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John Henry Wigmore and the Rules of Evidence: The Hidden Origins of Modern Law (book review)

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that their secularized reform programs were both welcome and free of imperialist taint. By the time of the Vietnam war, Kroncke argues, America's once "broad comparativist sensibility...had completely faded from American legal culture" (224).

In the final analysis, *The Futility of Law and Development* is a very good book, but one with a pronounced weakness: too much of its rich detail and analysis is subordinated to the author's rather reductionist normative aims. As Kroncke himself states, "This book is written with the open aspiration that we should be guided by an effort to make the best of the world and make it our own, with much the same curiosity and discretion as did the Founders" (9). In this reviewer's opinion, works of academic history, even those as well-researched and well-written as Kroncke's, are ill-served by "open aspirations" of this kind.

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Andrew Porwancher, *John Henry Wigmore and the Rules of Evidence: The Hidden Origins of Modern Law*. Columbia, MO: University of Missouri Press, 2016. Pp. 233. \$40.00 cloth (ISBN 9780826220868).
doi:10.1017/S0738248017000311

This revisionist history places the evidence scholar John Henry Wigmore among the vanguard of those rejecting legal classicism in favor of "legal modernism," and considers Wigmore's monumental four volume *Treatise on the System of Evidence in Trials at Common Law* (1904–5) to be the exemplar par excellence of modern legal thought. Andrew Porwancher rejects William Twining's conclusion that Wigmore's jurisprudential beliefs were "in sharp contrast" with his contemporaries promoting the "revolt against formalism." Instead, Porwancher implicitly accepts Wigmore's self-description, made in 1942: "In past times, my views on the law of Evidence have often been reproached as too radical, too advanced." Porwancher provides numerous examples that Wigmore, through his *Treatise*, embraced "contingency and flexibility where the formalists had demanded certainty and universality" (3). The *Treatise*, he concludes, "was a consummate expression of modern legal thought" (37). Porwancher additionally argues that "the history of evidence law complicates our understanding of the legacy of pragmatism" (5).

Chapters One and Two offer a brief biography of Wigmore and a study of the influence of James Bradley Thayer, Oliver Wendell Holmes, Jr., and Jeremy Bentham on Wigmore's thought. Chapter Three surveys Wigmore's

1904–5 *Treatise* (a second edition was published in 1923 and a third edition consisting of ten volumes was published in 1940). Chapters Four and Five explore the modernist impulses of the *Treatise*, including its acceptance that law was “socially constructed rather than natural and essential” (87), and that judges should be given greater discretion in admitting or excluding evidence by balancing probative value and evidentiary harm. Chapter Six examines the influence of the *Treatise* on Roscoe Pound, Benjamin Cardozo, Holmes, and several realists, including Jerome Frank.

Porwancher’s study of Wigmore is useful in reminding historians of American legal thought that legal modernists (or progressives) were not necessarily political liberals (or progressives). Porwancher is convincing in his criticism of those who concluded that Wigmore was a formalist because of his political conservatism; for example, in the Sacco–Vanzetti affair. Porwancher does not discuss another example of Wigmore’s political conservatism, his support of Judge Advocate General Enoch Crowder in the 1919 Crowder–Samuel Ansell affair concerning the application of military justice, including executions, on American soil. Reference to the Crowder–Ansell affair might have been helpful in bringing to light the initial event about which Wigmore and his generational evidence successor Edmund M. Morgan took opposing sides. (Additionally, Morgan later coauthored *The Legacy of Sacco and Vanzetti* (1948), including Chapter VI, titled “The Legacy of Doubt.”)

Although Porwancher discusses the influence of Wigmore’s *Treatise* on several important legal figures of the twentieth century, he is less interested in discussing the extent of the *Treatise*’s impact on the conduct of trials and appeals. Porwancher argues that Wigmore rejected “the Baconian ideal of absolute truth” (96) in favor of the contingent truths of modern science. Little evidence exists that trial and appellate courts thought that way or acted on that belief. One of the attacks on the American Law Institute’s 1942 Model Code of Evidence was that Morgan, the Code’s reporter and promoter, argued that the goal of a trial was to resolve disputes peacefully, not to find the truth. Wigmore may have rejected absolute truth, but he believed that “our judges and our lawyers shall firmly dispose themselves to get at the truth and the merits of the case before them.” Further, as Porwancher notes, Wigmore believed that cross-examination “is beyond any doubt the greatest legal engine ever invented for the discovery of truth.” Legal modernists appeared to accept both the contingency of truth and its necessity at trial. That may be demonstrated by the fact-skeptic Jerome Frank, who praised the modernism of the *Treatise* (155). As a federal court of appeals judge, Frank regularly urged courts to find “true facts.” That Wigmore, like Frank, championed the search for the truth while doubting its existence may suggest the extent of Wigmore’s impact on the most realistic of Realists.

Finally, Porwancher might have found it useful to compare Wigmore's views with Morgan's. They differed regarding presumptions, judicial notice, the origins of the hearsay rule (whether it was because of the rise of the jury, the development of the adversary system, or some combination of the two), and the structure of a proper evidentiary code (Morgan slyly referred to Wigmore's approach as an impractical "catalogue" to persuade ALI members to approve his more general Code) and its relation to judicial discretion. Those disagreements reflect the varying understandings of legal modernism. The history of the law of evidence has too often been ignored in efforts to understand the "legacy of pragmatism." Had Porwancher explored in detail the reasons for their differences on particular evidentiary doctrines, he may have given readers a better understanding of the complicated legacy of pragmatism.

Wigmore's *Treatise* was an extraordinary accomplishment, and Porwancher's assessment is fair and important. Little of significance has been written about Wigmore in 30 years. Porwancher's study is an important corrective that historians of American legal thought must account for. In the best fashion of revisionists, Porwancher has complicated the study of legal pragmatism by challenging historians to think less reflexively.

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Jeffrey Rosen, *Louis D. Brandeis: American Prophet*. New Haven: Yale University Press, 2016. Pp. 256. \$25.00 hardcover (ISBN 9780300158670). doi:10.1017/S0738248017000323

The centennial of the appointment of Louis D. Brandeis to the Supreme Court in 1916 has provided a welcome occasion to revisit the work and thought of a seminal figure in American life and law, and Jeffrey Rosen's new book makes a worthwhile contribution to that discussion. Unlike a number of prior works by distinguished Brandeis scholars, Rosen's book is not a "comprehensive biography" (8) although it is part of a series on "Jewish Lives" ranging from Moses to Barbara Streisand and Sigmund Freud and Albert Einstein to Groucho Marx. Although Rosen presents some information regarding Brandeis's remarkable career as a lawyer, public citizen, and jurist, his mission is "to introduce readers to what Brandeis thought and why he matters today" (8), not to detail the events of Brandeis's extraordinary career.