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## ARTICLE

# Orienting Lawyers at China's International Tribunals Before 1949

TAHIRIH V. LEE<sup>†</sup>

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## INTRODUCTION

The practice of law in Shanghai today appears rooted in a unified orientation of law, one forged during decades of authoritarian communist rule, and even before that, centuries of authoritarian imperial rule. But for decades before the Communist Revolution of 1949, Shanghai's lawyers disagreed amongst themselves about the sources and processes vital to the law. Divided into two schools of thought, they approached their careers oriented either to judicial decisions and oral advocacy or to statutory codes and writing-based bureaucratic procedures. Not only did dozens of these lawyers survive the Cultural Revolution to take part in the resurrection of China's legal system in the 1980s, but the repeat then of a sweeping legal reform once again opened the door to lawyers to stake out bold differences in approach to the law and to change the orientation of China's legal profession. The two camps drew a sharp line between themselves and embodied a profound local disagreement about how best to shape China's legal system which was then, in the 1920s and 1930s, in the throes of a revitalization. The code-oriented camp won out in the 1949 revolution, as bureaucracy formed the backbone of the new communist government and the role of courts and judges was greatly diminished.

Despite their differences, however, the two camps shared much, principally an embrace of law as a force for good in society, an ethic of service to clients, as well as an embrace of foreign legal systems.

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This embrace of foreign legal systems was at odds with the rising nationalism of all elites in China from 1910 through the 1930s.<sup>1</sup> The foreign nature of most of the courts and the global nature of much of the business of Shanghai at this time compelled Chinese lawyers to temper any pride in Chinese tradition with mastery of alien legal practices. The mutual respect for comparative law of both legal camps well equipped the Shanghai Bar to argue cases before the city's dozen-plus international tribunals and to service the globalized businesses that operated in the city.<sup>2</sup>

Given all of these similarities, the very existence of the division of the bar into two camps raises questions about why the division existed in the first place. Did it serve a particular purpose? Pierre Bourdieu<sup>3</sup> and Yves Dezalay<sup>4</sup> theorize that legal fields require the creation of polar opposites. This opposition, argue Bourdieu and Dezalay, masks fundamental overlaps of interests and views, but nonetheless is a necessary conceit for the creation of space within which a legal profession can function. Opposition is necessary, according to their view, because competition within the legal field creates hierarchical structures such as appellate courts, elite law firms and law schools, all of which form "symbolic capital" which bolsters

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1. For a description of nationalistic organizations in Beijing and Shanghai from 1917 through the 1920s, see ARIF DIRLIK, *THE ORIGINS OF CHINESE COMMUNISM* 158–63 (1989).

2. For an analysis of the relationship among these international tribunals and between them and the Chinese courts of Shanghai during the Extraterritorial period, see generally Tahirih V. Lee, *A Maze of Jurisdictional Walls: Conflict and Cooperation Among the Courts in Republican-Era Shanghai*, in *CHINESE WALLS IN TIME AND SPACE: A MULTIDISCIPLINARY PERSPECTIVE* 139 (Roger Des Forges et al. eds., 2010). For a description of the international tribunals of Shanghai during this period, see generally Tahirih V. Lee, *Shanghai Mixed Court*, in 3 *ENCYCLOPEDIA OF MODERN CHINA* 378 (David Pong ed., 2009) [hereinafter Lee, *Shanghai Mixed Court*].

3. See generally PIERRE BOURDIEU & LOÏC J.D. WACQUANT, *AN INVITATION TO REFLEXIVE SOCIOLOGY* (1992).

4. See YVES DEZALAY, *MARCHANDS DE DROIT: LA RESTRUCTURATION DE L'ORDRE JURIDIQUE INTERNATIONAL PAR LES MULTINATIONALES DU DROIT* [MERCHANTS OF LAW: LEGAL MULTINATIONALS AND THE RESTRUCTURING OF THE INTERNATIONAL LEGAL ORDER] 271–78 (1992) (Fr.). Dezalay applied this idea of the polarized legal field to lawyers specializing in international arbitration, in publications written with his research partner Bryant Garth, an American legal scholar. See generally *Building the Law and Putting the State Into Play: International Strategies Among Mexico's Divided Elite* (American Bar Foundation, Working Paper No. 9509, 1995); Yves Dezalay & Bryant Garth, *Fussing About the Forum: Categories and Definitions as Stakes in a Professional Competition*, 21 *L. & SOC. INQUIRY* 285 (1996). See also Yves Dezalay & Bryant Garth, *Merchants of Law as Moral Entrepreneurs: Constructing International Justice from the Competition for Transnational Business Disputes*, 29 *L. & SOC'Y REV.* 27, 35–36 (1995).

the prestige of legal specialists, particularly those accorded a higher status within the field.<sup>5</sup>

The two camps in early twentieth century Shanghai fit this theory, but the distinction between them served another purpose as well. It provided a means for expressing disagreement about the degree to which law in Shanghai should diverge from indigenous approaches. Cultural preferences for well-established models combined with negative associations with earlier Chinese models made foreign legal models attractive sources of ideas and vocabulary for working out the best legal system for the city.

