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## BOOK REVIEW

### THE RATIONALIST TRADITION AT TRIAL

JAMES L. KAINEN\*

**Analysis of Evidence: How To Do Things With Facts Based On Wigmore's Science of Judicial Proof**, By Terence Anderson\*\* and William Twining\*\*\* (with an Appendix on Probability and Proof by Philip Dawid\*\*\*\*). Little, Brown and Company, and London: George Weidenfeld and Nicolson, Ltd., 1991. Pp. 457. \$22.00. (Teacher's Manual. Pp. 181)

As Professors Anderson and Twining report, evidence scholars extending the field beyond its traditional focus on doctrinal analysis have split into two camps. On one hand, there are the "logical atomists." Their work emphasizes the science of rational inference and is represented, primarily, by research into probability theory, decision theory, and the uses and misuses of statistics in fact finding. On the other hand, there are the "narrative holists." Their work emphasizes the cognitive dimension of fact finding and is represented by research into the role that narrative plays in ordering fact finders' responses to proof. According to the narrative holists, these responses cannot be captured by such constructs as "Bayes nets" and "influence diagrams," about which most judges, juries, lawyers—and evidence teachers, for that matter—remain ignorant.<sup>1</sup>

*Should* the law of evidence be understood as an application of the techniques of logical analysis and the science of rational inference to the problem of resolving disputed issues of fact, as the logical atomists would have it? Or should the law of evidence be understood to define a culturally specific ritual in which disputed issues of fact are resolved by the choice of competing narratives whose appeal rests on their conformity to the stories that we tell to make sense of experience, as viewed by the narrative holists? Anderson and Twining's *Analysis of Evidence* may be understood as an extended—albeit indirect—response to these questions.<sup>2</sup>

*Analysis of Evidence* attempts to bridge the schism between the two

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1. See T. Anderson & W. Twining, *Analysis of Evidence: How to Do Things with Facts Based on Wigmore's Science of Judicial Proof* 94-104 (hereinafter *Analysis of Evidence*); Anderson, *Refocussing the New Evidence Scholarship*, 13 *Cardozo L. Rev.* 783 (1991).

2. See *Analysis of Evidence*, *supra* note 1, at 167-68; see also Anderson, *Refocussing the New Evidence Scholarship*, *supra* note 1, at 783-85.

camps by embracing both approaches in what the authors describe as the "rationalist tradition" underlying both the development and the critique of the law of evidence.<sup>3</sup> Central to that tradition is the belief that "the rectitude of decision," measured by the knowable truth value of propositions about past facts deemed important by the substantive law, is a central (although not the only) component of justice. In more complete form, Anderson and Twining argue that the prescriptive model of adjudication consistent with the rationalist tradition may be summarized by the following elements:

[1] The direct end [2] of adjective law [3] is rectitude of decision through correct application [4] of valid substantive laws [5] deemed to be consonant with utility (or otherwise good) [6] and through accurate determination [7] of the true past facts [8] material to [9] precisely specified allegations expressed in categories defined in advance by law i.e. facts in issue [10] proved to specified standards of probability or likelihood [11] on the basis of the careful [12] and rational [13] weighing of [14] evidence [15] which is both relevant [16] and reliable [17] presented (in a form designed to bring out truth and discover untruth) [18] to supposedly competent [19] and impartial [20] decision-makers [21] with adequate safeguards against corruption [22] and mistake [23] and adequate provision for review and appeal.<sup>4</sup>

The authors, of course, add the caveat that the "pursuit of truth . . . [is to be given] a high, but not necessarily an overriding, priority [in relation to other values]."<sup>5</sup>

With their model of rationalist adjudication in hand, Anderson and Twining set out to accommodate both the logical atomists and the narrative holists by demonstrating the existence of a science of proof that, unlike at least some suggested uses of probability theory, fits squarely within the accepted common-law framework for fact finding at trial. The procedure that they adopt for developing a science of proof that can incorporate the two approaches results in a book that is as remarkable as is the collaboration between two authors. Professor Twining, an eminent English Professor of Jurisprudence and biographer of American legal realist Karl Llewellyn,<sup>6</sup> originally approached the reconstruction of the rationalist tradition in evidence from the perspective of a lifetime of study of legal theory rather than litigation experience. Professor Twining's work thus originally emphasized the rationalist tradition in evidence scholarship.<sup>7</sup> In *Analysis of Evidence*, however, he surrenders that focus

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3. *Analysis of Evidence*, *supra* note 1, at 94-104.

