

A WISTFUL RETROSPECTIVE ON WIGMORE AND HIS PRESCRIPTIONS FOR ILLINOIS EVIDENCE LAW

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I. INTRODUCTION

Former Chicago alderman and political ward boss Paddy Bauler once famously exclaimed: “Chicago ain’t ready for reform yet.”¹ Mr. Dooley’s famous phrase, “Politics ain’t beanbag” has been another one of the city’s most quoted lines, one that is often heard in the state capital as well. In Springfield, after all, “good government types” are still heard to be called “goo-goos.” And then, of course, there is that other great slogan of local politics, “We don’t want nobody nobody sent”—the words that former Congressman, later federal judge, Abner Mikva heard when he first expressed a desire to become involved in Cook County’s Democratic organization but lacked a political patron.² For decades, Illinois’s political landscape combined a downstate, rural, and small-town Republican majority with a conservative urban Democratic machine, a potent coalition that ranked progressive or rationalist procedural innovation relatively low on its list of priorities. As a result, that phrase—“we don’t want nobody nobody sent”—could apply just as well to the reception that any rationalist, procedural-minded reformer would receive if he appeared in Springfield without the sponsorship of one of the dominant political party’s bosses, a group not usually known for appreciating the value of procedural niceties.

Given this political landscape, it should not be surprising that Illinois has remained procedurally anomalous in a number of ways. It was one of the very last states to adopt an Administrative Procedures Act.³ It maintains

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¹ Bauler coined this phrase the night that Richard J. Daley was elected mayor of the city.

² See Cynthia Grant Bowman, *We Don’t Want Anybody Sent*, 86 NW. U. L. REV. 57, 57 (1991). According to Mikva:

The year I started law school, 1948, was the year that Douglas and Stevenson were heading up the Democratic ticket in Illinois. I was all fired up from the Students for Douglas and Stevenson and passed this storefront, the 8th Ward Regular Democratic Organization. I came in and said I wanted to help. Dead silence. “Who sent you?” the committeeman said. I said, “Nobody.” He said, “We don’t want nobody nobody sent.” Then he said, “We ain’t got no jobs.” I said, “I don’t want a job.” He said, “We don’t want nobody that don’t want a job.”

Id.

³ Illinois Administrative Procedure Act, 5 ILL. COMP. STAT. 100/1-1 (2005).

the archaic distinction between evidence depositions and discovery depositions.⁴ It does not have a comprehensive single source of civil procedure but rather combines a short Code of Civil Procedure,⁵ that addresses only limited topics, with a more comprehensive set of Supreme Court Rules,⁶ where most procedural provisions may be found. It does not have anything nearly so comprehensive as the Federal Rules of Evidence, itself not fully a code. Rather, Illinois lawyers labor under a patchwork of specific statutory provisions,⁷ often buried within substantive laws, which themselves are often buried within a conflicting common law framework. And the Illinois Supreme Court is not known for quickly resolving conflicts among the state's five appellate districts.

Any centennial celebration of the *Northwestern University Law Review* then ought to include some mention of John Henry Wigmore's valiant attempt to challenge Paddy Bauler's wisdom at the state level in the very first issue of the *Illinois Law Review*, as this journal was then known.⁸ "Colonel" Wigmore, as he was affectionately called after his service in Washington at that rank during the First World War, was present at the creation of the American law review as an institution. He was one of the founders of the *Harvard Law Review* during his time as a student of the great scholars James Bradley Thayer, John Chipman Gray, and C.C. Langdell.⁹ During his long career he published more than nine hundred articles.¹⁰ His many books included his great Evidence treatise,¹¹ often called the greatest legal treatise produced in the Anglo-American world,¹² and the book that came to be titled *The Science of Judicial Proof* and which has enjoyed a renaissance among scholars in several fields.¹³

⁴ See Mark E. McNabola, *It's Time to Move Beyond Separate Discovery and Evidence Depositions in Illinois*, 92 ILL. B.J. 344 (2004).

⁵ 735 ILL. COMP. STAT. 5/2-1401 (2003).

⁶ See generally ILL. SUP. CT. R. 1-780.

⁷ See, e.g., 725 ILL. COMP. STAT. 5/115-10.1 (2002) (allowing prior inconsistent statements as substantive evidence in criminal cases in certain circumstances).

⁸ For more on the history of the *Northwestern University Law Review* and its origins as the *Illinois Law Review*, please see Dawn Clark Netsch & Harold D. Shapiro, *100 Years and Counting*, 100 NW. U. L. REV. 1 (2006).

⁹ WILLIAM R. ROALFE, JOHN HENRY WIGMORE: SCHOLAR AND REFORMER 10-11 (1977).

¹⁰ *Id.* at xiii.

¹¹ 4 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW (1905).

¹² Wigmore's Harvard teacher Joseph Henry Beale greeted the first edition with this assessment: "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." Professor Edmund Morgan of Harvard, one of Wigmore's great rivals from the next generation had this to say about the third edition: "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 American Law." Both are quoted in WILLIAM TWINING, THEORIES OF EVIDENCE: BENTHAM AND WIGMORE 111 (1985).

¹³ JOHN HENRY WIGMORE, THE PRINCIPLES OF JUDICIAL PROOF: AS GIVEN BY LOGIC, PSYCHOLOGY, AND GENERAL EXPERIENCE AND ILLUSTRATED IN JUDICIAL TRIALS (1913).

Illinois courts certainly recognized Wigmore's magisterial authority, and his great treatise has been cited by Illinois courts almost one thousand times.¹⁴ He served as dean and professor at a time when the much-criticized chasm¹⁵ between legal academics and the practicing bench and bar had not yet emerged. And so he frequently offered specific criticism of prevailing doctrine and particular judicial decisions, *even* in the state courts! Indeed one older Harvard professor faulted the first edition of Wigmore's evidence treatise for containing too much criticism in this vein for such a young scholar.¹⁶ Wigmore, however, was also sometimes criticized for being too concerned with how practitioners would receive his proposals and, therefore, insufficiently radical in his reconceptualization of the proper subject of evidence.¹⁷ In other words, Wigmore might be considered a "conservative reformer."

