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**JOHN HENRY WIGMORE—SCHOLAR AND REFORMER\***

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Professor Roalfe is currently engaged in writing the first definitive biography of John Henry Wigmore, one of the great scholars and leaders in the history of American law. In the following article, Professor Roalfe presents the fullest account to date of the man, his scholarly contributions, and his impact upon legal education and indeed upon the legal profession as a whole. He traces the work of Wigmore in the fields of criminal law and criminology, which are of special interest to the readers of the *Journal*; but just as Wigmore could not confine the broad range of his interests, Professor Roalfe could not review Wigmore's contributions without describing, in addition, his scholarly contributions to the field of evidence and to many other areas as well; his writings in a more popular idiom, including his frequent comments upon current affairs; his leadership in the profession of law; his famed dynamic personality and its catalytic effect upon those about him; and finally the highlights of his personal history—those persons and events which helped to form a man regarded as great in his lifetime and after.

The author prepared this article at the special request of the Board of Editors in commemoration of the *Journal's* fifty years of publication.—EDITOR.



JOHN HENRY WIGMORE

CRIMINAL LAW AND CRIMINOLOGY

It is not without significance that the last activity in John Henry Wigmore's extraordinary and fruitful career was participation in a meeting of the editorial board of this *Journal*, a meeting in the Chicago Bar Association from which he

\* The author is indebted to Mrs. Gustav Johnson for permission to read and quote from an unpublished manuscript entitled *RECOLLECTIONS OF A GREAT SCHOLAR AND SUPERB GENTLEMAN, A SYMPOSIUM* edited by her father, Albert Kocourek. Hereafter, it will be referred to as *RECOLLECTIONS* and, as it is not paged continuously, the reference will give the name of the specific contributor and the page or pages of his contribution to the *SYMPOSIUM*.

The author is also indebted to Miss Sarah B. Morgan, Wigmore's secretary for many years, for important information which would not otherwise have been available.

For information in printed form see especially *Tribute to Dean John H. Wigmore*, 44 *CHICAGO LEGAL NEWS* 117 (1911); *Editorial Preface* to *CELEBRATION LEGAL ESSAYS* 1 (1919), also appearing at 13 *ILL. L. REV.* 143 (1918); Kocourek, *John Henry Wigmore: A Personal Portrait*, 24 *GREEN BAG* 3 (1912), reprinted in 13 *ILL. L. REV.* 340 (1918); Amram, Note, 67 *U. PA. L. REV.* 80 (1919); Holdsworth, *Wigmore As a Legal Historian*, 29 *ILL. L. REV.* 448 (1934); Zane, *A Pioneer in Com-*

was returning to his home in a taxicab when in a collision he sustained a skull fracture from which he died a few hours later. Thus, tragically, at the age of eighty was terminated a deep and abiding interest in and support of the *Journal* that Wigmore had done so much to bring into being. The *Journal*, however, is but one reflection of the great impact that Wigmore had on the field of criminal law and criminology. He was the originator of the idea, the principal proponent of and the driving force behind the National Conference on Criminal Law and Criminology,<sup>1</sup> held in June, 1909, by the Law School of Northwestern University as an appropriate way to celebrate the fiftieth anniversary of the founding of the Law School.

At this conference, which was the first of its kind in the United States, it was voted to organize the American Institute of Criminal Law and Criminology. Wigmore was elected the first Presi-

*parative Law*, 29 ILL. L. REV. 456 (1934); *Chronology of the Career of John Henry Wigmore*, 32 J. CRIM. L. & C. 261 (1941); Editorials honoring John Henry Wigmore by Baker, Gault, Glueck, Healy, Howe, Hilton, Inbau, Hulbert, Hunter, James, Lindesmith, Lindsey, Loesch, Lyon, MacChesney, Meyer, Osborn, Overholser, Ulman, Vollmer, Wilson, 32 J. CRIM. L. & C. 263-96 (1941); [Belknap], *A Friend Bids Farewell to Dean Wigmore*, 29 A.B.A.J. 333 (1943); Clapp, *John Henry Wigmore*, 66 N.J.L.J. 244 (1943); Curran, *Dean Wigmore at his Last Meeting of the Editorial Board*, 34 J. CRIM. L. & C. 93 (1943); Evans, *John Henry Wigmore*, 49 Case and Comment, No. 2, p. 5 (1943-44); Holdsworth, *Memorial Note*, 59 LAW Q. REV. 289 (1943); Kocourek, *John Henry Wigmore—1863-1943*, 29 A.B.A.J. 316 (1943); Kocourek, *John Henry Wigmore*, 27 J. AM. JUD. SOC'Y 122 (1943); Kuttner, *Comment*, 3 JURIST (Catholic Univ.) 537 (1943); McCormick, *Wigmore, Nation's Greatest Legal Scholar*, *Passes*, 6 TEXAS BAR J. 154 (1943); [Pound], *John Henry Wigmore*, 56 HARV. L. REV. 988 (1943); Rutledge, *Two Heroes of the Law*, 29 A.B.A.J. 425 (1943); Same, 24 CHICAGO BAR RECORD 438 (1943); Stephens, *Meet the Illinois Lawyer*, 27 ILL. BAR. J. 67 (1938) and *A Door Closes*, 31 ILL. BAR. J. 300 (1943); Varga, *John Henry Wigmore, 1863-1943*, 14 CLEVELAND BAR ASS'N J. 174 (1943); *Dean Wigmore "Retires"*, 20 Law Student, No. 3, p. 3 (May, 1943); *John Henry Wigmore*, 22 Northwestern Univ. Alumni News, May 1943, p. 10; *Chronology of the Wigmore Career*, 29 A.B.A.J. 317 (1943); *John Henry Wigmore (Editorial)*, 34 J. CRIM. L. & C. 3 (1943); *John Henry Wigmore (Memorial)* 1943 HANDBOOK, ASS'N AM. LAW SCHOOLS 238; *John Henry Wigmore (Memorial)*, 27 J. AM. JUD. SOC'Y 6 (1943); *John Henry Wigmore*, (Memorial Addresses by Evans, Megan, MacChesney, Millar, Snyder), 34 J. CRIM. L. & C. 75-95 (1943); Same, 38 ILL. L. REV. 1-15 (1943); Millar, *John Henry Wigmore (1863-1943) [Pioneers in Criminology IV]*, 46 J. CRIM. L., C. & P. S. 4 (1955).

<sup>1</sup> PROCEEDINGS OF THE FIRST NATIONAL CONFERENCE ON CRIMINAL LAW AND CRIMINOLOGY, CALLED IN CELEBRATION OF THE FIFTIETH ANNIVERSARY OF THE FOUNDING OF NORTHWESTERN UNIVERSITY SCHOOL OF LAW (UNION COLLEGE OF LAW) (1910).

dent and he was thereafter an important factor in the development and execution of its program. The *Journal*, the first in this field in the English language, was of course one of the principal objectives for which the Institute was organized, and it began publication in May, 1910, and has ever since played the stimulating and all-important role of providing an effective outlet for the written contributions of those working in the field. The Institute, however, also carried on an active program and, among other things, planned and stimulated regional surveys of criminal justice. A bulletin was issued from 1909 to 1915, proceedings of significant meetings were made available, committee reports on a wide variety of subjects were published from time to time, and a draft of a code of criminal procedure was published in 1915.<sup>2</sup>

Wigmore's interest in the *Journal* involved far more than merely seeing that it got under way. He attended board meetings regularly and was an active and stimulating participant. He not only advanced novel ideas himself, but he was receptive to the ideas of others and encouraged the proponents to prepare manuscripts developing their views which frequently found their way into the pages of the *Journal*. As had invariably been the case throughout the years, at his last meeting he was vivacious, told stories, discussed books, and upon leaving "volunteered to assume responsibility for a small journalistic matter, and bade us all good day."<sup>3</sup>

The first issue of the *Journal*, in which Wigmore is listed as an associate editor, "contained a forthright comment . . . upon a recent criminal case,"<sup>4</sup> thus beginning his long record as a regular contributor. For the most part he utilized the *Journal* as an outlet for the communication of useful information which he believed should be made available, for case comments, and for editorial notes. Nothing denotes Wigmore's interest in the contemporary scene and his desire to bring about improvements in the law more unmistakably than this propensity to turn aside from his

<sup>2</sup> Mikell, *A Proposed Draft of a Code of Criminal Procedure* (Report of Committee E of the Institute) 5 J. CRIM. L. & C. 827 (1915). For the publications of the Institute, see KUHLMAN, *A GUIDE TO MATERIAL ON CRIME AND CRIMINAL JUSTICE* (1929).

<sup>3</sup> Curran, *Dean Wigmore at his Last Meeting of the Editorial Board*, 34 J. CRIM. L. & C. 93, 94 (1943). For further details see the foregoing article and *Wigmore (Editorial)*, 34 J. CRIM. L. & C. 3 (1943).

<sup>4</sup> Baker, *The Innovator*, 32 J. CRIM. L. & C. 263, 264 (1941).

more scholarly work long enough to prepare these brief contributions. A pending trial, a current decision, or some other event, if it engaged his interest, evoked an emphatic response—approval or praise for the opinion of the court, sometimes a biting criticism of the technical or legalistic approach involved. Often he pointed to ignorance of or failure to take account of the history of the doctrine or rule involved.

"His was the pen that in many a note and article, 'in each of which he seemed to shake a lance as brandished at the eyes of ignorance,' subjected to just censure those decisions in criminal cases wherein substance was sacrificed to form and obeisance made to reason bereft rule . . . ."<sup>5</sup>

Typical examples of his comments on criminal cases and perhaps of special interest were those on the Loeb-Leopold case,<sup>6</sup> because it attracted such widespread interest at the time and because Leopold's reformation brought him back into the news in the recent past. It will be recalled that the case involved the coldly planned and executed kidnapping and murder of Robert Franks by the two defendants, aged 18 and 19.

On several occasions Wigmore contributed characteristically forthright comments concerning this case. In one, he commended the parents who, in spite of their wealth, declared that they would not spend an undue amount for the defense, thus negating the idea of undue influence because of their wealth.<sup>7</sup> However, he criticized the experts for using the nicknames "Dickie" and "Babe" subtly to influence the jury.<sup>8</sup> Wigmore attributed the latter to

"the vicious method of the Law which permits and requires each of the opposing parties to summon the witnesses on the party's own account."<sup>9</sup>

He took the position that, while the parties should have the right to request certain witnesses, expert witnesses should be paid by the state and

<sup>5</sup> Millar, *On Behalf of the Law Faculty*, 34 J. CRIM. L. & C. 85, 86 (1943).

<sup>6</sup> For a fuller discussion see *The Loeb-Leopold Murder of Franks in Chicago, May 21, 1924*, 15 J. CRIM. L. & C. 347 (1924). See also the comment of Dr. H. I. Gosline and Wigmore's reply in *The Loeb-Leopold Case Again*, 15 J. CRIM. L. & C. 501 (1925).

<sup>7</sup> Wigmore, *Legitimate Bounds in the Defense of Accused Persons*, 19 ILL. L. REV. 95 (1924).

<sup>8</sup> Wigmore, *To Abolish Partisanship of Expert Witnesses, As Illustrated in the Loeb-Leopold Case*, 15 J. CRIM. L. & C. 341 (1934).

<sup>9</sup> *Id.* at 342.

called by the court but that both parties should be provided with the opportunity to consult them.<sup>10</sup>

Wigmore was also goaded into action by the sentence of the court in this case which, in his view, contained two "astonishing pronouncements."<sup>11</sup> The court declared that it was moved to impose less than the extreme penalty chiefly because

"of the age of the defendants—boys of 18 and 19 years . . . in accordance with [1] the progress of criminal law all over the world and [2] the dictates of enlightened humanity."<sup>12</sup>

The opinion adds that the life imprisonment penalty may well be "the severer form of *retribution* and *expiation*."<sup>13</sup>

In his comment Wigmore took advantage of the opportunity succinctly to state his own position. He declared that the basic theories of the penal law are reducible to four—retribution, reformation, deterrence, and prevention. The first he said had long since been discredited and the last one—prevention—concerns general social measures and not the law of the courts. In his view, "the *deterrence* theory is the kingpin of the criminal law."<sup>14</sup> He took sharp issue with the experts who suggested that, on the basis of the theory of determinism, the court should be lenient on the defendants both of whom were, in his opinion, completely beyond the possibility of rehabilitation.<sup>15</sup> As to the relationship between reformation and deterrence he said:

"As doctors and friends, let them sympathetically 'help the criminal to get through the situation' by all means. But as advisors of a criminal court, let them learn that their Determinism is out of place, and that Society's right to eliminate its human weeds is not affected by the predetermined character of the weeds."<sup>16</sup>

<sup>10</sup> *Ibid.*

<sup>11</sup> Wigmore, *The Judge's Sentence in the Loeb-Leopold Murder*, 19 ILL. L. REV. 167, 168 (1924).

