MODERN TRENDS IN EVIDENCE SCHOLARSHIP: IS ALL ROSY IN THE GARDEN?

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I. INTRODUCTION

When the doyen of the intellectual history of evidence scholarship, William Twining, was at a comparatively early stage of his explorations, he concluded that, despite its many strengths, a number of charges could be made against orthodox evidence literature. First, it was too narrow, focusing almost exclusively on the rules of admissibility. Second, it was atheoretical, as most discussions were conducted within an assumed common-sense empiricism. Third, it was incoherent, as the conceptual framework of legal doctrine did not provide an adequate basis for establishing links with other discourses. Finally, it led to distortions and misperceptions of key evidentiary issues.[1] Writing over ten years later in 1990, however, he considered that these charges needed to be qualified.[2] He reckoned he had been too harsh about some of the earlier literature: that the charges did not apply to the early giants in the field, such as Bentham, Thayer, and Wigmore. But he also acknowledged that the scene had dramatically changed with the advent of the "new evidence scholarship."

This term, "new evidence scholarship," is one that would seem to be susceptible to rather different uses and as such is liable to lead to some confusion. As Roger Park has pointed out,[3] one might infer from the inclusiveness of the term that its boundaries cannot be precisely defined. On this usage, the "new" evidence scholarship can be equated with all that is relatively "new" in evidence scholarship. On the other hand, it can be equated, as Park says, with the more specific study of the

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1. W. Twining, Goodbye to Lewis Elliot: The Academic Lawyer as Scholar, 15 JOURNAL OF THE SOCIETY OF PUBLIC TEACHERS OF LAW 2 (1980).
2. W. TWINING, RETHINKING EVIDENCE: EXPLORATORY ESSAYS 349 (1990).
3. See Roger Park, Evidence Scholarship, Old and New, 75 MINN. L. REV. 849 (1991).

science of proof, making use of logic, mathematics, and probability theory. Twining considered that a widely held American perception confined the term to the latter context, but that if one opened one's eyes globally to all recent writing about evidence in law, the term could embrace the many varied strands of multi-disciplinary interest in the subject of evidence-that is, all that took evidence beyond its traditional focus on legal doctrine.[4] These headings included procedural scholarship, sociological studies of legal institutions, inference, studies of discourse, including semiotics and narratological approaches, psychological research, forensic science, and historical inquiries. Ten years after Twining compiled this list, one might now add feminist approaches to evidence and law and economics. It is true that the literature under each of these headings has not been evenly spread. There has been much more emphasis in the United States on, say, inferential processes, social psychology and forensic science than on comparative, sociological and historical approaches. It is also true that some of the literature under some of these headings is not particularly new. Wigmore took an important step towards broadening the study of evidence to consider the logic of proof with the publication of his first edition of the Principles of Judicial Proof back in 1913.[5] Literature on the psychology of proof can be traced back to the early twentieth century.[6] There is also nothing new about the idea that legal scholarship should make use of insights and methods from other disciplines. As Park has said, this debate was won by the Legal Realists as far back as the 1920's.[7] What can be said, however, is that evidence scholars across the common law world came rather late to this realization, as compared with other legal scholars, and that what is new within evidence scholarship is a much greater readiness to embrace interdisciplinary approaches.

Looking at the state of evidence scholarship today, the charges mounted by Twining against evidence scholarship in 1980 seem even less appropriate. Evidence scholarship has ranged far beyond legal doctrine. It has been much concerned with theory, particularly with theoretical models, and it has been informed by a very wide range of disciplines, from social psychology, forensic philosophy, mathematics,

4. See TWINING, supra note 2, at 350.
5. See JOHN HENRY WIGMORE, THE PRINCIPLES OF JUDICIAL PROOF, As GIVEN BY LOGIC, PSYCHOLOGY AND GENERAL EXPERIENCE (1913).
6. See, e.g., HUGO MUENSTERBERG, ON THE WITNESS STAND: ESSAYS IN PSYCHOLOGY AND CRIME (1908). 7. See Park, supra note 3, at 849.

linguistics, to economics. At a recent conference on "New Perspectives on Evidence," Richard Friedman commented on the eclectic nature of the approaches taken in recent evidence scholarship.[8] The conference appeared to concentrate mostly on three particular perspectives-the empirical, the economic, and the epistemological-but Friedman did not wish to exclude other approaches, and he suggested that comparative and historical perspectives also had much to offer.

