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Encountering Amateurism: John Henry  
Wigmore and the Uses of American  
Formalism

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# Encountering Amateurism: John Henry Wigmore and the Uses of American Formalism

Annelise Riles

## Abstract

This article explores the productive uses of amateurism in comparative law through a close reading of the life and work of John Henry Wigmore, the founder of the American tradition of comparative law who first came to the subject as a young missionary for the Langdellian style of American legal education in turn-of-the-century Japan. Drawing on anthropological and linguistic theory, the article explains amateurism as a post-Realist epithet for formalism. It seeks to counter the received view of the discipline as a pure product of American and European critiques of legal classicism by demonstrating how Wigmore's turn to the performative dimensions of legal formalism, at a moment when formalism found itself under Realist attack, provided a sustaining vision of the discipline. The power and creativity of formalist performance, as well as its limitations and even dangers, as deployed by Wigmore, raise questions relevant beyond comparative law about the aesthetic dimensions of American formalism.

## Chapter 5

### Encountering Amateurism:

#### John Henry Wigmore and the Uses of American Formalism

Annelise Riles \*

One of the recurring complaints about comparative law is that it is amateuristic. It is not a new complaint. For decades, now, the same critiques have been heard and still, the old methods--and the old critiques--persist.

Amateurism within the academy is always met with a certain degree of unease. One common explanation presents amateurism, like popularism, as the effect of another era with its own problems and paradigms. Amateurism, in this view, is a feature of the pre-modernist past.<sup>1</sup> The persistence of

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<sup>1</sup> In this view, what looks to us now as amateuristic scholarship was in fact scholarship tailored for the evolutionary ideas that dominated the academy prior to the introduction of modernist social scientific paradigms. *See, e.g.,* Marilyn Strathern, *Out of Context: The Persuasive Fictions of Anthropology*,

amateurism in late twentieth century comparative law, long after the infusion of modern social scientific paradigms and methods into other fields of legal scholarship, then, is treated as something of an embarrassment. And yet, alongside other disciplines specializing in comparison from anthropology to comparative literature, amateurism is perhaps comparative law's defining methodological trait.

This essay began with a quite naïve professionalizing ambition for our amateuristic discipline and an equally naïve interest in one of our discipline's greatest promoters, John Henry Wigmore. Intrigued by Wigmore's three-year stay in Japan and of his work toward the translation and editing of Tokugawa Era<sup>2</sup> statutes and case law, I was interested to learn how a young legal scholar encountered a society which, in his own understanding, was entirely foreign to him, and how the experience might have shaped his work as a comparativist. One of the dogmas of modern relativism is that the encounter with difference through the extended experience of a distant society and its legal system

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28 CURRENT ANTHROPOLOGY 251 (1987). For my own views on modernism in comparative law, see Annelise Riles, *Wigmore's Treasure Box: Comparative Law in the Era of Information*, 40 HARV. INT'L. L.J. 221 (1999).

<sup>2</sup> The Tokugawa Era (properly called the Edo Period, 1603 - 1867) refers to the period during which Japan, ruled by the Tokugawa family, was closed to outside influences.



changes the person as well as the scholar; that the personal experience of difference directs and refocuses the theoretical project. From this standpoint, Wigmore's extended stay in a non-European country where he learned the language and engaged in serious long-term research might have provided a model from within the tradition for a more rigorous, less amateuristic, comparative law.

However, an inquiry into Wigmore's encounter with Japanese "custom" complicates the familiar trope of the scholar changed by travel to distant places and the encounter with things strange and foreign there. Not only did Wigmore emerge from his sojourn in Japan with most of the same views with which he began, but there was much that I found troubling about both the content and the genre in which those views found expression. I came to accept that Wigmore was an ordinary person and scholar, very much a product of his time and social milieu, with some extraordinary abilities, interests and commitments--we might call them professional hobbies--who produced some scattered but remarkable achievements. More importantly, I came to accept the necessity of rethinking my own ideas about amateurism and related professionalizing ambitions.

John Henry Wigmore, Professor and later Dean of Northwestern University School of Law, was the quintessential establishment figure, and he

worked hard at it. He was the sort of dean who was adored by alumni,<sup>3</sup> the sort of scholar whose ideal audience was the local bar association, a man who belonged to every club and society, and who meticulously clipped every reference to his activities in the most trivial of newsletters.<sup>4</sup> Although he has been called the father of American comparative law for his work in introducing the discipline to the American academy,<sup>5</sup> his work is rarely read today. In his time, as in retrospect, he was regarded as an eclectic, free-thinking, exceptionally energetic but somewhat distracted scholar whose

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<sup>3</sup> The Northwestern Alumni newsletter records an instance in which 400 alumni gathered, and banged on tables as they sang,

*Oh! Wigmore, Dean Wigmore,*

*You're a leader who is tried and true,*

*Oh! Wigmore, Dean Wigmore,*

*Old Northwestern Should Be Proud Of You.*

*John H. Wigmore Honored by "World,"* ALUMNI NEWS, NORTHWESTERN UNIVERSITY (January 1930).

<sup>4</sup> See, e.g., Colonel Wigmore Honored by Japan, THE DISCUS, Dec. 1935. (On file at Northwestern University Library).

<sup>5</sup> JEROME HALL, COMPARATIVE LAW AND SOCIAL THEORY 10 (1963).

contribution lay more in his popularization of comparative and foreign law than in the formulation of new paradigms or ideas.<sup>6</sup>

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<sup>6</sup> The reviewer of Wigmore's *Panorama of the World's Legal Systems* for the Yale Law Journal, for example, wrote:

If Dean Wigmore's primary aim is to give the general reader a series of interesting, but necessarily rapid and incomplete, pictures of the historical development of the sixteen legal systems of the world then he has undoubtedly been successful. Beautifully printed on excellent paper and enlivened by over five hundred illustrations the books are a pleasure to the eye. These "impressionistic" sketches, full of pleasant gossip bits and occasional good stories, are particularly easy reading for they do not attempt to deal with any general ideas or principles. . . . If, however, this work is intended as an introduction to the subject of comparative law, then we are doubtful whether it will accomplish its purpose. . . . After having enjoyed the elaborately colored illustrations of the Great Pyramid, the Hanging Gardens of Babylon, the Parthenon, and the Colossus at Rhodes, it may seem ungracious on the part of the reviewer to disagree with Dean Wigmore's view that the pictorial method is of practical value in expounding the science of the



\insert figure 1 here\

Wigmore's personal blend of idealism and complacency in his life and scholarship might serve as an apt metaphor for the character of our discipline. In his own time, Wigmore's personal views seemed at once revolutionary and reactionary. He was nominated to the World Court for his rare familiarity with foreign law and his visionary commitment to international institutions, but his nomination was later derailed because of his hostility to pacifists and leftists during World War I.<sup>7</sup> He took strong public stances on controversial issues,

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law. A student whose zeal must be stimulated in this way, can hardly be worth teaching.

A. L. Goodhart, *Book Review*, 38 YALE L.J. 554, 554-55 (1929). *See also* Theodore Pluckett, *Book Review*, 42 HARV. L. REV. 587 (1929).

<sup>7</sup> For an example of this hostility, *see* John H. Wigmore, *J.H. Wigmore Answers Frankfurter Attack on Sacco-Vanzetti Verdict: A Fair Trial-Facts as Well as Law Reviewed by Supreme Court*, BOSTON EVENING TRANSCRIPT, April 25, 1927; Felix Frankfurter, *Prof. Frankfurter Replies to Dean Wigmore*, THE BOSTON EVENING TRANSCRIPT, April 26, 1927; John H. Wigmore, *Editorial*, THE BOSTON HERALD, May 10, 1927; Felix Frankfurter, *Mr. Frankfurter's Reply*, THE BOSTON HERALD, May 11, 1927. Roscoe Pound

described Wigmore's attack on Frankfurter in this exchange as "a disgrace to legal scholarship." DAVID WIGDOR, ROSCOE POUND: PHILOSOPHER OF LAW 250



and yet he knew how to cut himself off from an unpopular position when necessary.<sup>8</sup> In his letter in support of Wigmore's candidacy for the World Court, Benjamin Cardozo put it in flattering but double-edged terms: "He has

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(1974). Likewise, Wigmore's approach to the testimony of sexual assault victims in his writings on evidence has been the subject of much-deserved feminist critique. See Leigh B. Bienen, *A Question of Credibility: John Henry Wigmore's Use of Scientific Authority in Section 924a of the Treatise on Evidence*, 19 CAL. W. L. REV. 235, 237 (1983) ("Under the guise of arguing on the basis of objective, scientific authority, this section of Wigmore's treatise simply states that all females who allege sexual assault should be assumed to be lying, a repressive and misogynist position.")

<sup>8</sup> Consider, for example, Wigmore's stance toward Japan at the outbreak of World War II:

John H. Wigmore, dean emeritus of Northwestern University Law School, who spent three years in Japan, was compiling a translation of international law for the Japanese government when the Pearl Harbor attack was made. He says the Japs pay no attention to laws, national or international.

*News Brief*, MOMENCE, ILL. PROGRESS REPORTER, March 12, 1943.



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attained an eminence that would make him lonely, if he were not so obviously human.”<sup>9</sup>

Throughout his career, Wigmore enthusiastically, even didactically promoted the comparative method in legal education. With funds raised from local industrialists, he traveled the world collecting legal materials<sup>10</sup> and

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<sup>9</sup> Benjamin Cardozo, *Statement regarding Wigmore's Nomination to the Court of International Justice* (1930) (on file at Northwestern University Library, Box 1)

<sup>10</sup> Consider, for example, the following summer travel schedule:

Route of tickets: 1st cl. steamer, 2nd cl. rail; beginning at Liverpool, thence by Harwich to Rotterdam, thence by rail Amsterdam, Enkhuizen, and Bremen to Kiel; thence by steamer & rail to Kopenhagen; thence by rail & steamer via Malmo, Sassnitz, Stralsund, Greifswald to Berlin; thence via Dresden, to Prag; thence to Krakau; thence via Waag Valley to Buda-Pest; thence to Vienna; thence via Linz to Salzburg; thence via Strassburg, Luxembourg, Namur, to Brussels; thence via Antwerp to Rotterdam; thence via Harwich, London, Oxford, Hereford to Liverpool.

John H. Wigmore, *Summer Schedule: June 12 to August 30, 1905* (on file at Northwestern University Library Archives, Box 12).

covered the walls of the law school with pictures of scenes of courtrooms and the world.<sup>11</sup> He corresponded with comparativists from around the world, and his translation and publication of the works of foreign jurists for an American audience is one of his great ignored legacies.<sup>12</sup> He played a key role in the

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<sup>11</sup> Cf. Riles, *Wigmore's Treasure Box*, *supra* note 1.

<sup>12</sup> The scale of this project was truly astounding. Wigmore's Continental Legal History Series and Criminal Science Series translated and published the works of French scholars Jean Brissaud, Joseph Charmont, Paul Collinet, René Demogue, Léon Duguit, Adhémar Esmein, Alfred Fouillée, Eugène Gaudemet, René Garraud, François Geny, Paul Frédéric Girard, Édouard Lambert, Georges Ripert, Raymond Saleilles, and Gabriel de Tarde; German scholars Fritz Berolzheimer, Heinrich Brunner, Arthur Engelmann, Heinrich Gerland, Andreas Heusler, Rudolf Hübner, Carl Koehne, Josef Kohler, Burkhard Wilhelm Leist, Adolf Merkel, Richard Schroeder, Heinrich Siegel, Rudolf Stammler, Roderich von Stintzing, Otto Stobbe, Ludwig von Bar, Rudolf von Jhering, and Heinrich Zoepfl; Italian scholars Carlo Calisse, Giorgio Del Vecchio, Enrico Ferri, Cesare Lombroso, Achille Loria, Luigi Miraglia, Alfred Rocco, Michele Angelo Vaccaro and Icilio Vanni, and many others from Latin America, China, Japan, Eastern, and Northern Europe. *See generally* CONTINENTAL LEGAL HISTORY SERIES and CRIMINAL SCIENCE SERIES. *See also* Sarah Morgan, *Memorial Proposing Dean John H. Wigmore*

organization and promotion of the International Congresses of Comparative Law of 1932 and 1937.<sup>13</sup> It was rumored that he even maintained a Shinto shrine in his suburban living room.

By Wigmore's own admission, however, during his most ambitious years as professor and then as dean, comparative law remained primarily a hobby—perhaps of the same order as the musical comedy routines and rhymed mottoes he wrote for the school,<sup>14</sup> or his summer holiday travels. Crucially to the future of comparative law in the United States, he left no

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*of Northwestern University (Chicago) for the Permanent Court of International Justice* 1930 (on file at Northwestern University, Box 10).