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

<sup>14</sup> *Id.* at 169.

<sup>15</sup> Wigmore, 15 J. CRIM. L. & C. 400, 401 (1924). However, Leopold did reform and, after a long term of useful service behind prison walls, was released on parole on March 13, 1958. Wigmore was not opposed to capital punishment, but he apparently had some doubt about it, for he once said the matter should receive further consideration. See Wigmore, *Book Review*, 7 ILL. L. REV. 395, 396 (1913).

<sup>16</sup> *Id.* at 405.

Nor was Wigmore easily deterred by the prominence of the individual involved if he believed his behavior could not be squared with a sound administration of justice or with the ethics of the legal profession. While he of course recognized that every defendant was entitled to a fair trial, he said, "we know that the regular criminal practitioner fights to free his client guilty or innocent."<sup>17</sup> In a scathing comment he condemned Clarence Darrow for taking this position in the celebrated *McNamara* case. Relying on Darrow's published statement that he foresaw the plea of guilty from the beginning Wigmore said:

"And yet he spent one hundred and ninety thousand dollars of laboring men's innocent money to secure at any cost the escape of men whom he knew to be guilty of this coarse, brutal murder. . . ."<sup>18</sup>

But it should not be concluded on the basis of the foregoing examples that Wigmore was usually aligned with the prosecution in criminal cases, although his interest in scientific crime detection may have tended to focus his major attention on identifying and convicting the guilty rather than on the protection of the innocent. Some of his comments and criticisms were directed toward practices which worked undue hardship on persons accused of crime or resulted in miscarriages of justice. Furthermore, he recognized that, in the nature of things, many innocent persons were accused of crime and suffered loss of freedom, income, and reputation pending their acquittal and that some were even convicted erroneously. As early as 1913 he strongly favored legislation to provide compensation for the latter,<sup>19</sup> and in 1932 he reviewed Edwin Borchard's *Convicting the Innocent: Errors of Criminal Justice* most favorably and commended

"the author on the final appearance of a book which will do much to promote the reform that he has so long advocated with such devotion."<sup>20</sup> Wigmore's interest in the legal aid movement was of course another evidence of his concern for the individual who needed legal guidance or ran afoul of the law.

<sup>17</sup> Wigmore, *The Limits of Counsel's Legitimate Defense*, 2 J. CRIM. L. & C. 663, 664 (1912).

<sup>18</sup> *Ibid.*

<sup>19</sup> Wigmore, *The Bill To Make Compensation to Persons Erroneously Convicted of Crime*, 3 J. CRIM. L. & C. 665 (1913).

<sup>20</sup> Wigmore, Book Review, 23 J. CRIM. L. & C. 320, 321 (1932).

Even in this brief sketch, mention should be made of the Sacco-Vanzetti case,<sup>21</sup> although it is impossible to deal adequately with the long and complicated record involved, for it gave rise to a controversy with Justice Felix Frankfurter (then on the Harvard Law School faculty) that is of considerable biographical interest. It will be recalled that the case concerned the robbery and murder of a paymaster and his guard at a shoe factory in Braintree, Massachusetts. Wigmore was convinced that the defendants had a fair trial, and he vehemently attacked Frankfurter, who had come to their aid first in an article published in the *Atlantic Monthly*<sup>22</sup> and later in a statement published in pamphlet form.<sup>23</sup>

That Wigmore was deeply stirred is evidenced by the highly personal nature of his attack, which appeared in two articles in the Boston Evening Transcript.<sup>24</sup> He never referred to Frankfurter by name but called him the "plausible Pundit" or "contra-canonical critic" because of his alleged violation of Canon 20 of the American Bar Association Code of Ethics. It was of course not unusual for Wigmore to speak out in colorful language, for many of his criticisms were sharp and uncompromising. However, he had a great capacity to distinguish between the issues involved and the participants concerned, and even when his feelings ran high they were usually quick to cool. Where there were strong personal differences of a continuing nature, they were generally one-sided, and if Wigmore was wrong he would usually acknowledge the fact upon giving the matter further consideration.

Why, then, was this controversy not only acrimonious on his part<sup>25</sup> but sustained? Although it is evident that the case evoked several strong emotional responses which no doubt reinforced

<sup>21</sup> See THE SACCO-VANZETTI CASE, TRANSCRIPT OF THE RECORD OF THE TRIAL OF NICOLA SACCO AND BARTOLOMEO VANZETTI IN THE COURTS OF MASSACHUSETTS AND SUBSEQUENT PROCEEDINGS, 1920-27 (5 vols. 1928-29).

<sup>22</sup> Frankfurter, *The Case of Sacco and Vanzetti*, 139 *Atlantic Monthly* 409 (March 1927).

<sup>23</sup> FRANKFURTER, THE CASE OF SACCO AND VANZETTI, A CRITICAL ANALYSIS FOR LAWYERS AND LAYMEN (1927). Reprinted with a new introduction by Edmund M. Morgan in 1954.

<sup>24</sup> April 25, 1927, p. 1, col. 5, and May 10, 1927, p. 15, col. 3. Frankfurter's replies appeared in the Boston Evening Transcript of April 26, 1927, p. 15, col. 3, and The Boston Herald of May 11, 1927, p. 3, col. 1.

<sup>25</sup> In his replies, Frankfurter made no disparaging personal references.

each other, the overriding consideration from an emotional point of view seems to have been that the case was inexorably associated with the communist movement, which was at the time exploiting it to the full by stirring up agitation all over the world. That communism was inimical to everything that Wigmore stood for is obvious. To him the agitation was started "among various alien Communist circles; and this was extended to the general public . . ." <sup>26</sup> by Frankfurter's articles for the purpose of undermining the orderly processes of the courts. In his opinion, to yield to pressure in this instance would establish a precedent that would be fatal. Feeling as he did, he was apparently incapable of appreciating that Frankfurter, and many others who unquestionably shared Wigmore's antipathy to communism, nevertheless believed that, because of the unpopularity of their views, the defendants had not had a fair trial.

As Wigmore saw the situation, Frankfurter's reflection of the record in the case was neither accurate nor fair, and he charged him with being guilty of "a gross libel" <sup>27</sup> against the honor of the courts of Massachusetts where he (Wigmore) had practiced after graduation from the Harvard Law School. Furthermore, he maintained that Frankfurter not only violated Canon 20 of the American Bar Association's Code of Ethics which "condemns newspaper publications by a lawyer as to pending or anticipated litigation" <sup>28</sup> but was misleading the public.

Wigmore so often criticised the courts that it is at first surprising to find him here taking another to task for doing the same thing. The explanation seems to lie in the fact that, although Wigmore was a frequent critic of the courts and of legal institutions in general, he was essentially a reformer dedicated to the piecemeal improvement of and not the destruction or replacement of these institutions. We see him here in the role of champion and defender of the judiciary as an institution, because he believed the communists were determined to destroy it and our entire system of government as well. <sup>29</sup>

<sup>26</sup> Boston Evening Transcript, April 25, 1927, p. 1, col. 5.

<sup>27</sup> *Ibid.*

<sup>28</sup> Boston Evening Transcript, May 10, 1927, p. 15, col. 3.

<sup>29</sup> Wigmore's appraisal of the situation at the time is clearly indicated in a review of Kate Holladay's book *THE IMMIGRANT'S DAY IN COURT* in which, although he showed sympathy for the immigrant, he took issue

Even if Wigmore was right on the basic issue, that of a fair trial (and on this there is still disagreement), unquestionably he unfairly identified Frankfurter's position with that of the communists as an attack on the judiciary. He overlooked completely the fact that honest men sometimes reach different conclusions even from an examination of the same facts, and in this instance they were not even in agreement on the facts.

Returning to the American Institute of Criminal Law and Criminology, after this somewhat extended digression to take account of Wigmore's important role as a commentator on current events, it should be noted that he was not only the guiding spirit but provided the major driving force that carried its program forward. Under his leadership, the problems of crime were approached with a broad perspective and a sympathetic attitude toward the use of scientific methods wherever they appeared applicable. This attitude elicited support from and encouraged leaders in psychology, psychiatry, and the other related social sciences at a time when the general attitude of the legal profession was far from receptive to such broader collaboration. Indeed, the legal profession as a whole showed virtually no concern about or sense of responsibility for the problem of crime and, in the words of Dean Pound, "At that time, American Criminal law was in an unhappy condition from which it has by no means wholly emerged." <sup>30</sup>

One application of the scientific method in which Wigmore took a great interest was crime

with the author's criticism of government policy under Attorney General J. Mitchell Palmer. He concluded the review with the following statement:

"The 'Little Red Book' used in this country pledged all union members (as candidly quoted by the author) to 'a forcible social revolution', 'a strike to abolish government', 'a quicker liberation of Russia and enslaved humanity in all countries.' Any government of vigorous, self-respecting humans, like ours, would have to strike at such a flagrant conspiracy to ruin us. Deportation was the most humane expedient. Prompt measures were vital; ordinary, long-drawn-out judicial proceedings would have been suicidal. Individual mistakes, of course were made; but the individual is nothing when a nation's life is at stake. If some of the deportees were victims of their own ignorance or of subordinate officials' harshness—well, every soldier knows that such things will happen in war; and this was really a war against an enemy. Mr. Palmer saved the country, in my opinion." 19 ILL. L. REV. 496, 497 (1924).

<sup>30</sup> Pound, Editorial, 56 HARV. L. REV. 988, 989 (1943).

detection. He was "the organizer and founder"<sup>31</sup> of the Scientific Crime Detection Laboratory, originally at the Northwestern University Law School and later transferred to the Chicago Police Department. He was also a pioneer in the movement to provide special training for police work at all levels. Without the leadership and encouragement provided by his extensive writings the courts might have been much slower in their acceptance of such contributions as science could make in this field.

At the same time, Wigmore was quick to detect quackery or exaggerated claims by those who overemphasized the contributions that these related disciplines could make to the solution of legal problems. Perhaps the most dramatic illustration was his vehement refutation of Hugo Munsterberg<sup>32</sup> who, in his book, *On the Witness Stand*,<sup>33</sup> greatly overstated the contributions that psychology could make at the time and took the legal profession to task for not using the knowledge made available by the psychologists. However, Wigmore admitted that the legal profession in this country was considerably behind in the scientific study of crime.

Important as Wigmore regarded the American Institute of Criminal Law and Criminology, his efforts were by no means confined to those which could be channeled through this medium. We find him active in the American Bar Association in support of the creation of a Section on Criminal Law. In his advocacy he pointed out that,

"For forty years the American Bar Association gave no sign, by committee or otherwise, that the great branch of Criminal Law existed."<sup>34</sup>

Wigmore believed the organized bar had a very useful function to perform and was determined that it should assume this responsibility. At last in 1920, as a result of his efforts and the work of a limited number of others, a Criminal Law Section was organized.<sup>35</sup>

Contrary to the view expressed by some of his colleagues in the Institute, Wigmore did not

<sup>31</sup> Kocourek, *John Henry Wigmore*, 27 J. AM. JUD. SOC'Y 122, 123 (1943).

<sup>32</sup> *Professor Muensterberg and the Psychology of Testimony, Being a Report of the Case of Cokestone v. Muensterberg*, 3 ILL. L. REV. 399 (1909).

<sup>33</sup> The full title is *ON THE WITNESS STAND, ESSAYS IN PSYCHOLOGY AND CRIME* (1908).

<sup>34</sup> Wigmore, *The Criminal Law Section of the American Bar Association*, 12 J. CRIM. L. & C. 314 (1921); *The Criminal Law Section*, 16 ILL. L. REV. 226 (1921).

