Washington Law Review

Volume 61
Number 3 *Dedicated to the Memory of Ted L. Stein*

7-1-1986

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Recommended Citation
William P. Alford, *On the Limits of "Grand Theory" in Comparative Law*, 61 Wash. L. Rev. 945 (1986).
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ON THE LIMITS OF "GRAND THEORY" IN COMPARATIVE LAW

William P. Alford*

This talk is dedicated to the memory of Ted L. Stein, a law school classmate and friend who was a brilliant young specialist in international law until his untimely death in an accident in June of 1985. Although only thirty-two when he died, Ted already was much accomplished professionally. I will remember and miss Ted, though, as much for his personal attributes as for his professional achievements, for he was an individual of extraordinary character. It is truly a privilege to invoke his memory in conjunction with this presentation.

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I am pleased that the American Association for the Comparative Study of Law has decided to focus upon the legal systems of East Asia this year, and flattered that Professor Dan Henderson, who has organized today's program, has asked me to speak about the question of "comparability" with respect to China. In so doing, Professor Henderson is clearly heeding Deng Xiaoping's message to turn to youth—albeit in this case, callow youth. Since he has been kind enough to do so, I hope that you will be equally kind in not blaming him for my remarks.

In the introduction to a recently published collection of essays, the distinguished British political philosopher Quentin Skinner characterizes the academic generation in which we live as an age of "the return of grand theory in the human sciences."[1] Referring specifically to the work of Claude Levi-Strauss, Thomas Kuhn, John Rawls, Michel Foucault, Jürgen Habermas, and others, Professor Skinner suggests that the best and most

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This article is based on the text of a presentation delivered at the annual meeting of the American Association for the Comparative Study of Law (AACSL), held at the University of Washington School of Law, Seattle, Washington, on September 27, 1985. I want in particular to thank the organizer of the program for that meeting, Professor Dan Fenno Henderson, for inviting me to speak at the AACSL. In addition, I wish to acknowledge the guidance that I have received from colleagues and other friends, including Abdullahi A. An-Na'im, Hans Baade, Jerome A. Cohen, Carole Goldberg-Ambrose, John O. Haley, Anna Marie Howell, Kenneth L. Karst, Victor H. Li, Henry W. McGee, Jr., Frances E. Olsen, Arthur I. Rosett, and Phillip R. Trimble. I would also like to thank the Research Committee of the UCLA Academic Senate and the UCLA School of Law for financial support. Finally, I wish to express my deep appreciation to Dean Susan Westerberg Prager of the UCLA School of Law for her constantly inspiring and supportive leadership.

1. THE RETURN OF GRAND THEORY IN THE HUMAN SCIENCES (Q. Skinner ed. 1985). In referring to "grand theory" in the title of his work, Skinner explicitly draws upon the use of that term by C. Wright Mills. According to Skinner, Mills meant "the belief that the primary goal of the social disciplines should be that of seeking to construct a systematic theory of the nature of man and society." *Id.* at 3.

creative thinkers in the social sciences and humanities have returned to bold and broad conceptualizing—even if some of these individuals have expressed skepticism about that very enterprise.[2] Although Skinner focuses upon scholars whose home base and disciplinary roots lie outside American law schools, had he cast his eye toward our law faculties, I suspect that he would have made much the same point. The work of Habermas and Foucault, for example, has attracted a following among American legal scholars, particularly in and around the critical legal studies movement.[3] But this interest in broad theoretical work is by no means the sole province of the left in American legal academe. Talented legal scholars across the political spectrum are engaged in what Skinner would extol as "grand theory in the human sciences."

I come neither to praise nor to deride efforts at grand theorizing. Nonetheless, I want in this talk on the problems of comparability that arise in studying Chinese law to sound a strong cautionary note. For, as I shall explain, I think that it is incumbent upon all of us in the field of comparative law—and particularly those of us who focus upon non-Western legal systems—to resist the pressure, often emanating from well-meaning colleagues, to approach distant cultures armed with or in search of "grand theory." I am not opposed to efforts to speculate broadly across cultures and times. Indeed, what I have to say today could be construed as a form of "grand theory." Nor am I suggesting that we should avoid bringing our own values to bear in evaluating foreign legal systems, even if we could do so. Rather, what concerns me is that our efforts at engaging in broad theoretical work may unwittingly lead us to believe that we are considering foreign legal cultures in universal or value-free terms when, in fact, we are examining them through conceptual frameworks that are products of our own values and traditions, and that are often applied merely to see what foreign societies have to tell us about ourselves.

