

Wigmore Confronts Munsterberg: Present Relevance of a Classic Debate

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Eighty years ago the *Illinois Law Review* published an article¹ by John Henry Wigmore, author of *Wigmore on Evidence*² and Professor of Law at Northwestern University. The article constituted Wigmore's defence of the legal profession and the common law trial system against the attack which had been mounted against it by Hugo Munsterberg,³ Professor of Psychology at the University of Harvard.

There are many reasons why this confrontation is of interest to us. First, the status and identity of the disputants lends the exchange interest. They were leading experts in their respective fields. Hugo Munsterberg has been called the father of applied psychology.⁴ He established the division of Applied Psychology in the Harvard Psychological lab and published many books devoted to all aspects of the field.⁵ John Wigmore, on the other hand, was author of that Treatise on the Law of Evidence of which it has been said that since its first publication it "has so dominated the field" that "no comparable work has yet emerged to replace or even to rival it".⁶

A second reason for our interest in the dispute lies in the continuing significance attached to it especially by psychologists working in the field of eyewitness testimony. The debate is cited frequently when the question of integration of the findings of psychology into the law is at issue.⁷

Thirdly and most significantly certain questions raised by the two disputants remain to be answered today. There is a great push in many branches of academia towards adopting an interdisciplinary approach to all

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1 Wigmore, J H, "Professor Muensterberg and the Psychology of Testimony being a Report of the Case of Cokestone v Muensterberg" (1909) 3 *Illinois LR* 399

2 Wigmore, J H, *Evidence in Trials at Common Law* (rev by James H Chadbourn (1961-1972) [cover title *Wigmore on Evidence*]

3 The name which includes a German diphthong is variously spelt in English, modern usage prefers a simple u, Wigmore himself employed the diphthong "ue".

4 Moskowitz, "Hugo Munsterberg: A study in the History of Applied Psychology" (1977) 32 *American Psychologist* 824, 841.

5 *Principles of Art Education*, 1905; *Psychotherapy*, 1909; *Psychology and the Teacher*, 1909; *Psychology and Industrial Efficiency*, 1913; *Psychology General and Applied*, 1914.

6 Twining, "Wigmore" in Simpson, *Biographical Dictionary of the Common Law* (1984).

7 See, for example, Saunders, Vidmar, and Hewitt, "Eyewitness Testimony and the Discrediting Effect" in Lloyd-Bostock and Clifford, *Evaluating Witness Testimony* (1983); see also Bersoff, *Psychologists and the Judicial Systems: Broader Perspectives* at 151, 153 (1982); Spencer, C E, "Methods of Detecting Guilt: Word Associations, Reaction — Time Method" (1929) 8 *Oregon LR* 158.

disciplines, and perhaps particularly law. Of all other disciplines it would seem that psychology would be most fruitful for any exponent of the law of evidence to explore. Accordingly knowledge of the issues between Wigmore and Munsterberg and opinions about the views expressed there may influence our approach to much of our subject. In the United States of America, where the debate took place, certain individuals and institutions have taken giant steps towards a partnership between the two disciplines in the last thirty years. In Australia as in the United Kingdom⁸ this work has barely begun. One explanation for this difference may lie in the suggestion that in Commonwealth countries there is a deep-rooted suspicion and scepticism among both lawyers and psychologists about the value of such interdisciplinary work.⁹ An analysis of the debate between Munsterberg and Wigmore is one way in which the causes and the justifications for these suspicions can be explored.

Munsterberg writing in 1908 levelled the charge of obscurantism against the legal profession. Wigmore's response took the form of an account of a mythical trial of an action, the action of *Cokestone v Muensterberg*. Wigmore¹⁰ through the words of his creature Tyro, counsel for the plaintiff, took care to acknowledge the great importance of modern experimental psychology in general and the indebtedness of the legal profession to Munsterberg for publicizing these developments. However, Wigmore went on to show that the science of psychology had not yet advanced to the point where it had any definite contribution to make to the reform of the law of evidence and trial procedure. In this paper the background which the two men brought to their discourse is examined, the debate is recapitulated and then its relevance to the concerns of today will be explored.

Munsterberg's Propositions

Hugo Munsterberg (1863-1916) was the first in the United States of America to call attention to the potential for applying the findings of psychology to the legal process. The fact that such a potential exists and should be exploited is not or should not be contentious. It will be suggested, however, that Munsterberg's method was unfortunate. It also appears peculiarly American despite the fact that Munsterberg retained German citizenship all his life.

Hugo Munsterberg began his career in psychology in Leipzig in 1882. His first major publication¹¹ involved him in controversy as it was criticised by several established psychologists on the basis that he had misunderstood the work of his teacher, Wundt.¹² He found support however from William James, then Professor of Psychology at Harvard.¹³ Thereafter Munsterberg under James' sponsorship took up a position at Harvard.

Now from the 1880s, a dominant theme of public opinion in American society was enthusiasm for natural science and its methods. Opinion-leaders,

8 King, M, *Psychology In and Out of Court, A Critical Examination of Legal Psychology* (1986) at 1.

9 Ibid.

10 Above n1 at 404.

11 Muensterberg, H, *Beitrage zur experimentellen Psychologie*.

12 Boring, E G, *A History of Experimental Psychology* (2nd edn) at 428.

13 Munsterberg, Margaret, *Hugo Munsterberg, his Life & Work* (1922) at 31 quoting a letter of W James written in July 1891. (hereafter M Munsterberg)

as members of the technostucture, saw science as a way to rationalise and control the social and political world as well as the natural. One bastion of the social and political world that remained unconquered at the turn of the century was the realm of the psychological. It was the task of the twentieth century to "scientize" and "professionalize" the self and the mind.¹⁴ Hugo Munsterberg became the man of the moment when he addressed himself to the task of raising the position of the psychology profession to one of importance in public life.¹⁵ He enjoyed immense popularity until adversely affected by the anti-German fervour that spread before the American entry into World War I.

