DICEY, LUBMAN, AND BAGEHOT: CHINESE LAW IN THE COMMON LAW MIND

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I. INTRODUCTION

Surprising comparisons can yield surprising insights. One such comparison is the study of Chinese law with that of English constitutional history. It turns out that such a comparison can help explain one of the more curious aspects of Chinese legal studies in the United States: the relatively unique success of Chinese legal studies in embedding itself into present-day American legal academe.[1] It can also help us better appreciate the germinal contributions of one of the foremost scholars of Chinese law, Stanley Lubman, both to our understanding of Chinese law, and to comparative legal studies more generally. One of the distinctive features of Lubman's scholarship is his ability to reference Anglo-

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* This essay is in rememberance of the late legal historian William C. (Bill) Jones, who served as commentator during its presentation at the *New Scholarship in Chinese Law* conference at Columbia Law School in honor of Professor Stanley Lubman.

[1] This is not to suggest that Chinese law scholarship is in any way *better* than other forms of comparative scholarship. *See infra* text accompanying note 25. It is simply to suggest that Chinese law seems to have a greater presence in the American legal curriculum than other areas of comparative legal study. See *infra* notes 22 and 24 and accompanying text.

American legal history.[2] As suggested by the title of this essay, I seek to show that a comparison of the evolution of English constitutionalism with the more recent evolution of Chinese legal studies in the United States reveals that Lubman is not only an accomplished student of this history, but is also in his own way an important part of this history.

Part II of this essay will examine the oscillating fortunes of constitutional jurisprudence in England over the past 200 years. It does this principally by contrasting two of England's most influential constitutional scholars: Walter Bagehot and Albert Venn Dicey –showing how Bagehot's scholarship corresponded with an ascendant phase of English constitutional jurisprudence, while Dicey's scholarship corresponded with a subsequent declining phase.[3] Part III both compares and contrasts this history with the more recent history of Chinese legal studies in the United States. Like English constitutional law during the period culminating with Bagehot, and unlike much of present-day comparative legal studies, Chinese legal studies has enjoyed dramatic success in attracting the interest of the American common law mind. Unlike English constitutional law's subsequent, post-Diceyan development, however, Chinese legal studies in the United States shows no sign of retreating into the more marginalized existence typical of comparative legal studies more generally. Why might this be the case?

Part IV suggests that this trend has to do with the dynamics that underlie a particular institution I call "the common law mind." Returning to our exploration of English constitutional history, it argues that the dramatic changes of fortune experienced by English constitutional jurisprudence were occasioned by the sudden appearance and then disappearance of a particular kind of pragmatic orientation of that jurisprudence. It then explores how comparative legal studies in the United States also tend to lack this particular kind of pragmatic orientation, and how comparative legal studies are the direct structural descendents of Dicey's particular vision of English constitutionalism.[4]

Finally, in Part V, we see that Chinese legal studies, by contrast, seems more or less unique among its comparative counterparts in having

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[2] *See, e.g.*, STANLEY B. LUBMAN, BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO 11-32 (1999) (using comparative historical analysis to identify critical distinctions and similarities between Chinese and Western law).

[3] However, Dicey's vision contributed crucially to other aspects of English constitutional governance.

[4] This is not to imply that comparative law as currently studied is not vitally and practically important to our understanding of law *per se*. Dicey himself was a crucial figure in English constitutional development and his vision of English constitutionalism was critically relevant to many areas of public governance. *See infra* text accompanying note 67. It is just that Dicey's particular vision turned out not to be significantly relevant to those areas that concerned the common law *per se*. *See infra* text accompanying notes 18, 19, 67-74.

been able to develop a pronounced, integral, practice-sensitive aspect. This is not due to any superiority in scholarly skills, but simply to the unique context in which China's legal system emerged. We shall also see that this development has been crucial to the work and influence of Stanley Lubman.

II. THE RISE AND DECLINE OF ENGLISH CONSTITUTIONALISM CA. 1800-1880

Prior to the early 19th century, English "constitutionalism" was a relatively esoteric intellectual pursuit. It had little real relationship with how English governance actually worked. It was riddled with legal fictions, such as the idea that the King was the principal motor for British political activity. It did not acknowledge the existence of key governance institutions such as the Cabinet. The limitations on government it posited did not exist, while it failed to acknowledge the limitations that actually constrained English government.[5]

Beginning in the early 19th century, however, radical English jurists nevertheless began to use this construct. At the forefront of this constitutional evolution were elements of a newly self-identified "working class." Inspired by Thomas Paine's description of American constitutionalism, early working class radicals began incorporating English constitutionalism into their political and legal arguments. An early example of this rhetorical transformation is found in the trial of T. J. Wooler in 1817. Wooler was a working-class pamphleteer and the publisher of the radical journal, *The Black Dwarf*. He had published an article arguing that recent actions by crown ministers were contrary to existing constitutional principles. At that time, simply questioning the constitutional legitimacy of an act of Parliament or a crown minister was a criminal offense: seditious libel.

At his trial, Wooler, acting as his own counsel, sought to defend himself by showing that the act was indeed unconstitutional. The judge held, however, that the only real issue in the case was whether Wooler had indeed impugned the legitimacy of an act of Parliament, and that the actual constitutionality of that Act was not at issue because Wooler, as an ordinary citizen, was simply not qualified to interpret English

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[5] ALBERT VENN DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 2 (10th ed. 1959) (dismissing pre-Victorian English constitutionalism as concerning the "sacred mystery of statesmanship"); *see also* BRIAN HARRISON, THE TRANSFORMATION OF BRITISH POLITICS, 1860-1995 13-14 (1996); *see also* Michael W. Dowdle, *Of "Socialism" and "Socialist" Legal Transformations in China*, *in* ASIAN SOCIALISM AND LEGAL CHANGE: THE DYNAMICS OF VIETNAMESE AND CHINESE REFORM (John Gillespie & Pip Nicholson eds., forthcoming 2006).

constitutionalism.[6] Wooler responded with an extended constitutional argument as to why ordinary English citizens were competent to interpret the Constitution. In this way, he effectively undermined court and prosecutorial efforts to constrain courtroom discussion to technical points of law, and transformed the trial into a debate about the proper public character of England's "constitutional" rights.[7]

Stories like this were part of a larger transformation of constitutional discourse in England during the first half of the 19th century. English constitutionalism was no longer the private symbology of a political elite. It became a part of public discourse. In the process, its fictive character was superseded by an emergent empiricism. The existence of a cabinet was acknowledged in 1850. The fiction of virtual representation gave way to a focus on actual representation. The political dominance of the House of Commons over the House of Lords was recognized, as was the significant role that political parties played in English constitutional governance.[8]

This transformation culminated with the 1867 publication of Walter Bagehot's *The English Constitution*.[9] One of the most influential books on English constitutional law ever written, it was the first book to acknowledge the largely ceremonial role of the English royalty,[10] the dominant role of the Prime Minister and Cabinet,[11] and the role of political parties.[12] It articulated a radical new theory of constitutionalism that foreshadowed the "expressive theories of law" recently advanced by Richard Pildes and Cass Sunstein, among others.[13] Despite downgrading the monarch's constitutional role, it was the principal referent for both King George V (r. 1910 A.D. – 1936 A.D.) and King George VI (r. 1936 A.D. – 1952 A.D.) in their understandings of their constitutional responsibilities.[14] His influence also reached across the Atlantic, serving

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[6] Truth was not a defense in seditious libel cases.