On the occasion of the *Law Review's* centennial, I thought it would be engaging for those interested in either Illinois evidence law or in the immediate context within which Wigmore worked to revisit an article in which the great scholar made a number of explicit recommendations for reform in Illinois law and then briefly to examine where we have come in the hundred years since he wrote. By one count, Wigmore published twenty-seven articles in the *Illinois Law Review*. Of these, five addressed evidence and the law of evidence as major topics. At least two of Wigmore's evidence articles relate to central aspects of Wigmore's intellectual projects. In one notorious piece, he subjected a prominent German psychologist to a satirical cross-examination; the psychologist had criticized the American bar for being slow to assimilate the advances of empirical psychology into its evaluation of witnesses.¹⁸ The point of his examination was to show that empirical social science had not yet developed means by which to reliably distinguish true from false testimony. Yet another of Wigmore's *Illinois Law Review* pieces was an early version of an important chapter in the book that was to be known as *The Principles of Judicial Proof* and then as the *The Science of Judicial Proof*.¹⁹ It was in this article that Wigmore developed what came to be known as "Wigmorean analysis" or "the chart method" for analyzing

¹⁴ This figure is based on a search, conducted in May, 2005, for the treatise citation within the text of all Illinois cases available on Westlaw.com.

¹⁵ See generally Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992).

¹⁶ TWINING, *supra* note 12, at 111.

¹⁷ *Id.* at 163–64.

¹⁸ John H. Wigmore, *Professor Muensterberg and the Psychology of Testimony: Being a Report of the Case of Cokestone v. Muensterberg*, 3 ILL. L. REV. 399 (1909). Twining refers to Huntington Cairns's conclusion that Wigmore's satire had a wholly unintended effect, given his interest in the social sciences, in that it "discouraged a nascent interest in testimony among American psychologists with the result that progress was delayed for a generation." TWINING, *supra* note 12, at 136 (citing HUNTINGTON CAIRNS, *LAW AND THE SOCIAL SCIENCES* 169 (1935)).

¹⁹ See *supra* note 13.

the structure of proof at trial. This project was consistent with Wigmore's view that issues of evidence were more fundamental and important than issues of the *law* of evidence.²⁰ Wigmore's distinctive method of analyzing factual issues retains its defenders among lawyers, philosophers, and psychologists and remains central to important issues in evidence scholarship.²¹

I have chosen one of Wigmore's shorter evidence articles as my topic—specifically, *Some Evidence Statutes That Illinois Ought to Have*, which was published in the *Illinois Law Review* in 1906. In this article, the great scholar made ten specific suggestions for the reform of Illinois evidence law.²² I will summarize Wigmore's proposals and then provide a short account of whether and how Illinois has progressed on the particular doctrines that Wigmore criticized. Part of my motive, I confess, is the sheer fortuity of the piece having appeared a century ago in the first volume of the *Illinois Law Review* and the opportunity it thus offers to consider the course of procedural reform in Wigmore's adopted state over those hundred years. Wigmore's piece also provides some insight into his skepticism about the likelihood of the bench and bar's acceptance of strong rationalization in evidence law and serves as an example of the type of rhetoric he employed when addressing those important audiences.

II. JOHN HENRY WIGMORE

Wigmore, of course, is too big a character to fairly characterize in an occasional piece, like this one. In 1977, William Roalfe, who had been Professor of Law and Law Librarian at the Northwestern University School of Law, published a largely hagiographical biography of Wigmore that ran well over three hundred pages and from which I will draw throughout this Part. Dean James Rahl, another great figure in the history of our Law School, wrote the Preface. The frontispiece of that volume, written by an old acquaintance of Wigmore from his Harvard days, Manley O. Hudson, described him in these terms:

Valiant, colorful, resourceful, courageous, he was a personality first and a scholar afterward. The facets of that personality were so numerous and so varied that the legend of Wigmore must long live in the lore

²⁰ See, e.g., WILLIAM TWINING, *RETHINKING EVIDENCE: EXPLORATORY ESSAYS* 308–31 (1990). In this, Wigmore's views paralleled those of another important Northwestern professor, Ian Macneil, who argued that contracts were far more important than the law of contract. IAN R. MACNEIL, *THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS* 5 (1980).

²¹ See TERENCE ANDERSON & WILLIAM TWINING, *ANALYSIS OF EVIDENCE: HOW TO DO THINGS WITH FACTS* xxiv (1991); TWINING, *supra* note 12, at 146–49, 179–86; Reid Hastie, *Algebraic Models of Juror Decision Processes*, in *INSIDE THE JUROR: THE PSYCHOLOGY OF JUROR DECISION MAKING* 84, 89, 96–97 (Reid Hastie ed., 1993).

²² John H. Wigmore, *Some Evidence Statutes That Illinois Ought to Have*, 1 *ILL. L. REV.* 9 (1906).

of American law, alongside his great contributions to the science of the law.²³

For good and for ill, Wigmore was a man of his time.²⁴ One close friend and scholarly collaborator affectionately referred to him as “the last mid-Victorian.” He was not, however, “fussy” in his personal relations and “[i]n dealing with people he was known for his courtesy, elegance and wit.”²⁵ There was an element of his personality and work that was completely immersed in the legal culture of his time. Though one of the great figures in the “rationalist tradition” in the law of evidence, he also celebrated his legal culture’s most particular rites, rules, and practices. He believed that a legal scholar ought to write from *within* the legal world and implicitly adhered to his own highly situated version of what philosophers sometimes call the “primacy of the practical.” He simultaneously believed that the *Sittlichkeit* of a legal culture—its concrete rites and practices and the values, otherwise inexpressible, that they carry—ought to be embraced and celebrated. And though he would have recoiled at the term, he believed that young lawyers ought to be “socialized” into that legal culture. (Perhaps “initiated” would have been more pleasing to him.) William Twining, a British philosopher who has written extensively, if often more critically than Roalfe, on Wigmore’s work, provides the following quite British summary of Wigmore’s place at Northwestern, one that should evoke concrete memories from those Northwestern alumni who thumb through this volume:

The visitor who enters Levy Mayer Hall, the main building of the Northwestern University Law School, is immediately struck by something distinctive about its atmosphere. Dark wood paneling dominates the entrance hall and corridors; around the walls are hung nearly 2500 portraits, engravings, etchings and photographs of famous jurists, trial scenes, court buildings and legal documents from all over the world; the two largest classrooms echo, rather than copy, the debating chambers of the House of Commons and the House of Lords; a life size replica of the Code of Hammurabi is the phallic *pièce de résistance* of a permanent exhibition of legal memorabilia in what a modern architect would call the “circulation areas”; a framed version of the Law School song “Old Northwestern”—more rousing than poetic—hangs in the hall. First impressions suggest an atmosphere that is homely, old-fashioned and slightly eccentric. Levy Mayer Hall is a building of character.

This distinctive character is largely due to the influence of one man, John Henry Wigmore, who was Dean of the law School from 1901 until 1929 and who was associated with it almost continuously from 1893 until his death in 1943. It was Wigmore who raised the funds for the building, argued over its

²³ ROALFE, *supra* note 9, at vi.

