

## Introduction of William Twining

*Peter Tillers\**

Twenty-two years ago, Richard Lempert wrote that evidence scholarship was “moribund” when he began teaching, which happened in 1968.<sup>1</sup> Having administered that slap at the evidence professoriate of his day, Lempert added a passage that is redolent of Goethe’s Faust’s complaint about desiccated and life-sapping scholarship.<sup>2</sup> Lempert wrote that although the federal codification movement had begun to breathe new life into the field of Evidence, law review articles about evidence generally followed “the model ‘What’s Wrong with the Twenty-Ninth Exception to the Hearsay Rule and How the Addition of Three Words Can Correct the Problem.’”<sup>3</sup> These articles, Lempert said, “were seldom interesting and if they had potential utility it was rarely realized, for the federal rules remain today largely as they were when enacted. The work was, in short, a

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<sup>1</sup> Richard Lempert, *The New Evidence Scholarship: Analyzing the Process of Proof*, 66 B.U. L. REV. 439, 439 (1986). All revolutions, however, are apparently temporary. If one is to judge by the content of some recent casebooks, there are distressing signs that evidence scholarship may be reverting to the desultory condition it was in the 1960s and early 1970s. But I refuse to identify any examples of such retrograde casebooks!

<sup>2</sup> JOHANN WOLFGANG VON GOETHE, *Prologue to FAUST: DER TRAGÖDIE, ERSTER TEIL* (1808):

Habe nun, ach! Philosophie,  
Juristerei und Medizin,  
Und leider auch Theologie  
Durchaus studiert, mit heißem Bemühn.  
Da steh ich nun, ich armer Tor!  
Und bin so klug als wie zuvor;  
Heiße Magister, heiße Doktor gar  
Und ziehe schon an die zehen Jahr  
Herauf, herab und quer und krumm  
Meine Schüler an der Nase herum—  
Und sehe, daß wir nichts wissen können!

Cf. Posting of Jim Chen, *Faust’s Midlife Crisis*, to Money Law, <http://money-law.blogspot.com/2008/02/fausts-midlife-crisis.html> (Feb. 24, 2008, 23:15 EST).

<sup>3</sup> See Lempert, *supra* note 1, at 439.

timid kind of deconstructionism with no overarching critical theory to give it life.”<sup>4</sup>

Lempert’s claim that Evidence was on death’s door in 1969 or 1970 was an exaggeration. Judge Weinstein was doing important work in Evidence in the late 1960s.<sup>5</sup> So too were professors such as John Kaplan<sup>6</sup> and Vaughn Ball.<sup>7</sup> Moreover, James H. Chadbourn’s painstaking preparatory work in the 1960s on the forthcoming California Evidence Code was nothing to sneer at.<sup>8</sup> Still, Lempert’s characterization of evidence scholarship circa 1970 was, in the main, on target.

But things that start badly sometimes turn out well.

In the 1970s and 1980s fresh faces emerged who changed the face of evidence scholarship here and elsewhere in the world. Among the innovators were Richard Lempert himself,<sup>9</sup> David Kaye,<sup>10</sup> Judge Jack Weinstein,<sup>11</sup> and, of course, William Twining. Twining

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<sup>4</sup> *Id.*

<sup>5</sup> *See, e.g.*, United States v. Schipani, 269 F. Supp. 43 (E.D.N.Y. 1968), *aff’d*, 414 F.2d 1296 (2d Cir. 1969) (discussed in 1A WIGMORE, EVIDENCE § 37.5 (Peter Tillers rev., 1983)).

<sup>6</sup> *See, e.g.*, John Kaplan, *Decision Theory and the Factfinding Process*, 20 STAN. L. REV. 1065 (1968).

<sup>7</sup> Vaughn Ball, *The Moment of Truth: Probability Theory and Standards of Proof*, 14 VAND. L. REV. 807 (1961).

<sup>8</sup> Jack B. Weinstein, *Writings of James H. Chadbourn*, 96 HARV. L. REV. 364, 366–67 (1982).

There were two major lines of legislative reform of evidence law during Chadbourn’s lifetime: the American Law Institute’s Model Code of Evidence, simplified by the 1953 Uniform Rules of Evidence, and the California Evidence Code, which built on the Uniform Rules but involved a more detailed codification. California’s formulation, based on Chadbourn’s studies, had a great impact on those who drafted the Federal Rules of Evidence, which have been adopted by more than half of the states. The important monographs on evidence that Chadbourn wrote for the California State Law Revision Commission are now little remembered except by scholars in the field. The Commission was directed by the state legislature to determine whether California should adopt the Uniform Rules of Evidence. Chadbourn, who moved from the University of California to Harvard during California’s consideration of the Evidence Code, “prepared comprehensive studies of the Uniform Rules of Evidence and the corresponding California law.” The studies were broader than advertised, for they drew on the full Anglo-American experience with rules of evidence. The resulting Code and comments were based in large measure on Chadbourn’s studies.

*Id.* (citations omitted).