Munsterberg's first chance to try to influence legal proceedings came in 1906 when he was asked to lend his support to the representations being made in the *Ivens case*. Richard Ivens, apparently slow witted, confessed to the brutal murder of a young housewife. On the basis of the confession, he was convicted and sentenced to death. Christison, the local psychologist, insisted however that the confession was obtained through hypnosis and was invalid. He called upon James and Munsterberg for support. Munsterberg, without personal investigation, lent the support asked and asserted that the confessions were untrue and resulted from dissociation and auto-suggestion. Reaction to Munsterberg's intervention was hostile and Ivens was executed.¹⁶ In his first encounter with the law Munsterberg had involved himself in controversy without adequate preparation. It appears however that there may have been a real question about the voluntariness of Ivens' confession.

The next case that Munsterberg involved himself in was even more notorious and it is suggested that Munsterberg's wisdom in involving himself was even more questionable. The case was based on allegations made by a self-confessed murderer, Harry Orchard, against four officials of the Western Federation of Miners. Orchard, who had murdered eighteen human beings, turned state's evidence, and confessed that all the crimes that he had done had been ordered, directed and paid for from the union's funds. Orchard thus obtained witness immunity, and could not be punished for these crimes. The fate of the four union leaders, Haywood, Moyer, Pettibone, and Simpkins, and of unionism in the West depended on whether Orchard's story was accepted by the jury.

At this stage Munsterberg had been working with word association tests and had successfully used them to discover that a college girl had been secretly indulging in forbidden chocolates.¹⁷ He decided that the *Orchard case* could be used to test the power of word association tests in the detection of criminal guilt. Having stipulated that his results were not to be released until the jury had reached their verdict he travelled to Boise, Idaho, as a guest of the state government and conducted experiments on Orchard. He found that Orchard's mind reacted on words vitally connected with his crime or his conversion at the same pace as on indifferent words. This preliminary finding led to the interim conclusion that Orchard had nothing to hide and felt no

14 Kargon, "Expert Testimony in Historical Perspective", (1986) 10 *Law and Human Behaviour* 15, 23.

15 Ibid.

16 Id at 23-24.

17 M Munsterberg at 142.

emotional disturbance at the mention of significant words.¹⁸ Munsterberg therefore reached the final conclusion that Orchard was telling the truth, at least subjectively.

Munsterberg's findings and opinion were not put before the jury but they were made public before the jury verdict was reached. This indiscretion was subsequently blamed on the persistence of the press.¹⁹ The statement made headlines all over the country. Despite his daughter's assertions to the contrary²⁰ it seems hardly credible that Munsterberg did not realise that this would happen. He was then "forced" to give a more extended interview where he revealed his methods. At the same time one of his students published an account of work that had been going on in the psychological lab in Cambridge, Massachusetts on an early form of polygraph machine.²¹

The resultant storm of publicity included charges by the defence lawyers that Munsterberg's judgment had been bought. It was revealed that Munsterberg had offered an article on his experiments with Orchard to a popular magazine before undertaking the trip. The jury, who had been secreted while this controversy was boiling, then delivered its verdict acquitting the labour leaders. Munsterberg subsequently withdrew the proffered article. Munsterberg's comments on the workings of the law in two separate cases had embroiled him in controversy and exposed him to criticism.

The attitude thus engendered in the psychologist seems to have been reflected in the writings from which Munsterberg's more lasting influence on the relationship between law and psychology came. These writings took the form of a series of eight popular articles published between January 1907 and March 1908. These articles were then collected and published as a book which first appeared in 1908 under the name *On the Witness Stand*. The book is said to have attained an extraordinary popularity with a large variety of readers.²² It certainly went through a great number of printings.

In the introduction to his book Munsterberg explains that his purpose was to appeal to public opinion to force the jurists to make concessions to the spirit of modern psychology. He adverted to the rapid development that experimental psychology had undergone in the last thirty years and commented on the fact that this development had gone on in complete detachment from the problems of practical life. The separation had not, he said, been to the disadvantage of psychology.²³

It is never a gain when a science begins too early to look aside to practical needs. The longer a discipline can develop itself under the single influence, the search for pure truth, the more solid will be its foundations.

However Munsterberg announced that the time had now come when experimental psychology could make contributions to the practical needs of society. For this purpose psychological research would need to be adjusted so

18 M Munsterberg at 145.

19 M Munsterberg at 147.

20 M Munsterberg at 147.

21 M Munsterberg at 148.

22 M Munsterberg at 378.

23 Munsterberg, H, *On the Witness Stand* (1908) at 7-8. (hereafter Munsterberg)

that research could be devoted to practical problems. Munsterberg was in fact calling for the establishment of Applied Psychology as an independent experimental science which would stand related to ordinary experimental psychology as engineering is related to physics.²⁴ This suggestion should have been seen as both valuable and noncontentious.

He went on to indicate that the fields to which psychology could be expected to contribute included education, medicine, art, economics and law. As he perceived it people in all professions except the law stood ready to receive the contributions that could be made by psychology. It may be understandable in the light of his experiences as related above but Munsterberg did not perceive the legal profession as similarly receptive:

The lawyer alone is obdurate. The lawyer and the judge and the juryman are sure that they do not need the experimental psychologist. They do not wish to see that in this field pre-eminently applied experimental psychology has made strong strides . . .²⁵

In his eagerness to press home this charge Munsterberg goes on to overstate the achievements in this area of the European psychologists.