4. *Id.* at 98-99. The assumptions underlying the model are also usefully explored in the same section.

5. *Id.* at 96.

6. See W. Twining, *Karl Llewellyn and the Realist Movement* (1973).

7. See W. Twining, *The Rationalist Tradition of Evidence Scholarship*, in *Well and Truly Tried* (E. Campbell & L. Waller eds. 1982); W. Twining, *Theories of Evidence: Bentham and Wigmore* (1985) (hereinafter *Theories of Evidence*); W. Twining, *Rethinking Evidence* (1990).

to collaborate with a litigator. Professor Anderson is a highly accomplished practitioner and clinician whose credits include the defense of former United States District Judge Alcee Hastings in his impeachment trial before the United States Senate<sup>8</sup> and experience litigating landlord/tenant cases in the District of Columbia as the courts were reaching the landmark decisions that still form the core of treatments of leasehold estates in first year property classes.<sup>9</sup> Together, they probe the notion of a rationalist tradition by putting it to what is perhaps its most exacting test.

Rather than defend the philosophic premises of the rationalist tradition, Anderson and Twining attempt to vindicate that tradition by emphasizing its utility in teaching the elusive skill of fact analysis. Given this perspective, one can hardly dispute their claim that, even conceding that the elements of the rationalist tradition express debatable first principles, these elements nonetheless "provide a basis for constructing arguments to persuade a court that the construction urged is the construction most consistent with the assumptions upon which the system is based."<sup>10</sup> Moreover, although Anderson and Twining apparently intend this observation to apply to the process of persuading a judge about the construction of evidence law, their book abundantly demonstrates that it is equally applicable to the process of persuading a fact finder about the appropriate construction of evidence. Insofar as the process of persuading the fact finder is *itself* logical—and our practices clearly presuppose that it is and that it should be—Anderson and Twining note that "'holistic' synthesis and 'atomistic' analysis are complementary, and the tools involved are all necessary parts of the equipment of professional litigators."<sup>11</sup>

The basis for Anderson and Twining's science of proof is found in John Henry Wigmore's *The Science of Judicial Proof as Given by Logic, Psychology, and General Experience, and Illustrated in Judicial Trials*.<sup>12</sup> Wigmore is, of course, best known for his contributions to the rules of evidence. But as Anderson and Twining remind us, Wigmore himself saw those rules of admissibility as "merely a preliminary aid to the main activity, viz., the persuasion of the tribunal's mind to a correct conclusion."<sup>13</sup> Thus, to Wigmore, the rules of evidence are, and always will be, secondary to the principles of proof that "represent the natural processes

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8. See 135 Cong. Rec. S3292 (April 4, 1989).

9. See, e.g., *Brown v. Southall Realty Co.*, 237 A.2d 834 (D.C. Ct. App. 1968) and its progeny. See also *Golphin v. Park Monroe Assoc.*, 353 A.2d 314 (D.C. Ct. App. 1976).

10. *Analysis of Evidence*, *supra* note 1, at 95

11. *Id.* at 169.

12. (3rd ed. 1937).

13. *Analysis of Evidence*, *supra* note 1, at 49 (quoting J. Wigmore, *The Science of Judicial Proof* §§ 1-2 (1937)); see also *Theories of Evidence*, *supra* note 7, at 109-66 (commentary on Wigmore's development of the principles of proof and the publication history of *The Science of Judicial Proof*).

of the mind in dealing with the evidential facts after they are admitted to the jury . . . so long as trials remain as a rational attempt to seek the truth in legal controversies."<sup>14</sup>