In a sense, the foregoing are fairly obvious points. But, as I will illustrate concretely below, standards, models, and efforts at theorizing that we might not ordinarily imagine to be culturally skewed may well be—especially when considering the law and legal history of societies whose social, political, economic, philosophical, and religious underpinnings may be far removed from our own. Our very distance from other societies may yield helpful perspectives not readily available to insiders, but that vantage point also imposes upon us an obligation to be vigilant as to the

2. *Id.* at 1–8.

3. For a consideration of this influence upon certain scholars identified with the critical legal studies movement, see, for example, Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685, 701 (1985).

ways in which the constructs that we have developed for ordering the world reflect assumptions and values that may not be shared by others.

The obligation to be vigilant does not preclude using the language and conceptual frameworks of our own society to try to understand and explicate for others the foreign societies we may be observing. As the debate in cultural anthropology surrounding Paul Bohannan's assertions about the limits of comparative work[4] suggests, we ultimately must invoke such terminology and concepts to make intelligible to ourselves and our compatriots what we have observed abroad. Nor should our concern with being scrupulous preclude us from forming judgments about foreign societies, for the very effort to understand entails the formation of judgments, large and small.

Our responsibilities as thoughtful, careful comparativists, however, do suggest particular—modest, rather than grand—guidelines for our endeavor. From the outset of any comparative inquiry, we need to approach foreign subjects with an even greater tentativeness of theoretical construct and with an even greater self-consciousness than we would subjects closer to home. This caution may require us, for example, to use less sweeping and more flexible models so that we can reshape our working hypotheses to account for phenomena that we could not anticipate upon the basis of our own experience. These responsibilities also necessitate weighing with greater seriousness than is now the case the rhetoric and consciousness of those abroad we would study. We find it easier when viewing foreign societies to discern whatever gap may exist between what people believe they are doing and what they seem to us actually to be doing—with the result that we often are quick to dismiss as self-serving or obviously false what others seek to tell us about themselves.[5] Whether our perception of that gap is wholly warranted, or whether we choose to subscribe to the values others profess, it is vital that we pause to weigh their self-characterizations and self-perceptions. Finally, our obligations as comparativists dictate that we appreciate more fully the importance of "description" and, particularly, the type of textured, reflective examination that Clifford Geertz terms "thick description."[6] Legal academics typically place little value upon descriptive work in legal scholarship. At least as concerns

4. That debate is well described in LAW IN CULTURE AND SOCIETY 339–418 (L. Nader ed. 1969).

5. For a further discussion of this point, see Alford, *The Inscrutable Occidental: Implications of Roberto Unger's Use and Abuse of the Chinese Past* (forthcoming TEXAS LAW REVIEW February 1986).

6. Geertz interprets the term, which was first coined by Gilbert Ryle, to mean a careful, contextualized consideration of a society that would aid one, for example, in appreciating why a gesture that might be quite innocent in one cultural setting may be fraught with meaning in another. *See* C. GEERTZ, THE INTERPRETATION OF CULTURES 3–30 (1973); *see also* C. GEERTZ, LOCAL KNOWLEDGE (1983).

China—and I suspect that it is true with regard to many other societies—that denigration of description is deceptive. It all too often masks the assumption that whatever is being examined either differs little from what exists in our legal system, or, if it does differ, is surely less deserving of attention.

We must not delude ourselves about the difficulties of adhering to even these modest guidelines. No matter how strenuous our efforts to identify our preconceptions, appreciate the rhetoric of distant societies, and familiarize ourselves with the fabric of another society's life, we will never be fully successful in those undertakings. We will never, for example, be able to see the law of ancient China or even that of modern China precisely as would someone living in either of those societies. But the impossibility of reaching that level of understanding does not negate the importance of our trying to do so. I believe that our faith in the possibility of understanding others, coupled with the process of rigorously seeking to reach that end, brings us as close to an appreciation of others as is possible—so long as we neither mistake our faith for a description of reality nor forget that we can never expect to attain the objective we seek.

