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## Roscoe Pound in China: A Lost Precedent for the Liabilities of American Legal Exceptionalism

Jedidiah J. Kroncke

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# ROSCOE POUND IN CHINA: A LOST PRECEDENT FOR THE LIABILITIES OF AMERICAN LEGAL EXCEPTIONALISM

*Jedidiah J. Kroncke\**

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## INTRODUCTION

Today the presence of an American lawyer in mainland China is a commonplace characteristic of contemporary Sino-American relations.<sup>1</sup> In fact, as China has become an increasingly critical part of American foreign affairs, judgments

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\* Senior Research Scholar, Harvard Law School. J.D. Yale Law School, Ph.D. University of California, Berkeley. Earlier drafts of this paper were greatly improved by the members of the NYU Golieb Legal History Colloquium, Boston College Legal History Roundtable, and the Harvard Legal History Workshop. For their specific feedback, I would like to thank William Alford, Marc Arkin, Asli Bali, Richard Bernstein, Robert Berring, Amy Chua, Jerome Cohen, Richard Epstein, Dan Ernst, David Fontana, Robert Gordon, Morton Horwitz, Dan Hulsebosch, Duncan Kennedy, Laura Nader, Ugo Mattei, Sara McDougall, Bill Nelson, Aziz Rana, Intisar Rabb, Jed Shugerman, Frank Upham, and Laura Weinrib.

1. See generally STANLEY B. LUBMAN, *BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO* 5 (1999); RANDALL PEERENBOOM, *CHINA'S LONG MARCH TOWARD RULE OF LAW* 564 (2002).

of Chinese law are routinely cited in American commentary.<sup>2</sup> Especially in recent decades, evaluating the role of law in China's potential liberalization is a staple of American popular and public debates.<sup>3</sup> Although American lawyers lament perceived deficiencies in Chinese law, they also eagerly engage the opportunities presented by China's modern legal development. In both criticism and engagement, American lawyers express a desire or assumption that their efforts will help shape Chinese law along American lines. However, this impact is expressed with a confidence contradicted by more sober evaluations of China's current legal reforms and the limits of American influence therein.<sup>4</sup>

While much has been written in recent years exploring contemporary developments in Sino-American legal relations, it is quite remarkable how much has already been lost concerning America's earlier legal history with China. It has almost been completely forgotten that, prior to 1949, China was often held out as America's most promising foreign site for the export of American legal influence.<sup>5</sup> This idea grew out of the larger notion that American law represented something new and vibrant to be shared with the world, a notion which had excitedly possessed the early twentieth century American legal community.<sup>6</sup> Even amidst often contentious domestic debates on legal reform, at the turn of the century American law began to be imagined as something not only exceptional, but reducible to an identifiable set of institutions and values capable of being exported across the globe.<sup>7</sup>

In fact, many of the challenges and debates wrestled with by contemporary American lawyers in regard to China were fore-

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2. See, e.g., Teemu Ruskola, *Legal Orientalism*, 101 MICH. L. REV. 179, 183 (2002).

3. See Jedidiah Kroncke, *Law and Development as Anti-Comparative Law*, 45 VAND. J. TRANSNAT'L L. 477, 512 (2012), for an overview of the modern state of U.S.-China legal interaction in the contemporary.

4. See Matthew C. Stephenson, *A Trojan Horse Behind Chinese Walls? Problems and Prospects of U.S.-Sponsored 'Rule of Law' Reform Projects in the People's Republic of China*, 18 UCLA PAC. BASIN L.J. 64, 92-97 (2000).

5. CAROLA MCGIFFERT, CHINA IN THE AMERICAN POLITICAL IMAGINATION 31 (2003).

6. See Jedidiah Kroncke, *An Early Tragedy of Comparative Constitutionalism: Frank Goodnow and the Chinese Republic*, 21 PAC. RIM L. & POL'Y J. 533, 535 (2012).

7. See Kroncke, *supra* note 3, at 509.

grounded in key developments already well underway during the early twentieth century internationalization of American law. The Janus-faced visage of Chinese law as both an exciting new frontier and a recalcitrant challenge for the American lawyer has roots that go far deeper than China's post-1978 reopening to global society. One vein of this deeper history, and perhaps the most striking precedent lost from this era, is the telling experience of the most famous American lawyer to serve as a legal reformer in China, namely one-time Harvard Law School Dean, and preeminent legal scholar, Roscoe Pound.

Once a great comparativist who championed American engagement with, and learning from, foreign legal experience, Pound, by the end of his career, became a parochial exporter of American law and a fervent believer in American legal exceptionalism—conceived as the idea that American law was the most advanced in the world and thus standing outside and above international legal development.<sup>8</sup> Abandoning his early trenchant critiques of American law that employed foreign examples, Pound was swept up in the spirit of the day, which in the international arena set aside the complexities of American law for an often idealized vision of American law ready for export abroad. Pound's tenure in China thus serves as a cautionary tale for the liabilities that such belief holds for contemporary Sino-American affairs, and America's current relationship to foreign legal experience more broadly.

Consider then that in the summer of 1946, Pound found himself far removed from the familiar life to which he had grown

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8. The conception of "American exceptionalism" has been notoriously difficult to narrowly define. See *IS AMERICA DIFFERENT? A NEW LOOK AT AMERICAN EXCEPTIONALISM*, at v–xi (Byron E. Shafer ed., 1991). See also SEYMOUR MARTIN LIPSET, *AMERICAN EXCEPTIONALISM: A DOUBLE-EDGED SWORD* 18 (1996) (explaining the "double-edged concept" of American exceptionalism). "Legal exceptionalism" has been no less difficult to pin down. In the contemporary era, the term is used to refer to either (a) American rejection of international legal norms or (b) the use of foreign legal examples in American judicial decision-making. See Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109, 109–11 (2005) and Harold Hongju Koh, *International: Law As Part of Our Law*, 98 AM. J. INT'L L. 43, 56 (2004), for support of the use of foreign and international law in American jurisprudence. Compare Steven G. Calabresi, "A Shining City on a Hill": *American Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law*, 86 B.U. L. REV. 1335, 1338 (2006), rejecting the citation of foreign law in American court decisions.

accustomed during his long tenure as one of Harvard Law School's most prominent faculty members. In contrast to Cambridge's summer lull, Pound was settled into a bustling expatriate neighborhood outside of Beijing, China. Much like it is today, Pound's Beijing was a whirl, not with the rapid transformations of modern globalization, but with the intensifying Chinese Civil War that had grown out of China's thirty years of instability after the fall of the Qing Dynasty in 1911.

As the ever-ambitious Pound had come to China in his late seventies, this new, and often chaotic, setting tried and tested his fortitude. Yet even though he was far removed from his routine academic comforts, Pound's mind was more alive than it had been in years. With great excitement, he believed he was living out what many Americans had come to imagine for decades—China's Americanization.<sup>9</sup>

For decades, Pound, as with the vast majority of Americans, had been informed about China's development through contacts in the religious missionary movement. Long inundated with tales of his great fame in China by his missionary-affiliated interlocutors, Pound readily accepted the invitation of the Guomindang Party ("GMD"), then in power throughout China's urban centers, to serve as the highest-profile legal adviser the Chinese government had employed in decades.<sup>10</sup> Pound's appointment represented the most heralded individual effort to date among the growing ranks of American lawyers who had begun to travel abroad as reformers with increasing frequency during the early twentieth century.<sup>11</sup> Public officials and private citizens on both sides of the Pacific lauded his appointment with grand language. This rhetoric was particularly grandiose in America, where great fascination had been aroused concerning China's political fate since the Chinese Republic was first announced in 1911.

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9. See MICHAEL H. HUNT, *THE MAKING OF A SPECIAL RELATIONSHIP: THE UNITED STATES AND CHINA TO 1914*, at 270, 313 (1983); MCGIFFERT, *supra* note 5, at 31–34.

10. During the 1910s, famed Progressive scholar Frank Goodnow had served as an adviser to Yuan Shikai, China's first president after the fall of the Qing Dynasty in 1911. See Noel Pugach, *Embarrassed Monarchist: Frank J. Goodnow and Constitutional Development in China, 1913–1915*, 42 PAC. HIST. REV. 499, 500–01 (1973); Kroncke, *supra* note 6, at 553.

11. See PAUL D. CARRINGTON, *SPREADING AMERICA'S WORD: STORIES OF ITS LAWYER-MISSIONARIES* 119–24 (2005).

Yet for all the fanfare and high expectations that this 7000 mile trek inspired in his contemporaries, Pound's time in China is the least studied episode of his otherwise well-studied life.<sup>12</sup> In recent decades—even with American legal reformers returning to China with new vigor—Pound's experience in China has lived on primarily as a historical curiosity, interred within an occasional academic footnote.

In theory, this forgetting could simply be the result of Pound's ultimate failure in China. By most any measurement, Pound had little impact on Chinese law prior to the GMD's defeat by the Chinese Communist Party ("CCP") in 1949. But, in reality, the roots of this forgetting are more complex. They reach beyond the details of Pound's personal efforts in China to how his reform work reflected the assumptions of the modern form of American legal exceptionalism. Pound was no longer the firebrand comparativist using foreign legal experience to improve American law; rather, he had become a putative beacon for the export of American law. The great irony of Pound's personal failures in China is that, while they were forgotten, this export view of American law abroad was nevertheless progressively normalized throughout American legal culture.

Thus, to evaluate this forgetting one must understand that American perspectives on Pound's appointment as a legal adviser to China reflected and informed these historic shifts concerning how American legal culture should and could relate to foreign law. Pound went to China with the expectation, shared by the larger American legal community, that as a legal adviser he could help transform the Chinese legal system, and thus Chinese society more broadly, along American lines.

In fact, Pound's experience in China highlights how the Sino-American relationship in the early- to mid-twentieth century was an opening chapter of what is today called "law and development," previously thought to have originated in Latin America during the 1950s and 1960s.<sup>13</sup> Moreover, Pound's story clarifies how American legal exceptionalism shifted from its more

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12. Even after three major biographies and numerous close studies, scholars are continuously able to uncover new aspects of Pound's life. *See, e.g.*, JOHN FABIAN WITT, PATRIOTS AND COSMOPOLITANS: HIDDEN HISTORIES OF AMERICAN LAW 211 (2007).

13. *See* David M. Trubek & Mark Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV. 1062, 1063–66 (1974).

rhetorical status in the eighteenth and nineteenth centuries to a set of concrete practices that directly impacted our relationship with foreign legal systems and undermined the domestic status of American comparative law.

Thus, Pound's ultimate rejection of legal cosmopolitanism expressed a very different view of the relationship of American law to foreign legal systems than had previously been the norm in American history.<sup>14</sup> Americans had long given law a prominent place within their national identity, and exceptionalist visions of American law were at the heart of the Revolutionary spirit.<sup>15</sup> However, the nature of Pound's particular transformative aspiration in China signaled a different manifestation of this vision where American legal institutions could be transplanted abroad to Americanize the development of foreign legal systems.<sup>16</sup>

By contrast, Pound had been educated within cosmopolitan intellectual currents prevalent in American law just decades prior to his time in China. At the beginning of his career, he had trumpeted America's embrace of an inward-looking comparative law as a key element of its dynamic capacity for legal innovation. However, when Pound came to China, he was unconcerned with what American law could learn from its Chinese counterpart. Even though Pound draped himself in rhetoric that claimed to value diverse legal traditions, his mission in China was focused on the export of his ideal version of American law.<sup>17</sup>

Pound's writings on China and his work as adviser exemplify how this new version of American legal exceptionalism grew out of the interaction between ideas about legal evolution and legal science. In popular and academic legal writing of the era,

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14. See, e.g., David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932, 934–946 (2010).

15. See Paul W. Kahn, *American Exceptionalism, Popular Sovereignty, and the Rule of Law*, in *AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS* 198, 198–203 (Michael Ignatieff ed., 2005).

16. See Kroncke, *supra* note 6, at 543–44.

17. In many ways Pound's arrival in China culminated two centuries of decline in the prestige of Chinese law in American legal culture. Several of the American Founding Fathers had studied China in their contemplations of how to adapt foreign legal experience to America's foundational legal institutions. See A. OWEN ALDRIDGE, *THE DRAGON AND THE EAGLE: THE PRESENCE OF CHINA IN THE AMERICAN ENLIGHTENMENT* 91–93, 264–68 (1993).

American law was commonly identified as the apogee of evolutionary legal development.<sup>18</sup> Further, Pound and others believed that modern American law had become so advanced because the scientific study of law, known as “legal science,” provided a methodological basis through which legal progress could be achieved using apolitical legal expertise. The fusion of the evolutionary and scientific views of law allowed Pound to make universalist claims about the methods upon which his foreign reform agenda was based, while in substance always promoting his version of American law as the normatively desirable outcome. Thus, American legal culture could be removed from the co-evolution of international legal debate and instead recast as a universal stimulus to legal development abroad.

The specific story of Pound’s time in China, as with the general story of Sino-American relations in twentieth century American legal internationalism, was obscured when the victory of the CCP in 1949 folded China into the larger framework of the Cold War. However, recovering and interpreting Pound’s time in China is important because it serves as an influential and illuminating precedent for the pitfalls of the export-driven view of American law that has become normalized today. Not only did Pound struggle, and ultimately fail, in his efforts to shape Chinese law, but he did so while grappling with the same difficulties modern American lawyers abroad recurrently face. Although his good intentions were part of the high spirit of the day, Pound influenced and echoed the marginalization of comparative law, which was in time replaced by the consistently disappointing export-driven agenda of today’s “law and development.”<sup>19</sup> At the same time, Pound’s inversion of his own original openness to international legal cooperation and exchange concurrently helped popularize the transformation of American legal exceptionalism from exemplification to export.

It is important to understand that, whatever personal criticisms will be made in this Article, Pound’s time in China

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18. See generally LEWIS H. MORGAN, *ANCIENT SOCIETY* (Leslie A. White ed., Harvard Univ. Press 1964) (1877) and BROOKS ADAMS, *THE LAW OF CIVILIZATION AND DECAY: AN ESSAY ON HISTORY* (Norwood Press 1921) (1896) (both discussing the evolution and character of different stages of society). See also Steven Wilf, *The Invention of Legal Primitivism*, 10 *THEORETICAL INQUIRIES* L. 451, 475–76 (2009).

19. See Kroncke, *supra* note 6, at 535.



should be read primarily as a story of tragedy. Although the GMD rejected his reform agenda in total, Pound's attachment to the project of exporting American law led him to promote a rosy picture of his work in China. Unfortunately, this distortion only fostered and helped legitimize a set of critical misjudgments about the nature of Chinese legal developments that were too readily adopted stateside. Pound's inability to face his own failures not only misled domestic audiences about Chinese legal developments during his tenure as adviser, but rebounded into a virulent anti-Communism after 1949 that blamed America's failure in China not on the export project itself, but on insufficient domestic support for such efforts. Ironically, Pound's failure in China helped usher in an era where overseas legal reform efforts were woven into the basic fabric of America's Cold War foreign policy.

To substantiate and elaborate upon this broader narrative, this Article presents the details and context of Pound's career in Sino-American affairs. Part I outlines Pound's early career and how he came to know and comprehend China through the missionary infrastructure that shaped Sino-American affairs of the era. Part II details his exploits during his formal tenure as legal adviser to the GMD, when he set aside his commitment to comparative law and embraced the new export-oriented view of American law abroad. Part III demonstrates how Pound's stateside propaganda work for the GMD distorted American understandings of Chinese legal developments and their relationship to Chinese politics. Part IV reveals how Pound reacted to the events of 1949 by becoming a crusading anti-Communist who helped transform Chinese law from a vessel for Americanization to being denounced as "Communist law." This Article concludes with the lessons that Pound's failure hold for America's contemporary relationship with the Chinese legal system as tied to the modern form of American legal exceptionalism and the concurrent enervation of American comparative law in American legal culture.

## I. POUND AND AMERICA IN REPUBLICAN CHINA

A. *Pound's Introduction to Chinese Law*

As the oft-recounted story opens, Roscoe Pound was born in 1870 to a prominent frontier lawyer.<sup>20</sup> His first love in life was natural science, and he earned a PhD in Botany from the University of Nebraska. He turned to law after only one year of study at Harvard. In 1895, following several unpleasant years in practice, he started teaching at Nebraska's law school. During this period, Pound developed a robust critique of formal legal rights and American jurisprudence, derived mainly from his early contact with Edward Ross and a host of other Progressive thinkers, including Lester Ward, Richard Ely, and John Commons.

By 1903, Pound had risen to the deanship of the law school at the University of Nebraska. His rise to national fame followed shortly thereafter, notably after his 1906 speech to the American Bar Association ("ABA") titled "The Causes of Popular Dissatisfaction with the Administration of Justice." In this speech, he boldly declared that the American judiciary was in a state of marked decay—anachronistic in both its structure and its jurisprudential practices. Further, he stated that American courts were maladapted to the rapidly shifting contours of American society.

Pound was sharply critical of contemporary common law judges' use of abstract analogical reasoning to preserve existing doctrine in the face of countervailing social change, the product of which was Pound's jurisprudential villain, the legal fiction. This criticism framed his famous critique of the U.S. Supreme Court's decision in *Lochner v. New York*, which rested upon liberty of contract theory and natural law.<sup>21</sup> Pound's solution to the pathologies of the American legal system was a new theory of judicial practice which he dubbed "sociological jurisprudence."

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20. The basic biographical details of Pound's early life are relatively uncontested and well covered by his major biographers. See, e.g., N.E.H. HULL, *ROSCOE POUND AND KARL LLEWELLYN: SEARCHING FOR AN AMERICAN JURISPRUDENCE* (1997); PAUL SAYRE, *THE LIFE OF ROSCOE POUND* (1948).

21. See DAVID E. BERNSTEIN, *REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM* 42 (2011).

Pound grounded much of his early work in the aggressive championing of comparative law, and in 1908, he served as one of the first editors of the *Annual Bulletin*, a publication by the Comparative Law Bureau of the ABA. In doing this work, Pound asserted that America's legal experience was but one of many internationally, and as such, foreign legal traditions were a critical source of reflection for American legal reform.

