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Recommended Citation

40 S. Tex. L. Rev. 483 (1999)

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ETCHINGS ON GLASS: REFLECTIONS ON THE SCIENCE OF PROOF

LOUISE HARMON*

INTRODUCTION: THE QUANDARY OF THE POST-CONFERENCE REFLECTOR

"How to define the task of the 'post-conference reflector'?" "Just reflect," someone from the law review responded. "Like the moon," I asked, "of the sun? A pale, silver version of hot, yellow light?" No one heeded my metaphor, and I wondered what I was doing at this conference. Psychologist David Schum wrote about being "an uninvited guest in the mansion of evidence law" in an earlier stage of his research.¹ My status as a post-conference reflector on the Science of Proof seemed even odder: I was invited to the mansion, to an exclusive club of cigar smoking, velvet dinner-jacketed evidence experts, with no apparent reason for the invitation. I do not teach evidence, or write in the area. Neither am I a trial attorney. Evidence has never been a favorite subject, or one that I have thought a lot about. Indeed, it has always been alien to me.

Perhaps outsider status has its virtues. The outsider's perspective sometimes reveals contours of a debate that cannot be seen by those located at its center. The outsider may also have fewer issues of ego to deal with since there is no history of stance, no old trench lines to dig one's heels into. And there is always the joy of a new set of words—a new vocabulary unencumbered with the weight of chronic use. If I were an insider, I, too, would beckon a wandering outsider to approach the mansion, to peer in at the warm glow of the fire within, to see what she could see. Perhaps she could be induced to inscribe messages on the windowpane, to make etchings where warm breath made contact with cold, black glass.

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1. David A. Schum, *Marshaling Thoughts and Evidence During Fact Investigation*, 40 S. TEX. L. REV. 401, 405 (1999).

Without Twining's brief overview of the development of "the new evidence scholarship," this outsider could never have made sense of what she saw in the mansion.² Twining located the debate historically, identified the participants—those who were present, and those who were not—and sketched out their positions.³ It was a great courtesy for Twining to have done so. By addressing the outsider at the window, he made a gesture that is not made often in academia where the background of a debate is hidden for the very purpose of exclusion. The discipline of philosophy works that way—like the roads of the rich in Long Island. Their roads are unmarked on the premise that if the driver needs a road sign to find herself, she has no business being there. Philosophy, too, disdains public signage. No footnotes, no introductions, no histories, no effort to help the reader find her way. Twining's orientation was much appreciated.⁴

My messages etched on the window glass of the mansion are about two interrelated topics: truth and knowledge.

2. See William Twining, *Narrative and Generalizations in Argumentation About Questions of Fact*, 40 S. TEX. L. REV. 351, 352–56 (1999).

3. My reflections will include no reference to Robert Schmidt's work. I could not come to a state of equilibrium about his ideas because they came into my mind through my ears and not my eyes. I look forward to reading his words captured on paper.

4. Twining has been unjustly accused of promoting the rationalist tradition when in fact his contribution to the debate was to describe its attributes. See generally Kenneth W. Graham, Jr., "There'll Always Be an England": *The Instrumental Ideology of Evidence*, 85 MICH. L. REV. 1204 (1987) (reviewing WILLIAM TWINING, *THEORIES OF EVIDENCE: BENTHAM AND WIGMORE* (1985)). Donald Nicolson summarized Twining's attributes of the rationalist tradition:

- There is such a thing as an objective reality which can be discovered and which exists independently of human knowledge (a foundationalist epistemology);
- Truth is defined as knowledge which corresponds to this objective reality (the correspondence theory of truth);
- Although present knowledge about past events is typically based upon incomplete evidence, the best way for discovering truth is through reason;
- The rational method of discovering truth is through drawing inferences inductively from the relevant evidence, with deduction playing a secondary role (scientific rationality);
- Although there are a number of other values to be protected in fact-finding, such as national security, civil liberties, etc [sic], rectitude of decisions has a high priority in legal fact-finding;
- The aim of adjectival law is rectitude of decision;
- Justice is achieved through the application of substantive law to correct facts (expletive justice).

Donald Nicolson, *Truth, Reason and Justice: Epistemology and Politics in Evidence Discourse*, 57 MOD. L. REV. 726, 727 (1994).

I. SOME THOUGHTS ABOUT TRUTH

I may not have thought much about evidence, but in other contexts, I have thought a lot—and unproductively—about truth, and its relationship to justice. I have a distrust of those foundationalists who claim that there is such a thing as discoverable, objective reality,⁵ and that truth is defined as knowledge which corresponds to this objective reality. This distrust has served me well on earth. I understand how truth can be crafted by those in power; how truth is socially contingent; how it is a construct of language.⁶

But when I lie on the roof of my car on Irish summer nights and contemplate outer space with binoculars, my postmodern leanings disappear. In the presence of the milky swathe of stars that make up our galaxy, and of the infinite space beyond, I become a believer in an objective reality—that somewhere out there, beyond man's grasp and grasping, there are other galaxies, other stars with planets spinning around them. Similarly, the stunning photographs from the Hubble telescope prompt me to say that scientists have gained knowledge of something that is really out there—that the pursuit of truth has been enhanced.

It makes for a schizophrenic form of skepticism. On earth, I am inclined to reject many social, and even scientific, truths. A Supreme Court jurist, Justice Bradley, made assertions in 1872 about the ability

5. Foundationalism tries to explain what would constitute a justification for a statement of "knowledge." Jane Duran summarizes its claims:

The foundationalist claims that a knowledge claim can be justified in a chain, or a series of chains, by basing each claim—including the original—on some other claim judged to be epistemically prior, and then finding a basic claim or stopping point beyond which, epistemically, one cannot go. This stopping point is alleged to have special epistemic status, and for most foundationalists dealing with empirical knowledge (rather than the deductive knowledge of mathematics and related fields) the stopping point has been a sentence or proposition of privileged access

JANE DURAN, TOWARD A FEMINIST EPISTEMOLOGY 39 (1991).

6. These are not, of course, my own insights. I acquired them from reading the required postmodern reading list. Probably Michel Foucault is quoted most often:

[T]ruth isn't outside power, or lacking in power Each society has its régime of truth, its "general politics" of truth: that is, the types of discourse which it accepts and makes function as true; the mechanisms and instances which enable one to distinguish true and false statements, the means by which each is sanctioned; the techniques and procedures accorded value in the acquisition of truth; the status of those who are charged with saying what counts as true.

MICHEL FOUCAULT, *Truth and Power*, in POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 1972-77, at 109, 131 (Colin Gordon ed. & Colin Gordon et al. trans., 1980).

of Myra Bradwell, a married woman, to practice law; they make me recoil:

[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.⁷

It is all well and good to shrug our shoulders and relegate these attitudes to the dust bin of history, characterizing them as quaint Victoriana, and not as truths that apply today. But that misses the point. What matters is that in 1872, there were competing truths about the nature of women—one held presumably by Mrs. Bradwell and other women like her, and another, dominant, masculine truth that prevailed. Mrs. Bradwell lost her petition; she did not obtain a license to practice law.⁸ That dominant, masculine truth kept Mrs. Bradwell, and other professional women trapped in the kitchen and the nursery. That dominant, masculine truth wasted one woman's time, talent, and spirit, and kept many other women from stepping out of the role the Supreme Court had assigned them.