²⁴ For example, Leigh Beinen criticized the stereotyping of women’s testimony in the *Treatise*. Leigh B. Bienen, *A Question of Credibility: John Henry Wigmore’s Use of Scientific Authority in Section 924a of the Treatise on Evidence*, 19 CAL. W. L. REV. 235 (1983).

²⁵ TWINING, *supra* note 12, at 110.

design, collected its pictures and exhibits, fought to save the paneling from cuts by an economy-minded administration and built up an unrivalled collection of legal novels, plays, detective stories and other law-related literature. Wigmore composed the words and music of "Old Northwestern"; he also designed and manufactured the chimes, which until only a few years ago played the tune of the song every day at noon in Levy Mayer hall. These pleasant eccentricities illustrate the former Dean's wide interests, his concern for detail and his distinctive style. If the song is worse than mediocre, if the mechanism of the chimes rival Heath Robinson, if the taste in books and pictures might be kindly designated "Catholic," such considerations do not detract from the affection and respect which persist for the memory of the man who almost single-handed transformed the institution into one of the leading law schools.²⁶

Twining goes on to argue that Levy Mayer Hall provides "a fair reflection of [Wigmore's] strengths and limitations . . . of his energy, breadth of interest, forcefulness and folksiness."²⁷ Although he finds Wigmore "untroubled by doubt or the elusiveness of reality," Twining concedes that he was possessed of "a methodological approach, exceptional industry, mastery of the detail of his chosen field and great clarity of thought," along with a capacity to "muster, marshal and reduce to order enormous quantities of variegated material and would then parade it smartly and efficiently."²⁸ With this very bare introduction to the great man's place at Northwestern and in the legal world, let us now turn to his proposals to reform the law of evidence within the state of Illinois.

III. WIGMORE'S PROPOSALS AND THE LAW ONE HUNDRED YEARS LATER

Wigmore begins *Some Evidence Statutes That Illinois Ought to Have* on a conservative note, commending Illinois for retaining more of the "pure common law rules" than even contemporary England.²⁹ ("Remove not the ancient landmark, which thy fathers have set!" Wigmore exclaims.³⁰) Per-

²⁶ TWINING, *supra* note 12, at 109. I remain unsure whether the reference to "Catholic" connotes its root meaning of "universal" or a significance (suggested by its capitalization) captured in ordinary English by the words "Baroque" or "Rococo." Or perhaps Twining's more Protestant sensibility was struck by some of Levy Mayer's art objects, which evoked the brightly colored statues and happy cherubs of Catholic churches of those eras. (Incidentally, we do have a statue of St. Ives, the patron saint of lawyers, in Levy Mayer. He also graces the school seal.) Wigmore did admire Catholicism. ROALFE, *supra* note 9, at 245 ("I believe that the Catholic religion is the most enduring and admirable form of Christianity,—strong enough to lift the weak, loose enough to satisfy the independent, broad enough to admit all, and devout enough to satisfy the universal religious emotions."). I doubt that orthodox Catholics will take too much solace from Wigmore's assessment given that he also was of the opinion that "[t]he American Catholic Church must be totally independent of Rome, if it is to achieve its just position in American religious life." *Id.*

²⁷ *Id.*

²⁸ TWINING, *supra* note 12, at 110.

²⁹ Wigmore, *supra* note 22, at 9.

³⁰ *Id.*

haps ironically, given the long code he himself would pen many years later,³¹ Wigmore likewise commends the incremental development of Illinois evidence law which has saved the state “from the unhealthy agitation for a Code and the dangerous results which often ensue upon that fever.”³²

It is not clear whether Wigmore’s introduction fully expressed his own feelings or whether it was a rhetorical strategy designed to appeal to his conservative audience of Illinois lawyers; his actual proposals, after all, were decidedly reformist. Twining concludes that Wigmore’s “concern for rationality” always remained in tension with “his deference to the legal profession, in respect of its power as well as its experience.”³³ And there is no doubt that in his article, Wigmore was sensitive to his audience’s settled expectations for arguments that came with some stamp of authority: The reforms he proposed had pedigrees from other American jurisdictions and so had already been “tested and approved.”³⁴ He wrote: “No doubtful experiments are here included; only rules which hold already, in some other States, the position of orthodoxy.”³⁵ On the other hand, it is significant that he urged that all proposals should be presented to the legislature, and should not await the slower process of acceptance by the courts, a choice for which he delicately presents no explicit argument.³⁶

A. Impeaching One’s Own Witness

First, Wigmore proposed that Illinois adopt the evidentiary rule that allows a party to impeach his own witness with a prior inconsistent statement.³⁷ This rule would replace the “vouching rule,” under which parties could not impeach their own witnesses with prior inconsistent statements. Since they called their own witnesses to testify, it was implicitly asserted that they were to be believed, or so the thought went.

Imagine, for example, a defense counsel forced to call a police officer who witnessed another officer shoot the defendant or a necessary witness who has a gang affiliation opposed to the defendant’s. Assume that the witness has given an out-of-court account which is in some ways favorable to the defendant³⁸ but who then “flips” under pressure from fellow officers

³¹ See TWINING, *supra* note 12, at 162.

³² Wigmore, *supra* note 22, at 9.

³³ TWINING, *supra* note 12, at 163. For example, many years later Wigmore explicitly urged that “acceptability and comprehensibility to the legal profession” be criteria by which scholars should shape the American Law Institute’s Model Code of Evidence. *Id.*

³⁴ Wigmore, *supra* note 22, at 9.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ If the witness told the lawyer that his prior statement was false and that he intended to testify unfavorably to the defendant on the point at issue, the lawyer would, even under current rules, be faced with a difficult ethical problem. If the prior statements were not admissible as substantive evidence under a local exception to the hearsay rule, but solely to impeach, then the lawyer would be “calling the

or gang members. Calling such a witness might simply prove too dangerous to the defendant's case if the "flipper" cannot be impeached; any risk-averse defense counsel would not call this witness. And as a result, the trier of fact is denied important evidence. This situation continued for another seventy-five years after Wigmore wrote. It was not until 1982—after the same rule had been adopted by the Federal Rules of Evidence³⁹—that Illinois adopted the simple rule Wigmore proposed.⁴⁰ Wigmore's influence, though, was felt long before the actual adoption of his proposal. In Professor Michael Graham's view, largely because of the "prolonged and vigorous attack by commentators"—notably Wigmore⁴¹—the old "vouching" rule died a death by a thousand qualifications, before it was officially abolished.⁴² For example, Illinois long permitted the "adverse examination"—including the consequent impeachment by prior inconsistent statements—of the opposing party and certain persons in authority within organizational parties in civil cases.⁴³ A similar qualification was the more generally applicable rule that permitted the impeachment of a witness whose testimony was found by the trial court to have "surprised" the examining lawyer.⁴⁴ Of course, such a rule invited courtroom theatrics which we are now mercifully spared. More importantly, it placed in the hands of the trial judge a largely discretionary power to determine whether or not the examining lawyer was indeed subjectively "surprised." Even more disingenuous was the practice of revealing the contents of an earlier statement under the guise of "refreshing the witness's recollection," a ploy that was permitted by courts which sought to circumvent the unfairness of the "vouching" rule.⁴⁵ Once again, lawyers were often forced into coy and dispiriting posturing to avoid the impact of the vouching rule that Wigmore attacked. The final device for avoiding the bite of the vouching rule was to request that the witness be called by the court as the "court's witness" and then allow the witness to be

