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# CATEGORIES AND CULTURE: ON THE “RECTIFICATION OF NAMES” IN COMPARATIVE LAW

*Janet E. Ainsworth*†

[T]he wise man is careful to . . . regulate names so that they will apply correctly to the realities they designate. In this way he . . . discriminates properly between things that are the same and those that are different.

Hsün Tzu<sup>1</sup>

Recently I had an experience in my Chinese Law class that prompted me to question how comparative law is taught and, by extension, to think about how comparative legal scholars can transcend our own culturally-specific legal concepts and categories to draw valid conclusions about the legal order of any non-Western society. I had asked my students to read an excerpt from Hugh Scogin’s fine article on contract law in early imperial China<sup>2</sup> and was pleased with the robust class discussion that followed. One enthusiastic student lingered after class to continue the discussion. “I was surprised that the Chinese had contract law as long ago as the Han Dynasty,” the student remarked. “Tell me,” he continued, “Had the ancient Chinese developed promissory estoppel by then, too?” A bit taken aback by the seemingly inapposite question, I wondered if the student might be joking. The student’s demeanor, however, showed me that he was indeed entirely serious. He saw nothing odd about the question, be-

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† Associate Professor of Law, Seattle University School of Law, B.A. Brandeis University, M.A. Yale University, J.D. Harvard Law School. I am grateful to the organizers and participants of the following two conferences for giving me the opportunity to deliver developing versions of this Article and receive useful feedback: the University of British Columbia conference, “Chinese Law: A Re-examination of the Field: Theoretical and Methodological Approaches to the Study of Chinese Law” and the University of Utah conference, “New Approaches to Comparative and Foreign Law.” My appreciative thanks go as well to Hugh Scogin, Randy Kandel, Frances Foster, Pitman Potter, and Sid DeLong for reviewing drafts of this Article; the finished product reflects their helpful comments and suggestions. Orthographic note: I have generally used standard pinyin romanization for Chinese words and names. When, however, a Chinese name in the title of a footnoted source material is romanized according to another system, I have retained that spelling in my subsequent textual references to that person to avoid confusion. For instance, I render the name of the early Confucian political thinker as Hsün Tzu rather than Xunzi because the Burton Watson translation of his writings uses Wade-Giles romanization.

<sup>1</sup> HSÜN TZU, BASIC WRITINGS 142 (Burton Watson trans., 1963).

<sup>2</sup> Hugh T. Scogin, Jr., *Between Heaven and Man: Contract and the State in Han Dynasty China*, 63 S. CAL. L. REV. 1325 (1990).

cause he apparently regarded the development of the concept of promissory estoppel as a natural evolutionary outgrowth of the law of contracts, such that any civilization possessed of a jurisprudence of contract doctrine would eventually produce the functional equivalent of Section 90 of the *Restatement of Contracts*.

Instead of answering the question directly, I asked the student why he assumed that the imperial Chinese legal system at some point would have developed a doctrine similar to promissory estoppel. Upon reflection, the student recognized he had erroneously assumed that any legal order with a law of obligations would inevitably face the question of whether to give legal effect to promises that induce detrimental reliance. As we talked, however, he began to appreciate the extent to which promissory estoppel in our own legal system was inextricably connected to problems created by the requirement in classical Anglo-American law that enforceable contracts be predicated upon consideration.<sup>3</sup> What had seemed at first to him a natural and obvious question common to any system of jurisprudence now began to look more like a parochial concern of one particular legal system that had chosen to predicate its law of obligation upon the doctrine of consideration.<sup>4</sup> Beyond learning something in particular about imperial Chinese contract law, the student remarked, he had learned something in general about the relationship of legal doctrine to its specific historical and cultural context.

I walked away from the conversation, however, with a nagging sense that the student's initial misconception was itself a symptom of a problem in the way that I approached the teaching of imperial Chinese law. In using the familiar nomenclature of Western legal doctrine to discuss the imperial Chinese legal system, had I unwittingly encouraged my students to make invalid assumptions about the characteristics and dynamics of the Chinese legal order? The more I considered the matter, the more it seemed to me that adopting Western legal terminology to discuss Chinese law would inevitably lead to misinterpretation of Chinese legal discourse and misperception of Chinese legal practice.<sup>5</sup> Ironically for someone trained in Chinese studies, I had committed the fundamental mistake of failing to ensure

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<sup>3</sup> For a classic explication of the relationship between the doctrine of consideration and promissory estoppel, see Stanley D. Henderson, *Promissory Estoppel and Traditional Contract Doctrine*, 78 YALE L.J. 343 (1969).

<sup>4</sup> Cf. Arthur T. von Mehren, *Civil-Law Analogues to Consideration: An Exercise in Comparative Analysis*, 72 HARV. L. REV. 1009 (1959) (contrasting aspects of French and German civil law contract doctrine with the Anglo-American doctrine of consideration).

<sup>5</sup> I should note that Hugh Scogin displays in his scholarship a full appreciation of the problem of using Western legal terminology in describing Chinese legal institutions and practices. See Hugh T. Scogin, Jr., *Civil "Law" in Traditional China: History and Theory*, in CIVIL LAW IN QING AND REPUBLICAN CHINA (Kathryn Bernhardt & Philip C.C. Huang eds., 1994).

that the language that I used properly corresponded to the Chinese reality to which I referred. What is needed in comparative legal study, I suggest, is nothing less than a thorough "rectification of names."

Chinese philosophy has a long tradition of intense engagement with issues of language,<sup>6</sup> including a long-standing preoccupation with the correspondence of language and reality, of the name with the named.<sup>7</sup> Confucian writings, including the *Analects of Confucius*<sup>8</sup> and the works of Hsün-tzu,<sup>9</sup> emphasized the importance of appropriate use of language and insisted upon the rectification of names;<sup>10</sup> that is, calling all things by their proper names. In urging that we give special attention to the language that we employ to describe non-Western legal systems, I am not, of course, advocating rectification of names in the technical sense that the term was used in Confucian political theory. I do use the term, however, as an evocative device to remind us that a heightened sensitivity to nomenclature is a particularly apt methodological stance for scholars working to bridge the intellectual gap between Western and non-Western legal cultures.

The fact that a recent conference on Chinese imperial law chose as its focus theoretical and methodological approaches to Chinese legal studies<sup>11</sup> shows that I am not alone in foregrounding methodological concerns in my teaching and scholarship. The current meth-

<sup>6</sup> See, e.g., FREDERICK W. MOTE, *INTELLECTUAL FOUNDATIONS OF CHINA* 49, 105 (1971); BENJAMIN I. SCHWARTZ, *THE WORLD OF THOUGHT IN ANCIENT CHINA* 91-94 (1985).

<sup>7</sup> This is not to say that the Chinese believed that there was a natural or preordained relationship between language and reality. From the earliest period of Confucian thought, the Chinese saw language as the arbitrary product of human faculties:

Names have no intrinsic appropriateness. One agrees to use a certain name and issues an order to that effect, and if the agreement is abided by and becomes a matter of custom, then the name may be said to be appropriate, but if the people do not abide by the agreement, then the name ceases to be appropriate. Names have no intrinsic reality.

HSÜN TZU, *supra* note 1, at 144. Centuries later, Western philosophy reached the same conclusion by a very different route in the turn-of-the-century semiotics of Ferdinand de Saussure. See FERDINAND DE SAUSSURE, *COURSE IN GENERAL LINGUISTICS* *passim* (Charles Bally & Albert Sechehaye eds. & Wade Baskin trans., 1960) (1916) (asserting that the relationship between signifiers and signifieds is arbitrary).

<sup>8</sup> In Book XIII of the *Analects*, Confucius is said to have asserted that, if he were asked to administer the country, his first action would be to correct language usage. "If language is incorrect, then what is said does not concord with what was meant; and if what is said does not concord with what was meant, what is to be done cannot be effected." *THE ANALECTS OF CONFUCIUS* 171 (Arthur Waley trans., 1938).

<sup>9</sup> Hsün Tzu elaborated upon the brief *Analects* passage in his extended essay, "Rectifying Names." See HSÜN TZU, *supra* note 1, at 139-56.

<sup>10</sup> The Chinese term for the rectification of names, *zheng ming*, is evocative in that its first character, *zheng*, literally means to make upright or true, with connotations of making something physically straight, such as a right angle.

<sup>11</sup> Held at the University of British Columbia in Vancouver, the conference entitled "Chinese Law: A Re-examination of the Field: Theoretical and Methodological Approaches to the Study of Chinese Law" (Mar. 22-23, 1993), was the first major conference on imperial Chinese law in recent years.

odological anxiety in Chinese legal studies is partly a function of the early stage of development of the field as a sub-discipline. Modern Chinese legal studies developed as an outgrowth of area studies programs in a few research universities during the 1960s.<sup>12</sup> The pioneering scholars in the field focussed on descriptive studies of various aspects of the Chinese legal system, using Western legal terminology in making comparative observations about Chinese legal institutions and practice.<sup>13</sup> In the 1990s, however, a second generation of scholars, many with these pioneering scholars as their mentors, is currently engaged in the field of Chinese legal studies. Unlike the work of the first generation of Chinese legal scholars, however, the work of the second generation scholars must deal not only with the primary source material in the field, but also with the prior interpretations of that subject matter by their mentors. Contemporary Chinese legal scholarship is no longer being written on a blank slate; rather, the scholar at every turn is disconcerted to find the intellectual graffiti, "Kilroy was here"—although in the case of Chinese legal studies, the graffiti is apt to read not "Kilroy" but "Li,"<sup>14</sup> or "Lubman,"<sup>15</sup> or "Co-

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<sup>12</sup> For an overview of the history of the development of Chinese legal studies in the United States, see Stanley B. Lubman, *Studying Contemporary Chinese Law: Limits, Possibilities and Strategy*, 39 AM. J. COMP. L. 293 (1991); Stanley Lubman, *Western Scholarship on Chinese Law: Past Accomplishments and Present Challenges*, 22 COLUM. J. TRANSNAT'L L. 83 (1983) [hereinafter Lubman, *Western Scholarship*].