Although adopting Wigmore's stance on the existence and priority of principles of proof, Anderson and Twining are quick to acknowledge that they retain only his core emphasis on the logical structure of proof that they and have jettisoned his grand attempt to codify forensic psychology, forensic science, and general experience into an empirical science of proof.<sup>15</sup> In the first place, as the authors note, many of the findings of Wigmore's science have been superseded.<sup>16</sup> Moreover, Anderson and Twining also properly seem to have abandoned Wigmore's hope that knowledge developed through scientific findings and ordinary observations of experience will allow meaningful codification. Perhaps the best known manifestation of this idea was Wigmore's notion of legal, as opposed to logical, relevancy. Wigmore believed that evidentiary precedents would amount to a fund of rules, responsive to observed uniformities in behavior, that would render *ad hoc* appeals to logic and experience unnecessary in deciding upon the relevance of evidence. But his insistence that *legally* relevant evidence possess some "plus value" beyond mere logical relevance has all but vanished in modern codifications that uniformly adopt the standard of logical rather than legal relevance.<sup>17</sup> Anderson and Twining, in their treatment of Wigmore's science, have "Llewellynized" him, as they put it.<sup>18</sup> What remains of Wigmore's science is the logic of proof that Anderson and Twining refine and convey in order to help one "master . . . a set of techniques for organizing a mass of evidentiary material (macroscopic analysis) and for constructing, reconstructing, and appraising in a rigorous and detailed way the key phases of complex arguments (microscopic analysis) based upon the evidence in a case."<sup>19</sup>

I suspect that most evidence teachers will be sympathetic to Anderson and Twining's effort to systematize the teaching of the logic of proof without necessarily starting down the road to "Bayes nets" and "influence diagrams."<sup>20</sup> My guess is that almost all of us recognize, to one degree or another, the primacy of the principles of proof over the rules of evidence, and that the effective teaching of the latter presupposes some

14. *Analysis of Evidence*, *supra* note 1, at 50 (quoting J. Wigmore, *The Science of Judicial Proof* §§ 1-2 (1937)).

15. *Id.* at 47-48 n.1.

16. *See id.* at 47-48.

17. *See* C. Mueller & L. Kirkpatrick, *Evidence Under the Rules* (1988), at 69 (discussing Wigmore's notion of legal relevancy and its rejection in modern evidence law).

18. *See* *Analysis of Evidence*, *supra* note 1, at xxvii.

19. *Id.* at 47-48 n.1.

20. Those inclined towards similar constructs will not be entirely disappointed. The book contains a highly readable appendix on probability and proof written by a distinguished statistician. It provides an excellent framework for discussing the uses and misuses of statistical proof and for educating even the mathematically illiterate about probability theory.

understanding of the former. For example, students must appreciate the various kinds of inferences that may be drawn from facts to adequately understand, rules about hearsay, best evidence, or limited admissibility. However, what of those students who are lost in the brief introductory section on the concepts of relevance, probative value, and prejudicial effect, in which we take the time to map out chains of inferences from facts? Most of us do very little overt teaching of the principles of proof for reasons apart from the shortness of time. In no other course, perhaps, does the desire to achieve coverage serve as a more convenient excuse. Suppose we *were* to teach the principles of proof appropriate to our evidential jurisprudence; what would we *say*?

*Analysis of Evidence* directly answers this question by making it apparent that there is, indeed, much to say. The authors begin by providing a lucid description of concepts essential to thinking about the processes of proof, such as induction, deduction, abduction, and inference. Building upon Wigmore, they also provide a refined vocabulary<sup>21</sup> to guide the student in thinking about the steps involved in constructing proof from "evidence that will be perceived by the tribunal through one of its senses" (for which the authors adopt Wigmore's term "autoptic proference"). Additionally, the authors proffer their own vocabulary for thinking about the ways in which evidentiary propositions may combine: conjunction, compound propositions, corroboration, convergence, and catenate inferences. Again, their clear discussion well serves their purpose of helping students learn to recognize arguments that *can* logically be made from a mass of evidence as a prelude to assessing the strengths and weaknesses of specific arguments.

More generally, the vocabulary introduced by the authors facilitates requiring students to think critically about why they may find particular items of evidence to be more or less probative. Perhaps more importantly, it provides a way to cause them to rethink their first impressions about the relative strength of pieces of evidence. If accepted judicial practice and classroom responses are an accurate guide, beginning evidence students' first impressions about the strength of various inferences are as likely as not to be "wrong" when measured against routine practices.

