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CORRESPONDENCE

Prejudice, Politics, and Proof

*Peter Tillers**

In the last fifteen years there has been a great resurgence of interest in fundamental theoretical analysis of the nature of factual proof in litigation. Many serious scholars, both in the law school world and outside it, have turned their energies in this direction. William L. Twining, Quain Professor of Jurisprudence at University College London, has been a major figure in this growing movement. He recently published a painstaking and scholarly study of Bentham's and Wigmore's theories of evidence, inference, and proof in adjudication.¹ This book is part of Twining's broader, long-term effort to develop a general theoretical framework for the analysis of evidence and proof.

Professor Kenneth W. Graham, Jr., recently published a vile review of this book in the *Michigan Law Review*.² Graham's attack on Twining's effort is not the usual trashing sometimes found in law reviews. He does not claim that Twining's book is poor scholarship.³ Graham does make it plain that he does not *like* either Twining or his book and he does his damndest to make his readers share his sentiments. Graham is entitled to dislike any book or person he pleases, but the polemics in his review are both thoughtless and offensive.

Persons familiar with Graham's work know that it contains a great deal of vitriol. This review is no exception. He speaks, for example, of "sneering pseudo-Englishmen" and "effete Eastern anglophiles"⁴ and he refers to Bentham's critique as "proto-Stalinist."⁵ Ironically enough, part of Graham's distaste for both Bentham and Wigmore seems to rest on his dislike of their polemics. For example, he apparently agrees with John Chipman Grey's view that Wigmore's abusive

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1. See W. TWINING, *THEORIES OF EVIDENCE: BENTHAM AND WIGMORE* (1985).

2. See Graham, "There'll Always Be an England": *The Instrumental Ideology of Evidence* (Book Review), 85 *MICH. L. REV.* 1204 (1987).

3. See *id.* at 1207 (Twining's book is "strong on Bentham, weak on Wigmore, provocative on everything else.").

4. *Id.* at 1205.

5. *Id.* at 1214.

language shows "bad grace."⁶ Graham is not well positioned to accuse anyone of bad grace. Graham draws back from putting Wigmore and Bentham into Bentham's category of "vituperative personalities,"⁷ one rather suspects because he realized this characterization would make him their spiritual ally.

As irritating as they are, Graham's "extreme polemical tones"⁸ are not the primary reason for my characterization of his review as thoughtless and offensive. One major fault in the review is shabby scholarship. Graham's concession that there is "silly stuff" in his review⁹ is accurate but insufficiently comprehensive; there is sophomoric stuff throughout. Another major fault is that the review is fiercely derisive. Graham is overtly anglophobic and his dislike of Twining and Twining's work rests on that anglophobia. Moreover, his review contains several personally demeaning and offensive remarks about Twining. Graham tries to make this vile brew palatable by packaging it in witty and camp discourse; by saying "da-da-da-da-da-da-da-da"¹⁰ he hopes, I gather, that readers will chuckle at his prejudice, his mean-mindedness, and his contempt for scholarship, William Twining, and everything English.

Graham's "Anglo-bashing"¹¹ seems to have its source in anglophile-phobia. He tells us that his "major concern is with the impact of . . . [Twining's] imperialist ideas on those political pubescents in this country who continue to believe in the cultural superiority of England."¹² He detests "American Anglophiles,"¹³ particularly those at Harvard Law School and at "petty Harvards."¹⁴ Perhaps this animus explains the personal abuse he heaps on Twining. To judge by his own expressions of sympathy for "despised ethnics" in the United States,¹⁵ Graham probably would not call a black man "my boy," but he is willing to refer to Twining as "our boy."¹⁶ Graham also strongly implies that Twining's motive for the study of evidence is the desire for "personal power and profit."¹⁷

6. *Id.* at 1226.

7. *Id.* at 1227.

8. *Id.* at 1226 (referring to a reviewer's comment about Bentham).