<sup>13</sup> Stanley Lubman characterized this work as displaying a "tendency to couch questions about Chinese law in terms of intellectual categories derived from Anglo-American law . . ." Lubman, *Western Scholarship*, *supra* note 12, at 98.

<sup>14</sup> During this period, Victor Li was professor of Chinese law at the University of Michigan, Columbia University, and Stanford. Among the scholarly works of Victor Li are DONALD J. LEWIS & VICTOR H. LI, MAJOR LAWS OF THE PEOPLE'S REPUBLIC OF CHINA: A PRELIMINARY INDEX AND COLLECTION OF LEGAL DOCUMENTS (1984); VICTOR H. LI, DE-RECOGNIZING TAIWAN: THE LEGAL PROBLEMS (1977); THE FUTURE OF TAIWAN: A DIFFERENCE OF OPINION (Victor H. Li ed., 1980); LAW AND POLITICS IN CHINA'S FOREIGN TRADE (Victor H. Li ed., 1977); VICTOR H. LI, LAW WITHOUT LAWYERS: A COMPARATIVE VIEW OF LAW IN CHINA AND THE UNITED STATES (1978); Victor Li, *Human Rights in a Chinese Context*, in THE CHINA DIFFERENCE 219 (Ross Terrill ed., 1979); Victor H. Li, *The Use of Survey Interviewing in Research on Communist Chinese Law*, in CONTEMPORARY CHINESE LAW: RESEARCH PROBLEMS AND PERSPECTIVES 118 (Jerome A. Cohen ed., 1970).

<sup>15</sup> Stanley Lubman taught Chinese law at the University of California at Berkeley during this period. In addition to his works cited *supra* note 12, his scholarly contributions to Chinese legal studies include Stanley B. Lubman, *Emerging Functions of Formal Legal Institutions in China's Modernization*, 2 CHINA L. RPTR. 195 (Fall 1983); Stanley Lubman, *Form and Function in the Chinese Criminal Process*, 69 COLUM. L. REV. 535 (1969); Stanley B. Lubman, *Mao and Mediation: Politics and Dispute Resolution in Communist China*, 55 CAL. L. REV. 1284 (1967); Stanley B. Lubman, *Trade Contracts and Technology Licensing*, in LEGAL ASPECTS OF DOING BUSINESS IN CHINA (Jerome A. Cohen ed., 1983).

hen,"<sup>16</sup> or "Jones."<sup>17</sup> In examining nearly any major aspect of the Chinese legal order, then, scholars must now maintain a double focus—confronting these earlier writings on the subject in question as well as putting forward their own interpretations of the Chinese legal practice or institution.<sup>18</sup> Contemporary Chinese legal scholars have attacked the methodological premises of earlier work in the field, particularly taking exception to the use of Western legal constructs in

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<sup>16</sup> Jerome A. Cohen initially taught at the University of California at Berkeley during the early 1960s and was then for many years professor of law and director of the Harvard Law School's East Asian Legal Studies Program. Among Cohen's many scholarly works are JEROME A. COHEN, *THE CRIMINAL PROCESS IN THE PEOPLE'S REPUBLIC OF CHINA, 1949-1963* (1968); JEROME A. COHEN & HUNGDAH CHIU, *PEOPLE'S CHINA AND INTERNATIONAL LAW: A DOCUMENTARY STUDY* (1974); Jerome A. Cohen, *China's Changing Constitution*, 76 *CHINA Q.* 794 (1978); Jerome A. Cohen, *Chinese Mediation on the Eve of Modernization*, 54 *CAL. L. REV.* 1201 (1966); Jerome A. Cohen, *Continuity and Change in China: Some "Law Day" Thoughts*, 24 *S.C. L. REV.* 3 (1972); Jerome A. Cohen, *Drafting People's Mediation Rules*, in *THE CITY IN COMMUNIST CHINA* 29 (John W. Lewis ed., 1971); Jerome A. Cohen, *Due Process? in THE CHINA DIFFERENCE* 237 (Ross Terrill ed., 1979); Jerome A. Cohen, *Intervewing Chinese Refugees: Indispensable Aid to Legal Research on China in Contemporary Chinese Law: Research Problems and Perspectives* 84 (Jerome A. Cohen ed., 1970); Jerome A. Cohen, *Reflections on the Criminal Process in China*, 68 *J. CRIM. L. & CRIMINOLOGY* 323 (1977); Jerome A. Cohen, *The Chinese Communist Party and 'Judicial Independence': 1949-1959*, 82 *HARV. L. REV.* 967 (1969). Professor Cohen has also edited or co-edited a number of collections on Chinese law and politics, including *CHINA'S PRACTICE OF INTERNATIONAL LAW: SOME CASE STUDIES* (Jerome A. Cohen ed., 1972); *CONTEMPORARY CHINESE LAW: RESEARCH PROBLEMS AND PERSPECTIVES* (Jerome A. Cohen ed., 1970); *CONTRACT LAWS OF THE PEOPLE'S REPUBLIC OF CHINA* (Jerome A. Cohen ed., 1988); *THE DYNAMICS OF CHINA'S FOREIGN RELATIONS* (Jerome A. Cohen ed., 1970); *ESSAYS IN CHINA'S LEGAL TRADITION* (Jerome A. Cohen et al. eds., 1980). Professor Cohen currently teaches Chinese law at New York University Law School.

<sup>17</sup> Professor William C. Jones is a professor emeritus of law at Washington University in St. Louis where he held a chaired position for many years. Among the scholarly contributions to the field by Professor Jones are *BASIC PRINCIPLES OF CIVIL LAW IN CHINA* (William C. Jones ed., 1989); *THE GREAT QING CODE* (William C. Jones trans., 1994); William C. Jones, *An Approach to Chinese Law*, 4 *REV. SOCIALIST L.* 3 (1978); William C. Jones, *Approaches to Chinese Law: A Reply to Comments by Dr. F. Münzel*, 4 *REV. SOCIALIST L.* 329 (1978); William C. Jones, *A Translation of the Fourth Draft Civil Code (June 1982) of the People's Republic of China*, 10 *REV. SOCIALIST L.* 193 (1984); William C. Jones, *Civil Law in China*, 18 *CHINESE L. & GOV'T* 7 (1985-86); William C. Jones, *Collection of Civil Law Cases from the People's Republic of China*, 10 *REV. SOCIALIST L.* 169 (1984); William C. Jones, *On the Campaign Trail in China*, 5 *REV. SOCIALIST L.* 457 (1979); William C. Jones, *Reflections on the Modern Chinese Legal System*, 59 *WASH. U. L.Q.* 1221 (1982); William C. Jones, *Some Questions Regarding the Significance of the General Provisions of Civil Law of the People's Republic of China*, 28 *HARV. INT'L L.J.* 309 (1987); William C. Jones, *Studying the Ch'ing Code—The Ta Ch'ing Lü Li*, 22 *AM. J. OF COMP. L.* 330 (1974); William C. Jones, *Theft in the Qing Code*, 30 *AM. J. COMP. L.* 499 (1982). Professor Jones's significance to the field of Chinese law is demonstrated by the tribute to him at 74 *WASH. U. L.Q.* 541 (1996).

<sup>18</sup> Anthropologist James Clifford has addressed a similar problem in contemporary anthropology, discussing what he terms the "intertextual predicament" of writing in an area already saturated with the texts of preceding generations of scholars. James Clifford, *On Ethnographic Allegory*, in *WRITING CULTURE: THE POETICS AND POLITICS OF ETHNOGRAPHY* 98, 117 (James Clifford & George E. Marcus eds., 1986) [hereinafter *WRITING CULTURE*].

the study of Chinese law.<sup>19</sup> Consequently, questions of appropriate methodology currently loom large in Chinese legal studies.

A preoccupation with methodological issues is not, however, peculiar to Chinese legal studies. Rather, all contemporary academic discourse is subject to the challenge of postmodern thought to established disciplinary methodologies, inducing a kind of intellectual vertigo in current scholarship.<sup>20</sup> Legal studies are not exempt from this generally prevalent turn within the academy.<sup>21</sup> Although

<sup>19</sup> See, e.g., Janet E. Ainsworth, *Interpreting Sacred Texts: Preliminary Reflections on Constitutional Discourse in China*, 43 HASTINGS L.J. 273, 278 (1992) (criticizing Jerome Cohen for applying Western notions of constitutional practice to Chinese constitutions); Lubman, *Western Scholarship*, *supra* note 12, at 98 (noting prevalence of this criticism of preceding work in the field by second generation Chinese legal studies scholarship). See generally William Alford, *The Inscrutable Occidental? Implications of Roberto Unger's Uses and Abuses of the Chinese Past*, 64 TEX. L. REV. 915 (1986) (criticizing Unger for using Western legal categories in analysis of imperial Chinese law).