witness solely to impeach him," something that is ethically problematic. The notion is that this ploy will inevitably push the jury into taking the prior inconsistent statement as substantive evidence, in violation of the rules of evidence. It is said that some prosecutors and criminal defense lawyers faced with this problem have concluded that they are entitled to assume the force of the oath will shame the witness into testifying consistently with the prior statement and thus provide admissible substantive evidence of the fact asserted in the prior statement. One line of Illinois cases prohibits some forms of impeachment when the prior inconsistent statement will almost certainly be taken as substantive evidence absent "affirmative damage" to the proponent's case by the unexpected testimony. MICHAEL H. GRAHAM, HANDBOOK OF ILLINOIS EVIDENCE 369–71 (8th ed. 2004).

³⁹ FED. R. EVID. 607.

⁴⁰ ILL. SUP. CT. R. 238, 433; *see* GRAHAM, *supra* note 38, at 368.

⁴¹ *Id.* at 360.

⁴² *Id.* at 361–68.

⁴³ *Id.* at 361.

⁴⁴ *Id.* at 363.

⁴⁵ *Id.* at 364.

impeached. Of course, this last device placed the lawyer almost completely at the mercy of the trial judge.⁴⁶

Each of these doctrines was developed out of fear that, in their absence, a lawyer would be tempted to call a witness “in order to” impeach him. The concern was that a prior statement of the witness that is itself hearsay would be improperly placed before the jury through the ruse of claiming that the prior statement is being offered solely to impeach the witness and, therefore, was not hearsay because it was not offered for the truth of the matter asserted. The cogency of this concern, however, has always depended on the assumption that prior statements of persons who are witnesses may be hearsay. This assumption is still embedded in evidence rules and case law,⁴⁷ though it has been consistently attacked by some of our greatest commentators and judges over the decades.⁴⁸ After all, if the purpose of the hearsay rule is to protect cross-examination—in Wigmore’s words, “the greatest legal engine ever invented for the discovery of truth”⁴⁹—it seems odd to exclude from evidence the prior statements of persons who are already present in court, testifying under oath under cross-examination and whose demeanor is subject to the jury’s scrutiny.

All four of these qualifications to the old vouching rule developed their own set of refinements and qualifications over time. One must have some level of sympathy for the lawyers and judges who had to practice under the jagged set of rules and exceptions to rules that prevailed in the eighty years that lapsed between the time that Wigmore’s proposal was made to the state legislature and the date on which Illinois finally accepted the simple, reform-minded rule.⁵⁰ On the other hand, the decades it took for Illinois to adopt this small change seem to suggest that Wigmore knew his audience quite well.

⁴⁶ *Id.* at 364–65. Throughout the law of evidence there exists a tension between the felt necessity of contextualizing evidentiary determinations so as to avoid excessive rigidity and mechanical application of inevitably overgeneralized rules, on the one hand, and the equally important goal of controlling the discretion that very broad standards would confer on the court. ROBERT P. BURNS, *A THEORY OF THE TRIAL* 99–101 (1999).

⁴⁷ *See, e.g.*, FED. R. EVID. 801(d)(1) (defining a subset of prior statements of a witness as nonhearsay and so, under the principle of *inclusio unius est exclusio alterius*, strongly suggesting that other prior statements are eligible to be hearsay); FED. R. EVID. 801(c) (defining hearsay to include statements made prior to the testimony of witnesses); *see also* *Tome v. United States*, 513 U.S. 150 (1995).

⁴⁸ *See* Edmund M. Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 *HARV. L. REV.* 177 (1948). *See generally* Jack B. Weinstein, *The Probative Force of Hearsay*, 46 *IOWA L. REV.* 331 (1961).

⁴⁹ 5 JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 1367, at 32 (James H. Chadborn ed., 1974).

⁵⁰ The Federal Rules of Evidence likewise allow the impeaching of one’s own witness. FED. R. EVID. 607.

B. The Rule in The Queen's Case

Wigmore's second proposal for reform showed his concern with the rhetorical realities of the trial courtroom and the ways in which small changes in the sequence of presentation can greatly change the persuasiveness of evidence offered. Specifically, he proposed the abolition of the "rule in The Queen's Case," which required a trial lawyer who intended to impeach a witness with that witness's own prior written statement to show the witness that statement before the impeachment began.⁵¹ Thus, "if the witness had lied, and was ready to lie again, this gave him full warning and every chance to evade detection."⁵² Wigmore concluded that "[t]his rule did as much to blunt a legitimate cross-examination as any one rule could do."⁵³

In his proposal for reform, Wigmore showed himself to be a master of courtroom lore. In the article, he refers to the legendary cross-examination by the renowned British courtroom advocate Sir Charles Russell⁵⁴ of the forger Richard Pigot in 1888. This cross-examination took place during the proceedings of the judicial commission created to investigate the politically incendiary charges of complicity in murder against the Irish statesman Charles Parnell. Wigmore offered the following text for a rule abolishing the rule in The Queen's Case, which had been adopted in Illinois only three years before he wrote⁵⁵:

For the purpose of impeaching a witness, the adverse party may question him as to a previous statement of his, made in writing or reduced by another to writing, without first showing or reading the writing to the witness. But the adverse party must in such case produce or account for the writing, at such later time as the trial Court may direct; unless the witness as upon cross-examination admitted its tenor to be as alleged.⁵⁶

In 1975, the Federal Rules of Evidence adopted a provision substantively identical to Wigmore's provision, rejecting what the Advisory Committee called "a useless impediment to cross-examination."⁵⁷ But Illinois has yet to follow suit. Although Professor Graham believes that the rule in The Queen's Case "has not been followed by trial courts in actual practice," he is still reduced to urging that it "should be formally discarded in favor of surprise."⁵⁸

⁵¹ Wigmore, *supra* note 22, at 9–10.

⁵² *Id.* at 10.

⁵³ *Id.*

⁵⁴ Russell was a renowned courtroom advocate, attorney general under William Gladstone, and in 1894 became the first Roman Catholic Lord Chief Justice since the Reformation.

