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A Question of Credibility: John Henry Wigmore's Use of Scientific Authority in Section 924a of the Treatise on Evidence

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INTRODUCTION

Prior to the movement of the mid-1970's to reform the rape laws, and the passage of the first rape reform legislation in Michigan in 1974,[1] the law, as expressed in statutes, reported appellate opinions, and legal commentaries, typically expressed denial, suspicion, and disbelief when confronted with allegations of incest or sexual abuse of young girls. Although the incest cases which received the attention of the legal authorities overwhelmingly involved young female children, the legal system seemed unwilling

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1. MICH. COMP. LAWS §§ 750.520a to .520*l* (West Supp. 1982). For a discussion of rape law reform, see L. Bienen, *Rape III—National Developments in Rape Reform Legislation*, 6 WOMEN'S RTS. L. REP. 170 (1980). [Ed. note: *Rape III* is the third in a series of articles published by this author. These articles are generally referred to as *Rape I-IV, see id.* at 171. The reader is referred to them for additional background information on this subject.] *See also* H. FEILD & L. BIENEN, JURORS AND RAPE: A STUDY IN PSYCHOLOGY AND LAW (1980); V. Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM L. REV. 1 (1977); Comment, *Rape and Rape Laws: Sexism in Society and Law*, 61 CALIF. L. REV. 919 (1973).

For a detailed critique of the Michigan statute and other rape reform legislation, see MODEL PENAL CODE §§ 213.0 to .6 and related comments (Official Draft & Rev. Comments 1980). Prior to the publication of the revised commentaries in 1980, the American Law Institute made a policy decision *not* to amend the 1962 official draft of the Model Penal Code, which was drafted between 1953 and 1961. H. Wechsler, *Foreword, id.* at XI. Thus, those writing the revised commentaries concerning the area of sex offenses were put in the position of having to support a late-1950's formulation of such offenses when a great deal of legal development had taken place during the period between 1962 and the late 1970's.

to recognize the offense. The credibility of the complaining witness was the primary object of the law's scrutiny: legal authorities often found reasons to disbelieve or, more importantly, discredit and discount reports of incest and sexual assault.[2] This Article will discuss a celebrated example of the legal system's official denial of the sexual abuse of young girls: section 924a of John Henry Wigmore's treatise on evidence,[3] which specifically deals with the credibility of female witnesses in sex offense cases.

The law prides itself on being objective and disinterested. An important justification for intervention by a court of law is the introduction of an impartial decisionmaker. However, the law has not been without its blind spots. Wigmore's section 924a can charitably be designated one of the law's more conspicuous blind spots. Under the guise of arguing on the basis of objective, scientific authority, this section of Wigmore's treatise simply states that all females who allege sexual assault should be assumed to be lying, a repressive and misogynist position. More important than the characterization of Wigmore's position is the fact that its author was so wholeheartedly committed to his view that he deliberately misrepresented the supposedly objective, scientific authorities upon which he relied.

In a court of law the question of a witness' credibility is always material. However, Wigmore seems to have been so convinced that female children fantasize about sexual assault that he went out of his way to recommend a special, radical change in the rules of evidence to discredit their complaints. He was not alone in this conviction. Sigmund Freud went to considerable effort to suppress his own patients' allegations of sexual abuse as children, especially when the offender was the child's father.[4] Though both

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2. *See* J. HERMAN, FATHER-DAUGHTER INCEST (1981) [hereinafter cited as HERMAN]. An exemplary case is Hawkins v. State, 326 So. 2d 229, 230-31 (Fla. Dist. Ct. App. 1976) (citing United States v. Hiss, 88 F. Supp. 559 (S.D.N.Y. 1950)), *see infra* note 130, and 3A WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §924a (rev. ed. 1970)). The *Hawkins* court held the trial court's refusal to grant a continuance to permit the defense to obtain psychiatric evidence regarding the victim's veracity and "paranoid tendencies" to be reversible error. *See also In re* Ferguson, 5 Cal. 3d 525, 534, 487 P.2d 1234, 1240, 96 Cal. Rptr. 596, 600 (1971) (citing Ballard v. Super. Ct., 64 Cal. 2d 159, 410 P.2d 838, 49 Cal. Rptr. 302 (1966)). In *Ferguson* the court held that permissible methods of impeachment are more liberal in sex offense cases than generally. *Accord* State v. Yates, 239 Or. 596, 399 P.2d 161 (1965) (it is preferred that jury be instructed of "danger" of convicting defendant on uncorroborated testimony of prosecutrix).

3. 3A J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 924a, at 736-47 (rev. ed. 1970) [hereinafter cited as WIGMORE, EVIDENCE]. [Ed. note: All references to Wigmore's treatise will be to volume 3A unless otherwise indicated.]

4. "[B]oth cultural and personal factors combined to cause everyone, including Freud himself at times, to welcome the idea that reports of childhood sexual victimization could be regarded as fantasies. This position relieved the guilt of adults. . . .

men prided themselves on their rationality and objectivity, and swore allegiance to the principles of impersonal, scientific inquiry, both violated those norms in their treatment of the sexual abuse of children. Both falsely reported relevant and important data.[5] Why these dominant intellectual figures put their professional reputations in jeopardy over this issue is a matter for speculation. Perhaps the sexual abuse of children struck a raw nerve for both men, leading them to deny what they could not rationally accept.[6] Perhaps they simply reflected a repressive Victorian attitude towards women and female sexuality.[7]

To the legal community, this would be no more than a historical curiosity if Wigmore's view had not been accepted and carried forward through several generations of legal scholarship. Even the perpetuation of this "error" would be of nothing more than minor consequence, a dart thrown at an overblown academic reputation, if Wigmore's view of the credibility of female witnesses in sex offense cases was not still widely accepted. However, Wigmore's views are still given deference with the result that many female children sexually abused by adults have been told by courts or prosecutors that the state and the law did not believe them and would not protect them or punish the offenders. For this reason alone, it is worthwhile to finally dispose of Wigmore's assertions in section 924a.

This section of the treatise on evidence is of historical interest for another reason. Wigmore's reliance upon outside testimony was an early example of the law's misuse of purportedly objective

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[B]oth Freud and his followers oversubscribed to the theory of childhood fantasy and overlooked incidents of actual sexual victimization in childhood." J. Peters, *Children Who Are Victims of Sexual Assault and the Psychology of Offenders*, 30 AM. J. PSYCHOTHERAPY 398, 401 (1976) [hereinafter cited as Peters, *Children Who Are Victims*].

5. "Freud himself admitted to suppressing the fact of a father as a molester in two cases he reported in 1895." *Id.* at 402; *see also* F. RUSH, THE BEST SECRET: SEXUAL ABUSE OF CHILDREN (1980) [hereinafter cited as RUSH, BEST SECRET]; F. Rush, *The Freudian Cover-Up*, 1 CHRYSALIS 31 (1977) [hereinafter cited as Rush, *Cover-Up*]; *see also* R. Blumenthal, *Did Freud's Isolation, Peer Rejection Prompt Key Theory Reversal?*, N.Y. Times, Aug. 25, 1981, § C, at 1, col. 1.

If Freud actually, systematically repressed details of sexual trauma experienced by his patients in favor of a theory based upon hypothesized patient fantasy, and the cited texts seem to support this conclusion, a major revision of psychoanalytic theory would be necessary.

6. At least one scholar believes Freud was unwilling to credit his patients' accounts of sexual abuse by a father because he was ashamed of certain facts concerning his own father's sexual behavior. *See* M. BALMARY, FREUD AND THE HIDDEN FAULT OF THE FATHER (N. Lukacher trans. 1982); *see also* R. Blumenthal, *Scholars Seek the Hidden Freud in Newly Emerging Letters*, N.Y. Times, Aug. 18, 1981, § C, at 1, col. 1.

7. "One source of [Freud's] hatred of America was that women were less subservient there, and Freud did not like the shift away from the old world conception of the relation between the sexes. He was one of the last defenders of the sexual double standard." P. ROAZEN, FREUD AND HIS FOLLOWERS 471 (1975).

psychiatric evidence. Wigmore relies upon academic sources which were never intended to support the propositions he put forward. The expert evidence offered in support of section 924a was arguably irrelevant and at least capable of a totally contradictory interpretation. As in later cases when psychiatric or psychological evidence has been introduced in courtrooms, controversy remains over what the evidence consisted of and whether it was "objective" at all. Wigmore's 1934 recommendation that the credibility of a female complaining witness in a sex offense case should always be examined by a physician or psychiatrist is a strange precursor to later and more flagrant examples of the use and abuse of psychiatric testimony in the courtroom. Section 924a is an early, fascinating preview of what has become a protracted and hostile conflict between the professions of law and psychiatry. Whose standards shall take precedence? What is the appropriate role for medical and psychiatric opinion in the guilt determination process? How objective or scientific is this evidence? What value does it have in the legal arena? These issues are all raised by Wigmore's use of scientific authority in section 924a, which was first published in 1934.

I. THE WIGMORE DOCTRINE

The single authority most often cited for the propostion that women and young girls are inclined to lie about or fantasize sexual assault is John Henry Wigmore's treatise, *Evidence in Trials at Common Law*.[8] Because this source remains highly influential, both the substance and structure of Wigmore's conclusions and the authorities upon which he relied will be examined in detail. In section 924a Wigmore recommends that the credibility of all complaining female witnesses in sex offense cases be examined by a psychiatrist or a physician because the report of sexual assault is probably false: *"No judge should ever let a sex offense charge go to the jury unless the female complainant's social history and mental makeup have been examined and testified to by a qualified physician."*[9] Wigmore particularly singles out young girls as being

8. WIGMORE, EVIDENCE, *supra* note 3 (ten volumes). This treatise comprises ten volumes and has been called the most famous single work in the field of law. Its author, John Henry Wigmore, was born in 1863 and, at the time of his accidental death in 1943, was the most famous legal scholar of his day. He was a law school dean, a professor of law, and the author of numerous textbooks and monographs. W.R. ROALFE, JOHN HENRY WIGMORE (1977) *passim*. *See also* W.R. Roalfe, *John Henry Wigmore—Scholar and Reformer*, 53 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 277, 283-87 (1962) (describing the publishing history of the treatise on evidence); R. Millar, *Pioneers in Criminology: John Henry Wigmore (1863-1943)*, 46 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 4 (1955).

9. WIGMORE, EVIDENCE, *supra* note 3, § 924a, at 737 (emphasis in original).

highly unreliable witnesses.[10]

The Wigmore doctrine is a bundle of related ideas and opinions, including the unequivocal recommendation of a compulsory medical examination of the prosecutrix as to credibility expressed as a proposed model statute. Although Wigmore does not address the question of incest specifically in this section, two of his examples of alleged pathological lying are incest cases. The general recommendation that the testimony of women and young girls be regarded with suspicion has been especially important in incest cases. These cases constitute a large proportion of all sexual offenses involving young girls.[11]

Section 924a of the treatise repeatedly puts forward the view that women, and especially young girls, are likely to imagine and falsify reports of sexual assault. Wigmore's recommendation that female witnesses undergo a credibility examination appeared for the first time in the 1934 supplement to the 1920 edition of the treatise. Section 924a was expanded in the 1940 edition to include a 1937-38 American Bar Association committee report.[12] The 1940 edition of the treatise became, after Wigmore's death in 1943, the final edition. While some editors have updated and changed some sections of the treatise, it seems to be the editorial policy to change as little of the original as possible. The latest 1970 revised edition leaves section 924a unchanged except for the addition of annotations to recent cases and a brief statement concerning recent developments barring evidence of the complainant's prior sexual conduct.[13] Current citations to section 924a, therefore, are misleading because the 1970 publication date gives no indication of when the section was actually written. In fact,

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10. *Id.* at 736.

11. *See* Peters, *Children Who Are Victims*, *supra* note 4 (reporting the results of research concerning a large population of victims of sexual assault who were under the age of twelve at the time of the offense). According to another commentator:

> The stereotype of the molester as a mysterious stranger who engages in fleeting, non-harmful, touching of children generally is not accurate. Although minimal reporting of child molestation makes accurate classification somewhat uncertain, it appears that almost one-third of molesters are strangers to the victims, more than one-third are non-family members known to victims (neighbors, friends, coaches, youth workers, teachers, doctors, etc.) and almost one-third are family members (step-fathers, natural fathers, "live-in" boyfriends of the victim's mother, other relatives).