[7] *See* JAMES A. EPSTEIN, RADICAL EXPRESSION: POLITICAL LANGUAGE, RITUAL, AND SYMBOL IN ENGLAND, 1790-1850 41-54 (1994).

[8] HARRISON, *supra* note 5, at 43.

[9] WALTER BAGEHOT, THE ENGLISH CONSTITUTION (1978) (originally published 1867).

[10] *See, e.g., id.* at 12; *see also* ALBERT V. DICEY, INTRODUCTION TO THE STUDY OF THE CONSTITUTION 19 (E.C.S. Wade ed., 10th ed. 1959) (crediting Bagehot as being "the first author who explained in accordance with actual fact the true nature of the Cabinet and its real relation to the Crown and to Parliament").

[11] *See* BAGEHOT, *supra* note 9, at 10-13; *see also* DICEY, *supra* note 5, at 19-20; HAROLD J. LASKI, PARLIAMENTARY GOVERNMENT IN ENGLAND: A COMMENTARY 183 (1938).

[12] *See* BAGEHOT, *supra* note 9, at 140-46; *see also* HARRISON, *supra* note 5, at 504-05.

[13] *Compare* BAGEHOT, *supra* note 9, at 4-10 (discussing "dignified"—as contrasted with "practical"—aspects of the English Constitution) *with* Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000).

[14] *See* HARRISON, *supra* note 5, at 47.

as a major inspiration for the early constitutional theories of Woodrow Wilson.[15]

The revolutionary character of Bagehot's *The English Constitution* is also seen in the author himself. Bagehot was neither on the faculty of Oxford or Cambridge nor a member of the English political elite. He was a successful journalist. His understanding of English constitutionalism was thus what we might call a "practitioner's understanding," one borne out of a journalist's practical interest in explaining to a broad readership why English governance did what it did; hence the tremendous influence of his book.[16] Bagehot was not writing for an insular collection of academic elite, but for that larger, less-insulated population that for the previous fifty years had driven the Constitution's new and transformative relevance.

Bagehot's "revolution" was short-lived, however. He passed away in 1877. In his place at the head of England's now invigorated constitutional-law table came Albert Venn Dicey. In many ways, Dicey was a product of Bagehot. He was motivated by the robust intellectual discourse on English constitutionalism that Bagehot had helped catalyze. But whereas Bagehot was a primarily a journalist and professional, Dicey was a jurist and an academic. Dicey took Bagehot's germinal observations about the working of the English constitutional system and repackaged them into a rationalized and encompassing theoretical framework. For example, where Bagehot simply observed the dominant role that Parliament and the government played vis-à-vis the monarchy in the constitutional order, Dicey extracted out of this observation a legitimating theory of parliamentary supremacy, which he called "sovereignty of Parliament." Whereas Bagehot simply observed the emergent workings of an administrative state, Dicey extracted out of this observation his famous theory of rule of law.[17]

Dicey's theorizing provided the conceptual foundation for what we might think of as "modern" English constitutional law. It allowed constitutional law to become a core component of English legal academia. But it did not seem to stimulate the actual development of what we might call a constitutional jurisprudence. In fact, it did just the opposite. After

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[15] *See* 1 RAY STANNARD BAKER, WOODROW WILSON: LIFE AND LETTERS, YOUTH, 1856-1890, at 213-14 (1968) (originally published 1927) (reprinting excerpt of a letter to Ellen Axson dated Jan. 1, 1884); *see also* Thomas O. Sargentich, *The Limits of the Parliamentary Critique of the Separation of Powers*, 34 WM. & MARY L. REV. 679, 684-96 (1993).

[16] For a good assessment of Bagehot's contributions to English constitutional understanding, see Adam Tomkins, *The Republican Monarchy Revisited*, 19 CONST. COMMENT. 737 (2002).

[17] *See* DICEY, *supra* note 5, at 35, 406-14; *see also id.* at 39-85 (on parliamentary sovereignty); *id.* at 389-98 (on rule of law). For more on the "rule of law" aspect of Dicey's vision, see *infra* note 79 and accompanying text.

Dicey, constitutional jurisprudence in England again became more or less moribund. As noted by Harold Laski, as of the 1920s, some fifty years after Bagehot's publication, the foundational constitutional research issues identified by Bagehot—issues such as the constitutional role of the monarch, the actual operation of the Cabinet and civil service, and even the actual workings of English judicial review—remained largely unexplored.[18] Administrative law jurisprudence, the principal protector of English constitutional liberties, lay largely dormant until the 1970s.[19]

III. THE RISE (BUT NOT DECLINE) OF CHINESE LEGAL STUDIES

I suggest that this history might help us better understand an interesting aspect of Chinese legal studies in United States law schools, and better appreciate Stanley Lubman's particular contribution to these studies.

What is this "interesting" aspect of Chinese legal studies? In the 1980s, America's legal academy began to take over the study of Chinese law, previously the domain primarily of historians, sociologists, and the occasional political theorist. At the time, one might have been excused for viewing that development with a certain degree of skepticism. As many have noted over the years, the American legal academy has not been particularly receptive to comparative legal study.[20] If American legal academia in the 1980s could generate so little scholarly discourse about the comparative meanings of the foundational civil law jurisdictions of Germany or France, or about the comparative meanings of legally heretical systems like those of the Soviet Union or even Japan,[21] then the prospects for an intellectual discourse on the comparative meaning of the law of a remote, non-European, non-capitalist, and underdeveloped China would seem particularly remote.

But in fact, the discourse surrounding Chinese law in American law schools has turned out to be surprisingly robust. A quick survey shows that in 2003 alone, American law reviews listed in Lexis/Nexis published seventy five articles with the word "China" in their title. By contrast, they published only thirty five articles with the word "Japan" in

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[18] *See* Harold J. Laski, *On the Study of Politics*, *in* THE STUDY OF POLITICS: A COLLECTION OF INAUGURAL LECTURES 1, 13 (Preston King ed., 1977) (a re-printing of Laski's inaugural lecture delivered at the London School of Economics in 1926).

[19] *See* WILLIAM WADE & CHRISTOPHER FORSYTH, ADMINISTRATIVE LAW 18-19 (9th ed. 2004).

[20] *See also* William Ewald, *Comparative Jurisprudence (I): What was it Like to Try a Rat?* 143 U. PA. L. REV. 1889, 1961-65 (1995) (describing the general malaise of comparative legal studies in the United States).

[21] *See infra* note 24.

the title; seventeen articles with the word "Germany" in the title; and seventeen articles with the word "France" in the title.[22] What accounts for American legal academia's surprising embrace of Chinese legal studies?

One might suspect that this embrace simply reflects American strategic geo-political and economic interests.[23] But this does not explain the whole story. For over forty years, our principal geopolitical competitor was the Soviet Union. But American legal academia never generated sustained institutionalized interest in Soviet law. Beginning in the 1970s and 1980s, our principal economic competitor was Japan. Not only did Japan sometimes challenge us strategically, but it sported a legal system that may arguably represent the most direct challenge to the foundational precepts of the American vision of law *per se*.[24] Nevertheless, as noted above, in 2003, twice as many articles were published on Chinese law than were published on Japanese law.