Using original archival research,<sup>6</sup> I aim in this article to describe the distinctions between the two camps of lawyers in early twentieth century Shanghai, as well as their similarities, and then to analyze why and how foreign legal models were used by both camps and why the differences between the two camps were emphasized despite their commonalities. The two legal models were used to attain an elite status for the individual adherent and for law and the legal profession in China more broadly. They were used because foreigners founded *yingmei* and international tribunals in Shanghai and with them created new opportunities for Shanghai's elites. The differences were shaped by the range of choices available in Shanghai by the turn of the twentieth century because of sustained foreign influence there, and were emphasized out of true passion for the models, a sense of nationalism, and an opportunistic pragmatism.

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5. Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 805, 808–09, 814–17, 824–34, 851 (1987) [hereinafter Bourdieu, *Force of Law*]; Yves Dezalay, *From Mediation to Pure Law: Practice and Scholarly Representation Within the Legal Sphere*, 14 INT'L J. SOC. L. 89, 102–03 (1986); Boaventura de Sousa Santos, *On Modes of Production of Law and Social Power*, 13 INT'L J. SOC. L. 299, 319–20 (1985).

6. The author gathered materials for this paper in the library of East China University of Political Science and Law, which was the library of the former St. John's University; the Shanghai Municipal Library; the Shanghai Municipal Archives, also known as the Shanghai Municipal Archives Bureau; and the Shanghai Municipal Research Center for Higher Education at Jiaotong University all in the city of Shanghai, People's Republic of China. Much of the information regarding the workings of the law schools referenced in this article are from the following sources: a) interviews conducted by the author in 1991; b) institutional publications, such as the yearbooks of the Soochow School of Comparative Law and the Shanghai Fazheng Xueyuan, which were substantial volumes including photos of faculty and students, essays and academic articles written by them, and drawings illustrating their visions of law in Chinese society (the Soochow yearbooks took on various titles over the years, such as *The Woolsack*, *The New Atlantis*, and *Dongwu Niankan*); and c) archival sources stored in files, referred to by the number assigned under the Shanghai Municipal Archives' own numbering system.

Awareness of this cleavage at the heart of Shanghai's legal profession in the early twentieth century helps us better understand the practice of law in Shanghai today, after three decades of legal reform which created many similarities to China's legal system in the earlier decades. In both periods, the practice of law grew and became more centered on clients and more open to foreign influences.<sup>7</sup> Both eras of legal reform brought about a resurrection of the legal profession of China and some of the same questions about the proper role of lawyer and judge.<sup>8</sup> These arguments are often couched in arguments stressing China's cultural uniqueness.<sup>9</sup> The earlier diversity of views orienting China's legal system undercuts the culture-as-destiny arguments. Foreign models may have been imposed to some extent upon China, but their Chinese adherents in the 1920s and 1930s did so with complexity, intelligence, and a keen awareness of China's needs.

#### I. TWO ORIENTATIONS TOWARD SOURCES OF LAW AND THE ROLE OF LAWYERS

The differences between the two types of legal education Chinese lawyers could obtain in Shanghai during the 1920s and 1930s were pronounced, and made deliberately so by the adherents to each camp, both while students and professionals.<sup>10</sup> Shanghai jurists themselves labeled the two cultures with names that emphasized their foreign origins. One culture was *yingmei* (Anglo-American), represented foremost by the Soochow School of Comparative Law (or *Dongwu faxueyuan*, hereinafter *Dongwu*). *Yingmei's* rival legal culture, promoted by at least six law schools in Shanghai, was commonly known as *deri* (German-Japanese).

