

Address to Evidencers

*William Twining**

Evidencers—for that is the collective name for the people in the room.

I am quite overwhelmed by this honor, which was completely unexpected. I am particularly pleased that it was on the basis of peer review. It is especially gratifying to have my name bracketed with two of my heroes: John Henry Wigmore and Jack Weinstein. Thank you for the award; thank you for coming; thank you Michael Risinger as Chair and impresario; thanks to Peter Tillers for his kind words. I have so many debts of gratitude that I could take up all of my allotted time. I shall confine myself to two special ones: first, my wife Penelope of fifty years, four months, and five days—without whom I would not be here—and, second, to the University of Miami Law School, which for nearly thirty years has provided a supportive environment; stimulating colleagues; my friend, collaborator, and co-teacher Terry Anderson; and the opportunity to inflict modified Wigmorean analysis in the first year, where it unquestionably belongs as part of basic legal method.

The story is told in Coral Gables that the late Clifford Alloway used to advise his students: “If you want to learn how to think, take Anderson; if you want to understand the Law of Evidence, take [Michael] Graham, if you want to pass the Bar, take me.” Different perspectives on Evidence have always been present at Miami.

Rather than be very serious in ten to fifteen minutes, let me indulge you in a sneak preview of the chapter on Evidence in my forthcoming memoirs. These will be completed after I finally retire, but you will need to patient in that with Jack Weinstein as my role model, that is at least a dozen years off. I am a mere seventy-three.

I have drafted the first sentence of this memoir: “I started my study of Evidence on All Fools Day (April 1st) 1972.” That was the date on which I took up my appointment at the University of Warwick Law School, then in its third year of operation. Warwick was commit-

* Quain Professor of Jurisprudence Emeritus, University College London; Visiting Professor, University of Miami School of Law.

ted institutionally to “broadening the study of law from within”; that is, developing alternatives to the expository or blackletter orthodoxy that had been dominant in English academic law. At my interview I was asked by Geoffrey Wilson, the founding Head: “What subject are you going to Warwickise?” I was well prepared and I replied “Either Land Law or Evidence.” By then Patrick Atiyah had done Torts and was working on Contract;¹ Wilson himself was dealing with UK Constitutional law; other colleagues had occupied territory, as law teachers do. I was quite keen on taking on land, but Patrick McAuslan wanted to bring public law perspectives to bear on land law and I yielded the territory to him. He produced the first English academic text on planning law² and has since become the world’s leading expert on urban planning and land reform in developing countries.

All that I knew—or at least thought I knew—about evidence was Jerome Frank’s campaign to urge us to take fact-finding seriously and the intriguing fact that Jeremy Bentham, our most prolific jurist, had written more on evidence than any other subject. I quickly discovered two things: that there was a vast intellectual heritage and history which stretched back through Michael and Adler, Wigmore, Thayer, Fitzjames Stephen, to Bentham, to medieval and classical rhetoric, and included probability theory, debates about the existence of God, the history of historiography, the philosophy of science and other mainstream strands in the Western intellectual tradition. As Bentham rightly said: “The field of evidence is no other than the field of knowledge.”³

My second discovery was that I had in fact been exposed to evidentiary and inferential issues in a variety of contexts without perceiving them as such: early on, I found that my daughter was studying *The Murder of Herodes* as a Greek set text that was crying out for Wigmorean analysis; that reminded me that at school I had studied Cicero and Demosthenes and some Aristotle (but not Quintillian); and, out of hours, I had been a fan of Sherlock Holmes, Poirot, and Maigret; as an undergraduate, I had spent many hours investigating the family legend that a great-great uncle had been wrongly convicted of assaulting a young lady in a railway carriage (the real culprit was thought to be the Prince of Wales); that I had been involved in controversies about coercive interrogation and allegations of torture in Northern

¹ P.S. ATIYAH, ACCIDENTS, COMPENSATION AND THE LAW (1970); P.S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT (1979).

² PATRICK MCAUSLAN, LAND LAW AND PLANNING (1975).

³ Jeremy Bentham, *An Introductory View of the Rationale of Evidence*, in 2 WORKS OF JEREMY BENTHAM 5 (John Bowring ed., 1843).

Ireland; and traditional dispute processes in Africa. I devoured legal biographies and accounts of famous trials and was vaguely puzzled as to why these had not featured in my legal education. And so on and so on. The label “evidence” brought all these seemingly disparate interests together under one rubric. Like Moliere’s Monsieur Jourdain with prose, I learned that I had been evidencing all my life. Indeed, evidence is a dilettante’s dream. It was only later that I learned that law is virtually the only discipline that treats evidence as a distinct area of expertise—and even that is largely confined to the common law setting. The same experience also applies to stories: it is only when one focuses on narrative as a subject of sustained attention that one realises how pervasive, varied, important, and seductive stories and story-telling are in many different legal contexts.

