

§ Law in Context

WILLIAM TWINING

Rethinking Evidence

Exploratory Essays

Second Edition

CAMBRIDGE

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Rethinking Evidence

The Law of Evidence has traditionally been perceived as a dry, highly technical, and mysterious subject. This book argues that problems of evidence in law are closely related to the handling of evidence in other kinds of practical decision-making and other academic disciplines, that it is closely related to common sense and that it is an interesting, lively and accessible subject. In recent years the emergence of evidence as a multidisciplinary field has been further stimulated by advances in forensic science, concern about intelligence after 9/11, the search for weapons of mass destruction in Iraq, and developments such as evidence-based medicine.

These essays, written over a period of twenty-five years, develop a readable, coherent historical and theoretical perspective about problems of proof, evidence, and inferential reasoning, and story-telling in law. Although each essay is self-standing, they are woven together to present a sustained argument for a broad inter-disciplinary approach to evidence in litigation, in which the rules of evidence (which have been the main focus of attention in the past) play a subordinate, though significant role.

This revised and enlarged edition includes a revised introduction, the best-known essays in the first edition, and new chapters on narrative, generalisations and argumentation, teaching evidence, and evidence as a multi-disciplinary subject.

This book provides the theoretical background to the very practical *Analysis of Evidence* (Anderson, Schum and Twining, 2nd edition, Cambridge University Press 2005). It will also be of interest to anyone concerned about the role of evidence in their own discipline.

William Twining is Quain Professor of Jurisprudence Emeritus at University College London, and a regular Visiting Professor at the University of Miami School of Law. His writings on evidence include *Analysis of Evidence* (2nd edition, Cambridge University Press 2005).

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Editors: William Twining (University College London)
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Since 1970 the Law in Context series has been in the forefront of the movement to broaden the study of law. It has been a vehicle for the publication of innovative scholarly books that treat law and legal phenomena critically in their social, political, and economic contexts from a variety of perspectives. The series particularly aims to publish scholarly legal writing that brings fresh perspectives to bear on new and existing areas of law taught in universities. A contextual approach involves treating legal subjects broadly, using materials from other social sciences, and from any other discipline that helps to explain the operation in practice of the subject under discussion. It is hoped that this orientation is at once more stimulating and more realistic than the bare exposition of legal rules. The series includes original books that have a different emphasis from traditional legal textbooks, while maintaining the same high standards of scholarship. They are written primarily for undergraduate and graduate students of law and of other disciplines, but most also appeal to a wider readership. In the past, most books in the series have focused on English law, but recent publications include books on European law, globalisation, transnational legal processes, and comparative law.

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Ward: *Shakespeare and the Legal Imagination*
Zander: *Cases and Materials on the English Legal System*
Zander: *The Law-Making Process*

For Peter

Preface

The first edition of this book was published in 1990. It consisted of eleven linked essays. The last chapter, 'Rethinking Evidence', outlined a general perspective on the processing and use of information in litigation as the basis for a broad interdisciplinary approach to the study of evidence in law. The essays had been written over sixteen years and were presented in the form of an intellectual progression, starting with an overview entitled 'The Story of a Project'.

In this extended edition, three of the original chapters have been dropped or replaced and eight more essays have been added, all written since 1990. The Introduction (chapter 1) has been extended and chapter 11 becomes chapter 7. The idea of the story of an intellectual progression has been retained. Chapters 2–7 are unchanged, except for a few minor corrections and some extra footnotes, which are indicated by square brackets. These chapters are a slightly condensed version of the first edition. Each essay is self-standing, but taken together they form a coherent historical and theoretical argument. The remaining chapters continue the story.

There have, of course, been many theoretical, legal, and practical developments in the subject of evidence in law since the first edition was completed. To have attempted a comprehensive overview of these here would have radically altered the shape of the book. Instead, developments that are immediately relevant are discussed or referred to in the recent essays, especially chapters 8, 14, and 15. A few significant sources are referred to in footnotes in square brackets in Chapters 1–7.¹

1 Major developments in the law of evidence and procedure in England since 1990 are noted in chapter 6. Useful overviews can be found in Zander (2003a), Cross and Tapper (2004), and Roberts and Zuckerman (2004). Similarly, relevant legal developments in the United States can be tracked in the latest editions of standard reference works, case books, and supplements (e.g. McCormick (1999) and supplements). For Australia, see Ligertwood (1998) and Odgers (2002). There is an enormous literature on scientific evidence, including some important theorising. (See, for example, Allen (1991), Damaska (1997), Haack (2003a), (2003b) and Becher-Monas (forthcoming, 2006)). Significant contributions to the intellectual and legal history of evidence since the first edition include C. Allen (1997), Franklin (2001), Langbein (2003), McNair (1999), Shapiro (1991) and Swift (2000). Other theoretical developments are diverse and less easy to track. Chapters 8, 14 and 15 below and Roberts and Zuckerman (2004) deal with some of these. See further J. Jackson (1996), Twining (1997b), (1997e), Allen and Leiter (2001), Park (2001), and recent issues of specialist journals, such as *The International Journal of Evidence and Proof* and *Law, Probability and Risk*.