<sup>35</sup> *Proceedings of the Criminal Law Section*, 45 A.B.A. REP. 423 (1920).

believe that the Section would supplant the American Institute of Criminal Law and Criminology. He maintained that the Section would

"develop the field of the law as applied to crime, just as the medical men, the psychologists, and others, have developed their respective fields. To coordinate the results of all these independent branches is the function of the Institute."<sup>36</sup>

Wigmore's concern with this field was by no means confined by national boundaries. His early and continuing interest in comparative law was of course reflected in his approach to the problems of criminal law and criminology. One evidence of this, which for him was a world-wide approach, was his support of the International Congress of Penal Law held in Brussels in 1926 at the call of the International Association of Penal Law of which the American Institute of Criminal Law and Criminology was the American affiliate.<sup>37</sup> Wigmore was the American member of the General Board of Councillors and, among other things, strove with characteristic vigor to develop interest in the Congress in this country and encourage attendance and active participation.

Another outgrowth of Wigmore's activities concerned with this international approach to the problem of crime was the *Modern Criminal Science Series*, published in nine volumes in 1911-1917, under the auspices of the American Institute of Criminal Law and Criminology. Wigmore was one of a committee of five appointed to select the treatises to be translated and arrange for their publication. Not only was he the originator of the idea, but the major part of the labor of the committee was performed by him.

This ambitious undertaking was intended to further one of the Institute's principal aims, namely, that of encouraging

"the study of modern criminal science, as a pressing duty for the legal profession, and for the thoughtful community at large."<sup>38</sup>

It was believed that one of the ways to achieve this objective was to make available in the English language the most useful works in the continental languages. This was regarded as particularly important because far more work in this

<sup>36</sup> Wigmore, *The Criminal Law Section of the American Bar Association*, 12 J. CRIM. L. & C. 314, 315 (1921).

<sup>37</sup> See Wigmore, *The 1926 International Congress of Penal Law*, 16 J. CRIM. L. & C. 310 (1925).

<sup>38</sup> *General Introduction to the Modern Criminal Science Series* in DE QUIRÓS, *MODERN THEORIES OF CRIMINALITY* at x (1911).

field had been done in Europe than in the United States.

Mention should also be made of another pioneering undertaking (the first in the United States), namely, *A Preliminary Bibliography of Modern Criminal Law and Criminology*,<sup>39</sup> published in 1909 as an aid to the study of criminal science, but with the immediate objective of providing a reference list for members of the National Conference on Criminal Law and Criminology to which reference has already been made. This arduous and time-consuming task was undertaken by Wigmore although he was at the time heavily involved in planning the conference.

Because Wigmore was active in such a diversity of fields it is necessary in this brief sketch to move on to other aspects of his career, inadequate as has been this delineation of his interests and activities concerned exclusively with the field of criminal law and criminology. However, as will be perfectly evident from what follows, criminal law and criminology were important considerations in much of the work that he did and, particularly, in his writing on the law of evidence and comparative law. For example, Kuhlman, in his *A Guide to Material on Crime and Criminal Justice* (1929), lists in addition to Wigmore's contributions exclusively concerned with the subject his *Treatise on Evidence; The Pocket Code of Evidence; The Principles of Judicial Proof; and Problems of the Law, Its Past, Present, and Future*, because of their importance in the field, although they were concerned with other fields as well.

This interest also carried over into the field of recreation, for Wigmore was an avid reader of detective stories. A frequent figure was Wigmore emerging from the Evanston Public Library with four or five detective stories under his arm. But, apparently, even in this reading he had a purpose, for he once said to the librarian:

"Do not, I beg you, think I take these solely for amusement. I go through them rapidly to see how the law is carried out."<sup>40</sup>

Wigmore's contribution to the field of criminal law and criminology has been succinctly summed

<sup>39</sup> The BIBLIOGRAPHY was an expansion of an order list prepared by Wigmore for the acquisition of materials for the Elbert H. Gary Library of the Northwestern University School of Law.

<sup>40</sup> Wright, Ida F., Letter of August 20, 1960 (in the Northwestern University Law School Library).

up by his colleague Robert W. Millar in the following words:

"In this field many men have had their part in the general advance, but the part of none has been more incisive or on a wider scale than that of John Henry Wigmore."<sup>41</sup>

#### THE TREATISE ON EVIDENCE

Impressive as was Wigmore's contribution to the broad field of criminal law and criminology, the achievement for which he is most widely known is his *Treatise on Evidence*,<sup>42</sup> the first edition of which appeared in four volumes in 1904-05 as "the product of 10 years of monastic toil."<sup>43</sup> Indeed, even among the members of the legal profession, there are relatively few who have any conception of the broad range of his interests or of the substantial contributions he made to fields other than the law of evidence. *The Treatise* quickly gained recognition as an outstanding work. A supplementary volume, covering the years 1904-07, was published in 1908, and this was followed by a second cumulative supplement in 1915. The second edition, which involved extensive revision and enlargement, appeared in five volumes in 1923 with a supplement in 1934. This in turn was followed by the third substantially expanded and final edition in 10 volumes in 1940 when Wigmore was 77 years old. This edition is still kept up-to-date by the use of pocket supplements.<sup>44</sup>

Even stated in purely quantitative terms this was a stupendous undertaking. Unusual as it may be to measure scholarly achievement in quantitative terms, in these circumstances no general appraisal can ignore them. The first edition contained about 40,000 citations to judicial

<sup>41</sup> Millar, *On Behalf of the Law Faculty*, 34 J. CRIM. L. & C. 85, 86 (1943). See also Millar, *John Henry Wigmore (1863-1943)* [*Pioneers in Criminology* VI], 46 J. CRIM. L., C. & P.S. 4 (1955).

<sup>42</sup> The full title is 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. In the second and third editions the title is 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.

<sup>43</sup> Kocourek, *John Henry Wigmore*, 27 J. AM. JUD. Soc'y 122, 123 (1943). In his dedication, Wigmore speaks of fifteen years of labor.

<sup>44</sup> A revised edition of volume 8, by Professor John T. McNaughton of the Harvard Law School, was published in May, 1961, and Professor McNaughton is at present revising volume 9.



decisions, the second approximately 55,000 and the third about 85,000. Statute citations in the third edition came to a total of about 20,000. In addition, there were numerous citations to "valuable literature from learned thinkers . . . occasionally differing with the views expounded in this *Treatise*,"<sup>45</sup> to reports of bar association committees and reformatory commissions and "scores of quotations of anecdote and comment from recent professional memoirs."<sup>46</sup> The third edition alone has 7,324 pages, and the three editions, and their supplements, together come to a total of 19,358 pages distributed among 22 large volumes which occupy four and one-half feet of shelf space. Standing before them one inevitably recalls the somewhat facetious but nevertheless effective words of Robert T. Donley, written in 1934 and some years before the third edition of *The Treatise* appeared:

"The amount of research, thought and physical labor which must have been necessary for the production of this [*The Treatise*] and the other works of Dean Wigmore is simply appalling: ample to have developed round-shoulders and quarrelsomeness in any dozen professors of law."<sup>47</sup>

How was this massive task, extending over a period of 50 years and involving what were thoroughgoing revisions, brought to fruition? Fortunately, some information is available, and it provides significant insights into Wigmore's character. In the first place, Wigmore was not only an extremely rapid reader, but he could absorb and retain the substance of what he read. This alone made possible the critical examination of the wide range of materials to which he referred.<sup>48</sup>

In the second place, he had great powers of concentration. That he could work intensely in the midst of confusion and probable interruption is demonstrated by the fact that he did much of his earlier work in the Chicago Law Institute Library, which, at the time when the first and second editions were written, was used by the Northwestern University Law School students as well as by practitioners. A common sight was Wigmore occupying

"a table in the smoking room . . . aided by numerous cigarettes [applying] himself to the

<sup>45</sup> Wigmore, *Preface*, third edition at xi (1940).

<sup>46</sup> *Ibid.*

<sup>47</sup> Donley, Book Review, 40 W. VA. L. Q. 300, 301 (1934).

<sup>48</sup> RECOLLECTIONS, Gault 10.

work which was to give him imperishable fame. It was not the quietest place in the world, but he was wholly undisturbed by the activity around him. No one could have been more completely absorbed in a task—an absorption which became all the more understandable when there arrived disclosure of the magnificent product of his labors. And with this absorption there attended an air of sureness and serenity, as of one who possessed the certainty that what he was doing would be in perfect fulfillment of his design."<sup>49</sup>

In the third place, Wigmore had an extraordinary capacity for organization. Long range planning was an outstanding characteristic, and he also gave careful attention to matters of detail. Consequently, when a project was once undertaken he planned carefully and then moved forward systematically, step by step, with vigor toward the desired goal.

"From the time of his first edition in 1905 he had kept the cards containing the numbers of the sections to be used as guide cards, keeping them in a file where he dropped items through the years from one edition to another . . . He never allowed anyone else to do his research or to keep his check lists."<sup>50</sup>

In the fourth place, Wigmore had an unusual capacity for sustained effort. It is reported that he got up at five o'clock in the morning to read the galley proofs of the first edition, no doubt to leave time for other work later on rather than to provide for leisure at the close of the day. When his interest flagged he would often turn to another task for a change rather than to some form of recreation, and the wide range of his interests gave him an unusual variety of alternatives from which to choose.

Wigmore's achievement in the preparation of the first edition becomes the more remarkable when it is realized that he not only had no professional assistance but he had no stenographic help. His sole assistant was Mrs. Wigmore, to whom he dedicated this work,<sup>51</sup> who loyally

<sup>49</sup> RECOLLECTIONS, Robert W. Millar 1.

<sup>50</sup> RECOLLECTIONS, Sarah B. Morgan 28.

<sup>51</sup> The primary dedication is as follows:

"To E. H. W. devoted co-laborer for fifteen years without whose arduous and skillful toil this work could never have been completed."

However, on another page Wigmore said:

"To the memory of the public services and the private friendship of two masters of the law of evidence Charles Doe of New Hampshire Judge and reformer and James Bradley Thayer of Massachusetts historian and teacher."

aided and supported him in this task and in everything he undertook. The first edition was sent to the printer in Wigmore's own handwriting, but was first copied by hand by Mrs. Wigmore for fear that the original might be lost in transit.

For the preparation of the second and third editions Wigmore did have stenographic and secretarial assistance, but he never relied on others for professional help. He personally examined all of the authorities originally cited and re-examined virtually every authority cited in a prior edition in preparation for the next. Much of the work on the second edition was done at home under an arrangement by which Wigmore spent Wednesdays and Saturdays at home. The books required for home use were regularly shipped by express in boxes from the Library to his home in Evanston and then returned after they had been examined. Work at home was also an important factor in the preparation of the third edition, and after 1934, when the Wigmore family moved to the Lake Shore Club just two blocks from the Law School, accessibility to the Library became a much simpler matter.

An interesting sidelight on Wigmore's work at home and on his playful sense of humor is revealed in the following account supplied by his secretary at the time:

"One summer he kept the itinerary of a two-week vacation a profound secret, but he sent me a card each day, starting 'from some place on Lake Mich.' and going through several midwest cities. As I knew at the time, they were all written on the big porch of his Evanston home, facing Lake Michigan. The secrecy enabled him to do uninterrupted work on whatever Mss. he was writing at the time."<sup>53</sup>

As has already been indicated, *The Treatise* was quickly recognized as an outstanding publication. However, no work, and certainly not one so ambitious in conception, could run the gauntlet of the critics unscathed. To deal adequately with the numerous criticisms and suggestions that have been made concerning particular features or specific topics is obviously impossible in the brief space available here. It can, however, be noted that Wigmore took account of many of them in preparing his successive revisions, sometimes by modifying his own statements and at others, when he did not agree with the critic, by justifying his own position. In other instances, he referred to the critical article in the text or cited

it in a footnote without comment. Thus, he did in fact respond quite affirmatively, even if not as fully as some of his critics thought desirable, to one early general criticism, namely, that he had not given enough attention to significant contributions appearing in the legal periodicals.

