Michigan Law Review

Volume 86 | Issue 6

1988

Hot Air in the Redwoods, A Sequel to The Wind in the Willows

William Twining
University College London

Follow this and additional works at: <https://repository.law.umich.edu/mlr>

Part of the [Evidence Commons](#)

Recommended Citation

William Twining, *Hot Air in the Redwoods, A Sequel to The Wind in the Willows*, 86 MICH. L. REV. 1523 (1988).

Available at: <https://repository.law.umich.edu/mlr/vol86/iss6/47>

This Review is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

HOT AIR IN THE REDWOODS, A SEQUEL TO THE WIND IN THE WILLOWS

William Twining*

HOT AIR IN THE REDWOODS. By *Kenneth Graham, Jr.* Ann Arbor: 85 MICHIGAN LAW REVIEW 1204 (1987). Pp. 25. \$12.

I. INTRODUCTION

In 1908, *The Wind in the Willows* by Kenneth Grahame (hereinafter Ken Sr.) was first published in London.¹ It became an instant children's classic, bringing pleasure to parents, and fame and fortune to its author, a Scotsman employed by the Bank of England. It lives on both in the original and in its adaption for the stage by A.A. Milne, under the title *Toad of Toad Hall*. In 1987, *Hot Air in the Redwoods* by Kenneth W. Graham, Jr. (hereinafter Ken Jr.) was published in Ann Arbor, Michigan.² Childish rather than childlike, and based on some elementary confusions, it is unlikely that it will make money, play in Peoria, or be adapted for television. The purpose of this review is to examine the relationship between *Wind* and *Hot Air*, and to make the case for rescuing some jewels buried in what might be called "rubbish," "garbage," or "trash," according to one's sociolinguistic status.

Most of *Wind* is taken up with the adventures and misfortunes of Toad of Toad Hall, a rash and conceited, but essentially good-hearted, property owner who has an irresistible weakness for flashy new machines such as sports cars and motorboats. Mr. Toad is punished repeatedly for his conceit and his addiction, and Toad Hall is seized by wicked, but cowardly, squatters from the Wild Wood — a rabble of weasels, stoats, and ferrets who are no respecters of private property. Eventually Toad is saved by three loyal friends — kindly Water Rat, sensible Mole, a rather cautious explorer who plays the role of participant-observer, and Mr. Badger. The latter is a terrifying loner who hates society and lives as a recluse in the Wild Wood: He proves on acquaintance not only to have a heart of gold, but also to be a masterful and ingenious military commander. This bourgeois morality tale

* Quain Professor of Jurisprudence, University College London. — Ed.

I am grateful to Christopher Allen, Jill Cottrell, Melissa Maxman, Alex Stein, and the editors for helpful comments and suggestions.

1. K. GRAHAME, *THE WIND IN THE WILLOWS* (1st ed. 1908) (Charles Scribner's Sons ed.) [hereinafter *WIND*].

2. Published *sub nom.* "There'll Always Be an England": *The Instrumental Ideology of Evidence* (Book Review), 85 MICH. L. REV. 1204-34 (1987) (reviewing W. TWINING, *THEORIES OF EVIDENCE: BENTHAM AND WIGMORE* (1985) [hereinafter *THEORIES*]).

ends with Toad Hall recaptured, Toad rehabilitated, and the Wild Wood successfully tamed.

At first sight, *Hot Air* is an attempt to update *Wind* and translate it to California. An arrogant, elitist English jurist, with a weakness for pseudo-mathematical technocratic devices (such as Bayes' Theorem, decision theory, and Wigmore Charts) sets out with grand imperial designs to impose some dangerous fallacies on naive, Anglophile, New Englanders. He gets his come-uppance from the poison pen (or is it an unfriendly word processor?) of an anarchic, irrealist, Wild-Wooder who is concerned to destroy rather than occupy Toad Hall and other elite law schools. The story ends on a note of hope: Toad's successor could still be rehabilitated, if only he would give up mathematics, get off his yellow submarine, and fly freely in the Wild Wood.

Hot Air has some good lines, squeezes in some sex, and is mildly amusing. However, it is improbable that it will be accepted as the True Son of *Wind*, for it has several fatal flaws. There is a mismatch between its vitriolic tone and its anodyne substance, it contains a remarkable number of errors, and it totally mixes up the characters: Toad is confused with Mole; and Ken Jr. turns out to be good-hearted Mr. Badger masquerading as the Chief Weasel while he lets off steam. The outcome is that a potentially good story is reduced to mischievous nonsense.

II. A STORY

Once upon a time, Mole was working away in his middling house in a middling province of the American Empire. The doorbell rang and the kindly Postman handed him a package with an imperial American postmark. On opening it, he found to his amazement that it was the draft of an article³ responding to a scurrilous attack on Mole that had been published some time before in an American magazine which had not yet found its way by sea to Mole's own institution.⁴ From this loyal and gracious defense, Mole inferred that he had been the subject of a malicious, chauvinistic, even xenophobic, attack by a total stranger; that he had been accused of holding views that were almost the opposite of those he professed; and that he had been called a "leader" of a dangerous cohort of fanatics called Theorists of Evidence, most of whom had made their names in that field before Mole had ever publicly admitted to exploring it. During the ensuing weeks rumours filtered through that increased his puzzlement: Mole had been accused of opposing the jury, of defending torture, of worship-

3. Tillers, *Prejudice, Politics, and Proof*, 86 MICH. L. REV. 768 (1988).

4. Ken Jr.'s most revealing slip is to describe the University of California at Los Angeles as "poor." P. 1204, n.*. This will seem odd to anyone with experience of law schools in Thatcherite England, let alone one in a Third World country. Such parochial notions of relative deprivation say much about isolationist "egalitarianism."

ping Science, and — strangest of all — of being a mathematician. (Mole is innumerate and suspects that it may be libelous to call an English jurist a mathematician.) Kind friends suggested that the whole thing must be based on an elementary confusion between trashing and writing trash and did not deserve a response.

Being a sensible fellow, Mole decided to bide his time. It sounded like a simple case of mistaken identity; but, of course, hearsay can be relied on to distort. Eventually, after further delay, he managed to obtain a copy of *Hot Air*. When he read it he was surprised by a number of things. First, he quite enjoyed reading it. Second, Rumor had been correct in most particulars. Third, *Hot Air* (for such it was) *purported* to be a personal attack on Mole; but despite aggressively asserting some nasty things, most of which were quite untrue, it was quite kind in a back-handed sort of way. It even said nice things about some of Mole's stories. When one scratched the surface it seemed to be not so much a case of mistaken identity as a radical misunderstanding of Mole's enterprise. Finally, to his surprise, Mole found that he shared several of Ken Jr.'s concerns and tastes, and that *Hot Air* raised some important issues. It was rather worrying to find oneself in sympathy with any of such "crazy stuff" (p. 1204, n.*). However, Mole was comforted by the fact that Ken Jr. had kindly set up an easy target: a Psychedelic Theory of Evidence in the form of *A Manifesto of Legal Irrealist Disbelief* (p. 1231).

The only thing that really upset Mole was the procedure that had been followed. One of the few positive commitments to nonhedonistic values that Ken Jr. claims is a belief in due process; but, in the context of academic debate, this seemingly does not extend to (1) giving notice to the subject of an impending attack, (2) giving an opportunity to the accused of even reading the charges against her, or (3) offering an opportunity for the accused to reply. There is a qualitative difference between an unfavorable review and a polemical attack. This is not only a matter of elementary courtesy and fairness. If the purpose of robust academic debate is to advance understanding, it is essential that the protagonists are kept informed and given a reasonable time in which to respond.

Mole rather enjoyed robust polemics. Initially he was tempted to reply in kind, sacrificing truth and serious issues to resonant phrases and merry quips. However, he was reminded that it is usually not sensible to respond to unfavorable reviews. On further reflection he decided to break his silence, but to concentrate on a limited number of points. His justification for this course of action is that *Hot Air* radically distorts the general enterprise of which *Theories* is a part, it misrepresents his views on a number of issues,⁵ and, most important, part

5. It would be tedious and unproductive to respond to all of Ken Jr.'s specific points. The following references are directly in point:

of Ken Jr.'s thesis, properly developed, could add a worthwhile political dimension to current debates about evidence and proof in litigation. In the interests of brevity and clarity, this response will concentrate on the most challenging aspect of the critique and relegate comment on some detailed points to the footnotes. My considered judgment on *Hot Air* can be rendered in televiewese: "Illuminating on Wigmore; oversimple on Bentham; wrong on Twining. A potentially valuable political critique marred by suicidal isolationism."