<sup>20</sup> For a representative, but by no means exhaustive, sampling of writings indicative of the impact of postmodernism on various academic disciplines, see INTERNATIONAL/INTERTEXTUAL RELATIONS: POSTMODERN READINGS OF WORLD POLITICS (James Der Derian & Michael J. Shapiro eds., 1989) (postmodernism and international politics); E.W. SOJA, POSTMODERN GEOGRAPHIES: THE REASSERTION OF SPACE IN CRITICAL SOCIAL THEORY (1989) (postmodernism and geography); F.R. Ankersmit, *Historiography and Postmodernism*, 28 HIST. & THEORY 137 (1989) (postmodernism and history); Zygmunt Bauman, *Philosophical Affinities of Postmodern Sociology*, 38 SOC. REV. 411 (1990) (postmodernism and sociology); Rachel T. Hare-Mustin & Jeanne Marecek, *The Meaning of Difference: Gender Theory, Postmodernism, and Psychology*, 43 AM. PSYCHOLOGIST 455 (1988) (postmodernism and psychology); P. Steven Sangren, *Rhetoric and the Authority of Ethnography: "Postmodernism and the Social Reproduction of Texts,"* 29 CURRENT ANTHRO. 405 (1988) (postmodernism and anthropology); Stephen K. White, *Poststructuralism and Political Reflection*, 16 POL. THEORY 186 (1988) (postmodernism and political theory). Postmodernism has also posed a challenge to contemporary political and social theory. See, e.g., FEMINISM/POSTMODERNISM (Linda J. Nicholson ed., 1990); JANE FLAX, THINKING FRAGMENTS: PSYCHOANALYSIS, FEMINISM, AND POSTMODERNISM IN THE CONTEMPORARY WEST (1990); CHRIS WEEDON, FEMINIST PRACTICE AND POSTSTRUCTURALIST THEORY (1987) (postmodernism and feminist theory); ANTHONY WOODIWISS, SOCIAL THEORY AFTER POSTMODERNISM: RETHINKING PRODUCTION, LAW, AND CLASS (1990) (postmodernism and social theory); Alex Callinicos, *Postmodernism, Post-Structuralism, Post-Marxism?* 2 THEORY, CULTURE & SOCIETY 85 (1985) (postmodernism and Marxist theory); Norman K. Denzin, *Postmodern Social Theory*, 4 SOC. THEORY 194 (1986); Fredric Jameson, *Marxism and Postmodernism*, 176 NEW LEFT REV. 31 (1989). Lest one be tempted to think that postmodernism's influence within the academy is limited to the humanities and social sciences, I hasten to add that even the sciences have not gone untouched by the postmodern turn in the academy. See, e.g., BRUCE GREGORY, INVENTING REALITY: PHYSICS AS LANGUAGE (1988) (postmodernism and physics); Charles Birch, *Eight Fallacies of the Modern World and Five Axioms for a Postmodern Worldview*, 32 PERSP. IN BIOLOGY & MED. 12 (1988) (postmodernism and biological sciences); David A. Platten, *Postmodern Engineering*, 56 CIV. ENGINEERING 84 (1986) (postmodernism and engineering); J.H. Wikstrom, *Moving into the Postmodern World*, 85 J. FORESTRY 65 (1987) (postmodernism and forestry). See generally THE REENCHANTMENT OF SCIENCE: POSTMODERN PROPOSALS (David R. Griffin ed., 1988) (postmodernism and the sciences). It would appear that postmodernism is a convocation to which no discipline can avoid sending a delegation.

<sup>21</sup> Postmodern legal theory has been the subject of a number of recent books, including COSTAS DOUZINAS & RONNIE WARRINGTON, POSTMODERN JURISPRUDENCE: THE LAW OF TEXT IN THE TEXTS OF LAW (1991); PETER GOODRICH, LANGUAGES OF LAW: FROM LOGICS OF MEMORY TO NOMADIC MASKS (1990); LEGALITY AND ILLEGALITY: SEMIOTICS, POSTMODERNISM

postmodernism is notoriously difficult to define with any degree of consistency,<sup>22</sup> the postmodern sensibility can fairly be characterized as one of epistemological anti-foundationalism, rejecting the belief that human knowledge can be grounded in eternal or universal truths.<sup>23</sup> Instead, postmodern claims to knowledge are, at best, only partial in nature, and can only be validated within a specific context. The insistence of postmodernism that commonly accepted categories of knowledge are humanly created artefacts, discursively produced by culturally and historically situated participants, creates a nearly insurmountable methodological hurdle for the comparative legal scholar. If a category such as "law" is seen as a culturally contingent product of our own Western discursive practices, then how can the term "law" be meaningfully used to label an aspect of Chinese social reality? Postmodernism thus provokes the comparativist to ask whether it is misleading or even meaningless to speak of Chinese "law." Postmodern thinking poses an even more fundamental methodological challenge to the comparativist, however, in that postmodernism views language not as a transparent medium for the representation of reality, but rather as the site for the discursively mediated struggle over meaning and truth.<sup>24</sup> Hence, representation itself, the very stock

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AND LAW (W. Richard Janikowski & Dragan Milovanovic eds., 1995); DRAGAN MILOVANOVIC, *POSTMODERN LAW AND DISORDER: PSYCHOANALYTIC SEMIOTICS, CHAOS AND JURIDIC EXEGESES* (1992); *POST-MODERN LAW: ENLIGHTENMENT, REVOLUTION AND THE DEATH OF MAN* (Anthony Carty ed., 1990).

<sup>22</sup> Nevertheless, many have attempted to do so with a striking lack of consistency in their definitive statements of the postmodern. See, e.g., *THE ANTI-AESTHETIC: ESSAYS ON POSTMODERN CULTURE* (Hal Foster ed., 1983); DAVID HARVEY, *THE CONDITION OF POSTMODERNITY: AN ENQUIRY INTO THE ORIGINS OF CULTURAL CHANGE* (1989); ANDREAS HUYSEN, *AFTER THE GREAT DIVIDE: MODERNISM, MASS CULTURE, POSTMODERNISM* (1986); JEAN-FRANÇOIS LYOTARD, *THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE* (1984); *POSTMODERNISM AND CONTINENTAL PHILOSOPHY* (Hugh J. Silverman & Donn Welton eds., 1988); *THEORIES OF MODERNITY AND POSTMODERNITY* (Bryan S. Turner ed., 1990); GIANNI VATTIMO, *THE END OF MODERNITY: NIHILISM AND HERMENEUTICS IN POST-MODERN CULTURE* (1988); Fredric Jameson, *The Politics of Theory: Ideological Positions in the Postmodernism Debate*, 33 *NEW GERMAN CRITIQUE* 53 (1984); Fredric Jameson, *Postmodernism, or the Cultural Logic of Late Capitalism*, 146 *NEW LEFT REV.* 53 (1984).

<sup>23</sup> In the words of Professor Stanley Fish, a leading exponent of this radical epistemological skepticism:

Anti-foundationalism teaches that questions of fact, truth, correctness, validity, and clarity can neither be posed nor answered in reference to some extracontextual, ahistorical, nonsituational reality, or rule, or law, or value; rather, anti-foundationalism asserts, all of these matters are intelligible and debatable only within the precincts of the contexts or situations or paradigms or communities that give them their local and changeable shape.

STANLEY FISH, *Anti-foundationalism, Theory Hope, and the Teaching of Composition*, in *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* 342, 344 (1989).

<sup>24</sup> For further reflections on the discursively mediated reciprocity of knowledge and power, see MICHEL FOUCAULT, *THE ARCHAEOLOGY OF KNOWLEDGE* (A.M. Sheridan Smith trans., 1973) (1972); MICHEL FOUCAULT, *POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 1972-1977* (Colin Gordon et al. trans., 1980) (1972).



in trade of the social scientist, is highly problematic in postmodern thought.<sup>25</sup> If representation as a general matter is suspect, the further problem of the representation of the "other" by those situated within the dominant discourse is considered to be a matter fraught with additional philosophical and political dimensions.<sup>26</sup> Is it any wonder that some postmodern scholars despair of the possibility of achieving "true" representation of other cultures within our scholarly discourse, asserting that "[no] cultural tradition can analytically encompass the discourse of another cultural tradition"?<sup>27</sup>

Although extreme skepticism as to the possibility of accurate representation of the foreign may be particularly emblematic of contemporary postmodernism, the problem of how to achieve cross-cultural understanding has long bedeviled scholars in a variety of disciplines. As a preliminary matter,<sup>28</sup> there are formidable problems inherent in linguistic translation when the language of the subject of study differs from that of the researcher.<sup>29</sup> In any language, individual words bear not only their primary meanings but also layers of nuance, slowly built up as a result of the historical context in which the word has been used in the culture. Thus, even assuming that the translating scholar can locate a word in her own language of equivalent primary meaning to the target word, the connotations attached to the equivalent words are unlikely to be the same in each language. These difficulties are compounded when the languages are as syntactically, lexically, and semantically dissimilar as English is from Chinese.<sup>30</sup> Even when the

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<sup>25</sup> See HANS KELLNER, LANGUAGE AND HISTORICAL REPRESENTATION: GETTING THE STORY CROOKED (1989); HAYDEN WHITE, *The Fictions of Factual Representation*, in TROPICS OF DISCOURSE: ESSAYS IN CULTURAL CRITICISM 121-34 (1978).