Probably the four additional most general criticisms of *The Treatise* concerned (1) the very original and extremely elaborate classification of the subject-matter; (2) the introduction of certain novel words, some of them of Wigmore's own creation, and words with which not even the experts in the field would be familiar; (3) the advocacy of certain principles of law by statements that were neither logical nor supported by the courts; and, (4) the length of the work, which it was asserted would have been more useful if the citation of authorities had been more selective.

As to the first criticism, Joseph H. Beale said in his generally most laudatory review of the first edition:

"This analysis is careful, original, and thoughtful; but it is new and strange, and probably would not help a lawyer in practice in his attempt to find the authority bearing upon a particular question at hand. The reviewer must speak on this matter with some hesitation, because use alone can be the final test. To lawyers trained as students in this analysis it may be entirely feasible, but to the present generation of lawyers, to whom it is novel, it may be simply repellent."<sup>53</sup>

Beale was even harder on Wigmore because of his introduction of a novel nomenclature. He said:

"Professor Wigmore presents us with such marvels as retrospectant evidence, prophylactic rules, viatorial privilege, integration of legal acts, autoptic preference, and other no less striking inventions. It is safe to say that no one man, however great, could introduce into the law three such extravagantly novel terms and Professor Wigmore proposes a dozen."<sup>54</sup>

Subsequent events soon demonstrated the wisdom of the qualification that Beale attached to the criticism first quoted above, although at the time he was quite generally supported by others in his criticism of Wigmore's classification and novel terminology. The utility of *The Treatise*

<sup>53</sup> Beale, Book Review, 18 HARV. L. REV. 478, 479 (1905).

<sup>54</sup> *Id.* at 480.

to the practitioner did not by any means await entirely the advent of a new generation of lawyers "trained as students in this analysis" or conditioned to the novel terminology for, as early as the year 1912, Professor Ralph W. Gifford of Columbia

"was informed by one of the staff of a great law library in New York that the book was called for by practitioners 'more than all other works on evidence put together'."<sup>55</sup>

By the time the third edition appeared in 1940 *The Treatise* had achieved the distinction of being the most often cited text in the field of law.<sup>56</sup>

Many years after his almost universally criticized novel terminology was first introduced to his readers Wigmore expressed his view of the matter as follows:

"In a book of mine, now widely used, some endeavor was made to use an accurate terminology; a few existing words (such as 'prophylactic') were given legal applications; and one single new term ('autoptic proference') was introduced. And yet, in a book of three thousand pages, these trifling innovations, sparingly used, seemed to strike the minds of some reviewers and readers more forcibly than anything else in the book. And to this day, after twenty years or more, a standard genial jest, at friendly meetings, consisting in a reference to that single phrase, 'autoptic proference,' serves to bring an hilarious reaction, as a symbol of its academic unfitness in a law book!"<sup>57</sup>

But that Wigmore could see the funny side of even this subject is evident from the following episode recounted by Louis B. Wehle.

"No one will ever forget the sudden break of the Wigmore grin and wide-open laugh, especially (the real test) when the joke was on him. I was familiar with the unique nomenclature in his Evidence. One day in 1917 luck was with me. He had happened to read an article of mine in which there was the phrase 'functional equivalent'. A few days later, at a distance of about forty feet across the Cosmos Club lounge-room he sang out to me: 'Hello, functional equivalent!' In an equally loud voice I replied 'Good morning, autoptic proference!'

<sup>55</sup> Gifford, Book Review, 24 COLUM. L. REV. 440 (1924).

<sup>56</sup> Metz, Book Review, 14 PA. BAR ASS'N Q. 94 (1942).

<sup>57</sup> Wigmore, *Introduction to KOCOUREK, JURAL RELATIONS* at xxii (1927).

Whereupon the Colonel's stalwart frame collapsed at the middle and his face exploded in a red and roaring fit of laughter to shake the staid foundations."<sup>58</sup>

Although the third criticism, namely, that some of Wigmore's statements were neither logical nor supported by the courts was to some extent justified, there were many points on which Wigmore's critics were not in agreement among themselves, nor did they by any means always take issue with him on the same questions. Consequently, in some instances, the lively discussion which his efforts obviously either initiated or greatly stimulated had a decidedly constructive effect, and, with the passage of time, there was a general acceptance of many of his views. Upon one point the verdict was virtually unanimous: regardless of the topic discussed or the position taken, Wigmore had made a valuable contribution to the question under consideration.

"Even when he is cited only to be rejected or is followed only in the dissenting opinion, it is no cause for disappointment, for it shows that he has become a force to reckon with. . . . The young men whom he has inspired are striving to crystallize his ideas in statutes. It is too early to say that Wigmore found the law of evidence built of brick and left it marble, for many of the old ramshackle structures still stand, but the signs of demolition and rebuilding are everywhere about us."<sup>59</sup>

As to the criticism that the work was too long it must be kept in mind that Wigmore believed a thorough examination of the entire field was essential and to him at least an important part of his task was to set forth

"by excerpts, the most influential, the most lucid, and the most carefully reasoned passages anywhere recorded in judicial annals—the best things that have been said upon the rules of Evidence."<sup>60</sup>

He also regretted the length of the book, but from the following passage it is clear that he placed the blame elsewhere:

"It is a pity that the book has had to be so large. But if Legislators will continue so copiously to legislate, and if Judges still refuse to justify with jejunity their judgments, shall

<sup>58</sup> RECOLLECTIONS, Wehle 3.

<sup>59</sup> Chafee, Book Review, 37 HARV. L. REV. 513, 521 (1924).

<sup>60</sup> *Preface*, first edition at viii (1904).

not Authors continue assiduously to amass and to annotate these luciferous lucubrations for the benefit of the Bar, so long as the Bar incumbently bears this burden?"<sup>61</sup>

That Wigmore did not rest on his laurels with the publication of the first edition is evident from the following statement from Zachariah Chafee's review of the second edition:

"The abundant harvest from a twice ploughed field has been brought home. The host of practitioners and law teachers who have eagerly awaited Mr. Wigmore's second edition can welcome it with the same praise that Mr. Beale nearly twenty years ago bestowed on the original work.<sup>62</sup> '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. . . . For greatness of conception and patience of execution, for complete collection of authority, and for fullness and vividness of treatment, this treatise cannot be too warmly commended. . . . When we come to the subject-matter we find it admirable in every way. The historical discussions are illuminating, the statement of doctrine is clear and sufficiently precise, and the argument is always enlightening and usually convincing. . . . This is, and must long remain, the best treatise on the common law of evidence.'<sup>63</sup>

One of the most painstaking and critical reviews of the third edition was written by Edmund M. Morgan, who expressed regret that Wigmore had not, in the preparation of the third edition, made a re-examination of the entire subject rather than in effect merely brought the second edition up-to-date. He conceded, however, that many changes and additions in the text indicated that this was thoroughly done and that

"No important published study of problems of evidence seems to have been overlooked. In a word, these ten volumes bring the second edition of Wigmore down to date, and do it in the Wigmorean manner."<sup>64</sup>

Wigmore gave two reasons for not undertaking the complete reexamination of the subject that Morgan suggested. He stated (1) that the changes in the arrangement that would be involved would be inconvenient to those who were familiar with the present work and (2) that he did not

have time. The first denotes Wigmore's characteristic desire to be practical and helpful. As to the second, it should be sufficient to point out that he was at the time a dean emeritus in his seventies.<sup>65</sup>

Although Morgan disagreed with Wigmore on some important matters (and others felt that Wigmore had not taken enough account of Morgan's contributions to the subject) Morgan concluded his excellent appraisal with the following statement:

"Disagreement with Mr. Wigmore's theories in some particulars and mild dissatisfaction with his treatment of some topics does not imply lack of appreciation of his sound scholarship or of respect for his views or any want of profound admiration for his accomplishment. In this day of freely flung challenges to debate this reviewer offers to support the following proposition against all comers: 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."<sup>66</sup>

#### OTHER PUBLICATIONS

When the first edition of *The Treatise* was completed, Mrs. Wigmore cherished the hope that her husband would now have some time for leisure. Certainly *The Treatise* alone would establish his reputation as a scholar, and he was already the author or editor of several books and of numerous pamphlets, articles, and book reviews. However, even the continuing task of the periodic revision and expansion of *The Treatise*, which he must have had in mind, was not sufficient, and he immediately plunged into other writings.

Even in the field of evidence alone the proliferation is impressive. In 1910 his *A Pocket Code of the Rules of Evidence in Trials at Law* appeared, as a convenient handbook to be used by the practitioner and fully keyed to *The Treatise* so as to give immediate access to the larger work when it was needed. This extremely useful and popular volume came out in a second edition in 1935 and in a third in 1942.<sup>67</sup> The *Pocket Code* was universally acclaimed and criticisms were few.

<sup>65</sup> He was 77 when the work was published in 1940.

<sup>66</sup> 20 B.U.L. REV. 776, 793 (1940).

<sup>67</sup> The title of the second and third editions was WIGMORE'S CODE OF THE RULES OF EVIDENCE IN TRIALS AT LAW.

<sup>61</sup> *Preface*, third edition at xii (1940).

<sup>62</sup> 18 HARV. L. REV. 478 (1905).

<sup>63</sup> 37 HARV. L. REV. 513 (1924).

<sup>64</sup> 20 B.U.L. REV. 776, 778 (1940).

Even in this handbook Wigmore was not content merely with a statement of the law as it was at the time. He also stated the law as he thought it should be, but in brackets or with footnote references, so as clearly to differentiate between the two. The advent of the *Code* as an adjunct to *The Treatise* prompted Charles T. McCormick to declare:

"In any event, whatever the group responsible, and whatever the method followed, when the rules of evidence come to be refashioned, the genius of Wigmore will light the council-table."<sup>68</sup>

The first edition of *The Treatise* was shortly followed by his *A Selection of Cases on Evidence for the Use of Students of Law* in 1906. This contribution to the field of legal education came out in second and third editions in 1913 and 1932, respectively,<sup>69</sup> and was supplemented by *A Students' Textbook of the Law of Evidence* in 1935, a text that was published in Braille in 1939.

While the *Casebook*, which is largely keyed to *The Treatise*, received a mixed reception as a teaching tool, which is not surprising as the selection of a teaching tool is a highly personal matter, it was quite generally acknowledged that Wigmore had made an excellent selection of cases and had arranged them in a very stimulating manner. Clarke B. Whittier concludes his review of the third edition as follows: "Anything that Mr. Wigmore does has elements of greatness in it. This is no exception."<sup>70</sup>

The *Students' Textbook* not only served as an elementary text, but also gave students easy access to Wigmore's classification and general approach. It was declared to be "much better than any other small book on the subject for the use of the student."<sup>71</sup> Not often does a textbook win such high praise as the following:

"Individuality sparkles through these pages and one is never unmindful that insight and critical judgment have informed every statement."<sup>72</sup>

However, Wigmore was by no means wholly preoccupied with these tasks, for he was at the same time creating that masterpiece, *The Prin-*

*ciples of Judicial Proof*,<sup>73</sup> and so extensively revising it between editions as to make it virtually three separate publications. Zachariah Chafee, Jr., described the first edition as "one of the most delightful books in a law library,"<sup>74</sup> but he thought lawyers should have both the first and second editions on their shelves.

In Wigmore's own words, the "book aspires to offer, though in tentative form only, a *novum organum* for the study of Judicial Evidence."<sup>75</sup> All three editions<sup>76</sup> were concerned with the "science" of proof rather than with admissibility (the procedural rules prescribed by the law), for he believed that the latter would become less important and the former more important with the passage of time.

Before leaving the subject of evidence we should recall that Wigmore began his substantial work in this field by editing the first volume of the sixteenth edition of Greenleaf's *A Treatise on the Law of Evidence*, which was published in 1899.<sup>77</sup> As would be expected, at his hands, the book was not only revised, but also it was enlarged and annotated in order, as he says in the preface, "to bring the text into harmony with the established results of modern research."<sup>78</sup>

As we already know, Wigmore's interest was never confined to the field of evidence. Indeed, his original interest in an academic career was that of becoming a professor of comparative law. It is, therefore, not surprising that, while in Japan at the beginning of his career as a teacher, Wigmore prepared an edition of the original indigenous civil law sources of Japan as *Materials for the Study of Private Law in Old Japan*. Parts 1, 2, 3 (section 1), and 5 were published in *Transactions of the Asiatic Society of Japan* in Tokyo in 1892. A new edition of this work, under the title *Law and Justice in Tokugawa Japan*, was

<sup>73</sup> The full title is THE PRINCIPLES OF JUDICIAL PROOF AS GIVEN BY LOGIC, PSYCHOLOGY, AND GENERAL EXPERIENCE AND ILLUSTRATED IN JUDICIAL TRIALS. It was published in 1913.