III. KEN JR.'S ENTERPRISE

At first Mole could not make much sense of *Hot Air*. What was biting its author? And why so hot? Learning from one of Ken Jr.'s mistakes,⁶ Mole decided to find out about his concerns from some of his other stories. This proved illuminating. For it transpires that Ken Jr. is involved in a sustained campaign to discredit a set of assumptions that he claims have dominated American procedural thought for more than half-a-century and which form the main ideological basis of the Federal Rules of Evidence.⁷ In a much more lucid account than is to be found in *Hot Air*, the nature of the Enemy is clearly revealed:

(a) On "theory" (pp. 1220-23), see *LEGAL THEORY AND COMMON LAW* (W. Twining ed. 1986) at chs. 4 and 13. See also notes 21-25 *infra* and accompanying text;

(b) On induction and generalizations (pp. 1219-20), see T. ANDERSON & W. TWINING, *ANALYSIS OF EVIDENCE* 258-69 (tentative ed., University of Miami Law School, 1987). The example of the coat (p. 1219), is Wigmore's, not mine. The criticism is unfair to Wigmore, for the point of the example is to expose the potential weakness in a "chain" of inferences. See *THEORIES*, *supra* note 2, at 127;

(c) On mathematicist approaches to evidence (pp. 1224, 1231, 1233), see Twining, *Debating Probabilities*, 2 LIVERPOOL L. REV. 51 (1980); Twining, *The Boston Symposium: A Comment*, 66 B.U. L. REV. 391 (1986) [hereinafter *The Boston Symposium*];

(d) On psychologists and evidence, see Twining, *Identification and Misidentification in Legal Process: Redefining the Problem*, in *EVALUATING WITNESS EVIDENCE* 255 (S. Lloyd-Bostock & B. Clifford eds. 1983) [hereinafter *EVALUATING WITNESS EVIDENCE*]. That paper argues that psychologists have tended to accept too uncritically formalistic lawyers' accounts of litigation. I would concede that there is some force in the critique of one passage in *Theories of Evidence* about witness psychology, see *THEORIES*, *supra* note 2, at 139-41, which may give the impression that the main potential contribution of psychologists is to provide techniques for improving reliability of evidence rather than assisting the understanding of legal processes;

(e) On stories, holism, and the fact-value distinction, see *Lawyers' Stories* (forthcoming) and *The Boston Symposium*, *supra*, at 393, 398-99;

(f) "The Cheshire Cat" view of the law of Evidence is discussed in a forthcoming paper, Twining, *What Is the Law of Evidence?*;

(g) On "science" and "scientism," see Twining, *The Great Juristic Bazaar*, 1978 J. SOC'Y. PUB. TCHRS. L. (New Series) 185; note 16 *infra*.

On the above topics our most profound differences seem to relate to (a) and (f); on both of these I find Ken Jr.'s views rather elusive; on the remainder he has misrepresented my views.

6. Ken Jr. only refers to works published in the United States. Almost all of the sources cited in note 5 *supra* were published elsewhere. If Ken Jr. were to shelve his Anglophobia, at least as a scholar, he would find some potential allies for some of his causes among those whom he attacks. See note 16 *infra*.

7. See 21 C. WRIGHT & K. GRAHAM, *FEDERAL PRACTICE AND PROCEDURE: EVIDENCE* 143-54 (1977) [hereinafter *WRIGHT & GRAHAM*]; GRAHAM, *The Persistence of Progressive Proceduralism* (Book Review), 61 TEXAS L. REV. 929 (1983) [hereinafter *Persistence*]; cf. p. 1211.

[W]hat the critics [of the Federal Rules] were arguing was that it was wrong to attempt to codify the rules of evidence on the basis of a procedural philosophy that now appears to be seriously deficient. The more thoughtful opponents of the Rules argued that the field of evidence was in the midst of what one historian of science has called a "paradigm shift"; *i.e.*, the fundamental theory of the subject is undergoing drastic change.

These critics argued that the drafting of the Federal Rules of Evidence was dominated by a set of assumptions that we call the Progressive Procedural Paradigm. This ideology, which has dominated evidence scholarship for the past fifty years, takes its name from the political movement in which most of its founders were active and from which they took their system of values. . . .

[W]hat are the basic features of the Progressive Paradigm? It begins with the assumption that the purpose of litigation is to vindicate the substantive law so as to make legal relationships predictable and certain. This goal requires that the court have a correct version of the facts to which to apply the law. The Progressives believed that the most efficient way accurately to ascertain the facts was to gather as much data as possible and subject it to the scrutiny of scientific experts.⁸ The principal obstacle to scientific fact-finding was the jury, a collection of amateurs whose participation in the trial required rules designed to shield them from evidence they lacked the capacity to evaluate or that might suggest a decision on irrational grounds. . . .

As far as the law of evidence was concerned, the Progressives favored converting a number of the rules of exclusion into discretionary powers of the trial judge. They believed that the more evidence that was admitted, the better. If some rules of evidence were to be retained, these should be based on purely procedural goals. . . .

The Progressive fetish for uniformity was a by-product of their other goals and values. . . . [M]aking the rules uniform served to emphasize their neutrality, their scientific basis, and their separation from the substantive law.⁹

In other contexts, Ken Jr. has carried on his campaign against Progressive Proceduralism. He has argued that: It is sustained by "naive Anglomania";¹⁰ it serves the interests of corporate capitalism,¹¹ but its ideology is neither openly avowed nor critically studied;¹² and it "is a

8. Ken Jr. tends to accuse his opponents of what he calls "the Hugh Hefner fallacy," *i.e.*, "if a little bit is good, a whole lot more is better." P. 1212. See also *Persistence*, *supra* note 7, at 940. In respect of Bentham, this confuses Bentham's attack on formal rules of exclusion of *classes* of evidence and his prescription that evidence should be excluded if, in the circumstances of the case: (a) it is irrelevant, (b) it is superfluous, or (c) its production would involve preponderant vexation, expense, or delay. See *THEORIES*, *supra* note 2, at 68. It is not clear what filtering process Ken Jr. would support other than one that includes Bentham's criteria. I am indebted to Christopher Allen for this point.

9. WRIGHT & GRAHAM, *supra* note 7, at 146-48 (footnotes omitted).

10. *Persistence*, *supra* note 7, at 940.

11. *Id.* at 946.

12. *Id.* at 947.

useful ideology for academics because it enhances their power."¹³

From these writings, Ken Jr. emerges as the leading evangelical critic of the phenomenon. He acknowledges that to be effective, its opponents "will have to provide an alternative model; so far they have not done so."¹⁴ Although he refers to "the critics," he only mentions two by name and more often than not his tone suggests that his self-image is of a lone prophet crying in the wilderness.

The "Progressive model" was instantly recognizable as an American emanation of what is characterized in *Theories* as "The Rationalist Tradition of Evidence Scholarship." This is a purported reconstruction of the basic assumptions underlying specialized Anglo-American Evidence scholarship and discourse for the past two centuries.¹⁵ The avowed purpose of *Theories* was to expound and explore the content and nature of this received heritage of texts as a preliminary to re-thinking the field both critically and constructively at a later stage, an enterprise not totally different from Ken Jr.'s. At first sight, his sharp attack seemed to be based on a simple confusion between subject and author: What was intended as a relatively detached historical account of an intellectual tradition had been construed as evangelical promotion of its ideas based on "the Benthamite ideology" (p. 1211). However, matters are not quite as simple as that: *Hot Air* advances a significantly different interpretation and a much more sweeping and radical critique of our heritage, even if it is shared. In the process it is in danger of throwing the baby out with the bathwater and of labeling as enemies some potential allies in the enterprise of revealing the nature and dangers of the Progressive model. These allies include some contemporary theorists of evidence and even some English academics.¹⁶ Accordingly, it is necessary to describe the continuing project of

13. *Id.* at 948.

14. WRIGHT & GRAHAM, *supra* note 7, at 149.

15. THEORIES, *supra* note 2, at ch. 1.

16. For example, most English academic lawyers, including myself, deplore the erosion of the jury, at least in criminal cases. In respect of probabilities, almost all English jurists have been skeptical about the use of mathematics in forensic contexts. Nearly all the leading "mathematicists" among lawyers have been American, the most notable exceptions being Glanville Williams (a Welsh frequentist), see Williams, *The Mathematics of Proof*, 1979 CRIM. L. REV. 297, 340 (pts. 1 & 2) and Sir Richard Eggleston (an Australian judge who has published in England), see R. EGGLESTON, EVIDENCE, PROOF AND PROBABILITY (2d ed. 1983). The main critic of "misplaced mathematicization," Jonathan Cohen, has not only advanced a nonmathematical theory of probability, but has also stirred up multiple controversies in his attacks on the cult of the expert in diagnostic medicine, psychology, and law. See Cohen, *Can Human Irrationality Be Experimentally Demonstrated?*, 4 BEHAV. & BRAIN SCI. 317 (1981); Cohen, *Bayesianism versus Baconianism in the Evaluation of Medical Diagnoses*, 31 BRIT. J. PHIL. SCI. 45 (1980); Cohen, *Freedom of Proof*, 69 A.R.S.P. 1 (1983). Many, but not all, of Cohen's most vigorous critics have been American. See the commentary by more than thirty contributors from several countries in 4 BEHAV. & BRAIN SCI. at 331-58. For reviews and comments on Cohen's *The Probable and the Provable*, see Fienberg, *Misunderstanding Beyond a Reasonable Doubt*, 66 B.U. L. REV. 651 (1986); Kaye, *Do We Need a Calculus of Weight to Understand Proof Beyond a Reasonable Doubt?*, 66 B.U. L. REV. 657 (1986); Kaye, *The Paradox of the Gatecrasher and Other Stories*, 1979 ARIZ. ST. L. J. 101 (1979); Lempert, *The New Evi-*

which *Theories* was one part; to give an alternative reading of the Rationalist Tradition and to show why most of Ken Jr.'s sketch of an alternative is mischievous nonsense.