⁵⁵ GRAHAM, *supra* note 38, at 491 (citing Ill. Cent. R.R. Co. v. Wade, 69 N.E. 565 (Ill. 1903)).

⁵⁶ Wigmore, *supra* note 22, at 10.

⁵⁷ FED. R. EVID. 613 advisory committee's note.

⁵⁸ GRAHAM, *supra* note 38, at 491.

C. “Deposition” Practice in Criminal Cases

In his article, Wigmore went on to decry the unavailability of depositions in criminal cases and proposed that depositions be taken “before a justice of the peace or master in chancery on order of a judge.”⁵⁹

In 1902, the United States Supreme Court ruled that there was no federal constitutional right to depositions in criminal cases in order to obtain and preserve the testimony of nonresident witnesses.⁶⁰ The Court thus made the issue solely a statutory one.⁶¹ Under Wigmore’s proposal, a deposition could be used at trial only if the deponent was unavailable and the party seeking to use the deposition had not engineered the deponent’s unavailability.⁶² In deference to the defendant’s Confrontation Clause rights, as they existed under Illinois law at the time,⁶³ Wigmore proposed that the defendant be permitted to use depositions only if he consented to the use of all depositions at trial. At the time Wigmore wrote, the most common use of the term “deposition” appears to be a proceeding designed to preserve the testimony of a witness who was expected to be unavailable at trial; that is all that Wigmore seems to have been seeking when he uses the term “deposition,” rather than full discovery depositions. Over time there appears to have been some glacial development of those “evidence depositions” into the full dual-purpose depositions that prevail under the Federal Rules of Civil Procedure and almost all state civil procedure regimes.⁶⁴

In this case, Illinois law came to accept the main lines of Wigmore’s proposal, though it took a good half-century to get there. The current version of Supreme Court Rule 414 provides for “evidence depositions” in criminal cases where there exists a “substantial possibility” that the witness may not be available for trial.⁶⁵ The rule provides for the right to confront and cross-examine such witnesses during the deposition.⁶⁶ The rule does not envision the routine use of depositions for discovery purposes in criminal cases, a procedural gap that Illinois courts have held does not violate defendants’ rights, even when the prosecution’s witnesses refuse to speak to

⁵⁹ Wigmore, *supra* note 22, at 10. A major argument against depositions of any kind in criminal cases has been the concern for the security of the deponent, something the presence of a judicial officer with the security of the courthouse was thought to address.

⁶⁰ *Minder v. Georgia*, 183 U.S. 559 (1902).

⁶¹ The common law made no provision for depositions in criminal cases. *See, e.g.*, Romualdo P. Eclavea, Annotation, *Accused’s Right to Depose Prospective Witnesses Before Trial in State Court*, 2 A.L.R.4th 704, 711 (1980).

⁶² Wigmore, *supra* note 22, at 10–11.

⁶³ *Id.* at 11 (citing *Tucker v. People*, 13 N.E. 809 (Ill. 1887)).

⁶⁴ *See United States v. Microsoft Corp.*, 165 F.3d 952, 960 (D.C. Cir. 1999). Illinois is the one state that continues to distinguish with some sharpness between evidence depositions and discovery depositions, though there are an increasing range of circumstances in which so-called discovery depositions may be used at trial. *See McNabola*, *supra* note 4, at 344.

⁶⁵ ILL. SUP. CT. R. 414.

⁶⁶ *Id.*

defense counsel before trial.⁶⁷ Unlike Illinois, about ten states currently allow some use of depositions in criminal cases for purposes of discovery.⁶⁸ In only a few are they regularly used without the need for a substantial possibility that the witness is unavailable for trial. It seems that their experience with depositions has been positive and that few of the obvious objections—such as cost and burdens on witnesses, especially the victim—have proven to be a problem.⁶⁹

In 2001, stung by the revelations of systematic error in capital cases in Illinois, the state's Supreme Court adopted a new rule 416(e) providing for depositions in capital cases "with leave of court upon a showing of good cause." The rule provides that

[i]n determining whether to allow a deposition, the court should consider the consequences to the party if the deposition is not allowed, the complexities of the issues involved, the complexity of the testimony of the witness, and the other opportunities available to the party to discover the information sought by deposition.⁷⁰

The Special Supreme Court Committee on Capital Cases concluded that "discovery depositions may enhance the truth-seeking process of capital trials by providing counsel with an additional method to discover relevant information and prepare to confront key witness testimony," as well as aiding "the trial judge in ruling upon motions *in limine* and evidentiary objections at trial."⁷¹ The Committee, however, went on to sound a few cautionary notes, warning that "the trial court must be aware of the impact a deposition may have on a witness, and address any witness problems and concerns as they arise."⁷² The Committee further noted that Rule 416(e) consigns the determination of whether to allow depositions to the sound discretion of the trial court, that the Rule is intended to apply to those classes of cases where depositions are "more likely to be *necessary*,"⁷³ and the Committee's view that even depositions falling within the most plausible categories "are not intended to be automatic."⁷⁴ It is too soon to know how exactly the criminal

⁶⁷ *People v. Hayes*, 564 N.E.2d 803, 815–16 (Ill. 1990) (stating that the absence of discovery depositions of prosecution witnesses who refused to speak to defense counsel does not violate defendant's constitutional rights); *see also* *People v. Peter*, 303 N.E.2d 398, 404 (Ill. 1973) (stating that there is no legal right to speak to prosecution witnesses if they decline to speak with defense counsel).

⁶⁸ WAYNE R. LAFAYE ET AL., *CRIMINAL PROCEDURE* 928–29 (4th ed. 2004).

⁶⁹ *Id.* at 929.

⁷⁰ ILL. SUP. CT. R. 416(e).

⁷¹ ILL. SUP. CT. R. 416 cmt.

⁷² *Id.*

⁷³ *Id.* (emphasis added). The Committee considered the following as possible examples: testimony of jailhouse informants, witnesses against whom criminal charges are pending, witnesses still serving their criminal sentences, eyewitnesses, especially sole eyewitnesses, and some experts. *Id.*

⁷⁴ *Id.*

trial courts, culturally unaccustomed to deposition practice,⁷⁵ will determine that there has been a showing of “necessity,” thus calling for the use of depositions.⁷⁶

If the American criminal justice system is to show a renewed respect for “actual innocence,” an increased use of deposition practice in criminal cases is essential. Much too often, criminal defense lawyers in serious felony cases begin trials with very little understanding of what it is that prosecution witnesses will say. This undermines the power of adversary presentation to focus on precisely the issues most important to a case and increases the likelihood of false convictions. Current “discovery” practice in Illinois, itself a reform from even more limited regimes, is generally confined to documentary discovery of preexistent documents, including police reports (often prepared with strategic goals in mind) and informal discovery (often imploring witnesses hostile to the defendant to speak with defense counsel).⁷⁷ The same justifications that justify deposition practice in capital cases justify expanded use of them in other serious felony prosecutions. The slowness with which Illinois adopted Wigmore’s much more limited proposal does not offer much optimism.