<sup>74</sup> Book Review, 80 U. PA. L. REV. 319 (1931).

<sup>75</sup> First edition at page 1 (1913).

<sup>76</sup> The second edition appeared in 1931 under the title THE PRINCIPLES OF JUDICIAL PROOF OR THE PROCESS OF PROOF AS GIVEN BY LOGIC, PSYCHOLOGY AND GENERAL EXPERIENCE AND ILLUSTRATED IN JUDICIAL TRIALS. The third edition appeared in 1937 under the title THE SCIENCE OF JUDICIAL PROOF AS GIVEN BY LOGIC, PSYCHOLOGY AND GENERAL EXPERIENCE AND ILLUSTRATED IN JUDICIAL TRIALS.

<sup>77</sup> The second and third volumes were edited by Edward Avery Harriman.

<sup>78</sup> P. vi.

<sup>68</sup> 30 ILL. L. REV. 686, 688 (1936).

<sup>69</sup> The second and third editions were entitled SELECT CASES ON THE LAW OF EVIDENCE.

<sup>70</sup> 27 ILL. L. REV. 586, 587 (1933).

<sup>71</sup> Cherry, Book Review, 20 MINN. L. REV. 842 (1936).

<sup>72</sup> McCormick, Book Review, 30 ILL. L. REV. 686 (1936).

initiated by the Society for International Cultural Relations, and parts 2 and 7 of this edition were published in 1941 and 1943 respectively.<sup>79</sup> Specialists who have examined the entire manuscript have declared it to be of great merit, but publication in its entirety has never proved feasible.

Wigmore's continuing interest in comparative law was reflected both in a number of articles and in *A Panorama of the World's Legal Systems*, copiously illustrated, which appeared in three volumes in 1928, and in *A Kaleidoscope of Justice*,<sup>80</sup> published in 1941. The *Panorama* was the outgrowth of lectures, given by Wigmore not only to students but also to lawyers all over the United States, which he illustrated with lantern slides, for he was convinced that much in the law could be taught pictorially. The *Panorama* was quite generally received with approval and won such appraisals as "perhaps the most attractive set of law books ever published,"<sup>81</sup> a book in which a scholar has humanized the law successfully "without loss of dignity to himself or to the profession"<sup>82</sup> and one in which the author has succeeded in converting "the dry history of the law into a fascinating story."<sup>83</sup> But it also elicited some highly critical responses.

These included the view that the inclusion of the early records would signify nothing to those for whom the book was intended, the belief that there should have been "fewer curiosities" and more of "Dean Wigmore's learning,"<sup>84</sup> the assertion that the translations were poor, that some of the illustrations were imaginary, that the text was "needlessly uncritical at times"<sup>85</sup> and that, although the book was good for the general reader, it was "a less serious work than either H. G. Wells' *Outline of History* or Durant's *The Story of Philosophy*."<sup>86</sup> Finally, Goodhart<sup>87</sup> and

Plucknett<sup>88</sup> believed that Wigmore overemphasized the importance of "a highly trained professional class" in "the rise and perpetuation of a legal system" when he identified it as the primary consideration.<sup>89</sup> Holdsworth apparently agreed with Wigmore.<sup>90</sup>

Although some of the criticisms unquestionably have merit it seems only fair to add that they do not always take account of Wigmore's clearly declared objective. The book was meant to be a popular outline of the sixteen legal systems, past and present, for the general reader and not for the scholar, "a temporary flight above the earth . . ." so that one may "look down upon the globe, and there watch the *Panorama of the World's Legal Systems* unroll before us. . ."<sup>91</sup> If judged in these terms the book achieved its objective for it did succeed in presenting "in perspective for the legal profession (and the general public) a true impressionistic whole."<sup>92</sup> The *Panorama* was republished in a one-volume "Library Edition" with some amplification in 1936.

The *Kaleidoscope of Justice* is an anthology of 142 trials and in effect complements the *Panorama*. It was designed to provide informational entertainment rather than to reflect scientific research. That Wigmore succeeded was generally agreed, and Arthur Train in a review declared:

"For sheer entertainment this book equals the *Arabian Nights*, Cellini's *Memoirs* or *Sherlock Holmes*."<sup>93</sup>

Wigmore's direct written contributions to the field of legal education are of course also significant. Mention has already been made of his *Cases on Evidence* and his *Students' Textbook on Evidence*. Wigmore's early interest in the law of torts, a field in which he also contributed significant articles, materialized in his *Cases on the Law of Torts* in two volumes published in 1910-1912.<sup>94</sup> His interest in legal education, however, goes back to the beginning of his career. His *Examinations in Law, Consisting of Practical Problems and Cases*

<sup>79</sup> Wigmore expressed great regret over the fact that the manuscript would not be published during his lifetime.

<sup>80</sup> The full title is A KALEIDOSCOPE OF JUSTICE CONTAINING AUTHENTIC ACCOUNTS OF TRIAL SCENES FROM ALL TIMES AND CLIMES.

<sup>81</sup> Witham, Book Review, 15 TENN. L. REV. 834 (1939).

<sup>82</sup> Hicks, Book Review, 15 A.B.A.J. 576 (1929).

<sup>83</sup> H. G., Book Review, 85 U. PA. L. REV. 656 (1937).

<sup>84</sup> Plucknett, Book Review, 42 HARV. L. REV. 587, 588 (1929).

<sup>85</sup> Hanna, Book Review, 45 POL. SCI. Q. 137, 138 (1930).

<sup>86</sup> Goodhart, Book Review, 38 YALE L. J. 554 (1929).

<sup>87</sup> *Ibid.*

<sup>88</sup> *Supra* note 84.

<sup>89</sup> See 3 WIGMORE, A PANORAMA OF THE WORLD'S LEGAL SYSTEMS 1129 (1928). Account should be taken of the fact that Wigmore advanced this generalization not as a final conclusion but as a mere hypothesis "thrown out as worthy of inquiry."

<sup>90</sup> Book Review, 77 U. PA. L. REV. 1038, 1039 (1929).

<sup>91</sup> 1 WIGMORE, *op. cit. supra* note 89, at 3.

<sup>92</sup> *Id.* at xiv.

<sup>93</sup> 27 A.B.A.J. 607 (1941).

<sup>94</sup> The full title is SELECT CASES ON THE LAW OF TORTS WITH NOTES, AND A SUMMARY OF PRINCIPLES.

appeared in 1899. This book was a compilation of materials contributed by various law schools and was offered in the hope of stimulating the increased use of examinations consisting of practical problems in the form of concrete hypothetical cases. It was intended to supply the needs of all those who were interested in this approach, an approach which was not generally in use at the time. Finally, at a much later date, he produced as Dean the *Northwestern University School of Law: Report of the Dean of the Faculty of Law on an Educational Survey 1925* (1927), a substantial study of 295 pages in mimeographed form. Although some of the data included was compiled by others, it is clearly his own product and one that he regarded as the first comprehensive educational survey of any American law school.

But Wigmore's far-ranging interests involved writings which do not fall neatly into the subject areas that have already been discussed, and some of these appeared at an early date in his career. His first venture in book form was produced during his brief period in practice in Boston when he prepared *A Digest of the Reported Decisions, Precedents and General Principles Enunciated by the Board of Railroad Commissioners of the Commonwealth of Massachusetts from 1870 to 1888, Inclusive*. This book was published in 1888, and his early interest in ballot reform was soon reflected in *The Australian Ballot System as Embodied in the Legislation of Various Countries, With an Historical Introduction* appearing in two editions (the second revised and enlarged), both published in 1889.<sup>95</sup>

At a much later date Wigmore gave the University of Virginia Barbour-Page Lectures, and they appeared in 1920 under the title, *Problems of Law: Its Past, Present and Future*. These three stimulating lectures advanced views with which all would certainly not agree, but they had one characteristic in common: "the brilliance that sparkles through them all."<sup>96</sup>

His participation in the war effort produced *A Source-Book of Military and War-Time Legislation* in 1919, prepared in great haste especially for the Student Army Training Corps. Although demobilization prevented the realization of its immediate objective it was a valuable book for anyone concerned with the subject, for it brought to-

<sup>95</sup> The title of the second edition included the following words at the end "and an appendix of decisions since 1856 in Great Britain, Ireland, Canada and Australia."

<sup>96</sup> Durfee & Dickinson, Book Review, 20 MICH. L. REV. 566 (1922).

gether more useful information than was available elsewhere.

Wigmore's longstanding concern with problems in the field of international law and his advocacy of a far more active role in foreign affairs by the United States eventuated in two publications. The first appeared in two parts as publications of the American Bar Association. Part I concerned international substantive common law, and Part II the law for a state of war.<sup>97</sup> The second publication was *A Guide to American International Law and Practice* published in 1943, a copy of which he presented to Northwestern University on his eightieth birthday and which he "characterized . . . with an almost boyish pride, as 'My last—no, I mean my latest—work'."<sup>98</sup> Both reflected Wigmore's interest in making useful information available, especially in an area where lawyers were not sufficiently informed. In order to make the books particularly useful to practitioners they were based primarily on American materials. Reference has already been made to *A Preliminary Bibliography of Modern Criminal Law and Criminology*, another example of Wigmore's desire to share useful information with others.

However, Wigmore not only wrote prolifically—he made a monumental contribution as an editor as well. To begin with, there is *The Modern Criminal Science Series*, in nine volumes, discussed in connection with Wigmore's contributions to the field of criminal law and criminology. He was also chairman editor of *Select Essays in Anglo-American Legal History* in three volumes (1907–1909), the *Modern Legal Philosophy Series* in 12 volumes (1911–1922), and *The Continental Legal History Series* in 10 volumes (1912–1928). The latter was, of course, but one reflection of Wigmore's interest in legal history. Much of his work in all fields reflected careful attention to the history of the subject-matter involved.<sup>99</sup> In addition, Wigmore was the prime mover in the preparation and publication of the *Evolution of Law Series*<sup>100</sup> in 3 volumes (1915–1918).

<sup>97</sup> The general title is TO POPULARIZE FOR LAWYERS THE STUDY OF AMERICAN INTERNATIONAL LAW, A SYLLABUS OF AMERICAN INTERNATIONAL LAW FOR AMERICAN PRACTITIONERS. Part I was published in 1941 and Part II in 1942.

<sup>98</sup> Snyder, *On Behalf of the University*, 34 J. CRIM. L. & C. 90 (1943).

<sup>99</sup> See Holdsworth, *Wigmore as a Legal Historian*, 29 ILL. L. REV. 448 (1934).

<sup>100</sup> The full title is EVOLUTION OF LAW: SELECT READINGS ON THE ORIGIN AND DEVELOPMENT OF LEGAL INSTITUTIONS.

In each of these ambitious undertakings Wigmore provided the driving force that carried the projects through to a successful conclusion. It is generally conceded that he did more work with each volume than anyone except the person primarily responsible for that volume. Edwin Borchard described *The Continental Legal History Series* as an

"enterprise . . . as masterful in conception as it is in execution. . . . a great work . . . whose importance in our legal education will be estimated at its true value and fully appreciated only in the perspective of time."<sup>101</sup>

According to Pound, the *Modern Legal Philosophy Series*, the *Continental Legal History Series* and the *Evolution of Law Series* together "have had much influence upon the development of jurisprudence not only in America but in the world at large."<sup>102</sup>

As a gesture of recognition, especially for his leadership with *The Modern Legal Philosophy Series*, Wigmore was designated honorary chairman of the Editorial Committee appointed by the Association of American Law Schools in 1939 to inaugurate the *Twentieth Century Legal Philosophy Series*, which consists of translations representing the progress of continental legal thought in the more recent period. Although in the late seventies Wigmore was, as always, an active participant in the work of the Committee of which Jerome Hall was chairman.

Other important assignments assumed by Wigmore were that of book editor of *Science and Learning in France*, published in 1917, and compiler (jointly with Albert Kocourek) of *Sources of Ancient and Primitive Law* (1915). The latter is volume one of the *Evolution of Law Series*.