At this time, Pound's star shone brightly and he was soon offered a position at Northwestern University, where his work was marked by both the reformist zeal of the day and the use of empirical social science to reform law.<sup>22</sup> It was during his tenure in Chicago that Pound articulated the core aspect of his theory of sociological jurisprudence, namely that studying law as a social science could yield a consistent and coherent system of rules that should replace traditional doctrine.<sup>23</sup>

In 1910, the ever-increasing popularity of Pound's work earned him another call, this time to teach at Harvard Law School. After just five colorful years in the classroom, he became Dean. His initial writings at Harvard expanded upon his critique of the American judiciary and openly expressed great faith in legal reform's ability to achieve "a continually more efficacious social engineering."<sup>24</sup> During the first decades of his meteoric rise, he continued to promote his particular interests in Roman legal history and Continental legal theory, and spoke glowingly about the need to understand foreign legal history and comparative law in order to promote American legal innovation.<sup>25</sup>

There is no direct evidence that Pound had any specific awareness of China during this phase of his professional life.

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22. See DAVID WIGDOR, ROSCOE POUND: PHILOSOPHER OF LAW 133–46 (1974). Pound was brought to Northwestern by comparativist John Wigmore, who regarded Pound as an important figure in the American appreciation of comparative law. See MICHAEL WILLRICH, CITY OF COURTS: SOCIALIZING JUSTICE IN PROGRESSIVE ERA CHICAGO 107 (2003).

23. See generally Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383 (1908) (arguing that statutory law should be entitled to as much respect as common law due to statutory law's accuracy as an expression of the general will).

24. ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 99 (1922).

25. See Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850–2000*, in THE NEW LAW AND ECONOMIC DEVELOPMENT 19, 49 (David M. Trubek & Alvaro Santos eds., 2006).

However, it is hard to imagine that he was wholly insulated from the popular and academic images of China which had proliferated in America in the early twentieth century, especially as he arrived in Cambridge during then Harvard President Charles Eliot's widely touted trip to study China.<sup>26</sup> The singular mention of China in Pound's early writings is found in an article on procedural reform, in which he compares American with British consular courts in China to characteristically argue that the American courts were too formalistic and thus unresponsive to their foreign social contexts.<sup>27</sup>

What is readily clear is that China's increasingly internationalized legal elite knew of Pound. While at Harvard, he taught many students from China. These students were part of the first wave of foreign nationals to come to American for legal study. They eagerly encouraged him to visit and lecture in their home country. Pound's most prominent early Chinese contact was John Wu, who was soon to become China's preeminent international legal scholar. Wu's tutelage under Pound at Harvard led to a lifelong correspondence.<sup>28</sup>

Wu's letters to Pound were full of grandiose flattery, and he told Pound that Pound's influence and fame in China were great. For example, Wu wrote: "There is no telling how many adherents you, beloved Master, have won among the Orientals. I have heard some scholars of the younger generation say that what China needs is neither individualism nor communism but sociological jurisprudence."<sup>29</sup> Wu's letters contained little in-

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26. See CHARLES W. ELIOT, SOME ROADS TOWARDS PEACE: A REPORT TO THE TRUSTEES OF THE ENDOWMENT ON OBSERVATIONS MADE IN CHINA AND JAPAN IN 1912 (1913).

27. Roscoe Pound, *A Practical Program of Procedural Reform*, 22 GREEN BAG 438, 449 (1910). In some of his other early work, Pound does make several references to "oriental justice," but only to the classic effect of invoking the specter of despotism. See Roscoe Pound, *Justice According to Law*, 14 COLUM. L. REV. 1, 22 (1914); ROSCOE POUND, THE SPIRIT OF THE COMMON LAW 56 (1921).

28. ROSCOE POUND PAPERS, Part 3, Reel 46, 417 (Harvard Law School Archive 601559) [hereinafter POUND PAPERS]. Pound and Wu exchanged letters consistently for decades. Note that Wu is known in Chinese circles by his native name, Wu Jingxiong.

29. *Id.* at Part 3, Reel 46, 432. Wu also told Pound that "Your influence, if that means anything to you, in this part of the world has been spreading like wild fire." If that was not enough, Wu told Pound: "My Master, if immortality means anything to a mortal, then you ought to be happy to have won and witnessed it even while you are living and in the fullness of your powers." *Id.*

formation about China itself, and Pound seemed generally inquisitive about Chinese law.<sup>30</sup> In fact, Wu more frequently mentioned Christianity, as he had been a product of China's first American missionary law school, the Comparative School at Soochow.<sup>31</sup>

It was not until the 1930s that Pound took a more active interest in China. Like most Americans during this time, he personally came to learn about China through his relationships with missionaries who comprised the first genuinely internationalized aspect of modern American society.<sup>32</sup> Pound came to understand Chinese affairs, as had America, through the public relations infrastructure of the missionary movement, an infrastructure that predated the formal American diplomatic service or other systemic institutional presence of Americans abroad.<sup>33</sup> Not coincidentally, American missionaries, many trained as both lawyers and theologians, had been some of the first to argue for the catalytic power of transplanting American legal institutions abroad.<sup>34</sup> And nowhere was this interest and

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at Part 3, Reel 99, 762. *See also* John C. H. Wu, *Some Comments on Dean Roscoe Pound*, CHINA CRITIC, Aug. 15, 1935, at 152; Yuen-Li Liang, *Dean Pound and a New Approach to International Law*, CHINA CRITIC, Aug. 15, 1935, at 154.

30. In 1928, when Pound published the fourth edition of his course outline on jurisprudence, Wu's work on Chinese legal history was the only selection of Chinese law. *See* ROSCOE POUND, OUTLINES OF LECTURES ON JURISPRUDENCE 155 (4th ed. 1928).

31. *See* William P. Alford & Shen Yuanyuan, "Law Is My Idol": John C.H. Wu and the Role of Legality and Spirituality in the Effort to Modernize China, in *ESSAYS IN HONOUR OF WANG TIEYA* 43, 44 (Ronald St. John Macdonald ed., 1994). The school is sometimes referred to as Dongwu Faxueyuan or other variants reflecting institutional reorganizations and inconsistent translations from the era.

32. Foreign reform efforts were thus closely related in concept to the broader Progressive project of engineered legal change, and also exhibited the same consonance with the secular aspects of the Social Gospel. *See* JERRY ISRAEL, PROGRESSIVISM AND THE OPEN DOOR: AMERICA AND CHINA, 1905-1921, at 15-22 (1971).

33. *See* Margaret B. Denning, *The American Missionary and U.S. China Policy During World War II*, in UNITED STATES ATTITUDES AND POLICIES TOWARDS CHINA: THE IMPACT OF AMERICAN MISSIONARIES 211, 211 (Patricia Neils ed., 1990).

34. These missionaries believed the placement of American legal institutions abroad might allow America to distinguish its international influence from that of the European colonial powers, particularly the British. *See generally* AMY KAPLAN, THE ANARCHY OF EMPIRE IN THE MAKING OF U.S. CULTURE

idea more focused than on China, the centerpiece of American missionary prestige and fundraising campaigns.<sup>35</sup>

More specifically, since the early 1930s, Pound had been on various missionary mailing lists focused on China. In 1932, he was asked by W.G. Cram, General Secretary of the Methodist Episcopal Board of Missions, to act as a trustee of the Comparative School at Soochow, a post which he quickly accepted.<sup>36</sup> Cram told Pound about the school's project: spreading "Christian influence" in China through legal reform.<sup>37</sup>

Pound's relationship with Soochow set the stage for his first two trips to China in 1935 and 1937.<sup>38</sup> In the early 1940s, Pound maintained his missionary connections, most notably when he accepted an advisory position with Harvard's sister university in China, the missionary-funded and administered Yenching University.<sup>39</sup> This background reveals that Pound's invitation to serve as legal adviser to the GMD had a much more developed foundation than has been generally acknowledged.

In the same way that his time in China has been given short shrift by his biographers, Pound's strong personal beliefs about the relationship between American law and religion have also

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1–7 (2002) (describing the desire for American foreign policy to avoid "European form[s] of absolutism," as illustrated by the dissenting opinion in *Downes v. Bidwell*, 182 U.S. 244, 381 (1901) (Harlan, J., dissenting)); Roger J. Bresnahan, *Islands in Our Minds: The Pacific Ocean in the American Literary Imagination*, in REFLECTIONS ON ORIENTALISM 3, 5 (Warren I. Cohen ed., 1983) ("Americans were politically and ideologically committed to setting themselves off from all things European . . .").

35. See, e.g., KENNETH SCOTT LATOURETTE, A HISTORY OF CHRISTIAN MISSIONS IN CHINA 744 (1932) (describing "unprecedented levels" of American missionaries in China after the end of World War I).

36. POUND PAPERS, *supra* note 28, at Part 3, Reel 22, 880, 888.

37. "It is intended to organize such an appeal among the Christian lawyers in America in order that they may, as a gesture of international goodwill, give this Comparative Law School to our sister Republic of China." *Id.* at Part 3, Reel 22, 880.

38. Alison W. Conner, *The Comparative Law School of China*, in UNDERSTANDING CHINA'S LEGAL SYSTEM: ESSAYS IN HONOR OF JEROME A. COHEN 210, 238 (C. Stephen Hsu ed., 2003); POUND PAPERS, *supra* note 28, at Part 3, Reel 99, 815. See also Anna Ginsbourg, *Roscoe Pound—An Appreciation and a Tribute*, CHINA WKLY. REV., Apr. 24, 1937, at 12.

39. The first record of Pound's missionary correspondence was from Charles Ernst Scott of the North China Theological Seminary. POUND PAPERS, *supra* note 28, at Part 3, Reel 90, 729; *Id.* at Part 3, Reel 100, 738.

gone largely unexamined.<sup>40</sup> The relationship of early twentieth century social-scientific thought to religion was a complicated affair that found diverse resolutions for even the most committed champions of scientific reason.<sup>41</sup> The link between Progressivism and the Social Gospel movement championed by mainstream Protestant churches has a long scholarly pedigree,<sup>42</sup> with both of these early twentieth century American social movements tied to a common faith in human progress.<sup>43</sup>

It is noteworthy that in his early work Pound made scant mention of neither Christianity specifically nor religion more generally. It was not until later in his career that he clarified his belief in the connection between Christianity and American law, even calling for a revival to reinvest American law with religious morality.<sup>44</sup> Tying religion to his own theories of legal change, he further claimed that the influence of Christianity was central to the evolutionary progress of modern society.<sup>45</sup> He ultimately cited the centrality of religion to the legal order as the “acid test” of a society’s quest for longevity.<sup>46</sup>

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40. Michael Willrich claims that Pound saw a great deal of his reform work as necessary because the state had taken over broad responsibility for regulating society in lieu of Christian institutions. See WILLRICH, *supra* note 22, at 112–13.

41. See generally RONALD C. WHITE, JR. & C. HOWARD HOPKINS, *THE SOCIAL GOSPEL: RELIGION AND REFORM IN CHANGING AMERICA* (1976).

42. In brief, the Social Gospel was a U.S. movement that emphasized social activism and reform work as a key expression of religious faith and as an important modern means of evangelical proselytization.

43. The specific relationship between American legal development and religious ideas, however, remains generally understudied. *But see* HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 31 (1983) (“It was the American and French revolutions that set the stage for the new secular religions—that is, for pouring into secular political and social movements the religious psychology as well as many of the religious ideas that had previously been expressed in various forms of Catholicism and Protestantism.”); HAROLD J. BERMAN, *LAW AND REVOLUTION, II: THE IMPACT OF THE PROTESTANT REFORMATIONS ON THE WESTERN LEGAL TRADITION* 16 (2003) (describing American law as a combination of “two conflicting belief systems—Puritanism, traditionalism, and communitarianism versus Deism, rationalism, and individualism . . .”).

44. See Roscoe Pound, *Law and Religion*, 27 RICE INST. PAMPHLET 109, 171–72 (1940).

45. *Id.* at 170 (“[R]eligion and morals and law [have] harnessed human nature to make it a servant of civilization.”).

46. See ROSCOE POUND, *SOCIAL CONTROL THROUGH LAW* 34 (Transaction Publishers 1997) (1942).

Deeper investigation reveals that Pound had been well immersed in the idea that America's divine purpose was to improve the world in its own image.<sup>47</sup> Further, the secular application of religious purpose was a central tenet of the modern Freemason movement in America, of which Pound was an active member.<sup>48</sup> Pound served as Master of his Lodge in Lincoln, and later founded Harvard's chapter. Pound clearly articulated his Freemason beliefs in a series of lectures delivered in 1915, in which he emphasized the importance of the inspired individual acting out the divine will by helping societies progress evolutionarily.<sup>49</sup> Pound continued to lecture on Freemasonry throughout his legal career.<sup>50</sup>

That such sentiments were submerged in Pound's general writings, and have not been recognized as part of his intellectual legacy. But more concretely, this missionary influence helps contextualize one important vector of how Pound was pulled into an export mentality. Pound, along with his missionary interlocutors, wedded altruism to the practice of modern science. And like even the most open-minded missionary, Pound was ultimately involved abroad with a predetermined endpoint—the export of his area of passion and expertise.

### *B. Pound's Arrival in China*

Pound was seventy-seven years old when he retired from Harvard in 1946, ending nearly fifty years of teaching. Weary from his battles with Karl Llewellyn over the rise of Legal Realism, Pound was quite unsentimental about his retirement. At the same time, China was wracked by political instability, as the GMD faced increasing pressure from the rural support of

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47. ROSCOE POUND, *CONTEMPORARY JURISTIC THEORY* 2–3 (1940) (recounting a story from Pound's childhood about America's divine mission in the world).

48. See generally BOBBY J. DEMOTT, *FREEMASONRY IN AMERICAN CULTURE AND SOCIETY* (1986).

49. See ROSCOE POUND, *LECTURES ON THE PHILOSOPHY OF FREEMASONRY* 73–88 (1915). Any serious attempt to evaluate Pound's intellectual history ought to delve into the significance of this consistent belief in Pound's life. It is sufficient to note that Pound saw himself as part of Freemasonry's larger mission as “[A]n organization of human effort along the universal lines on which all may agree in order to realize our faith in the efficacy of conscious effort in preserving and promoting civilization.” *Id.* at 86.

50. See FRANKLYN C. SETARO, *A BIBLIOGRAPHY OF THE WRITINGS OF ROSCOE POUND* 127–32 (1942).



the CCP. In the years prior to Pound's retirement, the GMD had begun to face increasing American criticism for its legal and political practices, which had initially formed the very basis of America's broad faith in China's commitment to Americanization.

The extant GMD legal system reflected the Qing dynasty's decision to primarily follow civil law models, explicitly infused with Leninist influences. As with Soviet law more generally, the GMD's constitution and legal system placed few restrictions on executive or prosecutorial power. The GMD leadership came to use this freedom quite often to exert dictatorial authority over its subjects. As a result, in the post-World War II era, many American observers in China began to question the GMD's commitment to American liberal legalism, and consequently the utility of continued American support for the GMD.

Concurrently, Pound had not only maintained his interest in China but had become a strong critic of Progressive legal thought, casting it as at odds with the common law tradition he had grown famous for criticizing.<sup>51</sup> He still favored social science, but felt that the work of legal scholars was to provide empirical facts and social theories for common law judges to use in specific cases and not to replace judicial work in total.<sup>52</sup> Current studies of Pound are generally compelled to ascertain whether this change was in fact a great reversal and to divine some version of Pound's true intellectual commitments. A pop-

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51. "That an engineering interpretation might be put to ill use I shall not deny. But for a season the dangers are in another direction." ROSCOE POUND, *INTERPRETATIONS OF LEGAL HISTORY* 164 (1923) [hereinafter POUND, *INTERPRETATIONS*]. "We must not allow our faith in the efficacy of effort to blind us to the limitations upon the efficacy of conscious effort in shaping the law so as to do the whole work of social control." ROSCOE POUND, *THE TASK OF LAW* 89 (1944). See also George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 *Nw. U. L. REV.* 1557, 1590-93 (1996) (describing Pound's attacks on the New Deal agencies and the connection he drew between such Progressivism and communist thought).

52. It was Pound's emphasis on judicial decision-making that specifically placed him at odds with Progressives, who often saw judges primarily as obstacles to the implementation of progressive legislation and the smooth functioning of administrative governance. See generally HULL, *supra* note 20 (providing an overview of Pound's sociological jurisprudence and its relationship with Progressivism).

ular theme in these evaluations dwells on Pound's thirst for the spotlight and his constant need for personal affirmation.<sup>53</sup> By contrast, others have focused on various periods of Pound's life as different expressions of his ever unresolved intellectual contradictions.<sup>54</sup>

Thus, while most biographers discuss Pound's trip to China in passing, they often do so only as a fleeting return to a lost enthusiasm for the social engineering of his early career. To some degree this is true, since Pound saw in China a new laboratory and proving ground for his vision of an ideal legal system. Given Pound's dissatisfaction with the trajectory of legal theory at his retirement, China held out the promise of being far removed from the frustrations he encountered in the American legal academy.<sup>55</sup> Yet few have highlighted the fact that Pound saw his early trips to China as a global expression of his new agitation against the rise of centralized legislative and administrative power in the New Deal.<sup>56</sup> Although his international expertise was minimal,<sup>57</sup> Pound had clearly been concerned with global affairs at least a decade prior to his China

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53. Once Progressivism became the norm, so the interpretation goes, Pound was no longer the center of controversy, and had to find new ground from which to draw public attention. This was a central thrust of Natalie Hull's analysis, and John Fabian Witt summarizes and updates this position in his work.

54. For example, David Wigdor identifies what would be considered conservative sentiments early on in Pound's work and what he calls a persistent dualism between Pound's organicism and instrumentalism. WIGDOR, *supra* note 22, at 228–31. In addition, Willrich sees Pound's work as grappling with a struggle to balance his more generalized view of the rule of law with his particularized conception of justice. See WILLRICH, *supra* note 22, at 316.

55. See HULL, *supra* note 20, at 257 (describing Pound as having “retired [from Harvard] under fire”).

56. See Robert W. Gordon, *Willis's American Counterparts: The Legal Realists Defence of Administration*, 55 U. TORONTO L.J. 405, 406–07 (2005).