In his chapter on memory Munsterberg opens with an anecdote about his own testimony at a trial of a man charged with burglary of Munsterberg's house. He identifies a number of statements about details which he made in good faith and which later turned out to be wrong. Certain of these blunders he ascribed to the reconstruction of the event by his memory, others to the power of suggestion. None of the blunders in detail appear capable of affecting the justice of the case. Munsterberg was however disturbed by them but took consolation in:

the fact that in a thousand courts at a thousand places all over the world, witnesses every day affirm by oath in exactly the same way much worse mixtures of truth and untruth, combinations of memory and of illusion, of knowledge and of suggestion, of experience and wrong conclusions.²⁶

He then expressed doubt as to whether there could be any certainty that the hypothesised blunders of other witnesses would not lead to injustice. Normal opinion would, he stated, take into account the fact that the witness might lie or that a witness might not remember a fact but not that an honest witness could remember the wrong thing. He cited no data to support this assertion.

Munsterberg asserted that justice would less often miscarry if all who are to weigh evidence were more conscious of the treachery of human memory. He went on to refer in very vague terms to the work that had been done in the psychological laboratories in Germany, France and the United States in exploring problems of the reliability of memory. He denounced the courts for being unwilling to receive testimony as to this work or to allow a witness to be examined by a psychologist in order to determine the witness's powers of memory and perception or the witness's associations and suggestibility. Certain of the Aussage experiments carried out in Europe were indirectly

24 Munsterberg at 9.

25 Munsterberg at 10.

26 Munsterberg at 43.

referred to but reports of these experiments were not cited and indeed the names of the experimenters were not given. Munsterberg also referred to certain experiments carried on in his laboratory on the relation between confidence and accuracy of memory. He reported that for some subjects certainty was related to the vividness of the mental image and in others to the congruity between the mental image and the expected pattern. He had found no definite relation of certainty to attention. It is important to note that throughout his book both in the chapter on Memory and the chapters on perception Munsterberg was addressing only the vagaries of "normal healthy individuality".²⁷

The General Reaction to Munsterberg's On the Witness Stand.

Munsterberg's book challenged the legal profession in peremptory fashion; it is therefore not surprising that the book was not universally well received by that profession. Typical of the reaction was an article by Charles Moore which appeared under the title "Yellow Psychology"²⁸ in October 1907. It was written in reaction to one of the articles which were later incorporated into Munsterberg's book. It appears that Moore could have been motivated by self-interest in repelling the suggestion that psychologists should play a more active role in the fact-finding process inasmuch as Moore's *Treatise on Facts*, a compendium of judicial observations on fact-finding, was to appear in 1908.

Moore opened his remarks with the satirical statement that a "Northwest Passage to truth" had been discovered that would allow judges to readily determine the facts of cases. He went on to state that the judge need merely have faith in the expert but that infidelity is rife on the bench; consequently judges were likely to continue to depend upon their own resources in the search for truth. He asserted that, on the basis of his own reading, on every topic with a "proximate and practical" bearing on the assessment of testimony "the judges have the psychologists "beaten a mile". Unfortunately for his point the psychologists he claimed to have read were, with the exception of James, all firmly of the older philosophical school. Finally he closed by stating that there was no evidence in the article by Munsterberg that the psychologist knew anything about judicial process. Uninformed persons tended, Moore said, to overrate the value that courts attach to direct testimony.

Munsterberg had an opportunity to respond to Moore's criticisms in the next issue of *Law Notes*.²⁹ In the course of doing so Munsterberg asserted that he had received many positive responses to his articles from well-known lawyers and judges all over the country. It thus appears that the reaction to his suggestions was not nearly as one-sided as it has subsequently been asserted.

27 Munsterberg at 67.

28 Moore, "Yellow Psychology" (October 1907) 11 *Law Notes* 125 reprinted in (1908) *American LR* 437-445.

29 "Yellow Psychology: Dr Munsterberg replies to Mr Moore" (November, 1907) 11 *Law Notes* 145.

Wigmore and Psychology

The most noteworthy response to Munsterberg's book both because of the research evidenced and the status of the commentator was Wigmore's article entitled "Professor Munsterberg and the Psychology of Testimony being a Report of the Case of Cokestone v Muensterberg"³⁰ which appeared in 1909. The article purports to be the report of a libel action that was entered in Windyville, Illiana on April 1, 1908. Windyville is clearly Chicago, and we note that the action commenced on All Fool's Day. The article was replete with other similar allusions. The plaintiff's name is clearly a combination of the names of those giants of the common law Coke and Blackstone. Sir Edward Coke, was a lawyer, politician and judge of the early seventeenth century. He was appointed a Judge of the King's Bench in 1613 but was removed from office in 1616 and committed to the Tower in consequence of his insistence on the rule of the common law in derogation of the power of the King and the Court of Chancery.³¹ He was also the author of the *Institutes of the Laws of England* and several volumes of case reports. William Blackstone, an English lawyer of the eighteenth century, was the first occupant of the Vinerian Chair at the University of Oxford. His great contribution was to make the common law intellectually respectable through his "Commentaries on the Laws of England".³² In naming the court, the Superior Court of Wundt County, Wigmore invoked the name of the father of experimental psychology in Europe. The cause was heard before Judge Solon Wiseman. Solon, of course, was an Athenian statesman and poet. He was the exemplar of the evenhanded judge, chosen to decide between rich and poor.³³ However, it was subsequently accepted by all Greeks that Solon's name belonged in the list of wisemen. Such a list was drawn up before the end of the fifth century BC and was repeatedly expanded and revised by various Greek teachers but every such list contained the name of Solon. In respect of Wigmore's choice of the name for his judge it is considered relevant both that the historical Solon was a lawmaker in a tradition that was foreign to the common law and that his decision pleased no one. The plaintiff's counsel was Simplicissimus Tyro, which translates as the merest (most simple) beginner. The defendant's counsel were "the celebrated Mr R E Search, assisted by Mr Si Kist and Mr X Perry Ment", these names clearly need no elucidation.