The word order of both names placed the country of the legal model's origin first and the transmitter of the model to China second.<sup>11</sup> Despite its precedence in the word order, English law

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7. For a description and a balanced analysis of the legal reforms in China of the 1980s and 90s, see RANDALL PEERENBOOM, *THE LONG MARCH TOWARD THE RULE OF LAW* 347–50 (2001). Peerenboom identifies four camps of legal reformers, distinguished in part by the degree to which judges and lawyers may independently influence legal outcomes. *Id.* at 12–17.

8. See Tahirih V. Lee, *Exporting Judicial Review from the United States to China*, 19 COLUM. J. ASIAN L. 152, 168 (2004).

9. See, e.g., LIU NANPING, *OPINIONS OF THE SUPREME PEOPLE'S COURT: JUDICIAL INTERPRETATION IN CHINA* (1997).

10. See *infra* at Parts I.A & I.B.

11. *Id.*

exerted little direct influence on the *yingmei* school.<sup>12</sup> Rather, the United States supplied the pedagogy, the course materials, and the curriculum.<sup>13</sup> In the same way, German law exerted little direct influence on the *deri* schools, while Japan provided the curriculum and the basic pedagogical approach and was its direct source for the latest trends in legal education from the European Continent.<sup>14</sup>

These two legal cultures developed during four decades preceding the 1949 Communist Revolution.<sup>15</sup> It was a formative period in Chinese legal development, the projects of Chinese jurists being nothing less than founding a legal profession and rebuilding China's legal system after collapse of two millennia of imperial rule.<sup>16</sup> The degree of legal ferment made the stakes high for Chinese lawyers. Foundational issues open to them included: sources of law in China, judges' interpretation of the law, and the role of lawyers in the legal system.<sup>17</sup> Schools and universities were established in China for virtually the first time, many by foreigners with religious affiliations,<sup>18</sup> opening to young women especially, but also to young men, new opportunities for self-advancement, and exposure to foreign ideas. It is no accident, then, that law schools provided the

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12. See *infra* Part I.A.

13. See *infra* Part I.A.

14. See *infra* Part I.B. For example, only one book of the 3,853 book in the Shanghai College of Law (*Shanghai faxueyuan*) library in 1938 was in German, while 172 of the books in its library were in Japanese, or forty-one percent of the foreign books in the collection. In the 1920s and 1930s, educational exchanges between Japan and China, both of people and information, thrived. Japanese jurists diligently studied Chinese law, Cyrus Peake, *Recent Studies on Chinese Law*, 52 POL. SCI. Q. 117, 131–34 (1937), and Chinese jurists studied the legal system that Japan adopted in the wake of the Meiji Restoration. The emphasis on codified law and inquisitorial due process, upon which *deri* jurists built a second legal culture in Shanghai, was first imported into Japan from Germany, and to a lesser extent, was imported into China directly from France. Percy R. Luney, Jr., *Traditions and Foreign Influences: Systems of Law in China and Japan*, 52 LAW & CONTEMP. PROBS. 129, 131–32 (1989).

15. For in-depth, primary research on this period that reveals different aspects of the ferment in the legal system, see generally CIVIL LAW IN QING AND REPUBLICAN CHINA (Kathryn Bernhardt & Philip C.C. Huang eds., 1994); ELIZABETH J. PERRY, REBELS AND REVOLUTIONARIES IN NORTH CHINA, 1845–1945 (1980); Tahirih V. Lee, Law and Local Autonomy at the International Mixed Court of Shanghai (Ph.D. dissertation, Yale University Department of History, 1991); Lee, *Shanghai Mixed Court*, *supra* note 2.

16. For a study of that collapse in two of China's provinces, see generally JOSEPH W. ESHERICK, REFORM & REVOLUTION IN CHINA: THE 1911 REVOLUTION IN HUNAN AND HUBEI (1976).

17. *Id.*

18. RUAN RENZE (阮仁泽) & GAO ZHENNONG (高振农), SHANGHAI ZONGJIAOSHI (上海宗教史) [THE HISTORY OF RELIGION IN SHANGHAI] 685, 915 (Shanghai People's Press 1992) (stating that more than 20 boarding schools were founded by 1926 that taught in English or French).

breeding ground for new ways of structuring law and the legal profession.

A. *Yingmei*

At the sole law school in the *yingmei*, or Anglo-American camp, one hundred percent of the faculty held law degrees from schools in the United States, forty percent of them from the University of Michigan Law School.<sup>19</sup> The Dean of this law school, known as the Soochow Law School, wrote: “England and America are the most perfect representatives of the western civilization.”<sup>20</sup> The Dean’s mentor was Roscoe Pound, the renowned American jurist and Dean of the Harvard Law School.