I. Prager, *"Sexual Psychopathy" and Child Molesters: The Experiment Fails*, 6 J. JUV. L. 49, 61 & nn.50-52 (1982) [hereinafter cited as Prager, *The Experiment Fails*].

12. *Report of the Committee on Improvements in the Law of Evidence*, 63 ABA ANNUAL REPORT 571-89 (1938) [hereinafter cited as *ABA Committee Report*], *reprinted in part in* WIGMORE, EVIDENCE, *supra* note 3, at 745-46.

13. "Many jurisdictions have now determined, by statute or by court decision, that evidence of a complainant's prior sexual conduct is not admissable by the defendent in order to prove consent by the complaining witness." WIGMORE, EVIDENCE, *supra* note 3, at 10, 1982 supplement.

section 924a was written prior to 1934 and has been included in later editions with little change. Wigmore's view seems to be directly derived from Freud and his early followers. His references to fantasy and especially his repeated use of the word "hysterical" suggest Wigmore was familiar with Freud's *Studies on Hysteria*.[14] His citation in the treatise to several works in the German language on psychopathology,[15] though none directly to Freud, and his general familiarity with European scholarship[16] also suggest Wigmore was at least acquainted with Freud's early work and theories. In section 924a, Wigmore cites extensively from outside authorities and documents. Experts from the fields of psychiatry and criminology are quoted at length,[17] and finally a section of the report from the American Bar Association committee is included.[18]

Wigmore argues for special tests and exceptionally broad rules of admissibility to impeach the credibility of the complaining female witness in a sex offense case. He unequivocally states that his concern is to protect innocent men from false charges: "One form taken by these complexes is that of contriving false charges of sexual offenses by men. * * * The real victim, however, too often in such cases is the innocent man . . . ."[19] His view remains influential because it appears to rely upon objective and impartial

14. J. BREUER & S. FREUD, STUDIES ON HYSTERIA (1893-95), *reprinted as* 2 THE COMPLETE WORKS OF SIGMUND FREUD (standard ed. 1955).

When Freud was developing his psychological theory, his closest friend and mentor was Wilhelm Fliess. The correspondence between the two men was published in English in 1954 under the title *The Origins of Psycho-Analysis*. Fliess was a nose and throat surgeon in Berlin. A monograph explaining his theories was published in German in 1897, entitled *Relations Between the Nose and the Female Sex Organs from the Biological Aspect*. "Fliess thought he had found a relation between nasal irritations and all kinds of neurotic symptoms and sexual irregularities. He diagnosed these ills by inspecting the nose and treated them by applying cocaine to 'genital spots' on the nose's interior. * * * Most of this was hailed by Freud as a major breakthrough in biology." M. Gardner, *Mathematical Games: Freud's Friend Wilhelm Fliess and His Theory of Male and Female Life Cycles*, SCIENTIFIC AM., July 1966, 108, 108-09.

"What probably appealed to Freud in the nasal reflex neurosis hypothesis was that Fliess related many of the symptoms presumably connected with nasal pathology to vasomotor disturbances of sexual origin, which [Fliess] treated and claimed to cure by the application of cocaine, a form of therapy based on Freud's cocaine research." M. SCHUR, FREUD: LIVING AND DYING 95 (1972). Fliess' hypothesis later lost its appeal to Freud and, in fact, seems to have become something of an embarassment. "He was staggered by the news that [his letters to Fliess] had been preserved, and he begged the owner . . . not to permit their publication." Gardner, *supra*, at 108. Fliess' major work, *The Rhythm of Life: Foundations of an Exact Biology*, published in Leipzig in 1906, has been referred to as "a masterpiece of Teutonic crackpottery." *Id.* at 109.

15. *See* WIGMORE, EVIDENCE, *supra* note 3, at 746 n.4.
16. *See infra* notes 101-03 and accompanying text.
17. WIGMORE, EVIDENCE, *supra* note 3, at 740-45.
18. *Id.* at 745-46.
19. *Id.* at 736.

expertise[20] and because it reinforces societal prejudices. Wigmore's opinions on this subject have been frequently echoed and repeated by later legal scholars.[21] If there is a single source of the law's concern with false reports in sex offense cases, it is the Wigmore doctrine. Wigmore's professional prominence at the time the doctrine was introduced, the status of the treatise itself, and Wigmore's domination of the field of evidence resulted in the doctrine being accorded special respect by the law. The appearance of the Wigmore doctrine in the second and third editions of the treatise and, more importantly, its apparent endorsement by authorities whose experience and judgment seemed beyond the competence of lawyers, additionally explains the long life of this doctrine.

Furthermore, the rhetorical power of section 924a of the treatise should not be underestimated. Wigmore writes as a man convinced, apparently so convinced that he actually suppressed factual evidence contradicting his assertions.[22] The Wigmore doctrine is not put forward as one man's opinion. The tone of the treatise implies the doctrine is nothing more than the objective presentation of a body of "scientific fact," above dispute in the adversary process. Yet upon closer examination, Wigmore's "recommendations" are phrased in emotional, hyperbolic language which is still quoted by courts forty years later.

Surprisingly, the fact is that the Wigmore doctrine has never been challenged on its face in the legal literature, although recent statutory enactments have announced a change in policy on this

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20. *See id.* at 740-45.

21. *See, e.g.*, M. PLOSCOWE, SEX AND THE LAW 175 (rev. ed. 1951):

> There are few crimes in which false charges are more easily or confidently made than rape. Rape charges are sometimes brought for the purposes of blackmail; sometimes they are the product of the psychopathology of the complainant. *Sometimes they rest on pure fantasy. Unfounded accusations of rape are particularly apt to come from young children* . . . . [Emphasis added.]

See also Comment, *The Corroboration Rule and Crimes Accompanying a Rape*, 118 U. PA. L. REV. 458, 460 (1970):

> Women often falsely accuse men of sexual attacks to extort money, to force marriage, to satisfy a childish desire for notoriety, or to attain personal revenge. Their motives include hatred, a sense of shame after consenting to illicit intercourse and delusion . . . .

According to one commentator the need for corroborative evidence in cases of sexual assault on children arises from deductions based on "extremely questionable assumptions," the first of which is "that complainants in these cases frequently make false reports." D. Lloyd, *The Corroboration of Sexual Victimization of Children*, in NAT'L LEGAL RESOURCE CTR. FOR CHILD ADVOCACY & PROTECTION, ABA, CHILD SEXUAL ABUSE AND THE LAW 103, 104 (1981) (footnote omitted) [hereinafter cited as Lloyd, *Corroboration*].

22. *See infra* notes 47-77 and accompanying text.

issue.[23] Even the California Supreme Court, which discussed section 924a in considerable detail in *Ballard v. Superior Court*, did not question or look behind the authorities cited.[24] Only recently have statutory and judicial developments affecting the general presentation of evidence in rape cases made any inroads against the doctrine and against general societal prejudices against the victims of sexual assault.[25] It is time to look closely at Wigmore's

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23. California seems to be the only state to have announced by statute a general policy prohibiting the introduction of psychiatric or psychological evidence for the purpose of assessing the credibility of a witness. *See* CAL. PENAL CODE § 1112 (Deering's Supp. 1982). This statute was lobbied through the legislature by feminists seeking to counteract prejudicial attitudes towards victims of sexual assault such as those expressed in Wigmore's section 924a. However, this provision is not crossreferenced in the rape evidence statutes. Many prosecutors and defense attorneys, therefore, may be unaware of it.

24. 64 Cal. 2d 159, 410 P.2d 838, 49 Cal. Rptr. 302 (1966). A similar result was reached in State v. Looney, 294 N.C. 1, 240 S.E.2d 612 (1978), which criticizes Wigmore's section 924a, but fails to analyze in detail the evidence or arguments advanced by Wigmore:

> Obviously, there are types of sex offenses, *notably incest, in which, by the very nature of the charge*, there is grave danger of completely false accusations by young girls of innocent appearence but unsound minds, susceptible to sexual fantasies and possessed of malicious, vengeful spirits.
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> [I]n the earlier decisions, the practice [of court-ordered psychiatric credibility examinations] was largely limited to cases of sex offenses and to examination of the alleged victim. Apparently, these courts were persuaded by the Wigmore view that *adolescent females are particularly subject to mental unsoundness* and, therefore, likely to be guilty of pathological perjury in connection with accusations of sexual abuse practised upon them.

Id. at 18, 240 S.E.2d at 622 (emphasis added). *Accord* Forbes v. State, 559 S.W.2d 318 (Tenn. 1977).

For an excellent discussion of *Ballard* and the rationale behind court-ordered psychiatric examination of rape victims, see R. O'Neale, *Court Ordered Psychiatric Examination of a Rape Victim—or How Many Times Must a Woman Be Raped?*, 18 SANTA CLARA L. REV. 119 (1978) [hereinafter cited as O'Neale].

25. *See, e.g.*, CAL. EVID. CODE §§ 782, 1103 (Deering's Supp. 1982); CAL. PENAL CODE § 1112 (Deering's Supp. 1982); PA. STAT. ANN. tit. 18, § 3106 (Purdon's Supp. 1982) ("The credibility of an alleged victim of [a sexual] offense . . . shall be determined by the same standard as is the credibility of an alleged victim of any other crime").

Recent cases in some jurisdictions have been critical of the Wigmore doctrine. *See, e.g.*, Ballard v. Super. Ct., 64 Cal. 2d 159, 410 P.2d 838, 49 Cal. Rptr. 302 (1966); State v. Romero, 94 N.M. 22, 606 P.2d 1116 (1980) (citing O'Neale, *supra* note 24) (prosecution under New Mexico rape reform legislation; court cited public policy objectives of such legislation); People v. Souvenir, 373 N.Y.S.2d 824 (Crim. Ct. City of N.Y. 1978) (rejecting defendant's request for psychiatric examination of rape victim as to credibility): "By its repeal of section 130.15 of the Penal Law . . . which required corroboration for sex offenses, the legislature clearly intended that this category of crimes be treated just like any other." *Id.* at 827 (citing N.Y. PENAL LAW § 130.16). *See also* Forbes v. State, 559 S.W.2d 318 (Tenn. 1977).

Accord 1982 CAL. STAT. ch. 98 (adding CAL. PENAL CODE § 1346, permitting videotaping of testimony of sexual crime victim under 15 years of age to preserve testimony and prevent additional emotional trauma to victim).

scientific evidence and the reasons for his conclusion that the testimony of young girls alleging sexual assault is probably false.

II. WIGMORE'S SOURCES OF AUTHORITY

Wigmore relies upon four different sources of authority. The most important source is the 1915 monograph *Pathological Lying, Accusation and Swindling* by William and Mary Healy.[26] He also cites, without documenting his own role in its preparation, the report of the American Bar Association Committee on the Improvements in the Law of Evidence.[27] The treatise implies that this report and Wigmore's own view are totally independent. Wigmore quotes Otto Mönkemöller, a German scholar,[28] and includes three letters from practicing psychiatrists of the 1930's.[29] The letters may well have been solicited by the ABA committee or for publication in the treatise.[30] Wigmore offers these four authorities as additional, independent evidence supporting the view that young girls are likely to lie about and fantasize incidents of sexual assault. Wigmore argues the combined weight of these authorities justifies a per se rule requiring a medical examination as to the complainant's credibility in every sex offense case.

The arguments for a required medical examination are also arguments for corroboration requirements and for special proof requirements in cases of rape and sexual abuse of young girls. Even though widespread adoption of Wigmore's proposed statute re-

26. W. HEALY & M. HEALY, PATHOLOGICAL LYING, ACCUSATION AND SWINDLING (1915) [hereinafter cited as HEALY, PATHOLOGICAL LYING], *reprinted in part in* WIGMORE, EVIDENCE, *supra* note 3, at 740-43. The Healys' monograph was published under the auspices of the American Institute of Criminal Law and Criminology and the Journal of Criminal Law and Criminology, both of which were founded by Wigmore.

27. *ABA Committee Report*, *supra* note 12.

28. O. MÖNKEMÖLLER, PSYCHOLOGY AND PSYCHOPATHOLOGY OF TESTIMONY (1930).

29. *See* WIGMORE, EVIDENCE, *supra* note 3, at 744-46. The psychiatrists and their 1933 institutional affiliations are identified as follows: Dr. Karl A. Menninger, Director of the Menninger Clinic, Topeka, Kansas; Dr. William S. White, Superintendent of St. Elizabeth's Hospital, Washington, D.C.; and Dr. W.F. Lorenz, Director of the University of Wisconsin Psychiatric Institute.