And the metatruth is there are still competing truths about the nature of women, including the ones articulated in *Bradwell*. The ubiquity of the *Bradwell* truths explains why the law firm I worked for channeled women attorneys into trusts and estates instead of litigation: women were softer and better suited for family matters, and not for the fractious fray of combat. It explains why the culture has such difficulties dealing with strong, assertive women.⁹ Indeed, it may

7. *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872). Justice Bradley prefaces his remarks with this:

The claim that, under the fourteenth amendment . . . the statute law of Illinois, or the common law prevailing in that State, can no longer be set up as a barrier against the right of females to pursue any lawful employment for a livelihood (the practice of law included), assumes that it is one of the privileges and immunities of women as citizens to engage in any and every profession, occupation, or employment in civil life. It certainly cannot be affirmed, as an historical fact, that this has ever been established as one of the fundamental privileges and immunities of the sex.

Id. at 140–41. Here Justice Bradley expressly invokes “historical fact” to support his denial of equal opportunities for women.

8. *See id.* at 137–39.

9. In a footnote, at least, I would like to add the attribute of being overweight. It has struck me lately, perhaps because middle-aged spread has happened to all my friends, and to me, that there is nothing quite so threatening to men in power as fat, smart, assertive women. If we were to have a witch hunt in the early twentieth century, I would not be surprised to learn that most of us who would burn would not be thin.

even explain why many law schools have traditionally assigned the course in Evidence to male professors.¹⁰ It is a "tough" course, full of rigor and logic; clearly it falls within the masculine domain. (Perhaps there is historical continuity; the laws of evidence replaced the ordeals, by combat or by other form of torture—hot irons, swallowed feathers or drowning—and they were all performed exclusively by medieval men.¹¹) There are other kinds of "truths" like these that I reject—*devalue* judgments about women, people of color, homosexuals, and other people who sit on the outer fringes of the centers of power. I am probably predisposed to reject these "truths" because many of them hurt me, and others like me. I have nothing invested in their perpetuation.¹² But I also do not take my public rejection of them lightly. There is a genuine struggle here for power and resources. When one version of truth trumps another, someone loses, and that loss is genuine.

There are many social, even scientific truths, that I reject.¹³ But

10. In the AALS Directory of Law Teachers 1998–1999 listing of Law Teachers by Subject, there were only 20 women out of 309 professors teaching evidence for over ten years. THE AALS DIRECTORY OF LAW TEACHERS, 1130–32 (1998–99).

11. The ordeals probably date to before the Christian era, and the practices were so deeply entrenched that the Church adopted them. The ordeal of the hot iron was the most common one used for freemen, and consisted of the accused carrying a heated iron over a distance of nine feet, then sealing his hands. See THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 114 (1956). If afterwards, when the bandages were removed, it was clean, then he was innocent; if there was "unhealthy matter," he was deemed "guilty and unclean." *Id.* The ordeal of cold water involved throwing the accused into a body of water and then waiting to see if he sank or not; sinking was a sign of innocence. See *id.* My favorite is the ordeal of the "cursed morsel." "This consisted in making the accused swallow a piece of food in which was concealed a feather or such like; if he was successful, he was innocent, but if he choked he was guilty." *Id.*

12. My status as a woman is relevant to my rejection of these "truths." As Steven Best and Douglas Kellner write:

Feminists tend to be critical of modern theory because the oppression of women has been sustained and legitimated through the philosophical underpinnings of modern theory and its essentialism, foundationalism, and universalism And not surprisingly, the postmodern emphasis on purity, difference, otherness, marginality, and heterogeneity has had immense appeal to those who have found themselves marginalized and excluded from the Voice of Reason, Truth and Objectivity.

STEVEN BEST & DOUGLAS KELLNER, POSTMODERN THEORY: CRITICAL INTERROGATIONS 206, 207 (1991).

13. In his seminal work on the philosophy of science, Thomas S. Kuhn challenged the traditional view that science evolved as a linear, logical progression. See THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (3d ed. 1970) (introducing the idea of the dominant paradigm which is a set of assumptions shared by a scientific community about what theory describes the world most satisfactorily). Science moves through stages, according to Kuhn. The first stage is characterized by having no dominant paradigm, only competing schools. Eventually someone engages in "extraordinary

when I look into space, and leave earth, imagining a vast, infinite, mysterious universe that transcends man's domain, and his definitions, I am willing to accept the truth: that there is a universe out there, that in that universe, there are material objects, and that things happen to them. And perhaps for these kinds of truths—about the existence of the universe, material objects, and events—I am willing to accept a set of similar truths about objective reality on this planet.¹⁴ I do believe, for example, that on a dark day in November of 1963, two bullets entered the body of John Fitzgerald Kennedy as he rode in a convertible through the streets of Dallas—and that he did not survive that fire. I am not prepared to deny the existence of objective truth altogether, although once it is rendered into language, that objective truth becomes tainted by hidden values. I believe that things are out there, but I do not necessarily believe in the sentence that asserts that belief. My position on the existence of “truth” is thus incoherent.¹⁵

But it is relevant to my thoughts about the conference on The Science of Proof. Even though I found myself in a foreign land of

science,” by articulating a theory that becomes a dominant paradigm which then becomes uncritically accepted, giving rise to “normal science” which extends scientific knowledge based on the assumptions and methodologies provided by the dominant paradigm. “[N]ormal-scientific research is directed to the articulation of those phenomena and theories that the paradigm already supplies.” *Id.* at 24. Eventually the dominant paradigm is eroded by awareness of anomalies or “counterinstances,” and there is a large-scale crisis in the discipline—a scientific revolution—in which a competing paradigm is articulated, debated, and accepted as the new theory that describes the world in a more satisfactory fashion.

14. Another set of “facts” that I must accept in order to function in the world is what Berger and Luckmann call the “temporal structure of everyday life.” PETER L. BERGER & THOMAS LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY* 26 (1967). The standard time that we all acknowledge is understood as an “intersection between cosmic time and its socially established calendar, based on the temporal sequences of nature, and inner time” *Id.* at 27. The sequence of the temporal structure is “coercive;” it cannot be reversed at will. *See id.* It also determines our individual and corporate histories. “The temporal structure of everyday life not only imposes prearranged sequences upon the ‘agenda’ of any single day but also imposes itself upon my biography as a whole.” *Id.* at 28.

15. When I studied philosophy in graduate school, my colleagues used to give me a lot of grief over my inability to make up my mind about fundamental key issues such as the nature of reality and truth, or the universality of absolute moral principles. It may be a fatal flaw in a field like philosophy for a participant in the debate to believe in absolute truth on Monday, to reject it on Wednesday, only to be lured into believing in it again on Friday. Philosophers pride themselves on “taking positions,” and when the position fluctuates on a daily basis, it may be difficult to play the game. It also makes the indecisive scholar “fair game.” As Twining points out, on a number of key issues, he does not “yet have a firm position or posture and, in these respects (which include some central issues concerning epistemology, rationality, and ‘holism’), I present a moving target.” William Twining, *Hot Air in the Redwoods, A Sequel to The Wind in the Willows*, 86 MICH. L. REV. 1523, 1538 n.52(e) (1998) (examining the relationship between WIND IN THE WILLOWS and HOT AIR IN THE REDWOODS).

probabilities, inferences, and inscrutable little boxes with arrows,¹⁶ there was a common patch of sand upon which I could stand with the conference participants. We all agreed that it would be unjust to incarcerate, and perhaps to execute, the wrong man—a defendant who did not commit the crime. As George Fletcher puts it:

A particular death can be attributed to the conduct of a particular person only if the conduct causes the death. As no one can be tortiously liable for a death that he has not caused, no one can be criminally tainted or blamed for a death beyond the causal sweep of his conduct.¹⁷

Rule 102 of the *Federal Rules of Evidence* alludes to this principle that punishment must be linked to wrongdoing and culpability,¹⁸ declaring

16. This conference introduced me to the word “innumerate,” coined to parallel the term “illiterate.” Presumably innumeracy refers to those of us who are not fluent in the language of mathematics. It seems to me that the label is too narrow. My deficiencies are not only numerical; all symbols repel me. One look at one of Wigmore’s Analysis Charts, with its concatenation of circles, arrows, squares, and letters—and my mind shuts down. The response is emotional, not intellectual. I am capable of performing the operations, and even passed a symbolic logic qualifying exam in the Philosophy Department at Columbia. But the moment I passed the exam, I flushed the symbols out of my system, and do not intend to introduce them ever again. “Innumerate” is thus too narrow. Perhaps “symbolically impaired” might be more descriptive, or to avoid the implication of superiority on the part of the label maker, “symbolically adverse.” Those of us who are symbolically adverse will also have difficulties turning appliances off and on in Europe. The microwaves and washing machines there are splattered with unintelligible symbols, and resemble a Wigmorean analysis chart. The goal, I assume, was to transcend the differences in language; the solution was to create a symbolic language that no one can understand.