My commitment to the project of rethinking evidence was sealed by two incidents involving Sir Rupert Cross, rightly admired as virtually the only evidence scholar of his generation in the U.K. Cross was a splendid man: he was blind since childhood, clear, robust, and outspoken, with a good sense of practicalities. In September 1972, during a heated debate on reform of criminal evidence, Cross rashly said: “I am working for the day when my subject is abolished.” My first reaction was political outrage: I believed and still believe in strong safeguards for the accused. But my second reaction was intellectual: how could problems of evidence and inference in law be *abolished*? The equation of the subject with the rules of evidence was just the kind of rule-centered, doctrinal approach to law that Warwick was seeking to subvert. So the starting-point for inquiry was: what would one study about evidence in law if there were no rules?

The second episode involving Cross was rather different: in the early 1970s, I enquired in Wildy’s, the lawyers’ bookshop in Lincoln’s Inn, about the availability and price of Bentham’s five-volume *Rationale of Judicial Evidence*. It moves rather slowly, I was told, and there is someone ahead of you in the queue. They took me to their battered card index file—under Bentham’s *Rationale* was listed R. Cross, 1938. No copy had come available. So, I suspect that Cross never read the greatest classic in our field—an omission unfortunately common among evidence scholars of the time. For an evidence scholar to admit this today would be like a specialist in French literature confessing to not having got through all of Proust.

Over time I gravitated from intellectual history, to the law of evidence (Yes, I did study and teach it!), to the logic of proof, to probabilities, to practicalities of constructing cogent arguments on questions of fact, on to the roles of narrative and story-telling and their

relationship to argumentation, and back to evidence as a multi-disciplinary field, not only in law, but generally. Given time, I could tell many other stories—about Dean Wigmore getting a friend to send postcards from Europe each summer to his colleagues to hide the fact that he was beavering away in a cottage on the shores of Lake Michigan—perhaps like one of our contemporaries. About Mrs. Wigmore copying out the manuscript of the first edition of the *Treatise* in longhand so that it could be sent by post, thereby saving the fare from Chicago to Boston; about Jeremy Bentham's auto-icon; about collaborating with a Shakespeare scholar on interpreting love letters as evidence; and about Lord Denning as a story-teller. But time is short: so let me end with two brief stories:

First, once upon a time, I walked into a law school. I had just had lunch with Peter Tillers at Legal Seafoods—only two glasses of wine—before giving a public lecture at the New England Law School, which, as you know, was once the Portia Law School and is now made of plate glass. I walked straight into a plateglass window and nearly knocked myself out. Concussed and with a bloody nose, I stiffened my upper lip and decided to continue. I had blood dripping from my nose and over my suit and was a bit unsteady on my feet. So I told my audience what had happened. I have never had a more sympathetic audience for Wigmorean analysis.

Second, some of us—David Schum, Terry Anderson, Peter Tillers, and others—have recently been involved in a multi-disciplinary program at University College London about the extent to which there is, or could be, an integrated field (or “science”) of evidence that transcends all disciplines that involve empirical inquiry. Last month we had an exciting conference at the British Academy with people from at least twenty disciplines participating—nearly all from the humanities and social sciences. Sadly, hardly anyone came from the physical sciences. Some of us have been surprised by the amount of skepticism, even hostility, to the idea that there are general principles of inferential reasoning and basic concepts, such as relevance, probative value, credibility, that can transcend disciplinary contexts. So a lot of people were resistant to Dave Schum's thesis outlined in *Evidential Foundations of Probabilistic Reasoning*. This was not only or even mainly epistemological skeptics or relativists or post-modernists of various kinds. Some of the hostility was justifiably directed to the excesses of evidence-based medicine and evidence-based policy. Some wanted narrative to supplant rather than complement evidence. But most either wanted to emphasise the uniqueness of their discipline and its special problems or else were dismissive of concerns

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about methodology: many historians are inclined to say “We don’t think about it, we just do it”; such attitudes were epitomized by one distinguished scientist who said in essence that there are no problems about evidence and inferential reasoning in randomised clinical trials. One only has to look at the papers or television to see that evidence pervades the news and our public life: DNA, WMD, crime scene investigation, evidence-based medicine and evidence-based policy, Patricia Cornwell, this week’s disputed election in Kenya, Dawkins’ *The God Delusion*, René Weis on Shakespeare.⁴ I leave you with this thought: this audience is almost unique in being made up of specialists on evidence; evidence is now a field whose time has come; and, as Jeremy Bentham said, “the field of evidence is no other than the field of knowledge.” Maybe we do have something to offer other disciplines.

⁴ RENÉ WEIS, *SHAKESPEARE UNBOUND: DECODING A HIDDEN LIFE* (2007).