⁷⁵ I would venture to say that the many criminal trial judges who spent all of their careers as Assistant State’s Attorneys or (more rarely) Public Defenders have themselves never taken a deposition and may view the practice as a kind of extraordinary device.

⁷⁶ See *People ex rel. Birkett v. Bakalis*, 752 N.E.2d 1107 (Ill. 2001). In the *Birkett* case, the Supreme Court denied a supervisory order sought by the State’s Attorney of DuPage County to prohibit the trial court from granting a defense deposition, relying on the newly promulgated Rule 416(e) and noting that supervisory orders were inappropriate vehicles to address alleged abuse of discretion. *Id.* at 1110. In his dissent, Justice Robert R. Thomas argued that the trial court judge abused his discretion in granting the deposition of the husband of the defendant. The latter had asserted an insanity defense to a charge of murdering their three children. Justice Thomas concluded that the benefit to the defendant did not outweigh “the right of David Lemak as a crime victim to be treated with fairness and respect for his dignity and privacy.” *Id.* at 1111 (Thomas, J., dissenting). The dissent went on to argue that the deposition was inappropriate because the information sought was generally available through documentary discovery of psychiatric reports and police reports. *Id.* It is not at all clear that a *trial* judge who refused to order a deposition on the same grounds invoked by Justice Thomas would have committed reversible error and how broadly trial judges will be sympathetic to his perspective.

⁷⁷ See *supra* note 67. Illinois Rule of Professional Conduct 3.4(a)(3) provides that a lawyer, including a prosecutor, shall not “request a person other than a client to refrain from voluntarily giving relevant information to another party” save for relatives and agents of the party whose interest will not be hurt by remaining silent. We do not know how many lawyers believe that informing a witness of the consequences of such a disclosure without any “request” not to disclose falls outside the rule. And often witnesses hostile to the defense need no such request to encourage them to remain silent. Litigation seeking to include any form of deposition practice within the “compulsory process” clause has uniformly failed.

D. Statements of Deceased Persons

Wigmore's next proposal in his article was a sweeping expansion of the traditional hearsay exception for dying declarations.⁷⁸ That exception—which was in use as early as the late eighteenth century and was still being used in its traditional form in Illinois when Wigmore wrote⁷⁹—was limited in a number of ways. The exception applied only in homicide cases, required that the declarant believe that he was facing almost certain death, and that the statement concerned the circumstances or cause of his imminent death.⁸⁰ In his article, Wigmore conceded that his proposal, at the time, was in effect only in Massachusetts, but concluded broadly that “apparently there gives entire satisfaction.”⁸¹ Wigmore's proposal would have excised many of the aforementioned limitations and provided:

No declaration of a deceased person shall be excluded as evidence on the ground of its being hearsay, if it appears to the satisfaction of the judge to have been made in good faith before the beginning of the suit, and upon the personal knowledge of the declarant.⁸²

The proposal would have applied in both civil and criminal cases and would have imposed only a few limitations—namely, good faith, personal knowledge, and a timing requirement (that the statement be made before the case was filed).⁸³ Had Wigmore's proposal been adopted, it would have effected a vast expansion of the circumstances under which the statements of deceased persons would have been admissible. It reflects the magisterial authority that the relatively young Wigmore felt he had earned and that he was willing to deploy in pursuit of his reformist goals. The scope of his proposal also reflects Wigmore's general commitment to expanding the range of admissible evidence beyond that evidence which could be admitted under the common law. At the same time, the proposal is so bold that it is oddly inconsistent with his usual rhetorical caution.

Illinois has not come close to accepting Wigmore's proposal; the traditional limitations on the dying declaration exception to the hearsay rule remain in effect.⁸⁴ Further, Illinois has not enacted a generally applicable version of the “catch all” exception to the hearsay rule that would apply to reliable hearsay and that does not fall within any of the enumerated exceptions. As a result, statements by deceased persons that do not fall under an enumerated exception, but have “circumstantial guarantees of reliability”⁸⁵

⁷⁸ See FED. R. EVID. 804(b)(2). The exception has survived the Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36, 56 n.6 (2004).

⁷⁹ See *id.*; *Marshall v. Chicago & Great E. Ry. Co.*, 48 Ill. 475 (1868).

⁸⁰ *Id.*

⁸¹ Wigmore, *supra* note 22, at 11.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ GRAHAM, *supra* note 38, at 775–77.

⁸⁵ FED. R. EVID. 807. The rule provides:

that would roughly parallel those identified by Wigmore,⁸⁶ may not be admitted. But even in Illinois there has been at least some movement in the direction of Wigmore's proposal. A recent statute provides for the admissibility in criminal cases of statements made by a declarant, now deceased, "under oath at a trial, hearing, or other proceeding" if the statement contains circumstantial guarantees of trustworthiness.⁸⁷

E. Public or Official Documents

Like any good reformer addressing a conservative audience, Wigmore could minimize the novelty of the rules he was proposing. For example, he suggested that his proposal for a rule admitting official documents was consistent with the "core of a sound principle . . . in concealment" in the "obscure" provisions of the common law on the subject.⁸⁸ Wigmore proposed that Illinois adopt a general rule that defined the elements of admissibility of all official documents.⁸⁹ Such a rule would replace the practice of resorting to "a thousand special statutes,"⁹⁰ each of which applied to a different type of official document. Wigmore's proposal would allow certified copies of official documents to be self-authenticating and admitted "as evidence of the facts stated therein."⁹¹ On its face, his suggestion appeared to be a simple housekeeping sort of rule; in reality, it evinced his reformist inclination toward generality over specificity.

Wigmore's efforts notwithstanding, to this day, Illinois does not have a general statutory provision for the admissibility of official records. The state has refused to adopt any provision that reflects either Wigmore's specific proposal or parallels Federal Rule of Evidence 803(8).⁹² Professor Graham concludes that such a provision is unnecessary because the exception for official records exists at common law⁹³ and cites a number of cases going back to 1921 where Illinois courts have admitted such records. The

A statement not specifically covered . . . is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

Id.

⁸⁶ See *supra* note 84 and accompanying text.