17. GEORGE FLETCHER, *RETHINKING CRIMINAL LAW* 360 (1978). It also offends my sense of justice if the right man (e.g., correctly identified perpetrator) is punished for a first degree murder if he in fact only committed manslaughter. This entails the principle of proportionality; that the punishment should reflect the degree and nature of the accused’s wrongdoing and culpability. As Fletcher puts it, there are two components of desert: wrongdoing and culpability. *See id.* at 461. “It is also common ground that a greater degree of wrongdoing justifies greater punishment [T]he maximum level of punishment is set by the degree of wrongdoing; punishment is mitigated according as the actor’s culpability is reduced.” *Id.* at 461–62.

18. Whether or not the accused had to have a culpable state of mind in Anglo-Saxon law has been debated for years. In 1894, Wigmore posited that liability was absolute: “The doer of a deed was responsible whether he acted innocently or inadvertently, because he was the doer; the owner of an instrument which caused harm was responsible, because he was the owner, though the instrument had been wielded by a thief” John H. Wigmore, *Responsibility for Tortious Acts: Its History*, 7 HARV. L. REV. 315, 317 (1894) (citations omitted). Justice Holmes criticized Wigmore’s claim of strict liability in 1881. Plucknett does not take a position, but points out that “there was a fatalistic attitude to life in earlier times which made men accept misfortune (in the shape of heavy liability for harm they did not mean to do) with more resignation than now.” PLUCKNETT, *supra* note 11, at 464 (citations omitted). Plucknett also quotes the laws of Aethelred (c. 1000) that emphasized not the state of mind of the accused, but his status:

that the rules shall be construed, inter alia, "to the end that the truth may be ascertained and proceedings justly determined."¹⁹ Truth and justice are inextricably linked: without truth, there can be no justice.

Peter Murphy rightly points out that a court of law does not actually purport to seek the truth, but to have the petitioner prove his case with an "acceptable degree of probability:" in the instance of a criminal trial, that standard of proof is "beyond [a] reasonable doubt."²⁰ We yield on the requirement of proving absolute truth because of the impossibility of attaining it.²¹ As Schum writes, "these events have not happened over and over in the past nor can they be reproduced or replicated in the future," and because cases are usually tried in an informational vacuum, the state will have to rely on circumstantial evidence.²² Every prosecution will have its gaps, or as Schum says, "missing evidence," and that is expected.²³ The state's job is merely to convince the trier of fact that its version of the incidents is acceptably probable—that the defendant has been proven guilty beyond a reasonable doubt.

That legal truism put aside, most of the conference participants (and I include myself in this desideratum) want a degree of assurance that the state will punish the individual only if he engaged in the alleged wrongdoing—truly. This means that there must be some evidence about unique events that took place sometime in the historical past—evidence that will constitute "knowledge," at least within the range of acceptable probability, that this defendant was causally connected to the wrongdoing that occurred. This was an

And always the greater a man's position in this present life or the higher the privileges of his rank, the more fully shall he make amends for his sins, and the more dearly shall he pay for all misdeeds; for the strong and the weak are not alike nor can they bear a like burden, any more than the sick can be treated like the sound.

Id.

19. FED. R. EVID. 102.

20. Peter W. Murphy, *Some Reflections on Evidence and Proof*, 40 S. TEX. L. REV. 327, 338 (1999).

21. Bentham said it best:

Certainty, absolute certainty, is a satisfaction which on every ground of inquiry we are continually grasping at, but which the inexorable nature of things has placed forever out of reach. Practical certainty, a degree of assurance sufficient for practice, is a blessing, the attainment of which, as often as it lies in our way to attain it, may be sufficient to console us under the want of any such superfluous and unattainable acquisitions.

5 BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* 351 (J.S. Mill ed., 1827), *quoted in* TERENCE ANDERSON & WILLIAM TWINING, *ANALYSIS OF EVIDENCE* 336 (1991).

22. Schum, *supra* note 1, at 410.

23. *Id.* at 430.

underlying assumption of David Schum's very interesting article on marshaling thoughts and evidence during a fact investigation. His goal was to design methods for enhancing the asking of questions during what he calls "discovery-related" tasks of fact investigation. Schum described the early stages of a case, "a new client appears in an attorney's office with a possible civil complaint, or a criminal investigator is sent to a certain location to determine whether a criminal act took place and, if so, who committed it."²⁴ The initial conditions of such discovery almost always involve uncertainty about these kinds of objective facts; doubts about what happened to whom, where, and when.

Although Schum does not tell us anything about the nature of the trifles that the investigator marshals, he seems to be referring to the kinds of facts whose objective reality I am ready to believe in: witnessed and well-chronicled events, colliding material objects, a dead body here, a dropped knife there.²⁵ But I do not know if Schum intends to include in the category of "facts" other kinds of information: that the victim of a rape was a "tease,"²⁶ or that the African-American petitioner in a housing discrimination case was "caustic and abrasive,"²⁷ or that the lesbian mother in a custody battle was "immoral,"²⁸ or that a gay soldier was "untrustworthy"²⁹—labels

24. *Id.* at 408.

25. Berger and Luckmann point out that certain kinds of objects, such as weapons, are not only objects that exist objectively in the world, but they are also an "objectivation of human subjectivity." BERGER & LUCKMANN, *supra* note 14, at 35.

Anger, however, can be objectivated by means of a weapon. Say, I have had an altercation with another man, who has given me ample expressive evidence of his anger against me. That night I wake up with a knife embedded in the wall above my bed. The knife *qua* object expresses my adversary's anger. It affords me access to his subjectivity even though I was sleeping when he threw it [T]he knife in my wall has become an objectively available constituent of the reality I share with my adversary and with other men.

Id. at 34–35. Thus, even my belief that the dropped knife is an objective "fact" is probably tainted by my understanding of what a weapon is, and what its user's subjective intent might have been.

26. *Scurr v. Niccum*, 620 F.2d 186, 188 (8th Cir. 1980) (using in defense another suspect's statements that the victim in an attempted rape and murder case was "lippy" and a "tease").

27. *Robinson v. 12 Lofts Realty, Inc.*, No. 79-Civ. 2979, 1980 U.S. Dist. LEXIS 11645, at *57 (S.D.N.Y. May 22, 1980).

28. See, e.g., *Bottoms v. Bottoms*, 457 S.E.2d 102, 107 (Va. 1995). In *Bottoms*, the Supreme Court of Virginia took the mother's lesbianism into account in denying custody of her son, noting that the conduct "inherent in lesbianism" was a Class six felony in the Commonwealth and that the child's "living daily under conditions stemming from active lesbianism practiced in the home may impose a burden upon a child by reason of the

attached to conduct or status that might pass for "facts" yielding "truth" of a different kind, a "truth" that might impede justice, not promote it. I found myself staring at those stacks of cards with abstractions under them: "Credibility" and "Inquiries" and "Testimony," wondering what kind of "facts" were scribbled on them. I loved aspects of Schum's article, particularly his concrete suggestions on how to keep the mind from calcifying during a period of uncertainty—when the reservoir of available information is fluctuating, and no one is certain what counts as a "trifle."³⁰ But there was a scary sterility to Schum's article as well. His "facts" had no race, no gender, no faces, no context.