Since 1990 my work on evidence has developed in three main ways. First, I have continued to teach the logic of proof to law students as a set of intellectual and practical skills concerned with constructing, reconstructing, and criticizing arguments about questions of fact. My co-authors, Terry Anderson and David Schum, and I have refined and adjusted our teaching of this subject without changing the basic approach, as can be seen in the differences between the first and second editions of *Analysis of Evidence* (Anderson and Twining, 1990; Anderson, Schum, and Twining, 2005). *Rethinking Evidence* can be read as a companion volume to that book, providing the historical and theoretical background to the more practical approach of *Analysis*. The two books are now better integrated through cross-references.

Secondly, during the past fifteen years I have continued to explore topics relating to stories and especially the relationship between narrative and argument in legal contexts. Chapters 8–13 deal with these themes from a number of perspectives.²

The third development since 1990 has been a broadening of my focus of attention, first to include a civil law jurisdiction (the Netherlands), and then to consider evidence in other disciplines. In 1994–95 Terry Anderson and I were Fellows at the Netherlands Institute of Advanced Study (NIAS), participating in a group project on ‘Forensic expertise in the Netherlands criminal justice system’. This was my first sustained exposure to a civil law system. The experience reinforced my belief in the transferability of some general ideas and techniques about evidence (principles of inferential reasoning, the Rationalist Tradition, the roles of narrative), but it also brought home the enormous cultural and institutional differences between legal practices and procedures in the Netherlands, England and the United States. Getting to grips with the details of Dutch criminal procedure involved a series of culture shocks that did not diminish with familiarity – indeed sometimes they were sharper. The main results of this particular experience have been published elsewhere,³ but this experience has subtly influenced one’s perceptions of many topics.

Another broadening of focus is of a different kind. The study of evidence in law has always involved interaction with other disciplines, but recent developments in science, computing, terrorism, politics, policy-making, and fiction have converged to give issues concerning evidence a very high profile in many different arenas. This in turn has raised the question whether there can be a unified multi-disciplinary subject (or even ‘Science’) of Evidence. *Evidence and Inference in History and Law* (2003, edited with Iain Hampsher-Monk) was the product of an extended interdisciplinary project that started in the Netherlands Institute of Advanced Study in 1994. This in turn can be seen as a precursor of a major multi-disciplinary programme on evidence at University College London (2003–). ‘Evidence as a

2 This is a selection of my writings about narrative and argument. See also *GJB*, chs. 13 and 14 and Twining (1999).

3 I contributed to a book based on our project, *Complex Cases* (Malsch and Nijboer (eds.) 1999) and wrote a number of separate papers (Twining (1995), (1997b), (1997c)).

Multi-disciplinary Subject' (ch. 15) is a programmatic statement of the central ideas. It shows how the general perspective developed in *Rethinking Evidence* can be extended far beyond law. However, *Rethinking Evidence* remains coherently a book about the subject of evidence in law. It contains some matter of potential interest to non-lawyers, but the primary audience is legal. David Schum's projected general introduction to Evidence (with which I am associated) will, by contrast, be a genuinely multi-disciplinary book addressed to a general audience.

Acknowledgements

First edition

One of the blessings of academic life is the collegiality that transcends institutions, countries and disciplines. These essays were written over a period of sixteen years during which I have benefited from the comments, advice, criticisms and friendship of more students, colleagues, editors, librarians and others than it is possible to list. A few of these debts have been acknowledged in the endnotes of individual essays either here or, in some cases, where they were first published. A more general debt is due to Terry Anderson, Ian Dennis, Neil MacCormick, David Schum, Alex Stein, Peter Tillers and Adrian Zuckerman. As usual I owe most to my wife for more support, advice and practical help than I deserve.

Iffley (1990)

Thanks are due to The Law Book Company, Australia, Basil Blackwell Ltd, Butterworth/Lexis-Nexis (Canada), Elsevier Science Ltd., the Journal of Legal Education, Northwestern University Press, Oxford University Press, South Texas Law Review, and John Wiley and Son for permission to reproduce copyright material (for details see the endnotes). In addition to those acknowledged in the first edition, all of whom have continued to influence and encourage me, special thanks are due to Philip Dawid, Hans Nijboer, and Susan Haack, who have in very different ways stimulated my thinking about evidence. I am particularly grateful to the editorial staff at Cambridge University Press for their patience, skill and help, to Judith Auty for scrupulous copy-editing, to Chantal Hamill for the index, to Noah Cox for research assistance and to Eileen Russell for help with the figures. Even more than for the first edition, this volume owes most to the skill and practical help of my wife, Penelope, who undertook most of the thankless editorial work in preparing it for publication.