Professor Henderson has advertised this as a talk pertaining in part to China. So at the risk of being the impertinent junior scholar, let me try to illustrate briefly with respect to Chinese law my points about the limits of "grand theory" in comparative inquiry. In so doing, I will draw upon the vocabulary and theoretical frameworks of our legal culture, but I hope I will not use them in such a way as to obscure what is there on the Chinese side. I want to focus upon certain dimensions of Chinese legal history before moving briefly to the present, in part because I believe Chinese legal history is important and inherently of great interest. But I also want to address Chinese legal history because I believe that we can no more fathom contemporary legal developments in China without an appreciation of her past than we can make sense of the idea of judicial review in our own legal system without an understanding of *Marbury v. Madison*. Indeed, given the immediacy of history even in the People's Republic of China (PRC)—that is, the tendency of scholars, bureaucrats, and ordinary people alike to draw examples from the Chinese past to illustrate points about the present—it may be even more necessary to appreciate legal history in the Chinese context than it is in our own.[7]

7. In the United States, for example, it is hard to imagine the widespread use of allusions to distant periods in history to make points about contemporary political issues. Such examples abound in the PRC and other Chinese settings. Witness the recent attention in the Chinese press to Kang Youwei and the Hundred Day Reforms of the late nineteenth century. *See, e.g.*, Kong Xiangji, *A Recommendation of the Causes of the Failure of the 100-Day Reforms*, Renmin Ribao (The People's Daily), Oct. 21, 1985, at 5, *translated and reprinted in* Foreign Broadcast Information Service: China, Nov. 5, 1985, at K1; *see*

The formal criminal justice process in both preimperial (prior to 221 B.C.)[8] and imperial China (221 B.C. to 1912 A.D.)[9] has generally not been portrayed in a favorable light by either Chinese or foreign scholars.[10] Typical of its portrayal by all but a small number of historians is a pair of essays published in 1979 by two of the most eminent authorities on Chinese law in the United States—Jerome Cohen[11] and Victor Li.[12] Those essays, which deal chiefly with modern China but draw heavily upon and further purvey particular images of China's heritage, encapsulate well the approaches that Cohen[13] and Li[14] have taken over the years to the study of Chinese law.

In his essay, Cohen seeks to determine whether the formal criminal justice process (by which he means public, positive law administered by the state) has accorded the essence of what we call the "due process of law." For him, the universality of the values, and even of some of the forms, of due process as we recognize it make an appropriate, if not necessary, prism through which to approach the study of Chinese law. Looking through this lens, Cohen sees the following characteristics in the late imperial Chinese criminal justice system: "the conception of judges as ordinary civil servants rather than special officials independent of political authority, the frequently long detention of a suspect in a coercive environment, the presumption of his guilt, the lack of a privilege against self-incrimination, the absence of counsel, the inadequate opportunity to make a defense and the emphasis on confession."[15] Not surprisingly, he finds traditional Chinese justice basically to have been deficient, although he does note in passing the existence of administrative and other devices designed to keep the exercise of authority by local officials within clear bounds.[16]

Li makes no effort to defend or explicate in different terms the formal criminal justice process in prerevolutionary China. Instead, he politely

also Alford, *Of Arsenic and Old Laws: Looking Anew at Criminal Justice in Late Imperial China*, 72 CALIF. L. REV. 1180 (1984).

8. For a discussion of the manner in which preimperial Chinese law and society have been depicted in the West, see Alford, *supra* note 5.

9. The treatment by Western, Chinese, and other foreign scholars of the formal criminal justice process in imperial China is considered in Alford, *supra* note 7.

10. *See id.* at 1186–88.

11. Cohen, *Due Process?*, in THE CHINA DIFFERENCE 237 (R. Terrill ed. 1979).

12. Li, *Human Rights in A Chinese Context*, in THE CHINA DIFFERENCE, *supra* note 11, at 221.

13. *See, e.g.*, J. COHEN, THE CRIMINAL PROCESS IN THE PEOPLE'S REPUBLIC OF CHINA, 1949–1963: AN INTRODUCTION (1968); Cohen, *Chinese Mediation on the Eve of Modernization*, 54 CALIF. L. REV. 1201 (1966).