Terence Anderson's analysis did satisfy some of my desire for context. Anderson seemed ready to argue that the articulation of the generalizations upon which our inferences depend may

provide a basis for clarifying and reconciling seemingly intractable distinctions between modern rationalism and postmodernism; between realism and critical legal studies; and between those who claim that there is objective truth and those who claim truth is always contingent—relative to power, to sexual identity, to race and ethnicity, or to all or some of the foregoing.³¹

And while Anderson had not yet finished his third section by the conference date, he will probably claim that the social contingencies of truth will be revealed once an analysis includes the hidden generalization upon which an inference depends.

Those revelations seem laudable, although Anderson's argument could be made stronger if he used generalizations that showed bias based on gender, race, or other prejudices that often determine cases, but are rarely talked about.³² In his discussion of *James v. Illinois*³³, for

'social condemnation' attached to such an arrangement, which will inevitably afflict the child's relationships with its 'peers and with the community at large.'" *Id.* at 108, (citing *Roe v. Roe*, 324 S.E.2d 691, 694 (1985)).

29. See, e.g., *McKeand v. Laird*, 490 F.2d 1262, 1266 (9th Cir. 1973) (quoting examiner's finding that the plaintiff's homosexuality indicated a "lack of reliability and trustworthiness as to suggest that he might disclose classified information").

30. Schum does tell us what Wigmore would put on his cards: "Wigmore went beyond mere temporal ordering and identified very specific substantive types of evidence that might be expected in each of these three broad temporal intervals. Focusing on criminal investigation, Wigmore mentioned that prospectant evidence concerns such matters as motives, intentions, habits, customs, and character." Schum, *supra* note 1, at 442. I worry about the use of such "facts" to deliver justice in a court of law.

31. Terence J. Anderson, *On Generalizations: A Preliminary Exploration*, (Nov. 6 1998) (unpublished manuscript, on file with *South Texas Law Review*).

32. Twining makes my point more expressly when he writes about the "dangers" of

example, the offender's race was never mentioned. He could have been either white or black, since he went from slicked back, reddish-brown hair to black, curly hair in a natural style. His race mattered to me.³⁴ While I would never assert that race is always relevant in police arrests, it often is. Postmodern skeptics might be more convinced if Anderson had fleshed out some really tough generalizations: "The police are sometimes/often/usually racists and are more likely to arrest a black suspect than a white one"; "The police are sometimes/often/usually likely to ignore domestic violence against women"; "Lesbians are sometimes/often/usually immoral and therefore make bad mothers"; or "Gay men sometimes/often/usually cannot be trusted and therefore should not be in the military." I liked Anderson's generalization analysis and the spirit behind it, but I yearned for some critical bite.

Anderson's unveiling of the hidden generalization might be effectively utilized in the voir dire of potential jurors.³⁵ In 1968, when Charles Garry defended Black Panther leader Huey Newton for

generalizations, particularly those generalizations that are implicit or unexpressed. There may be "rival generalizations available to each side in a dialogue," or "value judgements (including prejudices, racist or gender stereotypes) may be masquerading as empirical propositions." Twining, *supra* note 2, at 357-58. In their text, both Twining and Anderson point out that generalizations range over a broad spectrum, with scientific laws at one end and at the other end:

[B]iases or prejudices that may be strongly held irrespective of available data (for instance, women do not make good trial lawyers; men are generally poor single parents; whites cannot fairly sit as jurors when a black is on trial, etc.) Some or all these types of background generalizations are involved in all factual adjudications.

ANDERSON & TWINING, *supra* note 21, at 68.

33. 493 U.S. 307 (1990).

34. For a discussion of the role that race plays in the criminal justice system, see, e.g., *Developments in the Law—Race and the Criminal Process*, 101 HARV. L. REV. 1472 (1988) (discussing racial bias in all stages of the criminal process), and David Cole, *The Paradox of Race and Crime: A Comment on Randall Kennedy's "Politics of Distinction,"* 83 GEO. L.J. 2547 (1995) (responding to Kennedy's assertion that apparent biases in the incarceration context are not racial).

35. In their book *ANALYSIS OF EVIDENCE*, Anderson and Twining devote only a few pages to jury selection, recognizing a chasm between the literature on the logical aspects of proof and the literature on the psychology of jurors: "To put the matter briefly, evidence theorists emphasize cognition, rationality, and consensus; practice manuals emphasize evaluation, emotional identification (with cause, client, or advocate), and differences among types of jurors." ANDERSON & TWINING, *supra* note 21, at 379. They also recognize a central question, "whether it is possible to reconcile the 'rationalist' tendencies of the analytical approach represented by Wigmore with the emphasis on 'nonrational' factors, such as emotion, prejudice, and 'identification,' to be found in the literature on jury formation." *Id.* at 379-80. They do not answer the question since their "book is concerned with the logical aspects of proof more than with the psychology of decision-makers," but I credit them for asking it. *Id.* at 379.

allegedly killing a policeman, he created a voir dire designed to ferret out internalized, unspoken racial prejudice.³⁶ "Garry was able to spend days probing and pushing prospective jurors to come to grips with their racial prejudices."³⁷ His voir dire was compiled into a manual and distributed throughout the country. One criminal defense lawyer, Paul Harris, took Garry's lead, and asked prospective jurors in state cases questions such as,

Have you ever had an unfortunate experience with a black person? How has that experience affected your view of black people? Would you feel uncomfortable listening to a witness in this case who speaks with a heavy accent? Would you feel anger at a person living in the United States who will testify in this case through a translator?³⁸

Unfortunately, Harris has found that many judges are hostile to an antiracist voir dire and will restrict defense lawyers to minimal questions. (Worse yet, voir dire in federal courts is conducted by the judge, not the attorneys.) Harris blames conservative politicians for leading campaigns to wrestle the voir dire in state courts away from the attorneys. Voir dire, they argue, wastes time and money, impeding the efficient administration of justice. By denying the attorneys the opportunity to conduct the voir dire, Harris finds that

it is harder to weed out racially prejudiced jurors. But an antiracist voir dire is also valuable in bringing stereotypes into the open and encouraging jurors to reflect on their private feelings. Once the jurors begin to recognize their own preconceptions, the defense has taken a significant step in combating the racism engendered by those feelings.³⁹

36. See PAUL HARRIS, *BLACK RAGE CONFRONTS THE LAW* 75 (1997).

37. *Id.*

38. *Id.* at 76. Harris recounts that later, after gaining some experience, he was able to ask prospective jurors:

Did you read the statement by J. Edgar Hoover, Director of the FBI, that he wasn't worried about a Mexican shooting the President, because "they don't shoot straight, but if they come at you with a knife, beware." Do you think this reinforces the stereotype of the knife-fighting Mexican, too stupid to shoot straight, but still violent?

Id.

39. HARRIS, *supra* note 36, at 77. "Once they become *conscious* of their negative racial ideas, they will make a good faith effort either to overcome those beliefs or not to let them dominate their deliberations." *Id.* (emphasis in original) Few of us recognize our own racism. Charles Lawrence points out that culture transmits beliefs and preferences at an unconscious level; they are not experienced as "explicit lessons." Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 323 (1987).