In what amounts to the heart of the book, Anderson and Twining apply the vocabulary that they have introduced to a "chart method" of

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21. Since the book uses many terms that are likely to be unfamiliar to the reader, it contains a glossary that serves as a convenient means of referring back to basic definitions. See *id.* at 443-49. The core terms used are: *factum probans*, a factual proposition offered as support for a further inferred proposition; *factum probandum*, a proposition to be proved; interim *probandum*, a proposition to be proved which will support or negate, either directly or indirectly, an ultimate issue as part of a chain of inferences; penultimate *probanda*, simple propositions such as an element of a crime or claim or defense; and ultimate *probandum*, the ultimate issue which must be established or negated in order to prevail in a case. See *id.*

analyzing the evidence in any particular dispute.<sup>22</sup> Again, they begin with Wigmore's contribution. Next, they present a modified (and somewhat simplified) version of the "Wigmorian" chart as a way of mapping the evidence in any particular dispute. To construct such a chart, they utilize a "palette" of symbols that signify the types of evidence employed, the inferential relationships between items of evidence, and the non-evidentiary generalizations (about circumstances or experience) that are central to the parties' arguments. The symbols are accompanied by numbers, each of which corresponds to an evidentiary proposition that appears on a key-list of such propositions. Ideally, each such proposition is simple enough to be "susceptible to the response 'true/false,' or 'proven/not proven.'" <sup>23</sup>

As a result, the final product will graphically illustrate the many logical steps that the advocate is inviting a fact finder to take while reasoning along the path from "autoptic proference" to ultimate *probandum*.<sup>24</sup> The chart/key-list will clearly delineate, for example, testimonial assertions; inferred propositions; evidence providing alternative explanations for inferences proposed by the other side; evidence corroborating proposed inferences; facts that the tribunal will judicially notice or accept without evidential support; and generalizations that are likely to play a significant role in a case but which are not propositions to be proved.<sup>25</sup> The chart will also identify the inter-relationships among all the anticipated items of proof.<sup>26</sup> As a whole, the chart and key-list will depict both the central evidentiary propositions upon which the advocate relies and the logical relationship among them.

As Anderson and Twining realize, some will undoubtedly find the process of charting a case—at first blush, at least—to be more tedious than illuminating. Accordingly, they set out in truncated form what they call narrative and outline methods for analyzing proof.<sup>27</sup> In fact it is difficult to see how these approaches in their hands amount to different methods at all. Perhaps, however, that is their point about the utility of the charting exercise. They argue that regardless of the final form adopted for presenting a complete analysis of the facts, the logical processes used to arrive at the content of the chart, narrative summary, or outline are essentially the same. For example, they note—correctly in my view—that "[t]he nature of closing argument is to reassure the fact-finder that the evidence 'logically' makes one story the most plausible and to focus its attention on the inconsistencies and logical fallacies in the opponent's story in relation to the central legal principles laid down by the judge."<sup>28</sup>

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22. See *id.* at 108-55.

23. *Id.* at 125.

24. See *supra* note 21.

25. See *id.* at 145-46.

26. See *id.* at 145.

27. See *id.* at 155-72.

28. *Id.* at 169.

Thus, the chart itself is more a tool than a method: regardless of how one chooses to depict the results of factual analysis—on a chart, or in narrative or outline form—one should have performed the inferential analysis suggested by the exercise of charting a key-list of evidentiary propositions in Wigmorean fashion. If the tedium stems from thinking through the content of the chart rather than executing it in final form, then I think it safe to say that the fault lies with the student rather than the “method.”

A critique more likely to be voiced by experienced fact analysts is that the charting process is unnecessary because it unduly formalizes that which is intuitive. Nonetheless, I trust that those of us who have had the humbling experience of teaching evidence—even to very bright students—will recognize the error in that critique. It is true that the reasoning process formalized in the chart method will be second nature to experienced fact analysts. That it has *become* second nature to experienced evidence teachers or practitioners, however, does not mean that the skill is intuitive. I would liken learning the analysis of evidence that Anderson and Twining are seeking to teach to learning a language: one *can* learn a language by immersing oneself in surroundings where it is spoken rather than receiving any kind of formal training, and in that very limited sense one may think of the ability to acquire language as intuitive. But for only a very few will the process of actually learning to communicate not be accelerated and enhanced by receiving formal instruction in grammar. The intuitions of an experienced fact analyst, which she may perceive as second nature, are far more likely to reflect a painstaking, albeit informal, education.