<sup>9</sup> *See, e.g.*, Richard Lempert, *Modeling Relevance*, 75 MICH. L. REV. 1021 (1975).

<sup>10</sup> *See, e.g.*, David Kaye, *The Laws of Probability and the Law of the Land*, 47 U. CHI. L. REV. 34 (1979).

<sup>11</sup> *See* United States v. Schipani, 269 F. Supp. 43 (E.D.N.Y. 1968).

cannot be given sole credit for the broadening and the deepening of evidence scholarship that we have witnessed during the last three-and-one-half decades. But of course no single person can take sole credit for the flowering of evidence scholarship during the last thirty to thirty-five years. Be that as it may, Twining has been an important player in the transformation of evidence scholarship. Furthermore, Twining has made distinctive contributions to evidence scholarship, and his contributions have put a special imprint on this still-mutating field, an imprint that will be felt, I think, for decades to come.

Before I say just a few words about just a very small sample of Twining's many distinctive contributions, I want to make two general points about Twining's influence.

First, America is not the world. Twining's influence on the development of evidence scholarship in the rest of the world probably exceeds any other individual's. As many of you know, Twining is now known for his work on globalization.<sup>12</sup> But even in the field of evidence, Twining is a scholar with a truly global reach.

Second, Twining is Evidence's Mao Tse-Tung. He, more than anyone else, has taken steps to institutionalize the evidence revolution—he has worked to establish programs and communities in order to ensure that scholarship about evidence will continue to deepen, broaden, and evolve, if not forever, then at least for quite a while to come.<sup>13</sup>

Now I want to say just a few words about just three of Twining's many contributions to evidence scholarship. I must use broad brush strokes; I cannot go into detail. This is an introduction rather than a eulogy, and I have only five minutes to speak.

If I have his personal history right, Twining did not begin his teaching career in the UK. But he was in the UK when he began his work on evidence and proof in earnest.<sup>14</sup>

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<sup>12</sup> See, e.g., WILLIAM TWINING, *GLOBALISATION AND LEGAL THEORY* (2000).

<sup>13</sup> For example, not only has Twining been working at this evidence business for a very long time, and not only does he have legions of former students and admiring ex-colleagues all over the world, he is also one of the prime movers behind the sprawling, interdisciplinary, and exciting research program and community at University College London that goes by the name *Enquiry, Evidence, and Facts*. See Evidence, Inference & Enquiry: Toward an Integrated Science of Evidence, <http://www.evidencescience.org> (last visited Mar. 9, 2008). If all goes well, this program and this community will continue in some form at University College London.

<sup>14</sup> Twining provides details about his early career in the introduction to WILLIAM TWINING, *LAW IN CONTEXT: ENLARGING A DISCIPLINE* 1, 1–14 (1997). Twining took up evidence when he moved to the University of Warwick in 1972. *Id.* at 14.

Academics tend to be somewhat isolated from the real world. This was certainly true of legal academics in the UK in the 1960s and 70s, which is when Twining came of age as a law teacher: at that time the vast majority of UK law teachers had little or no experience in law practice. (The practice of law was a different career path then. I think it still is.) Furthermore, in those days law teachers in the UK, even (or particularly) law teachers (dons) at Oxford and Cambridge, were generally an intellectually insular lot: they generally had little interest in any academic field other than law.

As I see it, Twining meant to send his unrealistic and parochial academic colleagues in the UK three messages.<sup>15</sup> The three messages are these:

1. Getting the facts right is very difficult.
2. Evidence and facts are a very big part of law.
3. Factual inference and proof drip with logic and with theory.

Let's consider these messages in order.

1. *The difficulty of getting the facts right.*

Attempts to get the facts right face at least two big difficulties. First, subjectivity and prejudice threaten the very core of the enterprise of fact finding. Second, getting the facts right is an arduous and time-consuming enterprise—facts are not reeled in like fish in a well-stocked pond—because:

- (a) getting the facts right requires attention to evidentiary details and large masses of evidence; and
- (b) drawing sound conclusions from masses of evidence requires the development of multiple multistage arguments.

Twining has taught that it is important that budding lawyers and judges study this painstaking and time-consuming process.

Furthermore, Twining has taught that it is *possible* to teach budding lawyers and judges useful things about the process of inference and proof; that although assessment of evidence is at least as much art as science—in his view, more art than science—there is reason to think that law teachers can teach their students something useful and important about the arduous and difficult activity of factual inference and factual proof.<sup>16</sup>

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<sup>15</sup> Two of these messages are particularly germane in today's America. American law teachers are becoming increasingly divorced from law practice. Two of Twining's three messages amount to shots across the bow of people who are entering law teaching today.

<sup>16</sup> See, e.g., TERENCE ANDERSON, DAVID SCHUM & WILLIAM TWINING, ANALYSIS OF EVIDENCE, at xvii (2d ed., 2005) ("Building on the work of the American legal scholar

But Twining makes it very clear that no student should be left with the notion that there is somewhere a magic bullet—a rote or mechanical procedure that can guarantee that any dummy or slouch can get the facts right without doing a heckuva lot of work. Twining teaches and preaches that exactly the opposite is the case: one important moral is that sound inference generally requires good judgment and a lot of work.