<sup>13</sup> See generally John H. Wigmore, *Report of Committee of Conference of State Bar Delegates on 1932 International Congress of Comparative Law*, 18 ABA J. 37 (1932); John H. Wigmore, *The Congress of Comparative Law*, 23 ABA J. 75 (1937). “Where most of the American lawyers had never been to Europe, they were amazed to discover that Wigmore already knew all the leading European comparativists and spoke to them in their own languages.” William R. Roalfe, *John Henry Wigmore: Scholar and Reformer*, 53 J. OF CRIM. L. CRIMINOLOGY AND POL. SCI. 277, 296 (1962).

<sup>14</sup> Wigmore's musical compositions are on file at the Northwestern University Library, Boxes 230-31.

disciples.<sup>15</sup> Wigmore rather made his scholarly name as an expert in the field of evidence, and his serious and still-popular treatise is a standard performance in that formalist genre that makes only subtle nods to the virtues of comparativism.<sup>16</sup> During this period, he also devoted great efforts to building the law school and solidifying personal and institutional ties to the local bar associations, and in these tasks he proved to be a shrewd and popular politician.<sup>17</sup>

What is perhaps most difficult to come to terms with is Wigmore's dogged amateurism. The mature Wigmore's "pictorial method" of

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<sup>15</sup> See Pierre LeGrand, *John Henry Merryman and Comparative Legal Studies: A Dialogue*, 47 AM. J. COMP. L. 3, 6 (1999).

<sup>16</sup> See JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW (1904). For examples of the enduring relevance of Wigmore's treatise, see, e.g., TERANCE ANDERSON & WILLIAM TWINING, HOW TO DO THINGS WITH FACTS BASED ON WIGMORE'S SCIENCE OF JURIDICAL PROOF (1991); Paul Bergman, *Of Bentham, Wigmore, and Little Bo Peep: Where Evidence Lost its Way, and a Map for Scholars to Find it*, 66 NOTRE DAME L. REV. 949 (1991);

<sup>17</sup> See WILLIAM R. ROALFE, JOHN HENRY WIGMORE 105 (1977).

comparative law,<sup>18</sup> in which stories and images, authentic or not, were collected together into popular volumes and “entertaining” presentations, seems quixotic to the point of absurdity. How are we to reconcile the self-image of the serious young scientist, bringing the “science” of Langdellian legal education and its formalist precepts to the periphery of civilization and returning with “data” about strange foreign customs, with the eccentric presentations of the older scholar? Wigmore’s encounter with the Orient and later with the academy, therefore, will serve as an example of the place of amateurism in comparative legal method—that side of comparative scholarship that, as in Wigmore’s life, postdates and somehow survives the best justifications for the adventure.

Of course, *this* kind of amateurism, a certain studied eccentricity at the level of self and scholarly presentation, is rare in comparative law. But Wigmore’s treatment of non-Western legal culture as a source of information about modern law’s evolutionary past is more common. The critique that this paradigm inspires from scholars outside the discipline finds some echoes in comparativists’ own complaints about the vacuousness of their analytical categories, the casual way in which data is made to fit arguments about the transplantation of legal systems from one society to another, or the lack of




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<sup>18</sup> For a further discussion of Wigmore’s pictorial method, *see generally* Riles, *supra* note 1.

commitment to the societies they describe or interest in the messiness of detail.

Since the critique of the amateurism of adherence to outdated paradigms has already been laid out eloquently,<sup>19</sup> this critique will not be the goal of this essay. Let me be more plain: in the vocabulary of this essay, amateurism is not to be taken as a disparaging word. Rather, my interest is in the features of what critics call amateurism, its internal purposes and rationales.

What was the relationship, then, between professional work and hobby? Did the *Treatise on Evidence* occupy an entirely different world for Wigmore from his comparative interests? I do not think so. Rather, I want to suggest that we read Wigmore's approach to comparison as one enactment of the mainstream American approaches to legal thought we term legal formalism. What I have in mind here, however, is not the doctrinal, epistemological or logical dimensions of formalism often discussed by its realist and postrealist critics<sup>20</sup> but rather its performative, and relational dimensions.<sup>21</sup>

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<sup>19</sup> See, e.g., LeGrand, *supra* note 15; Symposium: *New Directions in Comparative Law*, 46 AM. J. COMP. L. 597 (1998).

<sup>20</sup> See, e.g., Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-*

One can begin by taking a cue from Wigmore himself: The trail of scholarship and correspondence Wigmore left behind suggests that the comparativist's life project – Wigmore, the Institution, as one colleague memorialized him<sup>22</sup> – hardly began and ended with the four corners of the scholarly text.

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Ambition in Lotus Land

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The origins of Wigmore's interest in comparative law are succinctly retold by Wigmore himself:

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1940, 3 RESEARCH IN LAW & SOCIOLOGY (Steven Spitzer ed.) (1980); Cass Sunstein, *Lochner's Legacy*, 87 COL. L. REV. 873 (1987); DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION [FIN DE SIECLE] (1997); Fred Schauer, *Formalism*, 97 YALE L.J., 509 (1988).

<sup>21</sup> My aim here is to bring thinking about legal formalism into conversation with broader debates about the performative dimensions of form. See, e.g., Hirokazu Miyazaki, *Faith and its Fulfillment: Agency, Exchange and the Fijian Aesthetics of Completion*, 27 AM. ETHNOL. 31(2000); ANNELISE RILES, *THE NETWORK INSIDE OUT* (2000).

<sup>22</sup> Albert Kocourek, *John Henry Wigmore: A Personal Portrait*, 24 THE GREEN BAG 2, 8 (1912).





At [the time of my studies] the subject of comparative law was not studied at Harvard, except in James Barr Ames' personal researches, omnivorously sympathetic as he was with all aspects of law....In Japan, the comparative point of view naturally emerged. At that time, as today in China, the new Occidental legislation was occupying all thoughts of the Japanese people, including the students, and no interest was shown in their own native institutions. This then seemed strange to me. ...I was able to discover a great mass of recorded materials showing their indigenous development...and hoped on returning to the United States to become a professor of Comparative Law. But President Eliot [of Harvard University] pointed out to me that there was no American interest in that subject, and no opening for it in law schools. In fact, most of the material which I used for my essay in the Harvard Law Review in 1897 on The Pledge Idea, a Study in Comparative Legal Ideas, was found in the great Library of the College and not in the Library of the Law School of that period.<sup>23</sup>

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<sup>23</sup>John H. Wigmore, *Comparative Law: Jottings on Comparative Legal Ideas and Institutions*, 6 TULANE L. REV. 48, 48-53 (1931).

Wigmore's irrepressible excitement about his project, and his resigned bitterness about its marginality in the academy will be familiar to many comparativists today.

In 1889, as a recent graduate of the Harvard Law School, Wigmore sailed to Japan to help establish the Keio Law School on the Langdellian model.<sup>24</sup> In Japan, it was a time of "Westernization" in which everything Japanese was to be discarded for things foreign, and Wigmore's work was a small part of this project. Wigmore's letters, diaries, newspaper articles and scholarly writings from his three years in Japan are those of an intelligent, ambitious, but otherwise ordinary law graduate, eager to make some "scientific" use of his time in a far away place, but undistinguished in his general outlook from other expatriates of that time. Like most of his fellow citizens, Wigmore believed that the West, as "Japan's adopted parent," had much to teach, and that the Rule of Law should be first among these lessons.

Wigmore was among the second generation of foreigners hired by the Meiji government—so-called "yatoi" (foreign menials) brought in after 1866 to Westernize all aspects of Japanese society.<sup>25</sup> Legal reform was at the top of

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<sup>24</sup> Keio University is the oldest private university in Japan and one of its most prestigious.

<sup>25</sup> See generally H.J. JONES, *LIVE MACHINES* (1980); ARDATH W. BURKS, *THE MODERNIZERS: OVERSEAS STUDENTS, FOREIGN EMPLOYEES, AND MEIJI*



the government's agenda as part of its bid to satisfy Western nations' conditions for the cession of extraterritorial jurisdiction over their nationals in Japan—a cause of deep humiliation to Japanese elites.<sup>26</sup> The first generation of foreign scholars had translated Western laws and jurisprudence and drafted the new civil codes, but by the time of Wigmore's arrival, that more momentous work was already coming to a close.<sup>27</sup> Wigmore's role, rather, was to be the

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JAPAN (1983); NEIL PEDLAR, *THE IMPORTED PIONEERS: WESTERNERS WHO HELPED BUILD MODERN JAPAN* (1990). Wigmore was the “foreign menial” of Yukichi Fukuzawa, an academic and educator, and the now mythical founder of the private Keio University. Fukuzawa's picture appears on the 10,000 yen note today.

<sup>26</sup> Wigmore himself was ardently against extraterritorial jurisdiction and wrote a number of editorials and academic articles in Japan and the United States on the subject. *See, e.g.*, John H. Wigmore, *Foreign Jurisdiction in Japan*, *THE NEW YORK NATION*, Jan. 12, 1893; John H. Wigmore, *Carstens and Exterritoriality*, *THE JAPAN DAILY MAIL*, Nov. 8, 1892; John H. Wigmore, *Code Translations*, *THE JAPAN DAILY MAIL*, Nov. 14, 1892; John H. Wigmore, *Throwing Stones from Glass Houses*, *THE JAPAN DAILY MAIL*, September 2, 1891.

<sup>27</sup> Key figures in this work included the American Erastus Peshine Smith, who worked for the Japanese Foreign Ministry as an advisor on



training of the next generation of Japanese lawyers—and hence he was free to turn to less applied and more scholarly forms of inquiry.

The nostalgia in Wigmore's turn to Japanese customary law, after the modernizing ambitions of codification were largely spent, was no doubt shaped by the commitments of his predecessors. The earlier generation of yatoi had come to see their role as one of preserving the true Japanese character from the desire to destroy all things indigenous in favor of Western trends—as protecting Japan against itself.<sup>28</sup> Upon his arrival in Japan,

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international law from 1871, the Frenchman Georges Bousquet, who established a School of French Law within the Ministry of Justice in 1872, and most importantly, Emile Gustav Boissonade of the Faculty of Law of the University of Paris, who over a period of more than twenty years drafted the Japanese Civil Code on property, the Penal Code, and the Code of Criminal Procedure. *See* PEDLAR, *THE IMPORTED PIONEERS*, *supra* note 25 at 187-8.

<sup>28</sup> Jones comments of Bousquet that

[the] motivation for the feverish activity he assessed as vanity, an attempt to show Europe a décor of Western civilization . . .

Bousquet felt their efforts too grand, too ostentatious, not in

keeping with indigenous qualities. This assessment represents a

fair consensus of opinion among yatoi. . . .

JONES, *supra* note 25 at 15.



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Wigmore received the following counsel from H.B. Adams, President of Johns Hopkins University, who had encouraged him to take the position:

I think the duty of American Educators in Japan should be to cultivate greater stability of character and judgement in the Japanese youth and to preserve a consciousness of historic continuity in the institutions and culture of the Japanese people. The introduction of the historic method of studying law, politics and religion would be the salvation of that revolutionary and iconoclastic race. . . . I believe you could render a substantial service to New Japan by Historical investigations into the social and legal History of Old Japan.<sup>29</sup>

These academic and political motivations served only as background and pretext, however,<sup>30</sup> for a very fantastical adventure. Wigmore's first letter home captures his mood:

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<sup>29</sup> *Letter from H.B. Adams, President of Johns Hopkins University, to John H. Wigmore* (October 28, 1889) (on file at Northwestern University Library, Box 18).

<sup>30</sup> Wigmore wrote to his mother-in-law en route to Japan that

[t]he only thing about the coming tasks that has the slightest

burden about it looking forward from now is the work of the lectures, but I am not much apprehensive even about this, for I



[T]he sail up the bay to Yokohama was like a sail into fairyland. The mountains on either hand were like curious bits of stage scenery, fantastic shapes and picturesque effect of light and shade. The volcano of Oshima could be seen on the left with a crest of smoke, and after the sun had risen, Fujiyama, the great snow-crowned mountain, came into sight far more majestic and beautiful than we had ever imagined. Soon we passed close to the shore, and the little coves, green sward, and fairy trees made one and all of us feel over and over again that it was a journey into fairy land. In the distance the white and yellow bluffs showed in the sun, and all the hills came close to the water's edge. About us were little fairy boats, like cockleshells or walnut boats...It [Yokohama] is the most picturesque looking town I have ever seen ...[The natives with] their shock of black hair, usually carefully parted, with their olive complexions, white teeth, and intelligent earnest looks make them very fascinating. The whole affair seemed like a

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am told positively that no one works hard in Japan, no matter who he is.