Before continuing, however, I want my claim to be as clear as possible. I am not suggesting that scholars of Chinese law are better scholars or better academics than American legal scholars focusing on other jurisdictions. That is clearly not the case. More articles do not at all suggest better articles. I simply point out that, for some reason, American legal academia has embraced the study of Chinese law in a way distinct from other comparative legal studies. We might think of this as a variation of the "Jerry Lewis in France" phenomenon. The French appear to love Jerry Lewis more than any other American comic. But few, if any, Americans regard this as suggesting that Jerry Lewis is indeed our "best" comic. Instead, most regard it as suggesting that there is something very curious about the French.[25] Similarly, the fact that American legal academia has unexpectedly embraced Chinese legal studies is interesting not so much for what it says about scholars of Chinese law as for what it says about American legal academia.

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[22] Searching on www.lexis.com in the US Law Review and Journal Combined database, by "Terms & Connectors," for "Title (China)"; "Title (Japan)"; "Title (Germany)"; and "Title (France)", restricted by date from January 1, 2003 to December 31, 2003.

[23] *See* DAVID MARTIN JONES, THE IMAGE OF CHINA IN WESTERN SOCIAL AND POLITICAL THOUGHT 145-203 (2001) (exploring institutional linkages between American foreign policy concerns vis-à-vis China and American political science scholarship on China).

[24] *See, e.g.*, Frank Upham, *Privatized Regulation: Japanese Regulatory Style in Comparative and International Perspective*, 20 FORDHAM INT'L L.J. 396, 488-99 (1996) (suggesting Japanese regulatory experience as a quasi-corporatist alternative to American-style "rule of law").

[25] *See, e.g.*, RAE BETH GORDON, WHY THE FRENCH LOVE JERRY LEWIS: FROM CABARET TO EARLY CINEMA (2001).

IV. COMPARATIVE LAW IN THE COMMON LAW MIND

At its heart, my inquiry is ultimately an inquiry into something we might call "the common law mind." The common law is, among other things, an "institution": a set of more or less stable patterns of ideas and behaviors that propagate themselves through time.[26] But this dynamic of propagation is not one of simple replication. Whether or not a particular idea or behavior propagates depends in part on whether some significant portion of legal society or general society associates that idea or behavior with "law." Further, the ideas that a society associates with "law" are both socially constructed and constantly evolving. One cannot assume that some idea that is associated with the law at some particular place and point in time will retain its association even in the near future. Twice during the 19th century, for example, many in the United States saw codification as a defining element of modern law and devoted considerable effort towards the codification of American law.[27] Today, however, such efforts are only of historical significance. They did not propagate.

We might also note that the act of propagation is only marginally related to functionality. Some practices that propagate clearly have a functional basis. But functionality *per se* does not guarantee propagation. A classic example of this would be the English Court of Chancery as it was originally intended to operate. By the 15th century, the traditional common law courts in England had become so rule-bound that there was real concern that the King was not adequately serving justice. The Court of Chancery was intended to provide justice in cases where the ossified jurisdictional rules of the ordinary, common law courts prevented these courts from doing so. The Court of Chancery was to do this by operating in "equity"—i.e., by doing justice without reference to formal rules and doctrine.[28]

Clearly, there was a functional utility here. The universal use of "alternative dispute resolution" procedures like arbitration, mediation, and restorative justice testifies to a strong functionality in such equitable approaches.[29] Nevertheless, by the 17th century, the Court of Chancery

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[26] My definition of institutions here elides two related ideas: one is the idea that institutions are constructed primarily out of norms, *see., e.g.*, DOUGLASS NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE, AND ECONOMIC PERFORMANCE 3-6 (1990); the other is the idea that these norms must propagate through time, *see, e.g.*, JACK M. BALKIN, CULTURAL SOFTWARE: A THEORY OF IDEOLOGY 42-73, 173-87 (1998).

[27] *See* CHARLES M. COOK, THE AMERICAN CODIFICATION MOVEMENT (1981); *see also* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 90-93, 403-06 (2d ed. 1985).

[28] See JOHN H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 102-08 (4th ed. 2002).

[29] *See, e.g.*, HUGH COLLINS, REGULATING CONTRACTS (1999).

had become just as rule-bound and ossified as the common law courts to which it was meant as an alternative.[30] The problem was that the practice of equity simply does not propagate well in an institutionalized juridical environment. A truly "equitable" legal solution is so personal and idiosyncratic that it is extremely difficult to reify in the form of stable institutional structures, since institutional structures are quintessentially collective phenomena. Without institutional reification, an idea is not easily transmitted to succeeding generations of institutional actors.[31]

By contrast, it is very easy to communicate rules.[32] For this reason, the Court of Chancery began to develop rules that allowed it to identify and propagate to subsequent generations of Chancery judges the essence of its uniquely "equitable jurisdiction."[33] The irony is that it was precisely this desire to preserve and propagate its special connection to equity that caused the Court of Chancery to ultimately become as rule-bound, if not more so, as the common law courts themselves.[34]

For convenience, I will refer to that collection of principles and expectations that caused particular ideas and practices to propagate in conjunction with the Anglo-American common law as "the common law mind." In light of the above explanation, we can restate the query that motivates this essay as follows: In contrast to comparative law more generally, Chinese legal studies has been relatively and surprisingly effective in propagating itself within the larger institutions of American common law. Why is this the case? The answer, I suggest, may lie in significant part in the nature of what I am calling "the common law mind."

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[30] *See, e.g.*, CHARLES DICKENS, BLEAK HOUSE (Holt, Rinehart & Winston 1970) (1853) (Dickens' famous satire of the Chancery Court as it operated around the mid-19th century).

[31] *See also* Michael W. Dowdle, *Deconstructing "Graeme": Observations on Pragmatism, Forensics, and the Institutional Epistemology of the Courts*, 9 PSYCHOL. PUB. POL'Y & L. 301 (2003); *cf.* MICHAEL POLANYI, PERSONAL KNOWLEDGE: TOWARDS A POST-CRITICAL PHILOSOPHY (1962) (identifying non-formalizable forms of knowledge called "tacit" knowledge); Julian E. Orr, *Sharing Knowledge, Celebrating Identity: Community Memory in a Service Culture*, *in* COLLECTIVE REMEMBERING 169 (David Middleton & Derek Edwards eds., 1990) (study of how tacit knowledge is transmitted).

[32] *See* Dowdle, *supra* note 31.

[33] *See* JOHN H. BAKER, *supra* note 28, at 109-11 (describing Chancery courts' gravitation towards ever greater rule-bounded nature during the 16th century).

[34] Indeed, some complain that in the modern-day, alternative dispute resolutions institutions—which, like the Courts of Chancery, were set up to introduce oases of equity into the larger system—seem to be suffering from the same creeping rigidification that affected the Courts of Chancery. *See, e.g.*, Penny Brooker, *The "Juridification" of Alternative Dispute Resolution*, 28 ANGLO-AM. L. REV. 1 (1999). A similar fate may have been met by China's imperial legal system which, despite the equitable emphasis of its Confucian ideology, seems to have become particularly rule-bound by the end of the 19th century. *See, e.g.*, R. Randle Edwards, *The Role of Case Precedent in the Qing Judicial Process as Reflected in Appellate Rulings*, *in* UNDERSTANDING CHINA'S LEGAL SYSTEM: ESSAYS IN HONOR OF JEROME A. COHEN 180 (C. Stephen Hsu ed., 2003).