Two preliminary matters were raised by the defendants. The court had first to consider whether the plaintiffs could complain inasmuch as they had not been named. The court ruled (following a genuine precedent³⁴) that where a wrongful act is expressly directed against a specific class of person, each and every person in that class is deemed to be injured.³⁵ The second preliminary matter was an objection to jurisdiction based on the defendant's lack of domicile. This is where Wigmore takes his unkindest cut at his opponent. He relates that the defendant had been in Windyville to deliver two

30 Wigmore, above n1 at 399.

31 Baker, J H, *An Introduction to English Legal History* (2nd edn, 1979) at 93, 144-5. Maitland, F W, *The Constitutional History of England*, (Fisher, ed) (1963) at 269-271.

32 Baker, above n31 at 148.

33 Plutarch, *The Rise and Fall of Athens: Nine Greek Lives* (Trans with an Introduction by Ian Scott-Kilvert, 1960) par16 at 58.

34 *Pillsbury-Washburn Flour Mills Co v Eagle* (CCA), 86 Fed, 608, 629 (1898).

35 Wigmore, above n1 at 402.

addresses. The first, to be given to a group Wigmore entitles the "Ambitious Affratellation of Office Boys" is an address in which, so it is said, the speaker suggested that there was a uniform psychological connection between the personality of the office chief and the number of times the letter M (for Munsterberg?) appeared on the scrap in the waste-basket. The second, to the Honorable Order of Suburban Dames, was entitled *Studies in Domestic Psy-collar-gy* and contained a suggestion for a method of locating lost collar buttons. It can be readily understood how the suggestions in the details of these addresses can continue to offend psychologists (and also, feminists and office boys). In Wigmore's defence it will be urged first that the context should rob the blow of much of its sting; secondly, that Munsterberg appears from all accounts to have been busy urging the benefits of a study of psychology on all and sundry; and finally that Munsterberg's method in the Orchard case was not much above that described for finding lost collar buttons. To determine Wigmore's true view of psychology other aspects of the article and other parts of his works carry more weight.

The substance of the article lies in the plaintiff's pleadings and the treatment of these. The pleadings define the true issues in the debate as Wigmore saw them. They were to the effect that the book must be interpreted to show that the defendant meant and asserted first:

That there existed certain exact and precise experimental and psychological methods of ascertaining and measuring the testimonial certitude of witnesses and the guilty consciousness of accused persons.³⁶

Secondly that these methods were fully accepted and endorsed by psychologists in general as applicable to American judicial practice and superior to those in use; further that these methods and their applicability had been explained in scientific journals and treatises which were accessible to the members of the legal profession generally; and finally that the legal profession had rejected or totally ignored something offered to them for practical use and that such rejection and such ignorance constituted a gross neglect of professional and civic duty by the members of the said profession including the plaintiffs which required that psychologists must invoke public opinion to coerce the profession to perform its duty and use the said methods.

Counsel for the plaintiff opened by asserting that his sole desire was to vindicate the honour of the legal profession. Investigation of the defendant's allegations had proved that they were totally unfounded. There was no attempt to deny that experimental psychology could make a contribution to the laws of evidence and procedure but there was a denial of the assertion that experimental psychology was currently capable of doing so. Further Wigmore, through his hypothetical counsel, denied that the law or lawyers are to be impugned because they had not already adapted their procedures in the fashion that Munsterberg indicated would be appropriate.

It was shown that there was not in print and accessible any psychological information which would cause lawyers to believe that there were available any exact psychological methods for measuring testimonial certitude which could be of practical use in trials. Such information as had been published

36 Id at 401.

appeared in languages other than English and in publications that were not addressed to lawyers. Further, such information had not achieved such levels of acceptance in continental Europe as to make it appropriate to consider immediate implementation of new methods in America. Finally, it was suggested that these methods were not superior to the methods currently in use.

Wigmore, unlike Munsterberg,³⁷ provided an extensive bibliography of relevant psychological writings in all languages. The two methods that Munsterberg had specifically suggested should be adopted in court were tests of testimonial certitude such as those first proposed by Stern in 1902 and guilt-diagnosis by psychic associations, first publicly discussed by Wertheimer and Klein in 1904 and presumably applied in the Orchard case. This meant that Munsterberg had allowed only about three years for putting the legal profession in default. This would have been a very short period of time in any profession and makes no allowance for the lag that is necessary for testing any technological advance before the law can properly adopt it. Further, neither Munsterberg nor any other American psychologist had yet drawn public attention to the accumulation of this corpus of knowledge.

Wigmore referred to the criticism levelled at Stern by a German critic who accused him of "ignoring the impolicy of publishing such theories" in that they tended to destroy popular confidence in the courts. Stern had defended himself against this criticism by pointing out that he had not offered his results to the public.³⁸ Munsterberg had failed to show this restraint. Wigmore quotes multiple passages from Freud, Stern, Wertheimer and Jung to the effect that evidence must be accumulated to dissipate all doubts of the utility of these methods.