30. Repeated attempts to locate a letter from Wigmore which might have been a solicitation of these letters have been unsuccessful. The author has tried to document the source of these letters, but neither the Menninger Clinic nor Northwestern School of Law Library, the repository of Dean Wigmore's papers, have replied to inquiries on the subject. It is not unlikely that the letters were solicited by either Wigmore or Dr. Harold Hulbert in connection with Wigmore's work on the ABA committee report or for the 1934 edition of the treatise. A footnote in the current edition indicates that the letters were "obtained through the courtesy of Dr. Harold S. Hulbert, consulting psychiatrist, Chicago." WIGMORE, EVIDENCE, *supra* note 3, at 744 n.3. Dr. Hulbert was associated with Wigmore's American Institute of Criminal Law and Criminology and was an early champion of the use of psychiatric and psychological evidence in the courtroom. *See infra* note 115 (discussing Hulbert).

quiring a medical examination as to credibility is no longer an issue, Wigmore's attitudes of suspicion, distrust, and denial, when confronted with a sexual assault charge by a young girl, are still common. Special proof requirements in sex offense cases persist and are embedded in the common law. It is an indication of the continued strength of the myth that "false" reports are prevalent that some states have carved out special exceptions from the rape evidence reform statutes in cases involving prior "false" complaints.[31]

Partly because such attitudes still linger in the judicial system, disposing of special corroboration requirements in sex offense cases involving minor victims has been more difficult than eliminating such requirements when the victims are adults. In *Fitzgerald v. United States*,[32] for example, an appellate court in 1982 reversed a conviction for assault with intent to rape a twelve-year-old victim because of the absence of "legally sufficient," special corroborating evidence. The *Fitzgerald* court relied on a 1952 source which seems to paraphrase Wigmore's section 924a:

> Courts have traditionally been skeptical of sexual charges by children, no doubt because "[i]t is well recognized that children are more highly suggestable than adults. Sexual activity, with the aura of mystery that adults create about it confuses and fascinates them. Moreover, they have, of course, no real understanding of the serious consequences of the charges they make . . . ." *To minimize the danger of false accusations*, the corroboration requirement imposes two safeguards in regard to infant

31. *See, e.g.*, MINN. STAT. ANN. § 609,347 (West Supp. 1980) (an exception permitting introduction of evidence of prior sexual conduct of victim with prior "fabricated" charge); VT. STAT. ANN. tit. 13, § 3255 (Supp. 1979),(exception for specific instances of past "false" allegations); WIS. STAT. ANN. § 972.11 (West Supp. 1980) (exception for prior "untruthful" allegations). *But see* C. HURSCH, THE TROUBLE WITH RAPE 14 (1977) (reporting that rape complainants of 16 or more years of age give false reports in only 4% of cases; those under 16 years, 5%; and that complainants of child molestation give false reports in only 6% of cases).

How the "falsehood" or "fabrication" of previous accusations would be proved presents interesting problems. Neither acquittal nor dismissal necessarily implies the charges were false. It has been reported, based on studies of four hundred cases of sexual assault in California, that the "unfounding" of rape complaints by police action has generally been based on factors other than the likelihood no crime occurred, in spite of a specific FBI directive to the contrary. *See* O'Neale, *supra* note 24. *But see* People v. Randle, 130 Cal. App. 3d 286, 181 Cal. Rptr. 745 (Ct. App. 1982) (appeal from conviction for forcible oral copulation; court of appeal held trial court erred in excluding evidence prosecutrix had falsely complained of being purse snatching victim on two prior occasions; court did not discuss issue of how "falsehood" was proved).

Although recent efforts to reform the rape laws have made a difference, courts still put special and extraordinary burdens upon the prosecution in sex offense cases. *See* People v. Mayberry, 15 Cal. 3d 143, 542 P.2d 1377, 125 Cal. Rptr. 745 (1975), *discussed in* L. Bienen, *Mistakes*, 7 PHIL. & PUB. AFF. 224 (1978).

32. 443 A.2d 1295 (D.C. App. 1982).

complainants.[33]

Wigmore's influence is still strong, in spite of the fact that his use of authority and his presentation of evidence substantially undermines the logic of his position.

A. The Case Histories from the Healys' Monograph

Initially, Wigmore's extensive quotations from the case studies in the Healys' monograph, *Pathological Lying, Accusation and Swindling*,[34] appear to support all aspects of the Wigmore doctrine and its underlying assumptions about the unreliability of female testimony in sex offense cases. The detailed passages quoted from documented case histories, as well as the Healys' supporting statements, seem to buttress Wigmore's view that young females are generally untrustworthy witnesses who demonstrate the danger and pervasiveness of pathological lying. These citations to purported cases of pathological lying seem to demonstrate a need for an examination by professionals trained in detecting such deception on the part of wayward and perverted young females.

The Healys' monograph is a selection of cases taken from a population of juveniles whose delinquencies are defined in part as "false accusations," "running away," "sex immorality" and "sex affairs" in the cases of females.[35] Before examining the Healys'

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33. *Id.* at 1299 (quoting GUTTMACHER & WEIHOFEN, PSYCHIATRY AND THE LAW 374 (1952), and citing *The Rape Corroborative Requirement: Repeal Not Reform*, 81 YALE L.J. 1365, 1388-89 (1972)) (emphasis added). The two "safeguards" imposed by the court were (1) corroborative evidence that (2) convinces the jury "beyond a reasonable doubt that the victim's account of the crime was not a fabrication." *Id.* (quoting United States v. Gray, 477 F.2d 444, 445, 155 U.S. App. D.C. 275, 276 (D.C. Cir. 1973)).

34. HEALY, PATHOLOGICAL LYING, *supra* note 26. William Healy was a physician who, in collaboration with others, wrote more than a dozen books on the subject of juvenile delinquency and the causes of crime. Healy was born in 1869 and received his medical degree in 1900. He had gone to Germany for his university education and, like Wigmore, was greatly influenced by German scholarship of the late nineteenth and early twentieth centuries. The work of Healy and his collaborators on mental testing is of particular historical interest. They were unusual for their time in that they actually collected data on large numbers of cases.

35. The methodology used by Healy in his study of one thousand juvenile delinquents in Chicago is described in detail, together with the "mental" tests administered to the subjects, in W. HEALY, THE INDIVIDUAL DELINQUENT (2d ed. 1929). The study was originally published in 1915. The survey of one thousand "repeated" offenders was conducted during the years 1909-14. *Id.* at 127. For females, who made up 306 of the subjects, the largest category of offense was "sex offenses with the opposite sex" (180 of 306). Other offenses included running away (76 of 306), sleeping out nights (33 of 306), and false accusations (16 of 306). *Id.* at 140-43. For males, the category "sex offenses with the opposite sex" accounted for only thirty-three of 694 offenses. A very different standard existed for male, as compared with female, juvenile delinquency. *Id.* A number of Healy's categories of delinquency would not be accepted today, *e.g.*, bad temper, smoking, begging, loafing (defined as "marked cases of refusal to work while living at home"), and pretending to be employed. Other

work in detail, two extrinsic criticisms of Wigmore's logic are immediately apparent. First, he generalizes about "normal" women and girls on the basis of observed behavior of a selected population of young females categorized as "abnormal" or "delinquent." Second, the authority cited by Wigmore as support for his proposition are cases chosen from a collection of cases preselected to prove the existence of pathological lying as a defined character disorder.

The cases in the Healys' monograph on pathological lying were culled from the authors' more ambitious study of one thousand juvenile delinquents who were referred to the Chicago courts at the turn of the century.[36] If ever there were examples of false reports or lies concerning a sexual assault, they presumably would be found here. Not only are the cases from an "abnormal" or delinquent population, but these cases are supposed to be particularly illustrative of a disorder termed "pathological lying."[37] However, the Healys themselves concluded from their research that out of one thousand juvenile delinquents, "it would be safe to say that [only] 8 or 10 of the 1000 were genuine cases of pathological lying *according to our definition*."[38] If only eight to ten of the one thousand cases within the entire study of juvenile delinquency were "genuine," then the monograph must contain a majority of cases which are not "genuine," whatever the Healys may have meant by

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categories sound more familiar, *e.g.*, alcoholism and incorrigibility. *Id.* Most, but not all, of the twenty-seven cases described in *Pathological Lying, Accusation and Swindling* are taken from the one thousand reports in this earlier study, *see* HEALY, PATHOLOGICAL LYING, *supra* note 26, at 5 (describing methodology), 15-41 (discussing previous studies), and 249-78 (giving the Healys' conclusions).

36. W. HEALY, THE INDIVIDUAL DELINQUENT (1915); *see supra* note 35.

37. The supposed condition known as "pathological lying" is no longer recognized as a legitimate diagnostic category of character disorder. *See* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (3d ed. 1980); *see also* A. Beck, *Reliability of Psychiatric Diagnosis: I. A Critique of Systematic Studies*, 119 AM. J. PSYCHIATRY 210 (1962).

38. HEALY, PATHOLOGICAL LYING, *supra* note 26, at 5. In *The Individual Delinquent*, the term "pathological lying" is not used. "Lying" and "false accusation" were considered categories of offenses for both females and males only when "notorious" or "very serious." W. HEALY, THE INDIVIDUAL DELINQUENT 143 (1915). Healy defined "pathological lying" as follows: "Pathological lying is falsification entirely disproportionate to any discernible end in view, engaged in by a person who, at the time of observation, cannot definitely be declared insane, feebleminded, or epileptic . . . . HEALEY, PATHOLOGICAL LYING, *supra* note 26, at 1. Healy believed that pathological lying was causally related to genetics, cholera, epilepsy, hysteria, and "lower class" origins. Healy also expressed the view that "constitutional inferiors" should be socially removed by proper colonization. Masturbation, in Healy's view, was a causal factor in criminality generally and often related to excessive lying. He also asserted that excessive tea drinking and dental defects were causally related to delinquency. Therapy and treatment of youthful pathological liars consisted of putting them in an appropriately strict environment and prescribing a "quiet country life." *See* HEALY, PATHOLOGICAL LYING, *supra* note 26, at 249-77.

that term. The compounded methodological error is obvious: questionable cases of pathological lying specially selected for a monograph entitled *Pathological Lying, Accusation and Swindling* are unconvincing proof of the proposition that the credibility of *all* female complainants in sex offense cases should be subject to special examination by a physician because it is likely the complaint is fabricated. Why should these dubious generalizations concerning the behavior of a selected population of "delinquent" juveniles be applicable to a population of "normal" individuals, juveniles or adults? Assuming for the moment that the Healys identified some lying juveniles, is this probative of the proposition that all women and young girls should be considered pathological liars when they allege sexual abuse? Of course not, yet this is just the proposition Wigmore puts forward. Upon closer examination an even more surprising fact emerges. Even these preselected, presumably biased examples of "pathological lying" among female juvenile delinquents from the turn of the century do not support the proposition that these young girls whose cases are presented in the treatise fabricated or fantasized a charge of sexual assault. These very cases, which were chosen to illustrate "pathological lying," do not themselves seem to be clear instances of "false reports of sexual assault" or "fantasies." One might have expected these cases specially selected by Wigmore would at least illustrate his proposition, but they do not. Apparently, however, Wigmore was so convinced of the truth of his own position that he omitted from the treatise evidence to the contrary.

Wigmore asserts that some female juvenile delinquents exhibit behavior termed "pathological lying,"[39] including falsely accusing men of sexual attacks. Therefore, he concludes, all normal female complainants in any sex offense, but especially young girls, should be subjected to a special psychiatric examination as to credibility.[40] Even if the methodological and diagnostic framework of the Healys' monograph on pathological lying were valid today,[41] Wigmore's proposition could not stand. There is no rational nexus between a generalization concerning a deviant, selected population of juveniles and a recommendation addressed to cases involving all normal women, children and adults.

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39. The exact origin of Wigmore's use of this term is unclear. He probably took it from the Healys' monograph, HEALY, PATHOLOGICAL LYING, *supra* note 26; *see supra* note 38. The term is no longer considered a valid psychiatric diagnosis, *see supra* note 37.