IV. MOLE'S PROJECT

The part of Ken Jr.'s wide-ranging attack that deserves a response contains three main theses: First, that the Rationalist Tradition of Evidence Scholarship, as I have depicted it, is based on a version of Benthamite ideology that could be used to legitimate the infusion of legal procedure with a set of repressive values in the service of a totalitarian and crudely instrumentalist version of "fanatic statism" (p. 1212); second, that I both subscribe to and am an evangelist for the Rationalist Tradition, so interpreted (p. 1212); and third, that the achievements (or aspirations) of Bentham and modern proceduralists (including myself) is "to convince people that there are apolitical solutions to political problems" (p. 1213).

My response to these charges is as follows. First, I agree that *Hot Air* presents one plausible interpretation of the meaning and possible uses of the basic ideas of the Rationalist Tradition, but it is not the only one. To the second charge I submit an outright rebuttal. To the third charge I offer a confession and avoidance: I concede that my presentation in *Theories* tended to play down (but not neglect)¹⁷ the political or ideological dimensions and that my treatment of Wigmore would have been improved by a fuller treatment of his political views. However, my relatively apolitical treatment was both motivated and justified by my scholarly objectives. These were to expound and expose the content and nature of our heritage of theories of Evidence as a preliminary to rethinking the field both critically and constructively at a later stage. The bottom line is that, while Ken Jr. and I have significantly different starting points, perspectives, and political attitudes, we are potential allies in challenging some key aspects of our received tradition of Evidence discourse. I agree that there is a danger that some of the core ideas in the Rationalist Tradition can be used or abused by anti-democratic forces or naive instrumentalists, or by those

dence Scholarship: Analyzing the Process of Proof, 66 B.U. L. REV. 439 (1986); Schum, *Probability and the Process of Discovery, Proof, and Choice*, 66 B.U. L. REV. 825, 827-76 (1986). More generally, obsession with "scientific analogies" has seemed, to English eyes, to be a peculiarly American phenomenon. See *The Great Juristic Bazaar*, *supra* note 5, (g), at 192-93. English academic law has traditionally tended to have closer links with the humanities (philosophy, history, anthropology, literature, social theory) than with the "sciences," including "scientific" versions of social studies. I, for one, have shared this taste and have on occasion satirized the use of scientific analogies in law by American jurists who mistranslated "wissenschaft" as "science." This is not so much a plug for English humanism as a plea for a more discriminating identification of potential allies and opponents across national boundaries.

17. See, e.g., *THEORIES*, *supra* note 2, at 88-108, 214-16. I had originally planned to repeat the whole of Romilly's classic attack on wrongful conviction of the innocent, see *id.* at 96 n.57, but had to cut it because of pressures of space.

whom Ken Jr. calls "mathematico-verbal monarchs,"¹⁸ and whom I would call decision theorists.¹⁹

In order to sustain this defense it is necessary to describe the general enterprise of which *Theories* is only one emanation. The opportunity to do so is welcome, because Ken Jr. is not alone in misinterpreting that enterprise's general aims and approach. About fifteen years ago, I took up Evidence as a sort of case study of what is involved in "broaden[ing] the study of law from within."²⁰ I soon became aware of the enormity of the undertaking and deliberately decided to make a series of exploratory forays and to report my findings piecemeal as they emerged rather than attempt to develop a comprehensive new Theory of Evidence for the Modern Age.²¹

As I am a sucker for history, one of my first lines of enquiry was whether anything similar had been attempted before. This led to a quite extensive exploration of the heritage of Anglo-American secondary writings on evidence (only one small part of our legacy of evidentiary texts) and to a more detailed examination of the two writers whose projects seemed closest to mine: Bentham and Wigmore. The example of the great James Bradley Thayer, who never got much further than the historical stage of what had been planned as a comprehensive treatment of his subject, suggested that strict limits should be set to this part of my project; but the richness of the material and the extraordinary neglect of Bentham's *Rationale* and of Wigmore's brave effort to rethink his chosen field in a broad and systematic fashion led me to dally much longer than I had intended.

Theories was originally planned as an introductory historical chapter in a general theoretical study of evidence and proof in litigation. However, as often happens, it grew and grew and I decided to present it as a prolegomenon to a broader series of studies, which is still continuing. Even so, the rest had to be rigorously pruned at the insistence of the English publishers. The book was explicitly presented as "more expository than critical."²² As Ken Jr. correctly observes, it is not really a work of contextual intellectual history in the mode of Quentin Skinner or J.G.A. Pocock.²³ There is a reason for this: It presents a general thesis about the *contemporary* significance of one part of our received heritage of thought about Evidence and Proof in litigation.²⁴

18. P. 1231. Cf. p. 1224.

19. See *The Boston Symposium*, *supra* note 5, (c), at 393-94.

20. See LEGAL THEORY AND COMMON LAW, *supra* note 5, (a), at ch. 4; THEORIES, *supra* note 2, at vii-x.

21. See LEGAL THEORY AND COMMON LAW, *supra* note 5, (a), at 77-78.

22. THEORIES, *supra* note 2, at ix.

23. See generally Twining, *Talk About Realism*, 60 N.Y.U. L. REV. 329, 335-41 (1985).

24. *Id.* at 336-37.

In nutshell form, the thesis is as follows: Anglo-American specialized writings about Evidence from Gilbert to Cross and McCormick have generally conformed to a remarkably homogeneous set of assumptions about evidence and adjudication, which I have labeled the "Rationalist Tradition of Evidence Scholarship." The basic ideas can be restated in the form of an "ideal type" from which individual writers deviated to a greater or lesser extent. The basic tenets are set out in the chart on the following page.²⁵

This account of the Rationalist Tradition has both an analytical and an historical aspect.²⁶ Analytically it was an attempt to reconstruct in the form of an "ideal type" an account of a set of basic assumptions about the aims and nature of adjudication and what is involved in reasoning about disputed questions of fact in that context. The test of success of this ideal type is its clarity, coherence, and usefulness as a tool of analysis of Evidence discourse and doctrine.

The historical thesis is more cautious: It advances the hypothesis that, by and large, the works of most of a list of named writers on evidence either articulated or assumed ideas that were close to the ideal type. The historical claim should be treated with caution for two main reasons. First, it is a tentative hypothesis based on selective sampling of works of a few writers. Even in respect of those named individuals the hypothesis needs to be tested and refined by much more detailed research. For example, no systematic attempt has been made to test the hypothesis in respect of judicial discourse in appellate cases or in writings by continental European writers on Evidence.²⁷ It would be surprising if there were not some significant deviants, but I would also be surprised if sufficient evidence were adduced to refute the claim that the predominant Anglo-American tradition of *specialized* discourse about evidence is remarkably homogeneous in respect of its basic underlying assumptions which are rooted in eighteenth-century Enlightenment Rationalism.²⁸

The emphasis on *specialized* discourse is crucial. For it is part of my wider thesis that there is a sharp contrast between writings about Evidence and the much more varied, often skeptical, literature(s) about litigation, legal processes, and procedure. Part of the argument

25. This version is taken from Twining, *Some Scepticism About Some Scepticisms* — I, 11 J.L. & Socy. 137, 140-41 (1984) [hereinafter *Some Scepticism*].

26. See *id.* at 315 n.85.

27. See note 31 *infra*.

28. As I understand him, Ken Jr. accepts the Rationalist Tradition as a recognizable ideal type, and castigates me for acting as an evangelist for its tenets. He seems to be challenging the historical thesis (or hypothesis), but adduces no evidence in support of that challenge. I hope that enough has been said to confirm that, far from selling the Rationalist Tradition, my purpose was to set it up as something to which to react; that the claims for the historical thesis are limited and tentative; and that, perhaps surprisingly, Ken Jr. and I are both interested in exploring alternatives to the Rationalist Tradition, though from rather different starting points and perspectives.