 *Letter from John Henry Wigmore to Mrs. Vogl (October 20, 1889) (on file with the author).*

play, from the ship to the hotel. There we found European life again.<sup>31</sup>

For a young lawyer who had struggled to find enough employment to feed himself in Boston, part of the excitement stemmed from his newfound status and relevance. His wife Emma wrote of Wigmore's reaction to the crowd of students that greeted them at the train:

The dear boy was of course unconscious as ever of his own self, and thought only of the mass of youthful faces about him, and set them almost wild by waving his hat and I don't know but that he joined in their cheering.<sup>32</sup>

The privileges of his colonial status, likewise, were avidly consumed in the register of fantasy and amusement:

[W]e took our first ride in the *jinrikishas*. We are all delighted with that way of travelling. The men seem so interested in you

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<sup>31</sup> *Letter from John Henry Wigmore to Mrs. Vogl*. (October 24, 1889) (on file at Northwestern University Library, Box 179).

<sup>32</sup> *Letter from Emma Wigmore to Mrs. Vogl*. (October 27, 1889) (on file at Northwestern University Library, Box 179).

and are so intelligent that it is like playing, not like sober life at all.<sup>33</sup>

In joining the expatriate community of Japan, Harry and Emma suddenly found access to a social and political circle far beyond their means.<sup>34</sup> This suited Wigmore's ambitions well:

What do you think of all the high-and-mightiness in which we have reveled this week? Think of being specially invited to a tea at the British Minister's! Think of inviting Sir Edwin Arnold to dinner and still more, think of him accepting it!<sup>35</sup>

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<sup>33</sup> *Letter from John H. Wigmore to Mrs. Vogl.* (Oct. 24, 1889) (on file at Northwestern University Library, Box 179).

<sup>34</sup> Harry and Emma Wigmore's letters and diaries from this period give the picture of a couple with few financial resources struggling to save. They emphasize that they shop at length for every household item; they share a home with another teacher and his wife; they sleep under a cotton comforter rather than a silk one and that Emma wears the same dress to every ball.

<sup>35</sup> *Letter from John Henry Wigmore to Mrs. Vogl.* (November 12, 1889) (on file at Northwestern University Library, Box 179). Something of their ambitions is revealed in Emma's request from her sister in a letter shortly following:



Wigmore threw himself into the experience of the expatriate scholar. He studied the Japanese language and read every book and article about Japanese legal institutions he could find. He learned Japanese fencing. He played shortstop on Tokyo's first baseball team.<sup>36</sup> Emma wrote that "this trip to Japan seems to be bringing out many strong points which [Harry] never knew he possessed."<sup>37</sup>

\insert figure 2 here\

Part of the excitement of Japan was the intellectual freedom Wigmore suddenly gained to stray beyond usual disciplinary confines.<sup>38</sup> He wrote

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In the next mail will you please send me 'Social Etiquette' and 'The Correct Thing', three hair nets for my bangs, and I wish you could spare me one of your cook books. ... Harry would like to have you send him 1) all of his newspaper cuttings [and] 2) his printed articles.

*Letter from Emma Wigmore to Edith Vogl* (November 22, 1889) (on file at Northwestern University Library).

<sup>36</sup> ROALFE, *supra* note 17 at 22-24.

<sup>37</sup> *Letter from Emma Wigmore to Mrs. Vogl* (February 3, 1890) (on file at Northwestern University Library).

<sup>38</sup> Jones comments that for many yatoi, who were in their mid-twenties, Japan afforded an opportunity to explore ideas and projects that were not

articles for *Scribner's* and *The Nation* on topics as distant from law as the architecture of the new parliament building and the latest fashions in dress.<sup>39</sup> He traveled to the countryside to witness elections. He held “interviews” with prominent Japanese intellectuals. He reviewed books on flower arranging and dissertations on Japanese history, and collected ethnographic information about festival preparations.

In particular, Wigmore was to find his niche among the members of the Asiatic Society, an institution in many expatriate communities in nineteenth century Asia. Here was amateurism at its zenith. Devoted to the study of local “custom,” the Society sponsored talks and published papers

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completely acceptable in the West. A notable example is Edward Morse's work on human evolution and biological anthropology at a time when the subject was highly controversial in the United States. *See* JONES, *supra* note 25 at 74-75; *cf.* D. ELEANOR WESTNEY, *IMITATION AND INNOVATION: THE TRANSFER OF WESTERN ORGANIZATIONAL PATTERNS TO MEIJI JAPAN* (1987).

<sup>39</sup> John H. Wigmore, *Starting a Parliament in Japan*, SCRIBNER'S MAGAZINE, JULY 1891, at 33-50; John H. Wigmore, *Parliamentary Days in Japan*, SCRIBNER'S MAGAZINE, Aug. 1891, at 243-55.

about Japanese history and ethnology.<sup>40</sup> Under Wigmore's direction, its Committee on Ethnography collected information on customary land tenure by way of a questionnaire distributed to local elites.<sup>41</sup>

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<sup>40</sup> The Asiatic Society of Japan still exists today as a club of amateur ethnologists under the titular leadership of a minor member of the Japanese royal family.

<sup>41</sup> In connection with this work, Wigmore wrote

The plan adopted, we may add, is not a novel one by any means. Only a year or two ago the China Branch of the Asiatic Society sent out a few questions in the same way and upon the same topic; and very gratifying results were obtained. The Ethnological Society of Great Britain has for some years worked in the same way in investigating the sociology of the southern hemisphere. Perhaps the most systematic undertaking of this sort is that of the United States Bureau of Ethnology, which publishes a book containing several thousand questions, for linguistic investigators among the American Indians. ...it is impossible to study local institutions aright without giving to folk-lore, superstitions, ceremonies, festivals, and such facts a more important place than hitherto.



The conversion of adventure into academic project began with Wigmore's discovery of the dusty reports of a Ministry of Justice commission on informal dispute resolution and customary law convened twenty years prior, and shortly after the purposeful obliteration of those customary practices by the Meiji government as part of its modernization drive.<sup>42</sup> Wigmore raised funds from the Asiatic Society and assembled a team of translators to edit an English language abridged version of the records of what he poetically called "Justice in Old Japan". He published the first four volumes of materials in 1892.<sup>43</sup>

It was in the course of this adventure, then, that Wigmore invented himself as a comparative legal scholar. The new science of comparative law provided a rationale for what otherwise must have seemed like an odd hobby.

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John H. Wigmore, *The Asiatic Society's Questions*, THE JAPAN DAILY MAIL, Aug. 13, 1891.

<sup>42</sup> JOHN H. WIGMORE, LAW AND JUSTICE IN TOKUGAWA JAPAN xiv (1969) (hereinafter, "LAW AND JUSTICE").

<sup>43</sup> *John Henry Wigmore Re-Visits Japan*, THE ALUMNI NEWS (1935). The Japan Cultural Society (Kokusai Bunka Shinkokai) resumed the project in 1967 under the direction of Dr. Takayanagi Kenzo, a law professor at the University of Tokyo, with funding from the Japanese government. See WIGMORE, LAW AND JUSTICE, *supra* note 42 at xi.

Wigmore imagined this hobby as a potential ticket to a teaching position in an American law school upon his return and in his correspondence with Holmes, Brandeis and other legal theorists back home, Wigmore positioned himself as a diligent foot soldier in the often thankless work of mapping out the evolutionary structure of law and of cataloguing its variations.<sup>44</sup>

On the ground, however, the work was considerably less lofty.

Wigmore claimed to speak fluent Japanese and he certainly had learned some technical legal terminology, but he did not read or write. He was dependent, then, on a team of young Japanese academics.<sup>45</sup> The correspondence suggests a cagey set of potentially exploitative relationships in which both sides jockeyed for advantage with their eyes on the project's implications for their personal advancement:

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<sup>44</sup> See, e.g., John H. Wigmore, *Letter to Oliver Wendell Holmes*, March 30, 1891 (sending materials on land tenure customs in Japan and informing Holmes that he plans to write a treatise on “native Japanese law”).

<sup>45</sup> See *Letter from John Henry Wigmore to Mr. Karusu (Chairman of the Society for International Cultural Relations)* (1935) (on file at Northwestern University Library).

July 17, 1890

Dear Prof. Wigmore:

I am sorry that I can not do the work for you, for the compensation is too cheap, and I can not get anyone instead of me.

Yours truly,

T. Matsumo<sup>46</sup>

Although during the course of this work, Wigmore clearly developed respect for his Japanese colleagues and for Japan more generally, it must be acknowledged that the inquiry into Japanese legal custom and the experience of collaborating with Japanese scholars ultimately did not shake the foundations of his own beliefs in the way a late modern comparativist might hope it would have done. One of the more interesting examples of the limits of Wigmore's own relativism concerns his own outrage over the treatment of Japanese immigrants in the United States. During his time in Japan and throughout his life, Wigmore spoke and wrote extensively about the injustice



<sup>46</sup> *Letter from Matsumo to John Henry Wigmore* (July 17, 1890) (on file at Northwestern University Library).

of American immigration policies.<sup>47</sup> Just prior to the outbreak of World War II, he wrote that the legal treatment of Japanese-Americans constituted “racial discrimination,” and that anger about American racism was inflaming militarism in Japan in terms that identified with the point of view of his former hosts: “if I were a Japanese, I should have that feeling.”<sup>48</sup>

And yet Wigmore’s ability to identify with an “other” as a result of his time in Japan did not challenge his own precepts about the central relevance of race in social policy or the categorization of legal systems.<sup>49</sup> Nor did his sympathy toward Japanese-Americans lead him to question racism toward less exotic others. In one early article condemning a federal court’s decision barring Japanese from naturalization as US citizens on grounds that they were not “white,” for example, Wigmore argued that the judge’s logic could not be defended as a matter of ethnology because

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<sup>47</sup> See, e.g., John H. Wigmore, *Throwing Stones from Glass Houses*, JAPAN DAILY MAIL, Sep. 2, 1891; John H. Wigmore, *American Naturalization and the Japanese*, THE JAPAN WEEKLY MAIL Aug. 25, 1894.

<sup>48</sup> John H. Wigmore, *Equality of Races*, ASIA MAIL, March 1940.

<sup>49</sup> See generally ALBERT KOCOUREK & JOHN H. WIGMORE, SOURCES OF ANCIENT AND PRIMITIVE LAW (1915) (using race as a classification system for legal traditions).

the term ‘white’ cannot be systematically applied to any such general theory as that adopted by the learned judge, or on any other general theory; that it is in fact thoroughly inefficient as to the basis for distinction.

At the brink of making the then radical claim that the notion of whiteness was an unsustainable notion, Wigmore, in a classic lawyerly move, limited his position to the case at hand with the argument that whiteness could be defined “only in contrast with the African Negro” and that, in effect, Japanese were more white than they were black.<sup>50</sup>

The argument captures the at once visionary and complacent dimensions of Wigmore’s very ordinary humanism. Ultimately, his views rarely fell far out of step with mainstream American bourgeois conservatism. In actuality, his more progressive political positions were always somewhat after the fact.<sup>51</sup> Conversely, his more relativist academic inquiries often

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<sup>50</sup> John H. Wigmore, *American Naturalization and the Japanese*, THE JAPAN WEEKLY MAIL (Aug. 25 1894).

<sup>51</sup> The critique of foreign powers’ exercise of extraterritorial jurisdiction in Japan, for example, had become the majority view by the time of Wigmore’s advocacy. England and the United States abandoned extraterritorial jurisdiction with Japan in 1894, a year after Wigmore’s departure, and other European countries followed shortly thereafter.



confirmed highly conservative political views. He encouraged Japan's colonization policy on grounds of Japanese equality with other great colonial powers, for example, and one of his favorite themes was the oddity of procedural safeguards in American criminal trials from an Asian standpoint:

In America, the Cleveland and Chicago horse-car strikes of a few years ago offered the spectacle of a whole city's transportation system in the hands of armed-lawbreakers, with the police divested of the power to use violence to dislodge them.... The tenderness of the Anglo-Saxon race towards criminals is certainly the result of a very peculiar attitude of mind.<sup>52</sup>

The picture that emerges from Wigmore's extraordinary life, then, is that of an ambitious, adventurous, and ultimately ordinary man and scholar caught in the political and intellectual milieu of his time, of which the

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<sup>52</sup> John H. Wigmore, *Outrage by Soshi*, THE JAPAN DAILY MAIL, Aug. 17, 1891. The only critical commentary on core Western values I have been able to find in Wigmore's entire corpus of writing about Japan is a reflection on the loss of "personal ties" in acts of charity in the contemporary West. *See* John H. Wigmore, *Charity in Old Japan*, JAPAN DAILY MAIL, Oct. 24, 1891, and a number of critical comments about Christianity. *See, e.g.*, John H. Wigmore, *The New Buddhism*, THE JAPAN DAILY MAIL, March 31, 1892.

encounter with a distant legal culture undergoing dramatic change was only one powerful trope. What to make of the ordinary comparative experience then? The question redirects our attention to the qualities of the legal ordinary.

