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“THERE’LL ALWAYS BE AN ENGLAND”: THE INSTRUMENTAL IDEOLOGY OF EVIDENCE

Kenneth W. Graham, Jr.*

THEORIES OF EVIDENCE: BENTHAM AND WIGMORE. By *William Twining*. Stanford: Stanford University Press. 1985. Pp. x, 265. \$29.50.

On April 26, 1783, as the defeated imperial army was preparing to return to England, a flotilla carrying 7000 “boat people” sailed out of New York harbor. These Loyalist refugees were the last contingent of an exodus of more than 100,000 who fled to Canada or Europe to escape the consequences of a protracted guerrilla war waged by George Washington’s Continental regulars and allied bands of terrorist irregulars who lacked the common decency to be slaughtered in the traditional European fashion. The emigrés included many, perhaps most, of the colonial lawyers, and Isaac Royall, a wealthy slave driver who was later to revenge himself upon his persecutors by funding one of the major counterrevolutionary institutions in the States.

Some colonial lawyers cast their lot with the revolutionaries, hoping that independence would mean replacement rather than displacement of the aristocratic forces that had governed most of the colonies. These anglophile lawyers found allies on both sides of the Atlantic among those who hoped that, despite its military and political defeat, the Evil Empire might maintain economic and cultural tutelage over its former colonies. These quisling lawyers flocked to the Federalist party; after its defeat some of them went over to the loyal opposition, others were pensioned off to the federal bench to continue the war against the democratic tendencies of the infant republic, while still others retreated to the bank of the River Charles where Royall’s patrimony enabled them to found the last headquarters of the Federalist

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* “Kenneth W. Graham, Jr.” is the pseudonym of a semi-retired sex maniac of mixed but predominantly Celto-Slavic ancestry who is employed as a teacher of evidence at a poor but pretentious public university somewhere on the West Coast. (The last five words are in the interest of accuracy, not anonymity; if what the geologists tell us is true, the *locus in quo* is moving at a pace that will, if it has not fallen into the Pacific Ocean long before, put it anywhere from Portland to Port Barrow by the time this piece is published.)

Inasmuch as all the crazy stuff is in the text, there seems to be little reason to sacrifice a tree to fend off with footnotes the suspicions of those who do not trust the editors to insure that the author has actually said something like that of which he stands accused by the reviewer. Those with a “need to know” can obtain the sources of other information alluded to in the text from the reviewer.

party and one of the most redoubtable outposts of English imperialism. "The rest," as they say, "is history."

The imperial ambitions and political strategies of the Harvard Law School eventually proved to be almost as vast and successful as those of its English idols. For more than a century, the landscape of American legal education has been dominated by the original and a number of "petty Harvards" founded by missionaries sent out from Cambridge to spread the Word to the unbaptized heathen of the South and West. Nowhere have these sneering pseudo-Englishmen been more successful in prescribing the orthodox than in the field of adjective law. To this day, procedural scholarship has been dominated by an ideology, posing as "science," whose devotees maintain the conceit that, despite the declarations of July, 1776, there continues to exist something that they like to call "the Anglo-American legal system."

Recently, however, there have been stirrings of revolt. Like so much that has gone wrong for them, the imperialists can justifiably blame this incipient insurrection on the Beatles. Except for their "cute accent," most of what was appealing about the "Fab Four" was inspired by (if not stolen from) Black American music. The rediscovery of the revolutionary possibilities of the American cultural heritage by the lads from Liverpool was a source of both inspiration and anger, qualities not entirely consonant with brahmanism. This foreign appropriation of our musical culture, and the recent infatuation of business bosses with a currently more successful Empire of Imitation, served to remind American scholars that most of the institutions supposed to be typically English were about as indigenous as Japanese baseball. Moreover, if the pictures of contemporary England presented by other English rockers, such as the Sex Pistols, were to be believed (and they were), then not only were these institutions not very English, they were also not particularly admirable.

The social movements for which the Beatles provided the early anthems also led the junior half of the Anglo-American dyad to a change in self-perception. Inspired by the example of those ethnic groups that did not have a colo(u)rable claim to be "Anglo-Saxon," other hyphenated Americans began to explore their own "Roots." These groups of traditionally despised ethnics soon discovered that their remote ancestors had had civilizations at a time when the denizens of the British Isles were still enthusiastically eating one another. The more studious learned how their ancestors' contributions to American culture had been belittled or appropriated by effete Eastern anglophiles, how their parents had fought valiantly against the often brutal oppression of Briticized bullies of the likes of Theodore Roosevelt and A. Mitchell Palmer, and how the long-standing and insidious exaggeration in our leading educational institutions of the virtues of English culture had served to defuse, if not defeat, the democratizing tendencies of the

frontier. The upshot of this new enthusiasm for their own heritage was that many third and fourth generation ethnics no longer felt they had to affect English manners and values to assimilate; to be "ethnic" was to be "American."

It took somewhat longer for these cultural currents to seep through the foundations of those shrines of Anglo-worship, the American law schools. Indeed, one imagines that even today yuppies in Cambridge are flocking to English pubs long after diners elsewhere have discovered that English culinary art runs more to the rigors of cannibalism than to the extravagance of *haute cuisine*. Be that as it may (and it might), recent events in Ireland and Argentina have revealed how the storied "stiff upper lip" conceals a set of fangs as sharp as those possessed by despots in less-fashionable corners of the globe. Belfast and Brighton gave lie to the claim that the tolerant English would have done better than we did at our Birmingham. Royal weddings may make the English feel better about themselves, but they do little to erase the images elsewhere of those "sporting chaps" bashing soccer opponents with lead pipes. Even first-year law students can see the folly in taking as a model a nation that has junked the jury and maintained the monarchy. Nowadays when a law professor reaches for his hankie at the words "our Anglo-American heritage" one cannot be sure whether he wishes to wipe away a tear or stifle a giggle.

The point of this Anglo-bashing is not that the English are any worse than any other ethnic group; merely that they are no better. The same cannot be said of American Anglophiles. There is a cultural distance between academicians who aspire to Englishry and the crackpot followers of Anglo-Israelism, a murderous anti-semitic religion whose tenets include the belief that the English and not the Jews were the Chosen People of God; but ideologically the snobs and the assassins are not that far apart. It would be difficult to exaggerate the number of mistakes, even atrocities, that have been committed under the flag of Anglo-Saxon moral or intellectual superiority.

More to the point are the probable consequences for procedural scholarship should we abandon the excesses of Anglomania. 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 not to devise means by which the English empire might be maintained under American auspices as a counterforce to Russian or Third World ambitions, but to find ways in which individuals might form communities that could coexist without resort to any form of imperialism.

So much for fables.

* * *

"One thing you learn, when you try to reconstruct an event from

eyewitness accounts, is that each version is just someone's story, and that all stories mix truth and lies."

— Mario Vargas Llosa

* * *

The book under review may disappoint readers familiar with Professor Twining's much-admired study of Karl Llewellyn and the Realist Movement. This book has more modest goals: "to provide an introduction to Bentham's *Rationale [of Judicial Evidence]* and Wigmore's *Principles [of Judicial Proof]*, set in the context of an overview of the dominant tradition of Anglo-American writing about evidence." But despite his claim that this work is a largely "expository" introduction to the ideas of the two thinkers on which the book focuses, Professor Twining can be read with profit even by those who fancy themselves familiar with works he analyzes.

The book is of particular interest to those Professor Twining calls "specialists on evidence," because he promises it is only one part of "a broader project on theoretical aspects of evidence and proof in litigation." If this initial foray is an accurate indication of what is to follow, we have reason for hope — and fear. For those who favor the television style of reviewing, the conclusion here is "strong on Bentham, weak on Wigmore, provocative on everything else." To American eyes, Twining is more a Bryce than a Toqueville — too close to our legal culture to give a foreign perspective to readers in the United States and too far from it to be a reliable guide for readers in the United Kingdom. Since writers who are thus situated are more likely to be used or abused than appreciated, we can hope for his sake, if not ours, that in his future work Professor Twining will take the advice of a popular Sun Belt bumper sticker whose local version reads: "Welcome to California — now go home!"

* * *

"There you go again!"

— Ronald Reagan

* * *

The first of the four chapters that make up this short but densely packed book is entitled "The Rationalist Tradition of evidence scholarship." It is divided into two parts, the second of which is a model of the "Rationalist Tradition." That model can be more profitably discussed in connection with the concluding chapter in which Twining attempts to assess its contemporary significance. Here we consider only the first part of the chapter, containing what Twining calls the "general outlines" of the "intellectual history" of evidence law.