Turning to examine the question of whether the psychologists had anything new and useful to offer the courts, Wigmore matches the observations of psychologists on a number of points against similar observations from the cases.³⁹ In this part of the article Wigmore is adopting an approach that is similar to that of Moore. It is suggested that these resemblances prove nothing other than that psychology was in its infancy. It has been remarked that new fields of scientific activity begin with things and ideas that are part of the common experience. At this time the science is widely intelligible and its discoveries can be understood, argued, resisted, supported and ridiculed by millions of people.⁴⁰ If this is accepted, it is not surprising that passages echoing the findings of psychologists (or vice versa) would be found in judgments. Another symptom of infancy that was specifically identified as such by Wigmore⁴¹ was the haste to make generalizations which judicial experience can puncture. The example given was the rule that suggestive questions should never be asked. Wigmore pointed out that the courts were aware of the problem but that such questions were the only practicable means of approaching a false witness. The fact that psychology was in its infancy may explain both these phenomena. However,

37 Munsterberg, 11 *Law Notes* 146.

38 Wigmore, above n1 at 412.

39 Id at 418-19.

40 Miller, *Psychology: The Science of Mental Life* (1962) at 3.

41 Wigmore, above n1 at 425.

the fact that the science was in its infancy would also suggest that it was too soon for it to be trying to remodel the world.

Another problem that Wigmore raised is one that will have to be addressed by modern psychology. He suggested that even if psychology does attain to veritable classified laws it would still need to be established that the laws properly describe the abilities of the individual witness.⁴²

In the course of his article Wigmore referred to two facts about the procedures of the common law system for which Munsterberg did not appear to have made allowances even if he properly understood them. The first was that because the procedure was adversarial the judges could not be held responsible for the type of evidence that was presented and utilised.⁴³ The second was that the accused's privilege against self-incrimination might well stand in the way of the use of association tests to prove guilt.⁴⁴

In closing, Wigmore urged, through counsel for the plaintiff, that both professions should be considerate towards each other. Goethe's epigram should, he said, be remembered:

There are two things of which a man cannot be careful enough; of obstinacy, if he confines himself to one line of thought, of incompetency, if he goes beyond it.

Contention continues as to the effect produced by this article. Numerous assertions can be found to the effect that the dispute seriously inhibited psychological research into legal matters.⁴⁵ The assertion is that Wigmore's rejoinder was so critical and sarcastic that as a consequence, American psychologists abandoned the field of inquiry.⁴⁶ If this is so, Wigmore's influence on psychology seems to have been greater than ever his influence was on the law. Twining asserts in his short account of Wigmore's life that:

He was revered as a scholar, popular as an entertainer, but cut little ice as a reformer or leader of opinion.⁴⁷

In a fuller account of Wigmore's work Twining acknowledges that Wigmore's article was uncharacteristically acerbic, but classifies the claims about its effects as exaggerated.⁴⁸ He cites statements to the effect that the publication was quite popular among professional psychologists during a period of years because it was an excellent survey of an area in which little work had been done. It is true that the initial burst of enthusiasm for this field of applied psychology was not sustained and had all but disappeared by 1930⁴⁹ but it is suggested here that those who attribute the psychologists' lack

42 Id at 422.

43 Id at 406.

44 Id at 430.

45 Bersoff, *Psychologists and the Judicial Systems: Broader Perspectives* at 151, 153 (152). contra Spencer, C E, "Methods of Detecting Guilt: Word Associations, Reaction — Time Method" (1929) 8 *Oregon LR* 158: "This controversy did much to stimulate interest and since that time much progress has been made."

46 See Loh, "Psycho-legal Research: Past and Present (1980-1)" 79 *Michigan Law Review* 659, 662.

47 Twining, in Simpson, above n6 at 334.

48 Twining, *Theories of Evidence: Bentham and Wigmore* (1985) at 136.

49 Greer (1971) *The British Journal of Criminology* 11, 131, 137.

of interest in this field during the next fifty years to Wigmore's influence are failing to take into account the influence of the rise of behaviourism with its emphasis on overt and measurable reactions to present stimuli. This suggestion draws some limited support from the history of European developments in this field. Binet and Stern are credited with pioneering this field of inquiry, shortly after the turn of the century.⁵⁰ However it was not until after mid-century that much attention was devoted to this field and progress was then made in the form of two methodological innovations which have been credited with converting witness psychology into a useful technology.⁵¹ These innovations take the form of *Criteria of Reality* utilised in *Statement Reality Analysis*⁵² and Trankell's *Formal Structural Analysis* whereby the statement made by the witness is considered in the context of the surrounding circumstances.⁵³

Whatever the effect of Wigmore's article on psychologists in general it is clear that he retained a warm interest in matters of psychology and lively contracts with psychologists. In fact this interest had originated well before Munsterberg's book was published as is evidenced by the fact that he had conducted a series of "Testimonial and Verdict Experiments" at Northwestern University Law School in 1905.⁵⁴ In 1913 he published the first edition of *The Principles of Judicial Proof as given by Logic, Psychology, and General Experience and Illustrated in Judicial Trials*. The book contained extensive extracts from psychological literature and Wigmore's own magisterial pronouncements on the uses and limitations of psychological findings in litigation. Gault further reports that Wigmore was eager for the psychologists to come up with anything of practical value to lawyers. Throughout his career he kept up with psychological literature and he gave encouragement and support to a number of young researchers in the field.⁵⁵ In a letter to a psychologist written in 1930 Wigmore commented that while he had been surveying recent developments in psychology he did not find that psychologists have contributed anything except in the two narrow fields of lie detecting and of the ratio of errors in general.⁵⁶ Thus Wigmore appears to have remained convinced throughout his life of the potential relevance and worth of psychological research into forensic questions. While he was conscious of the enormous obstacles which impeded progress to the point where positive usable techniques for testing the reliability of testimony could be developed, he acknowledged the importance of the negative or cautionary lessons of psychology. Of particular interest here, he acknowledged the crudity of psychological assumptions on which some rules of evidence were based.⁵⁷