57. Dan Ernst has described how, at one point in the 1930s, Pound planned to conduct a comparative study of all the common law countries worldwide as an expansive statement of “the future of our common-law doctrine of supremacy of law in relationship to the development of administrative agencies.” Dan Ernst, *Pound Under Pressure*, LEGAL HIST. BLOG (Sept. 29, 2008, 1:00 AM), <http://legalhistoryblog.blogspot.com/2008/09/pound-under-pressure.html>. The purpose of this project was to resist “the general march of absolutism all over the world.” *Id.*

tenure, a mission that he saw as part of his general concern with the spread of socialism.<sup>58</sup>

It was in October of 1945 that Pound's ennui and new politics meshed with the GMD's growing public relations crisis. GMD Minister of Justice Hsieh Kwan-Sheng wrote to Pound, asking him to serve indefinitely as China's main legal adviser.<sup>59</sup> Although Hsieh described Pound's duties as an adviser in quite modest terms, Pound quickly accepted.<sup>60</sup> His appointment satisfied the GMD's desire to improve its international reputation, but it was also part of China's liberal legal reformers' struggle for political capital against the dominant authoritarian elements in the GMD. This confluence of goals also exploited Pound's ability to act as a conduit for enhancing the international status of Chinese officials and his potential as a public relations agent to promote the general nationalistic sentiment to the world that, as expressed in the words of one law professor, "the Chinese have law."<sup>61</sup>

Following his acceptance, Pound sailed to China in 1946 to take up his new duties. He departed after spending the summer in China, though he would return in late 1947 for a longer stint that lasted through the summer of 1948. However, he would in fact spend the majority of his years as the GMD's legal adviser in residence at Harvard. He had planned several return trips after 1948, but these plans were upended by the GMD's displacement by the CCP in 1949.

Before Pound left for China in 1946, he had already begun to correspond with his first biographer, Paul Sayre, who claimed that "[Pound's] work on the Chinese law generally was so vast

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58. See MORTON J. HOROWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 219-20 (Oxford Univ. Press 1992) (describing Pound's first anti-communist comments). Pound later more clearly attached himself that to the idea that socialism was in conflict with the rule of law. See Roscoe Pound, *The Idea of a Universal Law*, 1 *UCLA L. REV.* 7, 9 (1953).

59. Hsieh claimed that the GMD had in fact long wanted Pound to come to China, but were prevented by the Japanese invasion during World War II. POUND PAPERS, *supra* note 28, at Part 3, Reel 68, 247.

60. "Your work as adviser to the [Ministry of Justice ("MOJ")] will consist mainly in giving advices and supplying materials on matters of judicial reform and other matters within the jurisdiction of the Ministry." *Id.* at Part 3, Reel 68, 247.

61. *Id.* at Part 1, Reel 49, 0547.

that it would take the rest of his life.”<sup>62</sup> Further, Pound saw his role as going beyond the reformation of Chinese institutions. As the challenges which China faced were so urgent, he could not simply set the institutional stage for educating the younger Chinese generations. He had to reshape the minds of those currently in power, and quickly.

Pound’s appointment as adviser was received publicly and privately with great enthusiasm on both sides of the Pacific. One American newspaper editorial captured this spirit in the competitive Cold War terms that would come to define Pound’s China legacy: “In view of the fact that the Chinese will be powerfully propagandized by the Russians, [Pound’s] presence in China and the influence [Pound] will be able to have in perhaps bringing the Chinese a juridical system somewhat in line with our own Anglo-Saxon tradition will be invaluable.”<sup>63</sup> Most of these articles saw Pound’s work as an extension of America’s continued support of Chiang Kai-shek, the GMD’s leader and presumed Christian modernizer. Consequently, Pound was quickly approached by many popular publications for his comments on Chinese legal reform.<sup>64</sup> Expatriate newspapers in China posted similar articles and would periodically reprint his comments on Chinese law.<sup>65</sup> Not surprisingly, his appointment resonated with the religious missionary infrastructure that had first involved him in Chinese affairs.<sup>66</sup>

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62. SAYRE, *supra* note 20, at 384.

63. William Loeb, (Untitled), BURLINGTON DAILY NEWS, Feb. 16, 1946, at 5. *The New York Times* had several articles about his trip, once describing his work as “revising and modernizing the Chinese law code.” See, e.g., *Leaves for China Today To Help in Law Revision*, N.Y. TIMES, Sept. 18, 1947, at 13.

64. *War in China Greatly Exaggerated Ex-Dean Pound Tells Reporter Here*, PORTLAND PRESS HERALD, July 19, 1947 [hereinafter *War in China*]. In like vein, Lee Brisol, President of the China-American Council of Commerce and Industry wrote to Pound to offer the organization’s aid. POUND PAPERS, *supra* note 28, at Part 3, Reel 68, 192.

65. POUND PAPERS, *supra* note 28, at Part 3, Reel 100, 675. See, e.g., SHANGHAI EVENING POST, Dec. 17, 1946.

66. Charles Ransom, the first Dean of Soochow, telegraphed Pound his congratulations on “your proffered appointment for great service in China.” POUND PAPERS, *supra* note 28, at Part 3, Reel 68, 180. Pound would receive several letters from Marguerite Atterbury, a teacher and missionary at Yenching. *Id.* at Part 3, Reel 62, 300, 302 (stating that “your article on Chinese Government is being eagerly read by church, professional and student groups”).

Pound came to China high on the new confidence of the post-World War II American legal community. The status of American law had risen astronomically alongside American international influence and was buoyed by confident self-assessments about the export of American law in Japan and Germany through the Marshall Plan. Legal periodicals and publications replicated the popular praise for Pound's appointment, never questioning the terms or prospects for Pound's eventual success. In the *Annual Survey of American Law*, Pound was described matter-of-factly as being "charged with the task of re-writing the nation's laws." In one of his last articles for the *ABA Journal* written before his 1947 China trip, Pound's efforts were given an enthusiastic editorial introduction: "[t]he hopes and prayers of American lawyers are with him in his valiant efforts."<sup>67</sup> He also received a great deal of private support from members of the legal community, including ranking members of the judiciary.<sup>68</sup> His colleague at Harvard, Warren Seavey, who had worked in China decades earlier, told Pound that "it is the most important job you ever had and that you can affect the destiny of the world by your work."<sup>69</sup> Carl Rix, then President of the ABA, praised Pound's appointment as part of America's destiny in the Far East.<sup>70</sup>

For all this grandiose language describing his appointment, Pound's correspondence indicates that his time in China was primarily spent dealing with the mundane concerns of living in a foreign city and partaking in the many social opportunities his fame and status enabled. Not surprisingly, Pound's life while in China was heavily reliant on local intermediaries, as he led a fairly typical, sheltered expatriate life. Crucially, he

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67. Roscoe Pound, *Decisions of Courts Show Some Dangerous Trends*, 33 A.B.A. J. 1093, 1093 (1947).

68. ABA President Carl Rix told Pound that "it is a great task and one of tremendous importance to the world, and particularly to the United States. If you have laid a foundation for a new China, it will have a profound influence on the economic life of the United States." POUND PAPERS, *supra* note 28, at Part 1, Reel 69, 93.

69. *Id.* at Part 3, Reel 90, 853. This letter was addressed to "Poonds Koo Wen, Lauyeh," the only hint that Pound or Seavey used pidgin Chinese. Pound told Sayre of his wide-ranging ambitions and that he was confident that "those who count here are with me and it looks as if I can succeed." SAYRE, *supra* note 20, at 384-85.

70. See Carl B. Rix, *Law and Government*, 72 ANN. REP. A.B.A. 315, 315-20 (1947).

came to understand his relationship to China in profoundly personal terms.<sup>71</sup> In particular, he mirrored America's love affair with Chiang, even though Pound appears to have rarely consulted with Chiang about his official reform work.<sup>72</sup>

Nevertheless, despite his formal retirement, he viewed his duties with great ambition. In the coming years, he penned numerous articles on Chinese law and the GMD, secured a secondary appointment as an assistant to the Ministry of Education, lectured widely, drafted a robust range of reports for the Ministry of Justice, and prepared an empirical survey of Chinese judicial practice.

Pound's first act as legal adviser before traveling to China was to submit a bibliography for the creation of a law library in Beijing.<sup>73</sup> Once in China, he compiled comments on China's constitution and developed a draft proposal for a juristic research center.<sup>74</sup> It is noteworthy that even at this early point, he had already gone far beyond the initial advisory scope of Hsieh's description of his duties in China.

In 1947, Pound wrote a personal report to Chiang in which he mentioned for the first time that he planned to write a completely new corpus of doctrinal treatises which he called the *Institutes of Chinese Law*.<sup>75</sup> After his first summer in China, he wanted to stay stateside indefinitely to compile the materials for this project, which he felt only the libraries at Harvard could supply. In his letter to Chiang, Pound reported to the GMD about the many speaking engagements he had undertaken in America on their behalf and argued that being stateside would best allow him to continue his public relations work.<sup>76</sup>

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71. Pound even took a personal interest in Chinese juvenile justice, as he had early in his domestic career. POUND PAPERS, *supra* note 28, at Part 3, Reel 62, 193.

72. There is significant evidence that Pound and Chiang's personal relationship was mediated by Madame CKS, who wrote a series of letters to Pound thanking him for attending social engagements and for his various pro-GMD articles in the American press. *See, e.g., id.* at Part 3, Reel 62, 227.

73. Pound's formal activities are directly recounted in a series of reports that he wrote to the GMD leadership about his work. The first report was written in May of 1946. *See id.* at Part 3, Reel 62, 10.

74. *See id.* at Part 3, Reel 62, 234.

75. This is the only extant evidence of any direct communication between the two men outside of formal social settings. *Id.* at Part 3, Reel 68, 272.

76. *Id.* This work initially included distributing reprints of his academic articles on China and copies of the Chinese Constitutions.

He spent only a brief time in China during 1947, although he produced a large volume of material for the GMD during this time, including a new curriculum for Chinese legal education, statutory analysis for the Ministry of Justice, and numerous academic articles for American law reviews.<sup>77</sup>

During these short stints in China, Pound continued to spend most of his time engaged in a mix of social and professional activities.<sup>78</sup> He maintained his involvement with Soochow, and accordingly, delivered their graduation speech in the summer of 1946.<sup>79</sup> He was also asked to give a series of lectures at the Jesuit Aurora Law School in Shanghai and at the National Chengchi University in Nanjing.<sup>80</sup>

These engagements allowed Pound to build a network of elite Chinese contacts, both in China and at Harvard.<sup>81</sup> He retained a number of papers and manuscripts by Chinese authors in his collection and claimed to have attempted to get some of them published in the United States.<sup>82</sup> The transnational character of this interaction is quite evident in his personal correspondence, and in one letter, a professor at Soochow asked Pound to

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77. See *id.* at Part 3, Reel 62, 559; *Id.* at Part 3, Reel 68, 275.

78. Wherever Pound was in China, he was a popular speaker and his personal archive is full of dozens of invitations and thank-you cards in English and Chinese. Pound naturally gave speeches at the Harvard Club and a range of expatriate organizations. See, e.g., *id.* at Part 3, Reel 62, 65.

79. Conner, *supra* note 38, at 238.

80. See ROSCOE POUND, ROMAN LAW IN CHINA 441 (1953) [hereinafter POUND, ROMAN LAW]; POUND PAPERS, *supra* note 28, at Part 3, Reel 68, 172. These early lectures were republished in ROSCOE POUND, LAW AND THE ADMINISTRATION OF JUSTICE (1947) [hereinafter POUND, ADMINISTRATION OF JUSTICE].

81. In one instance an official, the President of the Shanghai Supreme Court, had received permission to go abroad from the Ministry of Foreign Affairs but was denied funding by Ministry of Finance. So he turned to Pound who then said he would try to secure visiting teaching position at HLS. POUND PAPERS, *supra* note 28, at Part 3, Reel 68, 142, 168.

82. See, e.g., *id.* at Part 3, Reel 62, 648; *Id.* at Part 3, Reel 78, 140. Most of this personal correspondence echoed the same flattering tones as Pound's early China correspondence. The President of the High Court in Shanghai sent Pound an article in early 1949 citing Pound's praise of the President, and he thanked Pound quite profusely. *Id.* at Part 3, Reel 78, 145. Obviously, Pound anticipated a level of reciprocity from these arrangements as he wrote to the President of the Shanghai High Court asking him to talk to Hsieh on his behalf in respect to certain documents written for an IRS audit which Pound hoped would contain very specific characterizations of his work for the GMD. *Id.* at Part 3, Reel 78, 152.

lobby the ABA to let Chinese practitioners with foreign law degrees join American firms.<sup>83</sup>

However, by the summer of 1947, Pound was concentrating all of his efforts on his planned treatises. He asked the GMD to create a committee to assist his scholarly efforts.<sup>84</sup> Finally, true to his commitment to legal empiricism, he returned to China in the summer of 1948 to carry out the fieldwork he believed necessary for his doctrinal work. He visited a range of different Chinese cities and collected the results of his empirical survey.<sup>85</sup>

## II. POUND AS FOREIGN LEGAL REFORMER

### *A. Pound's Evolutionary Legal Science*

The content of Pound's public writings on Chinese law during his tenure as legal adviser reveals a great deal about how American lawyers were coming to understand their participation in foreign reform projects. Pound did not come to China to merely serve as a learned guide to America's own remarkable but thoroughly contested legal history. Instead, he was to transplant aspects of American law as the apogee of international legal development. To this end, in his academic writings, Pound constructed a specific vision of Chinese law that allowed Americans to both presume China's legal inferiority but also justify high hopes for its Americanization. Animating Pound's work was the expectation that the application of his legal expertise would lead to the positive development of China's political and economic life, which would emulate America's while retaining some vague Chinese distinctiveness. He routinely managed to praise the GMD as willing and eager recipients of American legal knowledge, while making sure that he never let

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83. *Id.* at Part 3, Reel 78, 142.

84. There is no evidence this ever actually happened. *See id.* at Part 3, Reel 62, 567.

85. *See id.* at Part 3, Reel 62, 277. Among these short trips were visits to Nanjing's courts and the city prison, another to Shanghai to visit the High Court, and a trip to Hangzhou to conduct more on-site inspections and give a variety of lectures. These various day trips took Pound around China for most of the summer, ending in mid-August after ten weeks. There are few records left from the surveys Pound collected at the time, but he did plan to continue such work when he next returned to China.



such praise undermine the necessity of his involvement in Chinese legal development.

Pound's move from comparativist to exporter comes across immediately in his writings on Chinese law. By the time Pound arrived in China, his own statements about the value of comparative law had become simply rhetorical, seeing China as solely a canvas on which to project American law, though always threaded with gestures of cultural sensitivity.

Pound did emphasize that the GMD's legal administration he observed was modern in its practice and formulation.<sup>86</sup> The distinction of "modern" was important because everything about his work on China was aimed to promote his views on sociological jurisprudence—the evolutionary endpoint of his narrative of common law historical development.

Within this framework, Pound was always careful in his writings to assert that his expertise on Chinese law followed the basic empirical tenets of sociological jurisprudence. He at different points claimed to have made a careful academic study of Chinese legal institutions and legal history, although there is little evidence as to what constituted this background study.<sup>87</sup> He consistently grounded his authority in three avenues of empirical investigation: "thorough inspections," "attending conferences," and "carefully prepared [judicial] questionnaires."<sup>88</sup> Pound routinely claimed that the cities he had visited constituted a representative sample of legal practice under the GMD.<sup>89</sup>

At the same time, it was this asserted empirical expertise that Pound felt positioned him to be an informed cultural relativist. He went out of his way in his public writings to validate the positive characteristics of Chinese culture in an effort to offset claims of cultural incommensurability.<sup>90</sup> Pound often con-

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86. ROSCOE POUND, *THE TRUTH ABOUT CHINA: REPORT BY HARVARD LAW SCHOOL DEAN* 5–6 (n.d.).

87. Specifically "a thorough study of . . . Chinese constitutional and corporation law." POUND PAPERS, *supra* note 28, at Part 1, Reel 122, 984. For his strongest articulation of his broad study of Chinese law, see Roscoe Pound, *Progress of the Law in China*, 23 WASH. L. REV. & ST. B.J. 345, 345 (1948).

88. POUND PAPERS, *supra* note 28, at Part 3, Reel 61, 418.

89. See Pound, *supra* note 87, at 359.

90. See, e.g., Roscoe Pound, *The Law in China as Seen by Roscoe Pound*, in *THE LAW IN CHINA AS SEEN BY ROSCOE POUND* 1, 16 (Tsao Wen-yen ed., 1953) ("The Chinese are a patient, diligent, intelligent, idealistic people, filled with determination to set up and maintain a modern, democratic progressive poli-

trusted himself with an unnamed former adviser who gave up on “Chinese justice” by claiming that Chinese culture and language had no real “idea of justice.”<sup>91</sup> If Chinese culture was too alien, then Americanization would seem doubtful. As such, Chinese law had to be deficient in comparison to American law but it could not be wholly foreign.

This praise of China also fit into Pound’s own public assertions that he was not promoting the crude transplantation of American law into China. At every turn, he denied that transplantation was an effective methodology for legal reform. He noted that in their conferences, Chinese legal reformers did not debate best practices for “some abstract country,” but rather faced the particular difficulties of modern China.<sup>92</sup> Thus, he felt that his empiricism demonstrated that he was not engaged in unreflective transplantation or blatant parochialism.<sup>93</sup>

Yet whatever commitment Pound had to cultural sensitivity in abstract rhetorical terms, he was operationally wedded to the evolutionary assumptions that undergirded the new export-driven view of American law. Pound himself had long been very clear in his belief that law was central to a civilization’s identity and progress.<sup>94</sup> He believed that “law is not only a means toward civilization, it is a product of civilization.”<sup>95</sup> He also claimed that law was central to the “agency of civilization” and the order provided by law clearly evidenced the greatness of a society.<sup>96</sup>

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ty . . . . They confidently expect to do this not by force of arms but force of ideals.”).

91. *Id.* at 3; Pound, *supra* note 87, at 349–50.

92. Roscoe Pound, *Law and Courts in China: Progress in the Administration of Justice*, 34 A.B.A. J. 273, 275 (1948).

93. *See, e.g.*, Pound, *supra* note 90, at 15.

94. *See* EDWARD B. MCLEAN, *LAW AND CIVILIZATION: THE LEGAL THOUGHT OF ROSCOE POUND 1–4* (1992).

95. POUND, *INTERPRETATIONS*, *supra* note 51, at 143.

96. *See* ROSCOE POUND, *SOME PROBLEMS OF THE ADMINISTRATION OF JUSTICE IN CHINA* 17 (1948). Thus, the longevity of a given civilization was dependent on a functioning legal system. *See id.* (“Stability is maintained by adjusting relations and ordering conduct by a systematic and orderly application of the force of politically organized society. . . . [As well as] by legislation, by legal reasoning, by technique of interpretation and application, and by interpreting and applying legal precepts . . . .”). Pound also echoed Weberian sentiments about the relationship of law to economic growth, claiming that “[w]here law is feebly developed, there is a feeble economic order.” *Id.* at 65.