Instead, they seem part of the individual's rational ordering of her

Harris's questions of prospective jurors were designed to uncover hidden—and prejudicial—generalizations upon which the jurors might draw their inferences. This is precisely what Anderson exhorts the trial attorney and other “analyzers” to do. Anderson's notion of “standpoint” is too narrow for the task, however; he limits it to the role that the “analyzer” played in the process, e.g., that of juror, advocate, judge, or historian. While that role is of great importance, it is only one factor of many that will dictate how an individual assigns meaning to things that happen in the world. I would rather see Anderson adopt something akin to Gadamer's notion of “horizon.”⁴⁰ An individual has a horizon that represents “the range of vision that includes everything that can be seen from a particular vantage point.”⁴¹ Our entire life histories, our social and economic status, our race, our gender, our sexual orientation, our spiritual beliefs, our intellectual bent, our moral framework—all these things are part of our horizon, a protean concept that changes as we move through time.⁴² As Gadamer puts it, a hermeneutical situation is “determined by the prejudices that we bring with us. They constitute, then, the horizon of a particular present, for they represent that beyond which it is impossible to see.”⁴³ By broadening the concept of “standpoint” to embrace the analyzer's entire horizon from which he engages in interpretation, Anderson would be forced to articulate the kinds of generalizations that I mentioned before—the generalizations that make a juror believe a light skinned witness more than a dark skinned one, or incline a judge to disallow expert testimony about battered

perceptions of the world. The individual is unaware, for example, that the ubiquitous presence of a cultural stereotype has influenced her perception that blacks are lazy or unintelligent. Because racism is so deeply ingrained in our culture, it is likely to be transmitted by tacit understandings: Even if a child is not told that blacks are inferior, he learns that lesson by observing the behavior of others. These tacit understandings, because they have never been articulated, are less likely to be experienced at a conscious level.

Id.

40. HANS-GEORG GADAMER, *TRUTH AND METHOD*, 269–74 (1989).

41. *Id.* at 269.

42. *See id.* at 271.

The historical movement of human life consists in the fact that it is never utterly bound to any one standpoint, and hence can never have a truly closed horizon. The horizon is, rather, something into which we move and that moves with us. Horizons change for a person who is moving. Thus the horizon of the past, out of which all human life lives and which exists in the form of tradition, is always in motion.

Id.

43. *Id.* at 272.

women's syndrome.⁴⁴ Generalizations that derive not only from the social role that the analyzer is playing, but from the complex web of personal history, beliefs, and prejudices from which the analyzer constructs reality.

One last message about truth, or rather about those of us who are skeptical of statements of truth, who expound a position that knowledge is socially constructed, that the determination of truth—even scientific truth at times—is inseparable from power. We are often called nihilists, or amoral, incapable of making judgments because we drift in a rubber raft instead of being moored to the ocean floor. Twining, in a response to a diatribe against him, exemplified this type of attack:

If one gives up the idea of the search for Truth as an aspiration, one also surrenders any claim to be able to talk of "mistakes" or "errors" or "miscarriages of justice" or "wrongful convictions." In an irrationalist world there are no innocent and no guilty parties, no reliable or unreliable evidence, no valid or invalid, strong or weak arguments. . . . Throw out the concepts of Truth, Reason, and Justice in this context and one is condemned to silence or to making meaningless noises.⁴⁵

Twining is articulating the position of Early Multiplicitist in William Perry's scheme of development, or "map of sequential interpretations of meaning," that is characteristic of a student's cognitive and ethical development.⁴⁶ According to Perry, each student operates out of an interpretive framework; it is not static, but evolves

44. Marilyn MacCrimmon convincingly argues that the application of the rules of evidence, and even their substantive formulation, depend upon unarticulated generalizations made by judges and that the rules of evidence can contribute to the silencing of members of disadvantaged classes. Marilyn MacCrimmon, *The Social Construction of Reality and the Rules of Evidence*, 1991 U.B.C. L. REV. 36 (1991). She uses the *Lavallee* case, a Canadian decision that upheld the admissibility of expert opinion about battered women generally, and Ms. Lavallee in particular. MacCrimmon argued that the rationalist tradition of evidence assumes "universal cognitive competence," that ordinary people are unbiased and "normal," and can assess information about human behavior without the intervention of an expert witness. *See id.* at 37. This rationalist tradition is in conflict with a feminist position that "the different experiences and perspectives of women have not been incorporated into legal decision making and that incorporation of these experiences requires a self-conscious, deliberate assessment of the schemas and generalizations operating in the individual case." *Id.* at 39. The notion of "universal cognitive competence" rests on "generalizations that often do not apply to women," and the rationalist rules of evidence end up silencing the experiences of women. *Id.*

45. Twining, *supra* note 15, at 1544-45 (1988).

46. William Perry, *Cognitive and Ethical Growth: The Making of Meaning*, in *THE MODERN AMERICAN COLLEGE* 76, 78 (Arthur Chickering et al., eds., 1981).

as the student moves from one structure of meaning to another.⁴⁷ This movement is sequential, and each stage “includes and transcends the earlier [positions].”⁴⁸ An Early Multiplicitist is a student who recognizes the legitimacy of diverse opinions and values, and, at least in areas of uncertainty, all speculation stands on equal footing. The Early Multiplicitist can make no distinction between legitimate abstract thought and what Perry calls “bull.”⁴⁹ All arguments are equally valid, and there is no such thing as a “right” or “wrong” answer.⁵⁰ Early Multiplicity can thus lead to unbridled relativism—and to the kind of meaningless noises that Twining is so afraid of. There is no truth for an Early Multiplicitist because all propositions are of equal value—and of equal absurdity. There can be no “right” or “wrong” answers; no mistakes or errors. This is the nihilism and amorality that Twining finds so disturbing, and indeed if those were the conditions under which my skepticism operated, his complaints would be justified.

But under Perry’s scheme, the evolved student eventually lurches towards the stage of Late Multiplicity.⁵¹ No longer wedded to the view that all answers or opinions are of equal value, the Late Multiplicitist comes to appreciate the notion of a “better” argument, whatever that means within any given context.⁵² Every sphere of human endeavor,

47. See *id.* at 78–80.

48. *Id.* at 78. The first position in the student’s *Pilgrim’s Progress*, as Perry refers to it, is known as “Dualism.” *Id.* at 77, 80. A Dualist thinker believes that all knowledge is known, and that knowledge is nothing more than a collection of information. There is only one right answer for every question, and all meaning is divided into two realms: right or wrong; good or bad; success or failure. A Dualist thinks of a teacher as the transmitter of correct information. See *id.* at 79–81.

49. See *id.* at 83, 85.

50. See *id.* at 84–85. An Early Multiplicitist would believe that merely having an opinion makes it just as “right” as any other competing view. Perry characterizes this stage of cognitive development as a form of personalism. “The pure statement that, in the domain of uncertainty, to ‘have’ an opinion makes it as ‘right’ as any other expresses an egocentric personalism that we called *Multiplicity*.” *Id.* at 85.

51. Perry does not actually use the term “Late Multiplicity,” although one of his interpreters, L. Lee Knefelkamp, does. See L. Lee Knefelkamp, *Faculty and Student Development in the 80’s: Renewing the Community of Scholars*, in 5 CURRENT ISSUES IN HIGHER EDUCATION 1980, at 13, 20.