1. *A Rationalist Model of Adjudication*
- A. *Prescriptive*
 1. The direct end
 2. of adjective law
 3. is rectitude of decision through correct application
 4. of valid substantive laws
 5. deemed to be consonant with utility (or otherwise good)
 6. and through accurate determination
 7. of the true past facts
 8. material to
 9. precisely specified allegations expressed in categories defined in advance by law i.e. facts in issue
 10. proved to specified standards of probability or likelihood
 11. on the basis of the careful
 12. and rational
 13. weighing of
 14. evidence
 15. which is both relevant
 16. and reliable
 17. presented (in a form designed to bring out truth and discover untruth)
 18. to supposedly competent
 19. and impartial
 20. decision-makers
 21. with adequate safeguards against corruption
 22. and mistake
 23. and adequate provision for review and appeal.
- B. *Descriptive*
 24. Generally speaking this objective is largely achieved
 25. in a consistent
 26. fair
 27. and predictable manner.

Note: Prescriptive rationalism: acceptance of A as both desirable and reasonably feasible. No commitment to B.
 Complacent rationalism: acceptance of A & B *in re* a particular system.

2. *Rationalist Theories of Evidence and Proof: some common assumptions*
 - (i) Knowledge about particular past events is possible.
 - (ii) Establishing the truth about particular past events in issue in a case (the facts in issue) is a necessary condition for achieving justice in adjudication; incorrect results are one form of injustice.
 - (iii) The notions of evidence and proof in adjudication are concerned with rational methods of determining questions of fact; in this context operative distinctions have to be maintained between questions of fact and questions of law, questions of fact and questions of value and questions of fact and questions of opinion.
 - (iv) The establishment of the truth of alleged facts in adjudication is typically a matter of probabilities, falling short of absolute certainty.
 - (v) (a) Judgments about the probabilities of allegations about particular past events can and should be reached by reasoning from relevant evidence presented to the decision-maker;
 (b) The characteristic mode of reasoning appropriate to reasoning about probabilities is induction.
 - (vi) Judgments about probabilities have, generally speaking, to be based on the available stock of knowledge about the common course of events; this is largely a matter of common sense supplemented by specialised scientific or expert knowledge when it is available.
 - (vii) The pursuit of truth (i.e. seeking to maximise accuracy in fact-determination) is to be given a high, but not necessarily an overriding, priority in relation to other values, such as the security of the state, the protection of family relationships or the exclusion of coercive methods of interrogation.
 - (viii) One crucial basis for evaluating "fact-finding" institutions, rules, procedures and techniques is how far they are estimated to maximise accuracy in fact-determination—but other criteria such as speed, cheapness, procedural fairness, humaneness, public confidence and the avoidance of vexation for participants are also to be taken into account.
 - (xi) the primary rule of applied forensic psychology and forensic science is to provide guidance about the reliability of different kinds of evidence and to develop methods and devices for increasing such reliability.

is that our heritage of specialized Evidence discourse became artificially isolated from these other bodies of literature and from broader movements in ideas and that the time is ripe for a rethinking.

The second caveat about the historical thesis relates to the first part of the ideal type. This was based explicitly on Bentham's ideas, deliberately set out in a way that signalled rather clearly and provocatively a whole range of possible points of departure from this model. One reason for constructing it in this way was to try to facilitate the pinpointing of differences between Bentham's powerful, but simplistic, theory of procedure, and existing and possible alternatives.²⁹ A second reason was that it is much harder to make confident assertions about Evidence specialists' underlying theories of adjudication and procedure, because these are relatively rarely articulated in a coherent fashion.³⁰ There are clearly some tensions between Table A and the "ideal type" of adversarial procedures. One could expect detailed research to reveal such tensions and more divergences by writers on evidence from Table A than from Table B.³¹

One reason for the persistence of this set of ideas is that "Evidence" as a subject of study, literature, and codification became artificially segregated from the study of substantive law, procedure, and legal process, even if this segregation could not be fully maintained in practice. The orthodox common law³² literature on Evidence con-

29. Table A allows for nonutilitarian views and for disagreements about the priorities between Rectitude of Decision and other values. It is, however, clearly instrumentalist and has the effect of anchoring debates on Benthamite territory. See text accompanying notes 41-42 *infra*.

30. Cf. WRIGHT & GRAHAM, *supra* note 7, at 147:

The Progressive proceduralists considered themselves pragmatists, rather than theoreticians, so they seldom troubled to develop their model in any systematic fashion. While the fundamental principles of the Progressive school are easily deduced from the works of its leading writers, modern critics attribute much of the weaknesses of the paradigm to this inattention to theory. They say the reason there has been so little successful empirical work on questions of procedure is due to a failure to develop any model of the procedural system other than a simple chronology of the steps in a lawsuit. In terms of evidence the failure to consider basic theory means that use is still made of a set of concepts evolved a hundred years ago as a method of categorizing the existing caselaw although they have little relevance to the issues that arise in modern litigation.

31. Several civilian proceduralists have suggested to me that the Rationalist Model fits civilian discourse even better than Anglo-American. This raises some interesting questions, which cannot be pursued here, about the compatibility of Table A with adversarial proceedings. A good starting point for such an enquiry is the theoretical framework presented in Mirjan Damaska's superb study, M. DAMASKA, *THE FACES OF JUSTICE AND STATE AUTHORITY* (1985).

32. The warnings in *Hot Air* about the dangers of exaggerating the similarities between England and the United States in respect of common law litigation and procedural law are salutary. The extent that shared concepts and assumptions have survived great divergencies in the extent, structure, style, and conduct of litigation in practice, may be attributable in part to the atheoretical nature of American procedural scholarship, see note 30 *supra*, linked to the almost-total academic neglect of adjective law in England. American scholars have almost completely overshadowed their English counterparts in respect of Evidence and Procedure, especially the latter. Atiyah and Summers suggest that "fact-finding processes in civil and criminal cases in England tend to be much more truth-oriented than in the United States. As a result there is less divergence between the 'law in books' and 'the law in action' in England than in the United States." P.S. ATIYAH & R. SUMMERS, *FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW* 161 (1987).

trasts sharply with the largely independent literature on "legal processes" which, *inter alia*, has tended to be generally more skeptical in tone and much more varied. As I argued in a long article (which is really a sequel to *Theories* but which was published shortly before it), these two bodies of literature seem to talk past each other, the one rooted in eighteenth-century Enlightenment thought, the other in late nineteenth-century ideas associated with Weber, Freud, Marx, Schutz, Mannheim, and the American "Revolt against Formalism."³³ At first sight the more sceptical and relativist views of some leading writers on legal process appeared to present a series of direct challenges to many of the central tenets of the Rationalist Tradition. However, on closer examination it transpired that the Rationalists were not all quite as perfectionist or inflexible as one might think, and the challengers included few, if any, genuine philosophical skeptics or relativists in any strong sense of those terms. Jerome Frank, for example, proved on inspection to be an optimistic rationalist who made a few skeptical noises.³⁴ My conclusions in the findings so far presented are that none of my sample of writers on legal process rejected outright the pursuit of Truth, Reason, and Justice as central values of adjudication; most would probably retain them as *concepts*³⁵ representing the "rational core"³⁶ of adjudication while providing some salutary reminders: for example, that the particular *conceptions* associated with the Rationalist Tradition are not the only possible ones and, in the light of more general intellectual developments, often appear rather old-fashioned and simplistic; that there are many practical obstacles to achieving Rationalist aspirations in practice, even in a genuinely democratic polity; and that the biggest obstacle of all is political in the sense that those who have gained power, even by democratic means, cannot be trusted not to abuse it.

I have yet to present a full-scale critique of the Rationalist Tradition, let alone to construct a coherent alternative.³⁷ However, I have arrived at a number of preliminary conclusions, the most important of which can be summarized as follows:

(1) The Law of Evidence is best treated as a subordinate, but important, part of the study of Evidence and Proof in litigation; a common fallacy is to treat the Law of Evidence as coextensive with the subject of Evidence;

(2) Such a study should be concerned not only with adjudicative

33. See *Some Scepticism*, *supra* note 25.

34. See *id.* at 157-61.

35. On the distinction between "concept" and "conception," see H.L.A. HART, *THE CONCEPT OF LAW* 155-59 (1961); J. RAWLS, *A THEORY OF JUSTICE* (1971); R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 134-37 (1977).