But this is not all, for, from 1884 until the time of his death in 1943 (a period of 59 years), articles, addresses, comments, editorials, and translations, appearing in periodicals and newspapers and in numerous pamphlets, flowed from his pen in an almost continuous stream. They extended over the wide range of subjects in which he had an interest and ran the gamut from scholarly work of the highest order to his more popular contributions, primarily concerned with the dissemination of information which he regarded as important, or forceful expressions of his views on significant contemporary occurrences. He was, of course, a fre-

<sup>101</sup> Borchard, Book Review, 6 AM. POL. SCI. REV. 645, 648 (1912).

<sup>102</sup> Pound, *John Henry Wigmore*, 56 HARV. L. REV. 988, 989 (1943).

quent contributor to the three Northwestern University Law School periodicals: the *Journal of the American Institute of Criminal Law and Criminology*,<sup>103</sup> the *Illinois Law Review*,<sup>104</sup> and *The Journal of Air Law*.<sup>105</sup>

Here again, as was the case with *The Treatise* alone, while the qualitative factors are obviously the most important, Wigmore's productivity as a writer was so astonishing that no appraisal of his achievements would be complete without taking it into consideration. According to a computation (counting only last editions and excluding supplementary volumes) made shortly after his death, and reported in the *Memorial* of the Association of American Law Schools,<sup>106</sup> Wigmore produced 46 original volumes, including his published casebooks and other compilations, 38 edited volumes, and 16 other volumes on the law of the Tokugawa Shogunate 1603 (1603-1867), or a grand total of 100 volumes. When his writings in pamphlet form and his articles, comments, editorials, and translations are considered the total comes to nearly 900 titles.<sup>107</sup> The sheer magnitude of the achievement is almost impossible fully to appreciate until one has seen the total brought together in one place and it is realized that it occupies more than 18 feet of shelf space or an entire section of standard library shelving. The text of the *Memorial* continues by making comparisons with the scholarly production of both legal and non-legal authors and concludes with the statement that

"no great law writer or even any great novelist, such as Scott or Dumas, . . . appears to match Dean Wigmore in the volume of published achievement."<sup>108</sup>

Although there might be disagreement on some points as to the basis of the above computation, when consideration is given to the fact that much of Wigmore's revision was extensive and many of his books contain a large number of pages, it is in all probability conservative.

<sup>103</sup> NOW THE JOURNAL OF CRIMINAL LAW, CRIMINOLOGY AND POLICE SCIENCE.

<sup>104</sup> In 1952 (volume 47) the title was changed to NORTHWESTERN UNIVERSITY LAW REVIEW.

<sup>105</sup> In 1939 (volume 10) the title was changed to THE JOURNAL OF AIR LAW AND COMMERCE.

<sup>106</sup> 1943 HANDBOOK, ASS'N AM. L. SCHOOLS 238, 239.

<sup>107</sup> An unpublished bibliography prepared by Albert Kocourek has 903 entries. However, as they are grouped by type of publication, i.e., books, articles, addresses, etc., there is some duplication because in a few instances, a title not clearly assignable to only one group is listed twice.

<sup>108</sup> *Op. cit. supra* note 106, at 241.



When it comes to a qualitative appraisal of Wigmore's achievements as a writer, it should first be pointed out that no useful evaluation can be made without taking account of a factor often overlooked. Broad as were the fields to which he devoted his scholarly pursuits, scholarship alone never was an adequate objective to engage the entire attention of this talented and dynamic figure, even as a writer. He was essentially a reformer and an educator for whom the long-range effect of his scholarship was not enough. Quite deliberately, he often turned aside to comment on some current development, for he could not resist the impulse to make himself heard, to throw his weight in favor of improvements in the administration of justice or against practices that were not in keeping with the best traditions of the legal profession. And over and over again he took up the task of making useful information available when no one else seemed disposed to do so. For example, how many leaders having the broad responsibility of preparing for and directing an important national conference would be either willing or able to take up the exacting and time-consuming task of preparing an extensive bibliography for the use of the conferees? This, however, is exactly what Wigmore did for the National Conference on Criminal Law and Criminology held at the Northwestern University Law School in 1901.<sup>109</sup>

Wigmore's writings simply cannot all be fitted into the category of scholarship and judged accordingly. Some are informative and are intended to be no more, some are educational in character, and others are editorials. Because Wigmore achieved such a high standard as a scholar his critics have sometimes tended to apply the standard of scholarship even to writings to which he ascribed other objectives.

When these several and distinctly different tests are appropriately brought to bear upon his writings there is surprisingly little that can be regarded as worthless and even less that, because of some temporary emotional reaction, can be regarded as irresponsible. Wigmore was a scholar whose scholarship never separated him from the life around him. His writings, like his relations with his fellow men, described a very wide circle indeed. He was perfectly at home with the scholar, and with the scholar in many fields and many countries, but he was by his own choice accessible to all and there is ample evidence to demonstrate

that he thoroughly enjoyed this wide span of personal relationships. Hence, it is not surprising that as a writer he was never satisfied to confine his efforts exclusively to the world of scholarship. His writings which cannot be classified as scholarly are themselves significant. What is remarkable is that Wigmore could make such a massive contribution at the highest scholarly level and yet produce so much of a more popular character.

The personality traits that accounted for Wigmore's extraordinary capacity to produce as a writer were briefly discussed above when *The Treatise* was under consideration. One more factor should no doubt be mentioned because it is closely related to the diversity of the subject matter which engaged his interest. Wigmore himself noted that it was his practice to carry on several research projects simultaneously so that he could shift from one to the other as his interest flagged. No doubt he discovered that lack of interest and not fatigue was the principal problem, and because of the wide range of his interests he could work far more continuously than the scholar specialized in one subject who finds it necessary to get away from his work entirely for more or less extended periods.<sup>110</sup>

#### THE LEADER

That Wigmore was by no means solely preoccupied with scholarly pursuits was made perfectly evident in the discussion of his role in the field of criminal law and criminology. However, this area of human endeavor, broad as it is usually regarded, represented but one facet in the wide range of his interests and activities. It is not often that one achieves distinction as a scholar even in a single chosen field and is at the same time recognized as an outstanding leader in that field. But where the scholarly contributions have embraced such a broad and diversified subject-matter as was mastered by Wigmore, the intensive and time consuming labor involved in the process would seem to preclude all possibility of an outstanding active career at the same time. That this was not true in Wigmore's case can be attributed only to the fact that he was extraordinarily endowed as both a scholar and a leader. His capacity in the former has been dramatically demonstrated in the foregoing pages. What were the qualities that made possible a simultaneous distinguished record as a leader?

To begin with, his creative mind, his ability to

<sup>109</sup> See *supra* note 39.

<sup>110</sup> RECOLLECTIONS, Hall 6.

plan, often meticulously down to every detail,<sup>111</sup> his genius for organization, and his capacity for sustained endeavor, which served him so well in grappling with any subject-matter however complex and in formulating the product of his labor in original scholarly writing, were applied with equal vigor to his endeavors as an active participant in the life around him. These faculties gave him a thorough grasp of the various factors involved in any problem to which he addressed his attention and served him admirably in framing proposals for which, quite characteristically, he would become an ardent advocate. In addition, he unquestionably had a talent for creating the conditions that would bring his proposals to full fruition. The fact that he almost always seemed poised and serene and not particularly busy no doubt denoted an exceptionally well adjusted individual—an individual in full command of his faculties.

"At work he reminded one of the easy motion of the long driving shaft of a powerful machine resting on oiled bearings."<sup>112</sup>

On the personal side Wigmore's great capacity for friendship, due to his genuine interest in people and his willingness to listen, drew them to him. Furthermore, his ability to inspire them to undertake specific assignments, or to carry forward some project of their own, and his active encouragement and support of their undertakings elicited a loyalty that extended to an ever widening circle of colleagues and friends. It is impossible to estimate the amount of constructive work done by others largely because of Wigmore's inspiration, encouragement, and support.<sup>113</sup> Finally, his own deep sense of loyalty to the institutions, programs, and persons with which he was identified obviously

<sup>111</sup> "What is one of the most interesting facets of Dean Wigmore's career is that the course of it was carefully reasoned and planned even in detail. We have no information as to what this plan was, but there are many evidences that such a plan did in fact exist. If it could be reproduced it would resemble the discourses of an Epictetus or the meditations of Marcus Aurelius." *RECOLLECTIONS, Editorial Preface* by Kocourek 10.

<sup>112</sup> Kocourek, *John Henry Wigmore*, 27 J. AM. JUR. Soc'y 122, 124 (1943).

<sup>113</sup> "He was ever eager to assist and encourage beginners in legal scholarship and law teaching. Many a young man who had diffidently published his first paper in a law review was encouraged to enter upon a fruitful career of law writing by an appreciative letter from Dean Wigmore. Not only those who were working for a better administration of justice in America, but those who were doing scholarly work in any field of the law have owed much to the stimulus of his encouragement and example." Pound, *John Henry Wigmore*, 56 HARV. L. REV. 988, 989 (1943).

strengthened the bond. Indeed, this generally admirable attribute was so highly developed that it occasionally colored his outlook or blinded him to the shortcomings of individuals to whom it was accorded.

Another important factor was Wigmore's penchant for languages, which both reflected his wide range of interests and denoted his thoroughness in preparing for any assignment he undertook. Preparation for a visit to a foreign country always included a year or two of the study of the language of that country.

"He used to read his foreign language on the train, whispering the words to himself, in spite of looks from the other passengers (and I really do not believe that he saw the looks as he was thoroughly engaged in what he was doing, but he would not have cared if he had seen them).

"When he decided to go to Morocco and Algeria, he thought he should know something about Arabic,—so he started studying alone from a French-Arabic grammar (there being no English-Arabic grammars), and he was in his seventies at the time! Then, through the French Consul in Chicago he got in touch with a priest in a Syrian church in Michigan City, Indiana, and paid him to come to Chicago once a week and give him an hour of spoken Arabic. This went on for about two years so that he could at least read the titles of law books and make a presentable effort at polite conversation with jurists over there."<sup>114</sup>

Altogether Wigmore could read or speak a dozen languages. These embraced the most important European languages, including Russian, and Japanese and Arabic as well.

The foregoing attributes and his essentially democratic attitude and undoubted charm provided Wigmore with an extraordinarily wide range of active personal associations which extended all over the world.

In spite of the general impression that Wigmore was in many respects conservative, because of his interest in legal history and his emphasis on the traditions of the legal profession, he was essentially a reformer.

"He waged a ceaseless war on imperfect law, or law as is, but which needed growth and development. He was the persistent foe of laws that lagged behind the advance of commerce or

<sup>114</sup> Letter from Miss Sarah B. Morgan dated February 22, 1960.

the accepted course of conduct in any other field."<sup>115</sup>

Whenever he encountered a situation which called for a remedy he was apparently impelled to work out a solution or at least devise a step forward by way of improvement. Usually, he was not satisfied merely with a written attack on the problem. He went into action, and because of his inherent modesty he seldom, if ever, stood in the way of the goal he envisioned by making his personal aggrandizement the first consideration. He kept his gaze on the objective and not on himself.

What, then, is the record of this great scholar as a leader? In the first place, as its Dean, he developed the Northwestern University Law School from quite modest beginnings into one of the outstanding law schools in the country. His was the imagination and the principal driving force which created the splendid original physical plant by the shores of Lake Michigan. As Dean, he revealed his capacity to select promising young men for his faculty and provide them with the conditions and the personal encouragement that brought forth from many of them distinguished contributions to legal education and to scholarship. That he was concerned about the role of the faculty and academic freedom is evidenced by his membership in the American Association of University Professors from the time of its organization in 1915 until his death, serving as its second president in 1916.

Wigmore was also concerned with scholarship among the students and was a founder of the honorary fraternity at Northwestern in 1907 for which he suggested the name the Order of the Coif. When the Order was merged with Theta Kappa Nu, an honorary fraternity, in 1912 the new organization adopted the name of the Northwestern group.