All readers will benefit from Twining's sketch of the history of evidence scholarship in the United States and England. American evidence experts will find here both unfamiliar facts and new light on familiar facts. For example, I was unaware that most of Taylor's Eng-

lish treatise was cribbed from Greenleaf's American work. I also found that Twining's assessment of Chamberlayne's treatise enhanced my own appreciation of that "interesting and underrated" (I would have said "forgotten") writer.

This first chapter also contains some evidence that more than a hyphen bifurcates what Wigmore liked to call the "Anglo-American System of Evidence." However valuable that book may be to English lawyers, few American scholars are going to share Twining's high opinion of *Cross on Evidence*. Conversely, his dismissal of McCormick's work as "pedestrian" will not do much for Twining's credibility among those of us fortunate enough to have read the McCormick hornbook before it was butchered by its revisors. This is not to say that Twining's judgements are misguided; only that they are English opinions and that perceptions on his side of the Atlantic may not accord with those in the New World.

* * *

"Here I go again, I hear a trumpet blow again . . ."

— *Taking a Chance on Love*

* * *

So this guy Twining thinks the rules of evidence "have diminished in scope and declined in importance over the years." He should sit at my desk, buried beneath the flow of cases, statutes, and commentary that ruin my evenings and rot my mind. I don't know what they are doing in "jolly old England," but our courts, state and federal, easily turn out more than a thousand significant evidence decisions each year, and there are probably twice that number of routine appellate opinions on evidence. That doesn't include what we have palmed off on the boys in Con. Law IV — *Mapp*, *Miranda*, and a host of lesser-known constitutional rules that use exclusion of evidence as a sanction. Indeed, if we hadn't ceded most of the fourth and fifth amendments to the Con. Law Mafia there would be no time left in our courses for hearsay and relevance. Moreover, we don't have to worry about the Parol Evidence Rule, a doctrine that nowadays lies "amoldering" in the domain of Contracts, but once was within the province of Wigmore.

Come to think of it, our boy Twining has an odd notion of the relative importance of the various venues in which evidence scholars flourish. He seems to think that only treatise writers matter and that scholars whose medium was the law review article have been of little influence. I'll bet most American evidence teachers have read more pages of Eddie Morgan's articles than they have of Wigmore's treatise. In those instances in which the two writers placed their formidable reputations on opposite sides of some line, Morgan's views have come off victorious as often as Wigmore's. Funny — that he should take Wigmore as his subject when Morgan was a much more thorough-

going Benthamite and far more typical of American evidence scholars than the idiosyncratic Dean. Maybe he thinks Morgan had no theory of evidence. I wonder what definition of "theory" would lead him to that conclusion?

* * *

"What's it all about, Alfie?"

— popular song of the sixties

* * *

In the first chapter and elsewhere, Professor Twining refers to "intellectual history" in a manner that might lead the reader to think that he imagines that this work is of that genre. If so, he here takes a constricted view of "intellectual history." To be sure, he discusses intellectuals who are now figures of history, but his efforts to trace the influence of and the influences upon these thinkers tend to be simplistic and dogmatic. For all that appears in this chapter, one would think that Twining supposes that writers on evidence were influenced only by each other and not by the philosophical and political battles of their time. One need not be a Marxist to speculate about the effect which the remarkable changes in the material world in the last 200 years have had on the theory and practice of evidence and proof. One hopes that in his future writing Twining will return to that broader view of the demands of "intellectual history" that marked his earlier works.

One advantage to the narrow view is that it does less to endanger Twining's intellectual agenda than would a more comprehensive approach. The latter would strain Twining's knowledge of American culture and history to the point where he might have to question the utility of his conception of an "Anglo-American law of evidence." It is, for example, to be expected that an Englishman would see nothing remarkable in the fact that the leading American evidence writers all have names suggesting an ancestry in the British Isles. There is no Levine, Esposito, or Vataha in Twining's Pantheon of Great Thinkers in Evidence. This is significant — though not surprising, because the law school that harbored the likes of Thayer and Morgan was, during the period of their greatest influence, eagerly engaged in excluding Jews, Italians, and Slavs from its student body. Little wonder, then, that Twining finds a "remarkable continuity" with English evidentiary thought in the writing of the Harvard evidence scholars.

* * *

The hope that Twining will eventually come back to a more expansive view of intellectual history is fanned by what we find in the second and longest chapter of the book, entitled simply "Bentham on Evidence." It opens with a psycho-biographical fragment speculating that Bentham's views on procedure were skewed by a childhood fear of ghosts, a compelled conformity to religious dogma during his stay

at Oxford, and his reading of the memoirs of an ex-courtesan who found that Bleak House could be as ruinous and much less lively than the whorehouse. This quasi-Freudian frolic is followed by an account of how Bentham was brought to his work on procedure and evidence by his explicit agenda of broader political reform.

Twining's explanation of Bentham's deeper motives is plausible, but a writer with a greater enthusiasm for Freudian analysis might think that a more convincing account should focus on Bentham's sexuality and his relations with his father. Bentham *père* was a successful lawyer with similar aspirations for his son. But Bentham apparently lacked the temperament for the bar, and his failure as a barrister might suggest that in attacking lawyers and judges he was striking back at his father. Bentham never married, and the biographies I have read seem to assume that his sexuality was of the Schubertian rather than the Tchaikovskian mode. Bentham's panopticon prison was of a design that would have enabled its warden to prevent the occupants from sodomizing each other. This suggests that Bentham foresaw that penitentiaries would share some of the problems of English public schools, but it does not tell us whether he feared only rape or would have also barred consensual homosexual encounters. Whatever his sexual preferences, the fetish for control exhibited in his writings suggests that his was a highly repressive personality.

The introductory section of the second chapter concludes with a brief description of Bentham's sources that is probably too short and dogmatic to have meaning to anyone not already quite familiar with Bentham and the writers Twining thinks have influenced him. The next twenty pages are taken up with "an analytical précis of the *Rationale of Judicial Evidence*." Though I have not read that work as recently or as thoroughly as Professor Twining, his summary of it strikes me as accurate and as probably of more use to most of us than the original.

The remaining (and largest) part of Chapter Two consists of a more detailed critique of what Twining thinks of as five central themes in Bentham's work: *i.e.*, his model procedural system; his attempt to devise a method for quantifying probative worth; his skepticism concerning the value of rules of evidence (what Twining insists on calling "the anti-nomian thesis" long before he bothers to explain to his readers what he means by this); his argument that defects in the system were the result of a corrupt self-interest of judges and lawyers; and a relentlessly instrumental treatment of procedure. The chapter on Bentham concludes with an account of reviews of his work by two of his contemporaries.

While this chapter can be read with profit by anyone with an interest in evidence and proof, it is especially valuable for American scholars who would like to escape (or at least not passively succumb to) the

dominant procedural ideology. Because Twining's efforts to criticize and modernize Bentham are based on the Benthamite ideology, we get two different and highly revealing accounts for the price of one. Thoughtful proceduralists will want to have their own copy of the book to underline and annotate, to reread and ponder.

It is an advantage for American proceduralists to come to Bentham through Twining's paraphrase, where we do not have before us the obsolete procedural targets of Bentham's copious wrath and cannot hear his dated locutions. Encountering Bentham anachronistically is like a blind date with an ex-spouse; what we lose of the fear and fire of the exotic is more than compensated for by the charm of seeing the familiar in an unexpected place. We recognize at once how much the procedural ideology that has been called "The Progressive Paradigm" is simply Benthamism with a Boston accent. Seeing the original impulses unchastened by a century or more of attempted implementation makes the flaws more apparent than when the same ideas reappear in their contemporary disguises.

Bentham assumed that enforcement of the substantive law was frequently frustrated by an inability to reconstruct historical facts — a failing fostered by the exclusionary rules of evidence. His solution to this supposed problem was to admit more evidence . . . and more evidence . . . and more. His faith in the curative powers of information reminds me of a computer salesman or one of those sincere sellers of the *Encyclopedia Britannica*. One suspects that had he ever tried a case Bentham would have learned that most litigated disputes do not involve questions of "pure" fact but are fought instead over such inseparably fused masses of fact and value as "negligence," "recklessness," and "intent." Indeed, a litigant's insistence on the purely factual nature of the dispute often masks a weak position on the normative aspects in issue. What counts as "evidence" of such "facts" is less often determined by evidentiary doctrine than it is by the ideological presuppositions of the judge or jury. All of which is to say that frustration of the substantive law is most often the result of its willful manipulation by one or both parties or its lack of congruence with popular values — and not a consequence of evidence rules, however stupid they may be.