9. *Id.* at 1217.

10. *Id.* at 1225.

11. *Id.* at 1206.

12. *Id.* at 1234.

13. *Id.* at 1206.

14. *Id.* at 1205.

15. *Id.* at 1205-06.

16. *Id.* at 1208.

17. *See id.* at 1230-31.

Graham's intense dislike of anglophiles (and his consequent dislike of everything English) may explain why he accuses Twining of having "imperialist ideas."¹⁸ We can see the logic of his position: (1) I hate American Anglophiles (at Harvard) (most of whom are dead); (2) therefore, I hate England; and (3) therefore, I hate Twining, who — though he is cosmopolitan and open to American (and Continental) theorizing, has urged English law teachers to become less parochial, and sees Karl Llewellyn as a guiding light — is, after all, English.

Graham professes to have a benign form of anglophobia. He asserts that he does not want to show the inferiority of the English; he only wants to show that Americans, particularly "despised ethnics," are just as good as the English.¹⁹ In defense of these despised ethnics, Graham notes that "their remote ancestors had . . . civilizations at a time when the denizens of the British Isles were still enthusiastically eating one another."²⁰ Graham's "argument" echoes Churchill's war-time defense of the racial superiority of the English over the Germans. His reasoning also implies that a good many "ethnics" are less genteel and civilized than Kenneth W. Graham, Jr., who is of "Celto-Slavic ancestry."²¹ The ancestors of some ethnics were eating pigs while Graham's were doing more refined things.

Only Graham's anglophile-phobic-anglophobia explains how he was able to conclude that Twining is a cultural imperialist. Graham's choice of Twining as a symbol of English cultural smugness is queer: it is roughly comparable to taking Averell Harriman as a symbol of American belief in a uniquely American cultural heritage. Twining has been tireless in his efforts to break down the insularity of English legal academics. He has repeatedly exhorted evidence scholars in the United Kingdom to become less insular and to pay more attention to American and Continental theorizing. I might also note that an English cultural imperialist is an unlikely general editor of a series — *The Jurists* — that includes or will include books on Hayek, Weber, Hegel, Fuller, and Kelsen. Twining himself (as Graham acknowledges) wrote a book about Karl Llewellyn. (Twining wrote the book practically in a fit of pique at the refusal of the *Times* of London to publish an obituary about a "minor" American legal theorist.) Perhaps Graham can show us how all of these activities are part of a clever plot to propagate the cultural superiority of England?

The only benign explanation I can offer for Graham's charge of

18. *Id.* at 1234.

19. *Id.* at 1206.

20. *Id.* at 1205.

21. *Id.* at 1204 n.*.

cultural imperialism is Graham's assumption that adherents to the "rationalist" tradition in evidence scholarship — in Graham's words, "the instrumental ideology of evidence" — are pro tanto English cultural imperialists, that anyone who shares the views of figures such as Bentham and Wigmore must be an English imperialist. This is a hard pill to swallow. Be that as it may, it is pertinent to note that Twining has strongly challenged the "rationalist" or "instrumentalist" thesis that the only purpose of proof process is the discovery of factual truth. It is also pertinent to note that, although Twining plainly admires much that he finds in the rationalist tradition, he generally bemoans rather than celebrates the homogeneity of American and English theorizing about evidence. I noticed, even if Graham did not, that Twining had favorable things to say about the work of Abu Hareira (who decidedly is not English), partly because Twining believes that Abu Hareira drew on intellectual currents entirely outside the British empiricist tradition.