50 Postman, "Human Learning and Memory", in Kimble and Schlesinger, *Topics in the history of Psychology* at 69, 95.

51 Trankell, A, *Reconstructing the Past: The Role of Psychologists in Criminal Trials* (1982) at 67.

52 Id at 124-5 et seq.

53 Id at 68, 149 et seq.

54 Wigmore, J H, *Principles of Judicial Proof*, (2nd edn, 1931) at 536-540; see Greer, (1971) 11 *The British Journal of Criminology* 131, 134

55 Twining, above n48 at 139.

56 Letter to H P Weld of Cornell, 1930 quoted in Twining, above n48 at 137.

57 Twining, above n48 at 137.

Themes of The Conflict

Several issues that appear in the exchange between Munsterberg and Wigmore have continuing relevance today. In attempting to categorize these issues it might be useful to focus first on the current state of the legal system, the discussion will then move on to concerns, both external and internal, with psychology and will conclude with a discussion of the appropriate form in which psychology can best make a contribution to the legal system.

1. The state of the legal system

Both Wigmore and Moore asserted that the legal system already took into account the facts that Munsterberg was pointing out. They were referring to the role of the tribunal of fact, which at that time in the jurisdictions with which they were concerned was constituted by the jury which (almost invariably) consisted of twelve men, in assessing witness credibility. The same point is still occasionally made. It is here suggested that those who take this position will maintain it even where the tribunal of fact is a judge and not a jury. Wigmore asserted⁵⁸ a fact that was later borne out by at least one experimental study although current research does not appear to support it⁵⁹ that the jury's verdict was likely to be closer to the truth than any witness' statement. A possible explanation of this is found in the hypothesis offered by Bennett and Feldman⁶⁰ that the trial is determined by evaluating the rival stories that are presented.

Munsterberg had a response to this type of criticism. He commented in response to Moore that the title "Yellow Psychology" seemed to imply that he was being accused of trying to carry psychology into quarters where it does not belong but that it would be discovered that:

my real crime is quite a different one. I have dared to carry psychology into quarters where it has been all the time!

He goes on to mock extravagant claims on behalf of the judiciary to psychological knowledge. His only consolation, he said, was that the lawyers and judges themselves seem not to have known that they knew it all. Indeed the attitude that psychology has nothing new to offer is not one that is becoming to the legal profession either in 1908 or today, although it is an understandable response in the context of Munsterberg's aggressive approach.

A similar attitude has been displayed at various times in the courts in the last ten years.⁶¹ It might be suggested that such attitudes are caused by fear of the novel and a fear of complications which might lead to the release of the guilty as well as the innocent.⁶² Spurred on by such attitudes psychologists have conducted studies which show that common conceptions of how

58 Wigmore, above n1 at 425.

59 "Jury sensitivity to eyewitness identification evidence" (1990) 14 *Law & Human behaviour* 185; "The child in the eyes of the jury: Assessing mock juror's perceptions of the child witness" (1990) 14 *Law and Human Behaviour* 5-23.

60 Bennett and Feldman, *Reconstructing Reality in the Courtroom* (1981).

61 See Loftus, E F, "Ten Years in the Life of an Expert Witness" (1986) 10 *Law and Human Behavior* 241 at 246-248; cf *State of Arizona v Chapple* 660 P 2d 1208, (CA, 1983) per Hays J. For the most recent expression of the same attitude see *R v Hentschel* [1988] VR 362 per Brooking J at 369-370.

62 See Magner, E S, "Expert Testimony & Credibility" (1989) 5 *Aus Bar Rev* 225

memory works are at variance with the research findings.⁶³ The law is based on common sense psychology which has been realized in workable legal processes which have evolved under constant close scrutiny over many centuries. However, although a common sense basis is a good pragmatic starting point, when scientifically verifiable and verified information which is at variance with common sense becomes available then modifications must be made to the structure that has been erected.⁶⁴ As is stated in one of the leading works in the area of psychology and law:

The idea that psychology may have a contribution to make in the area of witness evidence implies a notion which underlies most psychology and law research, namely that 'scientific' psychology can add to, clarify, or improve on the common sense or 'naive' psychology on which law proceeds.⁶⁵

The law does in some circumstances recognise this. As an instance, American authority has begun to accumulate to the effect that testimony as to psychological findings is relevant and admissible at least in the area of identification evidence.⁶⁶ A question which arises relates to the appropriateness of this form of response to the fact that the law is not and cannot be self-sufficient in this area.

2. *Concerns Internal to the Study of Psychology*

Wigmore suggested that psychology was not yet ready to make a contribution to the understanding of litigation. Through the lips of his creation Tyro, he acknowledged that he was deeply indebted to Munsterberg for opening his eyes to the wonderful prospects of future modern psychology.⁶⁷ The emphasis here should be put on the word "future". In fact in 1908 the science of experimental psychology was still in its infancy. An interest in the workings of the human mind or cognitive system which is, after all, the tool which is used in all intellectual endeavours, was not new. However despite the long history of psychological musings, psychology is one of most recent disciplines to achieve differentiation from general philosophy. This fact is recognised in Ebbinghaus' aphorism to the effect that psychology has a long past but a short history.⁶⁸

Wilhelm Wundt is frequently credited with being the father of experimental psychology. His experimental laboratory at Leipzig is said to have been founded in 1879. However the date has been selected quite

63 Wells and Loftus, *Eyewitness Testimony: Psychological Perspectives* (1984) at 246; Loftus, *Eyewitness Testimony* (1979).

64 "Introduction: Doing Psycho-legal Research" in Farrington, Hawkins, and Lloyd-Bostock, *Psychology, Law and Legal Processes* at xiii. See also Meehl, "Law & Fireside Intuitions: Some Reflections of a Clinical Psychologist" in Tapp and Levine, *Law, Justice & the Individual in Society: Psychological & Legal Issues* (1977).