36. L. FULLER, *THE PRINCIPLES OF SOCIAL ORDER* 92-98 (1981).

37. For preliminary statements, see *LEGAL THEORY AND COMMON LAW*, *supra* note 5, (a), at 70-72; *EVALUATING WITNESS EVIDENCE*, *supra* note 5, (d).

decisions, but with the factual or informational dimensions of all important decisions in litigation viewed as a total process;³⁸

(3) Contested jury trials, however important they may be in certain kinds of cases and more generally as symbolising some important values, are so much the exception rather than the rule in actual litigation in all common law countries, including the United States, that it is unrealistic and misleading to treat them as paradigmatic of all adjudicative processes and decisions, still less of litigation seen as a total process;

(4) The ideal type of the Rationalist Tradition contains much of value, but suffers from a number of endemic weaknesses, for example:

(i) the scholarly study of Evidence, and of evidence discourse generally, has tended to become artificially isolated from the study of substantive law, procedure, and legal processes and from developments in a number of relevant disciplines;

(ii) the Rationalist Tradition has tended to be too uniform in that:

(a) its basic assumptions have remained rooted in eighteenth-century Enlightenment thought, here characterized as "optimistic rationalism";

(b) it has tended to assume that it makes sense to talk of one law of Evidence within a given legal system rather than of loosely related series of laws of Evidence that operate in very different kinds of processes, arenas, and types of litigation;³⁹

(c) many writers on evidence tend to be court-centred, over-concerned with the contested jury trial, formalistic, and over-reliant on statutes and appellate judicial opinions as the primary sources and materials for study and discourse about evidence (p. 1208);

(d) it has tended to take a narrow view of the potential contributions of adjacent disciplines, such as psychology, to understanding and reforming legal processes;⁴⁰

(e) it has tended to overemphasise analysis and to neglect the role of theories, stories, and other synthesising modes of perception and judgment in reconstructing past events;⁴¹

38. Ken Jr. misses the significance of the distinction between optimistic and complacent rationalism. P. 1228. The former is normative and aspirational and often general, the latter involves claims about the actual working of *particular* institutions. Ironically, most apparent skeptics, such as Jerome Frank, as well as critics of existing institutions, turn out on inspection to be optimistic rationalists. See *Some Scepticism*, *supra* note 25, at 300. Ken Jr. claims to be interested in "the practices of the complacent," but some of the main objects of his attack were optimistic rationalists who were far from complacent, indeed highly critical, about particular institutions and practices.

39. See *Some Scepticism*, *supra* note 25, at 303.

40. See EVALUATING WITNESS EVIDENCE, *supra* note 5, (d), at 255.

41. See *The Boston Symposium*, *supra* note 5, (c), at 397-99.

(5) The strongly instrumentalist and consequentialist tendencies of the Rationalist Tradition have a strong, though not inevitable, bias towards bureaucratic efficiency and social control and against "process values" that are not related to outcome. In so far as recurrent debates between civil libertarians and proponents of law and order have been conducted within this framework of assumptions, the former have often laid themselves open to charges of defending sacred cows with bad arguments and entering into an unholy alliance with the legal profession in defending artificial and often pointless technicalities which contribute substantially to the mystification of legal processes to the detriment of litigants and the benefit of lawyers. Important values, such as the protection of suspects and accused persons from wrongful conviction, ill-treatment, and unfair procedures have too often been defended by unconvincing arguments.⁴² New doctrines, institutions, and rationales are needed to serve such values.

On its own, this account of my project does not entirely dispose of Ken Jr.'s challenge. For it does not explain why I reject the charge that my own analysis is based on Benthamite ideology or why I am concerned to preserve some of Wigmore's ideas and to defend Bentham against some of the allegations made against him.

V. BENTHAMIC AMBIGUITY⁴³

Within the highly specialized field of Bentham studies it is recognized that few, if any, Benthamists are Benthamites. A deep thread of ambivalence toward their subject runs through the writings of most Bentham scholars. One reason for this is that there are some fundamental ambiguities at the core of his thought: Both Fabian Socialists and Free Market economists have claimed him as an important ancestor; he was a genuine political radical, yet he placed a high value on security; his belated conversion to democracy tempered neither his authoritarian and centralist tendencies nor his sensitivity to the possibilities of abuse of power and his concern to combat misrule in all its forms; the architect of the horrendous Panopticon scheme was a life-long opponent of all forms of cruelty; his theory of procedure transcends conventional distinctions between adversarial and inquisitorial models of procedure; the great codifier was an unremitting utilitarian who opposed all rules of Evidence and procedure; he was ambitious and vain, yet socially diffident and notoriously reluctant to publish; he satirized political fallacies of Left, Right, and Center; he was sexually ambiguous; and he was deeply ambivalent about both the French and American revolutions. Given all these seeming contradictions and tensions, it is hardly surprising that much Bentham scholarship in-

42. See THEORIES, *supra* note 2, at 86, 100-08, 170-71.

43. See generally Twining, *Why Bentham?*, in THE BENTHAM NEWSLETTER No. 8, 34 (1984).

volves the study of the ambiguous by the ambivalent.⁴⁴

Ken Jr. glosses over Bentham's political radicalism, his conversion to democracy, his genuine humanitarianism, and, above all, his subtle and penetrating intellect. Nowhere is that more apparent than in Ken Jr.'s caricature of the "canon according to Twining" (p. 1228). This has almost nothing to do with my views; rather it is a crude approximation of an outdated interpretation of Benthamite ideology.⁴⁵ If I had to choose between the two, I would plump for the real Bentham every time. As it happens, I share the ambivalence of other Bentham scholars and, more often than not, I find myself treating him as a worthy opponent rather than as my guru. Jeremy Bentham is the most substantial jurist in the English speaking world, yet I reject many of his conclusions: for example, I do not accept that what is wrong with convicting the innocent is that it creates alarm in others;⁴⁶ that the main objection to torture is that it is liable to abuse;⁴⁷ that silence implies guilt;⁴⁸ that talk of nonlegal rights is mischievous nonsense;⁴⁹ or that no rule of evidence devised by man can enhance rectitude of decision.⁵⁰ On these and many other issues, I follow Hart's dictum that "where Bentham fails to persuade, he still forces us to think."⁵¹ I am a Benthamist, not a Benthamite,⁵² but I recognize both the histori-

44. Ambivalence trumps ambiguity in this context. In some respects Bentham was a remarkably consistent thinker who took clear, often extreme, positions on many topics, including adjective law. One needs to distinguish between some ambiguities in Bentham's own thought (e.g., was he a consistent act-utilitarian? or his treatment of abuse of power) and ambivalent reactions on the part of commentators.

45. As with other thinkers, including leading American Realists (p. 1230), one needs to distinguish between tenable interpretations of leading thinkers, such as Bentham and Llewellyn, simplifications, crude approximations, and other interpretations adopted by followers and others, and caricatures and distortions constructed by critics. As evidence to refute the charge that my efforts "to criticize and modernize Bentham are based on Benthamite ideology" (p. 1211), see Twining, *Evidence and Legal Theory*, 47 MOD. L. REV. 261, 261-62, 278 (1984). See also note 52 *infra*.

46. See THEORIES, *supra* note 2, at 95-100, 102-04.

47. See Twining, *Bentham on Torture*, 24 N. IRELAND LEGAL Q. 305 (1973) (with P.E. Twining) [hereinafter *Torture*].

48. See Twining, *The Way of the Baffled Medic: Prescribe First; Diagnose Later — if at All*, 12 J. SOC'Y. PUB. TCHRS. L. (New Series) 348 (1973); cf. THEORIES, *supra* note 2, at 170.

49. See Twining, *The Contemporary Significance of Bentham's Anarchical Fallacies*, 61 A.R.S.P. 325 (1951) [hereinafter *Anarchical Fallacies*].

50. See *Why Bentham?*, *supra* note 43; see also *What Is the Law of Evidence?*, *supra* note 5, (f).

51. H.L.A. HART, *ESSAYS ON BENTHAM* 39 (1982).

52. In the present context this denial involves the following elements:

- (a) I am not an unqualified utilitarian. See *Torture*, *supra* note 47; *Anarchical Fallacies*, *supra* note 49; *Why Bentham?*, *supra* note 43;
- (b) I am not an unqualified positivist in respect of the classic distinctions between law and value and fact and value. See *LEGAL THEORY AND COMMON LAW*, *supra* note 5, (a), at chs. 4 and 13;
- (c) I accept Truth, Reason, and Justice as core *concepts* but I have reservations about the *conceptions* of each of these as posited by Bentham and embodied in the Rationalist Tradition. See note 35 *supra*;
- (d) I accept neither Bentham's antinomian thesis nor his ideal of the Natural System of

cal and contemporary significance of Bentham's *Rationale*. His ideas and arguments have left an indelible mark on our received tradition of evidence discourse. My enterprise was to expound and expose Bentham's theory of evidence, not to promote it.