Even were the issues more frequently factual, Bentham's mania for masses of evidence is misplaced. A presidential commission, several trials, and scores of books analyzing the available evidence have only served to confuse the important factual questions surrounding the assassination of President Kennedy. 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. Perhaps in his time there was some justification for

Bentham's hyperbolic prescription, "[S]ee every thing that is to be seen; hear every body who is likely to know any thing about the matter." Today it is apparent that the man who wrote the book on fallacies missed one; *i.e.*, the argument that "if a little bit is good, a whole lot more is better" — what is called, in the parts of America Twining has yet to visit, "the Hugh Hefner fallacy."

Bentham was also procedurally naïve in failing to foresee how easily judges and lawyers could turn his favored reforms into technicalities of the same sort as those they were meant to displace. Bentham was, for example, an enthusiastic proponent of the rationality of cross-examination; as Twining puts it, he sought to "preserve and extend" the admirable English practice of "cross-examination face to face." But the desire to "preserve and extend" the right of cross-examination was to produce, over the next century, the hearsay rule and its allied exceptions, a bit of technicality as filthy as any of those that Bentham railed against.

Bentham prefigured the Progressive Proceduralists in another important way — his fanatic statism. If Twining's psycho-history is sound, Bentham embraced the State in order to escape the clutches of the Church, much as American proceduralists today cling to government as protection against the power of the business corporation. Both were unable to see the symbiosis that made the public-private distinction little more than a mask for interests likely to remain entrenched in any social structure short of true anarchy.

For Twining, the central paradox in Bentham's work is "how the most expansive and radical of our theorists of evidence belongs to the mainstream of an intellectual tradition that is characterized by a narrow focus and an optimism bordering on complacency about the rationality of judicial processes." That's not how it looks from here. Indeed, with appropriate emendations, this "paradox" could be made to fit the fate of thinkers as diverse as Augustine and Marx.

A more revealing question is how a man who believed that "[e]xperience is the foundation of all our knowledge," who used the fable of the king of Siam's disbelief in ice to illustrate the subjectivity of individual experience, who recognized that our knowledge of historical facts could aspire to nothing more than probability, and who understood how beliefs could be manipulated by those in power, could possibly elevate "pursuit of truth in adjudication above nearly all other competing claims of value or policy."

Since what we may call "the problem of pluralism" — how people with competing values, beliefs, and interests can coexist in a social world of limited physical and intellectual means — is one of the more vexing issues in politics, it is amazing to hear that "there is very little overtly political . . . about [Bentham's] writings on evidence." But from another point of view, this is quite expected. One of the major

achievements (or aspirations) of Bentham and modern proceduralists was to convince people that there are apolitical solutions to political problems.

One technical solution to the problem of pluralism is the discovery of a single (usually called "objective") truth that all people will, or must, accept. While this search has baffled and entertained thinkers throughout recorded history, such successes as have been achieved seem to have been highly localized in space-time. According to Twining, Bentham was not overly sanguine about the possibilities of universalizing these temporary and local successes.

We may deduce from Twining's account that Bentham was well aware of the political nature of his procedural projects. They followed closely upon the failure of his panopticon scheme, a plan by which Bentham hoped to get rich from the labor of prisoners in a dungeon more totalitarian than even modern despots have found to be practicable. Bentham's proceduralism was also heavily influenced by the French Revolution, a fairly bloody illustration of the problem of pluralism. Fear of uncontrolled subjectivity lies close to the surface of Bentham's lust for codification as well as his passion for procedure. It is, therefore, highly ironic that Twining should accuse Bentham's opponents of practicing a "politics of mistrust."

To Bentham, "security is . . . the principle object" of the law because it "is the only one which necessarily embraces the future" and "implies extension in point of time, with respect to all the benefits to which it is applied." (If we recognize that "embrace" was a more erotic term in those days, the allusion to the popular male fantasy of immortality through sexual potency sticks out of this passage like a sore . . . thumb?) Security required that the uncertainty of the common law be replaced by the comparative certainty of a codified substantive law whose contours were, it seems, to be determined according to the principle of utility rather than the practice of politics. How did Bentham expect to keep politics from intruding into the administration of his codified substantive law?

Bentham's answer was to degrade procedure from its prior position of equality in the legal enterprise to a position subordinate to the substantive law. To Bentham, even "adjective law" implied too much influence for procedure. He insisted that procedural rules had to be cleansed of all potentially modifying values and governed by nothing more ambitious than a subservient instrumentalism. His purely instrumental view of procedure led Bentham to oppose the privilege against self-incrimination and to favor the limited use of torture.

Now that the consequences of Benthamite thinking are all around us, it is clear that Bentham's procedural achievement was not the cleansing of values and the elimination of politics from the adjective law, but rather the embedding of a particular set of politico-ethical

values within the very definition of procedure. The ethos was control; the politics was hierarchical statism. Twining thinks Bentham's critique bears comparison to that of "a modern Marxist." Perhaps. But "proto-Stalinist" would be more like it. Both the Russian dictator and Mrs. Thatcher would be glad to pin a medal on the man who advocated abolishing the attorney-client privilege while favoring an expansive privilege for "state secrets."

Where did his views on evidence fit into Bentham's statist politics? He favored abolition of all rules of evidence (these conferred upon lawyers a limited power to control the trial) and their replacement by an illusory right to introduce as much evidence as the parties chose. After viewing this mass of evidence, the judge (Bentham opposed juries) would process it into an official "truth" by seeing which party's view of the facts conformed to His Honor's view of "the established course of nature." It was this kind of "truth" that Bentham claimed was the only justified goal of adjudication.

Bentham's view of this official "truth" was purely instrumental — as they say today, "Will it play in Peoria?" The only evil he could see in the conviction of an innocent person was that this flaw in official "truth" might become so widely known that it would detract from the legitimacy of the judge's claim to be the servant of truth rather than the toady of power. Thus, in Bentham's degraded view of politics what we see is not real people with conflicting values but images contesting for the title of "truth." Bentham would have been at home in the world of televised political campaigns, consumer-surveyed "news," and psychologically screened jurors.

This political analysis of Bentham's procedural ideology explains his opposition to the compromise of disputes. In the Benthamite world, all sorts of evils flow from permitting private, voluntary resolution of disputes. If the terms of the settlement vary from what the court would have decreed, this cheats the state of the power to control the conduct of its citizens through legal rules. Moreover, compromise involves citizens in accepting falsehoods, or setting themselves up as the arbiters of "truth," or worst of all, understanding that since there is no "objective truth" to rescue them, they will have to come to some political resolution of their conflict.

The models (or metaphors) that Bentham uses to make his version of totalitarianism more palatable would support the hypothesis that his desire for a politics of control sprang from a fear of the subjectivity of truths or values. In Twining's revealing description, for Bentham "[n]either foreign models nor Utopian ideas are needed; every man's family, the Saxon county courts and the sheriff's courts and borough courts in Scotland provide adequate models for 'a perfect system.'" Here we see foreshadowed the racist provincialism of modern Britain — and many of its former colonies. All of Bentham's models involve

disputes arising from homogeneous groups. East Indians, Pakistanis, red-necks, and Catholics are conveniently excluded from the "perfect system." His vision of the state-as-family was seen as dictatorial by Bentham's contemporaries long before this was demonstrated by the courts of some socialist states and by modern American juvenile courts.

* * *

"Monotonous! Monotonous!"

— Eartha Kitt

* * *

Twining's third chapter — "Wigmore on Proof" — is less enlightening for American readers, but may be more provocative than his discussion of Bentham. The central thesis of this chapter — that Wigmore's *The Science of Judicial Proof* is an unjustly neglected theoretical work of great power — will probably strike most American evidence teachers as about as eccentric as Twining's opinion that Wigmore's treatise has been "eclipsed" in many areas by McCormick's horribly mangled hornbook or by the volumes on the Federal Rules of Evidence by Judge Weinstein and Professor Berger. (The next time Professor Twining visits these shores, one of his Anglophile buddies should sit him down in front of Lexis or Westlaw and show him how to hit the "Wigmore" button.) Fortunately for his readers, the arguments Twining advances in support of his questionable hypothesis are not so screwy that they can be dismissed as the casual observations of a visiting crank. Trying to figure out just where one as obviously intelligent as Twining went wrong turns out to be a rewarding, even though unsuccessful, enterprise. One may even conclude that in a far different sense than he intended, Twining is right.