52. See Perry, *supra* note 46, at 88. Perry’s theory of cognitive and ethical growth concerns itself with the development of college students, but it can be applied to all thought in general. Consider, for example, this statement by a student about his transition from a belief that all discourse constituted meaningless “games,” to a belief that he could engage in meaningful discourse by learning the rules of a game, though he recognized that he might be playing a game:

So here were all these theorists and theories and stuff in [economics] and psychology and historiography—I didn’t even take any straight philosophy—

every discipline, every arena of social practice has its definitions, its standards, its assumptions, its vocabulary, its rituals—in short, a social context. It is that social context that gives meaning to statements. If we are talking about a trial, for example, even if I were skeptical of Twining's abstract notions of "Truth, Reason, and Justice," I could still use a term like "innocence" and "guilt" in a meaningful fashion because the legal system has created a consensus about what those terms mean.⁵³ Similarly, I could make a judgment about whether there was a strong or weak argument, while still denying that there are absolute foundations for knowledge. I understand the difference between a strong and a weak inference; I can detect inconsistencies and incoherence; in making judgments, I draw upon what Twining calls that "ill-defined agglomerations of beliefs,"⁵⁴ or my "stock of knowledge,"⁵⁵ and if a proposition is in conflict with that stock of knowledge, I can reject it. As a Late Multiplicitist, I can still make sense, even without swearing fealty to absolute truth.

II. SOME THOUGHTS ABOUT HOW WOMEN KNOW THINGS

I would like to tell you a story:

Bruce was a block of wood from the neck down, having struggled with polio as a child. There was a time in Bruce's life when everyone said that polio had lost. His accomplishments were plenty. Intelligent,

and hell, I said, "These are *games*, just *games* and everybody makes up their own rules! So it's gotta be bullshit." But then I realized "What else have we got?" and now every time I go into a thing I set out to learn all its rules cold—'cause that's the only way I can tell whether I'm talking bullshit.

Id. at 89.

53. One of the goals of a legal education is to teach the student the language of the law. I can use these terms because I have learned their meaning in this context. There is a great divergence between the meanings of "not guilty" in lay and legal discourse, for example. For a lay person, a defendant must be either guilty or innocent; "either he did it or he didn't. A verdict of 'not guilty' is taken to mean that he did not do it, and is thus understood as proof of innocence." BERNARD S. JACKSON, MAKING SENSE IN LAW: LINGUISTIC, PSYCHOLOGICAL AND SEMIOTIC PERSPECTIVES 26 (1995). Lawyers use the term

"not guilty"... relative to the criteria of proof used within that criminal case... in English criminal law, proof "beyond reasonable doubt." If those criteria are different from lay criteria of truth (as, indeed, they are, since social judgments of guilt and innocence are not made dependent upon proof beyond reasonable doubt), then it follows that "not guilty" in the legal sense does not necessarily mean "not guilty" in a lay or popular (or even factual) sense.

Id. at 26-27.

54. Twining, *supra* note 2, at 362.

55. *Id.*

determined, he got an education, and eventually taught political science in college from a wheelchair. Despite his disability, Bruce was very active for a man who could not move: he had friends; he had students; he traveled; he had a life. Then there were cutbacks at the college, and he lost his job. He went home to his apartment, laid down in his bed, and never got up again. He became heavier and heavier, and it got harder and harder to breathe. The disease snuck back into the apartment, and waited for Bruce—out in the living room where Bruce could no longer go. In the dust and the dark, it waited. Polio does not like losing; it always comes back for another round.

For over a year, Bruce had been low. He could not get out of bed. He was dependent on a serpentine plastic tube for adequate oxygen. He could not take care of himself. His circle of friends was getting smaller and smaller. The magic of music eluded him. He lost his sense of humor. He forgot how to be joyful. He found no meaning in his past, and no future at all. Television was all he had, a few close friends who could no longer make him laugh, and \$2000 hidden somewhere in the apartment.

One morning, we got a call from one of those close friends that Bruce was dead. He had “passed away” sometime during the night, and could we come over and “deal with the police?” When we got there, Bruce was surely dead, as dead a man as I ever saw, flat on his back as he had lived the last few years of his life, a sea mammal beached upon the shore, his mouth and eyes wide open in surprise, as if he could not believe what he had just seen. The money was nowhere to be found. “Several individuals,” including two good friends, had been seen entering and leaving the apartment in the early morning, probably after the time of death. One of the police officers suspected foul play.

In New York, if foul play is suggested, an autopsy is required. Without any consultation, all of Bruce’s close friends agreed: he should not be cut open. Bruce’s body had already survived four decades of violation, from the ravages of disease, disuse, and disintegration. It was an indignity to interfere with Bruce’s bodily integrity, even in the pursuit of truth about how he had died. The other police officer said that his hands were tied. If we could get a physician to come over and sign a form that Bruce had died of “natural causes,” there would be no need for an autopsy. A physician friend was called; the form was signed, and Bruce was cremated the next day, his skull intact, his face unpeeled, his body sealed off from the rest of world by a carapace of dark brown skin. Later in the week, we gathered to bury Bruce’s ashes, his small collection of friends, and to speak of his life, of his laughter, of his love. None of us mentioned the word “murder.”

There are many ways to tell this story. This sketchy version was mine, told from the perspective of a close friend who talked a police officer out of an autopsy, shutting the door on a criminal prosecution. As a piece of narrative, the gaps are understandable—the first person singular is always going to be limited by the teller's knowledge and perspective. But if someone had been arrested and prosecuted for Bruce's murder, the story's gaps would have to somehow be filled in. An investigation would have to be initiated. Some arches of knowledge would be built; some abduction engaged in; some trifles marshaled; some scenarios generated and a theory constructed. Someone could have come into the apartment, stole the money, and killed Bruce so that he would not tell. Or someone could have found Bruce dead from natural causes, or foul play, and taken the money. Or someone could have killed Bruce at Bruce's request, and taken the money, with or without his approval. Perhaps Bruce could have spent the money the week before his death, and found some way to kill himself. It is not inconceivable. He was crafty that way in life, in finding tricks to overcome his dull, insensate body. Why could he not be crafty that way in death? I would not put it past him.

All these hypotheses would eventually go into what Anderson and Twining call the "trial book," a pre-trial vehicle that serves as a "central organizational and analytical device."⁵⁶ It would include "pleadings, checklists, copies of documents to be introduced and statements or depositions to be used, outlines for opening and closing, outlines or anticipated 'scripts' for direct and cross-examination of witnesses, jury instructions, and memoranda of law addressing significant problems likely to arise during the particular trial."⁵⁷ Bruce's story would be Pierced and Wigmored—as it should be. This process strikes me as how a responsible trial attorney ought to behave.

But I wonder if responsible trial attorneys are actually reading these articles about the science of proof. There is a hidden issue of audience: for whom is this body of work written? Twining appears to be addressing fellow members of the academy,⁵⁸ but Anderson and

56. ANDERSON & TWINING, *supra* note 21, at 265.

57. *Id.* at 266–67.

58. Twining is not unaware of my concern that Wigmore's chart method may be of limited value to practicing trial attorneys. He writes that "the biggest single obstacle to convincing practitioners of its value is the objection that, if rigorously applied, it is too complicated and laborious to be usable in practice." WILLIAM TWINING, *THEORIES OF EVIDENCE: BENTHAM AND WIGMORE* 185 (1985). Twining defends the utility of the method, however, for its "educational value as a form of mental training [The]

Schum seem to be writing for practicing attorneys, for those individuals who investigate and try cases in courts of law. Both articles have analytical frameworks, but their thrust is pragmatic. Anderson's prose has an enviable clarity, and employs a linear format that a practicing attorney could readily have access to—if he or she ever had the time, opportunity, or inclination to read a law review. (This of course raises the more global issue of law review readership: is there any? I don't think even my mother reads mine, although she likes to use them as coasters.) Schum's work is much less accessible, and for me as an eccentric academic, much more fun. It operates on so many different levels, has a rich and challenging vocabulary, and the man is a veritable idea factory. I found myself dipping in and out of the article, running to the dictionary, worrying about fuzzy probabilities, trifle bases, and what Poincaré had to say. Surely, many readers will share my delight in Schum's work. But some will be daunted, and I worry that the very people who might benefit most from having their investigative arteries unclogged—practicing trial attorneys—might be intimidated by his intellectual ambition, his erudition, and his level of abstraction.