That does not quite dispose of Ken Jr.'s challenge. There is, first of all, the question of controversy. Ken Jr. interprets the claim that Anglo-American Evidence scholarship has been remarkably homogeneous in respect of its basic assumptions as a claim that "the Rationalist Tradition has no foes or heretics" (p. 1231). He continues: "This is, at the very least, bad drama. Every neophyte playwright is told that drama requires Conflict, that Conflict requires Antagonist and Protagonist" (p. 1231). It is certainly not my view that there has been, or that there is, no room for disagreement about Evidence. On the contrary, I had noted that it had been the subject of a series of persistent, often repetitive debates, illustrated by the different critics of Bentham's *Rationale*, by law reform debates in England and elsewhere about Criminal Evidence, and by the recent controversies about probabilities and proof.⁵³ Most of these debates sit quite comfortably (apart from the puzzle about "adversarial" models⁵⁴) within the framework of assumptions of the Rationalist Tradition: It is a scheme that accommodates sharp differences about ideology and priorities in respect of values — Due Process v. Social Control; Right(s) to Silence v. "Silence Implies Guilt"; Inductionists v. Bayesians; and so on. I would readily concede that such debates are more messy than that, and debates in England about the Law of Evidence may have tended to be more clearly "internal" than some of those in the United States.

More important is the point that the ideal type of Evidence literature was constructed deliberately to contrast it with other bodies of

Procedure, while recognizing that his ideas and arguments have left an indelible mark on our received tradition of evidence discourse. See *What Is the Law of Evidence?*, *supra* note 5, (f);

(e) On a number of key issues I do not yet have a firm position or posture and, in these respects (which include some central issues concerning epistemology, rationality, and "holism"), I present a moving target;

(f) Finally, I am deeply distrustful of all forms of political power, I reject the primacy of politics, and both by upbringing and experience I am pretty pessimistic about most political utopias, programs, and solutions. It is significant that Ken Jr. interpreted the phrase "the politics of mistrust," see *THEORIES*, *supra* note 2, at 70, 108, as a sneer rather than an oblique reference to my near skepticism in this regard. P. 1213. If one's main points of reference in politics are Uganda, Sudan, Northern Ireland, and Thatcherite Britain, there is not much scope for optimism. This does not imply lack of commitment to some important values, but rather pessimism about most strategies for attaining them.

This last admission, if such it is, provides one possible clue to Ken Jr.'s misreading of my enterprise. Rather than trying to promote or rescue the Rationalist Tradition, I attempted to expound and expose it with relative detachment. The "ideal type" that I constructed should be at least as susceptible to be used as an identifiable target for ideological critique as to be used and abused to legitimate repressive institutions and doctrines. My purpose was to advance understanding, but my sympathies lie with the former rather than the latter use.

53. See, e.g., *THEORIES*, *supra* note 2, at 108.

54. See note 31 *supra* and accompanying text.

literature. My scenario was of a series of specialized bodies of literature talking past each other. In what has so far been only a preliminary exploration, there have been not only one Protagonist (the Rationalist Tradition) and several Antagonists (a variety of apparently skeptical challenges to core concepts of this tradition), but also a sort of Resolution. The skeptical challengers make the Rationalist Tradition seem rather dated, but on inspection most of them turn out to be old-fashioned optimistic rationalists in disguise. Moral: Let us reduce the intellectual lag between Evidence and other discourses to a decent fifty years. Ken Jr.'s error was that he mistook Act I for the whole of a rather different kind of drama.

VI. PLURALISM

Some of the most valuable points in *Hot Air* relate to problems of cultural and political pluralism:

If the United States is viewed as a collection of ethnic groups, none of which has any natural right to intellectual, spiritual or political hegemony, then what we need is not a spurious common culture or a fictional political ancestry but a genuine politics. The task of proceduralists is . . . to find ways in which individuals might form communities that could coexist without resort to any form of imperialism. [p. 1206]

One need buy neither Ken Jr.'s personal version of "Small is Beautiful" nor his imperialist vision of the role of proceduralists in accepting that this kind of concern with pluralism presents sharp challenges to the Rationalist Tradition at a number of levels.

Commentators have observed that Bentham's political theory had marked *dirigiste* and centralizing tendencies. His own personal political views, even after his conversion to democracy, tended to favor unitary and centralized government.⁵⁵ However, he was well aware of the challenges presented by pluralism and he struggled with them in several of his writings.⁵⁶ Nevertheless, it is fair to say that there is a

55. In F. ROSEN, *JEREMY BENTHAM AND REPRESENTATIVE DEMOCRACY* (1983), Rosen points out that while Bentham favored clear "chains of command" he was quite prepared to envisage federal structures and strong, varied local government: The picture of representative democracy that emerges from this survey of the main institutions and offices is one that highlights the radical and democratic character of the state. *See, e.g., id.* at 130-67. "Bentham's account of the citizen-army where the privates can dismiss the officers, his attempt to limit the power of the professional army to turn against the democratic constitution, his provisions for giving to the poor full access to all judicial services, his use of the quasi-jury to limit the use of power by judges, and the 'dislocative' power placed in the hands of the electorate to remove any administrative and judicial officer all testify to his determination to keep government fully accountable to the people not only at periodic elections but also on numerous other occasions. Few modern democratic states provide for similar popular control." Rosen has recently also challenged the conventional view, promulgated by Halévy, that Bentham was simply an authoritarian in politics. Rosen, *Elie Halévy and Bentham's Authoritarian Liberalism*, 6 *ENLIGHTENMENT AND DISSENT* 59 (1987).

56. *See* Rosen, *Bentham's Constitutional Theory and the Greek Constitution of 1822*, 25 *BALKAN STUD.* 38-43 (1984).

tension between Benthamite ideology and the kind of pluralism valued by Ken Jr. One, but by no means the only, point of conflict with evidentiary theory relates to background generalizations. According to one widely held view, every step in inferential reasoning about questions of fact requires justification by reference to one or more background generalizations.⁵⁷ These generalizations are highly problematic in a number of respects. They are typically left implicit and it is often difficult to articulate what precisely is the background generalization that is being relied on in a particular context. One only has to try to reconstruct one or two examples of actual arguments to see that few, if any, of such background generalizations are value-free.⁵⁸ Furthermore, this model of inductive reasoning postulates a relatively high degree of "cognitive consensus"; in a given society, questions of fact can be rationally resolved only by reference to the shared "stock of knowledge" in that society.⁵⁹ In the absence of shared knowledge or values in respect of a given generalization, there is no basis for justifying the inferential step. One must be careful not to exaggerate the extent of a lack of consensus about fact or value in a given context, but Ken Jr. and I seem to agree that the Rationalist Tradition has tended to be unduly complacent in taking such a consensus for granted in regard to "common-sense generalizations."⁶⁰ As he percipiently observes, "All of Bentham's models involve disputes arising from homogeneous groups" (p. 1214-15). One of the main values of Wigmore's approach to analysis of Evidence is that it forces those who adopt it in

57. L. COHEN, *THE PROBABLE AND THE PROVABLE* (1977) [hereinafter L. COHEN]. See also *supra* note 16.

58. See, e.g., *THEORIES*, *supra* note 2, at 142-51.

59. See, e.g., L. COHEN, *supra* note 57, at 274-75.

60. See e.g., *Some Scepticism*, *supra* note 25, at 165; *THEORIES*, *supra* note 2, at 231-32, nn.17-20.

Alex Stein comments:

The problem of pluralism and unhomogeneous stocks of knowledge as one which sharply challenges the Rationalist Tradition, seems to me to be presented in a slightly far-reaching way. . . . Should one accept Ken Jr.'s vision of the society which consists of individuals and ethnic groups holding idiosyncratic, and by and large unshared, views and values? Even in nonmonolithic societies there should exist, can exist (and exists!) a sufficient stock of shared knowledge capable of sustaining a rationalist form of adjudication. If it is assumed that such a stock of knowledge does not exist, none of the procedural arrangements might be helpful, i.e., the "task" which Ken Jr. imposes on proceduralists will be unperformable *ab initio*. I think, however, that Ken Jr. is right in his criticism of Bentham's absolutely non-pluralistic paradigm of dispute resolution. Moreover, Bentham's "domestic tribunal" which professes a Natural System of litigation tends to underestimate the existence of common "family interests" of the parties in dispute. The latter interests are generally accepted in the milieu of domestic litigation as ones of a higher order than the merely private interests advocated by the parties. Hence, the allocation of factual mistakes committed by the family judge, the objectively acceptable rectitude of his decisions and their logical legalism are relatively uncrucial. In the society at large the common interests of a higher order are either nonexistent or too remote from the parties in dispute. It seems to me that due to the last reason (and partly due to the problem of nonhomogeneous stocks of knowledge and generalizations) the Natural Model can not serve the procedural needs of a complex society.