To his foresight and industry the Law School also owes the outstanding basic legal collection, reflecting his world-wide interests, that was assembled during his administration—the foundation for all of its subsequent growth. Here again he demonstrated his almost incredible capacity to deal not only with the broad program involved but with matters of detail as well. He devised the classification for the collection, one that was in use until 1947, and the old card catalog contained a number of entries in his own handwriting.

<sup>115</sup> Evans, *On Behalf of the Bench*, 34 J. CRIM. L. & C. 75, 76 (1943). See also Baker, *The Innovator*, 32 J. CRIM. L. & C. 263 (1941).

Wigmore's success with the students was phenomenal both as a teacher and as Dean. Because of his accessibility to students he established a personal relationship with most of them. In addition, he often sat at the piano in Lowden Hall after lunch and played, with informal group singing as a usual feature. Furthermore, he followed his students with intense interest throughout the years. Countless letters and post cards, written in his own hand, went to the men when in service. It is no wonder that there is such widespread devotion and loyalty among the graduates of the law school who were in attendance in his day.

The following rather amusing glimpse into the daily round of the administrative head of the law school, provided by Hugh Green, a library monitor who sometimes relieved the Dean's secretary, reveals not only that Wigmore was available to all but also that his sense of humor helped to carry him through. According to Green, the Dean gave him the following explicit instructions:

"When any caller inquires for me, please open my door and announce his presence. It may be that he has an appointment. On the other hand, perhaps some one is boring the life out of me and a new face will be a relief. Or, it may be that the one waiting to see me is the undesirable one and I may wish to continue with the person who is already in my office. In any event, I want the presence of the caller announced, no matter what I may be doing. To make the point plain, let me say that even if a stray dog comes in and you think the dog is by any chance looking for me, open my door and announce that a stray dog is out there, evidently wanting to see me."<sup>116</sup>

Wigmore's fifty years of service to Northwestern University was another demonstration of his deep sense of loyalty. Once committed to the institution he gave his life to it in spite of many discouragements and flattering offers to go elsewhere.<sup>117</sup> Furthermore, he

"was fiercely jealous of his law school. Next to Mrs. Wigmore his supreme interest was the honor, fame, and welfare of the law school."<sup>118</sup>

But Wigmore's contributions to the field of legal education extended beyond the law school and its impact in the field, and they involved more than

<sup>116</sup> RECOLLECTIONS, Green 2.

<sup>117</sup> For further details concerning Wigmore's role in the development of the Northwestern University Law School, see RAHL & SCHWERIN, *NORTHWESTERN UNIVERSITY SCHOOL OF LAW—A SHORT HISTORY* (1960). Also reprinted in 55 Nw. U.L. REV. 131 (1960).

<sup>118</sup> RECOLLECTIONS, *Editorial Preface* by Kocourek 7.

his writings concerned with or of value in legal education. He exhibited his characteristic lively interest in what was going on around him in the field of legal education. He was an active participant in the work of the Association of American Law Schools, playing his typical dynamic role in its formal activities and, perhaps equally important, in stimulating informal discussions with friends and colleagues. And the lighter side was not neglected; he was invariably a leader in providing the informal entertainment which is a traditional part of that Association's annual meetings. Wigmore was a staunch supporter of the legal aid movement and of student participation in the work of legal aid clinics. He believed that clinical experience was as important to legal education as it had proved to be in medical education. There can be no doubt that for years he was an active and commanding figure in the field of legal education, a field to which he contributed so substantially with his writings.

Wigmore always felt that there should be a close relationship between legal education and the work of the legal profession and was concerned over their tendency to drift apart. For his part, he regularly spent a portion of his vacation attending meetings of the American Bar Association, even in the beginning when those meetings were no more than a gathering of a few men. In his view, the Association was not nearly as effective as it should be, and he played a leading part in trying to transform it into a more dynamic and constructive agency. As chairman of a special committee he came forward with specific recommendations<sup>119</sup> which, however, were not approved by the Association, although even in retrospect Wigmore regarded them as entirely practical. But he was more successful as the leader of a movement to consolidate the work of the International Law Committee, the Comparative Law Bureau, and the Society of Military Law which bore fruit in the creation of the Section of International and Comparative Law, of which he was the first chairman. This step increased the effectiveness of the American Bar Association in these fields.<sup>120</sup>

As the chairman of the Association's Committee on Improvements in the Law of Evidence in 1938 he rendered an invaluable service, and the report of the Committee<sup>121</sup> was characterized as

<sup>119</sup> See *Organizing the Power of the American Bar*, 17 A.B.A.J. 387 (1931).

<sup>120</sup> RECOLLECTIONS, MacChesney 19. For the proceedings of the first meeting see 59 A.B.A. REP. 196, 653 (1934).

<sup>121</sup> 63 A.B.A. REP. 570 (1938).

"the most progressive and open-minded survey of needed reforms since the report of the Commonwealth Fund Committee in 1927."<sup>122</sup>

In addition, as was indicated earlier in this article, he was the driving force behind the movement to have the American Bar Association assume some responsibility in the field of criminal law. For these and various other contributions to the work of the Association and for his distinguished service as a member of the legal profession generally Wigmore was awarded the Association's most significant honor, its Gold Medal.<sup>123</sup>

During World War I Wigmore was a member of the staff of the Judge Advocate General, initially with the rank of major and commissioned as a Colonel in 1918. His services were important and covered a wide range of subject-matter. For his contribution to the war-time effort he received the Distinguished Service Medal.

Wigmore's participation in the work of the American Judicature Society is succinctly recognized in the following quotations, the first by Roscoe Pound and the second from an editorial tribute appearing in the Society's *Journal*:

"Another monument to his intelligently directed zeal is the American Judicature Society in which he took a leading part from the beginning."<sup>124</sup>

"No other person gave more assistance and encouragement or influenced so profoundly and beneficially the course of the Society's activities."<sup>125</sup>

Indicative of Wigmore's continuing vitality, versatility, and intellectual initiative was his interest in what were at the time the new fields of radio and air law. He was largely responsible for the establishment of the Air Law Institute at Northwestern University and the creation of the *Journal of Air Law*.<sup>126</sup> Although Wigmore was well past 70 he was an active participant in the discussions of the controversial questions of air law in the meetings of both the American Bar Association and the National Conference of Commissioners on Uniform State Laws. In 1937-1938 he went to Wash-

<sup>122</sup> McCormick, Book Review, 35 ILL. L. REV. 540, 544 (1941).

<sup>123</sup> For an account of the presentation, see *American Bar Association Medal Presented*, 18 A.B.A.J. 741 (1932).

<sup>124</sup> Pound, *John Henry Wigmore*, 56 HARV. L. REV. 988, 989 (1943).

<sup>125</sup> Editorial, 27 J. AM. JUD. SOC'Y 6 (1943).

<sup>126</sup> In 1939 (volume 10) the name was changed to THE JOURNAL OF AIR LAW AND COMMERCE.

ington to assume an important role in the drafting of the Civil Aeronautics Regulations.

Wigmore never lost touch with the active work of the legal profession at the state and local levels. He obviously enjoyed his personal associations with practitioners and not only took part in formal meetings and assumed committee assignments but also was often present on less formal occasions. He frequently had lunch with members of the bar at the Chicago Bar Association and particularly with his former students, who were always glad to have him join them.

Wigmore served as a member of the Illinois Commission on Uniform State Laws from 1908 to 1924, and from 1933 until his death in 1943. During these extended periods he was active in the work of the National Conference, serving as chairman of a number of committees and as vice-president in 1936-37.

But just as in his writing Wigmore's interest transcended national boundaries so as a leader his activities were world-wide in scope. "He was one of the leading instigators of the Inter-American Bar Association"<sup>127</sup> and an ardent advocate of a world-wide organization of the members of the legal profession. His own scholarly interests and his personal associations with individuals in all parts of the world convinced him that "all who belong to the legal profession—judges, teachers, legislators, prosecutors—have a common fund of tradition and experience in all countries."<sup>128</sup> As usual he came forward with specific suggestions, embodied in a plan worked out in considerable detail.<sup>129</sup> In his supporting argument he pointed out that the legal profession was "*almost the only profession or occupation in the whole social sphere that is not yet so organized.*"<sup>130</sup>

In the field of comparative law, in which Wigmore was everywhere recognized as an outstanding scholar, he was tireless in his efforts to promote a wider interest especially on the part of practitioners. Among other things, he played a leading role in both the first and second conferences of the International Congress of Comparative Law held at The Hague in 1932 and 1937. He did an enormous amount of preparatory work including the writing of hundreds of letters to persons all over

<sup>127</sup> John H. Wigmore (*Memorial*), 1943 HANDBOOK, ASS'N AM. L. SCHOOLS 242.

<sup>128</sup> Wigmore, *Should the World's Legal Profession Organize?—Reasons for Taking This Step—Outline of Plan for Consideration*, 18 A.B.A.J. 552 (1932).

<sup>129</sup> *Ibid.*

<sup>130</sup> *Ibid.*

the world. Because of his intellectual contributions, his facility with languages, and "his magnetic genius for friendship"<sup>131</sup> he occupied a commanding position.

Jerome Hall, a fellow delegate from the United States, gives us this glimpse of Wigmore in relation to the second conference:

"In 1937, the International Congress of Comparative Law met at The Hague. Mr. Wigmore was responsible for the large American delegation and for the publicity given to that conference in this country. I had been designated general reporter on *Nulla Poena sine Lege*, and it seemed advisable to attend the meeting partly to present my views but mostly, to respond to the Dean's alluring presentation of what was in store. For most of the American delegation, this was the first visit to Europe and the first attendance at such a congress. I do not believe there had been any formal appointment of representatives of our group. But it is certain that all turned, almost instinctively, to Mr. Wigmore as leader of the Americans. He knew many of the foreign scholars well and was most accomplished in making them generally acquainted. Mr. Wigmore excelled in an unusual capacity for social intercourse. He handled such situations easily and effectively. But, of course, he was essentially the great scholar with a particular interest in international collaboration by lawyers. It was characteristic that he aimed at the large body of practitioners in the various countries, rather than at specialized groups. At least, so his conduct at The Hague in 1937 seemed to indicate."<sup>132</sup>

Finally, Wigmore's interest in international collaboration extended beyond the fields of scholarship and the role of the legal profession as he conceived it. He was an ardent supporter of the League of Nations and served as a member of the Committee on Intellectual Cooperation.

"He was black and thunderous over criticisms of the League of Nations in 1919, that dimmed the prospects of its success. He wanted no more of neutrality."<sup>133</sup>

Wigmore felt equally strongly about the Permanent Court of International Justice. He concluded his congratulatory statement to the Court upon the election of Charles Evans Hughes with the words:

"The only dark feature in the picture is the

<sup>131</sup> RECOLLECTIONS, Wehle 4.

<sup>132</sup> RECOLLECTIONS, Hall 2.

<sup>133</sup> RECOLLECTIONS, Hyde 2.

humiliation that should be felt by the American people to realize that, after forty years of effort to establish the Court, the American nation should be refusing to make good its high principles by adhering to the Court treaty."<sup>134</sup>

#### THE MAN

Although the foregoing discussion of Wigmore as a scholar and leader has included many facts of biographical importance and has revealed some of his characteristics as a man, even in this brief sketch, a few additional biographical facts and a fuller delineation of his personality are indispensable.

John Henry Wigmore was born in San Francisco, California, on March 4, 1863. He was the son of John and Harriet (Joyner) Wigmore and, with the exception of a half-brother, the eldest of seven children who grew to maturity. He received his elementary education at the Urban Academy in San Francisco, a private school of high repute, in which he made "a very definite niche for himself in the school's hall of fame."<sup>135</sup>

An interesting, perhaps significant, and in any event revealing incident occurred in connection with the determination of whether Harry, as he was called, should go to a public or a private school. His father was in favor of the public school on the ground that it was more democratic, but his mother strongly favored the Urban Academy. According to his sister Beatrice:

"Before long father began to insist that his son should be educated in the democratic way, so Harry went off to public school. The first day, after standing in line in the school yard, the butt of all the smart things boys can think up for a new boy, he was finally settled at a desk in the schoolroom when in popped the superintendent and indicating Harry said 'Miss Blank, that new boy belongs in another room.' This was too much to bear, and Harry refused to be moved, winding himself around the legs of the desk so that he could not be pried loose short of tearing him apart. So the superintendent desisted for the moment. On going home at noon he told his tale of woe to mother, who was very indignant and declared that he should not go back to that school. So once more he took his seat in the Urban School with the privileged class."<sup>136</sup>

<sup>134</sup> 15 A.B.A.J. 264 (1929).

