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## The Study of Chinese law in the United States: Reflections on the Past and Concerns about the Future

Stanley Lubman

*University of California, Berkeley*

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## THE STUDY OF CHINESE LAW IN THE UNITED STATES: REFLECTIONS ON THE PAST AND CONCERNS ABOUT THE FUTURE

STANLEY LUBMAN\*

I am pleased to write in honor of Bill Jones by reflecting here on the study of Chinese law, which has occupied us both since the early 1960s and has since grown far beyond its narrow scope at that time. In the pages that follow, I first survey the development and current state of the field by reviewing American scholarship on some major areas of Chinese law from those early days up to the present. I am also pleased to use this review as a vehicle for noting, in particular, some of Bill's contributions to our inquiries. Some related activities are addressed, such as scholarly exchanges and the relevance of foreign assistance to Chinese law reform. Then, against this background, I comment on the current scene and address the challenges that Chinese law continues to present to Western attempts at understanding China.<sup>1</sup>

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\* Lecturer in Law and Visiting Scholar, Center for the Study of Law and Society, University of California (Berkeley). The author has specialized in Chinese law since 1963 in a dual career as a scholar and as a practicing lawyer. From 1972 to 1997 he headed the China practice at two American law firms and an English firm of solicitors. Since 1967 he has been teaching on Chinese law at numerous U.S. and European law schools, and since 1997 he has been the advisor on legal projects in China to the Asia Foundation.

1. My overview of the scholarship is impressionistic and does not attempt to be comprehensive. I have focused mostly on the work of American legal scholars, although I have also made a few grateful nods to historians of Chinese law and to a few social scientists. I also draw on an earlier review of the field. See Stanley Lubman, *Studying Contemporary Chinese Law: Limits, Possibilities and Strategy*, 39 AM. J. CONTEMP. L. 293 (1991). In this Article, I emphasized scholarship of the most recent two decades.

## THE 1960S: EXPLORING THE OTHER SIDE OF THE MOON

When we began, China was inaccessible to almost all Americans, including the handful of scholars who were then investigating Chinese law. There was little enough to study—the institutions denominated as “political-legal” were crude tools of the Party-state in the 1950s, further politicized in the anti-rightist movement of 1957-1958, and swept aside during the Cultural Revolution. Today’s students of Chinese law, confronting the vast array of materials available today in hard copy and on Chinese and Western websites, cannot imagine how scarce our resources were in the 1960s and most of the 1970s: “incomplete collections of statutes, a few law textbooks . . . and a few legal journals, of which one ceased publication in 1966 and the other was only published for two years.”<sup>2</sup>

Literally and figuratively, Hong Kong was as close as we could get to China. Useful research was conducted in Hong Kong, often using émigré interviews, but all the same, studying the law and administration in China at that time was an arcane activity done from afar.

The scholarship of that time focused largely on extra-judicial mediation and a variety of sanctioning institutions, both through the criminal process and otherwise. Studies sought to find the roots of practice in Legalism, the Soviet model, the experience of the Chinese Communist Party (CCP) in ruling the “liberated areas” before their victory in 1949, or some mixture of these possible influences.<sup>3</sup>

## THE 1970S: EXPLORING THE FRONTIER

Sino-American détente in 1972 made it possible for American scholars, as well as lawyers, to travel to China. The handful of academics who began their studies in the 1960s were joined in the 1970s both by younger scholars and by lawyers who wanted to specialize in the nascent China practice. The academics began to develop contacts with Chinese legal scholars even before law schools were reopened in 1979. Also, some became affiliated with law firms and began to spend a considerable amount of time in China engaged in practice. This occurred especially after the Chinese leadership proclaimed the policy of “opening” in the late 1970s, thus signaling China’s new welcome to foreign direct investment.<sup>4</sup>

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2. *Id.* at 297.

3. The scholarship on these issues is distilled in Lubman, *id.* at 299-302 and notes therein.

4. See generally KENNETH LIEBERTHAL, GOVERNING CHINA 122 (1995); BARRY NAUGHTON,

With “opening” and the launching of economic reform, new laws and institutions began to appear with surprising speed.<sup>5</sup> Foreign observers of Chinese law necessarily began to address problems involved in applying to China analytical categories and vocabularies of concepts derived from Western systems. As Bill Jones wrote in 1977, “Law is an outstanding example of the problems one faces in trying to fit the Chinese reality into a Western framework.”<sup>6</sup> We also remained concerned with attempts to analyze the impact of pre-1949 culture, tradition, and history on contemporary institutions. Reform-driven changes that began to appear during the reforms raised another problem that persists to this day: The institutions that we saw still bore a Maoist imprint, and there was uncertainty about how much of the new law on paper was reflected in practice. One issue, for example, is the extent to which Chinese administrative practices long used since 1949 would continue to be employed, such as the use of campaigns to implement policy objectives.<sup>7</sup>

#### 1980-2000: EXPLORING AN UNCHARTED FOREST

The last two decades of the twentieth century saw the Chinese leadership begin to use law as an instrument of governance in a manner relatively more sophisticated than the crude and formalistic copying of Soviet law in the early 1950s or the blunt instrumentalism—and worse—that had followed. An extraordinary outpouring of legislation gave substance to economic reforms, created new institutions and transactions, and established new rights in the context of a transition from a planned economy to an increasingly marketized one. A legal domain appeared in China: The judicial system was revived, law schools multiplied, and a bar was reestablished. . By the 1990s, the legal institutions created during the previous decade began to mature. The volume of litigation involving civil and economic claims filed in Chinese courts grew to slightly over 4.7 million in 2000. In addition, a new field, administrative law, emerged with the enactment of a series of laws that enabled Chinese individuals and organizations affected by allegedly arbitrary acts of the Chinese bureaucracy to challenge Chinese officials, either within the bureaucracy,

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GROWING OUT OF THE PLAN: CHINESE ECONOMIC REFORM 1978-1993 (1995).

5. See generally STANLEY LUBMAN, *BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO* (1999) [hereinafter *BIRD IN A CAGE*] and sources *infra* note 13.

6. William C. Jones, *Understanding Chinese Law: Thought Control in Prewar Japan*, 3 REV. SOCIALIST L. 219, 226 (1977).

7. William C. Jones, *On the Campaign Trail in China*, 5 REV. SOCIALIST L. 457 (1979).

in the courts, or both.<sup>8</sup>

The emergence of institutions and attention to law that was once unimaginable has stimulated Chinese legal studies in the United States. Much scholarly activity was necessarily devoted to the study of new legal rules and practice under them. Initially, the scope of analysis was necessarily limited, due to the often skeletal nature of the legislation and its very newness. Nonetheless, as experience began to accumulate, some lawyers and scholars raised provocative questions of interest to foreign investors, lawyers, and scholars alike.<sup>9</sup> Michael Moser, a practicing lawyer with a strong academic background in Chinese studies, edited a most useful collection of essays on foreign investment laws and problems arising under them.<sup>10</sup> Howard Chao and the late Yang Xiaoping contributed a practical analysis of the law in the emergent private sector.<sup>11</sup> Jerome Cohen and Anthony Dicks presented interpretive overviews that traced both genuine achievements and the continued tension between law and politics.<sup>12</sup> For the most part, however, scholarship on Chinese legal institutions during the two decades under discussion here was limited to exegetical surveys. Moreover, although the number of articles on Chinese law increased greatly, many were law review articles and notes written by students who knew little about China or Chinese law. Practicing lawyers with little knowledge of China also contributed to the quantity of articles, although not necessarily to their quality.

With the expansion of Chinese law and foreign opportunities to study it, scholarship has taken on a new vigor and ventured along new paths. By the beginning of the twenty-first century, the reforms had continued on long enough for foreign observers to engage in broad surveys examining the attainment of Chinese legal reforms and the formidable obstacles that

8. In addition to the civil and economic law cases, 85,000 administrative cases were received. ZHONGGUO FALU NIANJIAN SHE, ZHONGGUO FALU NIANJIAN [CHINA LAW YEARBOOK] 1257-58 (2001). On administrative law, see *infra* notes 42 and 43 and accompanying text.

9. See, e.g., Jerome Cohen & Stuart Valentine, *Foreign Direct Investment in the People's Republic of China: Progress, Problems and Proposals*, 1 J. CHINESE L. 161 (1987); Stanley Lubman, *Equity Joint Ventures in China: New Legal Framework, Continuing Questions*, in 2 CHINA'S ECONOMY LOOKS TOWARD THE YEAR 2000, SELECTED PAPERS SUBMITTED TO THE JOINT ECONOMIC COMMITTEE OF THE UNITED STATES CONGRESS 432 (May 21, 1986).

10. MICHAEL J. MOSER, *FOREIGN TRADE, INVESTMENT AND THE LAW IN THE PEOPLE'S REPUBLIC OF CHINA* (2d ed. 1987).

11. Howard Chao & Yang Xiaoping, *Private Enterprise in China: The Developing Law of Collective Enterprises*, 19 INT'L LAW. 1215 (1985).

12. Jerome A. Cohen, *Tiananmen and the Rule of Law*, in THE BROKEN MIRROR: CHINA AFTER TIANANMEN 323 (George Hicks ed., 1990); Anthony R. Dicks, *The Chinese Legal System: Reforms in the Balance*, 119 CHINA Q. 540 (1989).

confront future reform.<sup>13</sup> It is now possible to look back at some of the scholarship that appeared—at least in 2002 when this essay was written—to have made significant contributions to our understanding of the changes that were unfolding.

### CONTRACTS AND CIVIL LAW

The flood of legislation that poured forth as the reforms gathered momentum did nothing less than create a body of civil law to govern economic transactions that had previously been illegal or unknown. Western scholars began to find much to ponder. Bill Jones was in the forefront of those who tried to grapple with the conceptual and practical issues that began to appear as the new concept of civil law emerged. We are indebted to him for his translation of an early draft code and two collections of cases,<sup>14</sup> which was followed by a translation of China's first civil law codification, the General Principles of Civil Law (GPCL).<sup>15</sup> These important translations gave foreign observers access to Chinese civil law legislation and judicial decisions in a field of law that was both emergent and critical to the transformation of the Chinese economy and Chinese society. He followed these translations with a scholarly analysis of the new field in two articles.<sup>16</sup> Bill and others noted that in form as well as content, the GPCL reflected the intellectual debt that Chinese law and legal theory owed to continental European law. More specifically, it legislated certain core concepts of the legal institutions that form the foundation for market-economy transactions, namely contract, legal persons, and property rights. As Bill wrote, by defining all those natural and legal "persons" with legal rights who were entitled to legal protection, the drafters of the GPCL made a political statement by giving legal

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13. See, e.g., ALBERT HUNG-YEE CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA (2d ed. 1998); JIANFU CHEN, CHINESE LAW: TOWARD AN UNDERSTANDING OF CHINESE LAW, ITS NATURE AND DEVELOPMENT (1999); CHINA'S LEGAL REFORMS (Stanley Lubman ed., 1996); PITMAN B. POTTER, THE CHINESE LEGAL SYSTEM: GLOBALIZATION AND LOCAL LEGAL CULTURE (2001).

14. William C. Jones, *Civil Law in China*, 18 CHIN. L. GOV'T NOS. 3-4 (1986) (translation of COLLECTION OF CASES ON GENERAL PRINCIPLES OF THE CIVIL LAW); William C. Jones, *Collection of Civil Law Cases from the People's Republic of China*, 10 REV. SOCIALIST L. 169 (1984); William C. Jones, *A Translation of the Fourth Draft of the Civil Code (June 1982) of the People's Republic of China*, 10 REV. SOCIALIST L. 193 (1984).

15. William C. Jones, *The General Provisions of Civil Law of the People's Republic of China*, 13 REV. SOCIALIST L. 357 (1987).