With such a rich display of disciplinary approaches now taken towards evidence law and the process of legal proof, it might seem as if all is rosy in the evidence scholarship garden. The suffocating weeds of a particular type of doctrinal scholarship in the ascendancy from the mid- to late-twentieth century, which Rick Lempert has described as following the model of "What's wrong with the twenty-ninth exception to the hearsay rule?," have been supplanted by a wide variety of garden flowers.[9] It has been argued that some of the early debates on probability theory threatened to stifle the promising new ground with arid disputes about hypothetical cases set in an artificial world of rodeos, gatecrashers, and blue and green buses.[10] Some of this scholarship seemed to have little relevance to the real world of practice.

But with the benefit of other disciplines, such as social psychology and cognitive science, evidence scholarship became less transfixed by the competing claims of rival theories of probability. The benefit of other disciplines has thus allowed scholars to turn their attention towards considering the use that their models have for shedding light on the processes of actual proof and legal doctrine. This has generated some sharp debates and tensions, most recently about the degree to which formal models of reasoning have practical use for reasoning about evidence, and for the processes of proof,[11] but there is little doubt that evidence scholarship has been considerably energized and enriched as a result.

8. See Richard D. Friedman, "E" is for Eclectic: Multiple Perspectives on Evidence, 87 VA. L. REV. 2029 (2001).
9. See Richard Lempert, The New Evidence Scholarship: Analyzing the Process of Proof, 66 B.U. L. REv. 439 (1986).
10. See TWINING, supra note 2, at 362-63.
11. See, e.g., Ronald J. Allen & Brian Leiter, Naturalized Epistemology and the Law of Evidence, 87 VA. L. REV. 1491 (2001).

II. THE RATIONALIST TRADITION OF EVIDENCE SCHOLARSHIP

The question remains whether this eclecticism is as broad and wide-ranging in approach as it appears to be. One way of answering this question is to ask whether recent evidence scholarship continues to remain set within the parameters which Twining identified as the rationalist tenets of evidence scholarship.[12] Twining summarized these tenets in the form of two models, or ideal types: one was a rationalist model of adjudication, and the other identified the main epistemological assumptions of standard evidence discourse. The model of adjudication which he idealized was one whereby the direct end of adjudicative law was rectitude of decision through accurate determination of past facts, which proved to specified standards of probability on the basis of careful weighing of evidence. This model was predicated on a number of assumptions of evidence discourse which formed the basis of the second model: epistemology is cognitivist rather than skeptical; a correspondence theory of truth is preferred to a coherence theory; and the particular conception of rationality found its expression in the English empirical tradition of Bacon, Locke, and John Stuart Mill. Within the broad rationalist tradition, Twining concedes that there is room for differences of perspective. Thus, while many writers have been relatively complacent about the extent to which the rationalist model of adjudication is realized within existing practices and procedures, some, including some of the best known, such as Bentham, have been highly critical of the arrangements existing in their day. All, however, have been what Twining calls "optimistic rationalists" in the sense that they believed that rationalist standards represented a feasible aspiration, rather than a remote Utopian ideal. A further point which he developed is that there is a distinction between adherence to the core tenets of the rationalist tradition, the importance of rectitude in securing justice under the law, and adherence to particular conceptions of truth, justice, and reason, which he accepts have been deeply contested in philosophy.[13]

Looking at the broad range of modem evidence scholarship, it may be said that few have challenged the core tenets of the rationalist tradition. It is true that there have been wide-ranging debates on models of decision making, and some of these would seem to stray quite far from the rather simplistic or naive assumptions of the English empirical