14. *See, e.g.*, V. LI, LAW WITHOUT LAWYERS (1978); J. BARTON, D. GIBBS, V. LI & J. MERRYMAN, LAW IN RADICALLY DIFFERENT CULTURES 102–36, 322–63, 531–76, 698–737, 909–49 (1983).

15. Cohen, *supra* note 11, at 256–57.

16. *Id.* at 256–58.

suggests that Cohen is asking the wrong question. The content of due process, he argues, is not even wholly clear in the West.[17] More importantly, efforts to consider Chinese law through this prism lead us away from the small group processes for communicating behavioral norms and resolving disputes that, he indicates, are the core of the Chinese legal tradition.

I have great and genuine respect for Cohen and Li, but both have taken positions that are problematic. I am as firm a believer as Jerome Cohen in the importance of the values that undergird due process, and as committed as Victor Li to the study of informal legal institutions in China; yet, I feel that neither of these pioneers of Chinese legal studies in this country does full "justice" to the formal criminal justice process in imperial China.

Cohen's deep belief in the universality of due process leads him to employ it not only as an explicitly normative yardstick against which finally to assess the Chinese past, but also as a framework for structuring his initial inquiry into that past. Whatever the appropriateness of evaluating the Chinese legal tradition according to due process standards, the use of due process as a "grand theory"—whether consciously designated as such or not—to shape the questions we ask about the Chinese experience and provide the construct for categorizing the data we develop, is potentially misleading. In short, if we commence our examination of China's legal heritage, or that of any foreign society, by looking for the presence or absence of the values and forms of due process, we run the risk of failing to understand on their own terms the people we are studying. Our failure to do so, ironically, makes it far more difficult for us ultimately to evaluate fairly their experience according to due process or any other standard.

Li has gone too far in the other direction. At the general level, perhaps in reaction to Cohen's assumptions about the universality of due process concerns, Li does not address as comprehensively as he might standards beyond those of the society being studied that are appropriate either for framing inquiry or for forming judgment.[18] And at a more specific level, perhaps in response to Cohen's focus on the formal criminal justice process, he dismisses consideration of that millennia-old process too summarily. The formal criminal justice process is worthy of substantially greater inquiry in itself and for its influence upon both Chinese conceptions of justice and the informal processes that Li has studied so insightfully.

17. Li, *supra* note 12, at 221–24.

18. To be sure, in his essay *Human Rights in a Chinese Context,* Li does briefly sketch certain principles that he believes ought to apply to all societies. Li, *supra* note 12. One wishes that Li had spoken at greater length about those principles and, in particular, about his sense of why they form a legitimate basis for judging what he elsewhere suggests are "radically different societies." LAW IN RADICALLY DIFFERENT CULTURES, *supra* note 14.

In making these very un-Chinese comments regarding those whose age and wisdom is greater than my own, I do not suggest that I have answers to the difficult problems of comparative legal inquiry to which I have tried to draw attention. Rather, I wish to underscore the cautionary notes that I tried earlier to sound. I do not believe, for example, that we can begin to understand the nature and importance of the formal criminal justice process in imperial China without first focusing more upon the cultural context from which it emerged, within which it operated, and which it helped shape. At the risk of summarizing much too glibly, let us consider briefly that context.[19]

If we look carefully, we see that the formal criminal justice process in imperial China was a product of a society that envisioned a very different relationship between individuals and the state than has been seen in the Anglo-American world. Briefly stated, that relationship was not one defined by the model of an explicit contract in which the citizenry ceded carefully defined dimensions of their independence to a government of which they were, at least implicitly, wary, while retaining certain fundamental, inalienable rights. For the Chinese, the state was neither the embodied product of free will nor an impersonal encroacher upon individual autonomy. Instead, at least in theory, the relationship with the state was far more one of trust, modeled after the family, in which the Emperor and his representatives were conceived of more as senior relations than as public figures.[20] Within this context, there was naturally far less concern with sharply delineating public and private, or with jealously guarding individual prerogative against a threatening governmental presence.