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Law and Custom

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The unifying theme in Wigmore's early work is the relationship between new and old, between "custom" and "law", between past and present.

<sup>53</sup> His observations about the Japanese Parliament offer a glimpse of his interests, and an example of his eye for detail:

The costumes, the building, the drapery, the whole scene, were in appearance thoroughly Western, and one looked almost in

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<sup>53</sup> On this point, as on many others, Wigmore had a certain fondness for clichés:

The old Japanese artists, in their masterly woodcuts, were fond of depicting the celebrated mountain Fuji, one of the nation's (and the world's) scenic gems. The art of the modern photographer, too, may present it to us in another guise. The impressions are different. But the mountain is the same.

John H. Wigmore, *Panorama of the World's Legal Systems* 525 (1936).



bepress Legal Repository

vain for a touch of the Japanese. But perhaps the sight was on that account more significant in its contrasts with the past. Everyone remembers the killing of Richardson in 1862, the young Englishman who rashly refused to yield the road to the train of the great Daimyo of Satsuma, Shimadzu Saburo, and was literally cut to pieces by the enraged retainers. The redoubtable Saburo has passed away, but down in the front row of Peers, in the very dress of the once-hated foreigners, sit his two sons...All through the assembly stood men whose recollections must have been in equally vivid contrast with the scene in which they were taking part.<sup>54</sup>

As the emphasis on custom would imply, Wigmore writes within an explicitly evolutionary paradigm.<sup>55</sup> For example, “The Pledge Idea,”<sup>56</sup>

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<sup>54</sup> John H. Wigmore, *Starting a Parliament in Japan*, SCRIBNER’S MAGAZINE, July 1891, at 47.

<sup>55</sup> The eminent Japanese jurist Kenzo Takayanagi writes that at the time of Wigmore’s work in Japan, legal positivism was by far the dominant philosophy of the young foreign law teachers at the major universities and that natural law was regarded as outdated. This may explain in part Wigmore’s support for the project to codify Japanese law: “[Wigmore,] like [Henry T.] Terry, did not uphold natural law... Wigmore was historical and analytical. He

perhaps his most respected work on the subject of comparative law, uses comparative materials to attempt to trace the evolution of the institution of the pledge in commercial transactions. This evolutionary paradigm provided the justification for the comparison. Tokugawa Japan should be appreciated as a “laboratory” of legal development, Wigmore argued, because of its isolation from outside influences until Commodore Perry’s arrival in 1853:

The evolution of legal institutions involves the tracing of their growth. But the reciprocal influences of one civilization upon another form usually a complex phenomenon, difficult to trace. Ever since Egypt and Mesopotamia, down through

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followed Maine as well as John Austin.” Kenzo Takayanagi, *A Century of Innovation: The Development of Japanese Law, 1868-1961*, in *LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY* 15-20 (Arthur Taylor von Mehren, ed.) (1963). Wigmore’s co-edited 1915 text reproduces no less than six chapters of Henry Maine’s *Ancient Law*. See generally *PRIMITIVE AND ANCIENT LEGAL INSTITUTIONS* (John H. Wigmore & Albert Kocourek, eds.) (1915).

<sup>56</sup> John H. Wigmore, *The Pledge Idea: A Study in Comparative Legal Ideas, Part I*, 10 HARV. L. REV. 321 (1897); John H. Wigmore, *The Pledge Idea: A Study in Comparative Legal Ideas, Part II*, 10 HARV. L. REV. 389 (1897).

Mediterranean and European history, there have been borrowings and reactions innumerable. To identify a particular institution of a given country as a product of purely local and internal conditions, or to trace its borrowed path through other communities, has been too often the unattained ideal of the evolutionist. ...Now, in the laboratory methods of natural science, one of the chief methods of tracing causes is to isolate each hypothetical element and to observe its reactions in that isolation under controlled conditions. So, too, in the study of social evolution, the isolation of a community from outside influences furnishes a decisive opportunity to study the indigenous and inherent evolution of an institution. ...<sup>57</sup>

The genre of Wigmore's early work, likewise, carefully mimicked that of Henry Maine and his peers. Like Maine, Wigmore offers readers the thrill of a grander, more historical perspective on familiar phenomena.<sup>58</sup> For example, after introducing Japan's contemporary legal reforms, Wigmore describes the many cases throughout history in which one society has borrowed a new set of laws from another, and concludes:

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<sup>57</sup> Wigmore, *supra* note 23 at 49.

<sup>58</sup> Cf. Riles, *Representing In-Between: Law, Anthropology, and the Rhetoric of Interdisciplinarity*, 1994 U. ILL. L. REV. 597, 607-20.



We see, then, that the work of Japan is but a drop in the sea, a foot-path in the midst of highways, a single shot in the cannonade of centuries. This is not depreciating the importance of the work for Japan itself; for such a task seldom comes more than once in a nation's lifetime, and for each nation it has a right to be considered as epoch-making. But the remembrance that there is in progress a whole world-movement allows us to look with greater calmness on its manifestation in any particular quarter and to judge it more intelligently.<sup>59</sup>

Although Wigmore never overtly challenged the evolutionary paradigm within which he worked, he found in the model a difference of emphasis. Where Maine had emphasized difference--the question of why some societies ceased to evolve while others continued to progress--Wigmore's interest was rather in *commonalities*. Wigmore describes the emergence of this focus from his research in Japan:

All along the line, in Japanese legal history, were found institutions analogous to European ones. And yet there had been no possibility of imitation. Thus the problems of the evolution of corresponding legal ideas in independent systems

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<sup>59</sup> John H. Wigmore, *The Administration of Justice in Japan, Part III*, 45 AMER. L. REG. & REV. 571, 573 (1897).



were forced upon the student's attention. ...Del Vecchio's philosophy of the development of universal innate legal ideas seemed here to be illustrated.<sup>60</sup>

If one compared practices concerning the treatment of earnest-money, for example, "we find a coincidence of custom between Rome and Japan which is not merely interesting but even startling."<sup>61</sup> Banks in seventeenth century Japan, likewise,

lacked none of the essential features of our own. They received on deposit, honored cheques, issued notes, negotiated bills of exchange, discounted bills drawn against merchandise, and acted in general as the intermediaries for commercial transactions. The smaller banks were connected financially with the larger ones, just as the country banks are with those of

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<sup>60</sup> Wigmore, *supra* note 23 at 49. (Wigmore refers here to Giorgio Del Vecchio's article, "Upon the Conception of a Science of Universal Comparative Law," published as *Sull'Idea di una Scienza del Diritto Universale Comparato*, in *BERICHT UBER DEN III INTERNATIONALALEN KONGRESS FUR PHILOSOPHIE* (1909).) Del Vecchio's work was later compiled, translated and published as part of Wigmore's Legal Philosophy Series. *See*

GIORGIO DEL VECCHIO, *THE FORMAL BASES OF LAW* (John Lisle, trans., 1914).

<sup>61</sup> Wigmore, *supra* note 59 at 578.

American cities and the provincial banks are with those of London. ...They had some sort of a clearing-house system, the details of which are not yet clear. In short, there is little in the Western idea of a bank which the Japanese institution did not have or could not easily have assimilated.<sup>62</sup>

This commitment to the discovery of endless examples of “universal innate legal ideas” animates Wigmore’s entire project.<sup>63</sup> In reading the evolutionary paradigm backwards, it was possible to find a scientific argument for his own secular and universalist humanism.<sup>64</sup> Hence his own view of comparative law as a mechanism for making universals apparent:

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<sup>62</sup> Wigmore, *The Administration of Justice in Japan*, 45 AM. L. REG. REV. 628, 628-29 (1897).

<sup>63</sup> The direction of the argument is succinctly outlined in the initial chapters of Wigmore and Kocourek’s 1915 comparative law textbook: the book begins with a chapter on “evolution of law,” then moves to “ethnological jurisprudence,” then to “the origin of legal institutions,” and concludes with “universal comparative law” (an excerpt of Del Vecchio’s 1910 article translated by Kocourek). *See generally* ALBERT KOCOUREK & JOHN H. WIGMORE, *SOURCES OF ANCIENT AND PRIMITIVE LAW* 3-72 (1915).

<sup>64</sup> Some of Wigmore’s most intriguing writing from his time in Japan concerns his encounter with Asian philosophy and religion. In an article about





By comparative law . . . is meant the tracing of an identical or similar idea or institution through all or many systems, with a view to discovering its differences and likenesses in various systems, the reasons for those variations, and the nature and limits of the inherent and invariable idea, if any--in short, the evolution of the idea or institution, universally considered.<sup>65</sup>

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the similarities between the philosophies of Confucius and Emerson, for example, he wrote,

it testifies to the unity of all experience; and there is something in learning that, whatever the difference of epochs and circumstances, the secret of life was the same for the philosopher of an ancient Chinese principality and the thinker of a modern democracy.

John H. Wigmore, *Confucius and Emerson*, THE JAPAN DAILY MAIL, Sep. 25, 1891. This was reflected also in his support for the New Buddhism of the time. A Unitarian, Wigmore was highly skeptical of organized Christianity and was attracted to the philosophical subtleties of that blend of Buddhism and scientific rationalism. *Cf.* ROALFE, *supra* note 17 at 244-47.

<sup>65</sup> Wigmore wrote,

For example, in my study of the comparative pledge idea in 1897, I was able to demonstrate that in ten or twelve systems



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the modern institution of mortgage, in all alike, begins as an absolute transfer; that in etymology the words for pledge, bet, and forfeit are identical; that the idea of a conditional transfer gradually emerges; that if the condition was not fulfilled at maturity, the transferee retained the article without any duty of restoring the surplus value...

Wigmore, *supra* note 23 at 51. Cf. Giorgio Del Vecchio, *Science of Comparative Law*, in KOCOUREK & WIGMORE, *supra* note 49 at 66:

The fact that juridical institutions are subjected to a process of evolution may appear to negative this unity. On the contrary, it provides a new confirmation; since evolution itself manifests a general attribute of humanity which is realized in an analogous manner among the different peoples widely separated in space and time, and having no connection with each other; where, otherwise, to explain these phenomena, it would be necessary to revert to the hypothesis of a common origin of the races which in many cases is not verified, and where, for the rest, it would be insufficient to justify the analogies observed. The same evolution governs the general expression of the ethico-juridical system and special institutions (such as property, the family, etc.). They pass through a series of determinate stages



Wigmore cryptically named this approach “Comparative Legal Corporealogy.”<sup>66</sup>

Here we encounter the nexus of Wigmore’s universalist philosophy and his “amateurism”. It is precisely the grand equivalences—the willingness to see what today’s scholars would describe as a uniquely Japanese institution as “some sort of a clearing-house system”—that renders his work largely useless to contemporary scholars outside the legal academy.<sup>67</sup> But note that the amateurism is not simply the effect of an argument from another epoch. The universals Wigmore seeks to uncover through comparative research are *not*

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in a definite order and frequently with the most remarkable resemblances; even to the point of the smallest details, and among nations without any historical association.

<sup>66</sup> The term is intended to highlight the way in which different legal systems, like parts of the body, are all part of one whole. *See* Wigmore, *supra* note 23 at 51. Wigmore cites the Japanese scholar Nobushige Hozumi (*cf.* Aoki, this volume) as the only example of a scholar who has achieved what he believes comparative law should achieve. *See id.* at 52.

<sup>67</sup> It is striking that recent work on Tokugawa legal institutions ignores Wigmore’s work altogether. *See, e.g.,* HERMAN OOMS, TOKUGAWA VILLAGE PRACTICE: CLASS, STATUS, POWER, LAW (1996).

Mainian,<sup>68</sup> nor do they have their source in the kind of natural law philosophy one might associate with modern law's prehistory of posthistory<sup>69</sup>; Wigmore, after all, was an historically minded positivist. Rather, Wigmore's passion for discovering "universal innate legal ideas" has its source in the same modern humanism that animates twentieth century anthropology's concern for recording cultural difference, for example. The problem of Wigmore's amateurism, then, is not simply that Wigmore is out of date.