A. *English Constitutionalism and the Common Law Mind*

As it turns out, our story about the rise and subsequent recession of English constitutionalism during the 19th century provides a useful foil for exploring that aspect of the common law mind that relates most directly to the propagation of Chinese legal studies in American legal academia. As we shall see, that rise and recession, like the rise of Chinese legal studies in late-20th century America, is also a story about the nature of the common law mind, or about the dynamics of institutional propagation within the common law world.

We noted above that the dynamic emergence of English constitutionalism during the first half of the 19th century was driven by an emerging constitutional "practice"—by people like Wooler using the terms of English constitutionalism to address practical legal issues arising out of English governance. Bagehot's uniquely empirical exploration of the workings of constitutional government in England was also part of this trend.[35] It is precisely this new-found, practice-based utility that underlies the renaissance of English constitutional law during the first half of the 19th century. This, I argue, is because such pragmatic, practice-based concerns are an essential feature of the common law mind.

A particularly cogent examination of the critically pragmatic nature of the common law mind can be found in the work of Dicey's older contemporary, Frederic William Maitland. In his inaugural lecture as Downing Professor of the Laws of England at Cambridge University in 1888, Maitland set out to explore a seeming paradox in 19th century English common law.[36] On the one hand, in comparison with the civil law, the common law is a distinctly historical product—its foundational authority ultimately derives from historical cases rather than from abstract principles *per se*. Yet on the other hand, and again in contrast to the civil law, the English common law had largely neglected the actual study of legal history. Maitland concluded that the reason for this seeming paradox lay precisely in the common law's driving emphasis on practical utility:

> [I]t may seem a paradox, but I think it true, that the earlier ages of English law are so little studied because

[35] *See also* A.W. BRADLEY & K.D. EWING, CONSTITUTIONAL AND ADMINISTRATIVE LAW (13th ed. 2003) (noting Bagehot's germinal contribution by looking at the practice as opposed to the theory of English constitutional law).

[36] Frederic William Maitland, *Why the History of English Law is Not Written*, *in* FREDERIC WILLIAM MAITLAND, HISTORIAN: SELECTIONS FROM HIS WRITINGS 132 (Robert Livingston Schuyler ed., 1960).

> all English lawyers are expected to know something about them . . . . But on enquiry we shall find that the practical necessity for a little knowledge is a positive obstacle to the attainment of more knowledge and also that what is really required of the practicing lawyer is not, save in the rarest cases, a knowledge of medieval law as it was in the Middle Ages, but rather a knowledge of medieval law as interpreted by modern courts to suit modern facts.[37]

By contrast, Dicey's more theoretical vision of constitutional law was not concerned with issues of legal practice.[38] And this corresponds to the subsequent decline in constitutional jurisprudence during the first half of the 20th century. Dicey's effect in this regard was due in significant part to England's traditional disconnect between university-based legal academics and actual legal practice. Historically, England's legal academy had shown little interest in the mundane concerns of common law practice.[39] Instead, like its continental counterparts, it focused primarily on exploring the metaphysical implications of the legal categories set out by Roman law.[40]

Dicey's vision of English constitutional law recapitulated this metaphysical emphasis, albeit with particular focus on distinctly common law institutions.[41] Owing perhaps to his conceptual dependence on the abstract and academic categorizations advanced by John Austin earlier in the 19th century, Dicey's theoretical formulations overlooked the critical practice-area of judicial review, that special body of law developed to allow judicial review of administrative actions.[42] During the second half of the 19th century, judicial review was becoming the principal area of

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[37] *Id.* at 136-37; *see also id.* at 134 ("It is hardly too much to say that [in England] nobody taught law or attempted to teach [the common law], and that no one studied law save with the most purely practical intentions.").

[38] *See also* Tomkins, *supra* note 16; *cf.* WADE & FORSYTH, *supra* note 19, at 18-19. Of course, Dicey was also capable of very effective practice-oriented scholarship in other areas. *See, e.g.*, DICEY AND MORRIS ON THE CONFLICT OF LAWS (Lawrence Collins ed., 13th ed. 2000).

[39] *See* BAKER, *supra* note 28, at 170-71; *see also* Maitland, supra note 36, at 133.

[40] *See* Neil Duxbury, *English Jurisprudence Between Austin and Hart*, 91 VA. L. REV. 1 (2005) (discussing the stagnating effect of John Austin's analytic jurisprudence on English legal academics); *see also* Letter from Harold J. Laski to Justice Oliver Wendell Holmes (Jan. 29, 1919), *in* 1 HOLMES-LASKI LETTERS 181, 181 (Mark DeWolfe Howe ed., 1953) (attributing to Austin a deleterious effect on English legal thought).

[41] *See generally* RICHARD A. COSGROVE, THE RULE OF LAW: ALBERT VENN DICEY, VICTORIAN JURIST 23-28 (1980) (describing influence of Austin on Dicey's general jurisprudence).

[42] *See also* E.C.S. Wade, *Introduction* to DICEY, *supra* note 5, at xix, xxxii (suggesting that Dicey's failure to recognize the crucial constitutional implications of administrative law may have been due to the influences of Austin's particular classification of the realm of the constitutional).

common law practice in which constitutional principles were most likely to arise.[43] As subsequent generations of university-based scholars built upon Dicey's analytic-conceptual framework, with its *pro forma* exclusion of judicial review, the core growth area of English jurisprudence remained invisible to its constitutional conceptualizations.[44] What was left was a vision of English constitutionalism that became almost as divorced from actual practice as it was in the late 18th century.[45] It would not be until the 1940s that the linkage between judicial review and constitutionalism would be jurisprudentially identified. And with that, the idea of a meaningful constitutional jurisprudence would again begin to capture the imagination of the common law mind.[46]

None of this is to imply that Dicey did not make positive, crucial contributions to English constitutional understandings. Dicey's fame as a germinal constitutional scholar and theorist is well-deserved. His particular vision proved essential for bringing English constitutionalism into the 20th century and for linking it with evolving visions of English governance.[47] Nor is it to suggest that Dicey *per se* affirmatively caused the subsequent decline in English constitutional jurisprudence. The reason that the 19th century's renaissance in English constitutional law failed to propagate is not because of the appearance of Diceyan theorizing, but rather the disappearance of Bagehot-ist pragmatics. Perhaps because he was neither an academic nor a lawyer, Bagehot did not generate any common law protégés. If he had, then perhaps these protégées could have catalyzed Diceyan theories of constitutionalism by integrating into them the emerging practice of judicial review in the same way that Bagehot himself had catalyzed the older, monarchical theories of constitutionalism by integrating into them the emerging practices of cabinet and party-based government.

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[43] *See also* FREDERIC MAITLAND, CONSTITUTIONAL HISTORY OF ENGLAND 526-39 (1965) (arguing that administrative law must be regarded as an integral part of English constitutional law).