16. 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, *Sources of Chinese Obligation Law*, 52 LAW & CONTEMP. PROBS. 69 (Summer 1989).

recognition to the economic activities in which such “persons” were engaged.<sup>17</sup> Beyond that, Bill pointed to the disjunction between the complexity of the GPCL and the level of legal training in China at the time<sup>18</sup> (which now, sixteen years after he noted this concern, still exists). In that article, he became one of the first Western scholars to focus on an emerging function of the Supreme People’s Court. Under the Chinese Constitution and Chinese legal doctrine, courts are limited to applying legislative norms in the narrowest possible manner and without precedential effect. Despite these limits, the Court has undertaken to issue interpretations of legislation that clarify and fill gaps in enacted laws. This device has enabled the Court, by interpreting the General Principles and other pieces of legislation, to adjust new legislation to the fast-moving realities of continuously unfolding economic and social changes that were—and are—generated by the economic reform.<sup>19</sup>

Among the growing body of scholarship on China’s emerging civil law is compelling work by political scientist Daniel Rubenstein<sup>20</sup> and Pitman Potter’s analysis of the Economic Contract Law,<sup>21</sup> which governed transactions among Chinese domestic entities until it was superseded by the Uniform Contract Law adopted in 1999. Of particular interest are three articles on practice in the settlement of contract disputes during the 1980s.<sup>22</sup> Most recently, the new Contract Law has already begun to generate much scholarly activity.<sup>23</sup> Another area of civil law that has

17. See Jones, *Some Questions Regarding the Significance of the General Provisions of Civil Law of the People’s Republic of China*, *supra* note 16, at 325.

18. William C. Jones, *The New General Rules: A Realistic Perspective on Chinese Civil Law*, 4 E. ASIAN EXECUTIVE REP. 9 (1986).

19. See *infra* note 36.

20. Daniel Rubenstein, *Transaction Costs and Market Culture Under China’s Contract Law Reform* (1996) (unpublished Ph.D. dissertation, University of Minnesota) (on file with author); Daniel Rubenstein, *Legal and Institutional Uncertainties in the Domestic Contract Law of the People’s Republic of China*, 42 MCGILL L.J. 495 (1997).

21. PITMAN B. POTTER, *THE ECONOMIC CONTRACT LAW OF CHINA: LEGITIMATION AND CONTRACT AUTONOMY IN THE PRC* (1993). For another study of Chinese civil law before the Contract Law, see JIANFU CHEN, *FROM ADMINISTRATIVE AUTHORISATION TO PRIVATE LAW: A COMPARATIVE PERSPECTIVE OF THE DEVELOPING CIVIL LAW IN THE PEOPLE’S REPUBLIC OF CHINA* (1995).

22. Phyllis Chang, *Deciding Disputes: Factors that Guide Chinese Courts in the Adjudication of Rural Responsibility Contract Disputes*, 52 LAW & CONTEMP. PROBS. 101 (Summer 1989); Lucie Cheng & Arthur Rosett, *Contract with a Chinese Face: Socially Embedded Factors in the Transformation from Hierarchy to Market, 1979-1989*, 5 J. CHINESE L. 143, 219 (1991); David Zweig et al., *Law, Contracts, and Economic Modernization: Lessons from the Recent Chinese Rural Reforms*, 23 STAN. J. INT’L L. 319 (1987).

23. See, e.g., Lutz-Christian Wolff & Bing Ling, *The Risk of Mixed Laws: The Example of Indirect Agency Under Chinese Contract Law*, 15 COLUM. J. ASIAN L. 173 (2002) (including sources cited therein, especially at 176 n.17).

developed as part of legal institution-building is inheritance law; Frances Foster is one of the few Western scholars to study it closely.<sup>24</sup>

#### CRIMINAL LAW AND PROCEDURE

Codes of criminal law and criminal procedure were promulgated for the first time in the People's Republic of China (PRC) in 1979.<sup>25</sup> Veteran observers of Soviet law saw a continuing emphasis on revolution in the new Criminal Law.<sup>26</sup> At the same time, the Law departed from previous practice by outlining a sanctioning system governed by law rather than by policy and that purported to make courts significant participants in the criminal process vis-à-vis the Public Security apparatus. Bill Jones was able to find Western patterns in the new code. At the same time, he shared in the concerns of other foreign observers, asking whether the new code would affect police and Party dominance of the criminal process.<sup>27</sup> Donald Clarke, while still a student at the Harvard Law School, wrote a crisp analysis of the effect of campaigns on criminal sanctioning.<sup>28</sup> Additionally, the late Timothy Gelatt inquired into Chinese difficulties with the concept of the presumption of innocence.<sup>29</sup> Throughout the 1990s, the criminal process remained an area of law that most clearly bore the stamp of the Maoist era.<sup>30</sup> After revision of the Code of Criminal Procedure Law and the Criminal Law in 1996 and 1997, excellent analyses by Jonathan Hecht

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24 Frances H. Foster, *Towards a Behavior-Based Model of Inheritance?: The Chinese Experiment*, 32 U.C. DAVIS L. REV. 77 (1998); Frances H. Foster, *Linking Support and Inheritance: A New Model from China*, 1999 WIS. L. REV. 1199.

25. *Criminal Law of the People's Republic of China*, 73 J. CRIM. L. & CRIMINOLOGY 138 (1982) (adopted July 1, 1979, effective Jan. 1, 1980); *Criminal Procedure Law of the People's Republic of China*, 73 J. CRIM. L. & CRIMINOLOGY 171 (1982) (adopted July 1, 1979, effective Jan. 1, 1980).

26. Harold J. Berman et al., *A Comparison of the Chinese and Soviet Codes of Criminal Law and Procedure*, 73 J. CRIM. L. & CRIMINOLOGY 238 (1982).

27. William C. Jones, *The Criminal Law in the People's Republic of China*, 6 REV. SOCIALIST L. 405 (1980).

28. Note, *Concepts of Law in the Chinese Anti-Crime Campaign*, 98 HARV. L. REV. 1890 (1985).

29. Timothy A. Gelatt, *The People's Republic of China and the Presumption of Innocence*, 73 J. CRIM. L. & CRIMINOLOGY 259 (1982).

30. See, e.g., JEAN-LOUIS ROCCA, *L'EMPIRE ET SON MILIEU: LA CRIMINALITÉ EN CHINE POPULAIRE* (1991); LAWYERS COMMITTEE FOR HUMAN RIGHTS, *CRIMINAL JUSTICE WITH CHINESE CHARACTERISTICS: CHINA'S CRIMINAL PROCESS AND VIOLATIONS OF HUMAN RIGHTS* (1993); Donald C. Clarke & James V. Feinerman, *Antagonistic Contradictions: Criminal Law and Human Rights in China*, in *CHINA'S LEGAL REFORMS*, supra note 13, at 135-54. See Fu Hualing, *A Bird in the Cage: Police and Political Leadership in Post-Mao China*, 4 POLICING SOC'Y 277 (1994) (on the police). See JEAN-LUC DOMENACH, *CHINE: L'ARCHIPEL OUBLIÉ* (1994) (on labor reform camps and prisons); JAMES D. SEYMOUR & RICHARD ANDERSON, *NEW GHOSTS, OLD GHOSTS: PRISONS AND LABOR REFORM CAMPS IN CHINA* (1998) (same).



and Donald Clarke,<sup>31</sup> respectively, clarified the departure from some institutions and practices of the pre-reform period and simultaneous adherence to others. Additionally, Fu Hualing, then of the City University of Hong Kong and more recently of Hong Kong University, contributed studies of the Criminal Procedure Law.<sup>32</sup>

### *Courts and Mediation*

At the heart of the legal reforms has been the rebuilding of the courts, which, since 1949 (with the exception of a brief period of experimentation in 1956-1957 with a somewhat less politicized judicial system), had been only mouthpieces of policy and had been otherwise wrecked and made irrelevant by the Cultural Revolution.

The lowly position of judges in the new system and the maintenance of CCP supremacy over the courts has been the focus of a number of studies.<sup>33</sup> The dynamics of the judicial system and difficulties encountered by Chinese litigants in enforcing judgments have been meticulously described by Donald Clarke in several articles.<sup>34</sup> A number of surveys focused on problems such as the low level of legal education among the judges, the influence of “local protectionism,” and the extent to which the Chinese judicial process more closely resembles decision-making by bureaucrats rather than Western-style adjudication.<sup>35</sup> Several scholars have

31. LAWYERS COMMITTEE FOR HUMAN RIGHTS, *OPENING TO REFORM? AN ANALYSIS OF CHINA'S REVISED CRIMINAL PROCEDURE LAW* (1996). LAWYERS COMMITTEE FOR HUMAN RIGHTS, *WRONGS AND RIGHTS: A HUMAN RIGHTS ANALYSIS OF CHINA'S REVISED CRIMINAL LAW* (1998).

32. H.L. Fu, *Criminal Defense in China: The Possible Impact of the 1996 Criminal Procedural Law Reform*, 153 CHINA Q. 31 (1998); see also Susan Finder & Fu Hualing, *Tightening Up Chinese Courts' "Bags": The Amended PRC, Criminal Law*, CHINA L. & PRAC., June 1997, at 35.

33. See, e.g., Hikota Koguchi, *Some Observations about "Judicial Independence" in Post-Mao China*, 7 B.C. THIRD WORLD L.J. 195 (1987); Margaret Y.K. Woo, *Adjudication Supervision and Judicial Independence in the P.R.C.*, 39 AM. J. COMP. L. 95 (1991).

34. Donald C. Clarke, *Dispute Resolution in China*, 5 J. CHINESE L. 245 (1991); Donald C. Clarke, *Power and Politics in the Chinese Court System: The Enforcement of Civil Judgments*, 10 COLUM. J. ASIAN L. 1 (1996).

35. See, e.g., Jerome A. Cohen, *Reforming China's Civil Procedure: Judging the Courts*, 45 AM. J. COMP. L. 793 (1997); BIRD IN A CAGE, *supra* note 5, at 250-97. For a useful general survey written for the foreign lawyer, see Helena Kolenda et al., *People's Republic of China*, in *ENCYCLOPEDIA OF INTERNATIONAL COMMERCIAL LITIGATION* (Sir Anthony Colman ed., 1995). Although his article does not attempt to survey Chinese legal scholarship, I cannot ignore the opportunity to note the acute insights into the Chinese courts made by Professor He Weifang of the Beijing University Law faculty. See, e.g., He Weifang, *Tongguo Sifa Shixian Shehui Zhengyi: Dui Zhongguo Faguan Xianzhuang De Yige Toushi* [*The Realization of Social Justice Through Judicature: A Look at the Current Situation of Chinese Judges*], ZOU XIANG QUANLI DE SHIDAI: ZHONGGUO GONGMIN QUANLI FAZHAN YANJIU [TOWARD A TIME OF RIGHTS: A PERSPECTIVE OF THE CIVIL RIGHTS DEVELOPMENT IN CHINA] 209-84 (Xia Yong ed., 1995).

focused on the role and operation of the Supreme People's Court, particularly the extent to which it has used its power to interpret laws in order to try to adapt them to the rapid institutional evolution and social change set in motion by economic reform.<sup>36</sup>

Although field research and close observation of the courts in action has generally not been possible, at least for foreign scholars, the first beginnings of such research suggest that the establishment and maintenance of a judicial system is not likely to change quickly the legal culture of either litigants or judges who are unaccustomed to Western-type legal reasoning and argumentation.<sup>37</sup> And yet, despite the problems facing the courts, they have begun to become attractive fora to some Chinese seeking redress for conduct perceived to violate legal norms.<sup>38</sup> The twentieth century closed with strong affirmations by the leadership and by the President of the Supreme People's Court regarding the need for further judicial reform to raise the professional level of the courts, reform their methods of decisions, reduce local protectionism, raise the standards of judicial ethics, and stamp out corruption.<sup>39</sup> At the same time, there was little prospect that the position of the courts vis-à-vis the CCP and the organs of the bureaucracy would soon be elevated.