Consider, for example, Wigmore's thinking about the relationship of law to social context. The emergence of context as a problem and an organizing device is one of the defining dimensions of modernism across a

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<sup>68</sup> He tells us, contrary to the Mainian evolutionary scheme, that a right of property, for example, existed during the Tokugawa era: "This is worth while insisting upon, for it is an idea not uncommon among foreigners that Old Japan was a feudalism in which no rights of the common people were recognized and respected." John H. Wigmore, *The Administration of Justice in Japan, Part III*, 45 AM. L. REG. REV. 571, 575 (1897).

<sup>69</sup> This posthistory is evidenced, for example, in the odd collusion of the Vatican and the human rights community around questions of the universalism of human rights and values. *See generally*, Annelise Riles, [Deadlines], in

DOCUMENTS: ARTIFACTS OF MODERN KNOWLEDGE (Riles, ed. Forthcoming, 2001).

variety of disciplines, and this awareness of context brings with it the need for a new set of disciplines and tools, from economics to sociology, for understanding legal phenomena. One of the ways in which Wigmore is thoroughly modern in this respect is his awareness of the social context of law and of the relevance of social science to the problems he sought to address. As Wigmore wrote of the records of Tokugawa legal institutions he collected,

In these trial records ...not only the legal life is pictured, but also the whole domestic, social, agricultural and commercial life. The testimonies of the parties are set forth in great detail, and the daily events of importance in every walk of life are frankly and vividly revealed. ...There is a treasure house here for the economist and for the social historian. Every aspect of money lending, every trade and occupation, every commercial transaction, every social institution, is set forth in the parties' own stories.<sup>70</sup>

In its emphasis on interdependence and interconnections among legal systems, and its insistence that law be understood as “but a part of human life,”<sup>71</sup> Wigmore’s work would have resonated with the contextual turn in

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<sup>70</sup> WIGMORE, LAW AND JUSTICE, *supra* note 42 at xv.

<sup>71</sup> See John H. Wigmore, *Problems of the Law’s Evolution*, 4 VA. L. REV. 247, 261 (1917).



modernist legal scholarship. Indeed, Wigmore's favorite metaphor for legal evolution, the movement of planets in a planetary system,<sup>72</sup> would have captured the interest in relativism and relativity of a new epoch. Although he wrote within an evolutionary paradigm, moreover, Wigmore displayed a sensitivity to the relativism of a more modernist age:

The combination of ancient and primitive law itself results, in fact, in inconsistency. Barring the controversy provoked by the term "primitive" (for what is the test of "primitive"?) there are examples of ancient law as modern in conception as anything seen in the world to-day.<sup>73</sup>

Yet note that Wigmore's notion of context is in a sense "backwards" from the modernist conception outlined above. Here, it is not that law stands to be interpreted in its social context, but that law serves as a source of "stories" about the customs of the past, a source of context itself! This small example captures the intellectual location of Wigmore's work, in my view—not behind, or unaware, or even ahead of the paradigm shifts of his era, but consciously carelessly, somewhere else.

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<sup>72</sup> *See id.* at 264.

<sup>73</sup> Albert Kocourek & John H. Wigmore, *Preface*, in KOCOUREK & WIGMORE, *supra* note 49 at x.



And there is more that renders this project naïve from our modernist point of view: Wigmore's faith in the discovery of universals makes of comparative work a normative project on behalf of those universals—a hopeful academic venture in the service of legal reform.<sup>74</sup> For Wigmore, as perhaps for generations of comparativists accused by their academic colleagues of amateurism, scholarship and reformist ambition were indistinguishable.<sup>75</sup>

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<sup>74</sup> For example, *Justice in Old Japan* spoke directly, in Wigmore's mind, to the debate over the merits of Westernization then raging among intellectuals and politicians in Japan. Historical research demonstrated, in his view, that seemingly foreign reforms in fact represented only a superficial transformation of a deeper level of Japanese tradition. He responded to criticisms of the new legal codes with the argument that the substantive rules in fact had their analogs in Tokugawa law and custom. See John H. Wigmore, *Mr. Kaneko on Japanese Civilization*, JAPAN DAILY MAIL, Aug. 28, 1891. Note that one of Wigmore's most important opponents in this debate, Nobushige Hozumi, deployed comparative theories and ethnological data to equally powerful effect (cf. Aoki, this volume).

<sup>75</sup> Wigmore's assumptions about the normative dimensions of comparative law provide an interesting counterpoint to the contemporary view that "comparison" and "governance," as modes of scholarly engagement, are

As Wigmore's work developed, the genre, if not the argument, underwent a deep transformation. It began with a shift in emphasis from accounts of particular institutions, such as the pledge idea, to comparative accounts of the character of different legal cultures. As the work progressed, this more contextual style of scholarship afforded more room for vignettes, biographies, and photographs which, Wigmore argued, presented a more "realistic" picture of each legal system.<sup>76</sup>

Over the course of Wigmore's career, therefore, the analytical model—the evolutionary paradigm—gradually faded from overt view. In its place, Wigmore foregrounded the details, the anecdotes, the enticement of the facts. In his *Panorama of the World's Legal Systems*, Wigmore describes each of the legal systems he catalogs with particular attention to the character of the institutions, rather than the doctrine per se, and he makes extensive use of illustration. *Kaleidoscope of Justice*,<sup>77</sup> published over a decade later, goes even further. In this book, Wigmore reviews much of the same material as in

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worlds apart. Cf. David Kennedy, *The International Style in Postwar Law and Policy* 7 UTAH L. REV. 7 (1994).

<sup>76</sup> See WIGMORE, *supra* note 53 at 3.

<sup>77</sup> JOHN H. WIGMORE, *KALEIDOSCOPE OF JUSTICE: CONTAINING*

*AUTHENTIC ACCOUNTS OF TRIAL SCENES FROM ALL TIMES AND CLIMES* (1941).



Panorama, but this time he abandons totalizing descriptions of legal institutions altogether and focuses only on stories and images aimed at revealing something of what he terms “Justice.”<sup>78</sup> For example, stories in the chapter on Japanese law include an account of a custom of placing a bell and a box outside the court for commoners to make their pleas directly to the Shogun,<sup>79</sup> and translated excerpts of documents from a case in which a wife ran away from her husband, including a petition from the Buddhist convent to which she had escaped about the rights of the convent to grant divorces.<sup>80</sup> The documents and the fragments of anecdotes make no claims to be representative of the legal system as a whole, nor does Wigmore suggest what conclusions should be drawn from their perusal.

\Figure 3 here\

Yet although I find Wigmore’s turn to images and stories intriguing and even inspiring at points, for me, any effort to take Wigmore’s project seriously as an intellectual venture reaches something of a stumbling block over Wigmore’s pet label for his method, “comparative corporealogy.” Is this a farce, one might wish to ask of the collections of documents, slides, songs and typologies? “Comparative corpoeaology” seems to take to an extreme a

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<sup>78</sup> *Id.* at v.

<sup>79</sup> *Id.* at 327.

<sup>80</sup> *Id.* at 339-48.



dimension of comparative legal work which, as noted at the outset, has been the basis of a good deal of self-loathing within the discipline. Indeed, if Wigmore's early comparative work would have been treated as of great scholarly importance in his lifetime, his later work was avidly criticized by his contemporaries as amateuristic. As even one of Wigmore's most devoted supporters wrote in a review, *Panorama* "is not a book for experts embodying the author's researches, but it is worth our special notice as a new attempt by a veteran legal writer to popularize the subject for the general public."<sup>81</sup> A reconsideration of Wigmore's contribution to comparative law therefore prompts a further question: How are we to read the many comparative projects and paradigms, such as this one, that seem to flaunt our collective amateurism?

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A Performance of Gaps

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<sup>81</sup> The Japanese reviewer focused instead on Wigmore's service to Japan and on his relationships with Japanese scholars and lawyers. See Shinzo Koizumi, *Dr. John Henry Wigmore: The Panorama of the World's Legal Systems* (an abridged translation of a review of the book) CHUO KORON (August 1935).

Towards the end of Wigmore's life, a surprise opportunity for nostalgia presented itself. The Japan Cultural Society invited Wigmore to return to Japan to complete the translation project he had begun forty years before.<sup>82</sup> By the time of his arrival, the work had already begun under the leadership of several Japanese scholars, and although it proceeded under Wigmore's nominal direction, Wigmore's tasks seem to have been limited to final proofreading over a period of just two months.<sup>83</sup> Wigmore announced

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<sup>82</sup> *John Henry Wigmore Re-Visits Japan*, THE ALUMNI NEWS (1935).

<sup>83</sup> Wigmore's request to begin the work in Chicago before his arrival in Tokyo was explicitly rejected in terms that made clear the division of labor envisioned by his Japanese sponsors:

Your suggestion is very recommendable and I would like to accept it, had it not been for the fear that you might be confronted with the same difficulty Professor Miegishi is now encountering; namely the difficulty of verifying the accuracy of translation of so many peculiar vocabularies and phrases that appear in the MSS. They are not to be found even in the best dictionaries available at present, and only by the service of experts can they be accurately translated. This matter is withholding the rapid progress of the work. Under such circumstances, I would recommend you to let Professor



upon his arrival that “his was not a pleasure trip.”<sup>84</sup> Yet the era in which a foreign generalist effortlessly assumed the reins had long passed in Japan. From the standpoint of his foreign hosts, too, Wigmore the ambitious young scholar had become Wigmore the amateur.

During this return visit, Wigmore delivered a series of “lantern slide lectures” on the subject of comparative law. The lectures summarized his “legal corporealogy” approach, in simplified guise, with one twist: Wigmore illustrated his argument with exotic anecdotes and outrageous special effects, including a live physics experiment with the use of a balloon and a gyroscope, and a trick performed with a ribbon and a bicycle wheel.<sup>85</sup> Critics wrote about the performance with a mixture of bewilderment and condescension. I

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Minegishi proof read the MSS first before you give the final touch.

Setsuichi Aoki, *Letter from the General Secretary of the Society for International Cultural Relations to John Henry Wigmore* (March 6, 1936). The introduction to each volume makes it clear that the Japanese editors deviated considerably from Wigmore’s translation. See WIGMORE, LAW AND JUSTICE, *supra* note 42.

<sup>84</sup> See Koizumi, *supra* note 81.

<sup>85</sup> John H. Wigmore, *Evolution of Law*, TOKYO TEIKOKU DAIGAKU, Tokyo, 571935 (1935).



suspect that in an era of realist “fact skepticism”<sup>86</sup> Wigmore’s flood of details, and his appeal to the fascinations of natural science, would have seemed in need of serious updating. Yet what I hope to illustrate is that to the extent that these lectures were dismissed for their lack of “new theories” they were profoundly misread. What Wigmore gave his audience, rather, was a virtuoso performance in the American law professor’s genre, transposed into comparative legal studies. Indeed, we might read them as an instantiation of Wigmore’s entire comparative project: a performative experiment in how law engages.

\Figure 4 here\

What did Wigmore’s audience have in mind when they dismissed work such as the lantern slides lectures as amateuristic? The reviews repeatedly pointed out that *Kaleidoscope* was simply a collection of stories and images, without more.<sup>87</sup> There was no guidance from the author as to the scientific or doctrinal significance of the items collected on the page. Wigmore failed to analyze his material, to produce an argument. Contrast this failure, for example, with the indicia of knowledge in the academy in the twentieth century that have served as one powerful model for legal scholarship in the

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<sup>86</sup> See WILFRID E. RUMBLE, AMERICAN LEGAL REALISM 107-36 (1968).

<sup>87</sup> Cf. George F. James, *A Literary Stylist*, 32 J. CRIM. L. & CRIMINOLOGY 275 (1941) (reviewing Wigmore, *Kaleidoscope of Justice*).



post-Realist era (and which I refer to here as modern academic knowledge).<sup>88</sup> Here, the task is to identify and organize a series of facts by adding to these facts a layer of analysis that relates them in an innovative way.<sup>89</sup> The modern academic analysis guides the reader through the experience of the data, and ultimately is what is “gained” from the scholarly experience. The amateurism of Wigmore’s comparative legal scholarship, from this point of view, lies in its failure even to attempt an analytical output of this kind. There is no finished product, only a heap of raw material. The text leaves glaring analytical gaps.

Not every self-conscious modernist saw things this way, however. Early critics of nineteenth century classicism in the United States and Europe

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<sup>88</sup> I choose the term “academic” to index the opposite of “amateur” because of the confusion that the word “professional” might cause given the association of law schools with professional education. I do not intend to reduce all academic knowledge to a singular type, nor do I mean to imply that law professors could not be modern academics in the sense in which I invoke the term here. Indeed, many of the critical reviews of Wigmore’s work, written by law professors, might serve as paradigmatic performances of the academic genre.