WLT

Iffley (2005)

Abbreviations

ABA	American Bar Association
ABAJ	<i>American Bar Association Journal</i>
<i>Analysis</i> (1991)	T. Anderson and W. L. Twining, <i>Analysis of Evidence</i> (1st edition 1991, Boston: Little, Brown; London: Weidenfeld and Nicholson; reissued 1998 Evanston: Northwestern University Press)
<i>Analysis</i> (2005)	T. Anderson, D. Schum and W. L. Twining, <i>Analysis of Evidence</i> (New York: Cambridge University Press, 2005)
Bentham CW	<i>The Collected Works of Jeremy Bentham</i> , prepared under the supervision of the Bentham Committee, University College London (London: Athlone Press, 1968–82; Oxford: Oxford University Press, 1983–)
Bentham Works	<i>The Works of Jeremy Bentham</i> , published under the superintendence of John Bowring (Edinburgh, 1838–43)
Boston UL Rev	<i>Boston University Law Review</i>
Calif L Rev	<i>California Law Review</i>
CJA	Criminal Justice Act 2003
CLRC	Criminal Law Revision Committee
Col L Rev	<i>Columbia Law Review</i>
Crim L Rev	<i>Criminal Law Review</i>
<i>Cross on Evidence</i>	R. (later Sir Rupert) Cross, <i>Evidence</i> (London, 1st edn, 1958; 6th edn by C. Tapper, 1985; now <i>Cross and Tapper</i> , 10th edn, 2004)
E and P	<i>International Journal of Evidence and Proof</i>
EBM	evidence based medicine
EPF	Evidence, Proof, and Fact-finding
FL	W. L. Twining (ed.), <i>Facts in Law</i> , ARSP Beiheft No. 16 (Wiesbaden, 1983)

GJB	W. L. Twining, <i>The Great Juristic Bazaar: Jurists' Texts and Lawyers' Stories</i> (Aldershot: Ashgate, 2002)
Harv L Rev	<i>Harvard Law Review</i>
HTDTWR	W. L. Twining and D. Miers (1999) <i>How To Do Things With Rules</i> (2nd edn, London, 1982) (3rd edn, 1991; 4th edn, 1999)
IL	Information in Litigation
Jo Leg Ed	<i>Journal of Legal Education</i>
JSPTL (NS)	<i>Journal of the Society of Public Teachers of Law</i> (New Series) (later <i>Legal Studies</i>)
Law and Soc Rev	<i>Law and Society Review</i>
LIC	W. L. Twining, <i>Law in Context: Enlarging a Discipline</i> (Oxford: Oxford University Press, 1997)
LQR	<i>Law Quarterly Review</i>
LTCL	W. Twining (ed.), <i>Legal Theory and Common Law</i> (Oxford: Blackwell, 1986)
Mich L Rev	<i>Michigan Law Review</i>
MLR	<i>Modern Law Review</i>
NIAS	Netherlands Institute for Advanced Study
NILQ	<i>Northern Ireland Law Quarterly</i>
NITA	National Institute of Trial Advocacy
NYUL Rev	<i>New York University Law Review</i>
Oxf Jo Leg Stud	<i>Oxford Journal of Legal Studies</i>
TEBW	W. L. Twining, <i>Theories of Evidence: Bentham and Wigmore</i> (London: Weidenfeld and Nicolson, 1985)
Thayer <i>Treatise</i>	J. B. Thayer, <i>A Preliminary Treatise on Evidence at the Common Law</i> (Boston: Little, Brown and Co., 1898; reprinted, New Jersey: Rothman, 1969)
U Chi L Rev	<i>University of Chicago Law Review</i>
UCL	University College London
UCLA L Rev	<i>University of California at Los Angeles Law Review</i>
U Pa L Rev	<i>University of Pennsylvania Law Review</i>
Vand L Rev	<i>Vanderbilt Law Review</i>
Wigmore <i>Science</i>	J. H. Wigmore, <i>The Principles of Judicial Proof</i> (Boston: Little, Brown and Co. 1st edn, 1913; 2nd edn, 1931; 3rd edn, sub nom. <i>The Science of Judicial Proof</i> , 1937)
Wigmore <i>Treatise</i>	<i>A Treatise on the System of Evidence in Trials at Common Law</i> (Boston: Little, Brown and Co. (1st edn, 1904–5), cited as 1 Wigmore <i>Treatise</i> , s. –; later editions cited as 1 Wigmore <i>Treatise</i> (Tillers rev., 1983), s. –. (1998–) <i>The New Wigmore: A Treatise on Evidence</i> . R. Friedman (ed.) New York. (cited as <i>The New Wigmore</i>)).

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- R v Sang [1980] AC 402, HL 234ⁿ⁸⁵, 434ⁿ⁷⁴
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