12. See generally TWINING, supra note 2, at Chp. 3.

13. See id. at 127-28.

tradition. It has been argued that the kinds of models of decision making developed by Pennington and Hastie, which have deployed narrative stories or schemas to think about evidence, have marked a shift away from the type of atomistic, inductive reasoning associated with empiricism towards a more holistic mode of reasoning.[14] This may require new conceptions of rationality, but it does not entail any fundamental challenge to the core beliefs in truth, reason, and justice. Indeed, these alternative conceptions of rationality are put forward on the assumption that they represent a better explanation of our reasoning processes. Moreover, while most would seem to be both aspirational and relatively optimistic in their rationalist framework, evidence scholars have often been highly critical of existing rules.[15] A number have also adopted a more skeptical and sophisticated view on the abilities of fact finders to come to correct conclusions and more readily accept than evidence scholars in the past that biases creep into decision making processes. A number of feminist writers, for example, have argued that juries use cultural paradigms about rape which are often mythical to assess victims' stories in rape cases, and that evidentiary doctrine has reinforced and perpetuated such assumptions.[16] Again, it would seem that many of these writers believe that there are ways of combating the cultural stereotypes that often dominate our reasoning processes. Some have specifically endorsed the use of greater social science evidence in this endeavor.[17]

14. John D. Jackson, Analyzing the New Evidence Scholarship: Towards a New Conception of the Law of Evidence, 16 OJLS 309 (1996).
15. See, e.g., Ronald J. Allen, A Reconceptualization of Civil Trials, 66 B.U. L. REV. 410 (1986) (burdens of proof); Richard Friedman, Character Impeachment Evidence: Psycho-Bayesian [!?] Analysis and a Proposed Overhaul, 38 UCLA L. REV 637 (1991) (character evidence).
16. See, e.g., Aviva Orenstein, No Bad Men!: A Feminist Analysis of Character Evidence in Rape Trials, 49 HASTINGS L.J. 663 (1998); Katherine R. Baker, A Wigmorian Defence of Feminist Method, 49 HASTINGS L.J. 861 (1998); Aileen McColgan, Common Law and the Relevance of Sexual History Evidence, 16 THE OXFORD JOURNAL OF LEGAL STUDIES 275 (1996); Kathy Mack & Sharyn Roach Anleu, Resolution Without Trial, Evidence Law and the Construction of the Sexual Assault Victim, in FEMINIST PERSPECTIVES ON EVIDENCE 127 (Childs & Ellison eds., 2000).
17. See, e.g., Orenstein, supra note 16, at 663.

III. CRITIQUES OF THE RATIONALIST TRADITION

If we accept that the new evidence scholarship remains fundamentally attached to the core tenets of truth, reason and justice, and to the optimism that has underlain these beliefs, a further question is whether this attachment is unduly limiting and distorting its focus. It is possible to identify two broad critiques that have been made against the rationalist tradition of evidence scholarship. The first critique, developed by Donald Nicolson, is that the new evidence scholarship is failing to engage with fundamental challenges to the rationalist tradition manifested in philosophy, the humanities, and the sciences.[18] This raises two questions. The first question is whether these challenges are as fundamental as is claimed. Writing some twenty years ago, Twining claimed that when much of this literature is analyzed, few are able to maintain philosophical skepticism.[19] Professor Damaska, however, has taken the view that influential currents of contemporary thought have posited a radical disjunction of language from external reference.[20] The second question, however, is whatever the importance of post-modem conceptions of truth and knowledge - and some modern philosophers have been critical of them [21] - what relevance are these to evidence scholarship which is contextualized within law. Damaska has pointed out that as long as we engage in social practices such as adjudication, we presuppose a world outside our statements, in which there is a reality outside language and that "post-modem" thought is therefore of little use in evidence law.[22] The difficulty in sustaining a truly anti-foundationalist position in this context is illustrated by Nicolson himself. On the one hand, Nicolson denies that there are absolute foundations for knowledge - objectively valid or invalid arguments - but, on the other hand, says that this does not mean there are no strong or weak arguments, or that some arguments are more coherent than others. One strategy he adopts to sustain this position is to claim that arguments make sense within a particular shared understanding. But when we claim that there has been a miscarriage of justice within the practice of adjudication, we invariably want to appeal to more than just what the community thinks; we want to say that there are good reasons

18. See D. Nicolson, Truth, Reason and Justice: Epistemology and Politics in Evidence Discourse, 57 MOD. L. REV. 726 (1994).
19. See TWINING, supra note 2, at 92.
20. See Mirjan R. Damaska, Truth in Adjudication, 49 HASTINGS L.J. 289 (1998).
21. See, e.g., A. I. GOLDMAN, KNOWLEDGE IN A SOCIAL WORLD (1999).
22. Damaska, supra note 20, at 290.

for claiming that there have been miscarriages of justice even if the community disagrees with us.