Last, but by no means least, while formal legal processes for settling disputes grew, a slight decrease in the use of mediation was signaled in a drop in the number of cases reported to have been handled by mediation committees. A number of observers have studied changes in this realm.<sup>40</sup>

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36. NANPING LIU, JUDICIAL INTERPRETATION IN CHINA: OPINIONS OF THE SUPREME PEOPLE'S COURT (1997); Susan Finder, *The Supreme People's Court of the People's Republic of China*, 7 J. CHINESE L. 145 (1993); Nanping Liu, *An Ignored Source of Chinese Law: The Gazette of the Supreme People's Court*, 5 CONN. J. INT'L L. 271 (1989); Nanping Liu, *Legal Precedents with Chinese Characteristics: Published Cases in the Gazette of the Supreme People's Court*, 5 J. CHINESE L. 107 (1991).

37. Isabelle Thireau & Hua Linshan, *Legal Disputes and the Debate About Legitimate Norms*, in CHINA REV. 349-78 (Maurice Brosseau et al. eds., 1997); see also Isabelle Thireau, *DISPUTES AU VILLAGE CHINOIS: FORMES DU JUSTE ET RECOMPOSITIONS LOCALES DES ESPACES NORMATIFS* (2001).

38. See, e.g., Note, *Class Action Litigation in China*, 111 HARV. L. REV. 1523 (1998).

39. See *Outline for Reform of People's Courts Released*, BEIJING XINHUA DOMESTIC SERV., Oct. 22, 1999; in FBIS DAILY REP.: CHINA (FBIS-CHI-1999-1023) (Oct. 25, 1999), at [http://wnc.fedworld.gov/cgi-bin/retrieve.cgi?IOI=FBIS\\_clear&docname=0fk6frx0418q2a&CID=C964172362381250237380120](http://wnc.fedworld.gov/cgi-bin/retrieve.cgi?IOI=FBIS_clear&docname=0fk6frx0418q2a&CID=C964172362381250237380120); *Renmin Fayuan Wu Nian Gaige Gangyao*, [Five-Year People's Courts Reform Program] ZHONGHUA RENMIN GONGHEGUO ZHUGAO REMIN FAYUAN GONGGAO [GAZETTE OF THE SUPREME PEOPLE'S COURT OF THE PEOPLE'S REPUBLIC OF CHINA] No. 6 (1999) 182-90, at <http://www.china.judge.com/fnsx/fnsx386.htm>.

40. Michael Palmer, *The Revival of Mediation in the People's Republic of China: Extra-Judicial Mediation*, in YEARBOOK ON SOCIALIST LEGAL SYSTEMS 219-77 (William Elliott Butler ed., 1987); Michael Palmer, *The Revival of Mediation in the People's Republic of China: Judicial Mediation*, in YEARBOOK ON SOCIALIST LEGAL SYSTEMS 143-69 (William Elliott Butler ed., 1988); Fu Hualing,

*Administrative Law*

A new field of law appeared during the 1990s and gave promise that it was likely to grow. The Administrative Litigation Law was enacted in 1989 and came into effect in 1990. It was followed by a number of other pieces of legislation that conferred the right of persons or organizations affected by allegedly illegal acts of state agencies to seek legal redress in the courts or via review within the relevant administrative hierarchy.<sup>41</sup> Nonetheless, the scope of the law is limited. Just to name two obvious limitations, plaintiffs can only complain about the illegality of a specific act rather than the rule on which it was based, and they cannot question the discretion of the agency. Also, in practice, a considerable number of cases are withdrawn after they have been brought, but before a judicial decision has been reached. The circumstances in which withdrawal occurs are not clear; sometimes the agency intimidates the plaintiff or the agency modifies the act complained of because it does not relish being sued. This new and growing body of law has stimulated foreign scholarship. An essay by Pitman Potter, one of the first thorough studies of Chinese administrative practice to appear, was followed by two comprehensive texts.<sup>42</sup> More recent assessments by Minxin Pei and Veron Hung have added to the scholarship on this subject.<sup>43</sup> As noted below, China's accession to the World Trade Organization (WTO) raises issues of whether existing institutions for reviewing bureaucratic acts for illegality comply with WTO standards.

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*Understanding People's Mediation in Post-Mao China*, 6 J. CHINESE L. 211 (1992); BIRD IN A CAGE, *supra* note 5, at 216-49. For an interesting Chinese study based on survey research by two scholars at the Chinese Academy of Social Sciences, see Liu Guangang & Li Cunpeng, *Minjian Tiaojie yu Quanli Baohu [Civil Mediation and the Protection of Rights]*, in ZOUXIANG QUANLI DE SHIDAI: ZHONGGUO GONGMIN QUANLI FAZHAN YANJIU [TOWARD A TIME OF RIGHTS: A PERSPECTIVE OF THE CIVIL RIGHTS DEVELOPMENT IN CHINA] 285-326 (Xia Yong ed., 1995).

41. See BIRD IN A CAGE, *supra* note 5, at 204-16; JIANFU CHEN, *supra* note 13, at 133-66.

42. See Pitman B. Potter, *The Administrative Litigation Law of the PRC: Judicial Review and Bureaucratic Reform*, in DOMESTIC LAW REFORMS IN POST-MAO CHINA 270-304 (Pitman B. Potter ed., 1994); PETER HOWARD CORNE, FOREIGN INVESTMENT IN CHINA: THE ADMINISTRATIVE LEGAL SYSTEM (1996); LIN FENG, ADMINISTRATIVE LAW: PROCEDURES AND REMEDIES IN CHINA (1996); see also Song Bing, *Assessing China's System of Judicial Review of Administrative Actions*, 8 CHINA L. REP. 1 (1994). For an early study, see Susan Finder, *Like Throwing an Egg Against a Stone? Administrative Litigation in the People's Republic of China*, 3 J. CHINESE L. 1 (1987).

43. Minxin Pei, *Citizens v. Mandarins: Administrative Litigation in China*, 152 CHINA Q. 832 (1997); Veron Mei-ying Hung, *Administrative Litigation and Court Reform in the People's Republic of China* (2001) (unpublished D.S.L. dissertation, Stanford Law School) (on file with author).

### *Legal Profession*

The legal profession hardly existed before the Cultural Revolution. During the brief period when Soviet institutions were deemed desirable models, a Soviet style bar was established in some major cities. However, the bar, like other legal institutions, was a casualty of the anti-rightist campaign and had all but disappeared before the Cultural Revolution made lawyers even more politically incorrect than before.<sup>44</sup> The bar was reestablished in 1980, and China probably had close to 150,000 lawyers by 2000.<sup>45</sup> Foreign scholars have watched as the Chinese leadership sought to define the relationship between lawyers and the state, and between lawyers and their clients. Legal ethics also came under closer scrutiny, and were often found wanting. An early study by Timothy Gelatt<sup>46</sup> was followed by one by William Alford.<sup>47</sup> After the Lawyers Law was promulgated in 1997, a comprehensive study was done by Randall Peerenboom,<sup>48</sup> as well as a further study by Alford.<sup>49</sup> A relatively recent development has been the initiation of legal aid schemes to aid the poor and members of groups, such as women, who must overcome considerable cultural barriers in order to obtain legal assistance.<sup>50</sup>

### *Legal Aspects of Foreign Direct Investment*

As might be expected from the growth of foreign direct investment (FDI) since the “opening” policy was announced, new legal institutions and problems encountered by investors have attracted intense attention from practicing lawyers and scholars alike. Here I have limited myself to mentioning only scholarly publications of considerable length. I have quite deliberately excluded the abundant number of professional publications

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44. See, e.g., BIRD IN A CAGE, *supra* note 5, at 79-80.

45. Randall Peerenboom, *The Legal Profession*, in DOING BUSINESS IN CHINA, *infra* note 54, at I-3.1, I-3.12.

46. Timothy A. Gelatt, *Lawyers in China: The Past Decade and Beyond*, 23 N.Y.U. J. INT’L L. & POL. 751 (1991).

47. William P. Alford, *Tasseled Loafers for Barefoot Lawyers: Transformation and Tension in the World of Chinese Legal Workers*, in CHINA’S LEGAL REFORMS, *supra* note 13, at 22-38.

48. LAWYERS COMMITTEE FOR HUMAN RIGHTS, *LAWYERS IN CHINA: OBSTACLES TO INDEPENDENCE AND THE DEFENSE OF RIGHTS* (1998).

49. William P. Alford, *Of Lawyers Lost and Found: Searching for Legal Professionalism in the People’s Republic of China*, in ASIAN LAW AND DEVELOPMENT: UNIVERSAL NORMS AND LOCAL PRACTICES 182 (Arthur Rosett et al. eds., 2002).

50. Benjamin L. Liebman, *Legal Aid and Public Interest Law in China*, 34 TEX. INT’L L.J. 211 (1999); Luo Qizhi, *Legal Aid Practices in the PRC in the 1990s: Dynamics, Contents and Implications*, 4 OCCASIONAL PAPERS/REPRINTS SERIES IN CONTEMP. ASIAN STUD. 1 (1997).

that perform an essential function in keeping lawyers and businesses informed about recent developments as well as inquiring into current problems.<sup>51</sup>

As Chinese legislation and institution-building efforts expanded, observers noted both progress and complications that surrounded the tentative and not always smooth transition from a planned economy to one more market-driven, but still marked by indecisiveness about the future of the considerable state intervention that remains. By the end of the first decade of reform some overviews that appeared took account of progress made and obstacles encountered.<sup>52</sup> As the new decade wore on, FDI continued to receive close scrutiny.<sup>53</sup> The vague boundaries between practitioners and professors has been crossed, happily, by the English law firm Freshfields. Long active in China, Freshfields has taken on responsibility for supervising publication of an encyclopedic work dubbed simply *Doing Business in China*.<sup>54</sup> Now already in two large volumes, the work contains many articles by practicing lawyers and scholars covering a wide range of legal issues and institutions.

### *Arbitration*

As FDI has grown, so too has the number of Sino-Western commercial disputes. With this development, Chinese dispute settlement mechanisms have received more attention among China's trade partners than ever before. The China International Economic and Trade Arbitration

51. These include, just to mention the obvious, CHINA LAW AND PRACTICE, CHINA BUSINESS REVIEW, and books published by Asia Law and Practice in Hong Kong. No attempt has been made to describe the increasingly abundant sources available via the Internet.

52. See, in addition to the articles cited *supra* note 9, James V. Feinerman, *Backwards into the Future*, 52 LAW & CONTEMP. PROBS. 169 (Summer 1989); James V. Feinerman, *Chinese Law Relating to Foreign Investment and Trade: The Decade of Reform in Retrospect*, in CHINA'S ECONOMIC DILEMMAS IN THE 1990S: THE PROBLEMS OF REFORMS, MODERNIZATION, AND INTERDEPENDENCE, STUDY PAPERS SUBMITTED TO THE JOINT ECON. COMM., 102D CONG. 828 (Comm. Print 1991).

53. See, e.g., Pitman B. Potter, *The Legal Framework for Securities Markets in China: The Challenge of Maintaining State Control, and Inducing Investor Confidence*, 7 CHINA L. REP. 61 (1992); PITMAN B. POTTER, FOREIGN BUSINESS LAW IN CHINA: PAST PROGRESS AND FUTURE CHALLENGES (1995); Jerome A. Cohen & John E. Lange, *The Chinese Legal System: A Guide for Investors*, 17 N.Y.L. SCH. J. INT'L & COMP. L. 345 (1997); Stanley B. Lubman, *The Environment for Foreign Business in China: Two Decades of Progress, Continuing Uncertainties*, in DOING BUSINESS IN CHINA, *infra* note 54; Stanley B. Lubman, *The Legal and Policy Environment for Foreign Direct Investment in China: Past Accomplishments, Future Uncertainties*, in PRIVATE INVESTMENTS ABROAD: PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS IN 1997 3.1 (Carol J. Holgren ed., 1998); Pitman B. Potter, *Foreign Investment Law in the People's Republic of China: Dilemmas of State Control*, in CHINA'S LEGAL REFORMS, *supra* note 13, at 155.