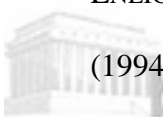
<sup>89</sup> Cf. MARILYN STRATHERN, *PARTIAL CONNECTIONS* (1991); Marilyn Strathern, *The Relation: Issues in Complexity and Scale*, 6 *PRICKLY PEAR PAMPHLET* (1995).

readily recognized Wigmore as one of their own. Édouard Lambert understood Wigmore's project as less normative and programmatic than his own, but nevertheless of great scientific value,<sup>90</sup> and he greatly admired Wigmore's scholarship and his skills as a "propagandist" for comparative law.<sup>91</sup> In

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<sup>90</sup> The two exchanged manuscripts and shared information frequently. See, e.g., Édouard Lambert, *Letter to John H. Wigmore*, July 13, 1925; Édouard Lambert, *Letter to John H. Wigmore*, October 3, 1929. Lambert campaigned for Wigmore's nomination to the World Court, see Édouard Lambert, *Letter to John H. Wigmore*, April 21, 1930; Édouard Lambert, *Letter to John H. Wigmore*, April 28, 1930; Édouard Lambert, *Letter to John H. Wigmore*, May 5, 1930, arranged for the awarding of an honorary doctorate from the University of Lyon to Wigmore, see Édouard Lambert, *Letter to John H. Wigmore*, and sought Wigmore's assistance in procuring funding for his projects. See Édouard Lambert, *Letter to John H. Wigmore*, April 20, 1929.

<sup>91</sup> Édouard Lambert, *Letter to John H. Wigmore*, April 3, 1930. In recent years, the visual and entertaining dimensions of modernist science have received some critical attention. See, e.g., JAMES GLEICK, *CHAOS: MAKING A NEW SCIENCE* (1987); BARBARA M. STAFFORD, *ARTFUL SCIENCE: ENLIGHTENMENT ENTERTAINMENT AND THE ECLIPSE OF VISUAL EDUCATION* (1994); Bruno Latour, *Drawing Things Together*, in *REPRESENTATION IN SCIENTIFIC PRACTICE* 19-68 (M. Lynch and S. Woolgar, eds. 1988).



particular, Lambert was very much attracted to the presentation of Wigmore's argument:

Dans leur ensemble, elles constituent pour des juristes, et surtout pour des historiens de droit, une documentation vivante, réaliste, saisissante. C'est ça la transplantation à l'enseignement de l'histoire du droit, et particulièrement au droit comparé, de methods d'illustration par l'image qui commencent à être pratiqués chez vous pour l'enseignement de l'histoire générale, mais qui n'avont encore jamais été engagés sur le terrain de l'histoire juridique. Dans le domaine du droit c'est quelque chose de très neuf—comme vos cartes—et quelque chose de très fécond.<sup>92</sup>

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<sup>92</sup> In translation:

Taken as a whole, [the images] constitute for jurists, and especially for legal historians, a living documentation, realistic, moving. This is the transplantation of methods of illustration with images that are beginning to be used in your country for teaching history, but which have never been used on juridical terrain. In the domain of law this is something of very new—like your cards—and something most fecund.





Likewise, Roscoe Pound greatly admired Wigmore's scholarly project and erudition, although, unlike Lambert, he found Wigmore's genre somewhat obtuse:

I think Wigmore understands the problem of application of law—the fundamental problem of jurisprudence today—better than anyone in this country unless it is Mr. Justice Holmes. What makes his writing on the subject difficult to understand, perhaps, is that he has not run through the current decisions and compelled himself to look at the problem as it is presented in the everyday workings of our courts. No one is more fertile in good ideas than Wigmore, and really he is worth careful reading and careful reflection after reading, and I guarantee will yield great results when so read and reflected upon. Of course when he is riding on his high horse it is another matter. But

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Édouard Lambert, *Letter to John H. Wigmore*, January 31, 1929 (on file at Northwestern University library). Lambert refers here to Wigmore's notorious Christmas cards, in which he composed personalized poems on scholarly themes. *See, e.g.*, Wigmore, *infra* note 94.

many things may be pardoned to one who has achieved what he has in the science of law.<sup>93</sup>

Then, as perhaps now, in other words, Wigmore's work seemed at once utterly relevant to and yet somewhat disengaged from his time. In order to come to terms with this fact, I turn first to Wigmore's affinity for American classical or formalist legal thought and its influence on his comparative project.

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At first blush, it may seem counter-intuitive to describe scholarship such as the Lantern Slide Lectures or *Kaleidoscope* as classicist or formalist in the Langdellian mold. To a contemporary reader, the genre of the work—the collections of images, scientific experiments, translations and theories into one all-inclusive text—might bear more resemblance to contemporary postmodern scholarship than to the treatises of the late nineteenth century. On a more theoretical level, also, Wigmore readily aligned himself with the Realist *critiques* of classical legal scholarship.<sup>94</sup> First, the new discipline of

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<sup>93</sup> Roscoe Pound, *Letter to Henry M. Bates, Dean of the University of Michigan Law School*, March 24, 1931 (on file with the author).

<sup>94</sup> This is particularly evident in Wigmore's correspondence with Holmes, Pound, and other prominent critics of formalism. See, e.g., John H. Wigmore, *Letter to Judge Holmes*, April 29, 1894 (praising Holmes for "a step

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which will make the heterodox orthodox” and presenting his own ideas for a new and more functional analytical framework for the law of torts). Wigmore was one of Roscoe Pound’s earliest and most enthusiastic supporters, and his own treatise on evidence was criticized for its modernist terminology by the same factions that led the attack on Pound. *See* DAVID WIGDOR, ROSCOE POUND: PHILOSOPHER OF LAW 129 (1974). Wigmore’s Christmas greeting to Pound in the latter’s first year on the Northwestern Law faculty captures Wigmore’s unique brand of enthusiasm for the Realist project:

All hail the newest star,  
 now fixed amidst our constellation!

A brilliant varied spectrum  
 marks your lofty stellar station.

As sociologic jurist,  
 may the message of your pen  
 Widely spread a mighty influence,  
 from your editorial den!

When Pharaoh had his Moses:  
*you’re* the Moses by whose hand  
 Our common law will pass from bondage  
 to the promised land.

*Id.* at 135.



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comparative law was *de facto* associated with the critique of classical thought in Europe and the United States (cf. Lasser, Curran, this volume). Wigmore's self-conscious promotion of the discipline would therefore have been widely understood as a challenge to traditional legal scholarship. Like the American Realists, moreover, Wigmore's comparisons emphasized change, discontinuity, conflict and power in the evolution of the legal tradition, and hence his work could be read as a challenge to homogeneous or ahistorical conceptions of legal norms. As Wigmore wrote in 1917,

[E]volution of Law, as in other cosmic facts, is always the result of a *conflict of forces*. The situation is very much like that of two men pushing face to face on the pavement, each seeking to pass, or wrestling in a final grip on the mat; in the wrestling match, finally a slight balance of force prevails, and the one man falls on his back, with the other over him as the winner. Then there is equilibrium for a while, but only until the next bout begins.<sup>95</sup>

Nevertheless, in many respects, Wigmore's larger project is archetypically Langdellian. Or, more accurately, Wigmore shared with



<sup>95</sup> Wigmore, *supra* note 71 at 253.

Langdell and his followers a “historist” tradition.<sup>96</sup> Although the materials Wigmore collected and exhibited were quite new to legal formalism, the kinds of questions he asked of those materials would have been familiar and comfortable. One would not expect less from a founder of the Harvard Law

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<sup>96</sup> Cf. Stephen A. Siegel, *Historicism in Late Nineteenth-Century Constitutional Thought*, 1990 WISC. L. REV. 1431.

Historism conceived law as an evolving product of the mutual interaction of race, culture, reason and events. Moreover, historism taught that objective legal principles were discernible through historical studies, not rationalistic introspection. ... Historism’s central claim was that historical studies reveal objective social norms and moral values. This claim rested upon a host of tenets, the most important of which were (1) that societies, social norms and institutions are the outgrowth of continuous change effected by secular causes; (2) that the universe has an ethical meaning that is accessible to human intelligence; and (3) that societies, social norms and institutions evolve according to moral ordering principles that are discoverable through historical studies.

*Id.* at 1435 (footnotes omitted).



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Review, and an acknowledged missionary for the case method in the frontiers of intellectual life.<sup>97</sup>

Take, for example, Wigmore's "legal corporeology" approach. What renders the term amateuristic to the point of absurdity to modern academic ears is precisely what would have appealed to the Langdellian taste for scientific analogies. Anthony Sebok recently has argued that, contrary to Realist characterizations, Langdellian formalism was committed to the notion of law as organic, living, and hence evolving over time.<sup>98</sup> Langdell's model for legal reasoning, Sebok claims, was the field of biology: the courts were "laboratories," decisions should be thought of as "specimens," and the task was to "select, classify and arrange all the cases which had contributed in any important degree to the growth, development, or establishment of . . . essential doctrines."<sup>99</sup> This attraction to law as a scientific study of organic change

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<sup>97</sup> See ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* 60 (1983) (describing Harvard University President Eliot's congratulations to Wigmore for "having got into a missionary diocese").

<sup>98</sup> See ANTHONY J. SEBOK, *LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE* 95 (1998).

<sup>99</sup> Langdell quoted in SEBOK, *supra* note 98 at 93.



pervades Wigmore's project. As Kocourek and Wigmore wrote in the Preface to their early textbook in comparative law,

There is a special kind of fascination in attempting here what seems to have been done with great success in the reconstruction of fossil remains of extinct animals. A single bone may lead to the reconstruction of the entire skeleton based on the size, shape, and function of the fragment used as a starting-point. Biological function however is immeasurably more simple than legal function; the one is related to the world of physical phenomena, the other to the world of mental and physical facts.<sup>100</sup>

Thus, although Wigmore clearly felt lonely in the presence of American formalists, and although his work was devalued and even dismissed when he first sought to introduce his former Harvard teachers to the emerging field of comparative law, Wigmore's love of comparison nevertheless built on the formalist sensibilities he had developed as a student. The case book, as used by Langdell, made liberal use of English cases as a means of learning through comparative analysis what essential legal principles persisted over



<sup>100</sup> ALBERT KOCOUREK & JOHN H. WIGMORE, FORMATIVE INFLUENCES OF LEGAL DEVELOPMENT viii (1918).

time.<sup>101</sup> The Socratic method, likewise, was all about comparison: starting from a more or less explicit and absolute notion of the coherence of law and legal decision-making, the notion that “like cases should be treated alike,” one compared facts and rules to reach conclusions either about the particular case or the legal principle as a whole. Indeed, the exercise of law teaching was largely concerned with inculcating in students a refined comparative sense.

The difference, of course, was that while the Langdellian formalist compared cases and rules to attempt to make visible, or discover, a latent system, Wigmore sought to compare systems. Indeed, as noted earlier, “legal corporeology” was meant to highlight precisely the interconnections and contexts. As sophisticated readers of formalism, Lambert and other modern comparativists would have understood, of course, that although the relationship of data to analysis in Wigmore’s work was thoroughly Langdellian, the *problem* Wigmore addressed -- his subject -- was quite different. Wigmore had used formalist knowledge practices against themselves to usher in a new era.

Nevertheless, the strangeness of the biological metaphor to modern ears illustrates how distant Wigmore’s work also was from the social scientific model of Pound and others. The amateurism resides in the relationship of facts




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<sup>101</sup> Edwin W. Patterson, *The Case Method in American Legal Education: Its Origins and Objectives*, 4 J. LEG. ED. 1, 11 (1951).



to theory. Wigmore's focus on exemplary cases that stood for and illustrated larger principles was archetypally Langdellian.<sup>102</sup> By the time of Wigmore's writing, the evolutionary paradigm that sustained this search for generalities would have been already well trodden.<sup>103</sup> Ironically, however, the worn quality of these themes presented Wigmore, like other late nineteenth century Langdellians, with an opportunity: he could take the theoretical model for granted, and indulge, rather, in the detail, the customs, the local facts. For Wigmore, as for Langdell, theory was what one borrowed from Maine and others. What contemporary comparativists would describe as a theory, in contrast, (for example Wigmore's theory about the evolution of the pledge) was for him a *fact* established scientifically through comparative work. In this sense, comparative law was ultimately a localized, factual endeavor, albeit one with theoretical underpinnings and implications.<sup>104</sup>

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<sup>102</sup> See SEBOK, *supra* note 98 at 58.

<sup>103</sup> See, e.g., RAYMOND COCKS, SIR HENRY MAINE: A STUDY IN VICTORIAN JURISPRUDENCE 247 (1988).

