2019

General Editor's Introduction to the Treatise

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The New Wigmore: Selected Rules of Limited Admissibility General Editor's Introduction to the Treatise: The New Wigmore in Perspective

Aspen Publishers | 3rd Edition 2022 Supplement

The New Wigmore: A Treatise on Evidence: Selected Rules of Limited Admissibility
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GENERAL EDITOR'S INTRODUCTION TO THE TREATISE: THE NEW WIGMORE IN PERSPECTIVE

There is a story--recalled rather wistfully by an American in 1995, shortly after the thrashing of *Young America* by New Zealand's *Black Magic*--that in 1851 Queen Victoria came to watch the first race for what became known as the America's Cup. "Who is leading?" she asked the signal master of the royal yacht. "The America," came the reply. "Which boat is in second place?" the Queen wanted to know. The signal master replied: "There is no second, ma'am.'DD'

This story--which, though perhaps apocryphal, has gained a life of its own [1] --captures perfectly the role that John Henry Wigmore's great treatise [2] has played in the development of the law of evidence in the twentieth century. In saying so, I can claim not originality, but rather distinguished authority. John M. Maguire, one of the great scholars of evidence of the generation after Wigmore, referred to the story in 1928 in a generally disparaging review of another treatise and concluded, "Wigmore is still first, and there is no second." [3] Edmund M. Morgan, Maguire's colleague at Harvard and perhaps the greatest evidence scholar of that generation, quoted Maguire's words approvingly 12 years later in reviewing the third edition of Wigmore's treatise. [4]

Remarkably, the superlatives used to describe the treatise began early, continued for many years, and transcended the field of evidence. Reviewing the first edition in 1905, shortly after its publication, Joseph H. Beale, one of Wigmore's own teachers at Harvard, wrote: "It is hardly too much to say that this is the most complete and exhaustive treatise on a single branch of our law that has ever been written." [5] Morgan, a rather persistent critic of Wigmore who found much with which he disagreed in the treatise, proclaimed in that 1940 review: "Not only is this the best, by far the best, treatise on the Law of Evidence, it is also the best work ever produced on any comparable division of Anglo-American law." [6] In 1963, Felix Frankfurter--who during his own Harvard days had been a fierce opponent of Wigmore during the Sacco-Vanzetti case [7] --went even further than Morgan, enthusing that Wigmore's work was "unrivaled as the greatest treatise on any single subject of the law." [8] And in 1983, William Twining, perhaps the most distinguished historian of evidence of our era, was still able to write that "Wigmore's *Treatise* has so dominated the field since its first publication in 1904-05 that no comparable work has yet emerged to replace or even to rival it." [9]

Twining has succinctly summarized much of the reason for success of Wigmore's treatise.
He was an essentially simple-minded man who combined exceptional industry with a clear mind, broad interests and a methodical approach. His unrivalled mastery of his field was attributable in large part to his simplicity of vision: the world is full of a marvellous diversity of things, but with application and a systematic approach they can be reduced to order; supremely self-confident and untroubled by doubt, he reduced more material to order than any other legal scholar. [10]

Another of Wigmore's Harvard teachers, John Chipman Gray, told students, soon after the first edition was published, that it "must be consulted." [11] Generations of lawyers and judges followed this advice. Reviewing the second edition in 1924, a year after its publication, yet another Harvard professor, Zechariah Chafee, Jr. wrote:
When the first edition was published, it was only possible to judge of Mr. Wigmore's book as a statement of the law. During the intervening years it has become something greater. It has created law. No man since Jeremy Bentham has by his own unaided labor brought about such a marked improvement of our system of law as Wigmore. [12]

So great was Wigmore's influence, Twining has noted, that "once he had perpetrated a doctrine on the basis of little or no authority, precedents would soon follow to fill the gap." [13] In a very real sense, Wigmore's treatise *was* the law of evidence.