54. DOING BUSINESS IN CHINA (Freshfields ed., 2002).

Commission (CIETAC), China's only international arbitration institution from the time its predecessor was created in 1956 until local arbitration commissions were given concurrent jurisdiction over Sino-foreign disputes in 1996, has grown to become one of the world's busiest trade dispute settlement organizations. A useful treatise and a number of articles have been published,<sup>55</sup> including one suggesting that foreign complaints about the influence of local protectionism might be exaggerated.<sup>56</sup> (The same article, however, also indicates that the odds of collecting awards of substantial size outside three major Chinese cities are not very good.)<sup>57</sup> The most critical appraisal of CIETAC is also the most recent, and resonates very strongly with what some veteran foreign practitioners well-acquainted with the commission have long said privately. Jerome Cohen, testifying before the U.S.-China Commission in 2001, drew attention to what he signaled as CIETAC's major defects:

At a minimum, I would surely no longer advise clients to accept CIETAC jurisdiction unless the contract's arbitration clause requires the appointment of a third country national as presiding arbitrator. And CIETAC needs to improve the ethical and professional standards of its staff, prevent breaches of confidentiality and conflicts of interest and insulate its arbitration panels from the hazards of politics, corruption, *guanxi* and ex parte communications that plague the courts.<sup>58</sup>

This criticism echoes the views held by a considerable number of foreign lawyers regarding China's institutions for settling disputes, whether among Chinese or between foreigners and Chinese. However far Chinese legal institutions have come from the legal desert that existed

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55. The treatise is CHENG DEJUN ET AL., *INTERNATIONAL ARBITRATION IN THE PEOPLE'S REPUBLIC OF CHINA: COMMENTARY, CASES AND MATERIALS* (2d ed. 2000); among the articles, see for example, Jerome Alan Cohen, *The Role of Arbitration in Economic Co-operation in China*, FOREIGN TRADE, INVESTMENT AND THE LAW IN THE PEOPLE'S REPUBLIC OF CHINA 508 (Michael J. Moser ed., 1987); William B. Grenner, *The Evolution of Foreign Trade Arbitration in the People's Republic of China*, 21 N.Y.U. J. INT'L L. & POL. 293 (1989); Sally A. Harpole, *Procedures and Practices Under the China International Economic and Trade Arbitration Commission*, DISPUTE RESOLUTION IN THE PRC 51 (Asia Law & Practice ed., 1995); Stanley B. Lubman & Gregory C. Wajnowski, *International Commercial Dispute Resolution in China: A Practical Assessment*, 4 AM. REV. INT'L ARB. 107 (1993).

56. Randall Peerenboom, *Seek Truth from Facts: An Empirical Study of Enforcement of Arbitral Awards in the PRC*, 49 AM. J. COMP. L. 249 (2001). The contrary view is more widely held.

57. *Id.* at 269-70.

58. Jerome A. Cohen, Opening Statement, Before the First Public Hearing at the U.S.-China Commission (June 14, 2001), at <http://www.uscc.gov/tescoh.htm>.

when the reforms began, the way ahead that must be trod before they establish solid credibility remains very long.

### *Legislation and Its Implementation*

Western scholarship has not focused exclusively on economic matters and dispute settlement. A few scholars have turned their attention to law-making, a disorderly field that has appeared chaotic not only to foreigners but to Chinese as well. Perry Keller, whose articles are indispensable guides to this tangle, has intrepidly investigated and analyzed the array of norms and their sources.<sup>59</sup> Murray Scot Tanner, in focusing on the National People's Congress (NPC) and its legislative processes, has guardedly foreseen growing significance in that institution.<sup>60</sup> Michael Dowdle has been a close student of the NPC as well.<sup>61</sup> The increasing assertiveness of local people's congresses has been the focus of Kevin O'Brien's work.<sup>62</sup> Most recently, a volume of essays, *Law-Making in the People's Republic of China*,<sup>63</sup> is an excellent collection of differing Chinese and foreign perspectives.

Penetrating further into practice have been those scholars who have addressed problems with the implementation of these new legal norms. In their daily activities, foreign lawyers have encountered and commented on weak implementation and inconsistencies in the application of laws. With the exception of observers of environmental law, who have pointed out significant deficiencies in China's state capacity to enforce its laws, systematic analyses have been few.<sup>64</sup> An excellent volume of essays on the

59. Perry Keller, *Legislation in the People's Republic of China*, 23 U. BRIT. COLUM. L. REV. 653 (1989); Perry Keller, *Sources of Order in Chinese Law*, 42 AM. J. COMP. L. 711 (1994).

60. Murray Scot Tanner & Chen Ke, *Breaking the Vicious Cycles: The Emergence of China's National People's Congress*, 45 PROBS. POST-COMMUNISM 29 (1998); Murray Scot Tanner, *How a Bill Becomes a Law in China: Stages and Processes in Lawmaking*, in CHINA'S LEGAL REFORMS, *supra* note 13, at 39; MURRAY SCOT TANNER, *THE POLITICS OF LAWMAKING IN POST-MAO CHINA: INSTITUTIONS, PROCESSES, AND DEMOCRATIC PROSPECTS* (1998).

61. Michael W. Dowdle, *The Constitutional Development and Operations of the National People's Congress*, 11 COLUM. J. ASIAN L. 1 (1997); Michael W. Dowdle, *The Political Economics of Constitutional Development in China*, 34 N.Y.U. J. INT'L L. & POL. (forthcoming).

62. Kevin J. O'Brien, *Agents and Remonstrators: Role Accumulation by Chinese People's Congress Deputies*, 138 CHINA Q. 359 (1994); Kevin J. O'Brien, *Chinese People's Congresses and Legislative Embeddedness: Understanding Early Organizational Development*, 27 COMP. POL. STUD. 80 (1994); Kevin J. O'Brien, *Implementing Political Reform in China's Villages*, 32 AUSTL. J. CHINESE AFF. 33 (1994); Kevin J. O'Brien, *Legislative Development and Chinese Political Change*, in BASIC CONCEPTS OF CHINESE LAW 369 (Tahirih V. Lee ed., 1997).

63. LAW-MAKING IN THE PEOPLE'S REPUBLIC OF CHINA (Jan Michiel Otto et al. eds., 2000).

64. William P. Alford & Yuanyuan Shen, *Limits of the Law in Addressing China's Environmental Dilemma*, 16 STAN. ENVTL. L.J. 125 (1997); William P. Alford & Benjamin L.

implementation of law in China, edited by the same scholars who have given us the volume on “law-making” mentioned above, appeared in mid-2002.<sup>65</sup> Of note, too, even as the Maoist era recedes into the past, is the continuing interest in studying the institutions and practices of the 1950s for shedding light on the roots of contemporary practice. One such study is Neil Diamant’s book on implementation of the Marriage Law.<sup>66</sup>

### *Legal Reform*

Legal reform itself has been the subject of close study by academics from a variety of perspectives that have focused on, among other themes, limits on the role of courts,<sup>67</sup> currents in Chinese legal scholarship,<sup>68</sup> the role of the CCP and individual leaders,<sup>69</sup> interactions between institutions and legal culture,<sup>70</sup> the role of non-governmental organizations,<sup>71</sup> and the participation of foreign advisers.<sup>72</sup> The views of Chinese legal reformers have also appeared in American journals.<sup>73</sup>

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Liebman, *Clean Air, Clean Processes? The Struggle over Air Pollution Law in the People’s Republic of China*, 52 HASTINGS L.J. 703 (2001).

65. IMPLEMENTATION OF LAW IN THE PEOPLE’S REPUBLIC OF CHINA (Jianfu Chen et al. eds., 2002) [hereinafter IMPLEMENTATION OF LAW].

66. NEIL DIAMANT, *REVOLUTIONIZING THE FAMILY: POLITICS, LOVE, AND DIVORCE IN URBAN AND RURAL CHINA, 1949-1968* (2000).

67. Anthony R. Dicks, *Compartmentalized Law and Judicial Restraint: An Inductive View of Some Jurisdictional Barriers to Reform*, in CHINA’S LEGAL REFORMS, *supra* note 13, at 82.

68. RONALD C. KEITH, *CHINA’S STRUGGLE FOR THE RULE OF LAW* (1994); Ronald C. Keith, *Post-Deng Jurisprudence: Justice and Efficiency in a “Rule of Law” Economy*, 45 PROBS. POST-COMMUNISM 48 (1998).

69. Pitman B. Potter, *Peng Zhen: Evolving Views on Party Organization and Law*, in CHINA’S ESTABLISHMENT INTELLECTUALS 21-50 (Carol Lee Hamrin & Timothy Cheek eds., 1986); Pitman B. Potter, *Curbing the Party: Peng Zhen and Chinese Legal Culture*, 45 PROBS. POST-COMMUNISM 17 (1998).

70. Pitman B. Potter, *Socialist Legality and Legal Culture in Shanghai: A Survey of the Getihu*, 9 CAN. J.L. & SOC’Y 41 (1994); Pitman B. Potter, *Riding the Tiger: Legitimacy and Legal Culture in Post-Mao China*, 138 CHINA Q. 325 (1994); PITMAN B. POTTER, *GUANXI AND THE PRC LEGAL SYSTEM: FROM CONTRADICTION TO COMPLEMENTARITY* (Woodrow Wilson Center for Scholars ed., 2000).

71. C. David Lee, *Legal Reform in China: A Role for Nongovernmental Organizations*, 25 YALE J. INT’L L. 363 (2000).

72. Ann Seidman & Robert B. Seidman, *Drafting Legislation for Development: Lessons from a Chinese Project*, 44 AM. J. COMP. L. 1 (1996).

73. E.g., Jiang Ping, *Chinese Legal Reform: Achievements, Problems and Prospects*, 9 J. CHINESE L. 67 (1995).



*Western Studies of Chinese Legal History*

Throughout recent decades of scholarship on contemporary Chinese law, an earlier tradition of scholarship in Chinese legal history has been continued by a small number of able scholars whose numbers have happily grown in recent years and infused new energy into the field. When current-day scholars of Chinese law began their work, they were very fortunate to have, at hand, excellent guides to the legal tradition and institutions of the past.<sup>74</sup> Although written forty years ago, these guides had already questioned an old saw that had respectable ancestry in the work of Max Weber, who had stated that China had no legal system, and demonstrated the operation of institutions that performed legal functions despite the absence of a formal “civil law.”<sup>75</sup>

As the scope, at least on paper, of Chinese law expanded outside the highly specialized activities of the scholars studying it, there grew the danger of forgetting history. By the beginning of the twenty-first century, the reform era was over twenty years old, and both Maoist-era and pre-1949 legal history were becoming increasingly remote in the face of the powerful economic forces and social changes that have been unleashed by the economic reforms. Fortunately, a few legal specialists remain interested in the past, alongside the historians who have come to the rescue. Studies of commercial dispute settlement,<sup>76</sup> the criminal process<sup>77</sup> and litigation<sup>78</sup> under the Qing, the status and treatment of foreigners

74. No attempt has been made here to inventory completely the rich materials that were available, but among those that come to mind are DERK BODDE & CLARENCE MORRIS, *LAW IN IMPERIAL CHINA* (1967); CHARLES O. HUCKER, *THE CENSORIAL SYSTEM OF MING CHINA* (1966); T'UNG-TSU CH'Ü, *LOCAL GOVERNMENT IN CHINA UNDER THE CH'ING* (1962); T'UNG-TSU CH'Ü, *LAW AND SOCIETY IN TRADITIONAL CHINA* (1961); SYBILLE VAN DER SPRENKEL, *LEGAL INSTITUTIONS IN MANCHU CHINA: A SOCIOLOGICAL ANALYSIS* (1962); Derk Bodde, *Basic Concepts of Chinese Law: The Genesis and Evolution of Legal Thought in Traditional China*, 107 *PROC. AM. PHIL. SOC.* 375 (1963).

75. See also William P. Alford, *The Inscrutable Occidental? Implications of Roberto Unger's Uses and Abuses of the Chinese Past*, 64 *TEX. L. REV.* 915 (1986) (examining a latter-day assertion of a view derived from Weber).