A noticeable difference between this chapter and the one on Bentham is the absence of any attempt at psycho-biography. Instead of looking into his personal history, Twining attempts to discern Wigmore's character from a building constructed at Northwestern University Law School while Wigmore was its dean. Twining deduces from this evidence that Wigmore had a persona split between that of a systematic legal scholar and what Twining calls a "folksy American intellectual tourist." The last two words are better directed at the author than at his subject. Only an English academic would find Dean Wigmore's regime at Northwestern to have been "eccentric" or would think that "folksy" was an apt description of the stuffy elitist who emerges from the pages of his biography. Twining accuses Wigmore's biographer of simply compiling "a mass of information," but the facts that Twining selects for his own biographical note, while more extensive than in the case of Bentham, are not particularly salient for an understanding of Wigmore's ideological preferences.

* * *

"I thought that cards were a frame-up I never would try. . . ."

— *Taking a Chance on Love*

* * *

Wigmore was born in San Francisco at the time of the Civil War. The son of a wealthy lumber dealer, he also suffered the attentions of a doting mother who insisted that her husband move the whole family to Massachusetts when her favorite son decided to matriculate at Harvard. While other influences surely shaped Wigmore's outlook, it would be a mistake to overlook the trauma of having been, first, a "momma's boy" who could not survive in the public schools of San Francisco, and then a Californian in Cambridge.

If, as seems likely, Wigmore was scorned by his youthful peers as a "sissy," this would provide a partial explanation for his lifelong concern with matters of personal appearance and his rigid adherence to social conventions. (Wigmore once came unglued because his wife had ventured out of doors without a hat.) One can easily imagine what this "dandy" from the West had to endure from his hyper-sophisticate Eastern and Southern classmates when he showed up at Harvard with a California accent and Momma hovering in the wings. Little wonder that he became a workaholic library "nerd" with few outside interests and suffered a physical (and emotional?) breakdown during his third year of law school. This might also explain why the "hick" from San Francisco became a driven cosmopolitan who could read or speak a dozen foreign languages. A longing to erase earlier imputations of effeminacy is suggested by Wigmore's martial enthusiasms and his desire to be addressed as "Colonel" rather than "Dean."

A fanatical Freudian could easily see Wigmore's hasty marriage and acceptance of a teaching post in Japan, both opposed by his parents, as efforts to escape the clutches of both his real mother and his alma mater. The fact that he spent his entire academic career in Chicago could be explained by a need to position himself at an equidistance, both culturally and geographically, between San Francisco and Cambridge — those terrifying symbols of maternal power. Finally, a resentment at his own father's apparent inability to prevent his son's emasculation could provide a motive for Wigmore's filial piety toward powerful judges.

Like Bentham, Wigmore had little experience as a lawyer and, so far as I have been able to determine, neither of the "great theorists" of evidence ever tried a case. Worse yet, both were childless. Children have a remarkable capacity for tempering exuberance regarding the possibilities of rational governance, even of the most paternalistic kind. Wigmore's political beliefs may also have been influenced by the experiences of his boyhood chum, Abraham Ruef, whom Wigmore once joined in a group to study civic problems in his native city. Ruef later became the colorfully corrupt political boss of San Francisco and

eventually earned a place among the citations in his old friend's treatise under the category of "other crimes" evidence in cases of bribery.

Twining describes Wigmore as a "conservative," but can be no more specific about his politics than to suggest that some of his views "alienated liberals." His biographer was surprised that Wigmore considered himself a Democrat, but we can avoid such anachronistic amazement if we recall that Ruef was a Republican and Stephen J. Field, another ex-San Franciscan whose hostility toward left radicalism resembled Wigmore's, spent much of his career on the Supreme Court lusting after the Democratic presidential nomination. Wigmore, like Field, was a rabid red-baiter, attacking Felix Frankfurter for giving aid and comfort to the cause of Sacco and Vanzetti. He also supported the lawless actions against the left carried out by the infamous Attorney General A. Mitchell Palmer. Wigmore not only refused to debate civil liberties with Roger Baldwin, but also tried to prevent the founder of the American Civil Liberties Union and Clarence Darrow from speaking at Northwestern. Dean Wigmore forced his students to sign a loyalty oath, but felt that academic freedom barred student criticism of his own poor teaching.

Wigmore, like most of Bentham's modern American disciples, was an elitist. He blamed many of the law's problems on the admission of the "hoi polloi" to the bar and the elevation of some lawyers of humble origins to the bench. Wigmore opposed the election of judges and thought that it would raise the standards of the bar if steps were taken at Northwestern to make it more difficult for students of modest means to matriculate there. His definition of "democracy" was "the progress of all under the *leadership* of the wisest and the best."

Given these attitudes, Wigmore's preference for bureaucratic government and his contempt for legislative politics is quite natural. Predictably, he thought military justice was superior to that which could be found in civilian criminal courts, and he once strayed so far from the anticlericalism of Cambridge as to admire the hierarchical politics of the Roman Catholic church. In later years, his paternalistic notions of government led him to praise Mussolini as "the Roosevelt of Italy" and to insist that "fascism has saved Italy." Is it possible that his desire to see America led by a similar "bold genius" reflected a yearning for the support he felt had been denied him by his own father?

(This is silly stuff — but is it any sillier than most of what passes for psycho-biography? The point is not to be intimidated by "intellectual history." It is a game that can be played, even solitaire, by anyone; all that is required is a pack of lies and a Pound of malice.)

* * *

In Chapter Three, after his sketch of Wigmore's personality and an attempt to assess his place in the history of evidentiary scholarship, Twining turns to a comparison of Wigmore and Bentham, persua-

sively demonstrating that their similarities are more salient than their obvious differences. There follows a section on "the genesis and conception" of Wigmore's *The Principles of Judicial Proof*, describing what Wigmore hoped to accomplish with this volume and trying to explain its relationship to the more massive and familiar treatise. Only then does Professor Twining get to the heart of his argument; namely, that Wigmore's reductive and inductive creed offers a "comprehensive interdisciplinary theory of evidence and proof, which incorporates the legal, logical, psychological and scientific aspects of the subject within a single coherent framework."

Sensing that in this battle he is badly outmanned (though not out-weaponed), Twining opens hostilities with a preemptive strike against actual and potential opponents. Those who fail to understand the merits of Wigmore's methodology must, according to Twining, be either (a) conservative, (b) too literal, (c) lazy, (d) irrational, or (e) all of the above. He obviously has my number. To avoid any massive retaliation, my counterattack consists of a series of "surgical strikes" at carefully selected targets.

* * *

Twining suggests that Wigmore believed that his analysis provided "a systematic reconstruction of what good trial lawyers do all the time," a view Twining apparently shares. Of course, theorists always hope that their ideas are of practical as well as academic use. But since Wigmore was never a trial lawyer (and the dust jacket is silent on the matter of Twining's forensic experience), one may well ask how he (or Twining) could know what "good trial lawyers do all the time." As Twining's account shows, there is no evidence that "good lawyers" or those aspiring to be such were buying Wigmore's *Principles*. Moreover, if one reads the books lawyers do buy — the "how-to-do-it" revelations of notorious or merely ambitious advocates — one is hard pressed to find more than trivial uses of anything like Wigmorean analysis. This does not dispose of Twining's argument that good lawyers are doing Wigmorean analysis, but like Monsieur Jourdan, they are too stupid to realize what they are up to. But it is noteworthy that clinical professors of law, who are devoting some effort to finding or developing paradigms of "good lawyering" have found Wigmore's book to be of limited use. But perhaps all the clinicians I know are lazy or irrational too.

* * *

Twining argues for the use of Wigmore's "chart method" of analyzing masses of evidence, claiming that it forces us to articulate all the steps in reasoning from the proffered evidence to the factual conclusion to be proved, thus insuring that "we can spot the vulnerable points." To illustrate the power of Wigmorean analysis, Twining uses the example of a murder case in which a scrap of cloth in the hand of

the victim matches precisely a hole torn in a coat found in the closet of the accused. Here are the first two steps in Twining's proposed Wigmorean analysis of this evidence:

- (1) The scrap of cloth fits this coat; therefore the scrap came off this coat;
- (2) The scrap came off this coat therefore, this coat was worn by someone other than the victim at the time of the assault.

Can you spot the flaw? Twining doesn't, even though (or, perhaps, because) he uses scientific symbols and numbers to assist in stating these two propositions. I suppose that this simply proves that I am one of those literalist fellows who are irrationally skeptical about "careful analysis."