The second critique of the rationalist tradition is, I would contend, a more penetrating one. This is to question how important truth finding is within adjudication. In an insightful article, Mike Seigel argued that the rationalist tradition has suffered from the "twin vices" of foundational rationalism (the pursuit of accuracy) and logical positivism (finding answers through scientific and in particular social-scientific pursuits).[23] Foundational rationalism, in particular, has caused evidence scholarship to suffer from both "macro-distortion" and "micro-distortion." Macro-distortion has artificially narrowed the scope of debates by ignoring non-rationalist values such as the acceptability of verdicts and the need for efficient resolution of disputes. Micro-distortion has resulted in evidence scholars failing to see many evidence-related issues outside of the contested trial. It is important not to read too much into this critique. Seigel himself is at pains to stress that he is not arguing that truth finding is an unimportant goal, and neither does he appear to argue that social science evidence cannot help to illuminate evidentiary discourse. At the same time, he does seem to question the key rationalist tenet identified by Twining that the direct end of adjudication is rectitude of outcome.

There are two aspects to Seigel's critique. First, is it true that evidence scholars have largely ignored values other than truth finding in adjudication? Secondly, if so, is this neglect a limitation? To come to the first question, Seigel developed his critique within a broad American context, and within this context he has convincingly argued that much evidence scholarship has largely ignored other values. Exceptions include Nesson's acceptability thesis which, as Seigel has pointed out, was subjected to considerable criticism by evidence scholars,[24] Friedman's work on the value of the confrontation right,[25] and Leonard's work on character evidence suggesting that permitting the defendant to offer character evidence serves the "cathartic" function of trials.[26] This neglect of non-truth values is not necessarily because, as

23. See Michael L. Seigel, A Pragmatic Critique of Modern Evidence Scholarship, 88 Nw. U. L. REV. 995 (1994).
24. See Charles Nesson, The Evidence of the Event? On Judicial Proof and the Acceptability of Verdicts, 98 HARV. L. REv. 1357 (1985).
25. See Richard D. Friedman, Thoughts from Across the Water on Hearsay and Confrontation, 1995 CRIM. L. REV. 697.
26. See David P. Leonard, The Use of Character to Prove Conduct: Rationality and Catharsis in the Law of Evidence, 58 U. COLO. L. REV. 3 (1986-1987).

Seigel appears to suggest, evidence scholars consider them unimportant, but because they have shown little interest in them. Ron Allen, for example, has produced a litany of truth's competitors in the legal system.[27] Referring to a list provided by a conference at Hastings College of the Law on 'Truth and its Rivals,' which included speed and efficiency of adjudication, protection of privacy, promoting party satisfaction, public acceptance of verdicts, and achieving catharsis, he added a number of variable objectives which key players such as the parties, state bureaucrats, lawyers and the media want out of it, and stated that each of these has programmatic implications for the rules of evidence. He then added, however, that this was not what he wished to discuss as he was "personally more interested" in the concept of truth.[28]

The second question whether the emphasis on truth finding is a limitation depends on where one comes from. It can be argued that the multi-disciplinary approach of much evidence scholarship has been largely beneficial. To the extent that truth finding remains a commonly accepted goal of adjudication, insight into our reasoning processes is surely valuable. If this focus has artificially narrowed the scope of debates-the danger of macro-distortion-then clearly this has been a limitation. But these insights nevertheless may help to inform a key, if not the key, objective of adjudication. Similarly, evidence scholars may have focused unduly on the contested trial and this may have meant that they have not contributed to debates about other dispute processes as much as might have been desirable. Seigel points to Alternative Dispute Resolution ("ADR") issues in the United States. One could also point to the rise of restorative justice schemes outside the formal criminal process in a range of common law jurisdictions, and the rise in the importance of judicial inquiries in a number of common law countries where, increasingly, issues which give rise to public concern-for example, child abuse within care homes, fatal accidents on the railways, secret payments to politicians and fatal shootings by security forces are being exposed to public inquiries. These developments are controversial. Lawyers have argued that extra-legal processes can subvert legal values. Historians have argued that the increasing lawyerization of inquiries can serve to legitimize political versions of the truth. No doubt evidence scholars have much to contribute to these developments, but does this mean that the work they have been doing is necessarily limited? There is certainly plenty of

27. Ronald J. Allen, Truth and its Rivals, 49 HASTINGS L.J. 309 (1997-1998).
28. See id.at 310.

other work evidence scholars could be doing, both in terms of exploring the relationship between rectitude of decision, and other values in adjudication, and in terms of paying more attention to the specific dispute-resolving contexts in which reasoning about evidence takes place. When one takes a global look at evidence scholarship, however, there are signs that evidence scholars are becoming more interested in this kind of work.