76. Rosser H. Brockman, *Commercial Contract Law in Late Nineteenth-Century Taiwan*, in *ESSAYS ON CHINA'S LEGAL TRADITION* 76-136 (Jerome Alan Cohen et al. eds., 1980); Fu-mei Chang Chen & Ramon H. Myers, *Customary Law and the Economic Growth of China During the Ch'ing Period (Part 1)*, 3 *CH'ING-SHIH WEN-T'Û* no. 5, 1 (1976); Fu-mei Chang & Ramon H. Myers, *Customary Law and the Economic Growth of China During the Ch'ing Period (Part 2)*, 3 *CH'ING-SHIH WEN-T'Û* 4 (1978).

77. William P. Alford, *Of Arsenic and Old Laws: Looking Anew at Criminal Justice in Late Imperial China*, 72 *CAL. L. REV.* 1180 (1984); Jonathan Ocko, *I'll Take It All the Way to Beijing: Capital Appeals in the Qing*, 47 *J. ASIAN STUD.* 291 (1988).

78. PHILIP C.C. HUANG, *CIVIL JUSTICE IN CHINA: REPRESENTATION AND PRACTICE IN THE QING* (1996); MELISSA MACAULAY, *SOCIAL POWER AND LEGAL CULTURE: LITIGATION MASTERS IN LATE*

under the Qing,<sup>79</sup> a conference volume on Chinese legal history that appeared in 1980,<sup>80</sup> studies of the legal institutions of the first half of the twentieth century that preceded Communist victory,<sup>81</sup> and of links between the current-day Company Law and its predecessors were added to the earlier body of work.<sup>82</sup> Major contributions are included in two conference volumes of essays: one that has explored civil law under the Qing as well as in the Republic of China,<sup>83</sup> and another that has examined concepts related to the rule of law in traditional, Republican, and contemporary China.<sup>84</sup> The Chinese legal tradition itself continues to invite reexamination.<sup>85</sup>

Bill Jones has been one of the few students of modern Chinese law who has also maintained a focus on Chinese legal history throughout his career. In particular, after publishing several articles on Qing law and institutions,<sup>86</sup> he devoted years of effort to a major contribution to scholarship on Chinese legal history, his translation and analysis of the Qing Code, for which generations of students and scholars will surely be grateful.<sup>87</sup> Although he has been one of the few law-trained specialists in contemporary Chinese law to cross the line between the disciplines in order to approach Chinese legal history, a considerable number of historians of China have made the journey in the opposite direction, as the citations in the previous paragraph should indicate. These are welcome developments in light of what has often been mutual isolation of different disciplines in the study of Chinese law.<sup>88</sup>

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IMPERIAL CHINA (1998).

79. Randle R. Edwards, *Ch'ing Legal Jurisdiction Over Foreigners*, in *ESSAYS ON CHINA'S LEGAL TRADITION*, 222-69 (Jerome Alan Cohen et al. eds., 1980).

80. *ESSAYS ON CHINA'S LEGAL TRADITION* (Jerome Alan Cohen et al. eds., 1980).

81. Alison W. Conner, *Lawyers and the Legal Profession During the Republican Period*, in *CIVIL LAW IN QING AND REPUBLICAN CHINA*, *infra* note 83, at 215; Madelein Zelin, *Merchant Dispute Mediation in Twentieth-Century Zigong, Sichuan*, in *CIVIL LAW IN QING AND REPUBLICAN CHINA*, *infra* note 83, at 249.

82. William C. Kirby, *China Unincorporated: Company Law and Business Enterprise in Twentieth-Century China*, 54 *J. ASIAN STUD.* 43 (1995); Teemu Ruskola, *Conceptualizing Corporations and Kinship: Comparative Law and Development Theory in a Chinese Perspective*, 52 *STAN. L. REV.* 1599 (2000).

83. *CIVIL LAW IN QING AND REPUBLICAN CHINA* (Kathryn Bernhardt & Philip C.C. Huang eds., 1994).

84. *THE LIMITS OF THE RULE OF LAW IN CHINA* (Karen G. Turner et al. eds., 2000).

85. *See, e.g.*, GEOFFREY MACCORMACK, *THE SPIRIT OF TRADITIONAL CHINESE LAW* (1996); GEOFFREY MACCORMACK, *TRADITIONAL CHINESE PENAL LAW* (1990).

86. William C. Jones, *Studying Ch'ing Code: The Ta Ch'ing Lu Li*, 22 *AM. J. COMP. L.* 330 (1974); William C. Jones, *Review Article of Metzger, the International Organization of Ch'ing Bureaucracy*, 1974 *WASH. U. L.Q.* 517.

87. *THE GREAT QING CODE* (William C. Jones ed., 1994).

88. Noting the inattention to law of many China scholars in history and the social sciences, see

*Chinese Legal Culture and Western Views*

In the scholarship on contemporary Chinese law, efforts to identify and understand contemporary institutions—which have appeared, ebbed, and flowed with dizzying swiftness—are often linked with attempts to analyze them for evidence of their impact on Chinese culture. In studying Chinese law, it is appropriate to place special emphasis on legal culture. Why stress it here, especially in view of the signs of vigor among historians of Chinese law that have been noted? Obviously, historians, anthropologists, and sociologists are involved in different disciplines; but that is not a complete answer, especially when the legal scholars are outsiders to all three.

It is necessary to explore contemporary legal culture very closely, even while relating it to Chinese tradition, because China is currently in the midst of an extraordinary institutional and social flux. Despite considerable progress in moving the economy out of the plan, reform of the state-owned sector has been uncertain and incomplete; the financial system remains in dire straits; economic inequalities are intensifying; crime and corruption are increasing; the growth of corporatist relations between local governments and businesses suggests patterns different from Western-style civil society; the legitimacy of the CCP has come into question; faith in socialism has shrunk; and a widening crisis of values has prompted a rise in both materialism and spiritual cults.

In today's turbulent Chinese society, attitudes and practices toward law are influenced not only by the policies and accomplishments of economic reforms and by the values promoted by legal institutions born in the reforms, but also by competing values arising from problems and contradictions generated by the reforms themselves. Tradition has not been negated, of course, but many Chinese have modified their behavior and expectations due to recent developments. Contemporary scholars—and China, indeed—must relate the Chinese cultural legacy to different contemporary values. The attempt is necessary even though both interpretation of the past and understanding of the present are contested, both in Chinese and in foreign scholarship. The importance of such an approach, and its contemporary relevance to handling very real practical and policy problems far removed from academe, is lucidly demonstrated by William Alford's study of the influence of both traditional and foreign values on attitudes and practices with regard to ownership and use of

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William P. Alford, *Law, Law, What Law? Why Western Scholars of China Have Not Had More to Say About Its Law*, in *THE LIMITS OF THE RULE OF LAW IN CHINA*, *supra* note 84, at 45.

intellectual property.<sup>89</sup>

One contested area is the extent to which Chinese tradition was alien to Western concepts of the rule of law. Karen Turner has incisively analyzed the differences between the Western ideal that “all men had the means and the right to decide what is just and lawful”<sup>90</sup> and the Chinese ideal that decisions of rulers and officials had “to guide and to define the goals of the legal system.”<sup>91</sup> In a related vein, some scholars have examined the dominance throughout Chinese history of the concept of duty over that of rights, the concomitant lack of belief that the individual is a bearer of rights,<sup>92</sup> and the assumption that rights are created by the state.<sup>93</sup> To some extent, law still seems to be regarded as an instrument of policy. In post-Mao China, as Pitman Potter has written, “The Chinese government’s approach to law is fundamentally instrumentalist.”<sup>94</sup> Yet the concept of the rule of law has been much emphasized in recent years. With the exception of the criminal process, law is used much less crudely than it was before reform. Party policy is ambivalent, however, and there remains embedded in it a fundamental tension between espousing the rule of law and continuing to insist on CCP leadership of society.<sup>95</sup> At the same time, foreign observers must constantly remind themselves to employ a nuanced view of the rule of law, and not to assume that the only measure of China’s progress to greater legality is the extent to which liberal democratic institutions are deemed to serve as models.<sup>96</sup>

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89. WILLIAM P. ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION* (1995).

90. Karen Turner, *Rule of Law Ideals in Early China?* 6 J. CHINESE L. 1, 44 (1992) [hereinafter Turner, *Rule of Law Ideals*]. See also Karen Turner, *Sage Kings and Laws in the Chinese and Greek Traditions*, in *HERITAGE OF CHINA: CONTEMPORARY PERSPECTIVES ON CHINESE CIVILIZATION*, 86-111 (Paul S. Ropp ed., 1990).

91. See Turner, *Rule of Law Ideals*, *supra* note 90.

92. See, e.g., Liang Zhiping, *Explicating “Law”: A Comparative Perspective of Chinese and Western Legal Culture*, 3 J. CHINESE L. 56 (1989); Randall Peerenboom, *What’s Wrong with Chinese Rights?: Toward a Theory of Rights with Chinese Characteristics*, 6 HARV. HUM. RTS. J. 29 (1993); Wang Guangwu, *Powers, Rights, and Duties in Chinese History*, in *THE CHINESENESS OF CHINA: SELECTED ESSAYS* 165 (Wang Guangwu ed., 1991).

93. ANDREW NATHAN, *CHINESE DEMOCRACY* 104 (1985).

94. POTTER, *supra* note 13, at 10.

95. See, e.g., *BIRD IN A CAGE*, *supra* note 5, at 122-31. Shen Yuanyuan has explored the views held by some Chinese intellectuals that the legal system should be subject to values extrinsic to it. Shen Yuanyuan, *Conceptions and Receptions of Legality: Understanding the Complexity of Law Reform in Modern China*, in *THE LIMITS OF THE RULE OF LAW IN CHINA*, *supra* note 84, at 20.

96. See, e.g., Randall Peerenboom, *Ruling the Country in Accordance with Law: Reflections on the Rule and Role of Law in Contemporary China*, 11 CULTURAL DYNAMICS 315 (1999); Randall Peerenboom, *Let One Hundred Flowers Bloom, One Hundred Schools Contend: Debating Rule of Law in China*, 23 MICH. J. INT’L L. 471 (2002). The significance of this problem for U.S.-China relations is discussed further.

Writing presciently in 1980, Bill Jones suggested that the promulgation of the Criminal Code and other rules might present to the Chinese populace a vision of a Chinese society administered according to rules that would be in dramatic contrast to what it had known and experienced since 1949. He raised a question that has increased in significance since then:

[A]s most Chinese become aware of [criminal trials] they may well come to expect a real trial as a necessary prerequisite to conviction. Failure to provide trials could give rise to very serious social unrest. I do not know if this will happen, but it could. Consequently, while I do not foresee the establishment of a real functioning Western-style legal system in the near future, *I do think that it is possible that legal consciousness is coming into being, and this may have interesting consequences.*<sup>97</sup>

Since then, William Alford has suggested that some Chinese citizens already see law as an instrument to be used as the basis for reform.<sup>98</sup> In addition, Kevin O'Brien and Li Lianjiang have called attention to the invocation of legal rules by villagers protesting against the imposition of illegal taxes and fees and other arbitrary acts.<sup>99</sup> The increasing currency of legal concepts and institutions, much of it propagandized by the central government, has already begun to influence attitudes among the Chinese populace toward the governance of Chinese society. Research by some foreign scholars suggests that "legal consciousness," in the sense that Bill Jones mentioned it twenty years ago, is slowly rising.<sup>100</sup>

### *Legal Education, Conferences and Exchanges*

No survey of scholarship would be complete without at least mentioning the teaching and scholarly exchanges that marked the rise of interest in Chinese law since the late 1970s. The pages that follow

97. Jones, *supra* note 27, at 413 (emphasis added).

98. William P. Alford, *Double-Edged Swords Cut Both Ways: Law and Legitimacy in the People's Republic of China*, in CHINA IN TRANSFORMATION 45 (Tu Wei-ming ed., 1994).