<sup>26</sup> For a critique of the representation of subordinated peoples within Western scholarship, see EDWARD W. SAID, ORIENTALISM (1978); Gayatri Spivak, *Can the Subaltern Speak?*, in MARXISM AND THE INTERPRETATION OF CULTURE 271 (Cary Nelson & Lawrence Grossberg eds., 1988).

<sup>27</sup> Stephen Tyler, *The Poetic Turn in Postmodern Anthropology: The Poetry of Paul Friedrich*, 86 AM. ANTHROPOLOGIST 328, 328 (1984).

<sup>28</sup> I am ignoring the even more preliminary question of whether, and how, people can achieve intersubjective understanding at all. For a recent attempt to unravel that long-standing philosophical tangle, see TALBOT J. TAYLOR, MUTUAL MISUNDERSTANDING: SCEPTICISM AND THE THEORIZING OF LANGUAGE AND INTERPRETATION (1992).

<sup>29</sup> Translation, or the transmission of meaning encoded within one language into an equivalent representation of that meaning in another language, presents both philosophical and linguistic problems that are beyond the scope of this Article. For the classic treatment of translation as a problem in the philosophy of language, see generally WILLARD V.O. QUINE, WORD AND OBJECT (1960) (outlining the indeterminacy thesis of translation). For an elaboration of the technical linguistic issues presented by translation, see generally ROGER T. BELL, TRANSLATION AND TRANSLATING: THEORY AND PRACTICE (1991).

<sup>30</sup> For a sensitive discussion of the issue, including aspects which are unique to the Chinese language, see Achilles Fang, *Some Reflections on the Difficulty of Translation*, in STUDIES IN CHINESE THOUGHT 263 (Arthur F. Wright ed., 1953); I. A. Richards, *Toward a Theory of Translating*, in STUDIES IN CHINESE THOUGHT, *supra*, at 247; Arthur F. Wright, *The Chinese Language and Foreign Ideas*, in STUDIES IN CHINESE THOUGHT, *supra*, at 286. The problem of

scholar uses meticulous care in her translation, the effect is similar to that produced by the cook who ventures to reproduce an ethnic dish from a recipe but who is forced to substitute various local foodstuffs for the authentic ethnic ingredients. The finished product may be recognizable as a good-faith attempt at the dish in question, but the subtle flavors are invariably all wrong.

The difficulties in linguistic translation, formidable though they are, constitute only one aspect of the problem of the representation of foreign cultures within our scholarly discourse, a problem facing historians and anthropologists as well as comparative legal scholars. As anthropologist Vincent Crapanzano explained, "The ethnographer is caught in a . . . paradox. . . . He must render the foreign familiar and preserve its very foreignness at one and the same time."<sup>31</sup> The scholar must strive to achieve a comprehensible representation of the other, all the while attempting to maintain the essence of what is incommensurable in the other. Even leaving aside the contemporary postmodern crisis of representation that generally problematizes the relationship of representation with reality,<sup>32</sup> the scholar who undertakes the analytic characterization of another culture is faced with a daunting task.

Legal anthropologists have long struggled with the problem of choosing a vocabulary with which to describe non-Western legal systems. Some, including Paul Bohannan, insisted on using native words for legal concepts as much as possible, because they believed that Western terminology was inescapably misleading in its connotations.<sup>33</sup> Others, most notably Max Gluckman, thought that a universally applicable legal terminology, which might or might not happen to correspond with Western legal vocabulary, did exist and could adequately describe non-Western legal systems.<sup>34</sup> This debate over appropriate language is grounded in a yet deeper disagreement concerning the nature of law within a culture. Those anthropologists and compara-

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slippage in translation in using Western terminology for Chinese ideas has been a perennially vexing one for scholarship in Western languages on Chinese philosophy as well. See Lin Tongqi et al., *Chinese Philosophy: A Philosophical Essay on the "State-of-the-Art"* 54 J. OF ASIAN STUD. 727, 750-52 (1995).

<sup>31</sup> Vincent Crapanzano, *Hermes' Dilemma: The Masking of Subversion in Ethnographic Description*, in WRITING CULTURE, *supra* note 18, at 51, 52.

<sup>32</sup> See, SCOTT LASH, SOCIOLOGY OF POSTMODERNISM 12 (1990) (discussing how postmodern thought problematizes the relationship between signifier, signified, and referent). For a specific consideration of the impact of postmodern critique on the representation of foreign cultures by anthropologists, see Paul Rabinow, *Representations Are Social Facts: Modernity and Post-Modernity in Anthropology*, in WRITING CULTURE, *supra* note 18, at 234.

<sup>33</sup> See Paul Bohannan, *Ethnography and Comparison in Legal Anthropology*, in LAW IN CULTURE AND SOCIETY 401 (Laura Nader ed., 1969).

<sup>34</sup> See Max Gluckman, *Concepts in the Comparative Study of Tribal Law*, in LAW IN CULTURE AND SOCIETY, *supra* note 33, at 349.

tive legal scholars who side with Bohannan assume that every culture has a unique legal order, with distinctive legal institutions, practices, and ideology that evolve in the context of its overall social order. Those scholars who agree with Gluckman, on the other hand, imagine that the legal order occupies the same structural niche in every culture, so that the superstructural details of legal systems may vary dramatically from society to society, but the fundamental structural functions of all legal orders are universally identical.

I count myself among those who, with Bohannan, consider any culture's legal order a unique and finely tuned product of the overall cultural context in which it is embedded. At the same time, legal discourse and practice act as a constituent thread in the fabric of meaning, belief, and social relations that make up that singular social world. In the words of Clifford Geertz, "Law . . . is local knowledge; local not just as to place, time, class, and variety of issue, but as to accent—vernacular characterizations of what happens connected to vernacular imaginings of what can."<sup>35</sup> In this regard, a culture's legal order is a highly particularized local form of discourse, and a comparativist must attend to the ways in which the local legal sensibility informs the practices and institutions through which that sensibility finds concrete realization. In doing so, the comparativist must bear in mind the complexity of the legal order of any culture. A legal order simultaneously encompasses systems of political arrangements, social relations, interpersonal interactional practices, economic processes, cultural categorizations, normative beliefs, psychological habits, philosophical perspectives, and ideological values. All of these aspects of a legal order are constituted through distinctive discursive practices, and it is in these discursive practices that law provides another arena for contests over social meaning within a culture.<sup>36</sup> Chinese culture, like other cultures, is not a consistent homogeneous entity,<sup>37</sup> but

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<sup>35</sup> CLIFFORD GEERTZ, *Local Knowledge: Fact and Law in Comparative Perspective*, in LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 167, 215 (1983) [hereinafter LOCAL KNOWLEDGE].

<sup>36</sup> Anthropologist Sally Merry makes this point in her study of cross-cultural dispute resolution:

Disputing, however, is cultural behavior . . . Parties to a dispute operate within systems of meaning; they seek ways of doing things that seem right, normal, or fair, often acting out of habit or moral conviction. The normative framework shapes the way people conceptualize problems, the ways they pursue them, and the kinds of solutions they look for.

Sally E. Merry, *Disputing Without Culture*, 100 HARV. L. REV. 2057, 2063 (1987) (citing Merry & Sibley, *What do Plaintiffs Want? Reexamining the Concept of Dispute*, 9 JUST. SYS. J. 151, 153-54, 169-77 (1984)).

<sup>37</sup> Few, if any, societies are perfectly uniform and coherent entities. As Alan Hunt once observed, "Consistent world views may exist, but they must be treated as special or exceptional cases." Alan Hunt, *The Ideology of Law: Advances and Problems in Recent Applications of the Concept of Ideology to the Analysis of Law*, 19 L. & SOC'Y REV. 11, 13 (1985).

rather a complexly overdetermined locus in which a variety of legal strategies and attitudes are constantly undergoing contest and change. Given the size and heterogeneity of China<sup>38</sup>—considering its regional diversity, the social differences between its urban and rural populations, the divergence between elite and popular culture, and the diachronic variation over its long history—it would be surprising not to find evidence of legal pluralism in China.<sup>39</sup> Therefore, it is in a sense misleading to speak of “Chinese” law as though China were a uniform and unchanging entity. Provided the scholar keeps the above qualifications in mind, however, Chinese culture does represent a social order with sufficient coherence for scholars to develop useful generalizations about an imperial Chinese legal sensibility and its attendant legal order.