* * *

The weakest element in Wigmore's "science" was his insistence that logic in litigation should be inductive rather than deductive. At this point in his defense of Wigmore, Professor Twining is in deep trouble ("and he knows it!") because even Wigmore had to concede that every step in inductive reasoning depended on an unstated assumption or generalization — what would be the major premise if the logic of litigation were what Wigmore called "the syllogistic or deductive form." For example, to go from direct testimony that "Cain put a pistol to Able's head and blew out his brains" to the factual conclusion "therefore Cain killed Able," we must rely on generalizations such as "people whose brains are scattered on the ground have a limited life expectancy" or "to blow someone's brains out is what the law means by 'kill' " or even "guns don't kill people; people kill people."

Professor Twining understands that an insistence on inductive logic is inconsistent with his claim that Wigmorean analysis helps us spot flaws in reasoning, because one of the defects in inductive reasoning is that it conceals defective or weak major premises that would be exposed if we were forced to cast the line of proof in a syllogism. It is less clear that Twining sees that deductive analysis would undermine Wigmore's claim that there are only five modes of proof and that these are capable of containing any proper chain of inferences. In a footnote buried in the back of the book, Twining comes near to admitting that Wigmore was wrong. But up front, where it counts, he pretends that Wigmore's fetish for induction is defensible, even if deductive reasoning is preferable. Why does he do this?

We must use inductive reasoning, Twining tells us, because "it is rarely possible in judicial proof to establish a major premiss which is both universal and true." Moreover, to use deductive reasoning would not benefit a lawyer "because it would merely shift the court's attention to the major premiss of the syllogism." This will not do because it would encourage "a form of skepticism . . . inappropriate to the practical conduct of litigation." Worse yet, "to harp continually on the falli-

bility of common sense and the relativity of knowledge would be to open up a Pandora's box of doubts in a way that would be inimical to the smooth conduct of practical affairs and public confidence in the legal system."

If we can translate this into plain language, what Twining here acknowledges is that if it ever gets out that the choice of the major premise is arbitrary, even political, the whole edifice of rationality erected around the power of the courts by Twining, Bentham, and Wigmore collapses. The virtue of inductive reasoning for Twining & Co. is that, like utilitarian (or instrumental) argument, it gives the appearance of having cleansed power of the subjectivity of values while actually doing no more than shoving values offstage where their influence is not visible to the suckers in the crowd. To admit that litigation involves conflicts of values even when the dispute is cast in terms of fact would be to confess that the trial is a political undertaking in which "truth" is manufactured, not unearthed.

* * *

"General knowledges are those knowledges that idiots possess."

— William Blake

* * *

Twining provides an account of Wigmore's opposition to the *Model Code of Evidence* that goes well beyond the conventional explanation of conservatism and turf-protection in explaining how Wigmore split from the Progressive Proceduralists (of whom, more anon) over the question of reform. Yet for all its nuanced sensitivity, Twining's version remains incomplete because it omits too much of the underlying politics.

It needs to be kept in mind that reform of the rules of evidence was simply a minor part of a broader Progressive agenda for the redistribution of political power through procedural means. This program was not limited to the courts (consider the campaign for municipal reform that eventuated in the city-manager system of urban misrule), nor was it consistently antidemocratic (consider the initiative referendum and the recall — even of judges and judicial opinions), but it was highly elitist. In the case of judicial reform, the underlying thrust was toward a centralization of power in the judiciary and the increasing insulation of that power from popular control; judges were no longer to be elected (this was misleadingly called "taking them out of politics"), and they were to be given greater powers over the attorneys, parties, and juries. With respect to rules of evidence, as the *Model Code* demonstrates, this meant transforming what had heretofore been rights (actually "powers") of exclusion in the parties into a discretionary authority in the judge.

On such technical questions of power distribution, the usual labels of "conservative" and "liberal" are not very helpful in describing the

positions of various members of the elite. Though often considered a "conservative," Wigmore was not unsympathetic toward the aspirations of the Progressive agenda and he was certainly not opposed to change, even radical change, in rules of evidence. His disagreement with the American Law Institute was political in another sense — it was disagreement over the strategy and tactics of reform. As to the first, Wigmore felt it was a mistake to confer so much power on trial judges before those judges had been insulated from popular influence. Conversely, he assumed that once we had "better" (for which read "upper-crust") judges and lawyers, the need for drastic reform in the rules of evidence would diminish. (Twining can be pardoned for not realizing how politics is encoded in the Progressive lexicon; most American proceduralists are similarly innocent of any such political perceptions.)

Wigmore also feared, correctly as it turned out, that it was a tactical mistake to propose so many sweeping reforms at a time when the bar had yet to be cleansed by educational reforms (the aforementioned exclusion of Slavs, Jews, Italians, et al., from law schools) of its "undesirable elements," who in combination with bar association reactionaries and fellow ethnics in the legislature had more than enough power not only to defeat the reforms but to discredit the reformers. It is a good guess that one of the reasons Wigmore proved to be the more astute politician and conservative reformer is that in Chicago it was easy to gaze out across the heartlands and see that Anglophilia had become little more than an oil slick on American culture — a thin but deadly mass that was increasingly harder to hold together. Out where people had cheered for the Germans in World War I and the Socialists in local elections, it was easier to see how the powers the *Code* created might fall into the wrong hands.

There is, of course, more to it than this. But then, there always is, isn't there?

* * *

Although Wigmore, like others of his generation, liked to invoke the name of "science" to exalt his own politics, Twining tells us he "did not theorize much about his conception of science." The same could be said of Twining, but this does not inhibit him in tossing the word about with reckless abandon. The only sustained discussion of "science" and proof appears in a discussion of Wigmore's interest in psychology. Twining points out that Wigmore focused his attention on the cognitive processes of witnesses and had little interest in applying psychological analysis to the other participants in the trial. This is not surprising if we think about Wigmore's political agenda. He would not care to admit that his anxieties about the reliability of witnesses could with equal justice be transferred to jurors, lawyers, or

(God forbid!) to judges, because this would blemish his picture of the trial as a scientific inquiry into "truth."

Twining concludes that Wigmore had "a somewhat monolithic view of science." What he means is that Wigmore usually overlooked the fact that many of the "scientific" principles he espoused were the subject of vigorous debate among real scientists. Twining might have added that Wigmore, like many legal writers, appears to have been ignorant of the politics of science. In science, as in litigation, what counts as "truth" is the product of a complex set of interactions among ambitious people operating within a procedural framework that prescribes what will count as evidence and what the proper modes are for validating claims, all resting on and implicitly invoking a set of values and assumptions that are motivated as much by politics and habit as by rational inquiry.

Before we consider whether Twining's views of "science" are an improvement on Wigmore's — a digression.

* * *

The title of Twining's book is *Theories of Evidence*. The two works he discusses are said to be efforts to "develop a broad general theory of evidence and proof." The words "theory" and "theories" are scattered across its pages. Yet nowhere does Twining tell us what he means by "theory." This is most un-Benthamite. The old boy was fanatic in his insistence on the use of clear definitions in legal writing.

It is not easy to discern his meaning from Twining's use of the word. At one point he says that since World War II "Wigmore's general theory of evidence was widely thought to have been discredited." On the next page we are told that "he was not treated as having a coherent general theory" and that his treatise "does not contain an explicit and coherent general theory." But this is followed by the assertion that his *Principles of Judicial Proof* "contains the most articulate and coherent statement of the general theory underlying all his writings." At one point, his claim that there has been a "resurgence of interest in theoretical aspects of evidence" is supported by citation to the glut of articles in which legal writers attempt to apply their understanding of mathematical theories of probability to the problem of burden of proof, to the increased efforts of psychologists to say something useful or meaningful about the process of proof in litigation, and to the revision of one of Wigmore's volumes on relevance — surely a very mixed bag of "theory." Still later he constructs a pantheon of evidence "theorists" consisting of Gilbert, Bentham, Stephen, and Thayer; but from my own reading of them, as well as Twining's descriptions, it is clear that all of these save Bentham were concerned more with evidentiary doctrine than with anything like a "theory" of proof.

A clue to his meaning appears in Twining's defense of Wigmore's

"chart method" of analyzing masses of evidence — Twining says it is "an excellent pedagogical vehicle for teaching rigorous analysis and for exploring a variety of issues in the theory of evidence." The reason Wigmore wants us to draw pictures of "lines of proof" is so we can see "why a total mass of evidence does or should persuade us to a given conclusion." Note the ambivalence: "does" or "should." A trial lawyer, and a certain kind of theorist, would be quite interested in why evidence "does" persuade. But what kind of theorist would care about why it "should" have probative force? One like Twining.