99. Li Lianjiang & Kevin J. O'Brien, *Villagers and Popular Resistance in Contemporary China* 22 MO. CHINA 28 (1996).

100. See for example the articles by Pitman Potter, *supra* note 70, and DOUGLAS GUTHRIE, DRAGON IN A THREE-PIECE SUIT, THE EMERGENCE OF CAPITALISM IN CHINA (1999). How powerful is it as a force for reform of the courts? Growing popular resentment of judicial corruption has been cited as one of the factors that has given impetus to the growth of the power of local People's Congresses to supervise the courts, to the extent of examining and changing the outcomes in individual cases. Cai Dingjian, *Functions of the People's Congress in the Process of Implementation of Cases*, in IMPLEMENTATION OF LAW, *supra* note 65, at 49.

immediately below are only intended to suggest some of the activity that has arisen and become commonplace.

### *Courses on Chinese Law*

American and Canadian law schools responded to the growth of Chinese law and legal institutions by expanding their course offerings. A glance at the web page maintained by Bill Jones's colleague Wei Luo, although several years out of date, shows more than forty-five courses offered at over thirty institutions.<sup>101</sup> My impression is that the number of schools offering courses has remained relatively stable in recent years. Among the relatively younger scholars who have begun to teach and write on Chinese law in the United States in the last decade<sup>102</sup> are Benjamin Liebman (Columbia Law School), John Ohnesorge (University of Wisconsin Law School), Qin Ya (Wayne State University Law School), Randall Peerenboom (University of California, Los Angeles School of Law), Margaret Woo (Northeastern University School of Law), Tahirih Lee (Florida State University College of Law), Mark Sidel (University of Iowa College of Law), Jacques deLisle (University of Pennsylvania Law School), Anna Han (Santa Clara University School of Law), Frances Foster (Washington University School of Law), Jonathan Hecht (Yale Law School), and Teemu Ruskola (American University, Washington College of Law).

### *Study of Chinese Law in China by Americans*

As Chinese legal institutions have grown, so too have opportunities for American scholars to study Chinese law up close. James Feinerman, now holder of a chair on Asian law at the Georgetown University Law Center, was a lawyer in the first group of American students who went to China in the late 1970s. He was followed by a considerable number of U.S. law graduates since then, such as Phyllis Chang, who studied and did research at People's University before moving to the Ford Foundation's office in Beijing, where she was responsible for law-related projects. Some China scholars have spent appreciable amounts of time in China doing research in recent years, including Donald Clarke, Pitman Potter, Randle Edwards, William Alford, and Margaret Woo. As I write, other, younger scholars,

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101. <http://ls.wustl.edu/chinalaw/clcourse.html>.

102. I have not included anyone whom I already identified in 1999 as teaching on Chinese law in Lubman, *supra* note 1, at 305-06.

some law-trained and others who are social scientists, are in China today engaged in useful research.<sup>103</sup>

Other China law specialists have chosen to bring their knowledge to the non-profit sector. Sharon Hom, professor at the City University of New York, is currently a Senior Advisor at Human Rights in China.<sup>104</sup> Jonathan Hecht, Associate Director of the Center for Chinese Law at the Yale Law School, was formerly with the Ford Foundation's office in Beijing. Titi Liu left private practice to join the Ford Foundation, initially in Shanghai and currently in Beijing with responsibility for law-related programs.

*Conferences, Teaching Law in China, and Participation in Chinese Law Reform Efforts*

Opportunities for Chinese and American scholars to exchange views have expanded. Early conferences were held in China in 1982 on the role of law (sponsored by the Ford Foundation and the Chinese Academy of Social Sciences) and in 1985 on legal aspects of trade and investment. There have been many conferences since those early ones; for example, a group of U.S. law school deans and China law scholars traveled to Beijing in 1998 to exchange views on legal education with Chinese counterparts. In recent years formal conferences have been few because opportunities for contacts between Chinese legal scholars, officials and judges, and their foreign counterparts have become plentiful. When conferences on Chinese law are held these days, Chinese scholars and others are invited to participate as a matter of course.

Foreign scholars have been teaching and lecturing in China since the 1970s. Bill Jones was one of the first Americans to teach on an extended basis, in Wuhan, where he was a Fulbright Lecturer from 1982 to 1984. Many American lawyers and scholars have since been invited to lecture in China over the years, some in connection with law reform projects. The Ford Foundation's extensive activities in fostering exchanges are particularly noteworthy.<sup>105</sup>

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103. A conference on "Law and Society in China" held in September, 2002 at the University of California School of Law focused on research in China by a number of younger scholars. Publication of a volume of essays based on papers presented at the conference is planned.

104. Previously, she spent two years as a Fulbright Scholar teaching at People's University in 1984-1986 before returning to teaching; thereafter, until CLEEC expired for lack of funding, she organized and ran a series of summer programs in China for CLEEC designed primarily for Chinese scholars who were preparing to study in the United States under CLEEC grants.

105. Aubrey McCutcheon, *Contributing to Legal Reform in China*, in MANY ROADS TO JUSTICE:

Perhaps the most interesting contacts, and most productive in terms of useful exchanges of views that both foreign scholars and practicing lawyers have experienced are those focused on specific areas of law reform. Notable activity has been initiated by the Administrative Law Research Group of the Legislative Affairs Commission of the National People's Congress and the Legislative Affairs Office of the State Council, which have consulted with American and European experts in the course of extensive legislative drafting activities related to administrative law. The Asia Foundation has organized contacts in this area in a systematic fashion since 1998, and the recently established Center for Chinese Law at Yale has been active in administrative law and other fields as well.

How significantly can foreigners influence Chinese law reform efforts? Pitman Potter suggests important limits. He notes that on legislative matters, educational exchanges have been limited to "practical operational matters" because of the CCP's insistence on dominating the legislative process.<sup>106</sup> There has been greater foreign influence on administrative law, as the examples noted immediately above should suggest, although Potter cautions that "foreign influences have had little effect on the basic normative premise underlying China's administrative law system, namely that administrative law remains an instrument in the service of Party-led governance."<sup>107</sup> Foreign influence, Potter continues, has been greater in the area of dispute resolution.

### *CLEEC and the Study of American Law by Chinese*

One organization that fostered a specialized program of law-related exchanges merits particular mention: The Committee on Legal Education Exchanges with China (CLEEC) was founded in 1982 and continued its work until the funds generously supplied by the Ford Foundation expired in 1995.<sup>108</sup> CLEEC enabled approximately 219 Chinese legal scholars to

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THE LAW-RELATED WORK OF FORD FOUNDATION GRANTEES AROUND THE WORLD 159 (Mary McClymount & Stephen Golub eds., 2000); Jacques deLisle, *Lex Americana: United States Legal Assistance, American Legal Models and Legal Change in the Post-Communist Worlds and Beyond*, 20 U. PA. J. INT'L ECON. L. 179 (1999) (providing a general overview of foundation programs related to law reform in China).

106. Potter, *supra* note 13, at 35.

107. *Id.* at 36.

108. The founding members of CLEEC were William Alford (U.C.L.A., later Harvard Law School), R. Randle Edwards (Columbia Law School), Walter Gellhorn (Columbia Law School), Victor H. Li (East-West Center), Bill Jones (Washington University School of Law), Eric Stein (University of Michigan Law School), Whitmore Gray (University of Michigan Law School) and myself. They were joined by Sharon Hom (City University of New York Law School at Queen's College), Donald Clarke (University of Washington School of Law), and Hilary Josephs (Syracuse University College of Law).



study and conduct research in the United States. Under a Memorandum of Understanding signed with the Ministry of Education, the American committee agreed to fund and place faculty members from eight law faculties in five cities.<sup>109</sup> Under a separate memorandum agreement, CLEEC agreed to do the same for scholars from the Institute of Law of the Chinese Academy of Social Sciences in Beijing.<sup>110</sup>

Almost seventy percent of the scholars who came to the United States returned to China, and over 100 of them continued to teach at universities where many used their American-learned teaching methods to modernize the rather rigid and formalistic approach that otherwise dominates Chinese legal education.<sup>111</sup> Some have been in the forefront of legal reform activities of various kinds since their return. Among prominent returning CLEEC scholars are Zhang Wenxian, formerly Dean of the Law Faculty and now Vice-President of Jilin University; Wang Chenguang, formerly Vice-Dean of the law department of Beijing University and now Vice-Dean of the law faculty of Qinghua University; Li Jiaojie, Professor of International Law at Qinghua; Luo Haocai, formerly Vice President of Beijing University and Vice-President of the Supreme People's Court; Wan Exiang, formerly a professor at the law school of Wuhan University who established China's first legal aid center, and recently appointed as Vice-President of the Supreme People's Court; and Xin Chunying, former Director of the Institute of Law of the Chinese Academy of Social Sciences. Other returned CLEEC scholars are practicing lawyers and officials.

The accomplishments of CLEEC appear to this admittedly biased observer to have been attractive enough to suggest that a new program to continue the work of CLEEC would be a desirable addition to other foreign efforts to assist Chinese institution-building in the legal realm. A number of American law schools have explored possible cooperation with Chinese counterpart institutions, all of which have been eager to create links abroad. One law school, Temple University School of Law, has begun an L.L.M. program that is conducted entirely in China.<sup>112</sup> More,

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Katherine Price (New York University School of Law) and Robert Berring (University of California, Berkeley (Boalt Hall)), at first members of a subcommittee for library development, also became members of CLEEC.

109. Ann Thurston, *The Committee on Legal Education Exchange with China (CLEEC) 1983-1997: Final Evaluation (2002)* (draft of a report prepared for the Ford Foundation) (on file with author).

110. *Id.*

111. *Id.*

112. In September, 2001 Temple University's Beasley School of Law was awarded a \$1.75 million grant from the U.S. Agency for International Development (USAID) to enlarge its rule of law

however, is needed. In addition to efforts by individual institutions, a CLEEC-like program that gives Chinese legal scholars the opportunity to study and conduct research in the United States before returning to teach in China could have a positive long-term effect by deepening the understanding of Western law and stimulating speculation among Chinese and Americans on the extent to which China can adapt Western legal principles to China.<sup>113</sup>

#### REFLECTIONS IN THE FIRST YEARS OF THE TWENTY-FIRST CENTURY

I have already crudely analogized foreign scholars in recent decades to explorers of an uncharted forest. Foreign scholars and lawyers were newcomers to a domain new to China as well as to us. It stretched before us, uncharted, and we observed its distinctive flora: trees (the institutions of the state) that were wound around by thick vines (the Party) which, when we entered the forest, completely engulfed the trees. By the end of the last decade, as we continued our explorations, the enveloping embrace of the Party had begun to loosen, and the institutions of the state had become more visible and viable than they had been previously. These institutions were changing, albeit slowly, before our eyes. They are continuing to change, but how Chinese legal institutions may evolve—or not—in the future, and under what circumstances, however, remains impossible to predict. The final section of this essay is devoted not to prediction, which would be foolhardy, but to consideration of some factors that appear likely to influence the future course of Chinese legal development, and, therefore, of foreign scholarship.

#### *Politics Still in Command*

For the last twenty years, foreign observers of Chinese law have witnessed a succession of developments and problems that has been constantly interesting since 1979. Unceasing social change has inevitably affected legal reforms, regardless of dips and rises in economic growth or

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initiative in China. Press Release, \$1.75 Million Grant Expands Law School's Program in China (Sept. 2001), at <http://www2.law.temple.edu/files/chinagrnt.htm>. This was the first grant of Federal funds authorized when Congress passed the legislation providing for Permanent Normal Trading Relations with China. A second grant of \$2.3 million was awarded in September, 2002. *Temple's Law Program in China Awarded \$2.3 million*, PHIL. INQUIR., Nov. 6, 2002, at <http://www.philly.com/mld/inquirer/2002/11/06/living/education/4452242.htm>

113. Columbia Law School has recently raised over \$500,000, which was matched by the Ford Foundation, to create a fund to support study by Chinese scholars at Columbia. The fund was named, appropriately, after R. Randle Edwards, long-time professor of Chinese law at Columbia.

progress in institution building. Some of the changes, together with factors inherited from the past, are inimical to legal development. The growth of corporatist forms of relationships between local governments and businesses, mentioned in passing above, notably, has created obstacles that the central government can remove only with difficulty.<sup>114</sup>

The pace of change and the lack of transparency in Chinese administrative and legal institutions have combined to complicate the task of fashioning useful foreign perspectives on what we have been seeing and experiencing. Foreign lawyers are involved in their day-to-day activities, while academics, with only limited access to courts and other institutions, have difficulty in teasing out forces in Chinese society that should be factored into their assessment of legal development.