The issue of audience aside, the process described by Schum, Anderson, and Twining is incredibly useful to trial attorneys as they prepare their cases. The case has to be thoroughly investigated; there has to be a theory of the case developed; there has to be an understanding of the applicable law, and what facts are needed to prove what propositions; there has to be a logical concatenation of events for the jury to make sense of; testimony has to be elicited with precision—getting out of witnesses statements that support your theory and do not undermine it. If an attorney had investigated Bruce's story, and been put in the position of prosecuting or defending one of Bruce's friends for the crime of his murder, I would fully expect that attorney to heed Schum, Anderson and Twining's advice. Everything they suggest in the way of investigation and trial preparation would lead to a more successful, coherent presentation of their client's case—of that I am certain.

But there was an unarticulated premise at the conference that the presentation of logical sequences, a consistent, coherent narrative,⁵⁹ a

application of the method induces a disciplined, rational, and patient approach to evidence." *Id.* at 185–86.

59. See generally W. LANCE BENNETT & MARTHA S. FELDMAN, *RECONSTRUCTING REALITY IN THE COURTROOM* (1981) (demonstrating how stories are used in presenting competing claims); WILLEM A. WAGENAAR, ET AL., *ANCHORED NARRATIVES: THE PSYCHOLOGY OF CRIMINAL EVIDENCE* (1993) (proposing a theory of judicial decision-

satisfactory concatenation of inferences, constitute the only legitimate way a juror might come to “know” whether an accused is guilty or innocent. At least no other ways of knowing were mentioned. Twining at least alludes to other epistemologies, although in a disparaging way. In writing about how story-telling can be shown to be “dangerous” in legal contexts, Twining claims that story-telling “is widely regarded as appealing to intuition and emotion and as a vehicle for ‘irrational means of persuasion.’”⁶⁰ But whoever determined that the term “rational” should apply only to the intellectual processes accepted by the rationalist tradition, “drawing inferences inductively from the relevant evidence, with deduction playing a secondary role (scientific rationality)[?]”⁶¹ As Donald Nicolson points out, what constitutes “rationality” is contextually specific; it has neither an abstract nor a universal quality.⁶² What is regarded as rational behavior will vary from society to society, and from era to era, and it is “politically loaded Moreover the labelling of behaviour as rational/irrational has always played an important role in privileging/deprivileging such behavior and of empowering/disempowering those groups associated with it.”⁶³

After the conference, I sat in the Murphy’s kitchen and listened to a conversation between Chris Murphy and Cathy Burnett, two observers of the conference. Both women are smart; both women understood what Schum, Anderson, and Twining had to say. But both

making in criminal cases where the trier of fact reaches a decision by first examining the plausibility of the case, and then analyzing how the narrative account fits with the examination).

60. Twining, *supra* note 2, at 359.

61. Nicolson, *supra* note 4, at 734.

62. *See id.* at 734–35. Peter Murphy made the same point in his introduction to the Symposium on the Science of Proof. *See* Peter W. Murphy, *Some Reflections on Evidence and Proof*, 40 S. TEX. L. REV. 327, 337–38 (1999).

63. Nicolson, *supra* note 4, at 734–35. Nicolson’s passage mirrors Carol Gilligan’s theory about the gender differences in moral outlooks. In her study, an eleven year old boy made his moral judgments by using deductive logic and resorting to principled concepts of justice, whereas an eleven year old girl saw her moral dilemmas “not [as] a math problem with humans but a narrative of relationships that extends over time.” CAROL GILLIGAN, *IN A DIFFERENT VOICE* 28 (1982). Carol Smart summarizes what Gilligan sees as the differences between the two perspectives:

This ethic of justice relies on objectivity, rationality and emotional distance. The feminine mode, which she calls the ethic of caring, is based on connectedness, subjective emotion and responsibility for maintaining relationships. The ethic of justice is founded on the idea that everyone should be treated the same, while the ethic of caring means that no one should be hurt.

Carol Smart, *Feminist Jurisprudence*, in *DANGEROUS SUPPLEMENTS: RESISTANCE AND RENEWAL IN JURISPRUDENCE* 150 (Peter Fitzpatrick ed., 1991).

women felt alienated by the conference because of its assumption that a particular way of knowing was privileged. "I felt so left out," Cathy lamented.

When I try cases, I do all the logic games they suggest, but as far as knowing the truth, for myself, it isn't usually logic that points the way. It's how I feel about the witnesses, how they testify, how they hold their heads, how they look and sound. You can call it intuition, I suppose, but it surely isn't logic, or at least not logic alone.

Chris voiced something quite similar: "I rely on my insight or my feelings when I'm trying to discern the truth. It's not that logic doesn't count, but my ways of knowing, my ways of understanding, were not even alluded to, let alone given credence."

I felt the same way. As women, we are often accused of being "irrational" because our responses to life are emotional; women's intuition is scoffed at, discounted. And as Nicolson points out:

[D]ominant discourse has for centuries disqualified as irrational and therefore inferior what have been constructed as 'natural' female forms of discourse (emotion, intuition, passion, etc). Accordingly, women have been confined to certain spheres of experience where they are required to display particular character traits of 'caring and sharing,' while the issues of law, justice, politics, etc are debated in the language of the experience of men – defined as rationality.⁶⁴

Could it be that Justice Bradley secretly believed that Myra Bradwell suffered from the same deficiencies—that somehow encoded in the language "the natural and proper timidity and delicacy which belongs to the female sex,"⁶⁵ there was another message: that she was irrational and epistemologically impaired?⁶⁶

64. Nicolson, *supra* note 4, at 735.

65. Bradwell v. Illinois, 83 U.S. 130, 141 (1872).

66. Simone De Beauvoir takes the position that women are not by nature epistemically, or otherwise impaired: "But we must only note that the varieties of behavior reported are not dictated to woman by her hormones nor predetermined in the structure of the female brain: they are shaped as in a mold by her situation." SIMONE DE BEAUVOIR, *THE SECOND SEX* 597 (1983). Here is Beauvoir's not very flattering description of how women think:

Not only is she ignorant of what constitutes a true action, capable of changing the face of the world, but she is lost in the midst of the world as if she were at the heart of an immense, vague nebula. She is not familiar with the use of masculine logic. Stendhal remarked that she could handle it as adroitly as a man if driven to it by necessity. But it is an instrument that she hardly has occasion to use She has no sense of factual truth, for lack of effectiveness She is content, for her purposes, with extremely vague conceptions, confusing parties, opinions, places, people, events; her head is

Bruce's story is a perfect example. If someone had engaged in a thorough investigation, charting the comings and goings of his friends that night, demonstrating through the use of logic that either person X or person Y could have been the perpetrator, I would expect all of that information to be placed in the trial book. That is not all. I would want to document my own intuitions, and those of others, about the witnesses' demeanor, about their relationships with Bruce and with others, about what they wore, where they grew up, how they viewed the world, how they treated me, and how they treated others. I would want to write down the expressions that they used, the authenticity of their language—or who they stole their words from. I would want to know how they looked out of their eyes, or as Cathy Burnett put it, how they held their heads.⁶⁷ I would want to see how the light reflected off their faces, what music came to mind when I uttered their names into the air—to document the nature and quality of their spiritual energy.⁶⁸

None of these observations could be put into a box or on a chart; they are not amenable to arrows, or other abstract visualizations.⁶⁹

filled with a strange jumble.

Id. at 599–600.