Inevitably, though, the treatise began to age. When the third edition was published in 1940, six years after a large supplement, Morgan was able to write that "these ten volumes bring the second edition of Wigmore down to date, and do it in the Wigmorean manner." But at the same time Morgan expressed some frustration that Wigmore had not made "a reexamination of the entire subject"; """good as it is," the third edition "is really the second edition plus the 1934 Supplement and material for a similar 1940 Supplement integrated in a single text." [14]

Part of the problem, no doubt, was that even Wigmore, a person of immense energy and efficiency, did not have enough time or inclination to begin again from scratch. But to some extent he had also become a victim of his own success. In the preface to the third edition, he acknowledged that in "two or three places" his "present views would have dictated a different arrangement of topics." Such reorganization was "impracticable," however, for it would have involved renumbering "a mass of sections and the thousands of cross-references to them." [15] The problem seems to have been not only the effort necessary to make such changes but also the "anticipated inconvenience to readers," who would approach the treatise with references to the prior editions. [16]

Wigmore died in 1943, the victim of a freakish automobile accident shortly after his eightieth birthday. [17] Pocket parts to the treatise were prepared regularly. [18] Not until 1961, however, did Little, Brown and Company publish the first volume of a fourth edition, numbered as Volume 8, to correspond to its placement in the third edition. This volume, with John T. McNaughton of Harvard as "reviser," received a review by Frederick Bernays Wiener in the Harvard Law Review [19] so nasty that it prompted a more sympathetic reply, published concurrently, by Charles T. McCormick, [20] whose own one-volume treatment of the field was beginning to acquire substantial authority. The same year, McNaughton left academia for a succession of high offices in the Department of Defense; in 1967, the week before he was to assume formally the post of Secretary of the Navy, he died tragically in an airplane crash, along with his wife and son and many others. [21] The task of revision was taken up by James Chad-bourn of Harvard, who revised all but Volume 1, before terminal illness forced him to turn the project over to Peter Tillers, then of the New England School of Law. Tillers completed the task, expanding the one volume into two. His work, dealing among other topics with general theories of evidence and relevance, has won deserved high praise for its intellectual sweep and power. Happily, Tillers is alive, well, and still in academia, now at the Cardozo School of Law, and he will contribute to this treatise a volume on much of the same subject matter.

McNaughton, Chadbourn, and Tillers--all able and energetic scholars--were all confined by Wigmore. Like Wigmore, none of them felt free to alter the organization of the treatise. But they were all, perhaps especially Chadbourn, operating under another limitation as well. Chad-bourn recalled that Wigmore himself, in preparing for Little, Brown the sixteenth edition of the Greenleaf treatise--a project that turned out to be the last edition of that treatise and a precursor to Wigmore's own--had

expressed the need to "leave the original text still available in its classic integrity."[22] Chadbourn stated a similar obligation. Thus, even though sometimes the revisers, Tillers especially, added separate sections or reduced Wigmore's writing to footnotes while putting their own commentary in text, most often any substantive discussion that they felt the need to offer was presented in footnotes; at the same time, however, at various points throughout the text small changes were required. Sometimes, despite the revisers' best efforts, this approach made it unclear, at least without substantial effort on the reader's part, whether the voice was that of Wigmore or of the reviser--a problem emphasized haughtily by Wiener.[23] This approach to the revision may have had an ironic aspect. Wigmore was restrained only by practicality, and not by obligation, from altering his text; one might say that he did not have Wigmore looming over his shoulder. Supposing his head had not been struck in the accident and he had lived and remained productive until the Mosaic age of 120, the fourth edition might have been a greater departure from the third than in fact it was.

In 1986, Tom Lincoln of Little, Brown asked me to consider participation, both as an author and as General Editor, in what was then conceived of as a fifth edition of the Wigmore treatise. I quickly came to the conclusion that it was no longer worthwhile to revise the text in the manner of the fourth edition; at the same time, I concluded that it was clearly worthwhile to prepare an entirely new text, along new organizational lines, but on the grand scale of the Wigmore treatise and with a similar scope of coverage. To my delight, Little, Brown--which had made a similar decision when it invited Wigmore to write a new treatise rather than prepare a seventeenth edition of Greenleaf's[24] --readily agreed and invited me to prepare an organizational outline for the new treatise.

The conclusion that it is better to write a new treatise than to revise Wigmore's again is a sad one in a way, rendering false Maguire's confident prediction, made at Wigmore's centennial, that the treatise would reach its own centennial with a fresh edition in print.[25] Perhaps paradoxically, though, I believe the "classical integrity" of Wigmore's text will be better preserved by not attempting another revision. By presenting a new treatise, we do not propose that *Wigmore* be removed from the shelves. On the contrary, it will continue to be very useful in some spheres.[26] For those who want their Wigmore unadulterated, it is best to use Wigmore's own editions.