40. WIGMORE, EVIDENCE, *supra* note 3, at 736-37.

41. The methodology of Healy's original study is discussed in W. HEALY, THE INDIVIDUAL DELINQUENT 126-65 (2nd ed. 1929); *see also supra* note 35. The methodology of the later study is described in HEALY, PATHOLOGICAL LYING, *supra* note 26, at 5; *see also supra* note 38.

Although Wigmore recommended the psychiatric examination for all female complainants in sex offense cases, his statements have been particularly influential in cases of incest which comprise a large proportion of all sexual assaults on children.[42] In a case of father-daughter incest, if there is no immediate admission of guilt by the father or corroborative testimony from other family members, the judge or prosecutor, relying upon Wigmore, may transpose vague Freudian concepts regarding Oedipal complexes into a conclusion that the victim's complaint is based upon fantasy, or that criminal prosecution is being used for some ulterior purpose. The seemingly unimpeachable sources cited by Wigmore support a whole-scale denial of the event.

Allegations of an incestuous assault are abhorrent and difficult for a judge, or anyone, to confront.[43] Wigmore's warning comments concerning "excessive [and] perverted sexuality"[44] among young girls seem to be particularly appropriate in an incest case where there is typically a history of continuing abuse and often sexual acting out on the part of the victim, typically a daughter or step-daughter.[45] If Wigmore's general comments concerning per-

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42. *See* Prager, *The Experiment Fails*, *supra* note 11, at 61.

43. For an additional discussion of present and past cultural attitudes towards child molesters and incest offenders, see Prager, *The Experiment Fails*, *supra* note 11 (suggesting these offenders have been treated "not as criminals" and have received punishments more lenient than given rapists). *But see* R. Wolfe & D. Marino, *A Program of Behavior Treatment for Pedophiles*, 13 AM. CRIM. L. REV. 69, 69 (1975): "The child molester has long been the object of special treatment by our criminal justice system. His crime is more frequently prosecuted than analogous sexual deviancy and is routinely met with longer sentences than many more serious crimes."

44. WIGMORE, EVIDENCE, *supra* note 3, at 737.

45. It is reported that the typical case of incest involves two years of constant sexual activity and that the psychological effects on the child are "usually devastating." R. GEISER, HIDDEN VICTIMS: THE SEXUAL ABUSE OF CHILDREN 46-47 (1979). According to another researcher: "Sexual relations with a parent are regarded as potentially more traumatic than sexual relations with a stranger . . . . [An] ongoing sexual relationship with a victim involving repeated contacts over a period of time is seen as potentially more traumatic than a single instance of sexual contact." Groth, *Guidelines for the Assessment and Management of the Offender*, in SEXUAL ASSAULT OF CHILDREN AND ADOLESCENTS 28 (1978).

The inexperienced clinician should be warned that incestuous offenders characteristically assault siblings serially:

> The male offender's behavior is repetitive, persistent and predictable. The sexual activity begins when the child is young (ages 6 to 10 or earlier) and often does not involve actual penetration until the child has been conditioned to accept his advances . . . . The most problematic phenomenon is that if he has molested one girl in the family, he will most likely molest others. Thus, if the court or welfare board, etc., removes the identified child, the remaining female children are already victims; if the offender is removed from the home, he will probably find another woman with young female children and repeat the pattern of sexual abuse.

J. Spencer, *Father-Daughter Incest: A Clinical View from the Corrections Field*, 57 CHILD WELFARE 581, 585 (1978)

verted sexuality were not enough, two of the five case histories cited from the Healy monograph involved charges of incest by a young woman. Wigmore unequivocally states the charges are false: "Judging merely from the reports of cases in the appellate cases, one must infer that many innocent men have gone to prison because of tales whose falsity could not be exposed . . . ."[46] A judge or attorney who consults Wigmore will quickly come away with the impression that a young girl's charges of incest are particularly likely to be false reports.

How can seemingly unequivocal evidence from documented case histories of sixty-five years ago now be rebutted? Even if the Healys' methodology or theory were incorrect, perhaps they documented some actual case histories of false reports. Should the cases cited in Wigmore simply be dismissed as examples of what were in fact a small number of false reports? They should not. On the contrary, a closer examination reveals the most astonishing aspect of the Healy case histories, especially in the allegations of incestuous assault: in each case some actual sexual activity is independently corroborated by the facts presented in the Healys' case reports.

The cases cited by Wigmore from the Healys' monograph are replete with external, objective, physical evidence that real sexual activity with these children took place. Even the meager information in the Healys' monograph supports the inference that these are not "false reports," although these cases are cited by Wigmore and the Healys as examples of "pathological lying" by unreliable female witnesses. Moreover, in some of these cases Wigmore actually omitted objective, corroborative evidence supporting the inference that sexual activity with a young child actually took place.[47] In other cases the facts presented by the Healys suggest an actual sexual incident occurred or do not contradict such a hypothesis.[48] In two cases, the Healys themselves put forward the view that sexual incidents actually occurred, although they remain committed to the characterization of the cases as examples of "pathological lying." Wigmore also edited out, without elipses, these corroborative statements of the Healys when he reprinted his edited versions of the case histories.[49]

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46. WIGMORE, EVIDENCE, *supra* note 3, at 736.

47. *See infra* notes 50-69 and 76-79.

48. *See infra* notes 50-79 and accompanying text.

49. With regard to case eighteen, a seven-year-old child, *see infra* notes 66-69, 73-75 and accompanying text, the Healys noted, "We always felt it a possibility that some member of her own family was guilty and that was the reason she told so many different tales about it." HEALY, PATHOLOGICAL LYING, *supra* note 26, at 197. With regard to the child called "Bessie," *see infra* notes 51-65 and accompanying text, the Healys reported that she slept in the same bed with her father and brother and that

Two dramatic examples where Wigmore omitted, without acknowledgment, corroborative facts involved charges of incest.[50] The first case involved a nine-and-a-half-year-old female referred to as "B" by Wigmore and as "Bessie" by the Healys. Both Wigmore and the Healys present this case as an example of pathological lying by a child who falsely accused her father and brother of incest.[51] "B" convinced a number of women and a judge that the charge of incest was true by demonstrating "the most extensive acquaintance with many kinds of pervert sex practices."[52] Nonetheless the Healys conclude: "The case illustrated well the fallibility of a young girl's accusations coming even from the lips of a normally bright and affectionate daughter or sister."[53]

The facts presented in the Healys' monograph, however, are a classic example of patterns of incest.[54] Although both the Healys and Wigmore repeatedly assert the case represents a girl's fantasy and false reporting, the case description is typical of recent reports of incest which have come to hospitals and social workers.[55] Equally typical is the failure of those in authority to offer any help.[56] The Healys ignored the corroborative physical evidence in their own case history because they were convinced the case demonstrated pathological lying. Wigmore, however, actually re-

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"[t]he credible substance of [her] story elaborately told upon inquiry into her life history was that she certainly had had many sex experiences." *Id.* at 184-85. When Wigmore edited these case histories he omitted these corroborative statements. *See* WIGMORE, EVIDENCE, *supra* note 3, at 742-43.

50. *Compare* HEALY, PATHOLOGICAL LYING, *supra* note 26, at 182-83 (case no. 16) [*and*] 195-97 (case no. 18) *with* WIGMORE, EVIDENCE, *supra* note 3, at 741-42.

51. HEALY, PATHOLOGICAL LYING, *supra* note 26, at 187; WIGMORE, EVIDENCE, *supra* note 3, at 742.

52. HEALY, PATHOLOGICAL LYING, *supra* note 26, at 185; WIGMORE, EVIDENCE, *supra* note 3, at 742.

53. HEALY, PATHOLOGICAL LYING, *supra* note 26, at 185; WIGMORE, EVIDENCE, *supra* note 3, at 742.

54. As one commentator notes, clinicians now recognize:

> Since knowledge through observation or hearing is the basis of fantasy, children are unlikely to fantasize about sexual activity using adult terms because sexual matters are not generally discussed between parents and children in an informative way. The child who can describe an adult's erect penis and ejaculation has had direct experience with them.

Lloyd, *Corroboration, supra* note 21, at 110 (footnotes omitted).

55. *See* Lloyd, *Corroboration, supra* note 21, at 109-11 (citing S. Mele-Sernovitz, *Parental Sexual Abuse of Children: The Law as a Therapeutic Tool for Families*, in LEGAL REPRESENTATION OF THE MALTREATED CHILD 70 (1979) (describing the "sexually abused child syndrome")); *see also* Peters, *Children Who Are Victims, supra* note 4 (hospital reports); HERMAN, *supra* note 2 (case reports);' D. FINKELHOR, SEXUALLY VICTIMIZED CHILDREN (1979) (statistical data).

56. The inability or unwillingness of social service personnel to help may be based on several factors ranging from disbelief in the legitimacy of the charge to a sincere belief that criminal prosecution is counterproductive and harmful to the child. *See* ILL. LEGIS. INVESTIGATING COMM'N, CHILD MOLESTATION: THE CRIMINAL JUSTICE SYSTEM 91-94 (1980); Prager, *The Experiment Fails, supra* note 11.

moved the corroborative, objective facts which contradicted his unequivocal assertion that this was an example of false reporting by a young girl.[57] The details make up a convincing and familiar portrait of incest, denial by the offenders, and compulsive sexual behavior by a girl of nine who alleged she had been repeatedly molested by her father and older brother, and subsequently by other adult men.[58] A closer look at the Healys' report of this case indicates just how far Wigmore was willing to depart from the norms of scientific objectivity.

Wigmore notes that the nine-year-old "B" had vulvitis, a physical symptom of sexual contact.[59] However, he then systematically edited out facts and information suggesting that sexual acts involving this young girl actually took place. The Healys' monograph includes several important facts which Wigmore omitted. First, this nine-year-old's genitals were so swollen a physician was unable to make a gynecological examination to determine whether her hymen was intact.[60] The Healys indicate that repeated bacteriological tests did not confirm gonorrhea. They suggest that the vulvitis was caused by a non-specific infection from masturbation with various foreign objects which the girl had admitted using. However, the Healys also admit another possibility: "Perhaps it was partly the result of perversions which, judging by her knowledge of them, had been practised by others on her."[61] The father "treated" the child locally for her gynecological infection.[62] The mother was dead; the father was an alcoholic.[63] The child seemed to describe in detail acts of intercourse, acts of oral-genital contact, and acts of penetration with an object.[64] Wigmore edited out the references to trauma or infection in the genital area and omitted the quoted statement.[65]

In the second case Wigmore again deliberately omitted facts which now would be seen as corroborating the child's allegations

57. *Compare* HEALY, PATHOLOGICAL LYING, *supra* note 26, at 182-87 *with* WIGMORE, EVIDENCE, *supra* note 3, at 742.

58. *See* Lloyd, *Corroboration*, *supra* note 21; *see also* CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SRVCS., SEXUAL ABUSE OF CHILDREN: SELECTED READINGS (1980).

59. WIGMORE, EVIDENCE, *supra* note 3, at 742 (citing HEALY, PATHOLOGICAL LYING, *supra* note 26, at 182).

60. HEALY, PATHOLOGICAL LYING, *supra* note 26, at 186. Such findings of genital trauma are now recognized as symptomatic of child sexual abuse, *see infra* note 72.

61. *Id.*

62. *Id.*

63. *Id.* at 184, 187.

64. *Id.* at 184-86, *quoted in part supra* note 4. *See* Lloyd, *Corroboration*, *supra* note 21, at 110, *quoted supra* note 54 (noting that such descriptions by children indicate the actual occurrence of sexual experiences).

65. *Compare* HEALY, PATHOLOGICAL LYING, *supra* note 26, at 186 *with* WIGMORE, EVIDENCE, *supra* note 3, at 742.

of sexual assault. The case summary related by the Healys is short and bare of facts: "Little girl of 7 makes false charge of sex assault against boy in same institution. She is later found to be an excessive liar and to steal. Causative factors: (a) attrociously immoral home environment, (b) early sex experiences, (c) local irritation from active gonorrhea."[66] Wigmore edited out three separate references to the fact that this seven-year-old child was suffering from a diagnosed, confirmed case of active gonorrhea at the time of the report: once in the introductory summary of the case and twice in the text.[67] Wigmore also omitted remarks by the Healys which indicate the authors themselves believed the child was sexually assaulted in her home.[68]

Given the fact of a seven-year-old with an active case of venereal disease, it is difficult to comprehend Wigmore's and the Healys' interpretation of this case as an example of a child fantasizing sexual assault. Venereal disease in children is routinely reported to hospitals and is almost always caused by sexual abuse by an adult, often a parent or member of the household.[69]

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66. HEALY, PATHOLOGICAL LYING, *supra* note 26, at 195.