67. Deborah Tannen makes the argument that for most women, “the language of conversation is primarily a language of rapport: a way of establishing connections and negotiating relationships For most men, talk is primarily a means to preserve independence and negotiate and maintain status in a hierarchical social order.” DEBORAH TANNEN, *YOU JUST DON'T UNDERSTAND: WOMEN AND MEN IN CONVERSATION* 77 (1990). Cathy Burnett's interest in how a speaker holds her head, or my concern with how the speaker's eyes appear are what Tannen calls “metamessages”: “Information conveyed by the meanings of words is the message. What is communicated about relationships—attitudes towards each other, the occasion, and what we are saying—is the metamessage. And it's metamessages that we react to most strongly.” DEBORAH TANNEN, *THAT'S NOT WHAT I MEANT: HOW CONVERSATIONAL STYLE MAKES OR BREAKS YOUR RELATIONS WITH OTHERS* 29 (1986).

68. Implicitly, many of the observations that I wish to enter into the trial book pertain to the credibility of the witness; they also assume that there will be oral testimony, something that can be counted upon in a common law trial, but not necessarily in civil systems, such as in France. Bernard Jackson writes:

Truth is a function not of discourse, but of the enunciation of discourse. If we cannot judge whether the semantic content of stories (“factual” or “fictional”) is true, we can at least judge who we think is *telling the truth*, in the sense of most adequately persuading us that s/he is fulfilling the sincerity conditions of the act of making a truth-claim.

BERNARD S. JACKSON, *LAW, FACT AND NARRATIVE COHERENCE* 2 (1988). In France, the witnesses are examined outside of the proceedings of the trial itself, which means that the court cannot assess the “integrity” of the witness, only the (literary) “integrity” of a text. *See id.* at 173.

69. This broader view of what belongs in a trial book mirrors a broader, more psychologically based view of what constitutes cognition. Leyens and Codol define

None warrants the label of “fact” or even “evidence.” They would not be presented to a jury as bits of objective truth. But at least in the trial book, I would want to own up to these intuitions, to articulate and dignify them, and to recognize that jurors might also be operating under alternative epistemologies—that those “irrational” ways of knowing might decide my client’s case. I use quotation marks here because I reject the rationalist’s claim that intuition is irrational. For me, my intuition is far more inclined to reveal the “truth” than any exercise in inductive reasoning.

Which brings me to the end of the essay, to the end of Bruce’s story, and back to the issue of truth. While it may never be completely ascertainable, I believe there *was* an objective truth about how Bruce died; a series of unique events that took place years ago in an apartment in Brooklyn—events that resulted in my friend’s death.⁷⁰ And if there had been a prosecution of person X or person Y, I would want everything done to ensure that the state proved beyond a reasonable doubt that the accused was indeed the perpetrator. Punishing an innocent person would constitute an injustice. But the fact is: there was no autopsy; there was no prosecution; there was no trial. No one wanted to pursue it, not even Bruce’s family or close friends, the most likely candidates for vindication. Can we learn something about the function of criminal prosecution from cases that do not go forward, despite the high probability that a crime had been committed? Why do we even have trials? Are they merely a forum for finding the truth, within an acceptable degree of probability, a regularized, public process for arriving at “right” decisions?

Surely not. Trials serve a wide variety of functions, and fact

cognition as “all those activities through which a psychic system organizes information into knowledge.” J.P. Leyens & J.P. Codol, *Social Cognition*, in INTRODUCTION TO SOCIAL PSYCHOLOGY 108 (1988).

Opinions, attitudes, values, feelings, emotions, the attribution of meaning, all play a role at every stage of cognitive processes: in information selection, transformation and organization. Moreover, the units of information themselves are most often of social origin, and the knowledge that is built up is linking to an individual’s social experience.

Id.

70. Whether the objective truth about the events surrounding Bruce’s death would now be ascertainable is questionable, given the number of years since its occurrence. Psychologists have discovered that the accuracy of eyewitness testimony is “directly related to the length of the delay between the observation and the recall of the events.” Margaret Bull Kovera et al., *Jurors’ Perceptions of Eyewitness and Hearsay Evidence*, 76 MINN. L. REV. 703, 712 (1992). The responses of eyewitnesses who testified two days after viewing an event were more accurate than the responses of witnesses who testified after a one-week delay. See *id.* at 713. Imagine how the passage of fifteen years would erode the memory of eyewitnesses.

finding is only one of them. The substantive law that is applied in a trial embodies societal norms and ideologies; those norms and ideologies are ratified and strengthened every time a trial takes place. Trials have a ritual function. Sir Edmund Leach, a cultural anthropologist, offered an expansive definition of ritual, applying it to all stereotypical, symbolic behavior that serves to communicate information about a culture's cherished values.⁷¹ If there had been a trial for Bruce's murder, the trial would seek to ensure that the accused was in fact the perpetrator and had the requisite degree of culpability. But the trial would also communicate to those inside and outside the courtroom that the values of nonviolence and keeping the peace are cherished; it would ratify the ideology that every life has value, and that in a state with the death penalty, one who takes the life of another will forfeit his own. (An ideology that many of us are leery of. Statistics suggest that another rule is silently in operation: a black man who takes the life of a white man will forfeit his own.⁷²) And beyond this ritual function, the trial also strives to mete out a punishment that is proportionate to the crime. The jury's job here has nothing to do with finding facts or making the "right decision;" its job here is to make a moral judgment. The truths that may emerge are not so much factual, but moral truths, and of course, political ones.

What can we learn from a case like Bruce's where there was no prosecution? We may have learned that society does not value the life of a severely handicapped black man as much as the lives of some others. We may have learned that a white lawyer and a white physician could convince two white policemen that such a prosecution would serve no public goal. We may have learned that just as with domestic violence, the values of nonviolence and keeping the peace are only cherished in some places—not in the homes of battering men and not in some parts of Brooklyn. We may have learned all of those things; we may not have.

But there was a hidden layer of truth to Bruce's story, beyond any comings and goings from his apartment in the early morning, beyond any removal of the box that stored his money. And this hidden layer of truth had more to do with the failure to prosecute than with any underlying political beliefs. This hidden layer of truth was

71. See Edmund R. Leach, *Ritual*, in 13 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 520, 524 (David L. Sills ed., 1968).

72. See generally Samuel R. Gross & Robert Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 27 (1984) (discussing arbitrariness and discrimination in the imposition of the death penalty in the United States).

spiritual in nature: Bruce wanted to die; in some ways he was already dead. How his physical death was achieved did not really interest us; most of his close friends suspected that he had orchestrated it. His dying had started several years back when he lost his job, his reason for getting up in the morning, his claim to a paycheck, to friends, to a place in the world where people listened to what he had to say. Bruce was trapped, utterly trapped, flat on his back, helpless and alone in an empty apartment, with no meaningful social role. It had become an unbearable existence, and now it was over.

In life, and sometimes in death, there are times when factual truth does not matter all that much. There are times when “being right” does not matter all that much. With respect to Bruce’s death, there was no perceived need to restore social order. There was no need to pass moral judgment on the individual—if there were such a person—who assisted Bruce in this version of suicide. There was no need to ritually ratify the principle of Thou Shalt Not Murder. No one had the heart to punish another human being. No one cared all that much about the money. All we felt was sadness, about losing Bruce and about the last few bitter years of his life. Polio won. We let polio win.

CONCLUSION: REFLECTING ON REFLECTING

Now I know: my metaphor about the task of the post-conference reflector—of the moon reflecting the sun—did not really work. The moon is, after all, just a dead ball; it generates no light of its own. If it were to lose its gravitational pull and spin off into space, it would take none of the sun’s light with it. But I have been illuminated by the “new evidence scholarship,” and left some etchings on the window pane. There is much about the work to admire. There is much about the work to distrust. Both responses have generated warmth and light. Luminous beings all, outsiders, insiders. As I move away from the mansion’s window, I plan to steal a bit of the fire’s glow. It will help me to find my way home.