By contrast, those who want a modern look at evidence--including historical issues--need a modern approach. What role, then, should this treatise play? In the preface to his first edition, Wigmore described the goals of the treatise as:
first, to expound the Anglo-American law of Evidence as a system of reasoned principles and rules; secondly, to deal with the apparently warring mass of judicial precedents as the consistent product of these principles and rules; and, thirdly, to furnish all the materials for ascertaining the present state of the law in the half a hundred independent American jurisdictions.

Today, this statement seems not only antiquated but rather quaint. Indeed, as my colleague, Brian Simpson, has pointed out, the role of treatises has declined substantially since Wigmore's day, in large part because of greater skepticism about the viability of law as a system of rules.[27] At the same time, a seemingly contrarian change, the ascendance of the Federal Rules, might also appear at first glance to diminish the role of an evidentiary treatise: To the extent that systemization of evidentiary law *is* possible, it might seem that much of the task has already been done by the Rules, and all that a researcher needs is a finding aid based on the framework that the Rules provide. And indeed numerous sources--codifications, often annotated, computerized research services, and various works on evidence, some concentrating on particular topics or particular jurisdictions--already perform the finding function far better than sources available in Wigmore's day.

Notwithstanding all these changes, I believe this treatise will perform three functions of great importance. First, perhaps most obviously, this treatise will help readers determine the state of evidentiary law across a wide topical and geographical domain. The size of the treatise means we can devote substantial attention to every evidentiary issue of significant importance. Moreover, our conception from the beginning has been that this treatise, like Wigmore's and unlike most other evidence treatises should transcend jurisdictions. It will concentrate primarily on American law. Thus, it will be organized in substantial part along the lines of the Federal Rules of Evidence and will pay a great deal of attention to the Rules--both because, of their own force or through state adaptations, they govern so much of modern evidentiary decisionmaking and because they help organize much of the discussion about evidentiary issues. On some questions, the treatise will actually present a jurisdiction-by-jurisdiction breakdown; when it does not, the reader should usually be able to gain a good understanding of the state of the law across

jurisdictions. But this will not be a treatise *on* the Federal Rules or on the law of any particular jurisdiction, as such; it will not be confined to the law of any jurisdiction, either in the issues it addresses or the solutions it proposes.

Second, I believe that this treatise will help judges and lawyers analyze difficult evidentiary issues as they arise. Codifications or appellate decisions often provide rather clear answers to evidentiary problems--but not always. Trial judges often feel free to roam at will in the wide spaces left open by evidentiary rules, whether prescribed by code or by appellate decision--but not always. On a day-to-day basis, this treatise may be most useful in the middle ground, when no single answer is clearly prescribed by binding law yet the court feels constrained, by a sense of conscientiousness or fear of reversal or both, to try to reach a sensible result consistent with the policies underlying the articulated law. Other treatises provide excellent analysis, but the market for such analysis is nowhere near saturation. Furthermore, I believe that on the whole this treatise, like Wigmore's, will be more comprehensive than others in the field, not only in the scope of evidentiary questions that it covers, but also in the depth of attention that it pays to each area.

Finally, and in my view most importantly, I hope that this treatise will contribute to the development of evidentiary law by addressing underlying conceptual issues and examining the basic precepts and organizing principles of that law. The responsibility of an author of this treatise is qualitatively different from that of a lawyer or judge focusing on the case at hand, or even of a scholar working on a law review article or on a smaller treatise. This treatise demands from its authors, and offers us an ideal forum in which to pursue, a unique combination of broad-based and fine-tuned work. We can, and should, spend as much time as seems useful thinking in broad terms, asking how evidentiary law and practice might be reconceptualized or otherwise improved; at the same time, the scope of this treatise, and our desire to make it useful in workaday legal research, force us to confront in a myriad of contexts the consequences of the principles and practices that we advocate. The need to take a microscopic view enhances the quality of the telescopic work, and vice versa.

Some of the analytical approaches and structures presented here will depart dramatically from those of current evidentiary doctrine. Indeed, one volume will not be organized according to doctrinal categories at all. Rather it will offer various perspectives--historical and sociopsychological, among them--on the whole of the law of evidence; I believe that the historical essays in that volume, to which there is no counterpart in Wigmore's treatise, will give us the closest thing we have ever had to a comprehensive history of evidence in the common law world.