As such, when Pound developed his theory of legal evolution, it was in practice simply a reiteration of his version of common law legal history, which culminated in the "greatness" of contemporary American law.<sup>97</sup> He detailed his version of common law history through a four-staged evolutionary process which he called "The Socialization of Law."<sup>98</sup> The teleological view of social change inherent in Pound's legal evolution showed that he remained optimistic about legal reform even after he had rejected the New Deal.<sup>99</sup>

It became clear in his duties as legal adviser that Pound's firm belief in legal evolution came into conflict with his prior commitment to comparative law. As mentioned earlier, Pound had been critical early in his life of the neglect of comparative law in America, a position he had reasserted as late as the mid-1930s.<sup>100</sup> In his writings for the GMD, however, Pound's invocation of comparative law was in practice hollow. The content of the comparative knowledge he invoked in his work as legal

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97. It is not coincidental that the specific writings in which Pound articulated his theory of legal evolution were refined during his time as legal adviser.

98. POUND PAPERS, *supra* note 28, at Part 3, Reel 61, 704. Pound saw himself as providing a more relevant series of progressions than the then popular six-fold articulation of Vinogradoff. For Pound, each "stage of legal development" reflected progress towards his goal of harmonizing formal law with the actual conditions of social life. Archaic law, the first stage, focused on securing peace through mediation when other, more prevalent, informal forms of social control failed. The next stage, strict law, was concerned with providing a system of remedies for harms: it had no concept of legal rights and placed strict mechanical restrictions on judicial decision-making. The third stage, equity, represented the move of Western legal system towards reconciling law with morality, matching intertwined advances in "moral ideas" with "economic development and the growth of trade and commerce." The great contribution of this stage was making the legal system cognitively open to social conditions through precedent. The last stage, where Pound saw his contribution, was "mature law." Here analytical judges restrain unprincipled articulations of equity and natural law through a scientific juristic practice. *Id.* at Part 3, Reel 61, 725.

99. *Id.* at Part 2, Reel 12, 1014. Pound had already presented a judicial-centric view of the mechanism of legal history, with the same Whigish faith in teleology, including claims about "primitive law-givers," self-help, and many of the popular evolutionary anecdotes redolent in common law doctrines. See generally ROSCOE POUND, THE HISTORY AND SYSTEM OF THE COMMON LAW (1939).

100. Roscoe Pound, *What May We Expect from Comparative Law?*, 22 A.B.A. J. 56, 58 (1936).

adviser was almost completely dominated by his early exposure to Roman law through German legal studies, and was peppered with very little analysis of contemporary foreign practices.<sup>101</sup>

Pound's move away from comparative law to this form of export work illustrates how the marriage of legal science and evolution could sustain both highly universalist and parochial elements.<sup>102</sup> While he situated his claims about law within a universal methodology, he had a predetermined assumption that the results of such inquiry would inexorably lead to the evolutionary developments which were typified in his view of the American common law.

This implicit parochialism was made clear when Pound demonstrated no qualms about his belief that Chinese legal reformers did not need to be exposed to, and in turn contemplate, the controversies and shortcomings of American law. Here Pound's thinking, like American legal thought more broadly, had stepped away from a dialogue with foreign legal experience.<sup>103</sup> Pound positioned America as an evolutionary apogee, and seemed much less concerned with how this state was purportedly achieved than simply assuming it to be so.<sup>104</sup> The only dialogic element in his work was his attempt to use his work in China to bolster the legitimacy of his own theories of American law stateside, and not to present a critical engagement with Chinese legal scholars over American legal experience.<sup>105</sup>

But in practical terms, and despite his own presumptions, Pound was confronted with a GMD legal system that had done little to mimic American law. Chinese legal reforms, beginning

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101. See Arthur Taylor Von Mehren, *Roscoe Pound and Comparative Law*, 13 AM. J. COMP. L. 507, 507–08 (1964). Pound would come to claim that comparative law should consist solely of a functional comparison of judicial techniques, while producing no such study himself. See Pound, *supra* note 100, at 59.

102. In the most general terms, he had come to only champion comparative law when it promised to support his existing intention to promote his legal science, not when it included dejudicialization or the welfare state—both concepts with which comparative law became associated after the New Deal.

103. See HULL, *supra* note 20, at 282–83. This also helps contextualize Witt's study of Pound and Melvin Belli, as Pound frequently cast his advocacy for the plaintiff's bar as an act of legal nationalism against foreign influences.

104. See Pound, *supra* note 100, at 57.

105. This foreshadows the recurrent critiques of contemporary law and development efforts. See generally Kroncke, *supra* note 3.

in the early twentieth century, had explicitly rejected many of the juris-centric common law characteristics that he placed at the center of his own evolutionary theory. Most critically, in the 1920s, the GMD had adopted a range of Soviet legal institutions, especially in its criminal justice system. These institutions not only focused a great deal of power and discretion on state agents, but emphasized prosecutorial, rather than judicial, supervision of state power.

Thus, Pound had to overcome a central and persistent challenge to his reform work: determining the place of the common law in China's reforms. As Pound saw his trip to China as being in combat with absolutism, he had to represent his reform work as not promoting the Continental theories of law which his domestic politics had come to virulently oppose. Furthermore, he publically stated that the common law, by contrast, had a salutary effect all over the globe, and that its influence should be further intensified.<sup>106</sup> But in China, Pound confronted a legal system that in many ways was far more genuinely reflective of "absolutism" and the civil law than could ever be claimed about the New Deal.

Pound's solution to this problem, at least theoretically, was to continuously project China's Americanization, and thus the influence of the common law, into the future. At times he argued that the common law was too complex to transplant to China in a short period of time<sup>107</sup> and that "Roman law" could be a stop-gap model for China.<sup>108</sup> He also recognized that China's legal elite had been educated under an equally diverse range of traditions. Therefore, he reiterated that China needed first to have a unified theory of law guiding the operation of its institutions and a unified doctrinal synthesis of its various codes before it could transition to common law legal institutions.<sup>109</sup>

Pound's long-term solution to the conundrum of China's civil law structure was to base China's future Americanization on Chinese judges retrained as vanguards of his judicial tech-

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106. Roscoe Pound, *What Is the Common Law?*, in *THE FUTURE OF THE COMMON LAW* 3, 6–7 (1937).

107. "[Common law] materials are too unsystematic, too bulky, and too scattered, and its technique is too hard to acquire . . ." Roscoe Pound, *The Chinese Civil Code in Action*, 29 *TUL. L. REV.* 277, 289 (1954). See also JIANFU CHEN, *CHINESE LAW: CONTEXT AND TRANSFORMATION* 28 (2008).

108. See POUND, *ROMAN LAW*, *supra* note 80, at 444.

109. See Pound, *supra* note 90, at 10–11.

nique.<sup>110</sup> Pound based his projection on the work of Chinese judges whom he believed would serve as the primary vehicle to adapt whatever law existed to social conditions on the ground. Again, this would happen assuming that they would properly follow Pound's own ideal common law technique. However, he clearly elided the fact that China's civil law influence did not embrace common law precedential authority or reasoning, even though so much of what he himself wrote about Chinese legal reform had to be functionally predicated on the structural importance of precedent.

Pound in effect ignored the existing structural realities of Chinese law and, perhaps sensing the inchoate sequence of this asserted legal transformation, often felt compelled to identify "common law influences" in the GMD legal system when actual common law institutions were absent. Pound thus sometimes cast his work as allowing the GMD to follow through on their desire to Americanize by "adapt[ing] provisions borrowed from Anglo-American law to a Continental legal system."<sup>111</sup> But, in the end, Pound would always retreat to arguing that whatever transplantation his reform agenda required would be indigenized purely through judicial decision-making, rather than constitutional or legislative process. Yet even these subtleties were often lost when interpreted by stateside audiences who simply accepted Pound's characterization that China has already adopted the common law.<sup>112</sup>

Pound's contorted effort to represent Chinese law as amenable to legal Americanization was also manifested by his circular treatment of Chinese legal history. To conform to his presumption that China needed American law, he had to believe, fundamentally, that China had a "backward legal order."<sup>113</sup> How-

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110. *See id.* at 3.

111. *Id.* at 1.

112. *Pound Discusses Legal Reform in China After Visit*, HARV. CRIMSON (Sept. 27, 1946), <http://www.thecrimson.com/article/1946/9/27/pound-discusses-legal-reform-in-china> (noting that Pound encouraged Chinese jurists to examine Chinese law "based on [China's] own institutions rather than on comparative law of Western countries . . . [a]lthough the Chinese have adopted the pattern of the English common law . . .").

113. *See* Roscoe Pound, *Introduction to CHEN LI-FU, PHILOSOPHY OF LIFE* 1, 7-8 (Jen Tai trans., 1948) [hereinafter Pound, *Introduction*] (examining the debate as to whether there is value in historical Chinese ideas about law and government); POUND, *supra* note 96, at 18. It is also true that, in many ways,

ever, to sustain his self-perception as a legal scientist and not an imperialist, Pound had to give some general validation to Chinese legal history. Thus, in public, he was always quick to turn his very general praise of Chinese culture into an open challenge to those who argued that there was little value in Chinese legal history for China's contemporary reform.<sup>114</sup>

This led quite naturally, then, to the question of what Chinese legal history was for Pound, and what practical impact it should have on Chinese legal reform. He made it quite clear that when he said "history" he did not mean it in the same sense as it would apply in the West.<sup>115</sup> He recognized that there had been dynastic codes, but claimed that they were only sets of ethical precepts whose lack of institutionalization led to there being "no model for the historical Chinese system."<sup>116</sup> When he mentioned "Chinese legal history" what he really meant was recent twentieth century history, and predominantly the GMD experience after the Japanese invasion in the 1930s.<sup>117</sup>

Here, his arguments for standardization in American law slipped effortlessly into the standardization implicit in his role as modernizer. He could claim that "traditional ethical custom and traditional legal institutions are not to be ignored," but, in deciding what was proper for China, he could state that such traditions "should not be made to introduce a discordant element into the codes and thus lead to inconsistencies and anomalies."<sup>118</sup> Pound then pushed this universalizing observation

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GMD legal elites themselves aggressively embraced this evolutionary judgment.

114. See POUND, *supra* note 96, at 13.

115. "China did not and, indeed, could not build her codes upon a preceding juristic development of her own . . ." *Id.* at 27.

116. *Id.* at 5-6; Pound, *supra* note 107, at 277. Pound did have the opportunity to learn about traditional Chinese juristic practice as for many years he was in possession of a massive multi-volume manuscript on dynastic law. POUND PAPERS, *supra* note 28, at Part 4, Reel 6, 147.

117. "For China, legal history must also be what the Germans call the international history of the present law of China . . ." POUND, ROMAN LAW, *supra* note 80, at 444. This narrow scope led Pound to claim that it "can be understood why there has been no more than a beginning of a Chinese legal literature." Pound, *supra* note 90, at 5. The same was true of Chinese legal language. *Id.* at 3 ("Another difficulty . . . is lack of a fully developed Chinese juristic and legal terminology.").

118. POUND, *supra* note 96, at 11.

further by claiming that “[m]odern law is not so much a product of the life of each particular people as a product of the experience of civilized life and the reason of many peoples.”<sup>119</sup> And this experience, in due course, always led to his version of modern American common law.

Pound was again confronted by the dissonance between his abstract methodological commitments and his role as an exporter. A robust valuation of Chinese legal history would have required him to acquire far more particular knowledge about Chinese law and then to interpretively reconcile the ways in which this tradition might conflict with what he deemed to be legal modernity.<sup>120</sup> Even before his tenure as adviser, Pound’s valuation of existing Chinese law was presaged by Sayre as functionally irrelevant to the application of his own transformative expertise.<sup>121</sup> Sayre wrote that, “Pound sees the merits of the Chinese legal order and of the whole Chinese governmental structure, but as an educator, and as a jurist, he has been assigned one of the greatest tasks ever given to any man in cultural history . . . .”<sup>122</sup>

Just as Pound’s views on Chinese legal history proved functionally peripheral, “comparative law” had only a minimal impact on his work in China. Pound had always rejected historical jurisprudence’s focus on law as a cultural epiphenomenon, especially as the historicist view of law had, from Montesquieu onwards, long argued that the world’s legal traditions were incommensurable. Pound instead had to presume that legal knowledge could transcend cultural differences, a presumption necessary not only for top-down, state-driven legal reform, but

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119. Roscoe Pound, *Comparative Law and History As Bases for Chinese Law*, 61 HARV. L. REV. 749, 758 (1948).

120. This impossibility is clear when Pound discussed the import of the jury system into China. *See id.* at 752–53 (“There is nothing in Chinese institutions or ethical customs which can be developed into the Anglo-American jury system. So far as China is concerned it will have to find a basis in reason or in imitation, not in experience.”).

121. *See* SAYRE, *supra* note 20, at 382.

122. *Id.* “The present Chinese code he thinks excellent but single-handedly he has set himself to do for the Chinese law somewhat the same task that the entire American Law Institute [“ALI”] with all its experts has nearly done in the restatement of the law for our legal system in the United States.” *Id.* at 384 (comparing Pound’s work to that of the ALI).



also his own cross-cultural legal expertise.<sup>123</sup> Yet he epitomized what comparative law had been moving towards for most of the American legal community—a process of implicit comparison mired in evolutionary trajectories. The implicit comparative dynamic involved solely contrasting China's legal deficiencies to the assumed superiority of American law, or in this case, Pound's own version of American legal history. To the extent that China itself engaged in comparative law, this was proper, not as a general scholarly practice per se, but in recognition of its current backwardness.<sup>124</sup> Thus, Pound's comments on comparative law during this time pulled him increasingly towards universalism, but only within the strictures of exporting a depoliticized view of American law.<sup>125</sup>

A telling example of how Pound's early comparative commitments were undermined by his export work was that, while Pound expressed his desire to carry out empirical analysis of China's existing legal system, his voluminous writings on Chinese legal reform were produced well before he had actually completed any of his initial surveys.<sup>126</sup> This was true despite the fact that he had easy access to formal Chinese legal documents in translation.

Pound thus resorted to a formalistic analysis of such documents to justify specific claims he made about law under the GMD, even though he repeated in his writings the anti-formalist presumptions of sociological jurisprudence.<sup>127</sup> He compared these documents with existing Western materials, with the primary aim of simply affirming their aspirations towards modern law. On the subject of whether these documents actually reflected Chinese legal practice and general social conditions, he retreated to vague empirical claims that, in the

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123. Pound invoked the popular interpretation of Japanese reform as empirical proof that Asian legal modernization was possible. See Pound, *supra* note 107, at 277–78.

124. See POUND, *supra* note 96, at 22; POUND, ROMAN LAW, *supra* note 80, at 442.

125. See Pound, *supra* note 119, at 758–59.

126. Pound began publishing articles on Chinese law early in 1947. His first round of surveys was completed in the summer of 1948. The level of cooperation with the survey is also unclear, as none of the survey materials survive in any known archive.

127. See, e.g., Pound, *supra* note 119, at 749–50.

Chinese context, the foreign-inspired codes were not a barrier to their implementation, citing his personal observations.<sup>128</sup>

For example, several of Pound's articles began, somewhere in the initial paragraph, with the statement "China has excellent codes."<sup>129</sup> He made sure that it was known that his basis of comparison for this praise was modern law.<sup>130</sup> At the same time, his writings on the codes rarely contained specific information about their substance, but rather emphasized the nature of their construction and local authenticity.<sup>131</sup> He also had to recognize that the codes' content was primarily of foreign origin.<sup>132</sup> Pound could not pretend that the codes were a reflection of common law influences, and at times he again declared it acceptable that China temporarily looked for inspiration in the civil law. Nonetheless, he routinely supplemented these observations with almost spontaneous claims of how important core American legal institutions and ideas, such as the independence of the judiciary, the jury system, judicial review, and adversarial procedure, would be to China's current and future reforms.<sup>133</sup>

Pound's early restriction to formal legal documents also moved him, in what would soon be well-established Western practice, to focus attention on the written Chinese Constitution which, like its codes, he praised in relatively unrestrained terms. At first, he compared the Chinese Constitution to those of other countries, even once acknowledging the GMD's Soviet influences. Yet his writing on the Chinese Constitution again revealed the dissonance between his compulsion to imbue Chinese law with the common law, and the actual structure of the GMD system.<sup>134</sup>

Essentially, Pound argued that China's constitution followed the American tradition: a justiciable legal document which ar-

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128. "[E]nough has been disclosed to show that the Chinese Civil Code in action is serving well." Pound, *supra* note 107, at 291.

129. See, e.g., POUND, ROMAN LAW, *supra* note 80, at 443.

130. See Pound, *supra* note 90, at 9 ("They will compare with the best of the recent codes which have been framed and enacted since 1896."). Pound's focus on the codes resonated with his general preference for standardization and distrust of localized "anomalies."

131. See, e.g., Pound, *supra* note 107, at 288–91.

132. See Pound, *supra* note 119, at 758.

133. See, e.g., POUND, ADMINISTRATION OF JUSTICE, *supra* note 80, at 43–74.

134. See Pound, *supra* note 87, at 348.

articulated specific rights and enabled strong judicial review of legislation.<sup>135</sup> This claim was based purely on assertion and speculation about future trends. He acknowledged the clear language in the Chinese Constitution that rights were limited by legislation and that, far from exclusively following the American emphasis on negative rights, “it is true some provisions in the Chinese bill of rights are hortatory.”<sup>136</sup>

Retreating from the text of the document itself, Pound developed a theory of how Chinese judicial review would proceed by focusing on the work of famed Chinese political thinker Sun Yat-sen.<sup>137</sup> In this analysis, “Chinese” became Pound’s interpretation of Sun’s personal writings and an interpretation where Sun was transformed from a national socialist into a liberal capitalist.<sup>138</sup>

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135. See POUND, *supra* note 86, at 4.

The Bill of Rights in the Chinese Constitution is not a mere preachment. It is safeguarded by an independent Judicial Yuan—an independent coordinate department of government—in which the Grand Justices have the ultimate power of interpreting the Constitution and are authorized to enforce the express provisions of the Constitution that executive acts and ordinances and legislative acts in contravention of the Constitution are null and void.

*Id.*

136. POUND PAPERS, *supra* note 28, at Part 1, Reel 69, 150. See Pound, *supra* note 87, at 349.

137. Pound repeatedly claimed that for the Constitution, “interpretation and application of their provisions are to be molded to Chinese institutions and ethical customs and to the Chinese people’s convictions of right.” POUND, *supra* note 96, at 5.

