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“Wasting His Substance”: Property and Personal Freedom  
in the Nineteenth-Century United States

In the spring of 1848, Cincinnati Harriet Smith had her husband declared legally insane. On the advice of a mesmeric medium, Pascal Smith had given away nearly half of his \$100,000 fortune. While admitting that Mr. Smith suffered from only a single delusion, Mrs. Smith’s counsel predicted that without protection he would be pauperized in a matter of months. The defense argued, conversely, that if the jurors took Smith’s property out of his control, they would surely make this sane man into a maniac. Both sides of the argument accepted that the ownership and personal control of property were fundamental rights that defined a man. Weighing personal freedom against property as a source of identity, the jury took away Smith’s freedom to contract in the name of protecting him from personal ruin.<sup>1</sup>

Records of lower-court incompetency cases from Illinois, Ohio, Pennsylvania and New York during the second half of the nineteenth century reveal that the ability to manage one’s business affairs was a test of competency that could determine whether an individual would remain free or be committed to an insane asylum. Ironically, this reduction to a state of total dependence frequently resulted from the desire to protect an individual’s status of financial independence. When witnesses claimed that an alleged insane man was “wasting his substance,” the denotation was that property was being dissipated, but the underlying concern was that the substance of a man—his worth as a human being—might be destroyed.

I argue that in the post-Jacksonian United States, where ownership of property no longer determined the right to vote, the significance of property was a cultural vestige of an earlier legal system that persisted far longer than is usually understood. Participants in incompetency trials continued to emphasize property ownership—and consequently, status—over freedom to contract.

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<sup>1</sup> Member of the Cincinnati Bar, “A Law Case Exhibiting the Most Extraordinary Developments Peculia[r] to Modern Times” (Cincinnati: Printed at the Daily Atlas Office, 1848).

**TERRIBLE DISHONESTY:  
PATHOLOGICAL LYING AND PROGRESSIVE EXPERTISE, 1880-1920**

Abstract

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Popularized in the medical literature of the 1890's, the diagnosis of pathological lying (*pseudologia phantastica*) helped expand lying from a Victorian moral discourse into a target of Progressive-era legal and social reform. Darwinian psychologists proposed that deceit was the natural response of weak individuals to overwhelming situations, including those of modern life. Redefining deceit as a universal instinct, reformers argued that pathological lying did not simply require moral solutions, but new institutions capable of detecting and curing the pathological liar (e.g. juvenile courts and reformatories) as well as experts capable of protecting the innocent from false accusations and frivolous litigation. By identifying the pathological liar as an individual uniquely capable of deceiving the lay juror and impervious to ordinary deterrents against perjury, reformers presented a compelling justification for expanding the role of forensic psychology.

Meanwhile, railroad lawyers and other corporate-allied experts seized *pseudologia phantastica* as a convenient legal defense, arguing that accident suit plaintiffs were faking their injuries for attention. With the outbreak of WWI, army hospital doctors quickly adopted a similar explanation for the symptoms of what today might be called combat-related post-traumatic stress. Finally, child psychologists argued that pathological lying represented a form of squandered creative potential that could be redeemed through educational reform. This paper explores the challenge that the apparently uncontrollable liar posed to the Progressive faith in human rationality between 1880 and 1920, as well as experts' efforts to promote their role in understanding, detecting, and curing pathological liars.

## Formalism, Facts and the Brandeis Brief: The Making of a Myth

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### **Formalism, Facts, and the Brandeis Brief: The Making of a Myth**

The Brandeis Brief has long been central to historical accounts of the struggle and ultimate triumph of progressive jurisprudence over legal formalism. Yet this storyline is difficult to reconcile with the historical evidence on two counts. The first is the incompatibility of the formalist thesis with the presence of extra-legal evidence in cases and briefs well predating that of Brandeis. The second is the inaccuracy of viewing conservative opponents of social legislation as the locus of opposition to the introduction of such extra-legal evidence. In practice, it was progressive defenders of social legislation who long sought to exclude proof regarding the alleged health and other benefits of legislation from judicial review. This article offers an alternative reading of the origins of the Brandeis Brief, and of its relation to the constitutional conflicts of the *Lochner* era. It argues that at its inception, the Brief stood as a necessary adaptation, rather than an intentional model. In marshalling the evidence on how fatigue poisoned workers' blood or otherwise put them at risk, progressives implicitly capitulated on the most divisive issue in 19th-century police power debates: the authority of courts to distinguish true public health measures from "mere pretext." The evidence presented in the Brief was not the product of a scientific tradition devoted to the discovery of objective facts. The Brief's medical and moral claims were rooted in a reformist "social medicine" tradition, dating to the start of the 19<sup>th</sup> century, designed to fit labor laws within the narrow rationales for state intervention that free-market ideologies allowed. In Britain, Parliamentary sovereignty precluded judicial scrutiny of the legislation's purported public health rationales; in the United States the doctrine of presumptive constitutionality had served a similar function. *Lochner*-era progressives were reluctant to tie the fate of social legislation to this category of medical evidence for two reasons. The first followed from the principled position that the laws were constitutional regardless of scientific proof of their contribution to health. The second, more instrumentally, was due to realistic concern over the medical evidence's capacity to withstand objective scrutiny. The success of the Brandeis Brief dissipated this worry, at least in the short term, while making it politically unwise for progressives to highlight their earlier ambivalence. It was at this juncture that they embraced the alternative explanation that formalism conferred on this chain of events.

## **AMERICAN LEGAL THOUGHT AND THE LAW OF EVIDENCE, 1904-1940**

**Andrew Porwancher**

General histories of legal thought do not discuss the rules of evidence and evidence law historiography explicitly denies a relationship between evidence and legal philosophy. In contrast, my research suggests that evidence law was fundamental to the rise of legal realism. Under the hegemonic influence of John Henry Wigmore's *Treatise*, the law of evidence embraced the core values of realism no later than the first decade of the twentieth century. As a young law student at Harvard in the 1880s, Wigmore became a diligent protégé of the high priest of realism—Oliver Wendell Holmes, Jr. By the time Wigmore produced his canonical tome on evidence in 1904, he had internalized Holmes's critique of the law for nearly two decades. Wigmore's *Treatise*, in turn, helped shape the intellectual tenor of a new generation of realists, including the prominent Roscoe Pound. Ongoing research suggests that many other key realists of the 1920s and 1930s viewed Wigmore's *Treatise* as the consummate expression of legal realism. This investigation of evidence law corroborates an emerging revision of the formalist-realist narrative, positing that mainstream legal thought, prior to the First World War, had much more in common with the realists of the interwar years than previously understood.

The history of evidence law also promises to contribute to the historical sociology of knowledge. A core function of jury trials is to sort out truth from falsehood, and so the courtroom offers as an illustrative microcosm of society's broader effort to grapple with the question: "What is truth?" As America reoriented from a rural, agrarian society to an urban, industrial one, the task of establishing credible knowledge in many spheres proved both pressing and elusive. Wigmore's reform of evidence law was one way in which American civic life responded to this challenge presented by modernity.