⁸⁷ 725 ILL. COMP. STAT. 5/115-10.4 (2002). The United States Supreme Court's recent decision in *Crawford v. Washington*, 541 U.S. 36 (2004), requires that, in some cases, the defendant have had an adequate opportunity to cross-examine the declarant as well.

⁸⁸ Wigmore, *supra* note 22, at 11.

⁸⁹ See FED. R. EVID. 803(8).

⁹⁰ Wigmore, *supra* note 22, at 11.

⁹¹ *Id.* at 12. The proposal was silent on the extent to which such "facts" would extend to broad "factual conclusions after an investigation" now admissible in the federal system under *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153 (1988).

⁹² FED. R. EVID. 803(8).

⁹³ GRAHAM, *supra* note 38, at 729.

state does have a codified version of the business records exception to the hearsay rule⁹⁴ that roughly parallels the federal version of the rule,⁹⁵ and attorneys have sometimes taken advantage of this exception, using it to admit official records as business records.⁹⁶

Overall, though, there remains a greater measure of ambiguity under Illinois law than under federal law as to the admissibility, under either exception, of documents containing opinions or factual conclusions. Further, Illinois has continued its trend of creating particular provisions that deal with discrete classes of documents, rather than adopting a single, overarching rule. For example, until 1992, Illinois excluded medical and hospital records in both civil and criminal cases, and they remain inadmissible in criminal actions.⁹⁷ Similarly, Supreme Court Rule 236(b) specifically excludes police accident reports from falling under the Rule 236(a) exception for business records.⁹⁸ Until this tendency to be more specific continues, the core of Wigmore's criticism of Illinois's laws of evidence will persist.

F. *Discovery of Chattels*

Wigmore's next proposal was not strictly an evidence provision, but rather expanded into the arena of criminal and civil discovery.⁹⁹ In 1906, Illinois had just approved a provision for the discovery of documents on motion in civil and criminal cases, but, in doing so, had not approved a comparable provision for the examination of real or personal property. Illinois now has a clear provision allowing for such discovery in civil cases.¹⁰⁰ In criminal cases, the state's Supreme Court Rules achieve a similar result by requiring the prosecution to give notice to the defense¹⁰¹ of "tangible objects which the prosecuting attorney intends to use in the hearing or trial or which were obtained from or belong to the accused"¹⁰² and of *Brady* material, which is now mandated by Rule 412(c) and which may include the material with which Wigmore was concerned.

Wigmore's remarks on the subject remind us of the weaknesses in the civil and criminal discovery systems during the first third of the twentieth century. His proposal represented a modest reform that, thankfully, was long ago adopted in Illinois.

⁹⁴ ILL. SUP. CT. R. 236.

⁹⁵ FED. R. EVID. 803(6).

⁹⁶ See GRAHAM, *supra* note 38, at 731.

⁹⁷ *Id.* at 726.

⁹⁸ ILL. SUP. CT. R. 236(b).

⁹⁹ Wigmore, *supra* note 22, at 12.

¹⁰⁰ ILL. SUP. CT. R. 214.

¹⁰¹ ILL. SUP. CT. R. 412(e)(i)-(ii).

¹⁰² ILL. SUP. CT. R. 412(a)(v).

G. Cross-Examination Supporting One's Own Case

In his article, Wigmore proposed a simple statute that would establish the “open” cross-examination rule: “The adverse party may cross-examine the witness as to any facts material to the issues on trial.”¹⁰³ In making this proposal, Wigmore sought to overturn the common law rule that limited cross-examination to the subject matter of the direct examination and to the credibility of the witness.

Placed in its best light,¹⁰⁴ the traditional rule was thought to maintain an enlightening rhythm between the exposition of and the challenges to each party's case. The traditional rule also was thought to protect against the surreptitious use of leading questions, generally proper only on cross-examination, during what was actually the presentation of the cross-examiner's case. Where the prohibition against “impeaching one's own witness” still prevailed,¹⁰⁵ the common law rule also served to keep the lines between who was and was not one's witness clean for the court. Further, given the breadth of the possible topics of impeachment, including failures of perception and memory, bias, prejudice, interest, corruption, and contradiction to name a few, cross-examination could still be quite broad and vigorous, even under the traditional rule.

On the other hand, the traditional rule had some practical drawbacks. Enforced literally, it would impose on a witness who had something positive to add to both cases the burden of returning to court on another day to answer what might be one or two questions that were beyond the scope of the direct examination. Further, the scope of the rule was always unclear, providing the trial judge fairly broad discretion in determining what was and what was not “beyond the scope of direct.”¹⁰⁶ And expanding discretionary limitations on the scope of the cross-examination always poses an opportunity for a hostile trial judge to undermine the real power of adversary presentation to reveal the truth.¹⁰⁷

Nearly one hundred years after his proposal, neither Illinois nor the federal system has accepted Wigmore's proposal on an unqualified basis. Illinois continues to adhere to the rule that the scope of cross-examination be limited to the subject matter of the direct examination and to matters that go to the credibility of the witness. The federal rule has established an explicit compromise designed to address at least the practical problems inherent in the traditional rule. Under the federal rules, the general principle of the restrictive cross-examination is maintained, but the rule also provides that the trial judge “may, in the exercise of discretion, permit inquiry into

¹⁰³ Wigmore, *supra* note 22, at 13.

¹⁰⁴ BURNS, *supra* note 46, at 130–31 (observing that the rules attempt to establish a tension between allowing a party to explicate his case and the opponent to challenge it).

¹⁰⁵ See discussion *supra* notes 37–50 and accompanying text.

¹⁰⁶ GRAHAM, *supra* note 38, at 446.

¹⁰⁷ Robert P. Burns, *Notes on the Future of Evidence Law*, 74 TEMP. L. REV. 69, 75 (2001).

additional matters as if on direct examination.”¹⁰⁸ The last phrase suggests that such an inquiry be in the form of non-leading questions,¹⁰⁹ unless the witness falls (as he often will) in one of those categories of witnesses who may be examined using leading questions even on direct examination.¹¹⁰ The compromise struck in the federal system allows a trial judge to prevent a cross-examiner from disrupting the opposing party’s case with a long examination on material relevant only to his case, while allowing a more limited “affirmative” cross where that is unlikely to occur. Professors Graham and Carey¹¹¹ suggest that the federal compromise solution is available within the discretion of Illinois trial courts, though not explicitly authorized by rule or controlling precedent.

Once again, Wigmore’s proposal has proven too bold for Illinois courts and legislature. Liberalization in Illinois has occurred, to the extent it has, only by an incremental expansion of the notion of what is within the “scope of direct” to include “inquiry into whatever tends to explain, qualify, modify, discredit, destroy, or otherwise shed light upon the testimony on direct.”¹¹² It seems here that the “conservative” Wigmore proved much too radical for his audience, then and even now.