138. For example, in his main article on the Constitution, Pound discussed the passage in Article One invoking Sun’s famous “Three People’s Principles,” which Pound interpreted as “nationalism, democracy and socialism.” See Roscoe Pound, *Development of a Chinese Constitutional Law*, 23 N.Y.U. L.Q. REV. 375, 383 (1948). Interpretation of these principles has always been contested in China, in large part because the Communists also claimed Sun as an inspiration for their movement. See *id.* (referring to Dr. Carsun Chang, the initial leader of the China Democratic Socialist Party). A great deal of this disagreement centered on the third principle (“minsheng”), which is translated literally as “people’s life” and more technically as “people’s welfare.” Pound noted that “[nationalism and socialism are] capable of sinister interpretation.” *Id.* To cast Sun’s principles in a favorable light and show that they were compatible with the American constitutional tradition required that Pound make several analytic contortions to discount fears that Sun’s work, and thus by proxy Chinese constitutionalism and judicial review, represented Continental influence. Pound conjured up the claim that Sun viewed twenti-

It is critical to understand Pound's treatment of Sun as it paralleled how Americans had come to interpret Chinese politics through the assumption that China was Americanizing. Pound asserted repeatedly that Sun was not only thoroughly Americanized but also an ardent proponent of judicial review. Viewing the Chinese Constitution as a product of Sun's Americanized political philosophy allowed Pound to support his rhetorical claim that the Chinese Constitution was adapted to Chinese conditions, and was not an idealized document copied from abroad or constructed from "pure reason."<sup>139</sup> Through a strange sort of alchemy, Pound's invocation of Sun allowed him to simultaneously claim that the Chinese Constitution was both American and authentically Chinese.<sup>140</sup>

This formalistic and stylized analysis reveals the extent to which Pound's invocations of local sensitivity were, in fact, functionally marginal in his scholarly work. Even at the level of comparative formalism, his export commitments strained the coherence of his analysis. Pound cast his mission as culturally neutral by claiming that his work was not "American" but based on his own theory of legal science. The empirical ambiguity that existed about Chinese law in America at the time allowed him to claim that sociological jurisprudence was feasible without anyone rising to challenge his claim on empirical grounds. Therefore, he could make strong relativistic statements about the importance of Chinese conditions without ever claiming, or needing, any particular knowledge of what this

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eth century politics as a challenge to "claims of the individual man to a free existence," consonant with Pound's own views and his anti-New Deal fervor. *See id.* at 384. Thus he explained that for Sun, and for China, nationalism meant harmony, not militant nationalism; democracy meant the practice of individual negative rights, not populism; and socialism meant "a state which reconciles the individual and the social by a gradual process," not, in fact, socialism. *See id.*

139. *See* Roscoe Pound, *The Chinese Constitution*, 22 N.Y.U. L.Q. REV. 194, 194-98 (1947).

140. In fact, Pound's entire understanding of Chinese constitutional interpretation flowed from his particular valorization of Sun. Pound claimed that Sun's political theory was a true indigenization of Western legal tradition and compared Sun's writings to the Federalist Papers. *See id.* at 194-232; Pound, *supra* note 92, at 273. Pound seemed to have drawn a great deal of his understanding of Sun's work not from Sun's actual writings but from a paper he read that enthusiastically compared Sun to the socially minded French administrative legal scholar Leon Duguit. POUND PAPERS, *supra* note 28, at Part 3, Reel 61, 291.

would, in substantive terms, dispositively mean. It was sufficient that he simply legitimize his work through association with things categorically Chinese, regardless of what analytical sleight of hand was required to align them with his objectives.

Thus, through his writings on Chinese law, Pound was able to successfully set himself up stateside as a crucial intermediary who possessed the method and knowledge to make accurate claims about Chinese law and qualify himself as a forecaster of the consequences of Chinese legal reform. Reciprocally, he was able to do so in a manner that validated his personal theories of law while affirming American hopes for China's Americanization. If one assumed that it was an unassailable fact that the GMD were liberalizers, then one also had to accept that Chinese legal reforms were in consonance with American values. Thus, Pound's participation in this process counter-intuitively gave him the benefit of casting his views as genuinely "American" by virtue of being involved overseas in the GMD's reforms.<sup>141</sup> Even though he had by this time rejected the Progressive project, Pound could cite with approval China's lack of a liberty of contract regime and use this claim to buttress the claim that his original critique of the liberty of contract was not an endorsement of socialism. For it was self-evident that Chiang, as America's proper current liberal prodigy, was not a socialist.<sup>142</sup> Like many who would later follow in his wake, Pound's actual frustrations as a reformer were tangential to how his work was received at home, and did little to undermine the intellectual and political capital his work was able to garner.<sup>143</sup>

Summarily, it was unnecessary that anything in China alter or enrich Pound's preexisting ideas on law. Ultimately, for Pound, Chinese law was what it had to be to sustain his project: an object to be transformed in the image of the world's

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141. See, e.g., Pound, *supra* note 139, at 225–26 (discussing the Examining Yuan and how it might alleviate the American problem of civil service being adversely affected by partisan politics).

142. See *id.* at 230.

143. See generally YVES DEZALAY & BRYANT G. GARTH, *THE INTERNATIONALIZATION OF PALACE WARS: LAWYERS, ECONOMISTS, AND THE CONTEST TO TRANSFORM LATIN AMERICAN STATES* (2002) (describing how the reception of American political and economic theories overseas and their subsequent use to fuel embedded domestic political feuds, which the authors term "palace wars").

most advanced legal system, American law. Whatever Chinese law was, or wherever it might be going, it was not the proper subject of any genuine comparative analysis.

*B. Pound's Frustrations and Growing Ambitions*

It is revealing then to compare Pound's academic writings on Chinese law with the materials he prepared privately for the GMD. Early on, he did not openly discuss his project in such grandiose terms with his Chinese interlocutors. He could not have been oblivious to Chinese nationalism, even with the stream of flattery that preceded his appointment. When accepting his appointment, he denied to various Chinese officials that he had come to bring the common law to China.<sup>144</sup> Yet, in the actual materials he produced for the GMD, he was in fact far less restrained in the scope of his ambitions than his initial disclaimers would have suggested. As noted, he generated a rather substantial body of material for the GMD over the course of just a few years. A great deal of these materials were simply rehashings of his earlier work, but they do show that he only grew more convinced over time about the need for him to shape every aspect of the GMD legal system.

Still, Pound was careful to lace his reports for the GMD with repeated claims to cultural sensitivity and criticisms of a singular notion of "modernity."<sup>145</sup> He also expressed open-mindedness toward the GMD's choice to produce a hybridized legal structure based on non-common law traditions.<sup>146</sup> Of

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144. POUND PAPERS, *supra* note 28, at Part 3, Reel 68, 233.

I may say to you, however, that I doubt very much whether in any large degree our system is applicable in China . . . our Anglo-American criminal law and procedures are made for countries with the historical English legal traditions. I doubt whether the system could be impelled effectively upon a country without that background . . . [I] cannot but feel that what is needed in China is not to go to the right about in the matter of criminal procedure by adopting a radically different system, but to go ahead making the best that can be made practical of the produce which you have.

*Id.*

145. *See id.* at Part 3, Reel 61, 190.

146. "A Constitutional government must be a gradual growth, arising out of the institutions, customs, and ideals of people, not something borrowed and transplanted full-grown to which the people are expected to adjust them-

course, he placed all of these statements within the context of the GMD's expressed aspiration to become "modern," and their bringing him to China to use his particular expertise to assist them in this process.<sup>147</sup> He expressly claimed that the Chinese should feel no pressure to harmonize all of their legal doctrines with American common law and that he was in China to assist in Chinese legal reform rather than to transplant the American legal system.<sup>148</sup> His reports to the GMD did criticize aspects of American legal practice, but only those that reflected his own existing critiques.<sup>149</sup> For example, the one way in which Pound claimed that China had surpassed America was by creating a Ministry of Justice, an institution he had long argued for in America.<sup>150</sup> Yet, as mentioned in the prior section, China's preexisting legal traditions and characteristics had little practical impact on Pound's actual recommendations to the GMD.

Further, Pound's reports to the GMD contained a range of documents presenting his earlier scholarship on American law as the definitive interpretation on which the GMD should base their understanding of legal reform and legal education. These included reports as broadly titled as "Rights" and "Law and Morals," as well as specific commentaries covering sociological jurisprudence, the rise of bar associations, and recent developments in American legal education.<sup>151</sup> Notably, following his general treatment of Chinese legal history, there was only one paragraph in all of Pound's reports that concerned what he

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selves speedily and without fruition because of its intrinsic reasonableness." *Id.* at Part 1, Reel 69, 120–21.

147. "In China of today, after centuries of isolation from the institutional development of the western world, you have a laudable desire to be thoroughly modern—to have a political and legal system abreast of the highest achievements of progress in the West." *Id.* at Part 3, Reel 61, 152.

148. *See id.* at Part 3, Reel 61, 186, 240.

149. These included Pound's critique of prosecutorial discretion—"The American district attorney, too often deep in politics, is not a model for China to follow"—and judicial elections, where "experience has shown that the system has no advantages to compensate for the bad effects it has had." *Id.* at Part 3, Reel 61, 523.

150. *Id.* at Part 3, Reel 61, 190, 121. Pound cites Cardozo's support specifically.

151. *Id.* at Part 3, Reel 61, 725, 755.

thought China should retain from his truncated view of its legal history.<sup>152</sup>

Throughout these reports, Pound also repeatedly mentioned the importance of legal reform and the value of legal expertise to modern civilization.<sup>153</sup> He glorified the role of lawyers and judges in American history, both of which were central to his version of common law history.<sup>154</sup> Here he clearly replicated the American focus on private lawyers as the public/private mediators of American democracy, and assumed that lawyers would come to dominate Chinese politics.<sup>155</sup>

As such, in his reports, Pound cast the GMD's support of his legal work as key to their historical greatness. In one report he asserted that "the Chinese judge has an opportunity which has not been afforded any body of judges outside of the English speaking world."<sup>156</sup> He did not neglect the role of the law professor, whom he described as possessing an opportunity for a grandiose legacy.<sup>157</sup> Moreover, it would be law professors and judges working hand-in-hand that would allow his sociological jurisprudence to flower.<sup>158</sup>

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152. *See id.* at Part 3, Reel 61, 184–85 (citing no felony-misdemeanor distinction, a unification of civil and commercial law, and no law-equity divide).

153. *See id.* at Part 3, Reel 61, 125.

In a constitutional democracy, under a regime of the supremacy of law, in England and America the lawyers have divided the primacy with the soldier. In China also the regime of supremacy of law has been set up by the constitution. China too must rely upon the lawyers to make the constitution achieve its purposes.

*Id.* at Part 3, Reel 61, 366.

154. *Id.* at Part 3, Reel 61, 704.

155. "In a constitutional democracy lawyers have always taken a leading part in public life." *Id.* at Part 3, Reel 61, 569.

156. "The course of judicial decision will determine how far the codes can be adapted to the life of the Chinese people and so how far a stable social and economic order be built upon them. The judges in China have an opportunity which they may well be envied." *Id.* at Part 3, Reel 61, 558, 568. Also see "Problems of a Modern Judiciary," "The Judicial Office in China," and "The Training, Mode of Choice and Tenure of Judges." *Id.* at Part 3, Reel 61, 150, 521, 637.

157. *See id.* at Part 3, Reel 61, 568.

158. *See id.* at Part 3, Reel 61, 101, 129, 142.



As a result, he restated these claims in his plans for revamping China's system of legal education.<sup>159</sup> Here he presented a variation of Langdell's post-graduate model as a universal evolutionary advancement, neglecting any mention of alternative forms still prevalent in the United States, nor taking notice of Chinese citizens' still limited access to undergraduate education.<sup>160</sup>

Pound also routinely argued for supplementary research institutions like those he had championed in America, including the American Law Institute, private research agencies, and social science-driven government agencies.<sup>161</sup> Not surprisingly, such work would require the cooperation and support of the entirety of the Chinese legal profession with his vision.<sup>162</sup>

Yet for all of Pound's initial vigor as a newly appointed adviser, he quickly found that the GMD would not instantly embrace these sweeping reforms, if ever. His repeated assertion that his time would be more productively spent in the Harvard Law School library grew out of his early frustration with the reception of his reform proposals. His requests for support from the GMD repeatedly went unanswered, and there is little evidence that any of his suggested reforms were ever introduced in the legislature or even reviewed by the Ministry of Justice.<sup>163</sup>

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159. Pound did believe that Chinese elites should go abroad for "cultural education." Yet, he also felt that the current diversity in the training hindered the development of coherent legal doctrines and the common technique with which he hoped to imprint Chinese judicial science. *Id.* at Part 3, Reel 61, 138.

160. The post-graduate model of legal education Pound oversaw at Harvard was still far from consolidated in the United States at the time he went to China, but Pound quite clearly stated, in a report entitled "History and Standards of the Legal Profession," that because of the development of the post-graduate, professional model of legal education "the level of general and professional education of American lawyers has been raised everywhere." *Id.* at Part 3, Reel 61, 351, 366. See generally WILLIAM R. JOHNSON, *SCHOOLED LAWYERS: A STUDY IN THE CLASH OF PROFESSIONAL CULTURES* (1978); WILLIAM P. LAPIANA, *LOGIC AND EXPERIENCE: THE ORIGINS OF MODERN AMERICAN LEGAL EDUCATION* (1994), for an overview of Langdell's model of legal education and the rise of post-graduate legal education in the United States.

161. See, e.g., POUND PAPERS, *supra* note 28, at Part 3, Reel 61, 123, 147.

162. See *id.* at Part 3, Reel 61, 173.

163. From all of Pound's record there are one official and two private indications that anyone read and gave him feedback on his reports. *Id.* at Part 3, Reel 68, 172, 220, 220A.

Some of his multiple frustrations found their way into his academic writings, especially his view of the GMD leadership's disposition to place political strategy above fidelity to legal principles.<sup>164</sup> Moreover, he also wrote of his difficulty in teaching Chinese students and leaders the concept of rights and justice as an individual virtue and other Western legal concepts.<sup>165</sup> But, in his public comments, he always softened any such criticisms with the assurance that his work would quickly cure the defect.<sup>166</sup>

Pound's turn to writing *Institutes of Chinese Law* was thus a tactic to bypass his slow and unresponsive sponsors.<sup>167</sup> His public claims notwithstanding, he had no prospects for changing the Chinese codes or Constitution. Yet, after finishing plans for reorganizing almost every aspect of the Chinese legal infrastructure, he became determined to develop this full corpus of doctrinal treatises through which Chinese law would be progressively reborn.<sup>168</sup> While there is also no evidence that the GMD was supportive of this turn in his work, the project offered Pound the benefit of removing himself from China and its political vexations, while still maintaining his personal commitment to the GMD. The project promised a finished product that could simply be bequeathed to China after its completion.

Pound only completed the first section of *Institutes of Chinese Law* before his position as adviser to the GMD ended in 1949—Volume I, Chapter 1, “Introduction to the Science of Law.”<sup>169</sup> Here he laid out a sweeping interpretation of Western legal history and thought, beginning with law in the Roman era and including every major school of legal theory developed subsequently.<sup>170</sup> In total, the completed introductory volume was expected to reach 1,530 to 2,150 pages, despite the fact that his

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164. See Pound, *supra* note 90, at 6.

165. See Pound, *supra* note 87, at 349–50.

166. In regard to the politicization of legal questions, Pound wrote: “Here is something which the commission to write the *Institutes of Chinese Law*, which I am proposing, might well begin work upon immediately.” Pound, *supra* note 138, at 390.

167. His records show various outlines of the proposed *Institutes of Chinese Law* and the expansion of their scope in subsequent drafts. See POUND PAPERS, *supra* note 28, at Part 3, Reel 62, 1.

168. “The surest and soonest way to bring this about seems to me to be an institutional book covering the whole law.” *Id.* at Part 3, Reel 61, 139.

169. *Id.* at Part 3, Reel 61, 984.

170. See *id.* at Part 3, Reel 61, 185.

“Historical Introduction of Chinese Law” would begin only in the twentieth century.<sup>171</sup>

The escalating scope of Pound’s work as legal adviser, even in the face of negative feedback, demonstrates that his belief in apolitical, culturally-neutral, expert legal knowledge provided no self-limiting principles for legal intervention. Whatever gestures he otherwise made, the agency of Chinese culture or even Chinese legal elites was a secondary concern to the achievement of the transformation he envisioned and his capacity to carry it out. Pound had to realize that there was resistance to his ideas, but in his role as adviser, he never accepted the terms articulated by his Chinese hosts, and he continued to press the limits of his reform agenda.

### III. POUND AS STATESIDE PROPAGANDIST

#### *A. Pound’s Public/Private Split*

Pound’s work in China clearly demonstrates the analytical twists and turns necessary to operationalize his move from comparative lawyer to exporter, and at the same time publically paper over his failures. Yet his public relations work for the GMD even more forcefully illustrates how deeply the view of Chinese law as an object of Americanization severely undermined the American ability to assess the GMD’s legal reform, or lack thereof.

Pound’s very presence in China reflected the fact that the GMD leadership clearly understood that it was centrally important for Americans to view them as willing to accept American law. In this regard, the GMD had already been active before Pound arrived in bringing legal scholars and officials to China for tours and to generate positive press.<sup>172</sup> But to the extent that these efforts were inspired by a clear-eyed, if cynical,

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171. Subsequent volumes were to include Volume I, Constitutional Law and Administrative Law (900–1000 pages); Volumes II and III, Substantive Civil Law (1000–1500 pages each); Volume IV, Criminal Law (800–1000 pages); Volume V, Remedial Law (1300–1500 pages); and Volume VI, Conflicts of Law and International Cooperation in the Administration of Justice (800–1200 pages). A grand total of 7330 to 9850 pages—truly this was a project that would have taken him the rest of his life.

172. See Tsao Hwa Loh, *Judicial Appointive System in China and How It Operates*, THE PANEL, Jan. 1945, at 6 (discussing Milton J. Helmich’s trip in 1944).

understanding of America, such strategic understanding was not reciprocated.

