

## BOOK REVIEW

*Theories of Evidence: Bentham and Wigmore*, by Professor William Twining (Weidenfeld and Nicolson, London, 1985), pp. i-x, 1-256, Index 257-265. ISBN 0 297 78669 5.

There is no doubt that there has been a recent resurgence of interest in theoretical aspects of evidence. Professor William Twining has been largely responsible, particularly in his numerous works over the last decade, for such an important and welcome event<sup>1</sup>. His most recent publication, *Theories of Evidence: Bentham and Wigmore* is no exception — in this book Twining displays much theoretical concern for the subject. He is constantly holding out a direct challenge to the teachers of evidence who 'continue to cling to the absurd fallacy that the subject of evidence is co-extensive with the rules of evidence' not to be so narrowly focused.

The book itself is essentially a lengthy book review of two books: first of Bentham's *Rationale of Judicial Evidence* and second of Wigmore's *Principles (later Science) of Judicial Proof*. Twining does state that his main purpose is to provide an introduction to Bentham's *Rationale* and Wigmore's *Principles* in the hope of showing that these two relatively neglected works deserve the attention of legal theorists, philosophers and others besides specialists in evidence and Bentham scholars. It is also, however, much more than a book review. It is a thorough, comprehensive and excellent account of both Bentham and Wigmore's broad general theories of evidence and proof, as well as an extensive treatment of their objectives and views concerning the creation and reform of the rules of evidence.

The first chapter presents a broad historical survey of the development of the Rationalist Tradition of Evidence Scholarship, of which Bentham and Wigmore are the two leading figures.<sup>2</sup> The second chapter is an excellent essay on Bentham on Evidence which explains the basic ideas of the *Rationale of Judicial Evidence* and some of its more important themes in the context of Bentham's utilitarian philosophy as a whole and of contemporary debates. The third chapter centres on Wigmore's little-known *Principles of Judicial Proof* which book Twining believes provides the fullest and clearest exposition of his general theory and approach to evidence. Indeed Twining argues that Wigmore's *Principles* is more important than his famous *Treatise* because it explains the general theory underlying most of the *Treatise* and because the principles of proof outlined in it are 'anterior to and more important than' the rules of evidence set out in the *Treatise*. The final chapter consists of a comparison between the two theories and an assessment of their contemporary significance in the light of modern developments in the law of evidence (recent developments have occurred mainly in the areas of probability theory, forensic science, the logic of proof and witness psychology). Twining himself claims that in this final chapter he is providing a justification for linking Bentham's masterpiece with an unsuccessful coursebook written a century later.

Twining's technique is thorough, organized and at all times interesting. He states in the introduction that his treatment is more expository than critical because both Bentham and Wigmore's works range very widely over difficult and unfamiliar territory. This is, however, a modest claim. Twining constantly underpins his 'exposition' with a theoretical or philosophical base highlighting the many dilemmas between the 'civil libertarians' who believe in strong safeguards for the accused and the 'utilitarians' who believe in the detection of crime and the rectitude of decision at all costs. A common ploy adopted by Twining is to list in point form his arguments in favour of a particular view and then to immediately follow these arguments with several points in rebuttal (e.g. a list of sharp contrasts between Bentham and Wigmore juxtaposed with five major points of similarity between the two jurists (p.116-7) or the setting out of reasons, first, why Bentham's work may no longer be of contemporary significance and second, why Bentham remains of significance today (p.168)). Often the first set of arguments

<sup>1</sup> Other evidence of such resurgence of interest can be found in *Wigmore on Evidence*, Volumes 1 and 1A, revised by Peter Tillers (1983) (Reviewed in (1985) 48 *Modern Law Review* 601-608 and in M.S. Weinberg — 'Evidence Scholarship and Theories of Adjudication — Towards an Integrative Jurisprudence' in Galligan, D. J., (ed.) *Essays in Legal Theory* (1984)).

<sup>2</sup> This chapter is a revised and abbreviated version of a paper originally published in Campbell, E. and Waller, L., (eds.) *Well and Truly Tried* (1982).

are presented so persuasively that it appears difficult to believe that Twining could produce any convincing counter-arguments. Nonetheless Twining skilfully manages to utilize this holistic technique successfully, producing a well-balanced picture of all the issues involved. At other times, especially where Twining anticipates resistance from his readers (e.g. in describing Wigmore's chart method), he is openly provocative, bidding his readers to abandon their conservative, irrational, literal or apathetic views (p.126). Yet again, on further occasions, Twining appears deliberately to take extreme positions in order to persuade the reader both to challenge him and to think about the underlying rationales of the rules of evidence. In this respect, Twining must surely be commended — he is clearly and courageously taking on a cause today which many evidence lawyers seem to have neglected. As Professor H.L.A. Hart said of Bentham, 'where Bentham fails to persuade, he still forces us to think', so too is this clearly true of Twining.

In summary, this book canvasses almost every important conceptual issue relating to the law of evidence that bears thinking about. For instance, there are excellent theoretical discussions of the privilege against self-incrimination (p.84), of the maxim that it is better that ten guilty men go free rather than that one innocent man be convicted (p.96) and of legal professional privilege (p. 103-4), all of which still retain contemporary importance. I strongly recommend the book for evidence lawyers, teachers and students even if it is only used as a reference book for the theoretical rationales of almost every rule of evidence existing today. There are some lawyers who still contend today that evidence is a non-jurisprudential subject and that any connection between legal philosophy and evidence is difficult to make. However, after reading Twining's *Theories of Evidence: Bentham and Wigmore* and several of his other related works, it is submitted that such a contention is insupportable and that the connection between jurisprudence and evidence is indisputable. In conclusion, it is appropriate to refer to the final words of Empson's review of Bentham's *Rationale* written soon after the latter book's publication:

We are bound to state, with equal sincerity, that we should have thought it impossible for any book upon a subject, with which we had fancied ourselves well acquainted . . . to have given us so many new ideas and to have so completely changed our old ones (p.106).

It is submitted that such sentiments, which were expressed over a century ago, are equally applicable to the response which the reader must surely experience when reading Twining's excellent book.

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