A Wigmorean chart, according to Twining, does not purport to depict "the actual judgements of decision-makers" but is "a rational reconstruction of what, in the chart-maker's view, *ought* to be the logical relations between the data." This sounds very much like "desire disguised as knowledge," which we may recall was Roberto Unger's definition of ideology. Is it also Twining's definition of "theory"?

* * *

Digression on digression.

Wigmore's charts resemble in form and function a military battle plan. The army of facts is drawn up in neat lines with arrows marking the point of the inferential onslaught. Colonel Wigmore, however, was never on a real battlefield — a distinct advantage when charting the supposed course of battle in the war room. But as anyone who has ever been shot at could have told the martial Dean, the battlefield, like the courtroom, does not have much resemblance to a chess board. It is filled with contingencies and the inexplicable contrariness of cause.

More suitable than military metaphors is one that my colleague Albert Moore employs in a work in progress. Instead of "lines" or "chains" of inferences, Moore refers to "inferential streams." This fluid imagery allows us to see evidence as a protean body of water that ranges from an inert mass that goes nowhere but impresses by its immensity to a clear sparkling mountain stream, a trickle of biting frigidity that follows the path of least resistance and is filled with unpredictable swirls and eddies (Morgan?), yet is capable of making an indelible impression on even the hardest rock. It warns us that the lawyer who attempts to dam the evidence in order to power a technology of proof may end up doing nothing more than polluting its clarity. And one who tries to sail to victory on an ocean of evidence may find himself becalmed far from shore, battered by an unexpected typhoon, or carried inexorably by silent currents into the Bermuda Triangle.

* * *

In his only concrete discussion of "science," Twining recalls Wigmore's well-known attack on Hugo Muensterberg for daring to suggest that forensic evidentiary techniques were psychologically naive, then goes on to explain that while disappointed at the "inability of the psychologists to come up with anything of practical value to lawyers"

Wigmore was really sympathetic to their efforts. Twining further recounts Robert Maynard Hutchins' conclusion that psychologists could provide little that was useful to his plan for reform of the rules of evidence. Twining adds that "the modern reader may find it sobering to note how little that is really usable in everyday practice has emerged in the last fifty years."

This is utilitarianism of the most fanatic sort. Psychology, we are to assume, is valuable only as it may be employed in the process of proof as it is presently conceived by lawyers and legal scholars. One is reminded of the generals who thought of the airplane as a new kind of horse. It does not occur to the instrumentalist legal thinker to wonder if perhaps the conclusion to be drawn from these close encounters of the first kind with psychology is not that psychology is barren, but that the rationalist conception of the trial is not particularly fruitful. To criticize psychologists because lawyers cannot imagine how to use their discoveries is like scorning Prometheus because fire does not make a very good blanket.

Twining's approach to psychology nicely illustrates one of the many grievous side effects of the instrumental mode of thinking that predominates in American, and apparently English, legal thought. Legal scholars approach other disciplines, whether they be science or history, not as neophytes seeking instruction in modes of thought that may enable them to see legal institutions in a clearer light, but as scavengers bent on looting adjacent fields of inquiry for whatever weapons may be useful in the one-sided political struggle called "legal scholarship." The Empire strikes back — again.

But why, in our search for what is "useful" in science, should evidence specialists confine their attention to psychology? Given the reductive passion of the "rationalist tradition," one might have expected legal scholars to penetrate beyond the surface appearance of the gross phenomenon we call "witness" to engage the underlying reality through excursions into neurobiology. But even cellular reality is far from the truly fundamental; we must whiz beyond the molecule and carry our search for the Ultimate Truth down to the real nitty-gritty — the world of particle physics.

At first glance, quantum mechanics would appear to be a discipline of great promise for Twining and his cohort of pseudo-mathematical truth-seekers. The world into which the physicists have plunged in their atom-smashing search for the fundamental units of existence is a weird domain populated from top to bottom with strange and colorful entities like the charming quarks that are endowed with such admirable qualities as "truth" and "beauty." Twining should find the quantum world appealing because in the land of quarks and gluons it seems that the ultimate truths are probabilistic, much as he and his throwers of computerized dice see the world of the trial.

But on closer inspection, the search of physicists for the "ultimate reality" provides not "the light of the noonday sun," but ultimate terror for the reductive analyst of legal rules. From the work done so far, it begins to look very much as though "there is no there, there" (hello, Los Angeles!), 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"), that electrons which put on the garb of particle and take a position when we are watching, begin to frolic as waves the moment our back is turned. Even the hardest "truth-seeker" must falter when faced with the possibility that Mother Nature is exactly the kind of wily woman our fathers warned us about. Elusive and without the Truth in Her.

* * *

"Yes, my heart belongs to Dada — da-da-da-da-da-da-da-da-da-da . . ."

— Cole Porter

* * *

For Bentham and Wigmore, if not for Twining, "science" is a mere metaphor. Like most metaphors, it is useful precisely because of its ambiguity, the ability to stand for many different things in the mind of the writer and the reader. For example, it seems likely that Bentham and Wigmore often invoked "science" only as a symbol for that state of mind that opposes religious or popular visions of truth — what Bentham derided as "superstition."

I suspect that for most contemporary legal scholars "science" is a metaphor of control. Faced with the daunting problems of pluralism, modern legal thinkers are not after that truth "that shall set ye free" to pursue an egalitarian politics, but after the information that is power and the power that is information. If "science" can master the Fruitful Mother of the contingent and diverse, then surely by applying the methods of "science," men of the world can subdue those struggling to free themselves from the world of men and its scientific determination of their status as inferior. "Science" is thus a substitute for politics as a technique for engaging the tumultuous subjectivity that surrounds us.

It is possible to turn the metaphor on its head (or as Real Men would say, "lay it on its back"). When men have attempted to control her, Mother Nature has proved a refractory bitch. Faced with a domesticity of dominance, She responds with an indiscriminate terrorism that strikes the repressor and the repressed alike on fields as diverse as Love Canal, Chernobyl, and Mount St. Helens. The nuclear genie regularly pops the cap on the bottle, new microbes rush to fill ecological niches vacated by viral victims of chemical warfare, and new needs to kill and coddle spring up faster than consumer culture can develop psychological pesticides. In short, the Science of Control is as prob-

lematic as the Politics of Control. Perhaps it is time to return to more primitive notions of how we relate to nature and neighbor but with a modern recognition that "subjectivity" and "objectivity," like Time and Space (or Man and Woman), are parts of a larger unity that can be seen only partially through reductive analysis or cosmic conceptions.

* * *

In a brief concluding chapter, Twining considers "The contemporary significance of Bentham and Wigmore." Here he expresses the hope that rules of evidence will diminish in importance so that evidence scholars, who are accused of stupidly supposing that "the subject of evidence is co-extensive with the rules of evidence," will turn their attention to the more important questions of theory and thereby rediscover how much "the rationalist tradition" has to offer. I doubt it.

It seems to me that Professor Twining is wrong to suppose that the opponents of the instrumentalist approach to evidence are unfamiliar with the ideology of Bentham and Wigmore. How could we be ignorant of it when we are being suffocated by it? We are skeptical "about the idea that rigorous rationality has much to do with trial practice," not out of ignorance, but because we have seen, before Twining wrote the words, that "the Rationalist Tradition . . . is rooted in a particular view of rationality" and that the choice of which rationality to embrace is a question of values; *i.e.*, that the issue is political. Some of us believe that it is to the present reality of the political struggle in the courtroom that rules of evidence and proof are properly addressed, not to the reconstruction of some unknowable past or the building of some future utopia. We reject Wigmore and Bentham, not because we are lazy and irrational, but because we believe it to be both irrational and wrong to try to conceal values, to slide them offstage and pretend they have no influence on the visible drama.

* * *

A fact that Twining observes but does not know what to do with is that both Bentham and Wigmore often adopt a (noninstrumental?) acerbic tone in their writings. One of Bentham's early reviewers was "fatigued" by Bentham's "extreme polemical tones" — "such indiscriminate, fanatical, and interminable abuse." Wigmore's teacher, John Chipman Grey, in his admiring notes on the treatise — a "colossal book" — criticized his former pupil for "irritating faults" such as "abusive language" and thought it "bad grace from an unexperienced person" to come across as "a man volubly scolding in unfamiliar language." Twining notes that a reviewer faulted Bentham for "bad diplomacy" in "making lawyers the scapegoats" of his critique, just as McCormick once thought that it was not sound strategy for Wigmore to "lash the judges . . . with the whip of scorn." Yet ironically it was

lawyers who carried many of Bentham's procedural reforms to fruition and judges who made Wigmore's tone so authoritative that fifty years after his death his language has been preserved intact while the gentle McCormick's hornbook has been hacked to pieces by an irreverent mob of revisors who did not blush at having the ghost embrace ideas that the man had rejected during his life.