It is particularly important that law schools join Anderson and Twining in their attempt to incorporate the skill of fact analysis within the traditional classroom curriculum. Too often, whatever fact analysis is taught by law schools is left to clinical courses taught by practitioners who learned that skill by a mixture of observation and trial and error. It is natural that, to those who have successfully learned a language through experiential exposure, formal training will appear unnecessary, if not entirely a waste of time. Therefore, it is understandable that they are likely to replicate their own training in their teaching, if not to be outright hostile to the attempt to formalize instruction in fact analysis. Nonetheless, the kind of rigorous analysis of facts made easily accessible by the Wigmorean chart/key-list might well help even experienced practitioner/teachers understand what they have learned and, thus, improve their ability to communicate it to students. After all, practitioner/teachers likely to think of the skill of fact analysis as intuitive always seem to be at a loss to explain why it is that their intuition seems to consistently serve them well, while the intuition of their beginning students always seems to come up short.

The ultimate test of the utility of the Wigmorean chart lies in the actual exercises that the authors have carefully assembled. Interspersed

with the textual materials are a series of exercises that lead up to the students charting the evidence in several hypothetical and real cases that are either developed in stages or presented in the form of substantially complete case files or trial records.<sup>29</sup> The case materials themselves are worth the price of the book. They provide abundant opportunities for making students appreciate the importance of clearly formulating *probanda* and reasoning out the inferential relationship between items of evidence and the ultimate *probandum*. Rigorous analysis of the cases and problems provided should dispel any misunderstanding by students, no less than some of their professors, that fact analysis is simply a matter of common sense or intuition. If the students analyze the evidence in the cases developed in the materials in response to the questions and exercises suggested by the authors, it is difficult to imagine that they will not begin to understand the analysis of evidence in precisely the way that their professors hope that they will, but too often leave to chance.

The most difficult question posed by *Analysis of Evidence* is how to best use it within the confines of the traditional law school curriculum. Following Wigmore's own example at Northwestern and his suggestion about the priority of the principles of proof over the rules of evidence, the authors suggest that the book may be used in a variety of ways, including as the text in a course on proof that precedes the course on the rules of evidence.<sup>30</sup> There is much to be said for this approach. The rigorous analysis of evidentiary propositions and inferences is itself extremely useful in understanding and evaluating the rationales for the rules and, thus, learning them in this way facilitates understanding of both how they can be used and how they impact on the structure of proof. For example, even a rudimentary understanding of the authors' conception of fact analysis would facilitate the teaching of such concepts as limited admissibility, *unfair* prejudice, hearsay, and relevance. I suspect that a mini-course in proof is already the theme, even in traditional evidence classes, where the discussion of the admissibility of any piece of evidence begins with the question "Why is it relevant?" and proceeds from there.

On the other hand, the materials themselves belie the utility of teaching the principles of proof apart from the rules of evidence. Many of the best exercises designed by the authors presuppose some knowledge of the rules of evidence. Additionally, the charting exercise is enhanced by undertaking it within the context provided by the rules. If the authors are correct about their claim to a rationalist tradition in evidence law, many of the uses of proof whose understanding is facilitated by the charting process will also be illuminated by the rules. In addition, those not fully convinced of the benefits of teaching the science of proof will undoubtedly find the Wigmorean chart useful, because it helps to teach the rules

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29. *See id.* at 62-63, 173-250.

30. *See id.* at xxiv, xxvii.

by graphically illustrating the inferential structure of proof which the rules both respond to and help to create.

The difficulty in developing a framework in which to make best use of the materials in *Analysis of Evidence* is reflected in the teacher's manual, which is less an integrated approach to the materials than it is a running commentary on how the authors use, or have used them, in different ways. For this reason, the manual, although filled with interesting ideas and suggestions, is less useful than it could have been. I fear that a teacher interested in developing a course on proof or fact analysis will not find that her decision on the selection of a text is made any easier by the existence of the manual. By the same token, an evidence teacher who is inclined to include more proof in the standard evidence course at the expense of coverage of the rules of evidence is likely to find that prospect no less daunting by virtue of the manual. Unfortunately, it reads more like a series of relatively idiosyncratic suggestions about how to use the materials than a finished package.