65 Lloyd-Bostock and Clifford, *id* at 3.

66 *State of Arizona v Chapple* 660 P 2d 1208, (CA, 1983); *People v McDonald* 690 P 2d 709 (Cal 1984). *US v Smith* 736 F 2d 1103 (6th Cir 1984). *US v Downing* 753 F 2d 1224 (3rd Cir 1985). *State v Moon* 45 Wash App 692, 776 P 2d 1263 (1986) *People v Brooks* 490 NYS 2d 692, *Skaramocious v State* 731 P 2d 63 (Alaska Ct App, 1987) see Loftus, E F and Schneider, N G, "'Behold with strange surprise': judicial reactions to expert testimony concerning eyewitness reliability" (1987) 56 *UMKC Law Review* 1-45.

67 Wigmore, *above* n1 at 404.

68 Ebbinghaus, "Abriss der Psychologie" (1908) at 1 as given in Boring, *above* n12 at 392.

arbitrarily; the experimental laboratory developed out of a laboratory that had been earlier established for demonstrative purposes. At or about the same time, William James, influenced by the German work, was instrumental in having laboratory facilities for psychology set up at Harvard University. Thereafter the history of psychology in the English-speaking world diverged from that of the discipline on the continent. If the terms of Kuhnian analysis⁶⁹ may be applied psychology in 1908/9 was most definitely in a pre-paradigmatic state.⁷⁰

There are, however, problems with applying Kuhnian analysis to psychology. In the first place the analysis was not designed to be applied to social science. Kuhn indicated that it remained an open question what parts of social science have yet acquired paradigms.⁷¹ Further Kuhn's analysis even as it applies to the physical sciences has been challenged by other historians of science such as Laudan⁷² and Hacking.⁷³ In his proposed revision of Kuhn's model Laudan states that every intellectual discipline has a history replete with research traditions. Laudan's criteria for a successful research tradition is that it leads, via its component theories, to the adequate solution of an increasing range of empirical and conceptual problems.⁷⁴

It is suggested that Wigmore was clearly right when he suggested in 1909 that psychological knowledge had not then reached such a stage as to justify Munsterberg's demand that legal doctrine should be revised to take its teachings into account. The question facing us today is whether it has now reached that stage. It is a fact that since the rise of cognitive behaviourism from 1960 a great deal of research has been done into subjects such as human memory which have peculiar relevance to evidence law. In an attempt to describe the nature of the growth and change that occurred, Tulving⁷⁵ identifies five specific changes characteristic of this stage of the historical development of the psychology of memory. These changes include an increase in the volume of research but more significant are the theoretical developments. More comprehensive theories of memory⁷⁶ and the human mind⁷⁷ have come into existence. Attempts to devise different taxonomies of memory have been made. Finally the change that Tulving regards as potentially most important is an increasing tendency on the part of students of memory to exhibit a critical attitude toward metatheoretical problems. The failure of some kind of general theory which would unify the disparate findings to emerge eventually led to questions as to whether a general theory should in fact be sought.⁷⁸

69 Kuhn, Thomas, *The Structure of Scientific Revolutions* (1962).

70 Id at 13.

71 Id at 15.

72 Laudan, *Progress and its Problems, Towards a Theory of Scientific Growth* (1977).

73 Hacking, *Representing and Intervening: Introductory Topics in the Philosophy of Natural Science* (1983).

74 Above n72 at 83.

75 Tulving, *Elements of Episodic Memory* (1983) at 23-25.

76 Atkinson and Shiffrin, "Human Memory: A Proposed System and its Control Process" in Spence and Spence (eds), *The Psychology of Learning and Motivation* vol 2 (1968).

77 Anderson, Spiro and Montague, *Schooling and the Acquisition of Knowledge* (1976).

78 Nilsson, *Perspectives on Memory Research* (1979) at 7.

No one theory as to the nature of memory has yet emerged.⁷⁹ If the law is to wait until there is such a general psychological theory before taking psychological knowledge into account this change identified by Tulving may mean that that day will never come. However there does appear to be some agreement that the state of knowledge has progressed. Tulving points out that, as the final goal is not known, progress is difficult to judge but asserts that many students of memory undoubtedly would agree that the enterprise has moved to a higher stage, in a direction that is superior to the previous level.⁸⁰ Psychology has accumulated many facts and findings about memory functions and many of these are reasonably hard.⁸¹ However the failure to agree on concepts is accompanied by the fact that the science knows no generally acknowledged solutions to problems.⁸² It is suggested that where the findings on a matter of legal relevance are relatively firm it is not too soon to re-examine our legal doctrines in the light of such findings. We need not wait for a unified theory.

3. *Concerns External to Psychology*

If one can accept that there is or may be a body of psychological findings which are sufficiently firm to warrant some consideration in devising legal theory the question becomes a question of how psychology might impact on the legal system. One concern is that the psychology's impact might be too destructive. It is observed that a major emphasis of Munsterberg's book was on the unreliability of witnesses, the reasons why witnesses should not be believed. Many of the experts on eyewitness testimony prominent since 1970 have made a similar point. However rejection of witness testimony simpliciter is not a viable option for the legal system. The courts exist to serve societal demands that cases be determined. The system can survive if some cases cannot be solved but any large scale rejection of witness testimony might well cause the system to disintegrate.⁸³ The importance attached to witness testimony by the untrained individual is attested to by Woocher.⁸⁴ So long as the psychologist's contribution is limited to pointing out that witnesses are unreliable its effect will be wholly destructive and the legal system will not be able to make any adaptation of its rules to adapt psychological findings.