Graham is not more attentive to tiresome details when he speaks of "Twining and his cohort of pseudo-mathematical truth-seekers."²² Graham apparently does not know — why let facts get in the way of a good phrase? — that Twining has *never* used mathematics to analyze evidence and that he has made strong arguments in favor of a theory of proof (L.J. Cohen's "Baconian" theory) that he sees as nonmathematical. Graham also seems to assume that "pseudo-mathematical truth-seekers" such as David Kaye and Richard Lempert belong in Twining's "cohort." This implication is absurd. Lempert and Kaye work within a theoretical perspective (Bayesianism) that is quite different from Twining's "Baconian" approach; it is rather unlikely that they think of themselves as Twining's disciples or his spiritual and intellectual brethren. In short, Graham's asides reveal that he blurs some rather wide differences among theorists of proof.

Graham has set out to destroy an enemy — theorists of proof — with one blow. He cannot do that easily because he does not know his enemy; his ignorance prevents him from realizing that he has many enemies and that it takes different kinds of blows to kill them. Consider just one example of an "argument" (really only a theoretical riposte) by Graham against theorists of proof. He tells us that "ultimate reality (if not entirely a construct of the human mind) is altered by our attempts to perceive it (a thought frightful to ponder for theorists of 'proof')."²³ Although Graham, having relieved himself of the tire-

22. *Id.* at 1224.

23. *Id.* at 1225.

some (some would say scholarly) obligation of documenting his claims, thankfully does not drop the obligatory citation to Thomas Kuhn, it seems apparent that he thinks that theorists of proof have not thought about the constructed character of evidence and reality. Which theorists of proof does he have in mind? Does he suppose that L.J. Cohen, one of the world's leading philosophers of science, has not thought about how "ultimate reality . . . is altered by our attempts to perceive it"? I have not taken the trouble to reread Cohen's works but I am quite sure that he knows the work of theorists such as Thomas Kuhn and scientists such as Heisenberg. Does Graham suppose that Bayesians such as Lempert have not pondered the way the mind shapes "reality"? Apparently he does not know that almost all Bayesians in the law-school world favor "*subjective* Bayesianism," which largely sprang from the work of de Finetti, who vigorously insisted that the mind structures experience, that *subjective* Bayesianism is a (logical) way of structuring evidence, and that no evidence is simply "given." Perhaps Cohen and other "Baconians" do not emphasize the constitutive activities of the mind to the same degree, but as far as Graham is concerned, all theorists of proof — Baconians, Bayesians, fuzzy set theorists, holists, cognitive psychologists, and the rest of them — are one and the same. A plague on their house! Or should it be "houses"?

How is one to explain these crudities? Has Graham adopted the view that trashing is scholarship? Or is he bewildered by things that he does not understand and fearful of becoming just a crotchety old fossil? In Graham's words, "What's it all about, Alfie?"²⁴ The kind of rhetoric used in the review suggests that Graham's philistinism and his vision of politics in litigation are to blame for the indiscriminate character of his attacks.

Professor Graham has a great dread of anything that reeks of science, mathematics, and logic. I am not sure if Graham wants to remove chemistry, biology, and geometry from the curricula of our high schools,²⁵ but he apparently does want to keep science and mathematics out of the courtroom. Graham makes the relatively restrained — I would not say "considered" — claim that "'science' [the quotation marks are his] *on the forensic stage* is only a pretense."²⁶ So throw chemistry out of the courtroom. If not chemistry, then logic and mathematics. Is he serious? (It's not easy to tell.) Mathematics, of

24. *Id.* at 1209 (quoting lyrics of a sentimental popular song).

25. But he may. *See id.* at 1225 (suggesting that scientific inquiry is fruitless because nature is a "wily woman" who is "[e]lusive and without the Truth in Her").

26. *Id.* at 1233 (emphasis added).

course, can be put to bad use in the courtroom. But it can also be enlisted in the effort to show that cigarette companies are killing off large numbers of people or that some employers systematically discriminate against certain ethnic groups (possibly even against people of Celto-Slavic ancestry). The view that science and mathematics are bad in the courtroom simply because they are scientific and mathematical seems philistine.