[44] *See* Wade, *supra* note 42, at xxxi-xxxii; Laski, *supra* note 18, at 10; *see also* Arthur Berriedale Keith, *Preface* to EDWARD WAVELL RIDGES, CONSTITUTIONAL LAW OF ENGLAND, at v (Arthur Berriedale Keith ed., 6th ed. 1937) (noting that "the classical doctrine of rule of law must now be modified and due recognition accorded to administrative law as an essential part of constitutional law").

[45] *See* Laski, *supra* note 18, at 10-11, 13; *see also* Wade, *supra* note 42, at xxi ("There is little doubt that generations of readers have been convinced of the truth of [Dicey's] assertions and so his views at one time were in some danger of being regarded as axiomatic . . . . It has, however, for some years now been apparent to those who study the working of modern government that both the sovereignty of Parliament and the principle of the rule of law can only with some difficulty be reconciled with [the actual workings of modern government].").

[46] *See also* WADE & FORSYTH, *supra* note 19, at 15-18.

[47] *See, e.g.*, Wade, *supra* note 42, at xxi.

B. The Common Law Mind and Comparative Law

The epistemic disconnect that prevented Dicey's vision of English constitutionalism *per se* from resonating with the common law mind also tends to infect comparative law. In the same lecture in which he discussed the difficulty of incorporating legal history into the study of common law, Maitland also noted how similar difficulties attended to comparative study as well:

> History involves comparison and the English lawyer who knew nothing and cared nothing for any system but his own hardly came in sight of the ideal of legal history.
>
> . . . .
>
> [T]here is not much "comparative jurisprudence" for those who do not know thoroughly well the things to be compared, not much "comparative jurisprudence" for Englishmen who will not slave at their law reports . . . . One of the causes why so little has been done for our medieval law is I feel sure our very incomplete and consecrated ignorance of French and German law.[48]

In other words, comparative law suffers from the same general infirmities as both legal history and Diceyan constitutionalism insofar as its resonance with the common law mind is concerned: for the most part, comparative legal studies have traditionally lacked any significant practice-oriented component.[49]

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[48] Maitland, *supra* note 36, at 134-36.

[49] Maitland here also accentuated a point seldom recognized in present-day American law schools: In the American law school curriculum, comparative law is invariably associated with international law. However, the more appropriate yokemate for comparative law is legal history. As Maitland recognized, legal history is simply comparative law turned on its side. Both legal history and comparative law exist outside of the normative justificatory concerns that drive common law jurisprudence. Both are, therefore, to a significant extent, ulterior to the common law mind. By contrast, while international law too has its conflicts with the common law, the two at least share a foundational normative concern: what Martin Shapiro and others have termed the "triadic logic" that underlies juridical law everywhere. One wonders, therefore, whether part of the problem with the American embrace of comparative law lies in its forced coupling with international law. *See, e.g.*, Alec Stone Sweet, *Judicialization and the Construction of Governance, in* MARTIN SHAPIRO & ALEC STONE SWEET, ON LAW, POLITICS, AND JUDICIALIZATION 56-71 (2002) (describing the "triadic dispute resolution" model); *id.* at 69, 78-84 (relating the "triadic dispute resolution" model to various forms of decision-making); *see also id.* at 72-78 (relating the "triadic dispute resolution" model to the development of international trade law).

More recently, comparative legal scholars H. Patrick Glenn, Mary Ann Glendon, and Mathias Reimann, among others, have also noticed this disconnect between the focus of traditional comparative law and the practice-based orientations of "the common law mind."[48] Glenn is perhaps most forceful in describing this disconnect:

> Comparative law, however, as it has traditionally been thought in western law, has rarely been interested in such an investigation [as are the focus on the normal legal curriculum], since comparative law has historically been harnessed to an instrumental role in the construction of nation-states . . . . It has been thought of as a domain of specialists, exercised essentially at the doctrinal and legislative level. Legal practice would thus not engage in comparative law, but would exercise its talents within the confines of national substantive law and national private international law (an essentially noncomparative process). The expression "the comparative method" is thus used to indicate the limited and exceptional character of comparative law, as opposed to the apparently noncomparative method of normal national legal practice . . . . Comparative law, as it has traditionally been thought, thus appears singularly inappropriate to examine the process by which legal practitioners, often organized on a transnational basis, engage in "removing borders" and challenging the primacy of state law.[49]

To Glendon, this disconnect expressed itself in a kind of internal conceptual quagmire that distinguished comparative legal studies from the rest of the common law world:

> [T]he question remains whether comparative methods, after taking us deep into the twisted labyrinths of law, behavior, and attitudes, can also help to lead us out of

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[48] *See* H. Patrick Glenn, *Comparative Law and Legal Practice: On Removing the Borders*, 75 TUL. L. REV. 977 (2001); Mary Ann Glendon, *General Report: Individualism and Communitarianism, in Contemporary Legal Systems: Tensions and Accommodations*, 1993 BYU L. REV. 385 (1993); Mathias Reimann, *The End of Comparative Law as an Autonomous Subject*, 11 TUL. EUR. & CIV. L.F. 49 (1996).

[49] Glenn, *supra* note 50, at 979-80.

> them? Or do they merely sweep us into a dizzying spiral where everything is both cause and effect; different from, but similar to, everything else; separate but intertwined; constituted by and constitutive of everything else; and so on? . . . [F]ancy legal and social theory in recent years has often lost track of what is distinctively legal.[50]

Finally, Reimann sees this disconnect in the insularity that shrouds comparative law in the common law curriculum:

> One of the major problems with comparative law today is that it leads to an insular existence within American law schools. This isolation is not primarily a question of curricular structures, course descriptions, and class syllabi because these matters are merely external expressions of thought patterns. It is primarily an issue of consciousness, i.e., of how one conceives of comparative law.
>
> The current prevailing conception is that of a separate (and esoteric) discipline that matters only to a few people with special interests.[51]

More comprehensive support for this observation about the disconnect between the practice-based orientation of the common law mind and the general concerns of comparative legal studies can be found in a recent article by Annelise Riles.[52] Riles sees comparative legal studies in present-day American legal academe as falling basically into three approaches, or "schools," which she refers to as the "categories" school, the "context" school, and the "discourse" school.[53] As she describes them, none of these schools evinces any significant practice-oriented component that would connect them with the common law mind.