IV. SOCIOLOGICAL, HISTORICAL AND COMPARATIVE PERSPECTIVES IN EVIDENCE SCHOLARSHIP

One reason for the neglect of non-truth values within American evidence scholarship is suggested when one looks at evidence scholarship from a comparative vantage point outside the United States. Evidence scholarship is taught in the United States across the civil-criminal divide, but largely outside a constitutional framework. In other common law countries, however, the decline of the jury has opened up a sharp divide in evidence teaching between the civil and criminal context. Civil evidence is largely disappearing and being absorbed within civil procedure, a subject which is not commonly taught in the undergraduate law curriculum. This has meant that many standard evidence courses have focused largely on evidence within the criminal context, with increasing emphasis on the relationship between criminal evidence and the values of the criminal justice system. This absorption of the subject into the context of criminal justice has forced evidence scholars in the Commonwealth to confront issues of fairness, rights, and legitimacy perhaps more directly in their evidence scholarship than their American counterparts.[29] In his Principles of Criminal Evidence written in 1989, for example, Adrian Zuckerman identified three general principles: the principle of truth finding; the principle of protecting the innocent from conviction; and the principle of maintaining high standards of property in the criminal process.[30] More recently, in his Law of Evidence, Ian Dennis has argued that the goal of the adjudicative process is legitimacy, and not factual accuracy.[31]

Much of this scholarship has remained firmly within the realm of

29. In the U.S., criminal procedure scholars, by contrast, seem to resort more to discussion of these concepts than evidence scholars. See, e.g., Christopher A. Bracey, Truth and Legitimacy in the American Criminal Process, 90 J. CRIM. L. & CRIMINOLOGY
691 (2000).
30. See ADRIAN ZUCKERMAN, PRINCIPLES OF CRIMINAL EVIDENCE 6-7 (1989).
31. See I. H. DENNIS, THE LAW OF EVIDENCE Chp. 2 (1999).

doctrinal discourse. Writing in the early 1990's, Park suggested that one reason why evidence scholars turned away from doctrinal analysis in the United States was because of the lack of doctrinal change.[32] Conversely, however, evidence scholars in the United Kingdom, and elsewhere in Canada, New Zealand, and South Africa, have had to cope with a barrage of legislation, law reform reports, and constitutional decisions on the law of evidence. This has kept many evidence scholars busy. At the same time, another trend has come to influence a number of scholars working within the field of evidence and procedure, namely the rise in socio-legal scholarship. Described by the Director of the Oxford Socio-Legal Centre as the "study of law and legal institutions from the perspectives of the social sciences," this "movement" has come more to mean for legal scholars an engagement with a "social" context whether sociological, historical, economic, geographical or whatever.[33] There is little doubt that the significance of this phenomenon has been considerable, at least within the United Kingdom, where the Economic and Social Research Council reported in 1994 that over the previous twenty years the socio-legal community had produced a substantial body of knowledge about the operation and effect of law in society.[34] The report identified 265 academics involved in funding socio-legal research, two thirds of whom were based in forty-six law departments. The U.K. Socio-Legal Studies Association has risen steadily since 1990, and there are a number of successful academic journals, such as the Journal of Law and Society and Social and Legal Studies, with similar journals in Canada and Australia.