67. *See* WIGMORE, EVIDENCE, *supra* note 3, at 742-43. The edited version in the treatise omits from the summary of the medical history the fact of diagnosed gonorrhea. The "causative factors" are also edited out of Wigmore's presentation of the summary. Gonorrhea is also mentioned in the Healys' physical description of the child:

> She was a small, bright-eyed child. General physical conditions decidedly good. No sensory defect. Well shaped head. Weight 55 lbs., height 4 ft. *Active gonorrheal vulvovaginitis.*

HEALY, PATHOLOGICAL LYING, *supra* note 26, at 195 (emphasis added). The Healys also note that the child "was long treated in a public hospital for her gonorrhea." *Id.* Wigmore edited out each of these references to gonorrhea, the latter with no elipsis or other indication of omitted material. *See* WIGMORE, EVIDENCE, *supra* note 3, at 742-43.

68. *See supra* note 49.

69. According to one report:

> Many physicians are aware of the possibility but uncomfortable with the reality that children may acquire gonorrhea through sexual contact. Often, infected children will be adequately diagnosed and treated; however, the source of their infection may not be questioned. When the source is not identified, the child remains at risk of reinfection. Many lay people are also uncomfortable with this reality and prefer to believe that children can acquire venereal disease through contaminated bed or bath linens . . . . In 1965, Branch and Paxton published the results of their study based upon interviews with gonorrhea-infected children and/or their families. In this study, 96 percent (43 of 45) of the children aged one through nine and 99 percent (114 of 115) of the children aged ten through fourteen were found to have a history of sexual exposure to someone infected with the disease . . . . Often the presence of venereal disease in a child may indicate inappropriate sexual contact between the child and an adult. This possibility cannot be ignored. It must be considered and investigated by an appropriate agency.

A. Knasel, *Venereal Disease in Children*, in CHILREN'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SRVCS., SEXUAL ABUSE OF CHILDREN: SELECTED READINGS (1980) (citing G. Branch & R. Paxton, *A Study of Gonococcal Infections Among Infants and*

Another prime example is "Emma," case number fourteen in the Healys' monograph.[70] At the age of eleven, Emma reported being taken into the woods by a man and being kept there by him all night. The following morning she was dirty and tattered. She positively identified a suspect, but he was later released, having amply proved an alibi. Two years later, Emma's mother related to the Healys that Emma complained frequently of headaches and dizziness, was very lonely for an absent sister, and since the alleged attack had been "nervous." The Healys also noted that Emma evinced "improperly obtained sex knowledge."[71] Recent research has revealed that this type of behavior in children of Emma's age is highly suggestive of sexual victimization.[72] Similar evidence is seen in case eighteen involving the seven-year-old girl suffering gonorrhea.[73] The Healys reported a "curious misuse of pronouns" in that she repeatedly referred to her father as "she."[74] Recent studies indicate that this "gender role confusion" is symptomatic of the sexually abused child syndrome.[75] These do not seem to be case histories of young girls "fantasizing" a sexual encounter.

While these examples are extreme, Wigmore also omitted material from other case histories which might undermine or contradict his hypothesis that young girls who report sexual assault or abuse are lying about the charge.[76] Other case histories report in-

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Children, 80 PUB. HEALTH REP. 347-52 (1965)); *see also* J. Thomas, *Venereal Disease in Children: A Case of Sexual Abuse?*, RESPONSE, April 1979, at 1-2.

70. HEALY, PATHOLOGICAL LYING, *supra* note 26, at 172-78, *reprinted in part in* WIGMORE, EVIDENCE, *supra* note 3, at 740-41.

71. HEALY, PATHOLOGICAL LYING, *supra* note 26, at 172-73.

72. One researcher reports:

> For pre-pubetal children it is argued that if any two of the following are present, it is highly likely that sexual abuse has occurred: (1) neurasthenia symptoms without physiological basis, including: fatigue; weakness; headaches; bedwetting or excessive urination; stomachaches; ringing in ears; sleeping, vaso-motor, memory or concentration disturbances; or complaints of numerous and constantly varying aches. (2) "Acting out" behavior, including frequent masturbation and/or indiscriminate or pseudo-seductive behavior . . . .

Lloyd, *Corroboration*, *supra* note 21, at 110 (footnotes omitted). *Accord* A. BURGESS, N. GROTH, L. HOLMSTROM, & S. SGROI, SEXUAL ASSAULT OF CHILDREN AND ADOLESCENTS 145-46 (1978) (detailing physical symptoms of child sexual assault, including recovery of sperm from genital or rectal area, pregnancy, genital or rectal trauma, and gonorrheal infections).

73. HEALY, PATHOLOGICAL LYING, *supra* note 26, at 195-97, *reprinted in part in* WIGMORE, EVIDENCE, *supra* note 3, at 742-43, *discussed supra* notes 49, 66-69 and accompanying text.

74. HEALY, PATHOLOGICAL LYING, *supra* note 26, at 196.

75. *See* Lloyd, *Corroboration*, *supra* note 21, at 111.

76. For example, in case number twenty-one, HEALY, PATHOLOGICAL LYING, *supra* note 26, at 214-17, *reprinted in part in* WIGMORE, EVIDENCE, *supra* note 3, at 743, Wigmore once again omitted facts corroborative of an actual sexual assault.

sufficient facts to corroborate or dismiss the specific accusation, but some actual sexual activity seems to have taken place in almost every one.[77] None of the case histories reported by the Healys clearly supports Wigmore's proposition that young girls falsely accuse men of sexual misconduct when no sexual acts have taken place.

Labeling these cases examples of "childish fantasy" reinforces apparently deeply engrained social attitudes of denial and suspicion toward young girls who bring charges of incest. In incest cases, initial denial on the part of the offender and other family members is now expected by experienced professionals.[78] Retraction of the original charge by the child is also not unusual, even in the face of overwhelming physical evidence that sexual abuse has

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Wigmore removed references to the fact that the young woman was pregnant. He edited out her plausible account of the pregnancy, which the Healys did not question. The Healys labelled this woman a "pathological accuser" because the "husband" in the "estimable family" whom she accused of having sexual intercourse with her "was a man of excellent character and of course this could not be believed . . . ." Wigmore removed the Healys' reference to an abortion and to the fact that the putative father of her illegitimate child paid the victim some money, perhaps in acknowledgement of paternity. Wigmore edited out commentary by the Healys which supports the implication that this young unmarried woman was in fact involved in sexual activity. The case is hardly one of a young girl imagining or fantasizing sexual events. The Healys' own narrative does not put forward the hypothesis that sexual activity never took place. "Taking it altogether there was no reason for considering her insane, or as being in anyway a psychopathic personality . . . . What happened to this girl was no great exception among these people. We know from their own accounts free and easy sex relationships are common . . . ." HEALY, PATHOLOGICAL LYING, *supra* note 26, at 217 (in mentioning "these people," the Healys are referring to "Slavics").

77. *See, e.g.*, HEALY, PATHOLOGICAL LYING, *supra* note 26, at 178-82, *reprinted in part in* WIGMORE, EVIDENCE, *supra* note 3, at 741-42. In case number fifteen, the Healys label as false accusations made by the subject against "several members of her family." The Healys finally disbelieve her account largely because they met her older brother with whom she lived and he "seemed to be very decent fellow and was really interested in her." HEALY, PATHOLOGICAL LYING, *supra* note 26, at 181. They note, however, that the girl had a very unfortunate acquaintance with details about "sex affairs." When the case came to trial, the subject "admitted" the accusations were "misrepresentations:" hence, the Healys condemn the statements as false. *Id.* Recent studies indicate, however, that a subsequent retraction is not a valid basis for concluding the initial accusation was false:

> The family often pressures the child to retract the story, by, for example, telling her she will split up the family, send her father to jail, and cause her mother to lose financial support. The legal process can also exacerbate the situation and contribute to a child's retraction or refusal to testify. Moreover, the child may have ambivalent feelings towards the abusive parent, which might lead to his or her changing the story initially given at a later date or at trial.

L. Berliner, L. Blick, & J. Bulkley, *Expert Testimony on the Dynamics of Intra-Family Child Sexual Abuse and Principles of Child Development*, in NAT'L LEGAL RESOURCE CTR. FOR CHILD ADVOCACY & PROTECTION, CHILD SEXUAL ABUSE AND THE LAW 172 (1981) [hereinafter cited as Berliner].

78. *See, e.g.*, R. Summit & J. Dryson, *Sexual Abuse of Children: A Clinical Spectrum*, 48 AM. J. ORTHOPSYCHIATRY 237-51 (1978), *reprinted in*, CHILDREN'S BUREAU,

occurred.[79] The specter of "sinister possibilities of injustice"[80] raised by Wigmore with regard to false reports should have been invoked for the opposite reason. The likelihood is there are more cases of false denials and repressed reports than there are false accusations of incestuous abuse.[81]

B. The 1937-38 ABA Committee Report

Wigmore's second citation to authority is to the purportedly independent report of the 1937-38 American Bar Association Committee on Improvements in the Law of Evidence,[82] which is reprinted in part in the treatise. Wigmore omits, without acknowledgment, the one reference in the pertinent section of the report, a cross-reference to an earlier edition of the treatise. This 1937-38 committee report was buttressed by reliance on Wigmore's treatise. Then, in a nice bit of circularity, the treatise is

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U.S. DEP'T OF HEALTH & HUM. SRVCS., SEXUAL ABUSE OF CHILDREN: SELECTED READINGS (1980); *see also*, N. GROTH, MEN WHO RAPE (1980).

Denials by parents and other adults perhaps should be considered as another species of false report:

> Particular concern is warranted in such cases when, in the face of convincing evidence to the contrary, a parent persistently denies the possiblity of abuse and focuses his or her anger on the child. One example, in one recent case, an eight year old girl was found to have gonorrhea and claimed that she had been sexually molested by her mother's boyfriend. Her mother refused to consider this possiblity and insisted that the child was lying . . . .

K. Leaman, *Sexual Abuse: The Reactions of Child and Family*, in CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SRVCS., SEXUAL ABUSE OF CHILDREN: SELECTED READINGS 23 (1980).

79. *See* Berliner, *supra* note 77. Jurisdictions which have developed techniques specially suited to interviewing child witnesses, such as in camera examinations and videotaped depositions, are more likely to be able to preserve and buttress a child's testimony. Videotaping a child's testimony at least memorializes the evidence and reduces the number of times in which a child is asked to repeat difficult testimony. *See* J. Bulkley, *Evidentiary Theories for Admitting a Child's Out-of-Court Statement of Sexual Abuse at Trial*, in NAT'L LEGAL RESOURCE CTR. FOR CHILD ADVOCACY & PROTECTION, CHILD SEXUAL ABUSE AND THE LAW 153 (1981); G. Melton, *Procedural Reforms to Protect Child Victim/Witnesses in Sex Offense Proceedings*, in NAT'L LEGAL RESOURCE CTR. FOR CHILD ADVOCACY & PROTECTION, CHILD SEXUAL ABUSE AND THE LAW 184 (1981). The most innovative and ingenious technical strategies, however, will not be effective in communicating a story which authorities do not wish to hear. Furthermore, such techniques may be considered unconstitutional on the basis of *Globe Newspaper Co. v. Super. Ct.*, 102 S. Ct. 2613 (1982), which held a Massachusetts statute closing sex offense trials to the press where the victim was under the age of 18 years to violate the first amendment. *But see* New Jersey Div. Youth & Fam. Srvcs. v. S.S., 185 N.J. Super. 3, 447 A.2d 183 (1982) (in camera examination of child abuse victim held proper procedure in light of best interests of child).

80. WIGMORE, EVIDENCE, *supra* note 3, at 736.

81. *See* HERMAN, *supra* note 2, at 167, 272 nn.7-9 (citing H. Giaretto, *Co-Ordinated Community Treatment of Incest*, in SEXUAL ASSAULT OF CHILDREN AND ADOLESCENTS 233 (A. Burgess ed. 1978), and J. Goodwin, *Incest Hoax: False Accusations, False Denials*, 6 AM. ACAD. PSYCHIATRY & L. BULL. 269 (1978)).