Perhaps the school that comes closest to recognizing practice-based concerns would be the categories approach—that approach associated with the post-World-War-II generation of comparativists like Arthur von Mehren and Max Rheinstein that focused on identifying

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[50] *Id.* at 418.
[51] Reimann, *supra* note 50, at 65.
[52] Annelise Riles, *Wigmore's Treasure Box: Comparative Law in the Era of Information*, 40 HARV. INT'L L.J. 221 (1999).
[53] *Id.* at 230.

functional equivalents between legal systems and exploring how these equivalents were expressed in the respective legal rules and doctrines of these systems.[54] Riles suggests that one of the concerns driving this school is the use of foreign law in decisionmaking.[55] But the decisionmaking that she refers to appears to be primarily legislative, and not the juridical, dispute-resolution-oriented kind that is the focus of the common law. Riles also suggests that the categories school has been particularly frustrated by the American legal community's "anti-intellectualism." Interestingly, this critique resonates with Maitland's despair at ever seeing the practice-oriented English legal mind embracing the true pursuit of legal history. It also resonates with the reason some give for the nonchalance that practice-oriented English legal professionals historically have shown towards university-based legal academics in general.[56]

If the categories school is only tangentially concerned with practice concerns, the other two schools seem wholly uninterested. The context school looks particularly at the relationship between law and culture.[57] This is a very important issue, but it is also an issue that does not mate particularly well with the common law's core concerns. Consider the following anecdote from Rebecca French, a comparativist scholar of Tibetan law working in the context-school mode:

> An American law professor recently asked me, "So, Rebecca, what was the Tibetan law of torts?" His question makes sense in the context of legal treatises that discuss legal institutions, move on to substantive legal rules and procedures, describe appellate and Supreme Court cases of interest, and analyze the current state of a particular legal category—that is, in the way American lawyers typically construct and define what is important in their own and other legal systems. Indeed, they will say that this is what constitutes law.
>
> What the law professor's question does not recognize are all the practical and conceptual assumptions that American lawyers already know about the world and about the law: the dimensions of space and time, the subtleties of legal myth and narrative, the legal rituals

[54] *See generally id.* at 230-40.
[55] *Id.* at 232.
[56] *Id.* at 233. *Compare* Maitland, *supra* note 36, at 136, *with* Duxbury, *supra* note 40.
[57] *See generally* Riles, *supra* note 54, at 240-46.

> that define how actors act, speak, and move in a legal forum, social hierarchies that influence their decisions, the aspects of authority, power and legitimation they understand.
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> But what if most or all of these practical and conceptual assumptions were not only different from those that apply in Tibet but arranged in networks or sets of relations that were also entirely different? What if, when one first asked Tibetans about law, they said that no such category existed?[58]

Obviously, these are very important observations. But in the end, Professor French's response to the common law professor's inquiry ultimately seems to be something to the effect of "the idea of tort is irrelevant to Tibetan law." But if the idea of tort is irrelevant to Tibetan law, then Tibetan law would also be irrelevant to the common law's core conceptual purpose of understanding tort law. Assuming that the same disconnect identified by Professor French with regards to tort law would affect the other core areas of common law concern—criminal law, contract law, and such—then this would not bode well for the propagation of context-based studies of comparative law within legal studies more generally. A mode of investigation that cannot find any purchase with such core conceptual components and concerns of the common law is not likely to spark the common lawyer's focused attention.

Finally, Riles also identified in American comparative legal thought what she terms "the discourse school." The discourse school focuses on "uncovering hidden purposes, meanings, themes or strategies in familiar mainstream legal texts or genres of argument."[59] The divergence between this school's comparative agenda and the practice-oriented interests that motivate the common law mind are best summed up by Riles herself: "These writers do not pretend to 'solve' real world problems. Rather, in the spirit of 'Art for Art's Sake,' they present comparative law as an entirely academic (by which they mean theoretical) pursuit, more similar to cultural studies or comparative literature than a technocratic set of skills."[60]

Collectively, according to Riles, "comparativists of all three traditions find themselves drawn to theory, to knowledge of foreign law

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[58] REBECCA FRENCH, THE GOLDEN YOKE: THE LEGAL COSMOLOGY OF BUDDHIST TIBET 57 (1995), *quoted in* Riles, *supra* note 54, at 241.
[59] Riles, *supra* note 54, at 246; *see generally id.* at 246-50.
[60] *Id.* at 247.

for its own sake, and to the idea that their work serves wider internationalist goals."[61] This is important, but it is also completely inapposite to the principal concerns of the common law mind. As Maitland described above, the common law mind is distinctly not interested in knowledge for its own sake. As famously noted by both Justice Holmes and Karl Llewellyn, the common law is interested in knowledge only insofar as it furthers the practical ends of (generally juridical) dispute resolution and avoidance.[62] It is thus no wonder that comparative law would find it so difficult to maintain purchase in American law schools.

C. *Comparative Law and Dicey: The "Rule of Law" Connection*

At this point, I wish to again remind readers of my focus here. My point is not that comparative law is irrelevant to the common law. The problem that traditional comparative legal studies has in maintaining itself is not a problem that lies in the nature or character of those studies *per se*; it is a problem that lies in the interaction between the particular concerns that drive these studies and the particular concerns that drive the common law mind. As we saw in the history of the Court of Chancery, simply being functionally relevant to the common law does not guarantee institutional propagation.

Again, reference to Dicey may be useful here. Despite its incompleteness in failing to consider the more practical aspects of English constitutional legal practice, Dicey's theoretical framework was clearly relevant to 20th century Britain's efforts to visualize a 20th century British constitutionalism.[63] It is just that its limited, metaphysical focus made it less relevant to common lawyers, and hence impeded its capacity to promote a common law constitutional jurisprudence.

Indeed, the connection between Diceyan constitutional thought and American comparative law is not simply metaphorical. It is also structural. Much of present-day comparative law discourse is a direct, albeit generally unacknowledged, product of Dicey's constitutional vision.

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[61] *Id.* at 261.

[62] *See* Oliver Wendell Holmes, Jr., *The Path of the Law*, *in* COLLECTED LEGAL PAPERS 167 (1921); KARL N. LLEWELLYN, THE CASE LAW SYSTEM IN AMERICA 76 (Paul Gewirtz ed., Michael Ansaldi trans., 1989). For a more modern articulation of this idea, see Daniel A. Farber, *The Case Against Brilliance*, 70 MINN. L. REV. 917 (1986). For a more analytic exploration of this idea, see HANS-GEORG GADAMER, TRUTH AND METHOD 329-30 (Joel Weinsheimer & Donald G. Marshall trans., 2d rev. ed. 1994).

[63] *See, e.g.*, Wade, *supra* note 42, at xxi, clxiii, cxciii.

This core structural linkage is found in their shared focus on issues of "rule of law."

In many ways, Dicey himself was a quintessential comparativist.[64] His constitutional scholarship is permeated by distinctly comparativist concerns. Dicey's interest in articulating an English constitutionalism was driven by two related motivations. The first was to show that English constitutionalism and American constitutionalism were actually of a single kind. [65] The second was to show why Anglo-American constitutionalism had succeeded while non-Anglo-American versions of constitutionalism had allegedly failed.[66]

The idea of "rule of law," Dicey's seminal contribution to modern legal theory, was a direct product of his comparative imagination. Dicey advanced his idea of rule of law in order to explain why English and American constitutionalism had been uniquely successful in repelling tyranny in comparison to the constitutional systems of other countries. He argued that Anglo-American constitutionalism subjected both the people and the government to the same law administered by the same, independent court system. By contrast, continental and Asian visions of constitutionalism had all proved comparatively unsuccessful, he claimed, because their executive governments either were not subject to law at all, or if they were—as was the case with the French—it was to a special law administered not by an ordinary court, but by a special body.[67] It was this condition of having both citizen and government subject to a single law administered by a single court that Dicey sought to capture with the term "rule of law."