The less adversarial relationship between the individual and the state in traditional China did not, as is almost always suggested by Western commentators, leave officialdom essentially free to treat the populace as it wished. To the contrary, as was the case in the Chinese family, those in positions of power owed an enormous, fiduciary-like obligation to those over whom they exercised that power. Failure to carry out this obligation represented a moral deficiency of the first order that might well lead those in power to lose their elevated position. Obviously, this idealized vision of the relationship between individuals and the state often was not borne out in practice. Indeed, at times persons in power both in the state and the family used it to secure their dominance over others. Nonetheless, it is an integral

19. That context is described in greater length in Alford, *supra* note 5, and Alford, *supra* note 7.

20. Western scholars of Chinese law and legal history should pay more attention to the family, for it provided a model, whether consciously seen as such or not, for key facets of imperial Chinese life. The bond between governed and governors, relations between China and foreign peoples, and the organization of some dimensions of commercial life, in guilds and beyond, all arguably drew, at least in their idealized forms, upon the structure of the family.

part of Chinese civilization that we ought not disregard because of its difficulties of effectuation, any more than we would ignore the concept of the social contract when considering Anglo-American society because we, in practice, have not always lived up to it.

As might be imagined, the formal legal process that emanated from the cultural setting that I have described mirrored that culture's fundamental values. A single local official, called the district magistrate but popularly known as the *fumu guan* (father-mother official), was delegated the task of fostering the overall welfare of the Emperor's charges living within his district. Concomitantly, he was vested with a range of investigatory, prosecutorial, adjudicatory, and other responsibilities that we, being more distrustful of governmental power, prefer not to see reposed in a single individual. In preparation for these many and varied tasks, magistrates did not receive formal training in law or finance, but were instead expected to have mastered the Confucian classics.

To a far greater extent than even the most inquisitorial of civil law systems, the magistrate—who was, after all, the local representative of the Emperor—was the dominant figure in any trial. In order to discharge his responsibility to ascertain the truth, he was authorized to ask any questions he wished, personally view the scene of the crime, assign staff to investigate and to produce all evidence and witnesses, apply torture (long after it was abandoned as a practice in Europe),[21] and admonish the accused. In contrast to the Anglo-American legal tradition, the accused had no opportunity to structure and present a defense. But neither did the accused have the obligations imposed by our system to put forward factual and legal arguments for the consideration of the decision-maker and to initiate appeals.[22] As the magistrate had the obligation and the authority to ferret out whatever was important about a case, there was no need for counsel at trial (although current research suggests that, at least during the important pretrial stages, there may have been more of a legal profession in late imperial China than the conventional wisdom would have us believe).[23] Indeed, early Chinese commentary upon the West speculates as to why anyone would want to hire two bright individuals each to obscure the truth

21. *See* J. LANGBEIN, TORTURE AND THE LAW OF PROOF 134–39 (1976).

22. To be sure, there are exceptions to this general statement. Not all appeals in imperial China, for example, were taken automatically. In addition to the automatic reviews that were to be conducted in cases involving any type of serious punishment, individuals in the late imperial period could initiate independent appeals. This process is described in detail in Alford, *supra* note 7, at 1227–34. Conversely, in California all cases involving the death sentence are subject to an automatic appeal. *See* CAL. PENAL CODE § 1239(b) (Deering 1982).

23. *See, e.g.*, CHANG WEJEN, 1 CH'ING-TAI FA-CHIH YEN-CHIU [RESEARCH ON THE LEGAL SYSTEM OF THE CH'ING DYNASTY] 155–57 (1983).

and so further complicate the already difficult tasks confronting officialdom.