82. *ABA Committee Report*, *supra* note 12.

expanded by citation to the report. In the treatise, Wigmore omits any reference to the fact that he was the author of this report. The inference is that it was an entirely independent authority supporting Wigmore's position.[83] In fairness to Wigmore, he may have thought that "everyone knew" he was the chairman of the committee. Nonetheless, the editing is very careful and does suggest the committee report is totally independent.

In the treatise, the report of the committee procedures and the tabulating of votes implies that the 1937-38 ABA committee's recommendation was the concensus of a large and diverse group. Courts and commentators have often assumed the ABA Committee Report and the treatise were mutually independent and corroborative. In fact, it seems to be only Wigmore. As chairman of the committee, Wigmore wrote the report, solicited and tabulated the votes, and through correspondence may have been an enthusiastic lobbyist for his own view.[84] In the treatise Wigmore never mentions his authorship of the report or his chairmanship of the committee.

Wigmore's representation of the vote of the ABA committee is misleading. The report is presented in the treatise as the collective position of several persons. The votes are reported as forty-seven in favor and two opposed, suggesting overwhelming support. However, the procedures were not a simple polling of forty-nine members. The report went through three stages of approval. The actual members of the committee were five: Judge Ernest A. Inglis, Judge Merill E. Otis, Judge Walter E. Treaner, Mr. Robert Dodge, and Chairman J.H. Wigmore.[85] The chairman assembled some twenty concrete proposals concerning specfic rules of admissibility and presented them to the five committee members for a vote.[86] In the case of the proposal for psychiatric examination of

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83. *See* WIGMORE, EVIDENCE, *supra* note 3, at 746-47 (reprinting Part III, Section 10 of the report, entitled "Psychiatric Examination of Witnesses in Sex Complaints," *ABA Committee Report*, *supra* note 12, at 588).

84. Wigmore's authorship of the committee report was acknowledged by the President of the American Bar Association, Arthur T. Vanderbilt, in his foreword to the reports of the Association's Section on Judicial Administration:

> [I]n the brief compass of the 33 pages of his report Dean Wigmore presents the American bench and bar the *minimum* requirements that are needed in a *practical* way to make our Law of Evidence workable in the twentieth century.

63 ABA ANNUAL REPORT 518, 518 (1938) (emphasis in original). *Accord ABA Committee Report*, *supra* note 12, at 570: "The aggregate of these views was then assembled by the Chairman [Wigmore] and put in the form here presented."

85. *Id.* at 570.

86. These twenty proposals are discussed in Part III of the report, *id.* at 581-97. Twelve proposals concerning general evidence administration, *id.* at 571-81, were also circulated and incorporated into the report, as were six "general considerations affecting [the] proposals for improvement," *id.* at 570-71.

complaining witnesses in sex offense cases, all five committee members assented. The report and the recommendation of these committee members on the issue were then sent for a vote of approval to fifty advisory members and to fifteen at-large members. The advisory members of the committee included the ABA representatives in each state. All but four of the at-large members had some law school affiliation.[87] The disaggregated vote of the advisory members was as follows: twenty-nine advisory members voted for the proposal; two voted against it; and nineteen abstained from voting on the recommendation for psychiatric examination as to credibility in sex offense cases. Of the at-large members, thirteen assented and two abstained.[88] Only by ignoring the twenty-one abstentions of the at-large and advisory members and by adding the full committee vote of five to the forty-two assents by the other classes of members is it possible to arrive at the reported tally of forty-seven to two. The presentation and editing of the report, the omission of cross-references, and the statement of the votes imply this is independent authority for Wigmore's view. However, far from being independent of the treatise, the committee report was written by the same person.

Wigmore also made a significant change from the ABA report, which specifically mentions an examination by a psychiatrist: "We recommend that in all charges of sex offenses, the complaining witness be required to be examined before trial by competent *psychiatrists* for the purpose of ascertaining her probable credibility, the report to be presented in evidence."[89] Wigmore's treatise, on the other hand, recommends examination by a *physician*. Wigmore may have changed his mind about the necessity of the examination being by a psychiatrist, or the discrepancy may be an inadvertent contradiction. Perhaps Wigmore changed his mind and did not feel he could change the published report. Perhaps Wigmore used the more general term "physician" because he envisioned an examination similar to those conducted by the Healys in their study of juvenile delinquents.[90] The examination

87. *See id.* at 588-89.

88. This process seems to have been accomplished entirely by mail. It does not appear that the full committee, including the advisory and at-large members, ever met for discussion. *See id.* at 570.

89. *Id.* at 588 (emphasis added). The report admonished the Bar, "The warnings of the psychiatric profession, supported as they are by thousands of observed cases, should be heeded by our profession." *Id.* The report contains no reference for the "thousands" of cases, but Wigmore may have been referring to the cases reported in Healy's earlier work *The Individual Delinquent*, *see supra* note 35.

90. Wigmore probably had in mind the kind of "mental" test used by the Healys. *See supra* note 35. Wigmore may have called for testing by a physician, rather than specifying a psychiatrist as the ABA committee had, because requiring a *psychiatric* examination in all cases of sexual assault complaints by females would have been

as to the complainant's credibility presumably would take place prior to or during trial. In this respect it is the obverse of the in camera examination of rape victims presently required by statute in the majority of states: these examinations are in camera to protect the privacy of the victim and to limit the introduction of prejudicial evidence concerning the "chastity" and prior sexual conduct of the victim of a sex offense.[91]

C. *The Mönkemöller Monograph*

As further support for the view that female complainants in sex offense cases should always be examined as to credibility by a physician because they are likely to be fabricating the charge, Wigmore cites *Psychology and Psychopathology of Testimony*, a 1930 German monograph by Otto Mönkemöller.[92] An English edition of this monograph has never been published, a source of frustration for researchers who later sought to challenge the statements quoted by Wigmore.[93] An additional impediment stems from the fact that only four American libraries seem to possess a copy in the original German.[94] Thus, it is not surprising that later researchers have found it difficult to locate and challenge this source. When Mönkemöller's views are examined, they prove to be biased and contradictory. Mönkemöller considered the testimony of young girls in sex offense cases to be highly unreliable: "The most dangerous witnesses in prosecution for morality of-

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impractical. The American Board of Psychiatry was founded in 1934 and only 2,405 psychiatrists were in practice in America by 1940: the American Psychiatric Association had only 1,001 members in 1941. *See* P. TITUS, DIRECTORY OF MEDICAL SPECIALISTS CERTIFIED BY AMERICAN BOARDS 919 (1940); BIOGRAPHICAL DIRECTORY OF FELLOWS AND MEMBERS OF THE AMERICAN PSYCHIATRIC ASSOCIATION vii (1941). It is interesting to note that under the recommendation of the ABA committee, though not under the treatise's suggestion, Healy himself would have been unable to provide the required testimony: he was not a psychiatrist, though he was a member of the American Psychiatric Association.

91. *See* L. Bienen, *Rape III: National Developments in Rape Reform Legislation*, 6 WOMEN'S RTS. L. REP. 171, 197-206 (1980); *see also* J. Tanford & A. Bocchino, *Rape Victim Shield Laws and the Sixth Amendment*, 128 U. PA. L. REV. 544 (1980); Comment, *A Due Process Challenge to Restrictions on the Substantive Use of Evidence of a Rape Prosecutrix's Prior Sexual Conduct*, 9 U.C.D. L. REV. 443 (1976). *Accord supra* note 79.

92. O. MÖNKEMÖLLER, PSYCHOLOGY AND PSYCHOPATHOLOGY OF TESTIMONY § a6, at 333 (1930) [hereinafter cited as MÖNKEMÖLLER], *quoted in* WIGMORE, EVIDENCE, *supra* note 3, at 743-44.

93. *See, e.g.*, Note, *Rape Reform Legislation: Is It the Solution?*, 24 CLEV. ST. L. REV. 463, 488 n.190 (1975).

94. According to the 1968 *National Union Catalogue*, the Mönkemöller monograph can be found, in German, in the following libraries: Library of Congress; Case Western Reserve University, Cleveland; University of California at Berkeley; and Harvard Law School. 389 NAT'L UNION CATALOGUE 172 (1968). The supplements to the Catalogue through 1982 list no additional locations.

fenses are the youthful ones (often mere children) in whom the sex instinct holds the foremost place in their thoughts and feelings."[95] If the child victim or witness whose testimony was under consideration was the resident of some sort of "institution," such as a boarding school, Mönkemöller's belief as to the unreliability of the testimony was even stronger:

> It is no wonder that gossip and slander thrive in connection with physical punishment and aberrations in these institutions where intellectually and morally inferior elements share daily life. A certain intimacy between pupils and educators is unavoidable especially since the educators often have to act as parental substitutes, and this intimacy often extends into the realm of the physical, especially in those institutions which practice modern educational approaches, and in that generally erotically explosive atmosphere these manifestations are easily misinterpreted and subject to slander and sexual fantasy, transgressing into the area of homosexuality . . . .[96]

Mönkemöller's opinion of young girls' testimony, however, is simply an extension of his beliefs concerning the lack of veracity in female testimony in general. He felt that such testimony "is inferior to that of men," a matter he thought was "common knowledge among judges."[97] Mönkemöller was particularly critical of women's credibility during menstruation:

> Menstruation has always been considered a physiological process which might very well exercise a detrimental influence on female testimony . . . . This fact must not be ignored when particularly important female witnesses are experiencing their very first [sic] of the beginning of their menstrual period . . . . For obvious reasons the sexual element moves to the fore during this period, though not very strongly . . . . It is during this time that incorrect testimony and wrong accusations concerning sex offenses, which would not have occurred to her at normal times, are being made.[98]

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95. MÖNKEMÖLLER, *supra* note 92, at 333, *quoted in* WIGMORE, EVIDENCE, *supra* note 3, at 743.

96. *Id.* at 278-79 (private translation by S. Liecty, University of California: Berkeley; the author would like to thank the Dean, University of California: Berkeley School of Law (Boalt Hall) for funding the Liecty translation). [Ed. note: Unless otherwise indicated remaining quotations from the Mönkemöller work are by this translator. Copies of these translations are on file in the offices of California Western Law Review].

97. *Id.* at 43.

98. *Id.* at 47. *Accord* W. HEALY, THE INDIVIDUAL DELINQUENT (1915). Healy considered that menstruation "may have a definite relationship to delinquency," and commented: "Premenstrual restlessness and sex stimulation . . . may be correlated with sex offenses and also other delinquencies." *Id.* at 232. For a discussion of recent research indicating a correlation between premenstrual tension and antisocial or criminal behavior, see L. Taylor & K. Dalton, *Premenstrual Syndrome: A New Criminal Defense?*, 19 CAL. W.L. REV. 269 (1982); this research, however, does not indicate

Mönkemöller's attitude towards women at the time of menstruation appears to be illustrative of a primitive and classic taboo.[99]

While Mönkemöller found the testimony of women and female children inherently unreliable, he thought the testimony of "psychics" might one day be properly received into evidence:

> In the past clairvoyants have not been considered suitable witnesses. They have been considered without exception to be fraudulent and deceitful. Now this attitude has been challenged. There are always certain cases where even after intense scrutiny the clairvoyant's success cannot be denied and where another explanation cannot be found. In view of the fact that we have come to accept the existence of telepathic waves as for instance in connection with the wireless radio, the notion that telepathy may exist between humans is no longer totally fantastic.[100]

This German monograph is typical of its time in its expression of racist and misogynist views.[101] Wigmore may have relied upon

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that "premenstrual restlessness" or menstruation affect the veracity of women's testimony as Mönkemöller suggests.

99. *See* P. WEIDEGER, MENSTRUATION AND MENOPAUSE: THE PHYSIOLOGY AND PSYCHOLOGY, THE MYTH AND THE REALITY 85-113 (1976) (discussing the menstrual taboo in detail).

100. MÖNKEMÖLLER, *supra* note 92, at 171. Mönkemöller, however, did admit that evidence from "clairvoyants and occult mediums" was "totally unacceptable" at the time of his writing and that such individuals needed "to be eliminated as witnesses and experts." *Id.* at 171-72.