Author's personal communication with Alex Stein.

constructing or reconstructing arguments to articulate the precise background generalizations that are being invoked and hence to subject the arguments to critical scrutiny. One of the approach's main uses is to clarify what exactly is being argued.⁶¹

VII. WIGMORE'S LEGACY

And so to Wigmore. Ken Jr. states that the central thesis of my chapter on Wigmore is "that Wigmore's *The Science of Judicial Proof* is an unjustly neglected theoretical work of great power" (p. 1215). This is not quite correct. Well aware that it would be an uphill task to persuade others to take this strange phenomenon seriously, I may have overplayed my hand. My argument is that the work deserves attention because: (a) it contains the most accessible and clear account of Wigmore's general ideas and underlying assumptions; (b) it embodies a bold and worthwhile attempt to develop a coherent, systematic, and broad interdisciplinary conception of Evidence and Proof as a subject within the discipline of law (whatever its flaws, Wigmore's "science" powerfully challenges the "Evidence-is-Rules" fallacy); and (c) certain sections (notably those concerned with the logic of proof, a small portion of the whole) deserve to be rescued and developed.

I also poke gentle fun at some of the eccentricities of what is in many respects a bizarre period piece: I suggest that the "colonel" is ripe for debunking and I try to relate the odd story of the choice of literary form and the publishing history of the book to the conservatism and myopia of most Evidence teachers in the common law world.⁶² Here Ken Jr. and I probably have some real disagreements. I learned much from his account of Wigmore's politics; I do not expect to convert him to the pedagogical and other values of Wigmorean analysis,⁶³ but I find his clinging to a narrow and impoverished view of his subject incomprehensible and difficult to square with his other

61. On articulation, see THEORIES, *supra* note 2, at 185-86. Ken Jr. accuses Bentham, Wigmore and myself of being concerned to *conceal* hidden premises. In fact "holism" emphasizes the limits of our capacity to articulate, whereas one of the main claims for "the chart method" is that it is a procedure for spelling out each step in an argument and so can be used to try to articulate and subject to critical scrutiny assumptions that are typically left unstated in ordinary discourse. The "Pandora's box" passage, THEORIES, *supra* note 2, at 149, which Ken Jr. criticized (pp. 1219-20), is quoted out of context, reconstructs Wigmore's views rather than mine, and relates to the practical constraints on raising metaphysical doubts and on making laboriously elaborate argument *in court*.

62. See THEORIES, *supra* note 2, 109-13, 164-66.

63. Ken Jr. is correct in hinting that I am not a practicing advocate. P. 1218. The bases for my claim that Wigmore's method formalizes (or "rationally reconstructs") some aspects of what many trial lawyers do in practice are: (a) the opinion of my collaborator, Professor Terry Anderson, and several other experienced clinicians, attorneys, and judges; (b) perusal of trial records, trial books, and secondary accounts of trials; and (c) the reactions to Wigmorean analysis of postgraduate students with trial experience.

Skepticism about the value of Wigmore's Chart Method is widespread and unsurprising; the least skeptical are those who have had firsthand experience using it. For an experienced litigator, Ken Jr. is surprisingly neglectful of the differences between preparation for trial and presentation

protestations. Scratch Ken Jr. and one finds another orthodox teacher of Evidence who, at least in *Hot Air*, is court-centered, obsessed with contested jury trials, and conceives of his subject as being mainly based on the law reports.⁶⁴ The main reason for taking Wigmore's *Science* seriously is that he tried to broaden the subject of Evidence in a way that put Evidence doctrine in its proper place as one relatively small, but important, part of an undeveloped field and opened the way to drawing on a much richer range of materials for its study. In this respect, my enterprise draws heavily on Wigmore in a fashion that has almost nothing to do with "the instrumental ideology of Evidence" or obsession with social control. Furthermore, as should become apparent in the next section, modified Wigmorean analysis, as some of us have tried to develop it, is rather closer to Art than to Science than it may seem on the surface.

VIII. INFERENCEAL STREAMS, CASCADED INFERENCES, AND LAWYERS' STORIES

He thought his happiness was complete when, as he meandered aimlessly along, suddenly he stood by the edge of a full-fed river. Never in his life had he seen a river before — this sleek, sinuous, full-bodied animal, chasing and chuckling, gripping things with a gurgle and leaving them with a laugh, to fling itself on fresh playmates that shook themselves free, and were caught and held again. All was a-shake and a-shiver — glints and gleams and sparkles, rustle and swirl, chatter and bubble. The Mole was bewitched, entranced, fascinated. By the side of the river he trotted as one trots, when very small, by the side of a man who holds one spell-bound by exciting stories; and when tired at last, he sat on the bank, while the river still chattered on to him, a babbling procession of the best stories in the world, sent from the heart of the earth to be told at last to the insatiable sea.⁶⁵

Ken Jr., in a passage almost as lyrical as that of Ken Sr., contrasts the military orderliness of Wigmore Charts with the more fluid imagery of Albert Moore, who substitutes the concept of "inferential streams" for "lines" or "chains" of inferences:

This fluid imagery allows us to see evidence as a protean body of water that ranges from an inert mass that goes nowhere but encompasses by its immensity to a clear sparkling mountain stream, a trickle of biting fridity that follows the path of least resistance . . . yet is capable of making an indelible impression on even the hardest rock.⁶⁶

I like the imagery and will borrow it in the future. But the under-

at trial. It is generally acknowledged that Wigmore's method is mainly useful for preparation rather than presentation.

64. See, e.g., p. 1208; cf. text at notes 61-62 *supra* (the Evidence-is-Rules fallacy).

65. WIND, *supra* note 1, at 4.

66. P. 1223; see also Albert J. Moore's valuable essay, *Inferential Streams: The Articulation and Illustration of the Trial Advocate's Evidentiary Intuitions*, 34 UCLA L. REV. 611 (1987).

lying idea is not new and it is very strange to suggest that in dealing with problems of reconstructing "reality" one has to make all-or-nothing choices between stories and arguments, between synthesis and analysis, or between wet and dry metaphors. "And-Not," said my American Guru, "is bad Jurisprudence."⁶⁷ Ken Jr. is plainly mistaken when he asserts that the idea that reality is constructed and is altered by our attempts to preserve it is "a thought frightful to ponder for theorists of 'proof'" (p. 1225). For example, Bentham's theory of fictions, which underlies his theory of evidence, is an early example of a constructionist epistemology.⁶⁸ Wigmore, rather naively, treated the Chart Method as an alternative, rather than a complement, to the Narrative method.⁶⁹ Peter Tillers⁷⁰ and Mohamed Abu Hareira⁷¹ (who first sensitized me to this issue) have both wrestled with the problem of the relationship between "atomistic" and "holistic" approaches. So has David Schum, who significantly talks of "cascaded inferences."⁷² Even Bennett and Feldman, who perhaps go further than most in arguing for the primacy of the story in *Reconstructing Reality in the Courtroom*, allow some scope for logical analysis in providing tests of coherence, consistency, and plausibility.⁷³

Theorists of proof have been actively pondering the implications of constructionist ideas for years. But Ken Jr. is quite right in pointing to a tension between such ideas and at least cruder versions of technocratic instrumentalism associated with the Rationalist Tradition (p. 1225). Whether one characterizes such tensions in terms of atomism and holism, stories and arguments, or metaphors such as streams and chains, is secondary. The issues are central to both normative and descriptive theories of decisionmaking.⁷⁴

67. K. LLEWELLYN, *LAW IN OUR SOCIETY: A HORSE-SENSE THEORY OF THE INSTITUTION OF LAW* (unpublished, 1950), *quoted in* W. TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* 516 (1973).

68. See Postema, *Facts, Fictions and Law: Bentham on the Foundations of Evidence*, 69 A.R.S.P. 37, 52-54 (1983).

69. J. WIGMORE, *THE SCIENCE OF JUDICIAL PROOF* 821-22, 858-59 (3d ed. 1937).

70. Tillers, *Modern Theories of Relevancy* in 1A J. WIGMORE, *EVIDENCE* § 37 (P. Tillers ed. 1983); Tillers, *Mapping Inferential Domains*, 66 B.U. L. REV. 883 (1986).

71. A.M. HAREIRA, *A HOLISTIC APPROACH TO THE ANALYSIS AND EXAMINATION OF EVIDENCE IN ANGLO-AMERICAN JUDICIAL TRIALS* (1984) (unpublished Ph.D. thesis available at the University of Warwick); Hareira, *An Early Holistic Conception of Judicial Fact-Finding*, 1986 JURIDICAL REV. 79 (1986).

72. See, e.g., Schum, *On the Behavioral Richness of Cascaded Inference Models: Examples in Jurisprudence*, in 2 COGNITIVE THEORY 149-73 (J. Castellan, D. Pisoni & G. Potts eds. 1977).