It has been clear to me from the beginning that a job of the scope envisioned for this treatise can be done properly only if authorship is divided among many persons. [28] Multiple authorship creates some complexities, most obvious of which is that the treatise will speak with many voices. In each volume, however, the voice will be clear: It will be that of the author or authors of that volume. As General Editor, I will offer comments to the author on the manuscript and I expect to avail myself of the opportunity in each volume, as I have done in this one, to write a substantive introductory essay, presenting some reflections on the subject matter of the volume. But in no sense do I control the author's text. I take the Groucho Marx attitude towards the matter: I would not want authors who would want me to exert such control.

Some substantive overlaps will be inevitable--there were in Wigmore's treatise as well--and this means that in different places the treatise will inevitably take different points of view. I do not regard that as a problem. Not only is perfect consistency across a work of this magnitude unattainable--Wigmore, it has been pointed out to me, was not always internally consistent himself--but I do not even regard it as a desideratum. On the contrary, the important thing is that each area be subjected to intelligent analysis; if a given question is subjected within this treatise to two competing analyses, each done well but coming to different conclusions, I regard that as all to the good.

In an ideal world, the volumes would all be ready together or at least in some sensible sequence. In this sense, the world is not ideal. The volumes will appear as they are ready, which will depend in large part on the speed of the individual author or authors. The volumes will also differ in style, in orientation, in depth and breadth, and presumably--however subjective judgment may be--in quality. But I am confident that even standing alone, each volume, beginning with this one, will be very useful to a variety of readers as it is published. And I hope that the entire treatise, when it is published, will make a unique and enduring contribution to the law of evidence.

One more issue remains: Should the name Wigmore be in the title of the treatise? I do not think there is a problem of misrepresentation. Readers will know (even apart from this essay) that they are not reading Wigmore's text. But what about the sheer effrontery of calling a treatise that does *not* use Wigmore's text *The New Wigmore*? For various reasons, I think the title is justified.

First, there is good precedent for this locution. The New Palgrave: A Dictionary of Economics (1987) and The New Grove Dictionary of Music and Musicians (1980) are both successors, completely rewritten, to distinguished works of an earlier era. And so--without the "New"--is Benjamin's Sale of Goods. [29]

Second is the matter of heredity. This is clearly the successor to the Wigmore treatise, presented by the same publisher in lieu of another revision of that treatise. In outlining the overall organization and coverage of this treatise, I have leaned heavily on the prior treatise. Though the organization of this treatise is radically different from that of Wigmore's, his structure was sometimes useful. And I have applied a presumption--sometimes (as in the case of the parol evidence rule), but rather infrequently, rebutted--that if a topic was covered by Wigmore it ought to be covered here as well.

Most important, however, are responsibility and aspiration. I believe that all the authors of this treatise feel an extra sense of responsibility when working on a treatise intended as a successor to Wigmore's. We do not aspire to make *The New Wigmore* as dominant as *Wigmore* was. That is not possible, and if it were would be a most unhealthy, retrograde development. But we hope that for many years this treatise will be, as Wigmore's clearly was, one of the first sources that anyone--judge, practitioner, academic, or non-lawyer--naturally consults when seeking a reflective discussion of an evidentiary question, whether doctrinal, historical, conceptual, or jurisprudential. If it is then it will be worthy of carrying the name Wigmore on the spine.

August 1995

Richard D. Friedman

Footnotes

1 The account given here is drawn from Tony Fairchild, The America's Cup Challenge: There is No Second (1983), frontispiece, quoting an account by William N. Wallace of the New York Times, itself drawing on various early sources, and from A Race With Grace, Washington Post, Jan. 11, 1995, at F5.

2 The treatise had a different title for each edition. The first (1904-1905) edition was titled: A Treatise on the System of Evidence in Trials at Common Law, Including the Statutes and Judicial Decisions of All Jurisdictions of the United States. The title of the second edition (1923) added more of a geographical component: A Treatise on the Anglo-American System of Evidence in Trials at Common Law, Including the Statutes and Judicial Decisions of All Jurisdictions of the United States and Canada. The third edition (1940) lopped off the end of this title, yielding: A Treatise on the Anglo-American System of Evidence in Trials at Common Law. And the fourth edition, published posthumously (1961-1983) and revised by three scholars, lopped off the beginning, so that it was titled simply: Evidence in Trials at Common Law.