Perhaps there is a more charitable way of describing Professor Graham's cast of mind; perhaps I should call him a politically motivated irrationalist rather than a philistine. In place of the rationalist "ideology of evidence" (as he construes it), he offers (without overtly embracing) a competing vision of evidence and proof in litigation. He offers a "theatrical vision of litigation";²⁷ he wants us to view "litigation as political theatre" [sic].²⁸ This vision of litigation is bound to appeal to once-junior radicals who have not yet given up the cliché that everything is politics. Be that as it may, Graham does demand fairness in litigation.²⁹ Fairness, however, seems to have nothing to do with factual accuracy; the importance of factual accuracy is attributable to nothing more than political ideology.³⁰ I suppose Graham thinks that it is fair to convict a person for a crime he did not commit. It's just all politics, isn't it?

Let me try to reduce Graham's errors to more manageable proportions. Let me say that his argument against rationalism in evidence and proof rests on two central premises: (1) litigation is not just the pursuit of factual truth; litigation serves many other social, moral, political, and ideological purposes; and (2) the process of construing evidence involves many ineffable factors that cannot be captured by rational, logical, mathematical, or scientific theory. These are respectable claims and there is something to them. However, there is not as much to them as Graham supposes; these claims may be true but they do not support Graham's view of the insignificance of either factual accuracy or rigorous theorizing about proof.

By now it is a truism, and it has been a truism for quite some time, that litigation is not just a search for the truth. Charles Nesson said this sort of thing recently, William Twining has made this point repeatedly, and Wigmore (along with many others) made the same point a long time ago. It is easy, however, to slip from this truism to the *different* and far more dubious proposition that litigation serves social

27. *Id.* at 1232.

28. *Id.* at 1233.

29. *Id.*

30. *Id.*

purposes and values *rather than* truthfinding. Simply put, the fact that litigation is used to serve a variety of purposes does not and should not mean that the value of factual truth has no role in litigation; to say, for example, that litigation serves expressive functions does not necessarily mean that we do not and should not use litigation to find out what actually happened. The issue is how we reconcile and meld the various functions of litigation, not whether we should choose truth or something else as the goal of litigation.

Graham is also not entirely off the mark in insisting that proof processes and inference cannot be fully dissected by rational analysis. He may be trying to say that there are things at work in inference that are hard to understand and that we are usually or always better off in letting our common intuitions guide our factfinding rather than in trying to construct a priori factfinding techniques that are supposedly more logical. He may well be right, but in choosing to defend this thesis by attacking logical, rational, and mathematical analyses of proof he has again chosen the wrong target. It is entirely possible to use the language of mathematics or logic to study evidence, inference, and proof without any commitment to the absurd idea that factfinding in trials should be governed by a “mathematico-verbal monarch”³¹ or even by mathematical equations purportedly describing the probative force of evidence. To the extent that Twining recommends that litigators use charts to analyze evidence, he is of course fair game for skeptics such as Graham, but Graham apparently has made the common mistake of equating mathematical or logical analysis as an exploratory tool with the application of mathematical, logical, or formal analysis in real-world situations.

I do not wish to denigrate the motives that seem to underlie the rhetoric in Graham’s review, particularly since I think I share some of Graham’s ideals and values (and some of his resentments). Nonetheless, I hope — I have to hope — that deep commitment to ideals and values is not bound to produce the sort of unwitting cruelty so evident in Graham’s review; I want to believe that in scholarship we do not have to take the view of generals in war — that we have to kill some noncombatants along the way. In any event, I think that Graham has done nothing but harm to the causes that he believes in. The shame of it all is that Graham could have made a much more intelligent and effective case by approaching the literature on evidence, inference, and proof with a more open mind. There is no monolithic theory of proof today; there are deep divisions of opinion on almost all of the funda-

31. *Id.* at 1231.

mental questions. It is a shame that Professor Graham, like Thrasymachus, does not want to participate in the discussion. His political, irrationalist, and subjective perspective has much to offer — if he takes the trouble to inform himself about what is at stake in the debates about proof.