He also teaches that even when lawyers, judges, and fact finders work conscientiously and hard, there is no guarantee of infallibility about facts. This is another reason why Twining believes that it is important for law students to study evidence, inference, and proof: they must be made to understand the many ways in which inference and proof can go wrong.<sup>17</sup>

2. *Evidence and facts are an important part of law.*

Lawyers do many things. Two of the many things they do are (a) gather and assess legal materials—i.e., “legal research and analysis”—and (b) gather and assess evidence. Twining, who is something of a legal realist,<sup>18</sup> had to remind UK law teachers that practicing lawyers do more of the latter than of the former.<sup>19</sup>

Most of you—mature Evidence teachers—do not need to be reminded of this. But some of the people who are entering law teaching today probably need to be reminded of this. Perhaps the Supreme Court of the United States also needs to be reminded of this: the Court is not overflowing with people who have seen law practice first-hand.

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John Henry Wigmore (1863–1943), we believe that skills in analyzing and marshaling evidence and in constructing, criticizing and evaluating arguments about disputed questions of fact are intellectual skills that can and should be taught effectively and efficiently in law schools.”)

<sup>17</sup> See, e.g., William Twining, *Argument, Stories and Generalizations: A Comment*, 6 L. PROBABILITY & RISK 169, 178 (2007) (“A central theme of my own writing in this area is that both stories and generalizations are ‘necessary but dangerous’ . . .”).

<sup>18</sup> Twining initially achieved international renown as a result of his book-length study of Karl Llewellyn. See WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT (1973).

<sup>19</sup> This is a point that Twining has made repeatedly. In one of his papers Twining constructs a parable in which the “Oldest Member” of a new law school in Xanadu states at the first faculty meeting,

It was once suggested that 90 per cent of lawyers spend 90 per cent of their time handling facts and that this ought to be reflected in their training. If 81 per cent of lawyer time is spent on one thing, it follows that 81 per cent of legal education ought to be devoted to it.

William Twining, *Taking Facts Seriously*, in TWINING, *supra* note 14, at 89.

3. *Twining's third general message has to do with the relationship between evidence & theory.*

One of Twining's original motivations for studying evidence was jurisprudential: he wanted to develop a better understanding of law by getting a better understanding of factual proof in law.<sup>20</sup> The structure of factual inference and proof should be important to many people other than students of factual inference and proof in law.

The nature of argument about evidence should interest students of the nature of argument about legal rules and principles. For one thing, arguments about legal principles may spring from facts about the world. For another thing—I speak for myself now—even legal argument and legal interpretation may be, to an important degree, an effort to infer how things actually stand in the world.

The nature of factual inference in law should also interest philosophers in general—because epistemology is central to philosophizing about human society and the human condition, and the workings of factual inference in law shed light on problems of epistemology.<sup>21</sup>

Contrary to some rumor,<sup>22</sup> Twining believes that imperialism is a bad thing.<sup>23</sup> But he does believe that Evidence theorists need to become a bit more imperialistic: they need to tell or remind other legal theorists that theories about law cannot get along if those theories are bereft of arguments about the nature and structure of inference and proof. You—you down-to-earth evidence theorists—must teach those fancy-pants legal theorists that they can't and won't go far unless they too learn to take evidence, inference, and facts very seriously indeed.<sup>24</sup>

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<sup>20</sup> See, e.g., William Twining, *Introduction: The Story of a Project*, in WILLIAM TWINING, *RETHINKING EVIDENCE: EXPLORATORY ESSAYS I* (2d ed. 2006).

Once upon a time a jurist in mid-career [Twining!] decided that the time had come to test and explore the implications and applications of some of his more general ideas at less abstract levels. The starting-point was an interest in "broadening the study of law from within" as part of a conception of the discipline of law as an intellectual activity primarily concerned with the creation and dissemination of knowledge and critical understanding within "legal culture."

*Id.* (citations omitted).

<sup>21</sup> See, e.g., William Twining, *Rethinking Evidence*, in TWINING, *supra* note 20, at 237 ("I soon found [in the early 1970s] that Bentham was much nearer the mark when he wrote: 'The field of evidence is no other than the field of knowledge.'").

<sup>22</sup> Kenneth Graham, Jr., *There'll Always be an England: The Instrumental Ideology of Evidence*, 85 MICH. L. REV. 1204, 1204–05 (1987) (reviewing WILLIAM TWINING, *THEORIES OF EVIDENCE: BENTHAM AND WIGMORE* (1985)).

<sup>23</sup> William Twining, *Hot Air in the Redwoods*, 86 MICH. L. REV. 1523 (1988); see also Peter Tillers, *Prejudice, Politics, and Proof*, 86 MICH. L. REV. 768, 770 (1988).

<sup>24</sup> See generally William Twining, *Taking Facts Seriously*, 34 J. LEGAL EDUC. 22 (1989).

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This is one of William Twining's most important lessons.  
I give you William Twining.