EVIDENCE IN CONTEXT

ROGER COTTERRELL

William Twining. *Theories of Evidence: Bentham and Wigmore*. (Stanford, CA: Stanford University Press, Jurists: Profiles in Legal Theory, 1985). x + 265 pp. Notes, appendices, bibliography, index. $29.50.

William Twining's *Theories of Evidence* is a fascinating attempt to retrieve a largely forgotten part of the heritage of legal theory concerned with evidence and proof in legal contexts. As such his goal is to show why at least some of this material should be dusted off and pressed into service in contemporary legal scholarship. Twining is primarily concerned with Jeremy Bentham's iconoclastic analysis of the *Rationale of Judicial Evidence*, published in 1827, and John Henry Wigmore's attempt to develop a general "science" of proof to underpin the law of evidence in his *Principles of Judicial Proof*, first issued in 1913. At first it would seem hard to find two more different characters around which to build a book. Bentham, the English philosophical radical, was an impatient innovator with few self-imposed boundaries to his systematic intellectual inquiry, the opponent of virtually all firm rules of evidence, and the scourge of the legal profession. By contrast Wigmore, the conservative American law professor, rigorous technician of evidence law, and author of its greatest treatise, was a man committed to the discipline of law (although a dabbler in other fields), thoroughly immersed in the ethos of the legal profession, and ultimately a staunch defender of what he saw as its values.

Indeed, only in the rather rarefied world of what Twining calls evidence scholarship could these radically different characters be brought together. Here, however, they can be seen as the two outstanding theorists of evidence and, despite all differences, are joined as preeminent representatives of what Twining terms the Rationalist Tradition in evidence scholarship, which he defines as a complex of epistemological assumptions and conceptions of the underlying values and purposes of adjudication and proof that unite mainstream Anglo-American writing on evidence. Among these elements are a preference for correspondence rather than coherence theories of truth, an emphasis on induction as the characteristic relevant mode of reasoning, a high (but not overriding) value attached to the pursuit of truth as a means to justice, and a

LAW & SOCIETY REVIEW, Volume 21, Number 5 (1988)

belief in "rationality" as a realistic aspiration of adjudicative and evidentiary procedures. What is excluded from this tradition is a whole range of "skeptical" positions on evidence and proof, including sociological and psychological revelations of the realities of the courtroom and Marxist critiques of legal doctrine and ideology. Nevertheless, Twining (pp. 177–178) claims here (and more fully in other writings: 1 Twining, 1984) that most of these "scepticisms [sic]" do not completely free themselves from the standards of the Rationalist Tradition. What he presents as this tradition is thus a powerful intellectual core around which numerous excluded modes of inquiry float, unconnected in any systematic way, yet not entirely unrelated. Lying behind the book's exposition of the doyens of the Rationalist Tradition is the assumption that all of these divergent forms of inquiry must somehow be integrated into a coherent intellectual field of evidence scholarship.

Much of the book is, as Twining (p. ix) admits, "more expository than critical." A short first chapter reviews the history of Anglo-American evidence scholarship, and a final one briefly assesses the contemporary importance of Bentham's and Wigmore's work. The heart of the text, however, is in two long essays. The first of these sets out Bentham's antinomian thesis ("a more radical rule-scepticism [sic] than can be attributed to any American Realist" [p. 66]) and the essence of the "natural system of procedure," which Bentham advocated in contast to the "technical system" with its convoluted and irrational rules serving the interests of only "Judge and Co [sic]" and those who would seek to abuse the litigative process. As Twining (p. 43) shows, what is most interesting about Bentham's work is the "sustained, indeed relentless, application of a few simple ideas to demolish one by one the whole complex structure of the technical system."

The essay on Wigmore, although shorter, is in some respects more interesting, partly because it treads less familiar terrain and partly because it attempts a perhaps almost impossible intellectual rehabilitation. Twining (p. 164) aptly terms Wigmore's strange, maverick *Principles* a "lead balloon." The book, presented as a practical manual that nonetheless sets out a general theory of proof on an interdisciplinary basis, seems to have almost totally failed in its objectives. It was hardly used as a teaching tool and was never taken seriously as a work of theory. In part Twining attributes this to the impenetrability of Wigmore's chart method, with its reliance on a system of symbols, and in part to the method of exposition that treats the "science" of proof as a matter of techniques and methods to be learned rather than theses to be defended. In Twining's (p. 142) view, however, the *Principles* "still provides by far the best model for coherently integrating and mapping connections between the logical, psychological, scientific and legal dimensions of proof."

It must be said that the defense of this claim is not particu-

larly convincing. Even Twining avoids imposing Wigmore's symbol system on the reader and claims that the chart method can be understood without this aspect. Unfortunately, however, there is no adequate demonstration of just what is to be achieved from this method, which Twining's discussion holds as the core of Wigmore's "science." It does make possible the systematic organization of very varied evidential material. However, Twining (pp. 174–175, 185) largely rules out its utility for the practicing lawyer in the trial context and expects considerable distrust even from academic specialists. Only in the teaching situation does Twining seem to feel confident enough to claim that this method has definite value—to aid the clarification of thought and to emphasize the "hard work" (p. 186) involved in seriously thinking through evidential propositions. He also suggests that Wigmore's work is currently being used productively in relation to some of the newer types of inquiry about evidence and proof. In addition, Twining argues that Wigmore's simple foundation conceptions have merit, although much of the material they organize in the *Principles* is outdated. It remains to be seen whether the "lead balloon" will fly.

If the important complementarity of Bentham's and Wigmore's analyses of evidence and proof is granted, one is still left with the feeling that Twining's book is dealing with writers very much further apart in their views of theory than he wishes to admit. Bentham's evidence project was ultimately part of a far wider intellectual pursuit in no way limited by the concerns of the practicing legal profession, of law as a discipline, or of those wishing to give intellectual coherence to the field of evidence. While Bentham did not see legal theory as part of what we would now call social theory, he certainly saw it as a specific application of a far broader and more inclusive moral theory. Because of the scope of that theory and the range of its rigorous application in his work, it has remained of value, although social theory has learned to avoid attempts to provide universal prescriptions of moral action postulated in isolation from serious historical and sociological study of the conditions of such action. Wigmore's approach was, however, the radically different one of what we might call "contextual theory," serving the needs of law as a discipline and wandering out into "nonlegal" fields of knowledge just far enough to fill gaps in the structure of law's self-contained disciplinary knowledge. In short, he took a set of lawyers' problems and sought to theorize them. If Wigmore's "lead balloon" has really failed to fly, it may be because, firstly, legal theory must identify its problems in a far wider context than that of any specific professional sphere if it is to say something of enduring importance, and, secondly, it must speak to those problems in a way that is not constrained by the intellectually arbitrary boundaries of particular professional practices and disciplines.

ROGER COTTERRELL is Reader in Legal Theory at Queen Mary College, University of London. His recent publications include *The Sociology of Law: An Introduction* (London: Butterworth's, 1984).

REFERENCES

BENTHAM, Jeremy (1827) *Rationale of Judicial Evidence*. London: Hunt and Clarke.

TWINING, William (1984) "Some Scepticisms About Some Scepticisms," 11 *Journal of Law and Society*, 137 (part I), 285 (part II).

WIGMORE, John Henry (1937) *The Science of Judicial Proof*. Third edition. Boston: Little, Brown.