Part of the problem may be the fact that the manual attempts to incorporate the various ways in the which the materials have been used by both authors to teach different audiences, including undergraduates as well as law students. I suspect, however, that the problem of integrating the materials may also be more substantive. In resurrecting the Wigmorean principles of proof, the authors seem to perceive their mission as counterbalancing the traditional emphasis on the rules of evidence by insisting upon the existence of a separate, neglected science of proof. In fact, however, a major contribution of the book seems to me its validation of the continuity between the principles of proof and the rules of evidence as they have developed within the common-law framework for resolving disputes. The authors might, therefore, have focused more on establishing the intimate connection between the rules of evidence and the principles of proof than on attempting to prove the existence of a forgotten science.

One way to approach the problem of integration might have been to concentrate, in the more theoretical portions of the book, as is done in the more practical, on the standpoint of the trial lawyer. While the trial lawyer's perspective dominates the exercises, it tends to get slighted in the textual material that does not directly address trial preparation or presentation. Yet, adopting this consistent perspective throughout the book seems to me to hold much promise as a vehicle for integrating the study of the principles of proof and the rules of evidence. In preparing a case for trial, for example, an advocate must be acutely aware that everything she does in the courtroom should be conceived as a form of persuasion directed to two audiences. Given the elements of the rationalist tradition that the authors describe, the fact finder must be persuaded that the desired verdict is the logical outcome of the evaluation of the proof. Simultaneously, the judge must be persuaded that the proof necessary to reach the desired verdict comports with the rules of evidence. Planning a

case, therefore, is an exercise in integrating forms of persuasion appropriate to both audiences, who are evaluating it from different perspectives.<sup>31</sup> For example, while the jury is hearing from a witness that an automobile accident must have been a horrible, startling event that riveted the attention of passersby, the judge is "hearing" that the witness is about to relate an excited utterance made by a bystander at the scene of the accident who, given the circumstances, must have been reporting his personal knowledge of the cause of the crash.

Attending to both perspectives, moreover, is mutually enhancing. The advocate who understands the rationale of the hearsay rule<sup>32</sup> and its excited utterance exception<sup>33</sup> is now also better prepared to make arguments addressing the probative value of the evidence as well as its admissibility. More generally, the advocate who understands *both* the rules of evidence and the principles of proof as applications of the rationalist tradition to the problem of resolving factual disputes fairly and accurately will be better prepared to approach what is, perhaps, the advocate's ultimate task—persuading both the fact-finder and the judge that the desired verdict is consistent with the aspirations reflected in that tradition.

Similar connections between evidence law and the principles of proof might also have been emphasized by focusing on aspects of the trial process that tend to be excluded in traditional evidence courses. These are similarly slighted in Anderson and Twining's discussion of the principles of proof. Standard jury instructions about how a jury should evaluate proof generally (such as credibility instructions) and how it should evaluate specific types of proof (such as cautionary instructions) provide a ready vehicle for exploring beliefs about how fact finders ideally should evaluate evidence and assumptions underlying beliefs about how they are likely to do so.<sup>34</sup> Effective persuasion in the context of presenting a case for trial should incorporate these beliefs and assumptions into the structure of the advocate's argument. What may first appear as an irrational verdict by a jury given "the facts," for example, may often reflect an effective job of persuasion about how the fact finder should understand its role in holding, say, the prosecution in a criminal case to the requirement of proof beyond a reasonable doubt of precisely specified allegations. As Anderson and Twining would, I think, concede, persuasion about the appropriate conception of the fact finder's role in the context of

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31. Put otherwise, both points referred to in the text must be "proved" to the relevant audience.

32. See Fed. R. Evid. 802.

33. See Fed. R. Evid. 803(2).

34. Similarly, standard and proposed jury instructions about the elements of a crime, cause of action, or defense could also serve to focus the process of formulating penultimate and ultimate *probanda*. See *supra* note 21. Because a student may have some difficulty grasping the notion of the relationship between a *factum probans* and *probandum*, see *id.*, it might be easier to teach by showing how jury instructions frame the question(s) to which his evidence must provide the desired answer.

the case is as much a part of the rationalist tradition as is "scientific" evaluation of the evidence to discover the "true facts."

Fully developing the persuasion approach to fact analysis through adoption of the trial lawyer's perspective would probably carry the risk of confusing *Analysis of Evidence* with a trial practice manual, which it most decidedly is not. Nonetheless, the risk could have been worth it. Utilizing the trial lawyer's perspective in order to teach the rigorous analysis of facts crystallizes two points that seem to me to be central to the substantial contribution to the theoretical literature on proof that Anderson and Twining have made in *Analysis of Evidence*.