<sup>135</sup> RECOLLECTIONS, Francis M. Wigmore 1.

<sup>136</sup> RECOLLECTIONS, Hunter 2.

Young Harry expected to go to the University of California at Berkeley across the bay, but his mother, who wanted him to become a clergyman, "was under the spell of the New England men and women of letters of the time and nothing would do but that Harry must go to Harvard."<sup>137</sup> Furthermore, she insisted that the whole family accompany him, first to Charleston and later to Cambridge, although her husband had to leave his hardwood lumber business in the hands of another person. Apparently, by the time Wigmore was ready to enter the Law School she had concluded that he could manage his own affairs, for the family then returned to San Francisco to live.

From Harvard Wigmore received A.B., A.M., and LL.B. degrees in the years 1883, 1884, and 1887, respectively,<sup>138</sup> and in 1889 he married Emma Hunt Vogl of Cambridge, Massachusetts, "the daughter of a scholarly gentleman who had come to New England from Prague."<sup>139</sup> After graduation from the Law School he practiced law in Boston for two years and at the age of 26 accepted an appointment as Professor of Anglo-American law in Keio University in Tokyo, Japan, in 1889 and, among other things, "came under the spell of what is called Comparative Law."<sup>140</sup> He returned to the United States to accept the post of Professor of Law at Northwestern University beginning in 1893, an association which continued until the time of his death in Chicago on April 20, 1943. Wigmore was appointed Dean in 1901, a post which he held continuously until 1929 when he became Dean Emeritus.

Upon going to Northwestern, Wigmore and his wife spent several winters in the home of Mrs. Sarah Katherine Rogers on Hinman Avenue in Evanston where several other couples connected with Northwestern University also lived. Later they rented a home on Lake Michigan, from Northwestern University, in which they lived until they moved to the Lake Shore Club in Chicago in 1934. The move was something of an ordeal at the time, for it was not easy to leave a home in which they had spent so many happy and fruitful years together. However, their most important possessions

<sup>137</sup> *Ibid.*

<sup>138</sup> Wigmore's scholarly achievements received recognition through honorary degrees as follows: University of Wisconsin, 1906; Harvard University, 1909; University of Louvain, 1927; Northwestern University, 1935; Université de Lyon, 1938.

<sup>139</sup> RECOLLECTIONS, Hunter 3. The Wigmore had no children.

<sup>140</sup> 1 WIGMORE, *op. cit. supra* note 89, at xv.

were still around them, although in more restricted quarters, they continued to have a magnificent view of the Lake, and they were just two short blocks from the Law School. After they were settled, Mrs. Wigmore was able to say: "I do not think either of us has had a moment of regret . . ." <sup>141</sup>

Albert Kocourek, one of Wigmore's closest colleagues, gives this revealing word picture of Wigmore in the Evanston days:

"Dean Wigmore was so long a familiar figure about the university in Evanston and Chicago that he was taken for granted as an able scholar, an urbane gentleman and a man of polite accomplishments. He was accepted through long habit as one accepts the air or sunshine. He was a man of elegant manners, tall, blue-eyed, erect, alert and self-contained. Not many saw beyond the externals regularly expected of those who fashion university life.

"Few knew the real stature of the modest, well-groomed, fine-featured and intellectual-looking man who in the Evanston days always carried a green cloth bag. They could not know of the depth, and breadth of his learning—certainly not from any disclosures on his part.

"On principle, Dean Wigmore rarely used the pronoun 'I'. Even his colleagues at frequent intervals throughout the long train of years first learned from outside sources of this or that new achievement or accomplishment. Dean Wigmore himself seemed to have a *horror naturalis* of speaking of what he had done." <sup>142</sup>

Wigmore's life-long interest in music began in childhood. "I was early chained to the piano; for ten years, more or less, I was made to practice from one to three hours daily." <sup>143</sup> At Harvard College he studied harmony under "the original genius John K. Paine—may his memory ever be revered," <sup>144</sup> and he produced a number of lyrics which were eventually collected under the title *Lyrics of a Lawyer's Leisure* and dedicated to Mrs. Wigmore on their twenty-fifth wedding anniversary. As has already been indicated, Wigmore frequently sat at the piano in Lowden Hall in the Law School and played while the students gathered around and sang, and music played an

important part in Wigmore's contribution to the social side of the many professional meetings and conferences he attended. He was also a great story teller and could compose his thought in verse at the slightest provocation. His stories and verses constituted an important part of the lively conversation for which he was so well known.

Dean Pound supplies us with this glimpse of his role both at the Law School and at the annual meetings of the Association of American Law Schools.

"But it was in the student smokers and the smokers of the Association of American Law Schools that his genius for organizing entertainment and all-around capacity for making such occasions delightful were most manifest. He wrote the law school song and devised the law school shield. I have heard him, when urgently called by the students at a law school smoker to 'do your stunt' recite the Barrister's Dream from the Hunting of the Snark. Year after year he would compose clever jingles set to well known tunes, with neat but in no wise malicious hits at well known law teachers, controverted legal theories, and leading or striking newly decided cases." <sup>145</sup>

The Wigmore's home life "was the acme of gracious living" <sup>146</sup> and included not only a great deal of informal entertaining but "numerous elegant parties . . . although the air of gracious simplicity made all guests feel at ease." <sup>147</sup> Mrs. Wigmore sometimes worked at intervals for days in making preparations so as not to interfere with the maid's routine work. On appropriate occasions Wigmore would of course play the piano, but there was always his animated conversation interspersed with stories and parlor tricks.

Wigmore was also very fond of opera and the theater. He took a great interest in puzzles and created a number himself. <sup>148</sup> Probably it was the same kind of a challenge that accounts for the following incident. According to Sarah Morgan, his secretary for many years, Colonel Wigmore did not like to play solitaire to which she (Miss Morgan) often turned in the evenings while Mrs. Wigmore was reading aloud:

"Finally I came to one, Idiot's Delight, which I could not get, although I tried time after time.

<sup>141</sup> RECOLLECTIONS, Belknap 9.

<sup>142</sup> Kocourek, *John Henry Wigmore*, 27 J. AM. JUD. Soc'y 122 (1943).

<sup>143</sup> *Introduction to SHAFER, MUSICAL COPYRIGHT* at xv (1939).

<sup>144</sup> *Id.* at xvi.

<sup>145</sup> RECOLLECTIONS, Pound 3.

<sup>146</sup> RECOLLECTIONS, Sarah B. Morgan 12.

<sup>147</sup> *Ibid.*

<sup>148</sup> Some of these are collected in Appendix IV of RECOLLECTIONS.

When the Colonel heard I could not win the game, he said he would try it and see what was the trouble. They were just on the eve of going to Hot Springs for a couple of months, leaving me with the maid to keep the house open. After about three days, I received a postcard from him saying: 'Idiot's Delight can be won, but you have to be careful and watch the moves far in advance. It is like chess.' The book said that it was possible to win three games out of five. So the Colonel kept a tally of the games, and after he had played 500 of them, he found that it averaged 3 to 5.<sup>149</sup>

The Wigmore's were very fond of travel and, as has already been indicated, early in his career they spent several years in Japan. During summer vacations they frequently went to Europe

"some years settling down in a quiet small town and studying the language of the country. Other years they travelled about rather freely and more than once were hosts for the vacation trip to some couple of whom they were fond, and who could not otherwise have had such a pleasurable experience."<sup>150</sup>

Wigmore's interest in travel invariably led to the study of maps, and no country was visited that was not studied as to its history and places of interest. These many trips were obviously a reflection of his broad and indeed universal interest, and they enriched his store of information and his understanding of various peoples and their institutions, including their laws.

Broad and intensive as Wigmore's professional interests were his reading extended far beyond these areas. He was not only thoroughly familiar with the classics but generously sampled the contemporary flow of books and was, as has already been indicated, a constant reader of detective stories. At the same time, he was always on the alert for books concerned with the law in one way or another. One reflection of this interest was his *A List of One Hundred Legal Novels*<sup>151</sup> in which he lists and classifies books in terms of their concern with the law.

So much for this all too brief account of Wigmore's diverse interests and activities. It is quite impossible to determine to what extent his successes were due to favorable circumstances,

<sup>149</sup> RECOLLECTIONS, Sarah B. Morgan 32.

<sup>150</sup> RECOLLECTIONS, Francis M. Wigmore 5.

<sup>151</sup> 17 ILL. L. REV. 26 (1922). This list originally appeared in 2 ILL. L. REV. 574.

including good health most of his life.<sup>152</sup> However, it is clear that one so gifted could and did overcome obstacles which would deter or thwart lesser men, and there can be no doubt about his great productive powers. Furthermore, "he had escaped the torque of genius—that twisting of mind, body, character or behavior which often afflicts men of great productive powers."<sup>153</sup> Wigmore's own appraisal of himself is evidenced by the fact that, when on his eightieth birthday a friend in writing to congratulate him remarked "that he had been a favorite of the gods . . . he admitted with feeling that the statement was true."<sup>154</sup>

But Wigmore was neither resting on his laurels nor reflecting on his past successes. He was deeply concerned with the problems of peace and the development of means for the enforcement of international decisions. At the time of his accidental death<sup>155</sup> his ideas on the value of the economic boycott were taking shape in an article entitled *Bullets or Boycotts: Which Shall be the Measure to Enforce World Peace?*<sup>156</sup> which was published posthumously.

"But for a stupid mischance he might have lived into his nineties like his senior contemporaries, Holmes and Pollock. *Fata obstant.* In a short hour the world of legal science shrank to a small and poorer dimension."<sup>157</sup>

Wigmore was buried with military honors in Arlington National Cemetery on the 28th of April, 1943, and when Mrs. Wigmore, who survived him by only four months, died, her ashes were buried beside him. This final resting place not only gave recognition to Wigmore's wartime contribution but, at the same time, took account of the fact that he sometimes seemed to feel a greater pride when identified as "Colonel," a title affectionately used by many of his friends, than as the author of *The Treatise on Evidence*.

The extraordinary character of the Wigmore matrimonial union, which had endured for 53 years, was evidenced in countless ways, and it is not possible to estimate the extent of Mrs. Wigmore's contribution to her husband's achieve-

<sup>152</sup> In 1938, he had a heart attack and later he had pneumonia, but he recovered from both satisfactorily and continued his activities.

<sup>153</sup> Kocourek, *John Henry Wigmore*, 27 J. AM. JUD. Soc'y 122, 124 (1943).

<sup>154</sup> *John H. Wigmore (Memorial)*, 1943 HANDBOOK, Ass'n AM. L. SCHOOLS 238, 245.

<sup>155</sup> Wigmore died in Chicago on April 20, 1943.

<sup>156</sup> 29 A.B.A.J. 491 (1943).

<sup>157</sup> Kocourek, *John Henry Wigmore*, 27 J. AM. JUD. Soc'y 122, 124 (1943).



ments. One evidence of Wigmore's deep affection and attentiveness is revealed by his characteristic propensity to use written notes to record ideas and events of which he should later take note. Almost unfailingly he remembered special occasions such as birthdays and other anniversaries with flowers or some other gift as a token of his affection. Often, Mrs. Wigmore was prepared for such welcome gestures, not only because they were so generally forthcoming but because she would find notes in various parts of the house as reminders to him of some special occasion of which he wished to take account.

How their marriage was regarded by Mrs. Wigmore is touchingly evidenced by the following

note, with the revealing signature, written shortly after his death:

"Dear Margaret:—

In spite of doctor's orders, I was going to write you a long birthday letter, but I find I am too tired. Uncle Harry and I were too much one person and when that taxi-cab killed Uncle Harry, he [sic] killed Aunt Emma, all but a mere fragment that is trying, not very successfully, to carry on and do the many things that have to be done. But remember always that you are our Margaret. . . .

Your Uncle Harry and Aunt Emma"<sup>158</sup>

<sup>158</sup> RECOLLECTIONS, Belknap 11. The Margaret to whom the note is addressed is Margaret G. Belknap, a lifelong friend of the Wigmores but not in fact a relative.