By all measures, the GMD's hopes for Pound's efficacy on this front were validated even when he was himself increasingly frustrated as a reformer. At every turn, he was strident and uncompromising in his effort to maintain the image of the GMD as an Americanizing agent in China. Despite the fact that his actual reform efforts were rebuffed, Pound was locked into the belief that China was inevitably Americanizing, and that his best efforts were to simply help facilitate this process in spite of whatever untidy problems temporarily accompanied it. While his more academic work spoke to the methodological tensions his time in China generated, Pound's public relations activities grew out of a murky area in-between his conscious misrepresentations of what he knew of the GMD's problems and his own deeply entrenched resistance to accepting feedback that challenged his presumptions of the GMD as an agent of Americanization.

As noted earlier, Pound's public relations activities were important for maintaining the expectation of China's Americanization by the GMD to counter a rising tide of stateside critics. Many U.S. State Department officials had begun to criticize Chiang and the GMD as neither liberal in orientation nor in possession of popular Chinese support, and these officials emphasized diplomatic negotiation with the CCP. As a result, Pound always couched his defenses of the GMD as a necessary, sometimes even reluctant, reaction to unfair victimization and libel by the uninformed or badly intentioned.<sup>173</sup> Most directly in the realm of foreign policy, Pound leveraged his general renown to testify in Congressional hearings to press for continued support for the GMD.<sup>174</sup> Here, Pound found a receptive audience who wanted affirmation that American law was not only exceptional, but could be transformative abroad.

To this end, everything that Pound wrote in the popular press about Chinese law validated the GMD's commitment to legal reform in general, and American legal reform specifically. He also again made clear that China was incapable of reform-

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173. He had a duty to be "speaking on behalf of the Chinese Government which seemed . . . to be important in view of the general misinformation current in [the] country and [the] persistent hostility of a section of the press and some of [the] periodicals." HULL, *supra* note 20, at 312 (citation omitted).

174. See, e.g., 95 CONG. REC. 3765–67 (1949) (statement of Roscoe Pound).

ing itself without specialized American expertise.<sup>175</sup> In this forum, his expressions of appreciation for the existing Chinese legal system functioned to promote the notions of commensurability that drove the global export of American law.<sup>176</sup> Further, in his speeches and popular writings, Pound often did not restrict himself to mere commentary on legal reform; rather, he lauded the GMD on every front from social service provisions to agricultural development.<sup>177</sup> During his time stateside, he was often called upon by GMD officials to respond directly to critical pieces in the American and foreign press.<sup>178</sup> It was this propaganda work, not his actual reform agenda, that inspired Chinese supporters domestically and abroad to write to Pound to express their gratitude.<sup>179</sup> At the same time, many American citizens also wrote to him, praising his efforts in providing a clear-eyed and sober view of Chinese affairs.

Naturally, Pound took aim most aggressively at criticisms of the GMD's legal system and its Soviet influences.<sup>180</sup> Pound not only rejected these attacks but also defended the conditions under which police, using their robust pretrial detention powers, detained citizens.<sup>181</sup> He rejected criticisms that represented

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175. See *Pound Declares China Misrepresented in United States; Gives His Own Views*, HARV. L. SCH. REC., Mar. 2, 1948, at 1 [hereinafter HARV. L. SCH. REC.].

176. See POUND, *supra* note 86, at 5–6, 12.

177. See *id.* at 5–7.

178. In one such letter, Pound was directed to respond to a *New York Times* article by Nathaniel Pfeffer; he happily agreed and stated that “Professor Pfeffer’s statement is typically communist.” POUND PAPERS, *supra* note 28, at Part 3, Reel 68, 301, 304.

179. Pound was often sought after for advice by American individuals and local organizations as to how to reconcile the conflicting reports on China; Pound always gave resoundingly pro-GMD interpretations. Pound was also often asked by members of the China Lobby for publicity and to serve on their organizations’ boards. *Id.* at Part 1, Reel 69, 214; *Id.* at Part 3, Reel 68, 141, 256.

180. *Id.* at Part 3, Reel 68, 159.

181. “Police detention pending preliminary examination by procurators and before transfer . . . is short and in most of the cities where I inspected the place of detention is light, airy, and clean and will compare favorably with the better police stations in America.” *Id.* at Part 3, Reel 61, 442. See also Pound, *supra* note 87, at 347, 361.

Chinese judges as corrupt and self-serving.<sup>182</sup> Given his personal affiliation with many such judges, he often took the strongest umbrage to these claims, and compared Chinese judges to American exemplars such as Joseph Story and Thomas Cooley.<sup>183</sup> Pound also addressed the poor reputation of Chinese lawyers, casting them as true patriots first, and self-interested professionals a distant second.<sup>184</sup> He claimed that the Chinese legal system as a whole was as efficient as could be expected under the circumstances, and only conceded that it was at times underfunded, citing this fact as all the more reason to increase foreign aid.<sup>185</sup>

Throughout all of these defenses, Pound was quick to compare the GMD favorably to the CCP. He attacked arguments that the Communists were more responsive to the needs of the Chinese populace.<sup>186</sup> In regards to legal services, he stated that while the GMD had worked to get the “machinery of justice moving again,” this was untrue in “Communist-held areas.”<sup>187</sup> He decried the recurring calls for the GMD to compromise with the CCP, in large part because he believed that the CCP did not believe in constitutionalism.<sup>188</sup>

The most striking quality of Pound’s propaganda work was that, while it often mentioned law, the majority of his arguments centered on the moral virtue of Chiang and the GMD

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182. See Roscoe Pound, *Other News of China*, 10 AM. AFF. 176, 177 (1948); Pound, *supra* note 90, at 15; POUND PAPERS, *supra* note 28, at Part 3, Reel 68, 112.

183. POUND PAPERS, *supra* note 28, at Part 3, Reel 68, 112.

184. See Pound, *supra* note 87, at 352.

185. Pound said that administrative delays did exist, but this was only when there was a lack of funding or military disruptions. See Pound, *supra* note 90, at 14–15; POUND, *supra* note 86, at 12.

186. Critics often pointed to the CCP’s rural programs as the telling contrast to the GMD’s urban cronyism. Pound addressed the problems of the peasantry by noting that the GMD had invited many American agricultural reformers to China to increase production and ease the lives of farmers. See Pound, *supra* note 182, at 178.

187. *Id.* Pound also addressed the popular issue of women’s rights, long a fetish of American observers of China. Here, Pound disputed that the CCP was doing anything for women and contrasted the CCP’s inaction with the formal gender equality articulated in the Chinese Constitution, as well as the number of women he saw in GMD governmental positions. See POUND, *supra* note 86, at 9–10.

188. See *id.* at 2 (“Coalition of a constitutional government operating under a Bill of Rights with Communists is impossible . . .”).

leadership. Pound emphasized the moral values of exceptional individuals as overcoming any particular institutional or cultural barrier to China's Americanization.<sup>189</sup> Thus, he argued that evaluations of democracy in China had to be interpreted through the work of these exceptional figures as fighting against the backwards Chinese populace.<sup>190</sup> In this way, he gave Chiang great credit for building up a "strong progressive government" in the context of an often recalcitrant nation.<sup>191</sup>

Pound also foreshadowed how this emphasis on moral virtue would come to rebut the harsh criticisms of many of America's subsequent authoritarian allies during the Cold War. He defended Chiang's openly authoritarian practices as evidence of his practicality in a time of war.<sup>192</sup> He also made sure to mention that Chiang placed himself under the law, while defending Chiang's emergency powers as mild in comparison to American historical precedent.<sup>193</sup> Pound's invocation of transitional emergency was also rife with references to the need for "security," and Pound invoked the specter of unstable regimes abroad that had adopted democracy too quickly and had become "democracies on paper."<sup>194</sup> In fact, Pound told his audiences that the GMD were such incorruptible liberals that they were often too

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189. See, e.g., Pound, *supra* note 182, at 177–78.

190. See POUND, *supra* note 96, at 10–13.

191. Pound, *supra* note 182, at 177. Pound often cast his description of Chiang in quite personal terms.

You ask me about Chang Kai Shek. I saw something in him, had some talks with him, and observed the operation of government under him particularly as to the administration of justice and organization of courts. He impressed me as a strong man with a high sense of duty, an earnest desire to establish and maintain constitutional democratic government and a democratic way of life in China.

POUND PAPERS, *supra* note 28, at Part 3, Reel 68, 174.

192. See Pound, *supra* note 182, at 177–78. See also HARV. L. SCH. REC., *supra* note 175; Pound, *supra* note 107, at 277; Pound, *supra* note 92, at 274.

193. POUND PAPERS, *supra* note 28, at Part 3, Reel 68, 112. Pound compared criticisms of Chiang to charges of constitutional violations made against Abraham Lincoln during the Civil War, against Japanese internment during World War II, and against the military rule imposed on Hawaii before its ascension to statehood. See POUND, *supra* note 86, at 13–14; Pound, *supra* note 182, at 176.

194. Pound, *supra* note 139, at 198. See also POUND PAPERS, *supra* note 28, at Part 3, Reel 61, 155, 174.

idealistic and not sufficiently appreciative of the importance of order.<sup>195</sup>

Pound's propaganda work also presaged the growing venom of post-New Deal politics, as he gave no quarter to critics of the GMD. He always opted to question critics' political loyalty rather than their strategic analysis. He routinely complained about the influence of such experts and further argued that they either did not have any real knowledge of Chinese conditions or that they proceeded from a purely anti-American ideological bias. With obvious irony, he also placed blame for other failed U.S.-GMD projects on such experts, claiming that the GMD's great faith in America could lead them to rely "too much upon advice from experts from the Western world unacquainted with the conditions to which their advice was to be applied."<sup>196</sup>

Thus, in reaction to the idea that America should pursue diplomatic relations with the CCP, Pound responded with vehement claims about the broad support enjoyed by the GMD and the anti-American nature of questioning the successful export of American law to China.<sup>197</sup> He characterized a claim that the GMD enjoyed no support from the intellectual or business elites as an "outrageous statement."<sup>198</sup> He routinely denied that the CCP had any real popular support in China, at times claiming that there was "no Communist Party in China," and at most that there were "scattered Communist agitators and conspirators here and there."<sup>199</sup> For all his claims of war-time exigency, he also increasingly came to attack those who claimed

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195. See generally Pound, *supra* note 139, at 194–200 (providing an overview of the political philosophy of the Chinese Constitution).

196. POUND, *supra* note 86, at 12.

197. When critics pointed out the one-party nature of the GMD regime, Pound claimed that there were minority parties—of which there are many—but that the minority parties were "made up of leaders with few or no followers." *Id.* at 12–13.

198. POUND PAPERS, *supra* note 28, at Part 3, Reel 68, 304.

199. Pound, *supra* note 182, at 177. See also *Newspapers Garble Conditions in China, Professor Pound Says*, HARV. CRIMSON (Mar. 2, 1948), <http://www.thecrimson.com/article/1948/3/2/newspapers-garble-conditions-in-china-professor>; *Pound Is Mum on Story He Upholds Chiang's Justice*, HARV. CRIMSON (Jan. 18, 1949), <http://www.thecrimson.com/article/1949/1/18/pound-is-mum-on-story-he>; *Law Forum's Experts Mull Asiatic Policy*, HARV. CRIMSON (Feb. 19, 1949), <http://www.thecrimson.com/article/1949/2/19/law-forums-experts-mull-asiatic-policy>.



that the Chinese Civil War was a real contest.<sup>200</sup> Moreover, Pound repeatedly told American audiences that the GMD was China, and that criticism of the GMD was a violation of the long-standing American tradition of supporting China's modernization. He assured his audience that America was still held in the highest regards in China, as it had been for over a century.<sup>201</sup>

Pound stayed true to these positions until the bitter end. He had for many years argued that China's future was secure "unless outside promotion of [C]ommunism brings about another era of disruption."<sup>202</sup> He denied problems within the GMD until the actual expulsion of the party from the mainland, and as late as 1949 he responded to questions about internal strife in China by offering up that he had seen "none at all."<sup>203</sup>

### *B. Pound's Strategic Distortions*

In Pound's public and semi-public roles, he projected an image of himself as both a clear-eyed observer of Chinese affairs and a welcome reformer of Chinese law. To varying degrees, his projections were directly shaped by the context and contour of the new export-driven view of American-led foreign legal reform. Pound represented the GMD and its legal reforms as the willing recipients of American benevolence, and claimed that they were on the straight path to liberalization and democratization. He continued to justify his role as reformer by replaying the classic trope of faint praise that condemned Chinese backwardness but validated the Chinese potential for rehabilitation through Americanization. There is little doubt that he honestly believed in the general aims of this project, and that this belief made him an effective advocate for the GMD. Yet, at some point, the ardent nature of his public relations work for the GMD has to be reconciled with the fact that, as a legal reformer, his work yielded absolutely no results, and, tellingly,

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200. See *War in China*, *supra* note 64.

201. "They remember how China was saved from partition by John Hay . . . All the Chinese (Communists excepted) recognize Americans as the one people who have never had aggressive designs against them; as the one people in whom experience has taught them to have confidence." HARV. L. SCH. REC., *supra* note 175.

202. Pound, *supra* note 87, at 362.

203. *Chiang Won't Quit, Dean Pound Holds*, N.Y. TIMES, Jan. 17, 1949, at 12.

pushed him away from any collaborative projects with the GMD during his tenure.

What Pound's archives reveal is that he practiced a dialogic of public confidence and private frustration that was rationalized by his unflinching faith in his ultimate mission. He simply rejected out of hand any and all developments in China that would invalidate his utility as a reformer or call into question America's self-congratulatory view of Chinese affairs. Yet, despite what he may have claimed publically, or even hoped personally, he received a great deal of critical information about Chinese affairs from sources outside of the GMD.

Throughout Pound's personal correspondence it is clear that he saw his mission in China as dovetailing with his larger political agenda, and that this was not a reversal as has been previously claimed.<sup>204</sup> Instead, it was part of his preexisting fight against absolutism and, with growing emphasis, against communism. In his letters to Seavey, Pound unambiguously stated that he felt that the GMD were allies in America's larger Cold War struggle.<sup>205</sup>

It could be argued that Pound's idealized view of the GMD can be explained by his limited and highly orchestrated existence while living in China. Certainly, the Chinese elites with whom he interacted reinforced such beliefs—even those legal reformers who struggled consistently against Chiang's authoritarianism.<sup>206</sup> In this vein, some commentators have assumed

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204. See HULL, *supra* note 20, at 282.

205. POUND PAPERS, *supra* note 28, at Part 3, Reel 90, 854, 855.

206. Even given his relatively strained relationship with the GMD, and China generally, during this time, Wu continued to praise Pound and his work in China. See, e.g., John C. H. Wu, *The Quest of Justice: Reflections on Modern Legal Philosophies*, 33 IOWA L. REV. 1, 3 (1947). Hsieh Kwan-sheng always described Pound's work in the flattering manner which had preceded his arrival. POUND PAPERS, *supra* note 28, at Part 3, Reel 100, 628 (noting Pound's "encyclopedic knowledge" and "wonderful power"). Other officials wrote to Pound in this way as late as 1949, claiming to be Pound's "obedient pupil" and describing the positive impact of Pound's work on "the morale of the people in general and the army." *Id.* at Part 3, Reel 100, 708. See XIAOQUN XU, *TRIAL OF MODERNITY: JUDICIAL REFORM IN EARLY TWENTIETH-CENTURY CHINA, 1901–1937*, at 53 (2008), for a history of these scholars' struggles within the GMD.

that Pound was kept in the dark both about Chinese politics and the dim prospects that his agenda would be enacted.<sup>207</sup>

Yet, from Pound's earliest contacts in the 1920s with Chinese legal scholars, he knew of the GMD's domestic troubles, as well as about the uglier realities of Chiang's weak commitment to democracy and legal reform.<sup>208</sup> More directly, Pound's high-profile appointment made him attractive to those Chinese legal elites outside of the GMD establishment who wanted to voice their criticisms to a respected foreigner.<sup>209</sup> Pound received detailed letters from reformers and judges who had been cast out of the GMD after agitating too aggressively for liberalizing reforms. These lawyers—many of whom asserted their own commitment to American legal values—warned him that the GMD was only interested in his utility as a propagandist.<sup>210</sup> In one such case, Pound carried out an extended correspondence with a Western-educated reformer from one of China's minority liberal parties who consistently provided him with an alternative view of GMD policies.<sup>211</sup> Yet Pound never validated the concerns or criticisms expressed in these letters, and he was likely

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207. See, e.g., JIANFU CHEN, FROM ADMINISTRATIVE AUTHORISATION TO PRIVATE LAW: A COMPARATIVE PERSPECTIVE OF THE DEVELOPING CIVIL LAW IN THE PEOPLE'S REPUBLIC OF CHINA 31 (1995).

208. In his earliest correspondence with Wu, Pound was introduced to the general state of unrest in post-1911 Chinese politics. POUND PAPERS, *supra* note 28, at Part 3, Reel 46, 438.

209. See *id.* at Part 3, Reel 62, 140, 148.

210. Pound received an extensive letter in 1948 from a former Chief Justice of two southern Chinese provinces, Y.H. Tseng, who had left for Hong Kong. The letter laid out Tseng's credentials, including his American legal education, participation in anti-Communist prosecutions, and his torture during the Japanese invasion. Tseng told Pound that he was purged from the GMD for being a true liberal and that the GMD gave more sway to advisers from fascist nations than those from America. Tseng ended the letter with his hope that Pound would stay in China if he believed "that such a regime can be defended and reformed into a democracy" and if Pound did, Tseng inquired whether Pound thought he could "in any way tell his rulers that torture and improper detention or execution of political opponents are condemned by civilized jurisprudence." *Id.* at Part 3, Reel 62, 611.

211. Chao Byng, a Chinese lawyer who had earned a PhD in Law from the University of London and a DCL from Oxford before returning to practice in China. Early in 1947, Chao first wrote to Pound to "give you the 'inside facts' about the Chinese law courts, especially those in the interior of China which really represent the typical Chinese tribunals." Chao claimed to represent one of the minority liberal parties that had tried to organize outside of the GMD, the National Liberal Party of China. *Id.* at Part 3, Reel 68, 278.

guarded in his responses given his public appointment. However, the content of these letters could not have been completely lost on him, and even though they had their own public strategies, it seems unlikely that none of Pound's GMD interlocutors shared their struggles with him.<sup>212</sup>

Pound again steadfastly chose to see any defects in Chinese law as institutional and merely transitory in light of his moral evaluation of the GMD leadership. This allowed Pound to echo extant criticisms of the GMD in his reports as adviser, while simultaneously rejecting them in his public writings.<sup>213</sup> And when he did make concessions in his public evaluations of the GMD, he made sure to articulate these defects as stemming from the influence of his domestic opponents, academically and politically.<sup>214</sup> What this advocacy work also clarifies is that Pound's loyalty was to Chiang and the GMD first, and "China" and the Chinese people second. It was the GMD that provided a bulwark against the spread of Communism, and especially against CCP populism.