<sup>104</sup> The factual emphasis of Wigmore's project is relevant where the debate over the amateurism of Comparative Law has often been framed as a question of an excess of theory. See, e.g., William Alford, *On the Limits of "Grand Theory" in Comparative Law*, 61 WASH. L. REV. 945 (1986); W.B. Groves, & G. Newman, *Against General Theory in Comparative Research*, 13

One way to think about the difference of expectations surrounding Wigmore's work is from the point of view of the relations that intellectual work is intended to generate—the relationship between author and audience, and the extent to which that relationship is mediated by the scholarly text. As Tony Crook has recently argued, for modern academics, textually mediated analysis engenders the social relations that are integral to professional success. A work's audience is the small community of readers who might be enticed to join the author in a debate. Ideas—units of analysis that speak to existing arguments and the communities that stand behind them in the appropriately situated and yet self-differentiated way—engender (academic) persons. To be an academic, then, is to have a stake in being a person in this sense.<sup>105</sup> Yet in Wigmore's most cherished roles as collector, translator, correspondent, critic

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INT'L J. OF COMP. & APP. CRIM. JUS. 23 (1989); Mathias Reimann, *The End of Comparative Law as an Autonomous Subject*, 11 TUL. EUR. & CIV. L. FORUM. 49 (1996); Eric Stein, *Uses, Misuses--and Nonuses of Comparative Law*, 72 NW. U. L. REV. 198 (1977).

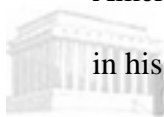
<sup>105</sup> See Tony Crook, *The Textual Person*, Paper presented at the American Anthropological Association Annual Meeting, Chicago, Illinois, November 17-21, 1999 (manuscript on file with the author).

and editor,<sup>106</sup> the relationality is within the edited text, not without—among the diverse fragments of essays and illustrations, each with their own diffuse authorship. From the modern academic’s point of view, Wigmore’s curious failure to analyze his materials, and his disclaimer of originality that can be situated in relation to the work of others, seems to treat his own relations outside the text, that is, in the community of scholars, as superfluous. We might read the progressive fading of analytical structures in Wigmore’s work over the course of his career alluded to earlier in this chapter as a privilege of his amateur status. To topple a predecessor’s model or to mount a critique is the ultimate relational, participatory move. Yet to gradually background a model, as Wigmore does of evolutionary theory, is to assert with increasing self-confidence that one has no particular stake in the “debate” per se.

Perhaps this is because for Wigmore the Institution, the darling of the classroom, the law school and the bar association, the global correspondent

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<sup>106</sup> One of Wigmore’s favorite genres was the book review; he enjoyed reading academic work and presenting it to a new audience. In Japan, he summarized the doctoral dissertations of Japanese scholars returning from the West, and he also wrote articles in American academic journals introducing American audiences to the work of more established Japanese scholars. Later in his career he continued this practice as editor of numerous monograph series.



and world traveler, social relations were elsewhere. Indeed, one difference between the professional and the amateur is that the latter by definition does not live by his or her ideas. Wigmore would have had no need to make himself relevant through his work; he already *was* relevant in every socially and institutionally significant way. Perhaps, then, thinking about interesting questions becomes what we would call a hobby: a privilege of Wigmore's hard-earned position, a chance for adventure, a secret deviance even, but not the source of personal relevance. Wigmore might prompt us to wonder whether scholarship produced as a source of personal relevance can always and inherently be assumed make the greater contribution—or rather why the social effects of scholarship should be judged in only one narrow way.

Wigmore's conceptualization of the scholarly venture was not, and is not, unique, I think. It is no wonder, in other words, that Lambert would have seen a powerful and productive parallel between Wigmore's inventive scholarship and his inventive Christmas cards: The volumes of personal correspondence and frequent visits among comparativists, the yearly conferences and international congresses at which it is openly acknowledged that the main attraction is the opportunity to see friends, not to hear academic papers,<sup>107</sup> the several associations, each with their own baroque politics, the

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 <sup>107</sup> See Legrand, *supra* note 15 at 22 (quoting John Merryman as writing, “Like most international congresses, these are valuable primarily for the

committees for the harmonization of legal rules, and the frequent *festschrift* volumes<sup>108</sup> suggest that for this community, the work of relationality lies elsewhere. The community of comparativists is not textually constituted and mediated. The joint project, rather, is institution building.

Yet there is more at issue here, I think, than a simple division of intellectual labor into what is professionally significant and what is not. If one remembers that Langdellian formalism was most explicitly a teaching method—that its epistemological, normative and scholarly implications remained largely implicit until they were unearthed in the guise of critique by

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opportunities to meet people and see friends. What the organizers call the “scientific programme” is almost always a debacle.”)

<sup>108</sup> See, e.g., ESSAYS IN MEMORY OF PROFESSOR F. H. LAWSON (Peter Wallington & Robert M. Merin, eds., 1986); Essays in HONOUR OF JUDGE TASLIM OLAWALE ELIAS (Emmanuel G. Bello & Bola A. Ajiboa, eds. 1992); COMPARATIVE AND PRIVATE INTERNATIONAL LAW: ESSAYS IN HONOR OF JOHN HENRY MERRYMAN ON HIS SEVENTIETH BIRTHDAY (David S. Clark, ed. 1990); COMPARABILITY AND EVALUATION: ESSAYS ON COMPARATIVE LAW, PRIVATE INTERNATIONAL LAW AND INTERNATIONAL COMMERCIAL ARBITRATION IN HONOUR OF DIMITRA KOKKINI-IATRIDOU (K. Boele-Woelki et al. eds. 1994); LEGAL THEORY COMPARATIVE LAW: STUDIES IN HONOUR OF PROFESSOR IMRE SZABO (Zoltan Petri, ed. 1984).

a later generation—then the notion that the form of Wigmore’s eclectic comparative work would reflect the wider genre of formalist legal teaching and debate should not strike us as strange. Wigmore was deeply interested in the application of the case method and the dynamics of law teaching generally, and much of his scholarship was explicitly presented in the genre of a teaching tool—for academics, law students and the wider community of lawyers.

Consider, for example, the casebooks used in legal teaching: If Wigmore would have opposed Langdell’s view that the only relevant materials for legal study were those contained in printed books,<sup>109</sup> he clearly followed Langdell’s emphasis on the exposure of students to primary materials:

For the student, the best results will be gotten by attempting first to master the raw materials of the first volume, in analogy to the case-method; that is to say, by making an effort to reconstruct for himself, from topic to topic, the state of development of the legal institutions among . . .<sup>110</sup>

These texts are, as their name implies, “materials”—collections of essays and documents. The idea is that the very absence of answers to the text’s open-ended questions will stimulate a response from the student and

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<sup>109</sup> See Patterson, *supra* note 101 at 3.

<sup>110</sup> 2 PRIMITIVE AND ANCIENT LEGAL INSTITUTIONS v (Albert Kocourek & John H. Wigmore, eds. 1915).



spark a dynamic discussion in class; they are tools for creating a moment.<sup>111</sup>

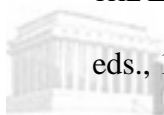
In typically Socratic fashion, Wigmore and Kocourek insist that they “have not sought here to solve any problems of their own, or to ventilate any theories” and that “[e]very reader will interpret his own philosophy of history, and construct his own generalizations.”<sup>112</sup> Although the collection and display of disparate fragments is found in some avant-garde forms of literature and art, it probably achieves mainstream status only in American legal teaching tools. Contrast this to the texts used in graduate education in the humanities and social sciences—finished papers and essays that give students an outsider’s glance at a very internal debate.

Wigmore’s project, as exemplified by texts such as *Panorama* and *Kaleidoscope*, seems reasonable to him, then, just as it seems a bit overdrawn and hence amateuristic to his critics, precisely because it is the formalist genre

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<sup>111</sup> I follow here Keith Basso’s suggestion that anthropologists understand written texts as “always one of several communication channels available” and his call to understand “the conditions under which [writing] is selected and the purposes to which it is put . . . in relation to those other channels.” Keith H. Basso, *The Ethnography of Writing*, in *EXPLORATION IN THE ETHNOGRAPHY OF SPEAKING* 425, 426 (Richard Bauman & Joel Scherzer, eds., 1989).

<sup>112</sup> Kocourek & Wigmore, *supra* note 110 at viii.



expanded from the context of teaching to scholarship. To return to the question of academic relations addressed above, another way to put this is to say that for the formalist legal scholar,<sup>113</sup> the text does not stand for the self in the way it does for the academic, nor does the textual debate stand for the community in which the self is constituted. This is because for the formalist, the relevant site of academic relationality is not the text but the classroom. The prototype of the evidence of the self is the classroom performance; it serves as model for various other genres of formal and informal conversations among peers. In each genre, the evidence of academic sociality is the momentary conversation the performance elicits. Where the ideal academic debate engages a group of a particular size—not too large and not too small—the formalist “debate” potentially encapsulates anyone who witnesses the performance—teachers, students, practioners, colleagues, patrons, strangers with whom one happens to be sharing lunch. The achievement of such

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<sup>113</sup> I use the term “formalist” interchangeably with “legal scholar” because as I indicate later, I believe legal knowledge is inherently formalistic as an aesthetic and performative genre, indeed, that this is one of the defining traits of legal thought, whatever its normative or epistemological claims. *Cf.*

ANTHONY T. KRONMAN, *THE LOST LAWYER* 169 (1993) (“For all their fashionableness and novelty, the law and claims and critical legal studies movements are essentially Langdellian in spirit.”)





momentary relationality is dependent on the performer's ability to generate interest at that moment by framing a question or set of materials in a sufficiently focused and yet general way such that a contentious conversation can be generated in a matter of minutes among the members of the audience.

For the formalist, reputation is determined by performative skill therefore. No matter how successful the performance and lively the conversation, however, it is not expected that the conversation will be sustained beyond the event. Legal knowledge is not about creating a sustained intellectual debate in this way, and therefore ideas (if defined, as above, as appropriately differentiated but situated units of analysis) are not of primary concern. My point, then, is that formalism cannot be reduced to a theoretical position and an accompanying epistemology. It is also an aesthetic judgement, a genre of self-presentation for the author and the text. From this point of view, I believe we can understand the gaps in comparative legal analysis, of which Wigmore's work offers an admittedly extreme example, as in legal analysis more broadly, as not just a matter of carelessness, but as an outcome, a consequence, of the author's performative goals.

One way of understanding the relationship between Langdellian formalism and the classroom performance, as practiced and promoted by Wigmore in his work on comparative law, is to consider sociological theories of play. In his classic work on the subject, Erving Goffman distinguishes the game—the self-contained rules—from play—the experience of performing the

rules.<sup>114</sup> Play is contingent on the game, and hence is understandable only by looking to the rules, but it is also a distinct genre of activity. In order for games to hold the attention of participants, the outcomes must be both predictable only with reference to the rules, but also contingent.<sup>115</sup> Moreover, the relationship of the “mutual focused activity” of the game and the outside world is integral to the game’s success.<sup>116</sup> The outside world is often introduced in a controlled or transformed manner (for example in the rule that spouses cannot serve as partners in a bridge game), and ideally, this manner will also serve as a ground for exhibiting skills one has developed elsewhere (as in the importance of memory, or strategy in many games).<sup>117</sup> This is

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<sup>114</sup> See ERVING GOFFMAN, ENCOUNTERS: TWO STUDIES IN THE SOCIOLOGY OF INTERACTION 35 (1961).

<sup>115</sup> See *id.* at 62.

<sup>116</sup> See *id.* at 33.

<sup>117</sup> See *id.* at 68-77. Patterson argues that one of the goals of the case method is to provide a kind of “vicarious experience” that will “acquaint the student with the contemporary culture in which he lives and in which legal devices are operative . . . By ‘culture’ I mean nothing more occult than the practices of people in buying and selling, in hiring and firing, in getting houses built and business enterprises financed, in evading or avoiding income taxes, and the like.” Patterson, *supra* note 101 at 15.

achieved, Goffman argues, through mutually agreed “rules of irrelevance” in which participants promise not to think about certain aspects of their shared experience (for example, the fact that the chess players could remove one another’s pieces by simply knocking them off the table) for the duration of the game.<sup>118</sup>

Goffman’s vocabulary makes plain, I think, how the classroom experience that Langdell pioneered, and that continues largely to this day, is enabled by the underlying Langdellian epistemology, theory and practice of law. The prowess which the successful teacher or student demonstrates in the classroom is imagined as an indication of his or her potential skill as a lawyer, albeit demonstrated in disguised form. The successful game at the law school, as on the football field, depends on participants’ degree of engagement with the performance, and this in turn depends on the existence of a certain element of surprise as to the direction that the event might go. This in turn depends on sufficiently fixed but also subtly porous rules of irrelevance that enable the event to echo the experience of the wider world but also maintain its focused, momentary quality. In the law school classroom, of course, it is the precepts of formalism that provide those rules. Moreover, as we have seen, the complex Langdellian notion of the place of history on the one hand and logic on the other in the science of legal reasoning enables a “vicarious” experience of



<sup>118</sup> See *id.* at 19.

social life, and even a great exercise in comparison, without ultimately undermining the structure of the game itself.