In other words, Dicey believed that recognizing the constitutional essence of "rule of law" would allow England and the larger common law world to preserve its special constitutional character during its rapid, turn-of-the-century transition to a more centralized, executive-oriented style of governance that would much later be associated with the term "modernism." [68] Of course, many, and perhaps most, comparative scholars today doubt the functional validity of Diceyan visions of "rule of

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[64] In addition to defining English constitutional law, Dicey's principal area of doctrinal focus was conflicts of law. *See generally* DICEY AND MORRIS ON THE CONFLICT OF LAWS , *supra* note 38. Conflicts of law is the substantive area of the common law to which comparativists have traditionally gravitated. *See* David J. Gerber, *System Dynamics: Toward a Language of Comparative Law?*, 46 AM. J. COMP. L. 719, 720 (1998).

[65] *See* David Schneiderman, *A. V. Dicey, Lord Watson, and the Law of the Canadian Constitution in the Late Nineteenth Century*, 16 LAW & HIST. REV. 495, 503-09 (1998).

[66] *See, e.g.*, DICEY, *supra* note 5, at 183-205, 328-32, 406-14.

[67] *See, e.g., id.* at 183-205.

[68] *See* Schneiderman, *supra* note 67, at 506-09.

law" even insofar as Anglo-American constitutionalism is concerned.[69] Yet, I do not suggest that present-day comparative law agrees with Dicey's vision of rule of law, but that present-day comparative law scholarship tends to focus on the same general issues that Dicey's idea of rule of law sought to address. Specifically, today's comparative project, like Dicey's constitutional project, sees its principal contribution to legal understanding in terms of understanding whether there are particular "essences" associated with the idea of law.

Indeed, one of the ways that we can think about Riles' various "schools" of comparative law is that each is ultimately defined by a different way of addressing this particular issue. What she calls the "categories" school argues for functional essences. It seeks to identify and locate common, core functions that relate seemingly different legal systems. The "context" school, by contrast, denies the presence of functional essences. It seeks to demonstrate that, to the extent that there is an "essence" operating in a particular legal system, that essence is culturally dependent, and thus the seeming essentialist correspondences identified by functionalists represent false correlations. The "discourse school" seeks to show how these comparative discussions about the essences of law are really just projected, egocentric discussions about ourselves.

Again, I want to reiterate that these are indeed important issues. The question of whether there are core essences behind the idea of "law" has extremely vital implications for our efforts to promote global human flourishing. In today's increasingly interpenetrated world, efforts to promote such flourishing are increasingly associated with the development of so-called "legal" regimes. Issues of the quality of law and legalism found in foreign and international "legal systems" are increasingly relevant to the formation of American foreign policy. These same issues also lie at the core of a multi-billion dollar international development "industry" in which just about every industrial and post-industrial social and economic interest imaginable has some sort of stake.

My focus here is not on the importance of this contribution, but in its ability to propagate itself in the common law mind. And just as focusing English constitutionalism on more theoretical issues of "rule-of-law" resulted in an anemic constitutional jurisprudence, so too, I argue, does the comparativist tendency to focus on the issue of whether there exist meaningful and useful trans-systemic legal essences push comparative law to the fringes of the common law's consciousness.

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[69] *See, e.g.*, FRANK UPHAM, MYTHMAKING IN THE RULE OF LAW ORTHODOXY (Carnegie Endowment, Working Paper No. 30, 2002), *available at* http://www.carnegieendowment.org/publications/index.cfm?fa=view&id=1063&prog=zgp&proj=zdrl (last visited Jan. 24, 2006).

This is because discussion of foundational essences is really a discussion about *why* the law works. But the common law mind is concerned primarily with questions of *how* law can be used. There is a fundamental, epistemic difference between these two concerns.[70] For those who focus on the latter, questions of the former are largely moot: a person who devotes her life to understanding *how* to use something has, in the very act of doing so, functionally committed herself to accepting *a priori* a presumption that it does indeed work. The tort law professor in Rebecca French's example most probably has, in the very act of choosing to be a law professor, decided that he will accept the presumptions that inhere in "the subtleties of legal myth and narrative, the legal rituals that define how actors act, speak, and move in a legal forum, [the] social hierarchies that influence their decisions, [and] the aspects of authority, power and legitimation."[71] At some level, that professor may recognize that these presumptions are indeed just that—presumptions. But at the end of the day that recognition has little to do with his professional responsibilities, because those responsibilities are addressed to a system that itself is largely locked into these presumptions.

Given that the common law mind is foundationally driven by a concern for *how* the common law can be used,[72] a comparative law jurisprudence that looks at questions of *why* and *whether* the common law works at all would at most simply confirm or refute the foundational presumption from which the common law itself seeks to build its conceptual edifice. But if it confirms these presumptions, it tells the common law mind nothing that it did not already know. And if it refutes these assumptions or removes a particular space from their scope, it merely reduces the common law's overall relevance. In neither case, however, does it significantly affect the core interests of the common law mind itself.[73] Regardless of its findings, it remains largely irrelevant to the common law mind's principal focus.

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[70] *See* Yang W. Lee & Diane M. Strong, *Knowing-Why About Data Processes and Data Quality*, 14(3) J. OF MGMT. INFO. SYS. 13, 27 (2003–04) (exploring epistemic difference between "knowing-how" and "knowing why").

[71] FRENCH, *supra* note 60, at 57.

[72] *See* Lee & Strong, *supra* note 72, at 27 (study finding that some kinds of organizational tasks benefit from "knowing how" but not from "knowing why").

[73] The "hermetically-sealed" quality of legal epistemology is most famously captured in the notion of law as an "autopoietic" system. *See* GÜNTHER TEUBNER, LAW AS AN AUTOPOIETIC SYSTEM (Zenon Bankowski ed., Anne Bankowski & Ruth Adler trans., 1993); Niklas Luhmann, *The Unity of the Legal System*, *in* AUTOPOIETIC LAW: A NEW APPROACH TO LAW AND SOCIETY 12 (Günther Teubner ed., 1988). For an analysis of the disconnect between the law's objective functionality and its autopoietic epistemology (resulting in what he calls a "regulatory trilemma"), see Günther Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 LAW & SOC. REV. 239 (1993).

This was ultimately the real problem with Dicey's idea of rule of law. Dicey and his successors were concerned primarily with validating English constitutionalism. They wanted to show why English constitutionalism, like American constitutionalism, worked. But the common law already presumed that it worked. What the common lawyer really wanted to know was how English constitutionalism could be better used by the common law itself. And for whatever reason, neither Dicey nor his successors in English legal academe chose to focus on this particular question. It was for this reason that English constitutional law as a legal discipline stagnated and atrophied in the shadow of Dicey's analytic framework.[74]

Of course, at the end of the day, questions of "why," "whether," and "how" are ultimately symbiotic and complementary. One would never waste time with the question of how a system works without some justifiable confidence that that system actually did work. Along these lines, Dicey's idea of "rule of law" was essential, as we saw, in identifying and defining the scope of that confidence, and thus in defining the scope of English constitutionalism *per se*. As discussed, English constitutionalism declined not because of Dicey's appearance, but because of Bagehot's disappearance. The same general observation applies to the place of comparative law in present-day American legal academe. Ultimately, the failure of comparative law to capture the common law imagination is not due to the presence of some Diceyan focus, but to the absence of a complementary Bagehot-ian focus.