It is thus clear that Pound knew a great deal more, or at the very least was exposed to a great deal more, critical information about the GMD's legal system than he ever publically admitted, especially as to Chiang's limited commitment to "the rule of law." On one level, his public writings can be cast as simply trying to build more support for his own work within the GMD out of a paternalistic interpretation of what the American public "needed to know." Here, the inerrant cultural confidence of the era imbued Pound with a personal confidence that served to cripple rather than enrich dialogue about Chi-

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212. See, e.g., POUND, *supra* note 96, at ii (admitting that comparative law and history cannot "do the whole work of developing Chinese law" and that both "should be made to serve the needs of modern Chinese life").

213. For example, Pound consistently valorized Chinese judges and claimed that the GMD judiciary was in fine working condition. Of course, Pound could not claim that the courts were flawless as this would have invalidated the need for his reforms. Thus, at different points in his articles Pound did note that the formal documents he discussed were not always well implemented. See Pound, *supra* note 182, at 178 ("Again there is need of making the judicial organization, which is excellent as a paper scheme, achieve its full possibilities in action."). In his reports for the GMD, Pound rarely made such valorizing claims and instead was often quite critical of local courts and the lack of financial resources that the GMD had provided them. See, e.g., POUND PAPERS, *supra* note 28, at Part 3, Reel 61, 443.

214. See POUND, *supra* note 96, at 1-3.

nese legal developments through strategic misrepresentations, however well-intentioned.

Somewhere in Pound's mind the alchemy of his faith in legal science and Americanization provided the rationalizations that kept him motivated in the face of repeated failure and frustration. This is, in essence, the self-reinforcing power that made modern American legal exceptionalism such a durable ideology. Collectively, presumptions about American superiority, legal evolution, a depoliticized science of law, and a deep moralism about the GMD all joined together to move Pound to promote a public image of successful legal reform efforts in China, despite only rhetorical encouragement from his GMD sponsors.

#### IV. POUND & LAW IN COLD WAR FOREIGN POLICY

##### *A. Pound's Anti-Communist Legalism*

Whatever tensions Pound faced in reconciling his sense of mission with his many practical frustrations, they were, ironically, relieved with the CCP's successful expulsion of the GMD from the Chinese mainland in October of 1949. The CCP's victory quickly became known in America as "the loss of China." This phrase reflected the presumption that China was America's to lose. However, it proved true that the "loss" had a powerful impact on the competitive rubric of the Cold War. Rather than give him pause, after the events of 1949, Pound's support for the GMD, and his anti-Communist rhetoric on China, only intensified.

When Pound returned from his last trip to China in 1948, he had taken up a temporary appointment at UCLA's new law school. Even though Pound's time in China had no impact on his intellectual views, it did crystallize his anti-Communism.<sup>215</sup> His appointment was not accidental, as California's proximity to China made it a hotbed for GMD supporters in America, who were frequently referred to as the "China Lobby." While at UCLA, Pound became embroiled in the controversial tenure of the law school's first dean, L. Dale Coffman, whose own stri-

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215. Despite not impacting his intellectual views generally, Pound's time in China did give great substance to his writings on legal evolution. In Pound's final articulation of these ideas, China was invoked as the best example of his second stage of legal history, "strict law." See generally MCLEAN, *supra* note 94, at 39–44 (providing an overview of "strict law").

dently anti-communist views garnered Pound's unswerving support, but also led to Coffman's ultimate ouster.<sup>216</sup>

As stated earlier, Pound was already a critic of socialism and communism before starting his work for the GMD. But it was not until he arrived in China that he became a rabid and publicly active anti-communist. Notably, Pound's views on free speech had shifted several times during his lifetime, and he had not been involved in the early struggles over communism at Harvard. During World War I he had actually been a vocal critic of communist prosecutions and had openly challenged the Palmer Raids.<sup>217</sup> Yet by 1948, he not only devoted a great deal of his efforts to anti-communist causes but, during his appointment at UCLA, he had become a strong proponent of loyalty oaths for academics and regularly brought red-baiting to evaluations of foreign legal reform efforts.<sup>218</sup>

Pound became specifically well-known for his criticisms of communist influence at Harvard, and, notably, he had a specific antipathy for the renowned Chinese historian John Fairbank.<sup>219</sup> Therefore, a review of Pound's behavior during this time strongly indicates that he never questioned his support of Chiang as even indirectly in service to authoritarianism, but interpreted his experience as a foundational stimulus for the reactionary politics of his later life.<sup>220</sup>

At no point did Pound characterize his work in China as a failure, but rather used the "loss" as political capital to call for

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216. See Renee Y. Rastorfer, *Thomas S. Dabagh and the Institutional Beginnings of the UCLA Law Library: A Cautionary Tale*, 95 LAW LIBR. J. 347, 357, 367 n.110 (2003).

217. WIGDOR, *supra* note 22, at 235–39. See generally Laura M. Weinrib, *From Public Interest to Private Rights: Free Speech, Liberal Individualism, and the Making of Modern Tort Law*, 34 LAW & SOC. INQUIRY 187, 207–15 (2009) (describing Pound's philosophical "about-face"). The Palmer Raids were attempts in the late 1910s by the U.S. Department of Justice to prosecute U.S. citizens for "radical" political views.

218. "Red-baiting" refers to the practice of using accusations of communist sympathies in public *ad hominem* attacks. See generally JOEL KOVEL, *RED HUNTING IN THE PROMISED LAND: ANTICOMMUNISM AND THE MAKING OF AMERICA* (1994).

219. Pound singled out Harvard for its contribution to the Communist problem. In 1948, Kohlberg wrote to Pound about the activities of Fairbank and other "Communists" who were on the faculty at Harvard while he was posted in China. POUND PAPERS, *supra* note 28, at Part 3, Reel 46, 490. See also *id.* at Part 1, Reel 123, 67; *Id.* at Part 3, Reel 68, 17.

220. See HULL, *supra* note 20, at 329.

even greater legal reform efforts abroad.<sup>221</sup> After 1949, he continued to write in glowing terms about the legal system of the GMD during the 1940s, and he never acknowledged that he had seen any political censorship or repression during his stay in China. Furthermore, and like so many before and after him, his appointment, however brief, had immediately transformed him stateside into a "China expert." He was approached not only for his political commentary on Chinese development, but also for his opinions on specific cases involving Chinese law or litigants.<sup>222</sup>

Pound's first formal anti-communist affiliation was with Alfred Kohlberg's American China Policy Association ("ACPA"). Kohlberg was a leading member of the China Lobby, and, like Pound, his anti-communism was catalyzed by his experience working in China. In December of 1946, Kohlberg first approached Pound to ask him to join the ACPA based on his new advisory position with the GMD. Pound quickly accepted, stating that "the Association is taking exactly the right stand with respect to China."<sup>223</sup> From that point onward, Pound participated in ACPA affairs, though it was not until after 1949 that he fully embraced his role in the organization and became a member of its board of directors. His many years of correspondence with Kohlberg expressed the stridency of his convictions, including his full support of Senator Joseph McCarthy.<sup>224</sup>

During his time in China, Pound also broadened his participation to include other anti-communist groups.<sup>225</sup> Pound became routinely cited in a number of other pro-GMD and anti-

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221. Seavey, in a short biography of Pound prepared for Collier's jurisprudence encyclopedia, wrote: "[Pound] went to China to assist the Chinese Minister of Justice in setting up a modern system of courts. When the Communist debacle occurred, Pound returned to teaching."

222. See, e.g., POUND PAPERS, *supra* note 28, at Part 1, Reel 122, 390. This was almost always associated with a fee paid to Pound for signing off on a client's existing interpretation of Chinese law. See, e.g., *id.* at Part 1, Reel 122, 984 (claiming an opinion on Chinese corporate law); *id.* at Part 1, Reel 122, 994 (showing Pound was paid \$50 to sign off on a brief for Wells Fargo); *id.* at Part 1, Reel 122, 987 (showing Pound was paid \$100 to sign off on a brief for Chennault's Civil Air Transport).

223. *Id.* at Part 3, Reel 46, 462.

224. See *id.* at Part 1, Reel 123, 83.

225. *Id.* at Part 1, Reel 123, 92. These other activities included becoming Vice-Chairman of Marx Lewis's Council Against Communist Aggression. *Id.* at Part 3, Reel 70, 210.

CCP publications.<sup>226</sup> It was through such participation that he influenced lawyer Pierre Goodrich, whose Liberty Fund supported the publication of Pound's scholarship during the 1950s as it laid the groundwork for the rise of modern libertarianism in American law.<sup>227</sup> During his later years, Pound was often contacted by lawyers looking to network through him into the anti-communist movement, and, in return, they offered to further publicize his views on China.<sup>228</sup>

Pound's main contribution to the China Lobby's efforts was allowing them to use any creative characterization of his tenure as legal adviser to support the GMD and cast doubt on its domestic critics. Moreover, Pound's claims about Chinese law became all the more valuable as law became a common point of contrast for distinguishing the United States from the Soviet Union. Like the American legal profession generally during this era, Pound emphasized the centrality of law in the Cold War struggle, a view that served as a key element in the further hardening of American legal parochialism. This anti-Soviet discourse began soon after Kohlberg had recruited Pound, and Pound was happy to allow Kohlberg to cite his views in any manner he pleased.<sup>229</sup>

Thus, in the post-1949 era, Pound became an important figure in the transformation of America's view of Chinese law from a fertile soil for Americanization to "Communist law." Pound claimed that "law and lawyers are the most effective

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226. See, e.g., GERALDINE FITCH, *FORMOSA BEACHHEAD* 103, 113 (1953).

227. See DANE STARBUCK, *THE GOODRICHES: AN AMERICAN FAMILY* 359–65 (2001).

228. POUND PAPERS, *supra* note 28, at Part 3, Reel 68, 29.

229. *Id.* at Part 3, Reel 46, 468. Pound told Kohlberg that the GMD "had adopted a democratic constitution which in all major respects is in accordance with the principles laid down by the all-party Political Consultative Conference." Later Pound would expand the scope of his claims, and even modify them at Kohlberg's request. After Kohlberg asked Pound about his views of the U.S. State Department in China—with which there is little evidence Pound had significant interactions during his tenure—Pound responded: "I have no objection at all to be quoted as saying that the State Department information office as I saw it in Nanking while I was Adviser to the MOJ from 1946 to 1949 was a foundation of misinformation." *Id.* at Part 1, Reel 123, 67. See also William F. Homer, Jr., *Ex-Law Dean Says U.S. Policy 'Messed Up China Dreadfully'*, BOS. SUNDAY HERALD, Apr. 10, 1949. Pound also told his sister that the State Department had actively armed the CCP. HULL, *supra* note 20, at 314.



foes of Communist absolutism<sup>230</sup> and that China's future was now a contrast between "Soviet rule . . . [and] a constitution."<sup>231</sup> Shortly after 1949, Pound began work on his main anti-Soviet publication. In that publication, he sourced the roots of his rejection of Soviet law to his time spent in China.<sup>232</sup>

Like many of its legal critics, Pound linked Marxist theories of law, often through Pashukanis, to the New Deal.<sup>233</sup> Through linking the loss of China to New Deal legal thought, Pound became useful to the broader anti-communist lobby by serving as not only an expert on China, but also on Soviet law.<sup>234</sup> At the same time, his transformation into an anti-communist expert gave him a platform from which he could express his personal views on religion and law with much more confidence. Pound could now, as a legal scholar, more easily strike out against the now reviled atheism of the Soviets.<sup>235</sup>

Pound was also important to Sino-American affairs as a conduit for shifting the dream of Americanization from China to Taiwan. Even though he would not travel again to Asia after 1949, he maintained his contacts with the GMD legal elites now in Taiwan. He continued to publish articles on Chinese law under the GMD as part of larger debates on foreign aid to Taiwan.<sup>236</sup> Pound also continued to write letters of recommendation for GMD officials' children to attend Harvard Law School, and he received letters from Chinese lawyers and academics asking for help in procuring employment or publication

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230. POUND PAPERS, *supra* note 28, at Part 1, Reel 49, 83.

231. Homer, *supra* note 229.

232. See Roscoe Pound, *Soviet Civil Law: A Review*, 50 MICH. L. REV. 95, 96–97 (1951) (reviewing VLADIMIR GSOVSKI, *SOVIET CIVIL LAW: PRIVATE RIGHTS AND THEIR BACKGROUND UNDER THE SOVIET REGIME* (1948)).

233. See Pound, *supra* note 58, at 9. Pashukanis was a leading Marxist theorist of law who had been executed in 1937 as part of Stalin's purges. Pashukanis's fate seemed no barrier to Pound's use of him as Communist legal schools par excellence twenty years later.

234. The utility and nature of this shift can be seen in another of Pound's replies to Kohlberg: "If justice in Red China is operating on the basis of Soviet law, of which I also have made a very careful study, I can testify that Soviet law is very largely a matter of window dressing for propaganda purposes." POUND PAPERS, *supra* note 28, at Part 1, Reel 49, 738.

235. See, e.g., ROSCOE POUND, *THE DEVELOPMENT OF CONSTITUTIONAL GUARANTEES OF LIBERTY* 111 (1957) ("Whether rule is borne by Rex or by Demos, a ruler ruling reasonably under God and the law founds his kingdom on a rock.").

236. See, e.g., Pound, *supra* note 107, at 291.

in America.<sup>237</sup> Even some of those who had provided criticism of the GMD to Pound prior to 1949 were now anxious to court his favor, and, self-servingly, provided him with the same overstated evaluations of Taiwanese and mainland Chinese affairs that they had previously sought to rebut.<sup>238</sup>

As such, legal elites in Taiwan had a continued interest in glorifying Pound and his work as a former legal adviser. This led several Taiwanese presses to republish his earlier works.<sup>239</sup> Ironically, his reception even among GMD scholars presaged how limited American legal advisers' control would often be over the interpretation of their ideas in foreign contexts. Whenever Pound was cited in Taiwan, it was almost always to support the centralization of a legal system that gave little power to the judiciary.<sup>240</sup>

This steady flow of trans-Pacific flattery and encouragement helped sustain Pound's commitment to the GMD until his death in 1964. In the fifteen years since the "loss of China," his experience had become a rhetorical prop to validate his anti-communist agenda, while his frustrations during his time as an adviser were all but forgotten. In sum, for all the ready lessons that could be drawn from his experience in China, the GMD's defeat for Pound only bolstered the assumption that American law was both exceptional and should be fervently exported, expanding the global scope of its universalism while entrenching its parochialism.<sup>241</sup>

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237. POUND PAPERS, *supra* note 28, at Part 3, Reel 100, 435.

238. *See id.* at Part 1, Reel 49, 489. Of particular interest, Pound continued his correspondence with the once GMD dissident Chao Byng after his 1949 flight to Hong Kong. Chao reversed his previous criticism of the and supported Pound's anti-Communist work and agreed with the ACPA and other China Lobby groups that an American supported invasion of the mainland would be met with popular support. *Id.* at Part 4, Reel 27, 876.

239. *Id.* at Part 1, Reel 49, 557.

240. Even Wu, who was Pound's longest-running Chinese interlocutor, took from Pound his faith in evolutionary legal development and his endorsement of social engineering through law. *See* JOHN C. H. WU, JURIDICAL ESSAYS AND STUDIES 120–42 (1928). *See also* Francis Liu, (Untitled), 51 CHINA L. REV. 6 (1949) (noting, from Pound, the rise of administrative law in America and the inefficiency of judges).

241. *See generally* JONATHAN SPENCE, TO CHANGE CHINA: WESTERN ADVISERS IN CHINA 1620–1960 (1969) (exploring the results of Western attempts to mold China). Pound's reaction to the fall of the GMD and the subsequent scapegoating discourse in America typify Spence's analysis of how reformers managed to avoid recognizing the roots of their own failures. *See id.* at 292–

*B. Pound's Legacy as Failed Exporter*

The fact that Pound's time in China has for so long been passed over for study speaks in many ways to the very ordinariness of Pound's legal reform project to contemporary sensibilities. Decades later, some biographers would still be content to state without detailed comment that Pound was invited "to visit China and rewrite its legal system" and to characterize this as just another of his many reform efforts.<sup>242</sup> Today, the image of the American legal expert going abroad has become commonplace, even routinized, in America's international legal relations. American legal ideals and institutions are now typically assumed to be imbued with socially transformative potential. Where such export was once deemed to provide a necessary line of defense against communist expansion, now it is often seen as an effective instrument against a wide swath of authoritarian regimes.<sup>243</sup>

In personal terms, a great deal of Pound's prior intellectual commitments made him a poor prospect to achieve actual reform in China. His theory of common law adjudication resolved tensions in his own intellectual positions through aspirational claims about future legal developments that did not require him to face the present realities of China. It also allowed him to successfully mask his practical failures with a soothing theory of American legal superiority and common law triumphalism. The increasing polemic of his later years reflected the fact that the logical coherence of his entire intellectual universe was based on a future supposition about the effects of sociological jurisprudence detached even from American legal experience. As a great escape from his challenges at home, in China Pound

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93 ("Some [reformers] hurled themselves with increasing energy into their work, burying future uncertainties in the all-absorbing and often satisfying present; others argued that the Chinese had proven themselves unworthy to receive Western help—they were corrupt, shifty, and cruel.").

242. HULL, *supra* note 20, at 278. Hull also accepted various claims by Pound about Chinese law on face value. While Hull's claims about Pound in China are often criticized in this Article, it should be noted that this is not a comment on the general quality of Hull's work on Pound and Llewellyn, which is otherwise excellent. It is likely because Hull is the only writer on Pound to pause and give any comment on his time in China that she is cited in this Article more frequently than others who more than likely shared her reflexive assumptions on this particular topic.

243. See Kroncke, *supra* note 6, at 589.

further convinced himself that his legal science was more important than local politics and, in doing so, imagined that legal reform abroad was easier in less “advanced” legal systems than it had proven to be stateside.

It is true that Pound was seduced by the adulations he had long received from Chinese quarters, but the depth and breadth of his commitment to this project of Americanization in China defies the dismissive characterization of him as simply a fickle grandstander.<sup>244</sup> He was frustrated in China, but his larger commitments sustained his work even when his legal ideas and reforms were ignored by the GMD. It is significant that Pound never recommended reforms for Chinese law that he had not consistently recommended for American law, and there is no evidence that he saw his time in China as a refutation of sociological jurisprudence.<sup>245</sup> If anything, his time in China emboldened his preexisting faith in the necessity of judicial empiricism to combat absolutism, even if he did not condemn Chiang’s own absolutistic rule.