Because law is recursive, that is, it is both a reflection of a cultural order and at the same time a producer of that culture, any interpretive project in Chinese legal studies must consequently alternate between a general focus on the Chinese cultural context and a specific focus on legal practices and discourse. In other words, to understand the Chinese legal order, one must understand more generally the categories of meaning through which the Chinese make sense of their lives and experiences. Conversely, one cannot fully appreciate the overall Chinese cultural context without developing a sense of the Chinese legal sensibility, the legal practices and discourses which it informs, and the place of that legal order in the larger social world.<sup>40</sup> The recognition that law cannot be studied *in vitro*, that it must be analyzed within the context of the whole cultural organism, suggests that Bohannan is right to be skeptical about the use of Western legal terminology in studying non-Western legal orders. Consequently, it is not sufficient merely to map Chinese legal practices and ideologies

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38 In recognition of the geographic heterogeneity of China, many historians explicitly frame their work as local studies, contrasting specific local conditions and characteristics with those that are more generally Chinese. See, e.g., HILARY J. BEATTIE, *LAND AND LINEAGE IN CHINA: A STUDY OF T'UNG-CH'ENG COUNTY, ANHWEI, IN THE MING AND CH'ING DYNASTIES* (1979); ROBERT B. MARKS, *RURAL REVOLUTION IN SOUTH CHINA: PEASANTS AND THE MAKING OF HISTORY IN HAIFENG COUNTY 1570-930* (1984).

39 In using the term “legal pluralism,” I do not mean to claim that imperial China had a synchronic multiplicity of formal legal institutions, as might be suggested by M.B. Hooker’s use of the term to mean “multiple systems of legal obligation existing within the confines of the state.” M.B. HOOKER, *LEGAL PLURALISM: AN INTRODUCTION TO COLONIAL AND NEOCOLONIAL LAWS* 2 (1975). Rather, I am using the term “legal pluralism” in the broader sense of a “normative heterogeneity attendant upon the fact that social action always takes place in a context of multiple, overlapping ‘semi-autonomous social fields’ . . .” John Griffiths, *What is Legal Pluralism?* 24 *J. OF LEG. PLURALISM* 1, 38 (1986).

40 This parallels the position taken by Clifford Geertz: “Taken together, these two propositions, that law is local knowledge not placeless principle and that it is constructive of social life not reflective, or anyway not just reflective, of it, lead on to a rather unorthodox view of what the comparative study of it should consist in: cultural translation.” Geertz, *supra* note 35, at 218.

onto familiar Western conceptual territory. Comparative law, warns Geertz, is not just "a matter of locating identical phenomena masquerading under different names."<sup>41</sup>

By contrast, comparative legal studies that attempt to identify universal legal principles and practices in the non-Western legal system present three interrelated pitfalls. One problem with using Western legal concepts in the study of non-Western law is that doing so encourages comparativist scholars to ask the wrong questions and thereby pose a research agenda that is detached from the subject of study. Universal, generally Western, conceptual frameworks in legal studies function as paradigms in the production of legal scholarship. All scholarly inquiry proceeds on the basis of paradigms, or meta-theories about the nature of the object of study, which then allow us to generate specific theories commensurate with the paradigms. These paradigmatic conceptual constructs organize and constrain scholarly research, making some questions seem natural—leading to potentially fruitful avenues of research—and others irrelevant, dead-end, perverse, or even literally unthinkable.<sup>42</sup> Because the conceptual constructs that we use determine the way in which we perceive the subject we are studying, and consequently the issues that we imagine to be worth investigating, our conceptual paradigms must arise directly from the subject matter in question. Thus, when we instead impose Western legal conceptual paradigms upon Chinese legal discourse and practice, we risk asking and answering questions that are at best irrelevant and at worst actively misleading in our quest to understand the Chinese legal order.

A second corollary pitfall in using constructs derived from Western legal discourse in the study of non-Western law is that these alien conceptual paradigms will influence the way in which we interpret the data we observe. Conceptual paradigms provide the scholar with a preconceived conceptual framework that can cause misinterpretation of the observed data because of the well-known truism that people tend to see what they expect to see. Paradigmatic conceptual frameworks tend to make the scholar observe what the paradigm predicts, sometimes literally causing the scholar to see things that do not exist. To take one notorious example, Western natural science of the Enlightenment hypothesized—incorrectly, as it turned out—that males created the human fetus without any biological contribution from the female. As a result of the power of this paradigmatic suggestion, scientists even "observed" miniature, perfectly-formed humans

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<sup>41</sup> Geertz, *supra* note 35, at 216.

<sup>42</sup> Cf. THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970) (positing that scientific inquiry and experimentation is similarly constrained by scientific paradigms).

curled within the heads of spermatozoa when examined under primitive microscopes.<sup>43</sup> In a similar—if less overtly visible—fashion, paradigmatic legal frameworks tend to organize our own legal studies research, not only dictating the significant questions, but also determining in no small measure the answers ultimately discovered.

Yet a third pitfall in using Western-derived legal terminology is that it obscures the normative framework that is presupposed within the Western legal vocabulary used in our scholarship, a framework that fails to reflect the normative universe inherent in the foreign legal order. In other words, the imposition of a Western legal framework onto a study of the Chinese legal system is misleading not only as to the structure and dynamics of Chinese legal practice, but also as to the nature of the Chinese normative legal order. The very concepts and categories with which the scholar organizes this purportedly universal legal framework are freighted with culturally contingent normative baggage. No matter how neutral and objective descriptive legal categories may appear, they are themselves creatures of a historically and culturally contingent social world, bearing the normative patina of the context from which they were derived.<sup>44</sup> Just as fish always in the sea have no consciousness of being wet, scholars always immersed in the ocean of their own normative order may well be unaware that this order permeates the very conceptual tools that they use in attempting to understand the other.

These pitfalls for the comparativist that I have described all played a role in generating the question my student asked concerning Han Dynasty contract law. His misguided question about promissory estoppel was in some sense the natural outcome of our classroom adoption of the Western contract paradigm to analyze the legal practice and discursive world of Han Dynasty China. Having mapped the known concept “contract” onto the unfamiliar world of Han Dynasty legal obligations, the student unsurprisingly asked a question based on his pre-conceived conceptual framework, rather than a question grounded in an understanding of the Chinese legal order on its own terms. Despite having read concrete data describing the practice and ideology of obligations in Han Dynasty China, the student’s analytic

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<sup>43</sup> Such eminent natural scientists as Leeuwenhoek, Andry, Gautier, Dalenpatius, and Hartsoeker all claimed to have observed tiny homunculi curled up in the heads of spermatozoa. See JOSEPH NEEDHAM, *A HISTORY OF EMBRYOLOGY* 205-06 (1959). This exemplifies the Kuhnian description of “normal” science, in which theory tends to determine data rather than the other way around. See KUHN, *supra* note 42, at 24, 64.

<sup>44</sup> For a persuasive discussion of how normative content permeates even ostensibly purely descriptive legal scholarship see Pierre Schlag, *Normativity and the Politics of Form*, 139 U. PA. L. REV. 801, 811-14 (1991) (noting that “the context and the legal unconscious . . . perform normative work in selecting, establishing, and organizing the so-called ‘descriptive’ categories deployed in legal thought.”).

faculties succumbed to the overpowering paradigm of contract as he already understood it.

Moreover, the imposition of the Anglo-American idea of "contract" onto the Chinese legal order silently infected the student's understanding of the imperial Chinese law of obligations with a host of Western ideological and normative assumptions implicit within the contract construct. Calling a legal practice a "contract," for instance, automatically imports a set of largely invisible and unexamined Anglo-American conceptual assumptions. These include not only juridical constructs such as state-mediated enforceability of the terms of the so-called contract, circumscribed by judicial unwillingness to reform contracts by varying the terms agreed upon in the contract instrument,<sup>45</sup> but also Western liberal normative concepts such as the primacy of autonomous individuals exercising unfettered free will in their bargaining over contract terms in arms' length transactions. Yet these normative implications of the term "contract" are entirely foreign to the Chinese legal sensibility.<sup>46</sup> It is always possible, of course, to disclaim explicitly the intentional importation of this Western cultural baggage when adopting Western legal terminology to analyze a foreign legal system. Doing so, however, requires both author and audience consciously to foreground these multi-leveled assumptions and then back them out of their understanding of the foreign legal order, a heroic intellectual feat of which few, if any, of us are capable.

What alternatives, then, do we have to using inappropriate and misleading Western legal terminology in the comparative study of law?

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<sup>45</sup> In classical Anglo-American contract doctrine, the judiciary is seen as powerless to rewrite contracts and include contract terms to which the parties have not earlier bound themselves, even if subsequent events radically change the factual situation of the parties. Rather, contract doctrine limits the role of the court either to enforcing the contract as written or voiding the contract. For an analysis exemplifying this classical normative posture, see John P. Dawson, *Judicial Revision of Frustrated Contracts: The United States*, 64 B.U. L. REV. 1, 26-38 (1984) (criticizing the anomalous case of *Aluminum Co. of America v. Essex Group, Inc.*, 499 F. Supp. 53 (W.D. Pa. 1980), and arguing that courts have no authority to rewrite contracts and vary their terms even if the purpose of a contract has been frustrated, and asserting that the proper authority of the court is limited to full enforcement or complete voidance of the contract).

<sup>46</sup> To illustrate, even contemporary Chinese contract law manifests normative attitudes radically different from those assumed in Anglo-American contract doctrine. Compare the normative stance implicit in Dawson, *supra* note 45, with that described in Phyllis L. Chang, *Deciding Disputes: Factors That Guide Chinese Courts in the Adjudication of Rural Responsibility Contract Disputes*, 52 LAW & CONTEMP. PROBS. 101, 132-35 (Summer 1989) (observing that Chinese normative principles permit judicial modification of contract terms as well as selective refusal to enforce specific contract provisions); see also David Zweig et al., *Law, Contract, and Economic Modernization: Lessons from the Recent Chinese Rural Reforms*, 23 STAN. J. INT'L L. 319, 340-55 (1987) (providing examples of judicial reformation of vague or ambiguous contracts as well as cases involving judicially created contract terms imposed upon one or more parties to the contract, including judicial imposition of conditions for future performance between the parties).