3 22 Ill. L. Rev. 688, 692 (1928).

4 20 B. U. L. Rev. 776, 777 (1940).

5 18 Harv. L. Rev. 478 (1905).

6 20 B.U. L. Rev. at 793.

7 *See, e.g.*, Liva Baker, Felix Frankfurter 125-126 (1969).

8 From an encomium published in John Henry Wigmore: A Centennial Tribute, 58 Nw. U. L. Rev. 443, 443 (1963). *See also* address by Frankfurter to the Harvard Law Society of Illinois 13 (Apr. 28, 1955) (privately published; similar praise, as to treatises "in the English tongue"), *quoted in* Dunne, Book Review, 30 St. Louis U. L.J. 567, 569 (1986) (referring to "Wigmore's classic treatise"). In the same centennial tribute, Frankfurter, without reference to the sharp confrontation over Sacco-Vanzetti, spoke of "the long, happy friendship that I had with John Henry Wigmore throughout my professional life." 58 Nw. U. L. Rev. at 443.

9 Wigmore, John Henry, in A.W.B. Simpson, ed., Biographical Dictionary of the Common Law 531, 533 (1984).

10 William L. Twining, Rethinking Evidence: Exploratory Essays 59-60 (1990).

11 Teaching notes quoted in John M. Maguire, Wigmore--Two Centuries, 58 Nw. U. L. Rev. 456, 459-460 (1963).

Gray was not without criticisms of his former pupil; with remarkable perceptivity, he pointed to problems--among them "nomenclature," """"ovetelaboration in arrangement," and "prolixity"--that have become more bothersome over time and successive editions. Quoted in id. at 459 (capitals and italics deleted).

12 37 Harv. L. Rev. 513, 521 (1924).

13 William Twining, Theories of Evidence: Bentham and Wigmore 111 (1985).

14 20 B.U. L. Rev. at 778.

15 Wigmore, preface to the third edition, at xi.

16 Morgan, Book Review, 20 B.U. L. Rev. 776, 778 (1940).

17 A useful biography is William R. Roalfe, John Henry Wigmore, Scholar and Reformer (1977).

18 Richmond T. Rucker first performed this job and then Walter A. Reiser, Jr. When the fourth edition was published, Mr. Reiser also prepared supplements to it for many years; the task is now carried on by Arthur Best of the University of Denver Law School.

19 75 Harv. L. Rev. 441 (1961).

20 75 Harv. L. Rev. at 453.

21 *See* New Navy Chief Among 82 Killed in Air Collision, N.Y. Times, July 20, 1967, at 1; McNaughton a Pentagon Aide 6 Years, id. at 22.

22 *See* Vol. 3, at v; *see also* vol. 8, at v (McNaughton); vol. 1, at xi (Tillers).

23 75 Harv. L. Rev. at 444-446, 453.

24 Twining, Rethinking Evidence, at 60.

25 Maguire, Wigmore--Two Centuries, 58 Nw. U. L. Rev. 456 at 460.

26 On some issues, which remain relatively stable over the years, Wigmore continues to retain great authority. In many areas as well, including his historical discussions, the treatise remains a tremendous resource; one wishing to learn the deep roots of any evidentiary doctrine can rarely begin better than

by consulting the treatise and reading the sources that he cites. And, of course, the treatise remains an immensely important historical document itself, reflecting and virtually embodying a long era in the development of evidentiary law.

27 A.W.B. Simpson, The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature, 48 U. Chi. L. Rev. 632 (1981).

28 To what extent this is because the world has changed and to what extent it is because none of us are Wigmore is an interesting question that I am glad need not be answered.

29 The famed work by Judah P. Benjamin (formerly a member of the United States Senate and the Confederate Cabinet), commonly referred to as Benjamins Law of Sale, was first published in 1868 and ran through eight editions in England, the last in 1950 but with later supplementation. The origin of the modern Benjamin, now in its fourth edition (1992), seems very much like that of The New Wigmore: A Treatise on Evidence. *See* the preface, at vii of the first edition (A.G. Guest, gen. ed. 1974).