In recent years, an unease has grown beneath my own studies and my participation in practice: How much is changing? Change is so uneven that it is impossible to discuss it in terms of one China; there is not one China but many. The lack of uniformity and the resulting localistic pulls at the power of the central Party-state are troubling. Beijing has lost a considerable amount of power since 1979, and as indicated above, local protectionism has grown. When I mentioned this to a senior Ministry of Foreign Trade and Economic Cooperation official recently, he agreed, and added that “departmentalism”—turf consciousness and turf protection—was worse in Beijing among ministries at the same level than local refusal to comply with central government policies and laws.

Moreover, at times I encounter a noticeable cynicism among a considerable number of foreign legal specialists, both academics and practitioners. One has written that although some foreigners once thought that adoption of Western-inspired laws on contracts would help strengthen the expectations of contracting parties, “formal delineation of a sophisticated law of contract has not led to greater contract observance.”<sup>115</sup> The laws grow in number, but the effectiveness with which they are enforced has not grown apace. Still highly in doubt at the present is the extent to which economic actors can rely on laws and promulgated regulations as the basis for their assertion of rights, either horizontally against other economic actors, or against government agencies. The impartiality and professional competence of the courts are often questionable.<sup>116</sup> Foreigners and Chinese alike who inquire into legal

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114. See, e.g., the sources cited in *BIRD IN A CAGE*, *supra* note 5, at 115-18.

115. James V. Feinerman, *The Rule of Law Imposed from Outside: China's Foreign-Oriented Legal Regime Since 1978*, in *THE LIMITS OF THE RULE OF LAW IN CHINA*, *supra* note 84, at 304, 315.

116. See, e.g., Written testimony of Donald C. Clarke, Professor of Law, University of

practice frequently encounter formalism among officials, to whom “the content of law is assumed to represent reality, with little if any inquiry permitted into gaps between the content and operation of law.”<sup>117</sup> In view of these problems, what expectations ought we have for the future of the growing array of laws and regulations? Another metaphor for the work of scholars of Chinese law, whether foreign or Chinese, suggests itself: we may be watching a glacier creep.

But we could be surprised, also. I ended *Bird in a Cage*, my survey of Chinese law reform, by concluding that for Chinese legal institutions to become more meaningful, significant political reform is needed. My analogy to a glacier assumes that such reform is not likely in the near future. If, however, Chinese leaders end the ambivalence of the CCP toward law and its role, reform would of course be accelerated. Reform would obviously be promoted if changes in Party policy were translated into legislation and constitutional amendments which, for example, elevated the position of the courts. Such changes would, however, require fundamental changes in the role and policies of the CCP that are signaled only faintly today, as perhaps, by the decision of the CCP leadership to allow businessmen to join the Party.<sup>118</sup> That development, on the other hand, might represent a desire to co-opt an increasingly powerful sector of Chinese society without real interest in changing the institutions of China’s governance. The entry into the CCP of actors in China’s growing private sector and their new respectability could foretell increased demands from that sector for greater protection of rights over property

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Washington, Seattle, Washington before the U.S.-China Commission, Jan. 18, 2002, accessed at <http://www.uscc.gov/tescla.htm>.

117. POTTER, *supra* note 13, at 12.

118. See, e.g., Joseph Kahn, *China’s Communist Party, “to Survive,” Opens Its Doors to Capitalists*, N.Y. TIMES, Nov. 4, 2002, at A10 (“With the opening to business leaders, China’s leaders are blurring the class distinctions they once considered sacred, perhaps jettisoning ideology altogether in a race for relevance.”). President Jiang Zemin, in his report to the 16th Congress of the CCP, provided the rationale:

Emerging during social changes, the social strata such as entrepreneurs and technical personnel employed by private scientific and technological enterprises, managerial and technical personnel employed by foreign-funded enterprises, the self-employed, private entrepreneurs, employees in intermediaries, and freelancers are all builders of the cause of socialism with Chinese characteristics . . . . It is not appropriate to judge whether people are politically advanced or backward simply by whether they own property and how much property they own; but rather, we should consider their state of mind, political awareness, and actual performance.

*Xinhua Summarizes Jiang Zemin’s Report to CPC National Congress*, BEIJING XINHUA DOMESTIC SERV., Nov. 8, 2002, in FBIS DAILY REP.: CHINA (FBIS-CHI-2002-1108) (Nov. 12, 2002), at [http://wnc.fedworld.gov/cgi-in/retrieve.cgi?IOI=FBIS\\_clear\\_new&docname=0h5gzl9003k7kw&CID=C293487548828125237903384](http://wnc.fedworld.gov/cgi-in/retrieve.cgi?IOI=FBIS_clear_new&docname=0h5gzl9003k7kw&CID=C293487548828125237903384).

interests,<sup>119</sup> it could also suggest emerging alliances between private business and the Party-state that could impede legal reform. Furthermore, the two are not incompatible. Pervasive in China, and unlinked to ideology, remains the desire of holders of power to continue their grasp, which obstructs the growth of legality in all societies.

It is too early to gauge the implications for legal or political reform of the change in ideology just noted, the increasing irrelevance of CCP ideology<sup>120</sup> or the major leadership changes that were scheduled to be formalized in the spring of 2003. Whether gradual or not, whenever and however they happen, fundamental changes in policy and an assertion of political will remain necessary preconditions for effective legal reform.

### *The WTO as a Force for Change*

Despite the incompleteness of Chinese legal institutions, they are now faced with even greater demands on them by reason of Chinese accession to the WTO. It seems widely accepted that Chinese leaders wanted accession not only because they wanted to open foreign markets to Chinese products and services, but because they believed that it would help accelerate economic and legal reform. But as many have observed, China's accession to the WTO and acceptance of the standards and requirements imposed on WTO members by the General Agreement on Tariffs and Trade (GATT) and related treaties that members of the WTO must observe raise some important issues. The fundamental assumptions underlying the GATT are very different from those on which Chinese institutions are based. A number of observers have pointed out, as Donald Clarke has noted, that the GATT assumes that all members are open societies that observe the rule of law:

The WTO structure assumes that a country's political structure involves a government limited by law and a certain degree of

119. Jiang Zemin was quoted as stating that "We need to respect and protect all work that is good for the people and society and improve the legal system for protecting private property." James Kynge & Richard McGregor, *China Leader Says Private Property To Be Protected*, FIN. TIMES, Nov. 11, 2002, at 11.

120. After the Sixteenth Party Congress ended, Kenneth Lieberthal, an astute American expert on Chinese politics, recalled that more than a year earlier he had heard a Chinese ambassador state that "foreigners were mistaken to view China as building socialism because the country now sought nothing so much as to build capitalism." Lieberthal went on to say, "The Sixteenth Congress officially sanctified this goal, albeit to build the kind of state-directed capitalism common in Asia and to wrap this in a thin cloak of socialist rhetoric." Kenneth Lieberthal, *China Inc. Is Now Open for Business; New Leaders Confront Daunting Challenges Amid Rapid Growth*, L.A. TIMES, Nov. 18, 2002, pt. 2, at 11.

separation of powers. . . . Most fundamentally, the WTO agreements assume that all member states have institutions labeled judicial that are fundamentally different from institutions labeled administrative, and that operate with some meaningful independence of the executive. . . . So profound . . . is the assumption of the WTO that all member states will be fundamentally alike in this way that nowhere in the mammoth texts of the WTO agreements is the term “judicial authority” even defined.<sup>121</sup>

Article X of the GATT requires that member nations must publish their laws on trade and administer them in a “uniform, impartial and reasonable manner.”<sup>122</sup> Much of the Western scholarship cited here suggests that China is far from meeting this standard at the present time and is unlikely to be able to meet it in the foreseeable future. Limitations of space prevent further consideration of this and related issues, but they are evident enough, and have been mentioned here sufficiently to permit passing consideration of some implications.<sup>123</sup>

#### *Foreign Assistance on Institution-building*

Meanwhile, the Chinese government has stimulated great interest within China in the WTO and fulfillment of WTO requirements. Extensive efforts are being made to train Chinese officials and others on the WTO. As Donald Clarke has stated in testimony to one of the two commissions created by Congress to monitor Chinese behavior under the WTO:

There have also been countless training sessions for Chinese officials, many with foreign financial support. The government has begun restructuring to facilitate the meeting of WTO requirements . . . . While much work remains to be done there, can be little doubt of the energy and commitment shown so far by the government.

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121. Donald C. Clarke, *China and the WTO*, in *DOING BUSINESS IN CHINA*, *supra* note 54, at I-11.1.

122. General Agreement on Tariffs and Trade, 1947, as amended, including notes and supplementary provisions, art. X.

123. American scholars of Chinese law have set forth their views in testimony before the two Commissions created by Congress after it enacted the legislation granting PNTR to China. See for example testimony or statements of Jerome Cohen, *supra* note 58; Donald Clarke, *supra* note 116; and William Alford, James Feinerman, and myself at <http://www.cecc.gov/pages/hearings/020702/index.php3>.

And this is to say nothing of the enthusiasm for knowledge about the WTO displayed outside of government.<sup>124</sup>

The Chinese government has demonstrated great interest in receiving assistance from the international community in training. Although in recent years the U.S. Congress has been reluctant to appropriate funds to support legal reform programs in China, China's accession to the WTO has prompted Congress to become a bit more willing to provide some funding for such programs.<sup>125</sup>

In the face of ignorance, impatience, and the tendency to moralize (frequent features that all too often mark American attitudes toward China) Western legal scholars of China could help raise the sophistication of policy-makers by demonstrating how far Chinese legal development has come even while showing how far it has yet to go. Moreover, given manifested Chinese interest in adapting legal institutions to the demands of the WTO and willingness to accept foreign assistance, legal scholars could contribute to the U.S. government, multilateral institutions, and non-governmental organizations (NGOs) in supporting legal reform efforts. The Ford Foundation, the Asia Foundation, Harvard's East Asian Legal Studies Program, and Columbia's Center for Chinese Legal Studies are among the most obvious examples of institutions that have labored for decades to convey to Chinese, in various milieus, some understanding of the values embedded in important Western legal institutions and the manner in which those institutions are intended to operate.<sup>126</sup>

My own participation in Asia Foundation programs on administrative law suggests the contribution that foreign scholars of Chinese law can make to China's legal development. Foreign programs usually involve bringing foreign experts in the legal institutions of their own nations together with Chinese counterparts. Almost invariably, however, such foreigners—American judges, say, or law professors—understandably know little or nothing about the operation and problems of Chinese legal institutions and their personnel, the organization of the Chinese Party-

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124. Statement before the U.S.-China Security Review Commission by Donald C. Clarke, Jan. 18, 2002, *supra* note 116.

125. To date, the grants to Temple University (see text *supra*, note 112) are the largest that has been made by USAID.

126. A recent review of training programs on the WTO notes the Asia and Ford Foundations, the World Bank, the Asian Development Bank, the European Union, and the governments of Germany, Great Britain, Australia and Japan. Among American programs noted are those conducted by the Department of Commerce, the U.S.-China Business Council, and Georgetown University. See Brian L. Goldstein & Stephen J. Anderson, *WTO At Last: Foreign Contributions to China's WTO Capacity Building*, CHINA BUS. REV., Jan.-Feb. 2002, at 8.

state, or the role and limits of formal legal institutions in that Party-state. Their Chinese counterparts and audiences, for their part, necessarily have only limited understanding of Western political and legal systems. This cultural gap, to which I can only allude here, is a formidable obstacle to meaningful understanding by Chinese of the Western institutions to which well-intentioned foreign efforts attempt to introduce them. In light of this, American and other foreign specialists on Chinese law can exercise a necessary and useful role as cultural interpreters when they participate in the work of foreign governmental, university, or NGO programs intended to assist Chinese law reform.