The search for an answer to that question returns us squarely to the problem of methodological stance. Again, I suggest that anthropology provides a serviceable methodological framework for the comparative study of law in its contrasting twin methodological stances, the so-called emic and etic approaches to cultural studies.<sup>47</sup> This terminology, coined by Kenneth Pike,<sup>48</sup> was modelled upon the parallel linguistics terms phonemic and phonetic.<sup>49</sup> Just as phonemic analysis in linguistics focuses on the linguistically variable significant phonological units for any particular language, emic cultural study examines the culturally variable aspects of particular cultures. Similarly, phonetic linguistic analysis is devoted to the study of the all-inclusive inventory of human sounds available to be used in human languages. Etic cultural study, by analogy, undertakes an analysis of a particular culture in terms of an all-inclusive inventory of categories of cultural analysis. An emic approach to cultural study presumes that every culture is an internally consistent system best studied on its own terms, whereas etic study presumes that using universal frameworks of analysis applicable to any culture is the most appropriate methodology to adopt in cultural study. Emic implies relativism, seeing things "from the native's point of view;" etic implies empiricism, a belief in the validity of objective data and universal modes of analysis. Emic cultural study is essentially interpretive, positing a culturally specific social construction of reality; etic cultural study is essentially analytic, positing an objective scientifically verifiable reality.

Cultural studies must begin with etic analysis whatever the methodological stance preferred by the researcher for her eventual finished product. Thomas Kuhn's paradigm model of scholarly research suggests that it can hardly be otherwise.<sup>50</sup> Without the imposition of some categorization onto data, that data remains meaningless to the observer. Yet any categorization necessarily involves making *a priori* assumptions about the appropriate meaning to be accorded to that data. Because there is no theory-free way in which to observe and analyze data, one must by default begin research in an etic fashion. Although one must begin any study of social life with etic categories, the ultimate point of one's work in cultural studies ought to be to

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<sup>47</sup> The emic versus etic dichotomy has been extremely influential as a heuristic device in anthropological methodology. See CAROL M. EASTMAN, *ASPECTS OF LANGUAGE AND CULTURE* 25-27 (2d ed. 1990).

<sup>48</sup> See KENNETH L. PIKE, *LANGUAGE IN RELATION TO A UNIFIED THEORY OF THE STRUCTURE OF HUMAN BEHAVIOR* 37-39 (2d ed. 1967).

<sup>49</sup> In linguistics, phonetic analysis refers to the study of the range of vocal sounds from which all languages are constructed; in contrast, phonemic analysis is the study of the set of significant sounds used in any particular language. See JOHN LYONS, *LANGUAGE AND LINGUISTICS: AN INTRODUCTION* 66-98 (1981).

<sup>50</sup> See KUHN, *supra* note 42.



supplant these default etic categories with emic interpretive constructs that better reflect the worldview of the studied order.

A useful starting point in an emic study of comparative law is to locate those key words within the foreign legal discourse that crystalize the foreign legal sensibility. True, there will probably not be a tidy English language equivalent for the terms in question,<sup>51</sup> but the mere fact that the legal vocabularies of two languages may not contain completely commensurate terminology does not mean that it is impossible to communicate the sense of foreign legal terms in English. For example, although it may be the case that Eskimo languages have a larger vocabulary to name different kinds of snow than does English, one can nevertheless convey the meaning of any of the Eskimo terms for snow to an English-speaker by using phrases such as "icy snow that forms crystals," or "heavy snow that is good for making igloos."<sup>52</sup> Admittedly, choosing phrases to translate legal terminology presents greater difficulty than finding phrases to translate an Eskimo word for a particular kind of snow because, unlike physical aspects of the natural world, social constructs such as legal categories may be the unique product of their local human contexts. It is possible, however, to unpack the meaning of a non-Western legal term through a hermeneutic process of alternating between painstakingly detailed observation of cultural practice and discourse and the interpretive synthesis of that raw material.<sup>53</sup> A dazzlingly effective example of this can be found in Clifford Geertz's essay, *Local Knowledge: Fact and Law in Comparative*

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<sup>51</sup> Except for basic order concepts, different cultures use incommensurate vocabularies to describe the culturally contingent aspects of their social world, so that a concept from one culture will likely not be "codable" in the language of another. The "codability" of a language may be increased, however, by various forms of lexical extension, including adoption of the foreign word into the host language, or by back translation of the foreign terminology into a neologistic loan expression. See LYONS, *supra* note 49, at 633-38.

<sup>52</sup> The assertion that Eskimo languages have a large number of different words for snow apparently originated with the turn-of-the-century anthropologist and linguist Franz Boas. Recently it has been suggested that Boas's claim is a product of a naive misunderstanding of the agglutinative nature of syntactic structure in these languages, and that Eskimo languages in fact do not have dozens of different words for snow, as Boas and his followers maintained. GEOFFREY PULLUM, *THE GREAT ESKIMO VOCABULARY HOAX: AND OTHER IRREVERENT ESSAYS ON THE STUDY OF LANGUAGE* 159-71 (1991). Regardless of the accuracy of this particular example, however, it is still undoubtedly true that the lexicon of any particular culture will contain the set of words needed for the realization of that culture, and that consequently, cultures with different needs are likely to have correspondingly different vocabularies.

<sup>53</sup> Clifford Geertz suggests that this hermeneutical method allows the anthropologist successfully to represent the other culture within our own discourse. See CLIFFORD GEERTZ, *"From the Native's Point of View": On the Nature of Anthropological Understanding*, in *LOCAL KNOWLEDGE*, *supra* note 35, at 55, 69-70. Elsewhere he refers to the process of interpretive ethnography as relying upon "thick description," or the use of highly contextualized, multi-layered narrative description as a prerequisite to interpretive anthropological work. See Clifford Geertz, *Thick Description: Toward an Interpretive Theory of Culture*, in *THE INTERPRETATION OF CULTURES* 3-31 (1973).

*Perspective*, in which Geertz discursively unpacks the Arabic word *haqq*, the Sanskrit word *dharma*, and the Malay word *adat* in order to illuminate the Islamic, Indian, and Malaysian legal sensibilities, respectively.<sup>54</sup> Geertz acknowledges that, in each case, a single term cannot suffice to completely capture the foreign legal sensibility in question; a "cycle of terms defining not point concepts but a structure of ideas—multiple meanings, multiply implicated at multiple levels" would be preferable.<sup>55</sup> Nevertheless, by sensitively considering the cultural context in which the terms in question are used, and by observing in close detail the cultural practices which they inform, Geertz conveys to the reader some sense of the particularized legal sensibilities of these non-Western normative worlds.

An example a bit closer to my own disciplinary home territory would be the interpretive application in imperial Chinese law scholarship of the contrasting and complementary Chinese terms *li* and *fa*.<sup>56</sup> Both terms have, over many centuries of use, accrued many layers of meaning.<sup>57</sup> *Li*, often translated as ritual or rite, refers to the system of prescriptive social rules in a Confucian society which together circumscribe appropriate and accepted modes of behavior and define hierarchical social relationships. Being both unwritten and lacking detail, *li* provides the unchanging basic normative underpinning of the state and the social order. *Fa*, on the other hand, was seen as constituting the positive, humanly created legal code of ancient China. If *li* was the embodiment of general nonspecific standards of morality, *fa* was the codification through written penal codes of detailed rules designed specifically to regulate and punish antisocial behavior. Although to some extent the Chinese imperial penal codes can be seen as a codified realization of the normative aspects of *li*,<sup>58</sup> there is a fundamental tension between the views of human nature and social order implicit within each of these competing concepts. A world regulated by *li* is premised upon the view that human nature is essentially good, and that moral suasion by the state is the appropriate stance for the inculcation of proper behavior by the population.<sup>59</sup> In contrast, the world view encompassed by *fa* is one in which humanity is seen as

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<sup>54</sup> See GEERTZ, *supra* note 35, at 214.

<sup>55</sup> *Id.* at 185.

<sup>56</sup> For a discussion of the roles within the Chinese legal sensibility of these two terms, see DERK BODDE & CLARENCE MORRIS, *LAW IN IMPERIAL CHINA* 11-48 (1967); Liang Zhiping, *Explicating "Law": A Comparative Perspective of Chinese and Western Legal Culture*, 3 J. CHINESE L. 55 (1989).

<sup>57</sup> The evolution of the meaning of the term *fa* is outlined in Zhiping, *supra* note 56, at 79-91.

<sup>58</sup> Bodde and Morris adopt the view that Chinese imperial legal orthodoxy represents a fulfillment of the spirit of the *li* through the positive mechanism of legal codes typical of *fa*. See BODDE & MORRIS, *supra* note 56, at 27-48.