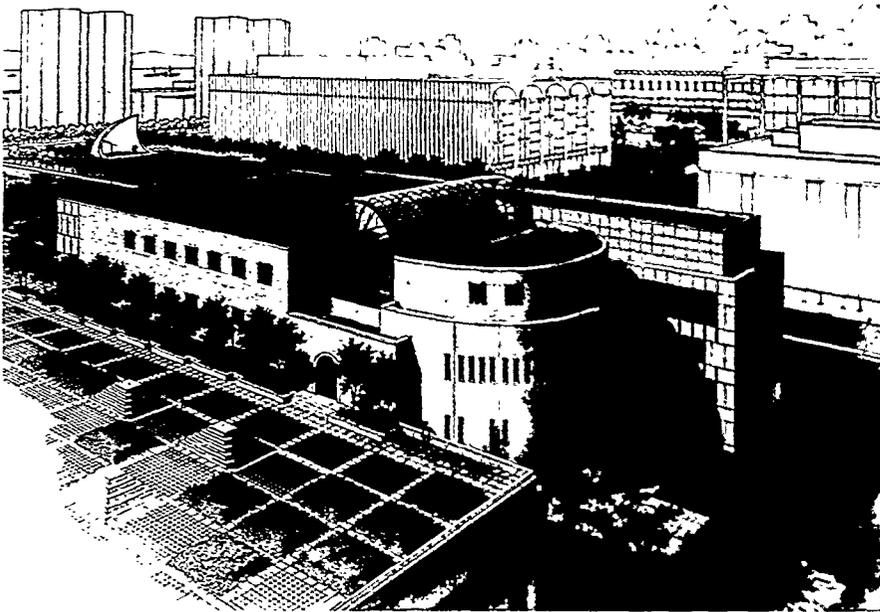
First, the book demonstrates that the extent to which the law of evidence is about the science of rational inference is itself a question that is up for grabs *within* the rationalist model of adjudication as Anderson and Twining conceive it. Indeed, insofar as advocates properly emphasize different elements within that tradition as part of the process of persuasion, the question posed at the beginning of this review may itself be seen as part of the contest in any given "factual" dispute. The rules of evidence and their associated principles of proof are drawn from the rationalist tradition of common-law adjudication at the same time they participate in its evolution. The rules and principles are, thus, both descriptive and prescriptive: they amount to a "grammar" of persuasion that describes how the process of persuasion in fact occurs and how that progress simultaneously serves as a basis for evaluating particular findings. Perhaps the notion of a "logic" or "science" of proof is ultimately misleading if one thinks of logic and science in their modern sense as aspiring to universality and objectivity. Instead, the principles of proof and the rules of evidence may better be conceived as part of what Roberto Unger has called a "dogmatic, interpretative, or symbolic discipline,"<sup>35</sup> like grammar, whose aspirations are unavoidably normative and, hence, different from those of modern empirical science. In this view, the rationalist tradition can accommodate the narrative holists and logical atomists precisely because it purports to account for fact finding *within* our particular legal system rather than in some universal or objective sense.

Second, the principles of proof that emerge from learning that tradition—although more akin to principles of classical rhetoric than to findings of modern empirical science—are indeed as central to our legal order as any other legal principles. Thus, their study deserves a place in the law school curriculum as exalted as that currently afforded the study of the rules of evidence. One may disagree with Anderson and Twining about whether it is more likely that the principles of proof will achieve that status through emphasis on their uniqueness or their continuity with, and dependency upon, the traditional course on the rules of evidence. But however one approaches that question, this book should

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35. See R. Unger, *Knowledge and Politics* 111 (Free Press: 1975).

cause us to consider not only how the skill of fact analysis should be taught, but also whether the standpoint of the trial lawyer should become as familiar to second-year law students as the standpoint of the appellate lawyer is to first-year law students. Were that to happen, I suspect that we might reconsider a number of boundaries that currently structure the law school curriculum, such as the distinction between clinical and classroom education. In the meantime, we can all enhance our teaching of evidence by incorporating the approach to proof embodied in *Analysis of Evidence*.



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