If the imperial Chinese legal process accorded the magistrate far-reaching powers, it also, at least theoretically, expected him to exercise them much as a trustee might. Elaborate imperial rules established clear standards that the magistrate was to meet in discharging his responsibilities. If he failed to meet those standards, even inadvertently, he was (again, at least in theory) subject to administrative or, in some serious cases, criminal punishment.[24] Thus, we find Chinese magistrates punished for oversights—both literally (as in the case of a nearsighted magistrate who failed to detect a small head wound when inspecting a corpse, and so accepted an erroneous coroner's report)[25] and figuratively—that would not have warranted substantial punishment at any point in modern Anglo-American legal history.[26] To ensure that those standards were met, the system also provided for the obligatory review by higher authorities of all sentences involving more than the infliction of a light bambooing, the availability to the accused of additional direct appeals, and the presence of officials known as censors, who were independently to evaluate the performance of magistrates and other officials, and who reported to the Emperor far more directly than did most officials.

That even with all these measures, the process worked imperfectly,[27] ought not to lead us to slight the moral ethos guiding that process, as some Western observers have done.[28] For example, respected American scholars have viewed the emphasis of imperial examinations upon the Confucian classics—to the exclusion of more "practical subjects"—as an exercise in antiquarianism, revealing that the Chinese system was both far less concerned with justice and far less likely to dispense it than our own. But such criticisms ignore the way in which this training was well attuned to its cultural setting. The Confucian classics were the embodiment of Chinese morality and stressed the deep responsibilities that those in positions of authority had to those in their charge. What better preparation could there

24. *See, e.g.*, TA TSING LEU LI [THE CODE OF THE GREAT CH'ING DYNASTY] arts. 7–8 (G. Staunton trans. 1966) (Taipei Reprint).

25. *See* In re: Hsü Chung-wei (unpublished translation by Fu-mei Chang Chen and others in the Harvard East Asian Legal Studies Group of a memorial presented by the Board of Punishments to the Ch'ien-lung emperor in 1780), *reprinted in* 1 CHINESE LAW 113 (W. Alford 3d ed. 1985).

26. I am grateful to Professor Hans Baade for pointing out to me that, during the eighteenth century, Spanish colonial administrators in the Americas could be punished for an erroneous judgment if, in reaching the judgment in question, they had failed to seek the advice of legally trained assessors. This notion had its genesis in Roman law.

27. Alford, *supra* note 7.

28. *See generally id.*; Alford, *supra* note 5.

be for a potential father-mother official, charged with a panoramic range of legal, administrative, and fiscal responsibilities, than a thorough appreciation of the moral message of Confucianism? Procedural details for conducting trials and the like could be spelled out in rule books that the magistrate could consult as necessary—or, better yet, have one of his many underlings consult for him.[29]

The care that we must bring to bear in examining Chinese legal history is no less warranted with regard to the study of law in the PRC (or, for that matter, Taiwan). On the surface, developments in the PRC since the death of Mao Zedong would seem to suggest that the Chinese are finally moving to develop what we would see as the early foundations of a "modern legal system." After all, during these years, the Chinese have adopted a new constitution that speaks of citizens' fundamental rights and protections from state incursions,[30] relatively elaborate rules of criminal procedure,[31] the PRC's first comprehensive criminal code,[32] and a host of other laws that are somewhat familiar in their terminology and procedures to Western lawyers.[33] Some foreign observers have heralded these changes as a sign that the Chinese are finally adopting a legal system that contains at least the beginnings of a rule of law ideal.[34] Other foreign commentators have dismissed these changes as a clever facade thrown up by the leadership "in an effort to restore *within the ruling elite* a set of rules that would enable them to play their usual games in less murderous conditions."[35]

Both of these interpretations miss the mark, for each seizes too readily upon the increasing presence in Chinese legal pronouncements of familiar language about rights and procedural safeguards. That language evokes for many in the West the connotations that such language carries in our own legal culture and sets up expectations that the Chinese mean to and will, in fact, be acting as we believe we do when we use it. The failure of the Chinese to meet these expectations, in turn, leads some foreign observers to

29. One could argue that the British civil service examination system, which was influenced by the Chinese, *see* Teng Ssu-yü, *Chinese Influence on the Western Examination System*, 7 HARV. J. ASIATIC STUD. 267 (1943), also subscribed to the notion that a broad classical education provided better training than narrow technical training.