<sup>59</sup> See *id.* at 19-23.

essentially self-interested, so that natural human selfishness must be externally controlled by strict punitive controls for misbehavior and rewards for good behavior.<sup>60</sup> Understanding the unresolvable tensions between these two competing normative legal concepts successfully communicates something significant about the imperial Chinese legal sensibility that sought to incorporate both, and it does so without rendering that sensibility incomprehensibly alien to the Western observer. The use of this Chinese normative vocabulary, coupled with a "thick description" of the cultural context in which that vocabulary is embedded, solves the paradox of the comparativist—it makes the foreign familiar and preserves its essential foreignness at one and the same time.<sup>61</sup>

If adopting an autochthonous, non-Western legal vocabulary were the only way in which to achieve a legitimate understanding of a foreign legal order, we comparativists would have our work cut out for us. After all, as any first year law student could attest, any legal order is a discursive universe utilizing hundreds, if not thousands, of items of specialized legal terminology as well as countless ordinary words that develop specific legal connotations in their use as legal terms of art. Unpacking the multivalent meanings of these words and situating them in a "thickly described" cultural context would be the lifework of more scholars in comparative law than legal academia could ever support.

Happily, other sources for gaining an understanding of a foreign legal normative order can be exploited by the comparative legal scholar.<sup>62</sup> What follows is a discussion of the kinds of sources that have enriched my own study of imperial Chinese law, a discussion that I include as an illustrative example of how an emic comparative study of foreign law might proceed.

One way in which the comparativist can gain considerable insight into a legal normative order is by considering how law is spoken of in everyday life. Ordinary Chinese language is particularly rich in proverbs and sayings<sup>63</sup> that express popular attitudes and beliefs about the entire range of social life and experience. Some of these proverbial sayings manifest cultural ideals and values concerning the law and

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<sup>60</sup> See *id.* at 23-27.

<sup>61</sup> See Crapanzano, *supra* note 31, at 51-52.

<sup>62</sup> In this Article, I emphasize sources available in English language translation. However, the suggestions that I am making apply equally to the larger world of Chinese language resources.

<sup>63</sup> Among the types of proverbial expressions used in Chinese are *chengyu*, or fixed expressions often of literary origin composed of four or five characters; *geyan*, or maxims; *yanyu*, or proverbial sayings; and *xiehouyu*, or two part metaphors, sometimes punning, in which only the first part of the metaphor is usually said aloud, with the second part to be inferred by the listener. See JOHN S. ROHSENOW, A CHINESE-ENGLISH DICTIONARY OF EMIC-MATIC FOLK SIMILES IX-XV (1991).

legal institutions. For instance, a number of proverbs<sup>64</sup> point to legendary Judge Bao of the Song Dynasty as exemplifying ideals of impartiality, fairness, and thoroughness in the adjudication of cases by district magistrates: "Judge Bao trying a case—an iron face of impartiality";<sup>65</sup> "Black-faced Bao [referring to traditional stage make-up depicting Judge Bao] judging a case—showing no favor towards his relatives or friends";<sup>66</sup> "Judge Bao's court—easy to enter, hard to leave" (because of his thoroughness);<sup>67</sup> "Old Judge Bao trying a case—black-faced but not black-hearted."<sup>68</sup> Contrasting proverbs evidence cultural disapproval of district magistrates with traits or practices thought to be undesirable, such as those unable to exercise good judgment: "An obtuse magistrate trying a case—each party is sentenced to fifty strokes" (figuratively, punishing each party alike, whether innocent or guilty).<sup>69</sup> Equally disapproved were magistrates biased in favor of powerful or influential parties: "Li Kui [a character from the classic Chinese novel of the Ming Dynasty *Shui Hu Zhuan*] trying a case—the stronger party is held to be in the right";<sup>70</sup> or magistrates who were excessively heavy-handed in using coercive force: "A blacksmith serving as a magistrate—using nothing but beating and striking."<sup>71</sup> Other proverbs expressed popular cynicism or resignation about whether formal legal institutions could provide any protection from exploitation by the powerful: "Facing a tiger when suing a wolf—there can be no good outcome," i.e., when powerful people are against you, the courts are no resort;<sup>72</sup> or whether the laws would be applied equally against the powerful and the powerless: "Although the magistrate is allowed to light fires, ordinary people are not allowed to light lanterns."<sup>73</sup> Chinese proverbs also reveal a general cultural predilection to avoid overt disputes whenever possible: "The less salted fish you eat, the less you get thirsty—don't stir up disputes."<sup>74</sup>

Another fecund source of culturally-specific normativity can be found in the literature of that culture.<sup>75</sup> Chinese legal scholars are

64 I have taken the examples below from John Rohsenow's recent compilation of Chinese folk sayings. See *id.* The English translations given in the text, however, are mine.

65 "Bāo Gōng shěn àn—tiě miàn wú sī." *Id.* at 8.

66 "Bāo Hēi Liǎn duān ànzǐ—liú qīn bùrèn." *Id.*

67 "Bāo Lǎo Yé de yāmen—hǎo jìn, nán chū." *Id.*

68 "Lǎo Bāo duān àn—liǎn hēi, xīn bùhēi." *Id.* at 119.

69 "Hūn guān duān àn—gè dǎ wúshí dà bǎn." *Id.* at 93.

70 "Lǐ Kuí duān àn—qiángzhe yǒu lǐ." *Id.* at 132.

71 "Tiějiāng zuò xiàn guān—zhǐ jiǎng dǎ." *Id.* at 230.

72 "Xiàng lǎohǔ gào lángde zhuāng—mēiyóu hǎo jiéguǒ." *Id.* at 255.

73 "Zhī xǔ zhōuguān fānghuǒ—bùxǔ bǎi xìng diǎndēng." *Id.* at 295.

74 "Shǎo chī xián yú, shǎo kǒu gān—(1) bié rě shì fēi. . . ." *Id.* at 199.

75 The potential insights that historians can derive from using literary sources is brilliantly demonstrated by Ann Waltner in her work on adoption in late imperial China. She contrasts the normative values expressed in late-Ming and early-Qing literature with those in legal codes and cases to expose the interplay between competing normative cultural and

singularly fortunate that a wealth of Chinese literature in a variety of genres survives from the Imperial period, including many works that focus on the relationship between law, justice, and the moral order in the social world of Imperial China. Classical Chinese short stories frequently feature lawsuits, criminal trials, and protagonists who choose to resort to informal methods of dispute resolution.<sup>76</sup> Within these short stories, one finds eloquent narratives of conflict and its resolution, rich with a normative vision of the nature of justice. In addition to short stories, there has long been a specific novelistic genre in Chinese literature, somewhat analogous to our detective fiction, in which the heroes are magistrates called upon to try criminal cases and restore the moral order after the commission of a heinous and baffling crime.<sup>77</sup> Similar themes of the relationship between justice and power, as mediated by the imperial district magistrate, exist in plays dating from the Yuan Dynasty.<sup>78</sup> This invaluable literary resource provides a window through which one can view popular visions of justice. By examining vernacular Chinese literature, we find evidence of the sometimes ambivalent attitude that Chinese popular culture maintained towards the likelihood that justice could be achieved through resort to formal state-sanctioned legal institutions and practices.

The popular visions of justice implicit within vernacular Chinese language and literature can be complemented with the more orthodox ideological view of the law and justice found in the writings of the quintessential Confucian elite, the district magistrates themselves. One particularly extensive example can be found in the voluminous writings of seventeenth century magistrate Huang Liu-hung.<sup>79</sup> In his manual for magistrates, Huang expounded upon the myriad duties of a district magistrate in late imperial China, providing advice on functions such as assessing and collecting taxes, regulating the local mili-

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juridical visions of kinship and selfhood as manifested in Chinese adoption practices. ANN WALTNER, *GETTING AN HEIR: ADOPTION AND THE CONSTRUCTION OF KINSHIP IN LATE IMPERIAL CHINA* 117-43 (1990).

<sup>76</sup> See, e.g., FENG MENG-LUNG, *STORIES FROM A MING COLLECTION* (Cyril Birch trans., 1958) (translating excerpts from *Gu Jin Xiao Shuo*); PU SUNG-LING, *MORE STRANGE TALES FROM CHINA* (Herbert A. Giles trans., 1988) (translating stories from LIAO CHAI CHIH I); PU SUNG-LING, *STRANGE STORIES FROM A CHINESE STUDIO* (Herbert A. Giles trans., 1880) (translating excerpts from LIAO CHAI CHIH I).

<sup>77</sup> See, e.g., *CELEBRATED CASES OF JUDGE DEE* (Robert Van Gulik trans., 1976) (not to be confused with other stories about Judge Dee written by Van Gulik in the style of the authentic Chinese stories); "THE STONE LION" AND OTHER CHINESE DETECTIVE STORIES (Yin-lien C. Chin et al. trans., 1992).

<sup>78</sup> Three of these plays are available in an exceptionally fine translation with commentary by George Hayden. See GEORGE A. HAYDEN, *CRIME AND PUNISHMENT IN MEDIEVAL CHINESE DRAMA: THREE JUDGE PAO PLAYS* (1978).