101. Wigmore's other works offer many examples of contemporary misogynist views, including his own and other representative opinions:

> Objectivity is another property that women lack. They tend always to think in personalities, and they conceive objects in terms of personal sympathies. * * * The few women witnesses for the defense often become the most dangerous for the defense. But here also women find a limit, perhaps because like all weaklings they are afraid to draw the ultimate conclusions. * * * With [women's] hypocrisy we have, as lawyers, to wage constant battle. Quite apart from the various ills and diseases which women assume before the judge, everything else is pretended; innocence; love of children, spouses and parents; pain at loss and despair at reproaches; a breaking heart at separation; and piety,—in short, whatever may be useful.

H. GROSS, CRIMINAL PSYCHOLOGY 300 (1911), *quoted in* J. WIGMORE, THE SCIENCE OF JUDICIAL PROOF 336-37 (1937).

> She has never been taught to reason and has really never found it necessary, having wandered through life by inference or, more frankly, by guesswork, until she is no longer able to point out the simplest stages of her most ordinary mental processes. * * * [Women] are prone to swear to circumstances as facts, of *their own knowledge*, simply because they confuse what they have really observed with what they believe did occur or should have occurred
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> . . . .

A. TRAIN, THE PRISONER AT BAR 279 (2nd ed. 1908) (emphasis in original), *quoted in* J. WIGMORE, THE PRINCIPLES OF JUDICIAL PROOF 345 (1913); *accord* C. MOORE, 2 A TREATISE ON FACTS §§ 914-20 (1908), *reprinted in part in* J. WIGMORE, THE PRINCIPLES OF JUDICIAL PROOF 349-50 (1913).

Healy's view of female duplicity is another example: "A general observation by practical students of conduct, namely, that females tend to deviate from the truth

it because of his interest in turn-of-the-century European scholarship and his fascination with the early work in psychology and psychiatry.[102] Wigmore was also an early champion of the use of psychiatric testimony. He rather optimistically expected the science of psychology to remove all ambiguities from courtroom testimony.[103]

D. The Three Letters

Finally, Wigmore relies upon three letters from practicing physicians to support his position that women and girls characteristically offer false reports of sexual assault. The letters are from Dr. Karl A. Menninger of the Menninger Clinic in Topeka, Kansas,[104] Dr. William A. White, Superintendent of St. Elizabeth's Hospital in Washington, D.C.,[105] and Dr. W.F. Lorenz, Director of the University of Wisconsin Psychiatric Institute.[106] According to a brief footnote to section 924a, these letters were "obtained through the courtesy of Dr. Harold S. Hulbert" of Chicago, Illinois.[107] Research, however, has failed to document exactly how these letters came to be written.[108]

The three letters do support Wigmore's view, although Dr. Menninger recommended a psychiatric examination only for "every girl who enters a plausible but unproved story of rape . . . ."[109] On the other hand, Dr. Menninger also stated that individuals who make other charges, for example, charges of malprac-

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more readily than males, is more than thoroughly borne out . . . ." HEALY, PATHOLOGICAL LYING, *supra* note 26, at 261.

For a fascinating discussion of nineteenth century European and American "science," see S. GOULD, THE MISMEASURE OF MAN (1981).

102. W.R. ROALFE, JOHN HENRY WIGMORE 77-104 (1977).

103. *See generally* J. Wigmore, *Professor Muensterberg and the Psychology of Testimony*, 3 ILL. L. REV. 399 (1909).

104. WIGMORE, EVIDENCE, *supra* note 3, at 744.

105. *Id.*

106. *Id.* at 745.

107. *Id.* at 744 n.3. *See infra* note 115 (discussing Hulbert).

108. *See supra* note 30.

109. WIGMORE, EVIDENCE, *supra* note 3, at 744. Dr. Menninger seems no longer to ascribe to the views expressed in the letter published by Wigmore in the treatise:

> "Why oh why couldn't Freud believe his own ears?" Dr. Karl Menninger of the Menninger Foundation in Topeka, Kan., wrote . . . . "Why did he knuckle under to those who said, 'Oh, people don't *do* those dreadful things to children.' They are still saying that, just as some people say there was no holocaust, is no torture, etc."
>
> Even in the Menninger facilities set up to assist wayward youngsters, Dr. Menninger added "Seventy-five percent of the girls we accept at the Villages have been molested in tender childhood by an adult. And that's today in Kansas! I don't think Vienna in 1900 was any less sophisticated."

R. Blumenthal, *Did Freud's Isolation, Peer Rejection Prompt Key Theory Reversal?*, N.Y. Times, Aug. 25, 1981, § C, at 2, col. 6 (quoting a letter, date not stated, from Menninger to Dr. Milton Klein of New York).

tice and other personal attacks, should be examined by a psychiatrist.[110] Dr. White similarly recommended that complainants making accusations of rape be examined "to disclose the existence of [pathological] tendencies."[111] However, he would have limited such examinations to "cases where accusations . . . are made without corroborative testimony of a sufficiently conclusive character . . . ."[112] Only Dr. Lorenz believed a "psychiatric examination is desirable in all criminal cases . . . [and] . . . *imperative* in every case where sexual assault is charged."[113]

While the limitations placed on the use of psychiatric examinations by Dr. White and Dr. Menninger make their recommendations extremely narrow, these letters are regularly cited as support for corroboration requirements in sex offense cases and for the general proposition that women falsely accuse men of sexual assault.[114] The professional opinions of these physicians of the 1930's are presumably based upon their experiences in supervising abnormal populations. Their views seem typical of their time.[115] However, they should not be relied on today.

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110. WIGMORE, EVIDENCE, *supra* note 3, at 744.

111. *Id.* at 745.

112. *Id.*

113. *Id.* at 746 (emphasis added).

114. *See, e.g.*, M. Juviler, *Psychiatric Opinions as to Credibility of Witnesses: A Suggested Approach*, 48 CALIF. L. REV. 648, 674 (1960); Comment, *The Corroboration Rule and Crimes Accompanying a Rape*, 118 U. PA. L. REV. 458, 460 (1970).

115. Consider the views expressed by Dr. Harold S. Hulbert, who assisted Wigmore in obtaining the three letters. *See supra* notes 30 and 103 and accompanying text. Hulbert described conscientious objectors as "very psychopathic in their religious life and in their sexual life." H. Hulbert, *Constitutional Psychopathic Inferiority in Relation to Delinquency*, 30 J. CRIM. L. & CRIMINOLOGY 3, 6 (1939). He considered "egocentric personalities" to have the "warped attitude of a childish, crippled mind." *Id.* at 8. On the subject of sex offenders, Hulbert wrote:

> These sex offenders are commonly also called degenerates. There is some degeneration in fact in many cases, but the generalization is apt to be misleading. Many of these morons are cowards: it takes a lot of courage for a young man to bring himself to a state of mind of burdening himself with a future home by proposing marriage to some girl. In lieu of the normal courage there is apt to be furtiveness and later a bold cruelty.

Id. at 18. Hulbert also had interesting opinions concerning members of the "upper classes:"

> There is an *opposite condition* to psychopathy. These are *aristocrats*: these are persons who have been successful in adapting themselves to their benefit. There is another condition also, the *patricians*. Patricians are inherited thoroughbreds: they even have certain facial characteristics. They are never propositioned: never is a shady proposition brought to them, for it is generally known that they do not and will not make mistakes."

Id. at 21 (emphasis in original). *See also* H. Hulbert, *Psychiatric Testimony in Probate Proceedings*, 2 LAW & CONTEMP. PROBS. 448 (1935) (suggesting psychiatrists be attesting witnesses to wills and that psychiatrists testify as to the testator's competency on the basis of a "sampling of data of the functions of the mind of the deceased testator").

III. WIGMORE'S CONTINUED INFLUENCE

Psychiatrists and other professionals now seem to concur that psychiatrists during the period from the 1930's through the 1960's categorized as "fantasy" many cases in which sexual abuse did in fact occur.[116] It now seems clear that even Freud covered up and refused to document instances of actual sexual abuse.[117] However, Wigmore's section 924a remains influential with lawyers and judges. Indiana is the only state actually to have mandated a physician's examination as to the complainant's credibility in sex offense cases, but this requirement was short-lived.[118] Many states, however, leave the decision whether an examination of the complaining witness should be made to the trial judge's discretion.[119] A small minority require that the examination should be ordered only when there are compelling circumstances.[120] Most, however,

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116. *See, e.g.*, Peters, *Children Who Are Victims*, *supra* note 21; RUSH, BEST SECRET, *supra* note 5; HERMAN, *supra* note 2; Y. TORMES, CHILD VICTIMS OF INCEST (1981); *see also* A. Rosenfeld, C. Nadelson & M. Krieger, *Fantasy and Reality in Patients Reports of Incest*, 40 J. CLIN. PSYCHIATRY 159, 159 (1979):

> In recent years there has been an increasing awareness that actual incest is higher than previously thought. * * * Nonetheless, some professionals still regard patients' reports of sexual molestation as fantasies."

117. *See* Peters, *Children Who Are Victims*, *supra* note 21, at 401-02 (1976); *see also* Rush, *Cover-Up*, *supra* note 5.

118. Burton v. State, 232 Ind. 246, 111 N.E.2d 892 (1952), *overruled*, Wedmore v. State, 237 Ind. 212, 143 N.E.2d 649 (1957).

119. *See, e.g.*, State v. Wahrlich, 105 Ariz. 102, 459 P.2d 727 (1969). This case involved a stranger's assault upon a six-year-old female whom the defendant asked to enter his car. He allegedly "choked her and struck her about the face and committed certain lewd or lascivious acts including severely lacerating her upper legs." *Id.* at 103-04, 459 P.2d at 728-29. The defendant was convicted and appealed: relying principally upon Wigmore's section 924a, he argued the conviction should be reversed because the victim's testimony was allowed without an examination as to her "social history and mental makeup." *Id.* at 105, 459 P.2d at 730.

See also State v. Forsyth, 20 Or. App. 624, 533 P.2d 176 (Ct. App. 1975). In *Forsyth*, involving a forcible stranger-to-stranger attack, the defendant attempted to introduce psychiatric testimony by a witness who had never examined the victim but only had read her deposition and observed her demeanor while testifying in court. The trial court refused the defendant's offer of proof as to the witness' testimony regarding the victim's "mental status" and personality. The appellate court upheld the conviction. *Id.* at 634-35, 533 P.2d at 181-82 (citing State v. Walgraeve, 243 Or. 328, 412 P.2d 23, *reh'g denied* 243 Or. 633, 413 P.2d 609 (1966), and Ballard v. Super. Ct., 64 Cal. 2d 159, 410 P.2d 838, 49 Cal. Rptr. 302 (1966)).

See also People v. Glover, 49 Ill. 2d 78, 273 N.E.2d 367 (1971). The defendant in *Glover* was convicted of deviate sexual assault. He appealed, arguing the trial court had abused its discretion in refusing to order a psychiatric examination of the prosecutrix. The case involved a stranger-to-stranger rape at knifepoint and the principal issue at trial was identification of the defendant. Nonetheless, the Illinois Supreme Court commented, "There is impressive support for defendant's argument that the complaining witness should have been ordered to undergo a psychiatric examination. See Wigmore on Evidence, vol. IIIA, sec. 924a, *and authorities there cited and discussed*." *Id.* at 82, 273 N.E.2d at 370 (emphasis added). However, the trial court was held not to have abused its discretion and the conviction was affirmed.

120. *See, e.g.*, People v. King, 41 Colo. App. 177, 581 P.2d 739 (Colo. App. 1978);

do not so limit the judge's exercise of discretion and some courts have even suggested that it be exercised liberally, particularly in the case which turns on the credibility of a minor victim of sexual assault.[121]

Those judges whose discretion is not limited by a compelling-situation requirement will look to both legal and medical experts for assistance in deciding whether to order an examination. Wigmore's unequivocal statements remain persuasive and influential:[122] many judges may look no further than to this section of the treatise. Even recent sources echo Wigmore's attitudes of suspi-

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State v. Kahinu, 53 Hawaii 536, 498 P.2d 635 (1972), *cert. denied*, 409 U.S. 1126; State v. Vincent, 51 Hawaii 40, 450 P.2d 966 (1969); Washington v. State, 96 Nev. 305, 608 P.2d 1101 (1980).