H. Comparison of Handwriting Specimens

A series of Illinois decisions¹¹³ that were fairly recent at the time Wigmore wrote had established the principle that handwriting specimens that the court determined to be authentic could be introduced for comparison with a disputed sample, for purposes of authentication. Wigmore proposed that this common law rule be codified in a statute.¹¹⁴

In 1915, Illinois did, in fact, enact a statute that reflects the substance of Wigmore’s proposal.¹¹⁵ That statute remains in effect today and represents the only reform that Wigmore proposed in his 1906 article and which he convinced the state legislature to enact during his own lifetime. It is instructive that this success came on a matter that was more a codification of an already existing law than any bold initiative.

¹⁰⁸ FED. R. EVID. 611(b).

¹⁰⁹ FED. R. EVID. 611(c).

¹¹⁰ Such categories include “a hostile witness, an adverse party, or a witness identified with an adverse party.” *Id.*

¹¹¹ JAMES P. CAREY ET AL., ILLINOIS EVIDENCE WITH OBJECTIONS 48–49 (3d ed. 2003); GRAHAM, *supra* note 38, at 448–49.

¹¹² GRAHAM, *supra* note 38, at 446.

¹¹³ See Wigmore, *supra* note 22, at 13 n.2.

¹¹⁴ *Id.* at 13.

¹¹⁵ GRAHAM, *supra* note 38, at 812–13 (describing 735 ILL. COMP. STAT. 5/8-1501 to -1503 (2005)).

I. Wigmore's Views on Two Existing Statutes

Finally, Wigmore's article urged the repeal of two existing Illinois statutes, both of which retained the echo of the extensive common law incompetencies of witnesses.¹¹⁶ Modern evidence law has transformed most of these preclusions from testifying at all into permissible grounds for impeachment, a movement that Wigmore generally endorsed. Without offering any argument other than reference to his treatise, he offered this proscription on Illinois's "thoroughly unsound" version of the Dead Man's Act: "Repeal it at once."¹¹⁷

Alas, Illinois's Dead Man's Act is flourishing a hundred years later, generating a relatively large set of interpretative questions for the courts.¹¹⁸ The current version is perhaps somewhat narrower than the version that Wigmore attacked in that it provides only a limited incompetency for testimony concerning conversations with the now-deceased or events occurring in the now-deceased's presence. The older statute worked a universal incompetency for testimony on any matter with only enumerated exceptions. I suspect that Wigmore would have viewed such a development as a step forward, though an extremely halting one.

Second, Wigmore urged the repeal of the statutory incompetency that prohibited spouses from testifying for or against each other in criminal cases. The statute in effect when Wigmore wrote was "patchwork of thirty years' growth, . . . full of inconsistencies which make it unique of its kind in American legislation."¹¹⁹ His analytic sensibilities were particularly offended by the way in which the statute failed to distinguish cleanly among the older common law marital incompetency *prohibiting* one from testifying for or against one's spouse, an immunity *allowing* a spouse to refuse to

¹¹⁶ Wigmore, *supra* note 22, at 13–15.

¹¹⁷ *Id.* at 14.

¹¹⁸ GRAHAM, *supra* note 38, at 334–52.

¹¹⁹ The statute in effect in 1905, which does have the feel of something that "just grewed," provided:

No husband or wife shall, . . . be rendered competent to testify for or against each other as to any transaction or conversation occurring during the marriage, whether called as a witness during the existence of the marriage, or after its dissolution, except in cases where the wife would, if unmarried, be plaintiff or defendant, or where the cause of action grows out of a personal wrong or injury done by one to the other or grows out of the neglect of the husband to furnish the wife with a suitable support; and except in cases where the litigation shall be concerning the separate property of the wife, and suits for divorce; and except also in actions upon policies of insurance of property, so far as relates to the amount and value of the property alleged to be injured or destroyed, or in actions against carriers, so far as relates to the loss of property and the amount and value thereof, or in all matters of business transactions where the transaction was had and conducted by such married woman as the agent of her husband, in all of which cases the husband and wife may testify for or against each other, in the same manner as other parties may, under provisions of this act: *Provided*, that nothing in this section contained shall be construed to authorize or permit any such husband or wife to testify to any admissions or conversations of the other, whether made by him to her or by her to him, or by either to third persons, except in suits or causes between such husband and wife.

51 ILL. REV. STAT. 5 (Hurd 1905).

testify, and the privilege against revealing confidential communications by a competent spouse-witness.¹²⁰ Wigmore urged that both the incompetency and the immunity be abolished and that only a privilege covering confidential communications remain.¹²¹ Here, Wigmore has triumphed: Illinois law currently recognizes neither the incompetency nor the immunity from testifying against one's spouse.¹²² Only the evidentiary privilege protecting confidential communication between spouses remains.¹²³

IV. CONCLUSION

Wigmore urged Illinois lawyers to "take our place as torchbearers of reform" with respect to the law of evidence.¹²⁴ As the above analysis reveals, this never quite occurred as consistently as Wigmore would have liked. The reform-adverse nature of Illinois politics provided fertile soil for the conservative sensibility of the state's trial judges and lawyers. Illinois lawyers and judges often adhered to the cautious principle wonderfully expressed by the United States Supreme Court in *Michelson v. United States*:

We concur in the general opinion of courts, textwriters and the profession that much of this law is archaic, paradoxical and full of compromises and compensations by which an irrational advantage to one side is offset by a poorly reasoned counterprivilege to the other. But somehow it has proved a workable even if clumsy system when moderated by the discretionary controls in the hands of a wise and strong trial court. To pull one misshapen stone out of the grotesque structure is more likely simply to upset its present balance between adverse interests than to establish a rational edifice.¹²⁵

Wigmore could never embrace that kind of quietism, and the Supreme Court's acceptance of the Federal Rules of Evidence a quarter of a century later showed that the Court itself did not remain wholly convinced. Later in his career, Wigmore was criticized by some of his progressive colleagues as being too deferential to the attitudes of bench and bar, and particularly in resisting some potential reforms because of the low likelihood that bench and bar would accept them. The history of Illinois's slow acceptance of his generally modest reforms may well suggest that the legal culture of his adopted home state played a role in his cautious approach.

¹²⁰ Wigmore, *supra* note 22, at 14.

¹²¹ *Id.*

¹²² Federal law retains a distinctive version of the immunity in that it allows the testifying spouse to decline to testify. *Trammel v. United States*, 445 U.S. 40 (1980).

¹²³ GRAHAM, *supra* note 38, at 319–20.

¹²⁴ Wigmore, *supra* note 22, at 15.

¹²⁵ 335 U.S. 469, 485–86 (1948).