*Chinese Law and Views from Abroad: Perceptions of Chinese Law by American Policy-makers*

China's membership in the WTO is likely to increase further attention given abroad to Chinese law. Problems encountered by foreign businesses because of the weakness of Chinese legal institutions could well increase friction between China and its trading partners.

In this connection, Chinese law is relevant to the attitudes of American policy-makers toward China. The difficulties that China can be anticipated to encounter in complying with WTO requirements constitute one set of potential problems that are quite apart from other law-related problems that have troubled U.S.-China relations, most notably human rights. Trade matters and human rights were formally compartmentalized in debate in the U.S. Congress, but in the minds of some members of Congress, they remain entwined. Moreover, ongoing congressional oversight over Chinese compliance with WTO obligations, as well as other aspects of Sino-American relations, have been institutionalized. When Congress passed legislation in 2000 that granted China Permanent Normal Trade Relations (PNTR) status that all WTO members must extend to each other, it created the Congressional-Executive Commission on China, which was charged with monitoring Chinese human rights behavior and practice as well as Chinese law reform. Congress also created the U.S.-China Security Review Commission, composed of private sector members, which also acts as a monitor of Chinese behavior, including in legal areas. Both commissions have been active in holding hearings.

Chinese law, then, is and will be of interest to U.S. policy-makers. Recently, for example, Senator Joe Biden (Democrat-Delaware) was quoted as saying that "the one thing that could knock off our mutual



interest would be for China not to set up a true system of rule of law.”<sup>127</sup> What might a “true system” be? There is a noticeable tendency to project American values onto the rest of the world. A simple illustration is U.S. support of legal reform abroad, which some observers have analyzed as displaying a narrow and ethnocentric focus.<sup>128</sup> At the same time, the views of some members of Congress are tinged with moralizing and self-righteousness. One need only review the debates in Congress during 2000 on granting China PNTR status to come to this conclusion. The one-dimensional portraits and caricatures sketched from the floor of the House and Senate, whether by liberals or conservatives are remarkable in their number and intensity.<sup>129</sup> Nuanced views of Chinese society, including

127. *Biden Calls On China To Strengthen Its Rule Of Law*, NAT’L J. CONG. DAILY, Aug. 10, 2001.

128. See, e.g., Jacques deLisle, *Lex Americana?: United States Legal Assistance, American Legal Models, and Legal Change in the Post-Communist World*, 20 U. PA. J. INT’L ECON. L. 179 (1999); William P. Alford, *Exporting the “Pursuit of Happiness,”* 113 HARV. L. REV. 1677 (2000) (reviewing Thomas Carothers, *AIDING DEMOCRACY ABROAD: THE LEARNING CURVE* 1999); Matthew C. Stephenson, *A Trojan Horse Behind Chinese Walls? Problems and Prospects of U.S.-Sponsored “Rule of Law” Reform Projects in the People’s Republic of China*, 18 UCLA PAC. BASIN L.J. 64 (2000).

129. Despite the PNTR debate’s ostensible roots in trade and commerce, much of the rhetoric in Congress centered on human rights. Opponents linked their opposition to Beijing’s violations of basic political and religious freedoms. Granting PNTR, the reasoning went, would constitute an endorsement of such reprehensible behavior and a betrayal of the American values. Representative Pete Stark (Democrat-California), made the following charge: “This is just a matter of will Americans do business with murderers, with torturers, with child molesters, with people who are being led by leaders who have no spark of humanity.” 145 CONG. REC. H6434-35 (daily ed. July 7, 1999).

Among other characterizations in China, see for example, the comments of Congresswoman Nancy Pelosi (Democrat-California), who pointed to:

[A] history of absolute noncompliance on the part of China of any trade agreements they have ever signed with the U.S., be they trade agreements for market access of U.S. products into China’s market, be they trade agreements on intellectual property violations by the Chinese, be they trade agreements on use of prison labor for export, China year in and year out continues to violate these agreements, and now the President has said, the Chinese will honor this one.

146 CONG. REC. H3036 (daily ed. May 15, 2000).

Congressman Frank Wolf (Republican-Virginia) called China an “evil empire” with more “labor camps” than the Soviet Union ever had. 146 CONG. REC. H3464, H6443 (daily ed. May 19, 2000). Congressman Dan Burton (Republican-Indiana) minced no words:

Mr. Speaker, in just about every area I can think of China’s record stinks. They spy on us, they try to buy our elections, they send missile technology to just about every rogue regime in the world, they are actively working to improve the missile technology of our enemies, and they thumb their noses at our trade laws and have one of the worst human rights records in the world. How all this merits preferential treatment is beyond me.

145 CONG. REC. H6434-44 (daily ed. July 27, 1999). Congressman Dana Rohrabacher (Republican-California) charged that China’s goal is “to dominate all of Asia, all the way from Central Asia . . . and we will see claims as we have already seen of the Communist Chinese, rights to dominate all of Southeast Asia down through Burma and Cambodia and, yes, our great ally Thailand.” H5084, H5086 145 CONG. REC. (daily ed. June 29, 1999).

legal institutions, seem to have little chance of percolating into congressional debates.

*China's Continuing Theoretical Challenge to Foreign Scholars*

The difficulties that members of Congress have in understanding Chinese institutions are those of scholars writ large. Foreign scholars of Chinese law, among other foreign observers, must continuously confront the methodological problem on which I have already quoted Bill Jones's early question, and which can be rephrased as follows: To what extent can the intellectual categories and concepts of Western law be employed to aid Western understanding of Chinese law?<sup>130</sup> I have tried elsewhere to consider how Chinese law can be approached from the West, arguing that it is useful to emphasize focus on studying the following:

- law in action rather than texts;
- the functions performed by the institutions that we study; and
- legal culture (while avoiding high theory in favor of thick description).<sup>131</sup>

Relevant here, too, are the approaches of a number of contemporary scholars who have theorized about comparative law generally.<sup>132</sup>

At the same time, it seems to me that Western ideals of the rule of law provide principles that can define an initial vantage point from which Chinese legal institutions can be studied. Such a perspective can be adopted without forgetting that the rule of law is both a Western ideal that is often departed from and a concept whose content is much disputed. Nor is it necessary to expect that liberal democratic institutions should be replicated. At the same time, it is clear that the rule of law is not just a Western construct irrelevant to China's circumstances. During my travels and encounters in China, I have been impressed by the expressed desires of ordinary Chinese for a legal system that is both uniform and fair, and not an instrument of government policy. The evolution of democracy on

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130. See Jones, *supra* note 6.

131. See BIRD IN A CAGE, *supra* note 5, at 34-38.

132. See, e.g., Vivian Grosswald Curran, *Dealing in Difference: Comparative Law's Potential for Broadening Legal Perspectives*, 46 AM. J. COMP. L. 657, 666-7 (1998) (emphasizing culture); George P. Fletcher, *Comparative Law as a Subversive Discipline* 46 AM. J. COMP. L. 683, 685-91 (1998); William Ewald, *The Jurisprudential Approach to Comparative Law: A Field Guide to "Rats,"* 46 AM. J. COMP. L. 701 (1998) (spirited denunciations of positivism); John C. Reitz, *How to do Comparative Law*, 46 AM. J. COMP. L. 617, 621-25 (1998) (emphasizing the search for functional equivalents while avoiding projection of the observer's ideals).

Taiwan further suggests that Western-style legality can take root in Chinese societies.<sup>133</sup>

I recognize that the tone of these concluding pages is not optimistic. Elsewhere, I have characterized my perspective on Chinese law as that of a “cautious pessimist.”<sup>134</sup> Chinese leaders will continue to declare their willingness to embrace of the rule of law, but real progress seems unlikely, as I have said, in the absence of fundamental political reforms. At the same time, however, even without political reform, the institutions of Chinese law will continue to expand because of the need to stabilize economic relationships and expectations, and to give substance to the rights of economic actors. Moreover, in recent years, the creation of rights has not been limited to the economic realm and has expanded, even if slowly. Will the broadening and deepening of law as it affects economic relationships promote or reinforce an increase in legality in other areas of

133. As I have noted, a considerable range of differences exists between those who would insist that the rule of law must be associated with capitalism, democratic government, and liberal concepts of human rights, and others who prefer what Randall Peerenboom has called “a more limited understanding of rule of law that emphasizes its formal or instrumental aspects—those features that any legal system allegedly must possess to function effectively as a system of laws . . . .” Randall Peerenboom, *Ruling the Country in Accordance with Law: Reflections on the Rule and Role of Law in Contemporary China*, *supra* note 96, at 316. Peerenboom argues that China is moving toward a limited or “thin” theory of the rule of law. *Id.* I believe that the ideal of the rule of law can be used to help define our perspectives while, at the same time, agreeing with William Alford that we must try to refrain from using the West as a standard of normality toward which China must evolve. See Alford, *supra* note 89, at 4-5. Support for such a choice is suggested by the acceptance by most of the nations of the world of the rule of law as an ideal. Moreover, the leadership of the PRC professes adherence to the principle of the rule of law. Further, adherence to the rule of law is also an obligation that Article X of the GATT implies for signatories to that treaty, and China has assumed such an obligation by joining the World Trade Organization, which implements the GATT.

Although I remain dissatisfied with my own approach, I have not found any other approach more appealing. Peerenboom’s attempt to address the methodological issues raised by foreign study of Chinese law is suggestive because he identifies, as alternatives to a “liberal-democratic” system, three ideal types that embody clusters of values in contemporary China that suggest different current emphases and possible future trends in legal development. One is a “Communitarian” vision that could be a “more statist ‘Asian values’ version, a pragmatic New Confucian version or a Deweyan civil republican version.” The other two are a non-democratic state led by the Chinese Communist Party or another, milder form that is “neo-authoritarian.” Randall Peerenboom, *Let One Hundred Schools Contend, One Hundred Flowers Bloom: Competing Conceptions of Rule of Law in China*, in *ASIAN LAW AND DEVELOPMENT: UNIVERSAL NORMS AND LOCAL PRACTICES* (Lucie Cheng & Arthur Rosett eds., forthcoming 2002). In the end, however, neither of the latter two seem consistent with “meaningful limits on the ruler,” which he includes as part of the “thin” or minimum theory of law. The “Communitarian” ideal type is critically vague in this regard: In it, he says, “Chinese citizens will enjoy democracy and rule of law but forego the extremes of liberalism in favor of a more balanced form of rule of law in which law both strengthens and limits the state and the rights of individuals are weighed against the interests of others in the community and in society as a whole.” This approach, while usefully provocative, appears otherwise limited by the vagueness of the proposed alternative categories.

134. *BIRD IN A CAGE*, *supra* note 5, at xvi.

Chinese society? This question will remain a significant issue, given the constraints on legal reform outside the economy.<sup>135</sup>

As for the future of scholarship on Chinese law, in any event, foreign observers will continue to be challenged by difficulties in ascertaining practice rather than the texts of norms, and by the distances between them. Progress in building a legal system will continue to be slow, but we must recall how far Chinese law has come since a few American legal scholars began to study it forty years ago. The journey has been far more interesting than we could have possibly predicted then, and continues to defy prediction.

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135. An important cautionary note is sounded in a thoughtful article on the implications of WTO accession for China's legal development:

The rationalization of business law or of economic law, to adopt the Chinese terms, does not, for all that, signify the adoption of the rule of law. What type of state are we dealing with in China today, then? With a state *sui generis* by law that serves the economy and refuses to free itself of the yoke of Party leadership but not with a constitutional state based on the rule of law.

Leila Choukroune, *Rule of Law Through Internationalisation: The Objective of the Reforms?* CHINA PERSP., Mar.-Apr. 2002, at 7, 20.