73. W. BENNETT & M. FELDMAN, *RECONSTRUCTING REALITY IN THE COURTROOM* (1981).

74. Ken Jr. seems to deny normative theory in respect of thinking and decisionmaking. P. 1223. Similarly, his conception of litigation as "a kind of political theatre," glosses over differences of standpoint. P. 1232. This perspective may be illuminating and entertaining for the outside observer, and useful — possibly even fun — for the professional actor. But Ken Jr.'s critique of the Progressive Paradigm is surely concerned with institutional design and improvement. To suggest that litigation should be made even more like political theatre than it already is

During the past year Mole has made some preliminary explorations into Narratology. Apart from finding it seductive, his most striking discovery is that Narratologists are no less imperialistic than enthusiastic Bayesians. His provisional, rather tame, conclusion is that Evidence discourse can benefit from diplomatic relations with both groups, but that it should resist all moves to make it part of either's Empire.⁷⁵ More important, however, is the point that holism presents a direct challenge to the prevailing *conception* of rationality espoused by the Rationalist Tradition. That does not involve giving up on the concept of Reason, but rather reinterpreting it.

IX. IRRATIONALISM AND IRREALISM AS MISCHIEVOUS NONSENSE

I have sometimes wondered what an Irrationalist Theory of Evidence would look like. Ken Jr. has obliged and, in due course, it will call for comment. Revealingly, however, he retreats from calling it Irrationalist and merely claims that it is Irrealist, whatever that means.⁷⁶ This is sensible. Full-blooded irrationalism tends to be as self-defeating as other forms of skepticism. For the politically committed it is almost suicidal, for it disqualifies them from engaging in political arguments.

This is not the place to attempt a full-scale defense of a concern for Reason and Rationality. Let it suffice here to give one political reason for wishing to preserve the concepts of Truth, Reason, and Justice as core concepts of Evidence discourse. I, for one, wish to have a language for appraising and criticising adjudicative decisions. If one gives up the idea of the search for Truth as an aspiration, one also surrenders any claim to be able to talk of "mistakes" or "errors" or "miscarriages of justice" or "wrongful convictions." In an irrationalist world there are no innocent and no guilty parties, no reliable or unreliable evidence, no valid or invalid, strong or weak arguments. Of course, Ken Jr. does not believe that, and he and I probably have broadly similar views about what counts as a miscarriage of justice. But he is in danger of being seduced by his own rhetoric. For instance, this is what he says of the Sacco-Vanzetti case: "Seven decades after Wigmore clashed with Frankfurter over the question, it seems unlikely that we will ever know for certain whether or not Sacco and Vanzetti were guilty of what must surely be one of the most studied robberies in Western history" (p. 1211). True, it is likely that we will never "know for certain," but to stop there is jejune. Having studied

— that the analogy should be embraced — suggests a rather obnoxious form of elitism: entertaining for the uninvolved spectator; fecund in power and money for the powerful; and Hell for ordinary litigants, witnesses, and other legal worms.

75. I shall develop these theories in two forthcoming papers: *Lawyers' Stories* and *Anatomy of a Cause Célèbre*.

76. Pp. 1231-34 ("*A Manifesto of Legal Irrealist Disbelief*").

the case with some care (though stopping short of a full-scale analysis), I wish to make some further reasonably confident judgments.⁷⁷ First, the evidence suggests that as a matter of historical fact it is more probable than not that it was not Sacco and Vanzetti who committed the murder of which they were convicted. The evidence against Sacco is somewhat stronger than that against Vanzetti. Second, Sacco and Vanzetti were victims of a miscarriage of justice, in that the case presented against them in court fell significantly below the criminal standard of proof. An *ex post facto* evaluation of the evidence suggests that there was considerable room for doubt about their involvement in the murder. Third, independent of the other two judgments, I believe that there are good grounds for claiming that the pretrial procedure, at first instance and subsequently, fell seriously short of civilized standards of due process. Thus a strong case can be made for the judgment that Sacco and Vanzetti were the victims of a "miscarriage of justice" in three senses of that term: as a matter of historical fact as to the identity of the actual killers; in terms of the criminal standard of proof; and in respect of fair procedures. Sacco and Vanzetti have been made into potent political and literary symbols open to a rich variety of interpretations. But these interpretations are intimately related to one's beliefs about the other issues. My interpretation of the political legend would be quite different if I believed that one or both was a murderer or that the Massachusetts legal and political system had operated with both decency and fairness. I, for one, wish to participate in discourse about such matters and, where appropriate, to come to considered conclusions and make judgments that I am prepared to justify. Throw out the concepts of Truth, Reason, and Justice in this context and one is condemned to silence or to making meaningless noises.

Ken Jr.'s main fear seems to be that by promulgating a relatively clear model of what he calls "an instrumental ideology of Evidence," I am giving ammunition to Thatcherites, proto-Stalinists, and other supporters of hierarchical statist social control (pp. 1207, 1214, 1230-31). I hope that enough has been said both here and elsewhere to establish that I am not an adherent of the Benthamite version of the Rationalist Tradition and that my political sympathies are very different from those who might use or abuse such an ideology in attempting to legitimate repressive measures of social control.

The main lesson that I have learned from this exchange with the author of *Hot Air* is that in the future I should spell out more clearly my conception of my scholarly enterprise and dissociate myself more

77. These conclusions are based on my own, and several students', attempts to use the Trial Record and several secondary sources as the basis for exercises in Wigmorean analysis on a number of occasions. To date, my only other discussion of the case in print is in KARL LLEWELLYN AND THE REALIST MOVEMENT *supra* note 67, at 341-49.

explicitly from the kind of crude instrumentalism that he attributes to me. I remain mystified by some key aspects of Ken Jr.'s version of West Coast Irrationalism and how he reconciles his commitment to due process with a view of litigation as political theatre. Maybe some field work is called for. California Here I Come!

X. ENVOI

I have tried to show that there are almost as many affinities between *Theories*, *Hot Air*, and *Wind* as people other than jurists might expect. If literary critics or contextual intellectual historians were ever to study and compare these works, they would have plenty of scope for differing interpretations. One hopes that these will not be confined to Freudian speculations about the relationship between Ken Sr. and Ken Jr. (a kind of DaDaism?). On two points the evidence seems to preclude serious disagreement. First, Ken Jr. clearly confused Toad and Mole. The alleged object of his attack has a taste for stories, rivers, and exploring (rather timidly) in the Wild Wood; both by temperament and commitment he prefers Art to Science and, above all, he has never so much as said "Poop-Poop" to Bayes' Theorem or any other mechanical device.⁷⁸ Mole burrows away on his own and counts as a gentle subversive because he reveals roots and foundations with all their faults, rather than destroying them by direct attack.⁷⁹ Second, Ken Jr. (like, one suspects, Ken Sr.) seems curiously like Mr. Badger: He lives underground in the Wild Wood; he has secret access to Toad Hall; he is gruff and pretends to hate society, but is really gentle and good underneath; and, despite his protestations, he is an ally of Rat and Mole in the enterprise of saving Toad from himself. Badger also needs friends and allies to save him from self-destruction when he overheats and also to save him from spoiling good cases by poor advocacy. There is, however, one puzzle. What is the likely political effect of Badger's growlings? The ending of *Wind* provides a possible clue:

Sometimes, in the course of long summer evenings, the friends would take a stroll together in the Wild Wood, now successfully tamed so far as they were concerned; and it was pleasing to see how respectfully they were greeted by the inhabitants, and how the mother-weasels would bring their young ones to the mouths of their holes, and say, pointing,

78. WIND, *supra* note 1, at 40-41. Toad fell in love with Bayes' Theorem at first sight: He breathed short, his face wore a placid, satisfied expression, and at intervals he faintly murmured "Poop-poop!"

....
... At intervals he was still heard to murmur "Poop-poop!"

....
... "The poetry of motion! The *real* way to travel! The *only* way to travel! Here to-day — in next week to-morrow! Villages skipped, towns and cities jumped — always somebody else's horizon! O bliss! O poop-poop! O my! O my!"

79. Mole deplors the hijacking of his name by the writers of spy stories. Moles are not agents or double-agents for anyone. The world of spy faction and fiction is much closer to irrationalism than his more prosaic vision of litigation.

“Look, baby! There goes the great Mr. Toad! And that’s the gallant Water Rat, a terrible fighter, walking along o’ him! And yonder comes the famous Mr. Mole, of whom you so often have heard your father tell!” But when their infants were fractious and quite beyond control, they would quiet them by telling how, if they didn’t hush them and not fret them, the terrible grey Badger would up and get them. This was a base libel on Badger, who, though he cared little about Society, was rather fond of children; but it never failed to have its full effect.⁸⁰

80. WIND, *supra* note 1, at 301-02.