Twining also notes that Wigmore wrote "in a magisterial style which suggests that there is little scope for argument or doubt" and that "[h]is views were clearcut, forcefully expressed and not always entirely consistent." Bentham, too, Twining tells us, relied on "the sustained, indeed relentless, application of a few simple ideas." He might have added that this avowed "rationalist" made much use of rhetoric and ridicule in his arguments, dismissing opposing arguments as "the Chinese Argument," "the fox-hunter's reason," and (goodness gracious!) "the old woman's reason."

To Twining, these excesses suggest that Bentham fell into his own category of "vituperative personalities." Readers with some acquaintance with theological discourse may think it more to the point to see Bentham and Wigmore as practitioners of "the prophetic style." Both of these "theorists" hope to persuade by prophecy, to hint at coming doom and point the path to redemption in hopes that readers would choose Heaven over Hell. Like most successful prophets, their specifications of calamity tended to be vague; nothing is more destructive of the power of prophecy than to have predicted last Tuesday as the day of Armageddon. Similarly their schemes for salvation were so extreme that there was little danger that they would ever be tried and found wanting. As the Free Marketeers insist, partial implementation is not an adequate foundation for disproof.

There is some evidence that Bentham saw himself as the destroyer of the Established Paganism and the prophet of a new scientific religion. In *The Rationale of Judicial Evidence* he wrote: "Near 300 years has religion had her Luther. No Luther of Jurisprudence is yet come; no penetrating eye and dauntless heart have as yet searched into the cells and conclave of jurisprudence." Not until Bentham, who added to his self-portrait the hope that the Profit of Jurisprudence would find a "new path to fame" by combining "the talent of Blackstone . . . with the sagacity and probity of a Father Paul." Aware that the New Church would need relics, Bentham had his own body posthumously stuffed and mounted on a chair, suggesting that it should thereafter be venerated at gatherings of the faithful. It is a shame that Twining did not use photographs of this "auto-icon" and of Wigmore's mausoleum at Northwestern to adorn the dustjacket of his book instead of the unrevealing portraits of the two "theorists" that now appear there.

It is hard to explain why Twining does not see "the Rationalist Tradition" as another religion, a cult of control. In his book on the

Legal Realists, he quotes Holmes' put-down of Langdell as a "theologian," describes the Harvard Law School as the seat of a "legal theology," and recognizes that for many of the Realists law was merely "a means of social control." Here, however, he treats the two prophets of the sado-masochistic sect as expounding a scientific theory of proof rather than a credo of control.

* * *

In the Western way of thinking, every church must have a Credo. Since neither the Father nor the Son seems to have provided one for the True Believers in Evidentiary Instrumentalism, Brother Twining has derived one from his scrutiny of the sacred texts. He calls his creed "The Rationalist Tradition" and sets it forth in a series of propositions and a "rationalist model of adjudication" that spreads across four pages in the first chapter. Anticipating the attacks of schismatics, Twining divides the followers of Bentham and Wigmore into the aspirational, the optimistic, and the complacent. As in any theology, one assumes that the greatest number of clerics falls into the last group. My concern here, however, is not with niceties of doctrine or internecine struggles over the power to excommunicate, but rather with a sociological analysis of this dogma; that is, I wish to examine the practices of the complacent rather than the optimistic or aspirational rhetoric of the concerned.

For a number of years I have been engaged in a participant-observer study of the American branch of this sect. By watching both what its practitioners do and say when not practicing theology, I have drawn certain conclusions concerning the operational, as distinct from the aspirational, tenets of their faith. I set these tenets forth as a set of propositions resembling in some slight degree those of Brother Twining, hoping that this will not be seen as blasphemous, in an attempt to show how the religion-in-practice complements as often as it contradicts the canon according to Twining.

* * *

Brother, can you paradigm?

* * *

(1) The supreme value is the survival of the species. (Of course, there is room for disagreement as to who counts as a member of the species and whether or not the continuation of the chemical components of existing specimens can be considered "survival.")

(2) The highest human characteristic is rationality because it is this quality that permits us to dominate nature, be dominated by other men, and, thus to survive as a species.

(3) Rationality is a scarce commodity, and it has been unequally distributed among existing components of the species. (There is much dispute about the degree to which both scarcity and inequality are natural arrangements or social conveniences.)

(4) Rationality cannot be satisfactorily defined to the satisfaction of all and the underendowed have great difficulty in comprehending its magnificence, but those who possess it can recognize it in themselves and in others. (It is for this reason that rationality is sometimes equated with pornography or, to use the legal term, obscenity.)

(5) Force is the great enemy of rationality because the capacity to use it has not, historically at least, had any direct and positive correlation with the capacity for rational thought.

(6) The function of government is to conscript force into the service of rationality. (There is a much-disputed corollary that rational men have no need for, indeed are exempt from, government; even more controversial is the proposition that if all men were rational there would be no government.)

(7) Democracy is a procedural device (or ceremony) in which rationality bows (or appears to bow) to force. (Here, too, there is dispute between those who think the procedure can be dispensed with when rationality has commandeered sufficient force and those who have a nostalgic fondness for obsolete procedures or persistent doubts about the sufficiency or trustworthiness of the available force.)

(8) The most important product of government is order, defined as "behavior that follows expected modes of thought and action." (The expectations are, of course, those of the rational.)

(9) The great enemy of order is disputes because, in disputing, unexpected thoughts or actions are manifested or incited.

(10) There are two kinds of dispute — rational and irrational.

(11) Rational disputes usually (perhaps exclusively) involve the ownership or entitlement to scarce material resources; disputes over limitless resources like the air or opinions, and disputes involving questions of subjective values, are irrational.

(12) The major task of procedure is to deploy a limited amount of rationality so as to obtain the maximum possible order.

(13) A rational procedure provides separate methods (and institutions) for rational and irrational disputes, committing greater amounts of rationality to those institutions that handle rational disputes and lesser amounts to those whose subject is subjectivity.

(14) In our culture, institutions for resolving rational disputes are called "courts"; those that traffic in irrationality are called "legislatures." (The executive is an agency that combines rationality and force and it is the fallback institution for those disputes that cannot be adequately disposed of by courts or legislatures or both.)

(15) Rational disputes may be true or feigned.

(16) A true rational dispute arises when one or more of the parties has an honest but irrational set of expectations or an unwitting false perception of events, or both. In a feigned dispute either the asserted expectation or claimed perception is knowingly false.

(17) The goal of litigation is to punish those who feign disputes and to correct the false expectations or perceptions of honest disputants.

(18) An expectation or perception is false if it does not conform to established standards of expectations or perceptions.

(19) Established standards of expectations are called "The Law"; established standards of perception are called "The Truth." (It was once thought that The Law was the province of Experts, but that anyone could know The Truth; this now seems to have been disproved by The Experts.)

(20) The only function of a trial is to create and enforce The Truth.

(21) The purpose of rules of evidence is to foster the Basic Truth.

(22) The Basic Truth is that the social world consists of (a) material objects and events that can be perceived in a single uniform fashion by all rational men (and, lately, women), save those who suffer defects in their perceptual organs, and (b) imaginary substances called values that are unfortunate vestiges of our former existence as animals, retaining a stronger or weaker grip on individual members of the species as a function of their progress up the evolutionary ladder to the Nirvana of Pure Materiality.

On second thought . . . this is all useless because Twining could undoubtedly prove, as he did in the case of the Legal Realists, that nobody believes all this stuff. They don't, do they?

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"We all live in a Yellow Submarine."

— Lennon

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We may now return to the question that has troubled us (that's "U.S.," folks) from the beginning of his book; namely, why Professor Twining is at pains to insist on such a thing as the "Rationalist Tradition" if, as he also wants to argue, that decidedly wet blanket covers anyone who ever wrote on the subject of evidence in the English language?

My first suspicion was that the category had imperial motivations; that is, Twining wanted to obtain for himself a right to censure American courts that he had not earned by reading the cases. If Bentham were the Pope of Evidence, then Twining as an agent of the Vatican was in a better position to sniff out heresy in the provinces than local priests whose nostrils might be too acclimated to exotic odors to detect the first whiff of unorthodoxy.