It is not surprising, perhaps, that this movement should have influenced evidence scholars and those working broadly in the field of evidence and legal procedure. Within the last thirty years, a number of historical and socio-legal examinations have been made of legal processes of proof, including the role of the legal profession in the development of the rules of criminal evidence;[35] the interaction between scientific experts, lawyers and the rules of evidence;[36] the construction

32. See Park, supra note 3, at 869.
33. See S. Wheeler & P. Thomas, Socio-Legal Studies, in LAW'S FUTURES (Hayton ed., 2000).
34. Economic and Social Research Council, Review of Socio-Legal Studies Final Report (on file with author).
35. See CHRISTOPHER ALLEN, THE LAW OF EVIDENCE IN VICTORIAN ENGLAND (1997).
36. See C. JONES, EXPERT WITNESSES: SCIENCE, MEDICINE AND THE PRACTICE OF LAW (1994).

of cases by the police and prosecutors;[37] lawyer-client interaction in the police station and at court, and the construction of defense strategies;[38] the negotiation and settlement of personal injury claims;[39] the presentation of cases before judges as compared to juries;[40] and the interaction of the media and law in constructions of truth.[41]

From a wider comparative angle, then, Seigel's criticism of modem evidence scholarship seems less pertinent than it may be in the U.S. context. What we see when a wider lens is applied to certain recent evidence scholarship is a trend away from the rather naive optimistic rationalism of traditional evidence scholarship, and towards a more sophisticated and realist critique of the role of truth in legal processes. One of the shifts that has taken place is to recognize the importance of pre-trial proof processes. Twining himself has long pointed out that one of the limitations of the orthodox evidence literature was its trial-centeredness, pointing out that this skews the way in which most cases are actually disposed of.[42] One of the concepts that has had considerable mileage in much of the socio-legal literature has been that of "case construction." As one of the originators of the concept in the context of criminal justice literature has put it, "evidence, the facts of the case, strong and weak cases are not simply self-evident absolutes; they are the end-product of a process which organizes and selects the available 'facts' and constructs cases for and in the courtroom.[43] One criticism of this approach is that the theoretical aspects about these claims have been somewhat under-developed. Mike Redmayne has pointed out that, at one level, the idea that cases have to be built is pretty unremarkable.[44] Of course, in this process fact finders may fall into error as a result of cognitive biases. But this does not mean that the cases constructed have no foundation in reality. Where it may make

37. See DOREEN J. MCBARNET, CONVICTION (1981); M. MCCONVILLE, ET AL., THE CASE FOR THE PROSECUTION: POLICE SUSPECTS AND THE CONSTRUCTION OF CRIMINALITY (1981).
38. See MIKE MCCONVILLE, ET AL., STANDING ACCUSED: THE ORGANIZATION AND PRACTICES OF DEFENSE LAWYERS IN BRITAIN (1994).
39. HAZEL GENN, HARD BARGAINING: OUT OF COURT SETTLEMENT OF PERSONAL INJURIES (1987).
40. See JOHN JACKSON & SEAN DORAN, JUDGE WITHOUT JURY: ADVERSARY TRIALS IN THE DIPLOCK SYSTEM (1995).
41. See R. NOBLES & D. SCHIFF, UNDERSTANDING MISCARRIAGES OF JUSTICE (2000).
42. See generally TWINING, supra note 2, at 153.
43. See MCBARNET, supra note 37, at 3.
44. See MIKE REDMAYNE, EXPERT EVIDENCE AND CRIMINAL JUSTICE 7 (2000).

sense to talk about a stronger form of constructionism, than simply one of building cases, is where an interactive process takes place between the police and witnesses or suspects, or between the prosecution and the defense, which results in evidence being created and labeled. Confessions are created through a process of questioning which results in legal categories, such as 'recklessness' or 'theft' being suggested or adopted by suspects. Some types of evidence are more susceptible to this kind of construction than others. It is difficult, for example, to talk about physical evidence being constructed. However, another form of constructionism which socio-legal studies have emphasized is that cases get built upon goals which can inject motivational bias into the process. As a line of inquiry hones in upon a suspect, time is invested in making a case against him or her which can lead to the neglect of other lines of inquiry and even the suppression of items of information. Miscarriages of justice involving forensic evidence have highlighted how even forensic scientists can be imbued by motivational biases as well as cognitive biases, a theme that has been developed in much of the constructionist literature in science studies.[45]