Many psychologists are very conscious of this fact. Indeed the criticism of the work of the eyewitness psychologists on the basis of its destructive effect was canvassed very strongly in the debate⁸⁵ between McCloskey & Egeth and Elizabeth Loftus and subsequently.⁸⁶ It is suggested that where particular classes of testimony can be singled out as being particularly unreliable an

79 Tulving, above n75 at 27: "The conceptual development of our enterprise has simply not kept up with our ability to design and conduct experiments and to generate data."

80 Id at 26.

81 Id at 27.

82 Ibid.

83 Wells, "Applied Eyewitness Testimony Research: System Variables and Estimator Variables" (1978) 36 *J of Personality and Social Psychology* 1546 at 1547.

84 Woocher, F D, "Did your eyes deceive? Expert psychological testimony on the unreliability of eyewitness identification" (1977) 29 *Stanford Law Review* 969 at 970.

85 McCloskey and Egeth, "Eyewitness Identification: What can a psychologist tell a jury?" (1983) 38 *American Psychologist* 550 at 563. Loftus, "Silence is not Golden" (1983) 38 *American Psychologist* 564 at 572.

86 (1986) 10 *Law and Human Behaviour* Nos 1/2 at 1-181.

injunction to caution in dealing with witness testimony can and should be valuable to the legal process. Further, it is suggested that when and if the findings of psychology can be made to relate to methods of making evidence more reliable psychology can be expected to make a positive contribution to the legal system. To do him due credit Munsterberg sought ways in which psychology could make a positive contribution as when, for example, he suggested having a psychologist classify the individual's mind as to whether it best retained acoustical, visual or motor images. It is here suggested however that the focus should be on system variables or procedural factors not on estimator variables or individual factors.

This brings us to the question of the form of contribution psychology can best make to the legal system. Munsterberg, and many of those who postdate him, were of the view that psychologists should be invited to testify in court as to the weight to be assigned to the testimony of other witnesses. Those who make this suggestion are envisaging some sort of adjudicative role for psychological knowledge. An alternative would be to suggest that psychological findings could best be taken into account in structuring the legal system and the rules of evidence. This would be to envisage a legislative role for psychological knowledge.

There are a number of problems with envisaging an adjudicative role for psychological knowledge. There is, first, the fact that jurors or judges may not be capable of properly assimilating the psychological information.⁸⁷ There is also the fact to which Wigmore drew attention that psychological knowledge of the normal is derived from studies based on statistical methods whereas the court is concerned with the application of that knowledge to the individual.⁸⁸ Statistical methods may determine what behaviour will normally be expected by determining the mean and the median in any set of data but it does so by taking account of the extreme positions not by denying that they exist. Statistical methods can provide no guarantee that the individual case is not one in which an extreme is manifested. However when legal rules are drafted it is appropriate to take the average behaviour into account. There would be a good case for drafting a statutory amendment to a common law rule on, for example, the use of prior consistent statements if it could be shown that in 90 per cent of cases the existence of a prior consistent statement is consistent with truthfulness and inconsistent with deceit.

Psychology, as Doob has pointed out,⁸⁹ is better employed when it is addressed to questions of systematic design or legal doctrine. An instance of such an application of psychological research into eyewitness testimony is found in the *Canadian Guidelines for Identification Parades* devised by Brooks. In approaching the project of re-examining legal doctrine, by which is meant specifically the laws of evidence, in the light of psychological findings it will be important to distinguish between those factors which the

87 Loftus, E F, "The incredible eyewitness" (1974) 8 *Psychology Today*, 116-119 where Loftus suggests that jurors fail to discredit the effect of witness testimony even when presented with psychological findings impugning that evidence. However subsequent studies have cast doubt on the validity of this finding, cf Saunders, Vidmar and Hewitt, above n7.

88 Id at 20.

89 Doob, in Friedland, *Courts on Trial* (1975).

legal system can determine and those which it can only hope to estimate.⁹⁰ It is the writer's opinion that certain rules of evidence such as those bearing on the use of out of court statements made by the witness in the past and those relating to the topic of refreshing memory can truthfully be reconsidered.

Conclusion

It appears to the writer that Wigmore was the clear victor in the contention with Munsterberg. Further it is suggested that the victory was deserved, Munsterberg was demanding progress much too quickly and his minatory tone was unwarranted. However it is contended equally that Wigmore's position has been mistakenly represented as being totally negative. While some lawyers of the time may have responded by outright rejection of the suggestion that there was any potential for psychology to contribute to the law Wigmore was not of this number. A recent description of the debate in question compares Munsterberg's advances to a proposal of marriage and suggests that Wigmore dismissed the proposal with unwarranted bitterness.

One would have thought that this proposal of "marriage" between psychology and law would have been readily accepted and "consummated", but it was not to be so. Wigmore . . . responded with criticism of psychologists for not really having the strong empirical evidence that Munsterberg alluded to, or at least for not publishing it in legal journals. What should have started in an atmosphere of collaboration began in an atmosphere of antipathy.⁹¹

The insinuation that Wigmore's bitterness was unwarranted is not supported by an examination of the writings in context. Instead it is suggested that if Munsterberg offered a proposal of marriage it was a proposal with much in common with the first proposal offered to Elizabeth by Darcy in Jane Austen's *Pride and Prejudice*. Happily it can also be reported that a second and gentler proposal is now in hand. Both academics and practitioners of the disciplines are now involved in negotiations to achieve a pre-nuptial agreement as to the division of responsibilities between the two professions. Among the outstanding issues are several that were discussed by Munsterberg and Wigmore and that must now be addressed again.

90 Above n83.

91 Elwork, A, Sales, B D and Suggs, D, "The Trial: A Research Review", in Sales, *The Trial Process* (1981) in the series *Perspectives in Law & Psychology* at 2.