My second conjecture was similar, though in some respects the reverse of the first; that is, Twining invokes an Anglo-American empire of evidence to arm himself against domestic foes. In other words, like Mrs. Thatcher, he is well aware that it is England that is now the

colony and that the path to personal power and profit is collaboration with the conqueror. This scenario also has its moral aspect since in a peculiar way it makes us all Quislings but allows Twining the ethically superior position of having betrayed his countrymen to a real rather than an imaginary power.

But if Twining is to be trusted, neither of these scenarios seems to work because according to him the Rationalist Tradition has no foes or heretics. This is, at the very least, bad drama. Every neophyte playwright is told that drama requires Conflict, that Conflict requires Antagonist and Protagonist. Since Professor Twining apparently has no Real Enemies to add spice to his intellectual romance, perhaps we had best provide him with some imaginary foes — a phantom school of thought against which The Rationalist Tradition can compete for hegemony.

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A Manifesto of Legal Irrealist Disbelief

We do not believe in a hierarchical kingdom of human faculties ruled by a mathematico-verbal monarch. We think that it is possible to know that for which there is as yet no word and to communicate that which cannot be described. It is our Faith that the fastest tongue in the West is no more entitled to rule than the fastest gun.

We are irrational. We believe that there is a multitude of rationalities; the choice of what is to be taken as “reasonable” is as much a political decision as the choice of what is “desirable.” We reject those Ratzingers of Rationality who assert that an intellectual orthodoxy can be overthrown only by means that it is prepared to recognize as legitimate. We do not intend to let anyone dictate to us the terms on which our beliefs are to be justified, whether the dictator is armed with an English accent or an Israeli sub-machine gun. (Tenure? Let’s talk. . . .)

We say “beliefs” because we do not think that there has ever been an intellectual system that did not begin (and often end) in something as simple and irrational as an Act of Faith. (An *auto-da-fé*, as they used to say.) A good example is Bentham, whose whole life’s work rested on the faith that utilitarian arguments were capable of persuading those with most to lose from utilitarianism to accept it. If we must have faith to act, then we see no good reason not to put our faith in the multiple mentality of the many rather than in the singular talents of some specialist in Pure Thought.

We are not opposed to logic any more than we are opposed to art. We would like to be able to know the limits and strengths of each. But we suspect that like runners and weightlifters, intellectual athletes are inclined to exaggerate their exercise of the mental muscle. Bentham, for example, did not oppose slavery on utilitarian grounds, and his

preference for democracy was based upon an undernourished logic. We doubt that many adherents of The Rationalist Tradition would reject Hitler's slaughter of Jews, Slavs, and Gypsies on the ground that genocide was not a rational response to the problem of pluralism. If feelings are an appropriate response to atrocities like these, we see no reason why, with proper exercise, sentiment might prove an able ally of reason in areas where it has previously been little more than a slave.

One of the major tasks of any system of thought is to discover those procedures by which it can coexist with other subjectivities. In its interior manifestation, this is a problem of psychology; on the exterior this is one of the meanings of "government." As Irrealists, we believe that peaceful if necessarily stressful coexistence is preferable to imperial strategies of conquest or subordination. Devising procedures by which this can be done is more an art than a science. Art is more tolerant of paradox, it teaches us to expect the unexpected, and it is more reverent toward the mysteries of existence than that "cow on stilts" — science. It is through art that we may come to sense that a condition of our own uniqueness is the singularity of other subjectivities, that pluralism is more promise than problem, and that somewhere in our souls there is sufficient similarity to permit us to survive each other without conquest or cloning. We accept objectivity; but we glory in subjectivity.

But to get down to cases. If, as we believe, government is an art rather than a science, then litigation is a kind of political theatre. A trial is the present re-presenting the past (or sometimes pre-scenting the future) through the use of human speech and posture and the manipulation of places and things. To make it faithful to the past requires a close attention to the presentness of the production; to be real, steps must be taken to make it unreal. The light that is cast across the stage is not the light of the sun that shone, and persons that move upon it are both more and less than they are (and were) in real life. If characters try to play themselves without close attention to the theatrical demands of the court, they quickly become cardboard.

This theatre is, we must emphasize, political; it both presents and re-presents power relationships. It is the allocation of power on stage, and to some extent off it as well, that is the task of procedure; rules of evidence more resemble job descriptions than they do yardsticks for measuring Truth. Is the judge to be merely the stage manager or is he also the playwright? How much freedom do the characters have to improvise, to tell their own stories, and how constricted are they by the scripts that the law provides? The sorts of scripts the actors can play limits the power of the jurors when they gather to write what it is hoped will be the last act before ". . . and They lived happily Everafter."

Our theatrical vision of litigation grants Logic a role in the trial,

but only a walk-on. It is important to recognize that the "science" on the forensic stage is only a pretense, the representation of the Real Thing. This has implications for the amount of information we will require or tolerate. We cannot do *Nicholas Nicholby* every night. But if we recognize the difference between a biology text and *Moby Dick*, we can question whether our forensic Melvilles really need to give us *all* they know about whales. The problem with our present system is that whether the party can emulate the massiveness of Mahler or is to be restricted to the miniatures of Mozart is left to the judge for indirect regulation limited only by a highly politicized notion of what is and is not a Big Case. We could go on milking this metaphor, but . . .

Once "science" has been put in its place, we can focus on fairness. The insistence of Progressive Proceduralists that factual accuracy is the fundamental concern of rules of evidence has done little more than confer on judges vast powers that have been used to deny some parties the right to tell their own stories. Inductive logic and the hegemony of substance over procedure are tools by which the government portrays its political opponents as criminals. For example, in a recent sanctuary trial the judge refused to allow the defendants to show the illegality of the government's proxy war in Central America and the political use of the powers of the I.N.S. that had led them to resort to civil disobedience; then, in sentencing them, the judge castigated the defendants for their failure to trust the government.

Such unfairness is not limited to political trials. Our rules governing character evidence give the prosecution a rather free hand to bring the defendant's misdeeds before the jury but prohibit the defense from showing specific instances of admirable conduct. There is a new privilege for the trysting spots of police spies, but none for lovers. The location of a vehicle identification number is likely to be excluded from evidence, but a mother's conversation with her child won't be. Computerized business records are not barred by the hearsay rule, but the family checkbook is. In Dalkon Shield litigation, some judges thought rationality required them to permit the corporate defendant to spread the victim's sex life before the jury, while not letting them hear of the corporation's contempt for human life or its efforts to cover up its crimes. This listing could be greatly extended, but this should suffice to show why we do not join Professor Twining in applauding the sterile debates on probability that fill the pages of our law reviews, though we would have to concede that he is probably correct to think that they represent a Renaissance, if not the Apotheosis, of the Rationalist Tradition.

Viewing litigation as political theatre should broaden the field of procedural inquiry to include other types of political drama — or dance. If we understand that a trial is no more rational than a Presidential election, scholars as well as lawyers can learn from the uses to

which evidence, science, and art are put by those who stage our electoral extravaganzas. If the goal of rules of evidence should be the equalization of the political power of the participants, then *Robert's Rules of Order* is a more promising text than an elementary treatise on probability theory. Perhaps most important to the Legal Irrealist, this requires a turn away from the stifling uniformity of Psuedo-science toward the diversity, the complexity, the contingency, and the craziness of contemporary culture. We disbelieve that the dull could ever be Divine.

* * *

"Things are mending now, I see a rainbow blending now . . ."

— *Taking a Chance on Love*

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If the Reader has not long ago thrown up her hands in disgust and gone on to more profitable activities, she is undoubtedly waiting for the obligatory "good news." There is none. Worse yet, she will have to read the book for herself and make of it what she will. I hope that in the pages allotted me by the editors I have demonstrated that my response to Twining could easily exceed his book in length and scope — a desirable but infrequent occurrence in my experience. I should add that in the wild, Twining flies more freely and gives more pleasure than when pinned to the board as a mere specimen.

I hope, however, that in his future work Professor Twining will get off his Yellow Submarine and look with some care at the ocean of intellectual history that separates us. While my major concern is with the impact of his imperialist ideas on those political pubescents in this country who continue to believe in the cultural superiority of England, I do not look with equanimity upon the possibility that he may have encouraged those multinational masters of the McDonald's mentality who would replace delightfully disgusting English institutions with the franchised products of American intellectual imperialism. *Royall's Revenge Reversed* is not a tragicomedy that appeals to me.

Welcome to California, Professor Twining. Vamoosel