V. CHINESE LEGAL STUDIES IN THE COMMON LAW MIND: FROM BAGEHOT TO LUBMAN

Of course, there is good and understandable reason why comparative law has found it difficult to generate a real, practice-oriented component. Historically, the practice of the common law limited itself to what was in effect a single legal jurisdiction. To the extent that the common law found a need to reference other legal systems, they were invariably the legal systems of already developed jurisdictions.[75] These were the systems that the common law found most relevant to its own experiences because they were the systems in which most common law practitioners, whose international professional activities tended to follow

[74] *See* Laski, *supra* note 18, at 13; *see also* WADE & FORSYTH, *supra* note 19, at 18-19.

[75] This is also the case with conflicts of law, the early mainstay of comparative law scholarship. *See* Riles, *supra* note 54, at 261.

along the lines of international trade and commerce, most often came into contact with.[76]

Yet, in being already developed, these systems had already produced a large number of extremely sophisticated, practice-oriented legal professionals. There was therefore little real need for the common law to reproduce detailed practice-based knowledge about these legal systems. If I am an American lawyer working on a transaction involving Japanese law with a relatively detailed, practice-based question about Japanese law, it is probably easier for me simply to consult with a Japanese lawyer than to learn for myself the full range of practical intricacies that inform Japanese law. And to the extent that there might exist legal systems in which practical knowledge might not be so easily extracted from an indigenous community, this system will rarely intersect with the professional activities of the common law population. Clearly, the global isolation of Tibet makes consulting with suitable indigenous experts in Tibetan law much more difficult than consulting suitable, indigenous experts in Japanese law. But just as clearly, that same isolation also means that few, if any, common law practitioners will ever need to consult such experts.

However, there is one legal system in which these factors do not hold true. There is one legal system in which the American common law, driven by private interests in international trade, developed a practitioner's interest in a foreign legal system that could not be met by the products of that system itself, but only by developing significant "in-house" practitioner-oriented knowledge. There was, in other words, one foreign legal system in which there was significant opportunity for a Bagehot to arise, who could present that system in ways that resonated with the inherently pragmatic orientation driving the common law mind. The "one" legal system, of course, is that of China. And China's Bagehot is Stanley Lubman.

Chinese legal studies has long been characterized by a relatively robust and distinctive discourse on how the common law lawyer should go about *practicing* law in China.[77] This is probably because the particular pace and focus of the initial stages of China's economic reform and international emergence engendered significant legal interactions

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[76] *See id.* at 231-32.

[77] For example, a perusal of the works cited in Stanley Lubman's *Bird in a Cage* reveals at least five English language periodicals that focus specifically on issues of the international *practice* of Chinese law. These include *China Law and Practice*; *China Joint Venturer*; *China Law Reporter*; *China Law Update* and *China Law for Business*. *See* LUBMAN, *supra* note 2, at 383-482. By contrast, the bibliography for Joseph W.S. Davis's similarly-themed *Dispute Resolution in Japan* does not evince the presence of any English-language, practitioner-oriented periodical specializing in Japanese law. *See* JOSEPH W.S. DAVIS, DISPUTE RESOLUTION IN JAPAN 529-50 (1996).

with China before China had developed its own significant legal profession. We needed expert understanding of the practical implications of China's emerging legal system, but could not satisfy this need simply by consulting with indigenously-trained lawyers—hence, the distinctive focus on practice. It is this distinctive presence of a practice-oriented discourse, I suggest, that has allowed Chinese legal studies to capture the attention of the American common law more than other areas of comparative legal study. Stanley Lubman was definitive in establishing this discourse.

In the 1970s, Stanley Lubman became one of the first Americans to engage in legal practice specializing in China. His practical focus began in 1971, even before Deng Xiaoping began his modernist re-birth of China's present-day legal system.[78] He was thus in the extraordinary position of being able to experience and participate in what was effectively the birth of a new legal system, not only as an academic scholar, but also as a practitioner: one who was constantly having to learn, not only what this new law was, but how you could use it as a practicing lawyer.

I believe that this makes him a unique figure among elite American academic comparativists. He is a scholar who experienced the effective birth of a legal system not simply as a theorist, but as a participant. As he noted in *Bird in a Cage*, "My principal emphasis in this book is on institutions for settling disputes among Chinese."[79] Resolving disputes is what lawyers do. It is what drove the common law's uniquely practitioner-oriented "scholastic" as opposed to "academic" model of legal education.[80] It is the driving essence of the common law mind.[81]

Moreover, in contrast with Bagehot, Lubman's vision of Chinese law has indeed propagated. Today, there are any number of academically well-established China-law scholars who spend significant amounts of time and effort engaging in China-related legal practice, and who continue to devote their considerable analytic talents at least in part to the issues that arise during the course of that practice. The very uniqueness that Lubman brought to our discipline is now firmly embedded in our institutional structure. Because of him, we need not fear that

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[78] LUBMAN, *supra* note 2, at xiv.

[79] *Id.* at 3; *see also id.* at xiv-xv (detailing how his practice informed his scholarship).

[80] *See* BAKER, *supra* note 28, at 159-62 (describing practitioners' driving role in the development of common law legal education); Maitland, *supra* note 36, at 133 (noting that English legal education was traditionally and distinctly "scholastic" rather than academic).

[81] *Cf.* Sweet, *supra* note 49, at 78-84 (showing dispute resolution as core function of courts). *Accord* Holmes, *supra* note 64, at 167 (arguing that the foundational task of the common law lawyer is to predict how courts will decide cases); LLEWELLYN, *supra* note 64, at 76 (arguing the same).

academicization will have the same deleterious effect on Chinese legal studies in the 21st century United States as it did on constitutional law in late-19th century England.

VI. CONCLUSION

Of course, what I am calling the common law mind is not without its problems and limitations. To the extent that it has embraced Chinese legal studies, it might be an embrace that is not without its costs to our understanding of China. Indeed, I would argue that the principal contribution of comparative law generally has been precisely to document the problems, limitations, and costs inherent in the common law perspective. And I and others have argued that Chinese legal studies, and legal studies in general, should itself take these costs more seriously than it does.[82]

But these are not issues that need concern us now. They do not diminish the fact that Chinese law seems to have been able to accomplish something special—that it seems to have been able to forge a unique kind of integration between the common law mind and a foreign legal system. Even with its costs, both Chinese legal studies and the common law more generally are clearly richer for it. And key to this integration has been the work of Stanley Lubman. Celebratory issues are times for celebration, and perhaps even for a bit of self-congratulation among those who have been affected by the celebrant. In this essay, I simply seek to show why at least insofar as Stanley Lubman's contributions both to Chinese legal studies and to the common law mind are concerned, such celebration and congratulation are indeed most warranted.

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[82] *See, e.g.*, Michael W. Dowdle, *Public Accountability in Alien Terrain: Exploring for Constitutional Accountability in the People's Republic Of China*, *in* PUBLIC ACCOUNTABILITY: DESIGNS, DILEMMAS AND EXPERIENCES (Michael W. Dowdle ed., forthcoming 2006); Randall Peerenboom, *Out of the Pan and into the Fire: Well-Intentioned but Misguided Recommendations to Eliminate Administrative Detention in China*, 98 NW. L. REV. 991 (2004).