In *King*, the ten-year-old prosecutrix accused her mother's common law husband of sexual assault. The defendant requested a psychiatric examination of the victim, stating in an ex parte affidavit "that the victim was 'mentally immature,' had a 'vivid imagination,' and is 'subject to flights of fancy,' and that he had 'observed that the complainant has fantasies concerning sexual contact and relationships.' " 41 Colo. App. at 179, 581 P.2d at 741. The examination was refused. In affirming the conviction, the court of appeals noted, "[T]he testimony of the prosecuting witness, notwithstanding her age, was forthright, detailed, and in no significant way discredited by cross-examination." *Id.*

The *Kahinu* court discussed Wigmore's section 924a at length. 53 Hawaii at 545-47, 498 P.2d at 641-43. It made particular note of Dr. Menninger's recommendation of a psychiatric examination for those charging malpractice, commenting "He did not elaborate upon why he inferred the likelihood of mental illness from a charge of malpractice." *Id.* at 545-46 n.5, 498 P.2d at 641 n.5; *see also supra* notes 109-10 and accompanying text. The defendant in *Kahinu* had produced an "expert" who testified that "during his career he had interviewed from 15 to 25 females who were in the process of filing or had filed complaints in sex offense cases, and that from 20 to 30 percent of these either admitted through therapy that they were fabricating the matter of rape or were in his opinion fabricating." *Id.* at 546, 498 P.2d at 641-42. As to this testimony, the Supreme Court of Hawaii commented, "In other words, [the witness] testified that he had observed in his career from 3 to 8 complainants in sex cases, who either admitted to or whom he suspected of lying. Of course, no testimony was presented concerning the propensity of witnesses in general to fabricate." *Id.* at 546 n.6, 498 P.2d 642 n.6.

The defendant in *Washington* asked for a new trial and for a psychiatric examination of the victim to determine if she was a "pathological liar." The trial judge denied both motions. As to the latter, the Nevada Supreme Court held the decision to order such an examination is "a matter left to the sound discretion of the trial court," and stated that such an examination should be ordered only when "the defendant presents a compelling reason." 96 Nev. at 307, 608 P.2d at 1102.

121. People v. Russell, 69 Cal. 2d 187, 443 P.2d 794, 70 Cal. Rptr. 210 (1969); *but see* CAL. PENAL CODE § 1112 (Deering's Supp. 1982), *discussed supra* note 23, and CAL. EVID. CODE § 1103 (Deering's Supp. 1982) (generally limiting admissibility of evidence concerning victim's prior sexual conduct on the issue of credibility).

122. *But see* State v. Romero, 94 N.M. 22, 27, 606 P.2d 1116, 1121 (1980) (citing O'Neale, *supra* note 24, and relying on legislative intent behind New Mexico rape reform legislation) (rule requiring routine psychological examinations in rape cases considered "based on outmoded notions of instability and duplicity of women in general and, as such, should be discarded altogether"); State v. Looney, 294 N.C. 1, 18, 240 S.E.2d 612, 622 (1978) (Wigmore's § 924a criticized as "completely unrealistic and unsound"); *accord* People v. Souvenir, 373 N.Y.S.2d 824 (Crim. Ct. City of N.Y. 1975); Forbes v. State, 559 S.W.2d 318 (Tenn. 1977).

cion and disbelief towards allegations of sexual assault. Professor Leon Letwin suggests that doubts regarding the reliability of psychiatric evaluations of the complainant's credibility can be overcome and that "[t]here is no reason to preclude such testimony if the opinion has an adequate basis."[123] Dr. David M. Paul, who is an attorney as well as a physician, has recently written an article intended "to deal with the physician's role in diagnosis of [rape]."[124] He cautions the examining physician not to assume rape simply because signs of "repugnant" sexual acts are found: "It is not uncommon for the females [consenting to and] involved in such activities to experience the pangs of remorse and self-disgust some time after the acts and to make an allegation of rape."[125] The continued reliance by some courts on Wigmore and those who share his opinions can be taken by defense attorneys as a mandate to seek a psychiatric examination of the complainant in all cases of sexual assault, especially if the victim is a child. This particularly will be the case in situations of incest which often involve the uncorroborated testimony of young female victims.

Wigmore's unequivocal assertion that young girls who complain of sexual assault are likely to be lying is not supported by recent clinical experience or by survey research data. Surveys conducted during the period of the 1950's through the 1970's suggest that a significant portion of the female population has had some type of childhood sexual encounter with an adult male, many with relatives.[126] "In reality, false denials of incest are vastly more common than false complaints."[127] Nonetheless, it is still common to see reports in the legal literature of the danger of false accusation and the prevalence and normalcy of incestuous fantasies resulting in false reports of sexual abuse.[128] Thus, in

123. L. Letwin, *"Unchaste Character," Ideology, and the California Rape Laws*, 54 S. CAL. L. REV. 35, 73 (1980).

124. D. Paul, *The Medical Examination of Live Rape Victim and the Accused*, 1982 MED. TRIAL TECH. Q. 424, 427.

125. *Id.* at 438.

126. HERMAN, *supra* note 2, at 12 (1981):

> The results of the five surveys were remarkably consistent. One fifth to one third of all women reported that they had some sort of childhood sexual encounter with an adult male. Between four and twelve percent of all women reported a sexual experience with a relative, and one woman in a hundred reported a sexual experience with her father or her stepfather.

Other research indicates that the incidence of incest, though not necessarily with the father or stepfather, is much higher. *See* Prager, *The Experiment Fails*, *supra* note 11, at 61.

127. HERMAN, *supra* note 2, at 167, 272 nn.7-9 (citing H. Giaretto, *Co-Ordinated Community Treatment of Incest*, in SEXUAL ASSAULT OF CHILDREN AND ADOLESCENTS 233 (A. Burgess ed. 1978), and J. Goodwin, *Incest Hoax: False Accusations, False Denials*, 6 AM. ACAD. PSYCHIATRY & L. BULL. 269 (1978)).

128. *See, e.g.*, Note, *United States v. Bear Runner: The Need for Corroboration in*

every case involving a suggestion of developmental difficulties or a history of psychiatric or psychological consultation, the defense arguably can use a specially ordered examination to undermine the complaining witness' credibility on the theory that it was likely the child fabricated the charge. Even in the face of overwhelming physical evidence that a sexual incident actually occurred, Wigmore's arguments support calling for such psychiatric evidence. If the judge or jury can be convinced the child harbors "fantasies" of incestuous attack, then a real incident can be confused with a fantasy.[129]

Psychiatric examinations as to credibility have had a bizarre legal history,[130] but the unequivocal assertion by Wigmore that young girls who complained of sexual assault were likely to be lying remained to bolster the firmly entrenched preconceptions, suspicions, and hesitations of judges and attorneys. In every case in which there was a suggestion of socially unacceptable sexual behavior by a young girl, or a history of family problems for any reason, the defense could use a specially ordered examination as to credibility to substantially weaken the complainant's testimony

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Incest Cases, 23 ST. LOUIS U.L.J. 747 (1979); *see also supra* notes 123-25 and accompanying text.

129. Recent data, however, will assist prosecutors to overcome such defense tactics. It has been reported that "it is exceedingly rare for a child to falsify a sex report." F. INBAU & J. REID, CRIMINAL INTERROGATIONS AND CONFESSIONS 111 (1976). Another researcher maintains that "children cannot and do not make up stories outside the realm of actual experience." RUSH, BEST SECRET, *supra* note 5, at 156.

130. The most celebrated case to consider whether a psychiatric examination as to credibility should be offered to the jury was the perjury trial of Alger Hiss. *See* United States v. Hiss, 88 F. Supp. 559 (D.D.C. 1950). A psychiatrist, Dr. Carl Binger, testified as to Whittaker Chambers' credibility. He stated he had concluded Chambers was a "pathological liar" based solely on his observation of the witness in court and upon his reading of Chambers' written work. Dr. Binger cited the Healys' monograph on pathological lying, HEALY, PATHOLOGICAL LYING, *supra* note 26, as the leading work in the field. *See* Transcript of Record, Vol. IV, United States v. Hiss, Crim. No. C 128-402 (S.D.N.Y. Jan. 6, 1950), at 2560, Direct Examination. On cross-examination the prosecutor, whose goal was to convict Hiss and rehabilitate Chambers, spent considerable time undermining the scientific basis of Binger's analysis. The direct and cross examination of Dr. Binger lasted several days and covers over two hundred pages of the trial transcript. During this questioning, the diagnostic concept of pathological lying was shown to be unreliable:

> *Q.* In other words, you can't tell as you told us before, which part is true and which part is false, and you do not say as a doctor that everything a psychopath says is a lie; that is correct, isn't it?
>
> *A.* You are right. That is right.

Id. at 2598, Cross-Examination.

The most significant development concerning psychiatric examinations in federal law since the *Hiss* case (and prior to the trial of John Hinckley) was the trial of Patricia Hearst. No fewer than five well-known psychiatrists testified as to Hearst's credibility and other issues. Issues of questionable relevance, such as Chinese torture techniques, were examined at length. *See* THE TRIAL OF PATTY HEARST (Great Fidelity Press, San Francisco, 1976) (reprinting the entire trial transcript).

and suggest her story was fantasy rather than fact.[131] Wigmore's section 924a therefore both reflected and exacerbated a societal prejudice against female complainants of sexual abuse. At best, the attitude of society towards sexual abuse of young girls has been ambivalent. Wigmore and Freud were not alone in suppressing facts of actual sexual abuse. Because of Wigmore's prominence and the law's inherent conservatism, his view has remained influential even after the national movement to reform rape laws in the mid-1970's.[132]

IV. CONCLUSION

Who then is to be believed? After closely examining the authorities relied upon by Wigmore, it is difficult to conclude they support the proposition that female children are rarely victims of sexual assault. Rather, some of Wigmore's own sources support the opposite view. The cases from the Healys' monograph used to support Wigmore's proposition that women and girls frequently offer false reports actually seem to show that real sexual acts with these children took place. These cases seem *not* to be examples of childish fantasy which should be dismissed as inherently unreliable and incredible. The legal profession, however, has not been alone in denying the existence of sexual exploitation of children. The psychiatric profession, the medical profession, and social service agencies have collectively ignored this form of child abuse which is, for whatever reason, reported with considerable regularity and frequency in the United States.

Is this collective and systematic denial simply an example of

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131. *See supra* note 127 and accompanying text. This technique may also be used to wear down the complainant, even where there is no evidence of prior psychological or developmental difficulties: "Most young victims simply do not have the emotional strength to endure the ordeal of a criminal investigation and trial." HERMAN, *supra* note 2, at 167.

132. *See supra* notes 123-25, 128 and accompanying text. However, judicial attitudes are changing, perhaps because of the increasing appointment and election of women to the bench. Consider the following comment from a judge of the Philadelphia Court of Common Pleas:

> I do not know of any girl who enjoys sex with her father. On the contrary, these girls testified as to beatings, physical cruelty and brutal threats to compel them to accede. As for the mother's alleged coldness, these incidents frequently occur when she is in the hospital giving birth to another child. * * * The stereotypes of the father loving and sexually stimulating the child, the child enjoying sex and the mother being an "accomplice" are, I believe, as false as the stereotypes of the happy "darkies" who sang in the cotton fields and loved "old massa," and the contented coolies toiling in imperial China. The responses of women and girls to outrageous abuse by the man of the house should no longer be camouflaged by other men cloaked as scientists and therapists.

Letter from Judge Lois G. Forer to the Editor, New York Times (June 20, 1981), *printed in* N.Y. Times, June 29, 1981, at 14, col. 5.

Victorian biases remaining in our society? When the culture shows such obvious ambivalence to what is a crime in every United States jurisdiction, shouldn't one ask why? Wigmore's outspoken opinions can at least be confronted, even if belatedly. The silent assent of the many individuals in positions of authority who routinely deny the fact of sexual abuse is more difficult to challenge. Their views are only expressed on an institutional form, in an unpublished opinion, or in a court-ordered judgment of dismissal.

Historically, the Wigmore doctrine has survived because it appealed to society's traditional distrust and general hostility towards women, which was embodied in the law. Even the most carefully fashioned arguments could not dislodge deeply engrained beliefs which were predicated upon an assumption of female untrustworthiness. When Wigmore passionately expressed his view about the threatening nature of complaints of sexual assault made by female children, he articulated and memorialized an attitude which was apparently widely shared. By documenting his case, however, he has allowed later readers to discover the inherent flaw—or call it a "blind spot"—which lay behind his ostensibly objective presentation of scientific evidence.