . . [A]ny such testimony has an impermissibly low SNR, which makes it

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45. See generally Tapper, *supra* note 23; ANDREW L.-T. CHOO, EVIDENCE 16 (3d ed. 2012). The terminology is borrowed from Lisa Duffraimont, *Regulating Unreliable Evidence: Can Evidence Rules Guide Juries and Prevent Wrongful Convictions?*, 33 QUEEN’S L.J. 261, 280 (2008).

46. R v. Luttrell, [2004] EWCA (Crim) 1344, [42], [43].

47. Stein, *supra* note 1, at 453.

48. *Id.*

49. *Id.*

inefficient. This inefficiency can only be remedied by corroborative evidence that the law generally requires.<sup>50</sup>

The rationale for the requirement, Stein emphasizes, is not the fact finders' potential inability to assess the reliability of the accomplice's testimony, but rather considerations of efficiency: "Those witnesses would not mislead fact finders on many occasions, as fact finders would tend not to believe them. Those witnesses, however, would nearly always waste the fact finders' time and effort when the party who calls them does not offer corroborative evidence."<sup>51</sup>

In England and Wales precisely the same concerns raised by accomplice evidence are recognized, but the response to these concerns is entirely different. Immediately prior to the Criminal Justice and Public Order Act 1994, a trial judge was obliged to issue a warning to the jury about convicting the defendant on the uncorroborated evidence of an alleged accomplice of the defendant testifying for the prosecution. It is important to note that this did not constitute a corroboration requirement, being simply a mandatory warning requirement. Even this warning requirement was then abolished by section 32(1) of the abovementioned Act of 1994 with these words: "Any requirement whereby at a trial on indictment it is obligatory for the court to give the jury a warning about convicting the accused on the uncorroborated evidence of a person merely because that person is . . . an alleged accomplice of the accused . . . is hereby abrogated."<sup>52</sup> Consequently, there being no longer any *requirement* to warn, such an accomplice may simply be the subject of a warning given in the exercise of judicial *discretion*. In the words of the Court of Appeal of England and Wales:

Whether, as a matter of discretion, a judge should give any warning and if so its strength and terms must depend upon the content and manner of the witness's evidence, the circumstances of the case and the issues raised. The judge will often consider that no special warning is required at all. Where, however the witness has been shown to be unreliable, he or she may consider it necessary to urge caution. In a more extreme case, if the witness is shown to have lied . . . or to bear the defendant some grudge, a stronger warning may be thought appropriate and the judge may suggest it would be wise to look for some supporting material before acting on the impugned witness's evidence . . . . We . . . stress that judges are not

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50. *Id.*

51. *Id.* at 454-55.

52. Criminal Justice and Public Order Act, 1994, § 32(1).

required to conform to any formula and [the Court of Appeal] would be slow to interfere with the exercise of discretion by a trial judge who has the advantage of assessing the manner of a witness's evidence as well as its content.<sup>53</sup>

Despite, however, the growing reliance in England and Wales on warnings to fact finders about admitted evidence, it would be far from true to assert that all relevant evidence is now generally admissible and available for evaluation by the fact finders (subject to their taking into account any warnings that they may have been given). As the examples provided in the previous section demonstrated, the courts in England and Wales appear generally to be well aware of the need to prevent evidence from getting to fact finders too readily. Proof in England and Wales may be somewhat “freer” than was once the case, and is probably considerably freer than proof in the United States, but it is a long way from being essentially free.

#### CONCLUSION

I have endeavoured here to provide some broad reactions to, rather than a fully developed commentary on, Stein's article. Stein's thesis is thought-provoking and his article offers valuable perspectives on some of the general issues raised by particular categories of evidence. SNR analysis is a useful device, so long as one does not expect straightforward answers to follow from it. Further, while it does not purport to be a comparative piece, Stein's article indirectly challenges those functioning in smaller jurisdictions where contextual determinations of admissibility take place alongside traditional-style rule-driven ones, such as myself, to assess whether their own legal systems might do well to strive for (a return to) greater “efficiency.” “Free proof,” however, is a red herring. Stein appears to conflate the issue of different styles of determining admissibility, which he regards as relevant to the level of efficiency of the legal system, with the—analytically distinct—issue of freedom of proof. As such, the brief references to free proof in his article might have been developed more thoroughly and convincingly, or alternatively—as they have no discernible relevancy to his general thesis—omitted altogether. The force of Stein's central thesis does not appear dependent on, and may actually be undermined by, his references to free proof.

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53. *R v. Makanjuola*, [1995] 1 W.L.R. 1348, 1351.