In focusing on the teaching of comparative law, then, I believe that Wigmore ironically found in his own formalist tradition something of enduring interest to a new era of legal scholars. This was true even though the teaching model Wigmore deployed was very much unique to the American legal tradition, and something quite apart from the genre of teaching prevalent in the social sciences that were then serving as the inspiration for legal theory. It is at least suggestive, I think, that realist comparative legal scholars, like the realists more generally, spared the classroom performance from the critique they leveled at the formalist academic text and in fact engaged in the performance to great effect themselves.<sup>119</sup> I suggest this, of course, not in the

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<sup>119</sup> On the “practical” question of teaching methods, Pound had very similar ideas to Wigmore’s. As he wrote to Wigmore in 1905, a casebook method was far more practical than a social scientific approach in training American law students in comparative law:

I had inclined to prepare somewhat carefully a small book of extracts illustrating the history of juristic thought and to try teaching from it as an experiment, but I am not at all certain that such a plan would meet the requirements of the situation. Probably the ideal method would be to insist in some way upon



guise of yet another realist critique of law for failing to be social science, but as an effort to understand the unique character of legal knowledge on its own terms.

In appropriating the formalism of legal teaching to scholarship, and hence actively collapsing the difference between the treatise and the classroom, in other words, Wigmore brilliantly collapses the distinction between performative and analytical genres of formalism. In an era in which the epistemological and political foundations of formalism, as a doctrinal theory, found themselves under attack, Wigmore stretches formalism to the limits of its plausibility. His innovation circumvents the intellectual aridity of analytical formalism, which Wigmore was explicitly against, while preserving the “logical universal form” which Wigmore’s inspiration, Georgio Del Vecchio, described as a “necessary condition to experience juridical facts,”<sup>120</sup>

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adequate economic and sociological training as a prerequisite for admission to a law school. But...I fear that a thorough course in constitutional law would tend to dissipate all the results of prior academic training.

Roscoe Pound, *Letter to John H. Wigmore*, May 11, 1905 (on file with the author).

<sup>120</sup> Del Vecchio, *supra* note 65 at 64. Del Vecchio adds,



by rediscovering formalism's performative side. It was the perfect innovation for an amateur radical and a sometime visionary.

I believe we should read this innovation on doctrinal formalism as on par with the analytical *critique* of formalism more famously associated with the realists. Wigmore's work suggests that formalism, as a genre of scholarship and teaching, may be effectively performed even when the epistemological or theoretical foundations of the performance are entirely at odds with the *beliefs* routinely associated with a formalistic understanding of law. Wigmore's performative genre recreates formalism as a condition for the abeyance of analysis, the gaps that make play contingent and hence

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Recognition of this transcendental condition of juridical experience does not diminish the value of experience itself. Rather, it puts experience in its true light and guarantees it authority in its own field. In reality, we are able and ought to borrow from experience as an inexhaustible fountain, knowledge of the content that law has provided in space and time. From what has been just said nothing which credits the study of historical facts in which a juridical character is found is an obstruction to going back in turn to the formal idea of which facts are only the applications and illustrations.

*Id.* at 65.



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interesting, not just the excess thereof, as is often assumed in antiformalist critiques of formalism's undetermined and arid logic.

In particular, comparativists may take an interest in the universalism at the heart of Wigmore's work which, as we saw, also explained contemporary dismissals of the work as amateuristic. One of the assumptions that the formalist author/speaker must make in order performatively to generate a momentary debate is that the audience is composed of persons that one understands, with whom one shares a series of assumptions and background knowledge as well as interest and affect. Like students in the classroom in the didactic tradition, the audience is, in a sense, understood from the start. Wigmore extends this notion of "we" not simply within but without, from the relationships of teacher and student or audience to the relationship of the author to his subject. His vision is of a universal set of legal principles and a universal notion of Justice appropriate for an ultimately common humanity. This understanding in turn assumes access to the minds of other people (imagined to be only superficially different from ourselves). As in the law school classroom, it is this assumption of commonality that ultimately generates the excitement of learning. As he wrote of his interest in traditional Japanese forms of association such as mutual aid societies,

For the student of institutions, the reconstructor of systems and of forms of society, there is much material. But the living interest of such records is even greater. Difficult enough it is to



get at the inner life, the motives, the mind-workings of a people so differently constituted from ourselves; but here the actions and interactions of a brotherhood of men in free and informal intercourse are laid bare to us with an unconsciousness and an ingenuousness which is as rare as it is fascinating.<sup>121</sup>

In other words, Wigmore's work demonstrates how, within the framework of its own universal truths, formalism expands to include virtually any fact or paradigm.<sup>122</sup> In one of the only explorations of "ordinary formalism" to date, Charles Goetsch investigates the reasoning and beliefs of one Simeon Baldwin, a rail road attorney, judge, and "archetypal legal formalist" of the late nineteenth century,<sup>123</sup> and finds that while Goetsch's reasoning was

from the start a jurisprudential expression of his core conservative beliefs. . . to say that Baldwin first decided what result he wanted to reach and then hunted around for principles

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<sup>121</sup> John H. Wigmore, *Mutual Aid Societies in Old Japan*, THE JAPAN DAILY MAIL, Oct. 14, 1891.

<sup>122</sup> Cf. Annelise Riles, *Division Within the Boundaries*, 4 J. ROYAL ANTH. INST. 409 (1998).

<sup>123</sup> Charles C. Goetsch, *The Future of Legal Formalism*, 24 AM.J. LEGAL HIST. 221 (1980).





able to ‘dictate’ that result does not adequately describe the complexity of his decision-making process. The relationship between his results and his principles was far more subtle and paradoxical: when deciding cases, his result simultaneously determined his principles, and his principles instantly dictated his result. Thus, his results and principles both functioned as beginning and end.<sup>124</sup>

Yet it is important to understand that Wigmore achieves this success, in an era in which the confidence that figures such as Goetsch would have enjoyed in the distinction between “beginnings” and “ends” had been shaken, only by confounding data and audience—by stretching the notion of universalism outside the confines of its frame. For example, his own interest in the legal profession in different parts of the world as a *subject* for comparison, a Langdellian fragment that could stand for the whole of the legal system, is one and the same as his interest in rendering comparative law accessible to members of the profession, as *audience*. Popular (read amateuristic) knowledge about law then serves as both the beginning and the ending point of his work, and hence explicitly confounds beginnings and ends. It is the logical equivalent of saying that the questions one asks about legal doctrine in



<sup>124</sup> *Id.* at 251-52.

the formalist classroom are indistinguishable from the students who answer them.

The person and the scholarship associated with Wigmore, in other words, demonstrates how formalism enables a particular kind of encounter with difference—a genre of encounter that, in the realm of the comparative disciplines, is probably unique to comparative law. Wigmore’s innovation is to push to its limits this dimension of the formalist aesthetic—the possibility that an infinite amount of incongruity and difference can be included within the boundaries without threat to the coherence of the whole. His own odd reconciliation of his progressive and conservative views and his formalist and realist commitments serves as the ultimate example of how the formalist structure, the universalizing frame of reference, ultimately, is not challenged in this comparative exercise.

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## Conclusion

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This returns us to the question of the amateurism in comparative law I raised at the outset. The question of how to handle persons and projects that make our amateurism explicit is a delicate one: At the conference at which this paper was first delivered, a brisk debate erupted as to whether Wigmore could legitimately be considered a “Master” deserving of a chapter in a book alongside Pound, Rabel, and others. Perhaps the embarrassment stems in part

from self-recognition: Although few comparativists today would publish pictorial volumes with romantic titles like *Panorama of the World's Legal Systems*, to a greater or lesser extent, present day comparativists also seem content with the incompleteness of their analysis. To date, there has been little response to outsiders' calls for more rigorous comparative methods other than a sense that "that's just not what we do." To a modern academic, including a comparative lawyer in modern academic mode, Wigmore's casual refusal of analysis seems to invite an image of scholarly laziness.

Yet a consideration of Wigmore's life and scholarship suggests that if amateurism is defined as a failure to analyze, then comparative law is inherently amateuristic. It can't be otherwise as long as our discipline remains comparative *law* that is, a discipline grounded in the culture of legal formalism, rather than comparative politics, literature, aesthetics or anthropology. What I have tried to demonstrate in this paper for an audience of comparativists more accustomed to thinking of their discipline as the heir to a realist and functionalist critique of classicism, is that the formalist tradition - and particularly the performative formalism of the American law school classroom -- has played a productive legitimizing and sustaining role in the discipline, and has also been the source of much of its energy and

creativity.<sup>125</sup> Yet, if this is so, by way of conclusion, we must ask ourselves why the critiques of Wigmore's amateurism never fall upon the formalism of his work in evidence—why the formalism that defines all legal knowledge only looks amateuristic within the context of comparative law where the same analytical moves serve, in other contexts, as the prototype of serious legal scholarship.

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<sup>125</sup> What I am proposing may not appeal to today's comparativists. In a recent book, Alan Watson devotes a chapter to an attack on the case method in American law schools:

When only a few [cases] are studied, each appears out of context. The casebook does not put any of these into the general framework of the concept . . . to give students the big picture. Students cannot tell how far a quoted case reflects general propositions or whether it stands at the very edge of a doctrine. They have no way of seeing how the law builds up. The role of authority is not clarified. . . . When a case is discussed in isolation, it is often impossible to know which facts are to be regarded as relevant. ALAN WATSON, *LAW OUT OF CONTEXT* 141 (2000).

Watson adds that "the absence of theoretical underpinnings is a fatal flaw in the casebook approach." *Id.* at 143.



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One answer, I have tried to show, lies in the necessity of collapsing the distinction between the performative and analytical dimensions of formalism discussed above in order to render formalism compatible with the modernist comparative project -- the project of comparing legal systems rather than simply tracing the evolution of rules. Ultimately, it is this innovation, *not* a contextual understanding of Japanese or American law, I think, that is the legacy of Wigmore's encounter with Japanese custom.<sup>126</sup> Wigmore's carefree

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<sup>126</sup> Wigmore adds a personal addendum to the preface to *Sources of Ancient and Primitive Law* that makes stark the relevance of his time in Japan to the teaching mission of the volume:

Twenty-five years ago, while living in Japan, I became interested in the sources of old Japanese law. On turning over then unpublished materials, I discovered that its institutions, point for point, showed parallel legal ideas, and sometimes (amidst influences totally independent) a striking similarity of development with the Occident. I was led to study these ideas from the comparative point of view. As yet a novice in the world of legal thought, I came under the fascination of what is called comparative law (or, as it may preferably be named, universal legal ideas). And I felt a wish and hope to cultivate that field especially. . . . that early experience convinced me in



performance of the life of the expatriate amateur remains his prototype of the experience of learning, and hence his experimental model of formalism itself. In this sense, like results and principles for the formalist Baldwin, as described by Goetsch as quoted above, the performative and analytical dimensions of formalism are already collapsed for Wigmore before he renders them as a singular scholarly form.

Wigmore's work might give the critiques of amateurism in comparative law just a moment of pause, then. What is unique about the "amateurism" of legal knowledge, as it has shaped comparative law into a distinctly legal discipline, Wigmore's work suggests, is precisely that, in its analytical incompleteness, it leaves gaps for future analytical work. I want to suggest that we view Wigmore as the prototype for the comparative text as a

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a personal way that the subject had a real claim upon us and a great future,--immensely greater than the then state of the literature might indicate.

Circumstances obstructed my wish to pursue this task, and it was laid aside as a dream. . . . I obtrude here this personal statement because I have a sentimental interest in thus returning to the science of my early hopes.



John H. Wigmore, *Addendum to the Preface*, in KOCOUREK & WIGMORE, *supra* note 49 at xi-xii.

set of materials for collective conversation. The “open” dimension of the work serves as a point of entry for the audience, a nexus of mutual engagement. And yet while the notion of the experiment with the open text is as engaging as Wigmore’s eclectic materials, Wigmore’s life and work suggests also the limitations and the arrogance of the excitement.