More recently, scholars have turned to other theories to point to the problems in achieving rectitude of outcome in the legal process. While constructionism has focused on the role that actors play within the system in constructing reality, other work relying on autopoietic systems theory has suggested that the legal system itself is an important forum for giving authority to certain kinds of evidence and truths as it seeks to provide closure to the issues under examination. This need for closure is problematic because it means that truth may be compromised as inflated, or even fictional, claims are made for the methods of proof deployed or for the conclusions reached. The tension between finality and truth opens up what has been described as a "tragic choice" within the very nature of the legal process: admit the possibility of error and confidence is undermined within the legal process; refuse to concede error and confidence may be undermined from without.[46] At the same time, the prize of finality makes the legal forum a tempting arena for powerful interests to seek legitimacy for their actions and pursuits. Much of this socio-legal and historical evidence literature is in its infancy. Within a U.K. context, Twining has declared that socio-legal studies as a whole are coming of age and achieving critical mass, but

45. See, e.g., BARRY BARNES, ET AL., SCIENTIFIC KNOWLEDGE: A SOCIOLOGICAL ANALYSIS (1996).
46. See generally NOBLES & SCHIFF, supra note 41.

that they are approaching a critical point when they could either continue to develop or decline. In the United States, social psychology would seem to have had more influence on evidence scholars than sociology. At the same time, there have been calls for more attention to be given to both historical and comparative approaches, and it would seem that the increasing problems of expert evidence and the impact of Daubert is leading some scholars to look historically and comparatively at the relationship between law and science. Recent work by Jennifer Mnookin on the history of handwriting has illustrated how the courts themselves not only determine issues of guilt or liability, but also affect general conceptions of what counts as knowledge.[47] The courtroom, she argues, may serve as a "kind of epistemological public space." This argument has repercussions for the increasing use of judicial inquiries at a national and international level to adjudicate on different versions of the truth. At the international level, considerable thought is being given to the role of the new international criminal court, and to truth commissions as means of bringing closure to armed conflicts. Within the comparative field, Damaska's work on the institutional foundations of evidence law rules shines out as a fairly solitary beacon of light.[48] As the importance of expert evidence grows in a number of jurisdictions, however, there may be a greater willingness to look at comparative experience. David Bernstein has argued that experience elsewhere suggests that it may be less profitable to focus on rules of admissibility as a means of controlling "junk" science than to consider improvements in the procedural arrangements governing the generation of expert evidence in the first place.[49] No doubt comparative scholarship may yield other insights in the future.

V. CONCLUSION

Bernstein has argued that one of the advantages of studying controversies surrounding scientific evidence in other common law jurisdictions is that scholars can relinquish their own "ideological baggage" and gain insight into unanswered questions.[50] This, it is

47. See Jennifer L. Mnookin, Scripting Expertise: The History of Handwriting Identification Evidence and the Judicial Construction of Reliability, 87 VA. L. REV. 1723 (2001).
48. See, e.g., MIRJAN R. DAMASKA, EVIDENCE LAW ADRIFT (1997).
49. See David E. Bernstein, Junk Science in the United States and the Commonwealth, 21 YALE J. INT'L L. 123 (1996).
50. See id.

suggested, may be the general virtue of the branch of evidence scholarship which may be called sociological, historical, and comparative. I have argued that the rationalist tradition is very much alive and well within modem evidence scholarship. Multidisciplinary approaches have provided much instructive insight within this tradition. As Twining conceded, however, this tradition brings its own ideological baggage. The giants of evidence scholarship fought hard to erase the more complacent tendencies of the rationalist tradition. One of the advantages of socio-legal scholarship is that it has raised doubts about some of its more optimistic tendencies. It is too early to say whether this shift away from optimistic rationalism will come to provide a more mainstream challenge to the rationalist tradition. Some constructionist theorists suggest that the construction of cases is so dependent on the interests of the actors involved that facts and evidence play little constraining role.[51] Others, whose approach has been influenced by autopoiesis theory, have criticized the rationalist tradition in the belief that the ideas of truth and fairness exceed what the legal system can hope to deliver. However, the extent to which the theories of constructionism or autopoiesis constrain facts and evidence is unclear, and these theories are in need of considerable refinement and development. At most, perhaps what this literature has shown is that there are inevitable constraints on truth finding in legal processes. As a corrective against the dominant optimism of the rationalist tradition, this branch of scholarship deserves a place in the garden of modern evidence scholarship, and can contribute to its general health and rosiness.

51. Jones, for example, suggests that even scientific facts are "negotiated constructs," supra note 36, at 273.