30. The Constitution of the People's Republic of China was adopted in 1982.

31. *See* Zhu Qiwu, *General Aspects of the Chinese Criminal Code and Code of Criminal Procedure*, 2 UCLA PAC. BASIN L. REV. 65 (1983); *see also* Alford, *Zhu Qiwu and the Development of Criminal Law in the People's Republic of China*, 2 UCLA PAC. BASIN L. REV. 60 (1983).

32. *See* Zhu, *supra* note 31.

33. The best general portrayal of legal developments in the PRC during the first five years following the end of the Cultural Revolution in 1976 may be found in Lubman, *Emerging Functions of Law in the People's Republic of China*, in CHINA UNDER THE FOUR MODERNIZATIONS: PART 2: SELECTED PAPERS SUBMITTED TO THE JOINT ECONOMIC COMMITTEE OF THE CONGRESS OF THE UNITED STATES 235 (1982).

34. *See, e.g.*, Paragon, *Some Firsthand Observations on China's Legal System*, 63 JUDICATURE 476, 477–78, 484 (1980); Rood, *China Turns Back to the Rule of Law*, 54 FLA. B.J. 662, 662–63 (1980).

35. *See, e.g.*, S. LEYS, BURNING FOREST 159–69 (1985).

conclude that the Chinese are being wholly cynical in adopting such language.

To make the foregoing points is neither to suggest that we disregard the use of familiar language about rights and procedural safeguards used by the Chinese nor to ignore the possibility that, regardless of how it was originally intended, repeated use of such language may eventually take on something of a life of its own in Chinese society. Rather, it is to stress that because contemporary Chinese legal developments may seem less exotic and distant to us than those aspects of imperial Chinese law that I have described above—by reason of the language within which the new developments are cast, the modern setting within which they occur, and our growing personal interaction with Chinese colleagues—we must be doubly vigilant in examining these developments. We must guard against the tendency, that even the most cautious among us may share, to see the Chinese as now finally realizing—or at least saying they realize—the need to organize their legal and economic life the way we believe that we have chosen to do, and so validating the grand theories and other constructs through which we in the West seek to order our existence. In our inquiries, we must pay more careful heed to the setting within which the familiar language and new developments are presented. If we read carefully the language of the Chinese Constitution and other legal pronouncements, for example, we will find a constant coupling of rights with obligations, repeated indications that procedural safeguards are subject to the overall good of the people, and the frequent message that a major goal of these new legal developments is to restore China's power and prominence—none of which have exact parallels in the West. We must take seriously both this unfamiliar language and the historical and contemporary cultural, political, and economic settings from which these legal pronouncements have emerged, for each qualifies and imparts meaning to the words of due process and other familiar language. If we do so, we shall see that just as the Chinese selectively adapted to domestic circumstances and so transformed the original message of Buddhism, Christianity, and Marxism (to the extent they adopted each), they are now doing the same with the law of the modern liberal state. The Chinese are, to steal a phrase from a famed Chinese leader's characterization of his nation's adoption of Marxism, busily engaged in putting a "Chinese face" upon what they find of interest in the law of other peoples.

We foreign scholars may not think of our interest in ascertaining the existence or absence of due process in China—with or without a Chinese face—either as constituting a "grand theory" for inquiry in Professor Skinner's sense or as being inappropriately laden with the values of any particular culture. It is all too easy, however, for us to use due process not

only as a standard for explicitly evaluating Chinese law, but also, consciously or otherwise, as a framework for structuring initial inquiry into that law. Efforts at separating these two uses of due process are obviously somewhat artificial, but they are definitely worth making. There will always be ample opportunity to assess the Chinese experience according to familiar standards—as each of us in the West who writes about China inevitably does. To make those assessments fair and meaningful, however, we need to do a better job of trying first to understand that experience on its own terms. Only through such steps can we begin to understand what, if anything, genuinely is universal.

* * *

I wish to draw this talk to a close by returning to my starting point—namely, Ted Stein. It would be unwarranted of me to suggest that Ted necessarily would have endorsed the views that I have set forth today. But I do know that, as a deeply thoughtful and compassionate believer in the importance both of international law and international understanding, Ted would have wanted us to accord to the study of foreign societies and their law the same respect, fairness, and rigor that we would expect to shape any inquiry that a foreign observer might make into our law and legal tradition. Let us strive toward those standards as we remember him.