<sup>79</sup> See HUANG LIU-HUNG, *A COMPLETE BOOK CONCERNING HAPPINESS AND BENEVOLENCE* (Djang Chu trans. & ed., 1984) (1699).

tia, maintaining a healthy fiscal administration,<sup>80</sup> promoting the public welfare,<sup>81</sup> overseeing the administration of justice,<sup>82</sup> and fulfilling the Confucian ritual obligations of the position.<sup>83</sup> Because the administration of the formal legal system played such a prominent part in the duties of the magistrate, it is unsurprising that a large part of the manual was dedicated to particular problems faced by the magistrate in his judicial role.<sup>84</sup> Throughout the manuals, Huang interweaves theories concerning the proper administration of justice with recommended procedures for magistrates to follow in supervising criminal investigations,<sup>85</sup> interrogating witnesses,<sup>86</sup> and adjudicating lawsuits.<sup>87</sup> Huang also wrote about specific cases that he had adjudicated, providing us with a glimpse of how magistrates constructed legal "cases" from the raw material of local disputes, what they saw as their appropriate role in the resolution of these cases, and how they perceived their adjudication of cases as satisfying the requirements of justice. Huang's writings also provide part of the source material for Jonathan Spence's brilliantly realized book, *The Death of Woman Wang*<sup>88</sup>—a richly imagined work exploring the possibilities for justice in a poor, rural county of northeastern China during the early Qing Dynasty.

As I hope I have already made clear, the comparative study of Chinese law would do well to move in the emic direction charted by the interpretive turn in contemporary anthropology. There is much more that we need to know about the Chinese legal sensibility before we can claim some measure of understanding of the imperial Chinese legal order. We need to explore Chinese normative attitudes towards personal responsibility and liability, causation and moral agency, and wrongful intent and harmful consequences. We could benefit in these projects from historical and ethnographic work exploring the social construction of the self in Chinese culture,<sup>89</sup> because only with

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80 See *id.* at 181-237.

81 See *id.* at 542-54.

82 See *id.* at 251-462.

83 See *id.* at 511-12.

84 See *id.* at 251-462.

85 See *id.* at 253-58, 319-25, 359-375, 380-402, 406-62.

86 See *id.* at 265-79, 326-27, 399-402.

87 See *id.* at 40-41, 265-73.

88 JONATHAN D. SPENCE, *THE DEATH OF WOMAN WANG* (1978). In addition to the usual documentary sources, Spence also makes use of the short stories of P'u Sung-ling, who lived in the county in question, to elucidate the ethos of that time and place.

89 A number of historians have considered the impact of the Confucian vision of the self upon Chinese society. See, e.g., TU WEI-MING, *CONFUCIAN THOUGHT: SELFHOOD AS CREATIVE TRANSFORMATION* (1985); Wm. Theodore de Bary, *Individualism and Humanitarianism in Late Ming Thought*, in *SELF AND SOCIETY IN MING THOUGHT* 145-247 (Wm. Theodore de Bary ed., 1970); Wm. Theodore de Bary, *Introduction to SELF AND SOCIETY IN MING THOUGHT* 12-24 (Wm. Theodore de Bary ed., 1970); Mark Elvin, *Between the Earth and*

an understanding of the nature of the self in a society<sup>90</sup> can we proceed to fruitful inquiry as to the relationship of that self to the social order, and the interrelationship between the social order and the natural order. Just as the modern Western legal order is premised upon the autonomous, individualistic rights-bearing self of the post-Enlightenment Western normative order,<sup>91</sup> so too the Chinese legal order cannot be understood without an appreciation for the Chinese concept of the self.

The self as imagined in China is not the autonomous, atomistic individual of the liberal Western imagination,<sup>92</sup> but rather a fundamentally relational and social self:

Rather than creating discrete and unified ontological categories of persons each having the same equality of rights, it appears that the Chinese subscribe to a relational construction of persons. That is to say, the autonomy and rights of persons and the sense of personal identity are based on differential moral and social statuses and the moral claims and judgments of others. Chinese personhood and

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*Heaven: Conceptions of the Self in China*, in *THE CATEGORY OF THE PERSON: ANTHROPOLOGY, PHILOSOPHY, HISTORY* 156 (Michael Carrithers et al. eds., 1985). Anthropologists, too, have focussed attention upon various aspects of the construction of the self in Chinese culture. See, e.g., MARGERY WOLF, *A THRICE-TOLD TALE: FEMINISM, POSTMODERNISM, AND ETHNOGRAPHIC RESPONSIBILITY* (1992) 113-16 (highlighting the importance of gender for the social construction of the self in China); Mayfair Mei-hui Yang, *The Gift Economy and State Power in China*, 31 *COMP. STUD. IN SOC'Y & HIST.* 25, 39-44 (1989) (considering the relational networks of reciprocity, status, and obligation inherent in the concept of *guanxi* as key to the Chinese sense of self). Cf. *EXPRESSIONS OF SELF IN CHINESE LITERATURE* (Robert E. Hegel & Richard C. Hessney eds., *Studies in Oriental Culture*, No. 19 1985) (exploring Chinese concepts of the self as exemplified within the Chinese literary tradition); BERNARD FAURE, *CHAN INSIGHTS AND OVERSIGHTS: AN EPISTEMOLOGICAL CRITIQUE OF THE CHAN TRADITION* 243-68 (1993) (reflecting upon the concept of the self in Chan Buddhism).

<sup>90</sup> On the cultural variability of the social construction of the self, see generally Richard A. Shweder & Edmund J. Bourne, *Does the Concept of the Person Vary Cross-Culturally?* in *CULTURE THEORY: ESSAYS ON MIND, SELF, AND EMOTION* 158 (Richard A. Shweder & Robert A. LeVine eds., 1984); Milton Singer, *Signs of the Self: An Exploration in Semiotic Anthropology*, 82 *AM. ANTHROPOLOGIST* 485, 485-507 (1980).

<sup>91</sup> It has been suggested that the origin of the autonomous Western self lies not in the classical tradition, as often assumed, but rather in Anglo-Saxon tribal conceptions of the primacy of the individual in their cultural world, a world marked by an unusual paucity of kinship relations. See Robin Fox, *The Virgin and the Godfather: Kinship Versus the State in Greek Tragedy and After*, in *ANTHROPOLOGY AND LITERATURE* 107, 108-09 (Paul Benson ed., 1993).

<sup>92</sup> The Western construct of the self is, in fact, an unusual construct in comparison with concepts of the self prevalent in non-Western cultures:

The Western conception of the person as a bounded, unique, more or less integrated motivational and cognitive universe, a dynamic center of awareness, emotion, judgment, and action organized into a distinctive whole and set contrastively both against other such wholes and against its social and natural background is, however incorrigible it may seem to us, a rather peculiar idea within the context of the world's cultures.

GEERTZ, "From the Nature's Point of View": *On the Nature of Anthropological Understanding*, *supra* note 53, at 59.

personal identity are not given in the abstract as something intrinsic to and fixed in human nature, but are constantly being created, altered, and dismantled in particular social relationships. Furthermore, the boundaries of personhood are permeable and can easily be enlarged to encompass a scope beyond that of the biological individual. As a result, Chinese culture presents a frequent lack of clear-cut boundaries between self and other.<sup>93</sup>

Without an understanding of this basic normative framework governing the perceived nature of personhood within Chinese culture, it is impossible to attempt to illuminate concepts within the Chinese legal normative order, such as the distribution of rights and obligations of the participants in that normative universe.<sup>94</sup>

Keeping in mind these overarching cultural constructs such as the nature of the self, the comparativist could then look more specifically at questions inherent in the Chinese legal order—asking, for instance, how the Chinese legal sensibility responded to wrongful behavior in the light of its assumptions about human nature; examining both formal and informal practices of dispute resolution in the light of Chinese normative values of community consensus and accommodation; inquiring about the ways in which asymmetrical power relationships of class, gender, and other social hierarchies affected the discursive practice and the normative fabric of a legal order predicated upon the affirmative sanctioning of that system of social hierarchy. The challenges and problems inherent in Chinese legal studies are not unique to that field, but are shared by all scholars seeking to understand non-Western legal systems. As this consideration of imperial Chinese legal studies shows, an emic approach to comparative legal studies is both possible and desirable as a methodological perspective. By taking a more emic approach to the interpretive study of non-Western law, comparative legal scholars will fulfill in our scholarship and teaching the obligation to “regulate the names” that we use to describe the foreign legal order, ensuring that our language “appl[ies] correctly to the realities [it] designate[s] . . . [A]nd discriminates properly between things that are the same and those that

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<sup>93</sup> Yang, *supra* note 89, at 39.

<sup>94</sup> For some examples by contemporary anthropologists demonstrating how an understanding of the cultural construction of the self can elucidate the nature of that self within the legal order, see CAROL J. GREENHOUSE, *PRAYING FOR JUSTICE: FAITH, ORDER AND COMMUNITY IN AN AMERICAN TOWN* (1986) (illustrating the role of legal normative values in the construction of the self in relation to the community among the members of a Southern Baptist sub-culture); LAWRENCE ROSEN, *BARGAINING FOR REALITY: THE CONSTRUCTION OF SOCIAL RELATIONS IN A MUSLIM COMMUNITY* 165-79 (1984) (explaining the construction of the self in Moroccan village culture and its effect on the legal order); Akhil Gupta, *The Reincarnation of Souls and the Rebirth of Commodities: Representations of Time in 'East' and 'West,'* 22 *CULTURAL CRITIQUE* 187, 205 (1992) (observing that Western contract law would be seriously undermined by the concept of the self implicit in reincarnation).



are different,"<sup>95</sup> accomplishing, in our own cultural context and for our own intellectual purposes, a rectification of names.

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<sup>95</sup> HSÜN TZU, *supra* note 1, at 142.