As a reformer, Pound’s attempt to actualize this ideal failed because—following a theoretical distinction of his own creation—he presumed that his judicial empiricism was the “modern element” that all legal systems could share as a template to lay over whatever particular “ideal element” their national cultures possessed. Yet so much of what he took as “modern” was not only culturally and historically specific to his version of American common law, but also represented an inherently politicized distribution of social and political power that invariably implicated entrenched interests in China. His presumptions were thus all the more limiting for the actual implementation of any legal reform through China’s highly contested political system. While perhaps honestly believing that China offered him a chance to enact his ideal system outside the restraints of American politics, his turn to solo work such as his *Institutes of Chinese Law* at Harvard revealed that he came to privately realize that this comparative free rein was an illusion.

Pound’s broadened commitment to anti-communism further aggravated these issues as it heightened his resistance to the empirical feedback he had received that would have challenged his loyalty to his project and the GMD. This personal dynamic

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244. See WITT, *supra* note 12, at 229–31.

245. See HULL, *supra* note 20, at 282–83.

paralleled the larger American rejection of legal cosmopolitanism, where the “loss of China” only made the desire to successfully achieve legal reform elsewhere more urgent. More than ever, Pound needed to reconcile his belief in a common human legal science with the inherent parochialism of American legal exceptionalism now writ large into the Cold War. As such, his scholarship after 1949 showed no indication that he “learned” anything from his experience in China, though he included references to work on Chinese legal history in his final five-volume opus, *Jurisprudence*.<sup>246</sup> He rarely mentioned Chinese law outside of his advocacy work, and he pursued no further study of Chinese subjects. Even the transnational mutualism he aspired to earlier in his work—using his characterization of GMD reform efforts to validate his own ideas at home—understandably disappeared after 1949.

If China did have an impact on Pound’s thought, it was in clarifying how he thought his work could be universalized. His anti-communism broadened his global gaze. As early as the 1920s, he had extolled the imperial theory of Roman jurists like Grotius, and he expanded his general judicial theory to include a valorization of the ability of international jurists to coordinate international society.<sup>247</sup> Pound also included statements about this drive towards global legal unification in his early writings on China,<sup>248</sup> and here he cast international rights as “reasonable expectations involved in life in civilized society.”<sup>249</sup> During the late 1940s, he had begun to write on “world law” and “globalism.”

After 1949, however, he lost this faith in global cultural unification and rejected the strong claims of internationalists about “universal law.”<sup>250</sup> His experience in China may have damp-

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246. See, e.g., 1 ROSCOE POUND, *JURISPRUDENCE*, at xi (1959).

247. See Roscoe Pound, *Philosophical Theory and International Law*, in *BIBLIOTHECA VISSERIANA DISSERTATIONUM IUS INTERNATIONALE ILLUSTRANTIUM* 71, 75–78 (1923).

248. See, e.g., Pound, *supra* note 119, at 753; Pound, *Introduction*, *supra* note 113, at 3–7. Pound also wrote optimistically about global cultural unification and used China as an example of the possibility of a convergence that would allow for a world court. See Roscoe Pound, *Possibilities of Law for World Stability*, 1 *SYRACUSE L. REV.* 337, 344–45 (1950).

249. Pound, *supra* note 139, at 219.

250. See Pound, *supra* note 58, at 7–9; Roscoe Pound, *A World Legal Order: Law and Laws in Relation to World Law*, Address at The Fletcher School of

ened his enthusiasm for total global homogenization, but it clearly only strengthened his belief that his universal theory of modern law was nevertheless a global solution. Pound had little faith in international legalism per se, but full faith that whatever good could come from internationalization would be through the influence of modernized American common law, and not through the cosmopolitan participation central to his early career.

What is perhaps more important than evaluating the specifics of Pound's reform mission is understanding how it clearly resonated with, and reinforced, the newly entrenched image of the American lawyer as a foreign reformer. At the time, domestic commentators rarely scrutinized or even mentioned exactly what Pound was doing in China or how he was going about it. Even Pound's allies who agitated against the New Deal as a great paternalistic affront had little hesitation in presuming to know the proper shape of Chinese law for China.<sup>251</sup> All that really seemed to matter was that Pound was a famous American legal scholar doing what American lawyers now did abroad, that is, "develop" foreign law towards a version of modernity pre-scripted as Americanization.

No one, even his political opponents on Chinese affairs such as John Fairbank, ever requested that Pound produce his data on Chinese courts, and most certainly not after 1949. That most of his public writings on China were formal analyses of documents compared, often only implicitly, with an idealized form of American law, generated little criticism. Few challenged the idea that Chinese law was flawed in comparison to American law, and, even in his pro-Taiwanese writings, Pound helped contribute to the idea that Chinese culture was anti-legal and that China now had "no law."<sup>252</sup> Lastly, he continued to deny agency to China or Taiwan when he cast American ac-

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Law and Diplomacy at Tufts University (Oct. 27, 1959), in *A WORLD LEGAL ORDER: LAW AND LAWS IN RELATION TO WORLD LAW* 3, 38 (1959).

251. See, e.g., STARBUCK, *supra* note 227, at 362 ("In February 1947, Goodrich wrote to Pound offering unsolicited and detailed comments on what [Goodrich] believed were the strengths and weaknesses of the new Constitution and how it should be improved.").

252. See Wen-Yen Tsao, *Equity in Chinese Customary Law*, in *ESSAYS IN JURISPRUDENCE IN HONOR OF ROSCOE POUND* 21, 43 (Ralph A. Newman ed., 1962) (noting that "[i]n the long history of legal evolution in China there were hardly any distinguished jurists").

tion as determinative of both pre- and post-1949 developments. China had become an ideal type of American legal reform abroad far removed from domestic concerns, and, like all ideal types, was rarely troubled by reality.

#### CONCLUSION

Given Pound's good intentions, one would hope to be able to identify salutary effects of Pound's work in China on either Chinese law or American understandings of Chinese legal developments. But outside of perhaps developing some affective personal relationships, there genuinely seems to be almost none.<sup>253</sup> His work had little impact on the GMD's legal reforms, and possibly only aggravated the elitist tendencies of the liberal legal cohort that ran counter to the CCP's successful grass-roots rural political strategy. More problematically, Pound did not use his time in China to embrace the comparativism of his early life and therefore did not test and refine his own legal thought. Neither did he give American audiences clear-sighted insight into Chinese affairs, even when he had relevant information on what the "rule of law" meant in Chiang's China. Further, he presented his Chinese interlocutors with none of the complexities of American legal experience, thus inhibiting them from developing critical perspectives on American law.

Ultimately, after his failure, he chose not to question his own presumptions, but instead proactively, and in reactionary terms, entrenched a dogmatic view of American foreign legal reform work that fueled the newly ascendant form of American legal exceptionalism that rejected his early commitment to comparativism.

While all of this may in some way serve to characterize Pound as ethnocentric or imperialistic, the basic fact remains that his view of Chinese law reflected, in lockstep, the general assumptions of the American legal community. In concrete

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253. There were a few GMD legal scholars who cited Pound as an influence after 1949. For example, Yang Zhaolong, head of the Criminal Section of the Ministry of Justice, considered himself a protégé of Pound after studying at Harvard in the 1930s. Yang, however, stayed in China after 1949 and worked for the CCP. Unfortunately, like most GMD holdovers in the CCP legal system, Yang was purged in the reactionary purges of the late 1950s. See Glenn D. Tiffert, *Epistrophy: Chinese Constitutionalism in the 1950s*, in BUILDING CONSTITUTIONALISM IN CHINA 59, 75 (Stéphanie Balme & Michael W. Dowdle eds., 2009).

terms, Pound's time in China is a strong example of how this new export-driven view of American law abroad rarely served American interests effectively. While it is often possible in historical analysis to identify specific groups which benefit from spectacular failures, it is nevertheless difficult to see any American or Chinese benefit from the events leading up to and following 1949—save in some limited sense the GMD dictatorship that soon emerged on Taiwan.

Pound, like America more broadly, was trapped by his presumptions. He could only argue for some version of Americanization abroad as the solution for foreign legal development. While Pound saw himself as engaging in a scientific endeavor that was presumptively universal in approach, his evolutionary and parochial assumptions recursively compelled the same substantive conclusion regardless of the realities of local conditions abroad or the actual complexities of American legal history. By assuming that Chinese law was only an object of change, Pound's intellectual views could not be influenced by his many frustrations and failures as a reformer. He did not seek to learn from Chinese legal experience, but he also could not learn from his personal experience and so become a better legal reformer—abroad or otherwise.

Nevertheless, Pound and his high profile appointment were historically important in that they helped increase the visibility and status of the American lawyer's new role abroad, and in doing so, reinforced the deeply flawed valuation of legal science over local politics inherent in foreign reform efforts. Pound's representation of legal developments in China was paradigmatic for American legal reformers abroad. He reconciled the tensions and negative feedback in his technical reform work by personalizing his efforts, most directly in the high moralism he used when discussing the GMD and Chiang. Here, Pound was swept away by the politics of legal reform in authoritarian regimes that would become prototypical during the Cold War era—where it was believed that transcendent individuals would overcome any local resistance to American legal reforms.<sup>254</sup> His high moralism, woven into his evolutionary view

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254. See generally ROBERT A. PACKENHAM, *LIBERAL AMERICA AND THE THIRD WORLD: POLITICAL DEVELOPMENT IDEAS IN FOREIGN AID AND SOCIAL SCIENCE* (Princeton Univ. Press 1973) (discussing the approaches of social scientists and policymakers to foreign reform post-World War II).



of legal science, did little to inspire sober assessments of particular foreign legal systems.

It is critical to note that even though Pound did not expound upon the extant controversies of American law while in China, American politics during this period was actively grappling with its own domestic legal reform issues. The view of America as solely an exporter of legal knowledge actually served to narrow the empirical range of American legal debates, in effect closing American legal culture off from the experience of so many other nations, most of whom increasingly faced the common legal difficulties of a globalized world. Instead, for American law, the international legal world increasingly paralleled Pound's view of foreign law as split between emulation and contagion.

It is in the mid-twentieth century move to place American law outside and above international legal development that the primacy of new export efforts in American foreign legal relations became intertwined with the marginalization of comparative law in America. By the mid-twentieth century, the promise of genuine comparative legal analysis had been lost to Pound, as it had been to the larger American legal community.<sup>255</sup> As Pound's story illustrates, foreign law was no longer a site of critical inquiry alongside which Americans could contemplate their own legal development. Rather, foreign law was solely a perpetual subject of American influence or potential threat. The legal internationalism that accompanied America's new status as a superpower certainly had global ambitions, and the new legal exceptionalism now necessitated that the practical defects of foreign legal systems were to be compared to idealizations of American legal history. Sophisticated comparative lawyers still practiced their craft at the margins of the American legal community.<sup>256</sup> However, even their best efforts could do little to substitute for what once had been a much more broadly shared commitment to comparativism.<sup>257</sup>

We can most directly see the lasting imprint of the ideas and approach with which Pound viewed Chinese law by looking at the manner in which they are still deeply embedded in Sino-

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255. See DANIEL T. RODGERS, ATLANTIC CROSSINGS: SOCIAL POLITICS IN A PROGRESSIVE AGE 502–08 (1998) (“The old comparative policy questions no longer seemed worth asking . . .”); Kennedy, *supra* note 25, at 68–69.

256. See Kroneke, *supra* note 3, at 544.

257. See *id.* at 544–52.

American relations today.<sup>258</sup> While Pound's story is largely unknown to most American lawyers who are presently attempting to influence Chinese legal development, the same pitfalls inherent in his export-oriented view continue to plague contemporary "law and development" work related to China. In the past three decades, the resurgence of interest in Chinese law by Americans has rearticulated much of Pound's reform idealism, despite the fact that China has a forthrightly authoritarian regime.<sup>259</sup>

Summary reports concerning the decades of post-1978 American legal reform work in China reveal that American lawyers and activists, even as they carry his same altruistic intentions, are repeating Pound's errors, from the projection of American ideal types onto Chinese conditions to the flawed search for apolitical engagement with an actively adaptive authoritarian regime.<sup>260</sup> Just like Pound, analytic contortions are made to optimistically project strong judicial review into China's future.<sup>261</sup>

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258. See, e.g., Donald C. Clarke, *Alternative Approaches to Chinese Law: Beyond the "Rule of Law" Paradigm*, in 2 WASEDA PROCEEDINGS OF COMPARATIVE LAW 49 (Narumi Hasegawa trans., 1999); Robert C. Berring, *Farewell to All That*, 19 LOY. L.A. INT'L & COMP. L.J. 431, 440–44 (1996).

259. Compare Stephenson, *supra* note 4, at 67–73 (describing the prioritization of developing the "rule of law" in China during the Clinton Administration), with Paul Gewirtz, *The U.S.-China Rule of Law Initiative*, 11 WM. & MARY BILL RTS. J. 603, 609 (2003) ("[F]oundational ideas remain in dispute within China . . . the 'rule of law' remains a contested ideal and is still contending for preeminence with phrases such as 'rule by law' and 'ruling the country according to law.'").

260. See, e.g., Jacques deLisle, *Lex Americana?: United States Legal Assistance, American Legal Models, and Legal Change in the Post-Communist World and Beyond*, 20 U. PA. J. INT'L ECON. L. 179, 248–68 (1999) (detailing the lack of knowledge and use of detailed prescriptions without local context by international actors, as well as the predominance of short term projects); Sophia Woodman, *Bilateral Aid To Improve Human Rights*, CHINA PERSP., Jan.–Feb. 2004, at 2, 12–15 (describing reform efforts that have proven difficult to assess, possess limited transparency, discriminate against non-English speaking partners, evidence a large urban bias, and are plagued by practitioner and donor exaggeration of results).

261. See, e.g., Keith Hand, *Can Citizens Vitalize China's Constitution?*, FAR E. ECON. REV., May 2007, at 15, 19; Thomas E. Kellogg, "Courageous Explorers?": *Education Litigation and Judicial Innovation in China*, 20 HARV. HUM. RTS. J. 141, 187–88 (2007). *But see* Stephanie Balme, *The Judicialisation of Politics and the Politicisation of the Judiciary in China (1978–2005)*, 5 GLOBAL JURIST FRONTIERS 1, 35–36 (2005); Carl F. Minzner, *China's Turn Against Law*, 59 AM. J. COMP. L. 935, 977 (2011).

The basic idea that Chinese legal reform can be cajoled and molded according to American influence remains at the heart of international legal discourse from subjects as broad as human rights treaties to World Trade Organization ascension.<sup>262</sup> Moreover, just as in Pound's time, there are many current Chinese reformers—as diverse in normative outlook as China's internal political landscape—looking to learn from, not simply ape, American legal experience.<sup>263</sup> And potential interlocutors are just as poorly served as they were in Pound's time by the skewed idealizations inherent in export-driven perspectives.<sup>264</sup>

Pound's tenure in China shows clearly that the broad-ranging scholarly search for comparative legal knowledge that characterized his early career was replaced by a well-intentioned, though ultimately self-defeating, desire to reshape the world in particular images of American law. This desire to reshape others was historically central to the particular form of modern American legal exceptionalism criticized today as inhibiting American legal development by setting American law outside the currents of global legal experience.<sup>265</sup> Especially today,

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262. See Pitman B. Potter, *China and the International Legal System: Challenges of Participation*, 191 CHINA Q. 699, 700–03 (2007); James Li Zhaojie, *Commentary on "China and the International Legal System: Challenges of Participation"*, 191 CHINA Q. 716, 718 (2007) (claiming that "China is increasingly concerned with its ability to shape preferences of other nations so as to enhance the sense of legitimacy for its international behaviour").

263. See WILLIAM P. ALFORD & FANG LIUFANG, *LEGAL TRAINING AND EDUCATION IN THE 1990'S: AN OVERVIEW AND ASSESSMENT OF CHINA'S NEEDS* 52 (1994), for an alternative structure of dialogic exchange.

264. See Julie Mertus, *The Liberal State Vs the National Soul: Mapping Civil Society Transplants*, 8 SOC. & LEGAL STUD. 121, 127 (1999), for a non-Chinese case-study that summarizes the pitfalls of such an approach for foreign reformers.

265. See generally Sandra Day O'Connor, *Broadening Our Horizons: Why American Judges and Lawyers Must Learn About Foreign Law*, 2 INT'L JUD. OBSERVER, June 1997, at 2 (discussing the values of looking to the decisions of foreign courts, as well as foreign law generally, as a tool to broaden a lawyer's and/or judge's legal knowledge and competence); Ruth Bader Ginsburg, *The Value of a Comparative Perspective in Judicial Decisionmaking: Imparting Experiences to, and Learning from, Other Adherents to the Rule of Law*, 74 REV. JUR. U.P.R. 213 (2005) (providing varying opinions on the benefits of comparative analysis); Jeremy Waldron, *Foreign Law and the Modern Ius Gentium*, 119 HARV. L. REV. 129, 144 (2005) ("[T]o ignore foreign solutions, or to refrain from attending to them because they are foreign, betokens not just an objectionable parochialism, but an obtuseness as to the nature of the problems we face."); Mark Tushnet, *The Possibilities of Comparative Constitu-*

when American legal reform is as contested as ever internally, and where our legal solutions to pressing and basic social problems are still unresolved, such presumptions are not just self-defeating abroad, but they are a comparative disadvantage at home. Until we admit the possibility that we might have something to learn and contemplate from even legal cultures such as China's, which we are so practiced at dismissing, then we likely will rarely see China, or ourselves, as clearly as a globalized world demands.

It is fitting to conclude with perhaps the most insightful thing Pound wrote during his later life: "How may we expect to realize an ideal of universal relief from poverty, distress, frustration or fear before we have found out how to bring about such a condition in our local society?"<sup>266</sup>

If only Pound, no less America, had truly taken this to heart.

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*tional Law*, 108 YALE L.J. 1225 (1999) (discussing the benefits and detriments of learning from other constitutional courts' decisions and reasoning and the general skepticism of this in America); Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 IND. L.J. 819 (1999) (examining the reluctance of American courts to rely on foreign sources and the benefits such comparativism has brought to foreign courts); Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771, 774–75 (1997) (suggesting that other nations have a useful "fund of experience for comparative investigation").

266. Pound, *supra* note 248, at 343.