The curriculum and pedagogical approach were pre-professional more than theoretical and grounded students in methods that would help clients win commercial disputes about promises and property ownership. The school published hornbooks for its students detailing how to bring various types of private actions in local Shanghai courts. Students observed trials at the local courts,<sup>21</sup> and their yearbook published the history and procedural rules of the courts.<sup>22</sup> Students had to write a long paper in their final year, on topics oriented to the practice of commercial law in the city’s internationalized marketplace, such as maritime insurance and contract law, international private law, commercial paper, labor insurance, evidence, Anglo-American sealed contracts, limited and unlimited liability corporations, and trade unions.<sup>23</sup>

Pupils were trained to be generalists skilled in problem solving, rather than specialists in a particular substantive area of the law. Teachers used the case method in the classroom, assigning casebooks from the United States to teach such courses as legal ethics, criminal

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19. Student Body of the Comparative Law Sch. of China, 2 DONGWU FAKE JIKAN (東吳法科季刊) [WOOLSACK] 18–22 (1924) (on file with author). Alison Conner has also researched this law school and brings to light connections between it and a religious community in Shanghai and the great emphasis placed upon comparative law at the school. See Alison W. Conner, *Training China’s Early Modern Lawyers: Soochow University Law School*, 8 J. CHINESE L. 1, 3 (1994).

20. The school’s official literature does not say where or when, and leaves this piece of information out after 1930.

21. Here the local courts refer to The Shanghai District Court and the Jiangsu First Branch Appeals Court. See 1932 Dongwu Niankan (東吳年刊) [SOOCHOW ANN.] 5 (on file with author).

22. 1924 WOOLSACK 94, 94–95.

23. See 1932 SOOCHOW ANN. 9, at 9; see generally *Falü Simian de Xuecheng* (法律四年的學程) [*Four-Year Curriculum of Law*], 1944 SOOCHOW ANN. 1.

law, torts, evidence, common law pleading, equity, domestic relations, and contracts.<sup>24</sup> To prepare for class, students memorized the facts, issues, and rulings in United States court cases, and in the classroom professors grilled them on these details, pushing them to find the answers latent in each case by using logic, argumentation, and hypothetical scenarios. Professors used the Socratic method of firing questions at students, then leading them to reason their way to the answer by applying to each hypothetical the correct principle of law from each case they had read. Thus, instructors drilled their students in questions of admissibility of evidence and the Anglo-American tort concept of nuisance.<sup>25</sup> They posed questions such as:

1. When and how did the common-law maxim 'Husband and wife are considered as one person' originate?
2. Suppose your client is being sued for breach of promise of marriage, what will you advise your client to do?
3. A seller sells his sheep to a certain C in consideration of a big sum of money, is it a good sale?
4. What is de facto officer? Tell us what you understand by that.
5. Tell us the nature of common-law marriage.
6. What is a de jure corporation?

To this last question, one of the flustered students called upon ventured an answer: "Well, the *jury* corporation is a corporation, composed of a group of persons, chartered by law, carrying on Jury-business, to render a favorable verdict to whichever party in litigation employing them." The Professor continued: "where can you find such corporations?" The student dug himself in deeper: "Oh! Throughout England and the United States."<sup>26</sup> Leading students down the primrose path, not correcting them, but letting them discover answers more or less on their own; this pedagogical technique deemphasized the absolute truth of an answer and emphasized the importance of supporting arguments of any kind, no matter how tenuous.

In the Anglo-American tradition of the jurist as general problem solver, students at this law school could not specialize in particular areas of the law. They all followed the same four-year course

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24. They taught German civil law and private international law without cases, however. See 1932 SOOCHOW ANN. 7, at 7-9. For the domestic relations course, professors assigned the book *Cases on Domestic Relations*. See 1924 WOOLSACK 112, 112.

25. *Graduation Examination—Barred!*, 1924 WOOLSACK 102, at 102.

26. *Id.* at 120.



designed to expose them to a broad range of subjects.<sup>27</sup> A small part of the program was left open for electives, most of which were in Anglo-American common law subjects such as real property, contracts, and trusts.<sup>28</sup>

Campus discourse and activities at the law school promoted Anglo-American culture. English was spoken and written to the exclusion of all other languages. About two-thirds of the books and law journals in the library were published in the United States.<sup>29</sup> All courses and assigned readings were in English.<sup>30</sup> One course focused solely on English principles of rhetoric, and used Charles Dickens' *David Copperfield* as a text.<sup>31</sup> Students were familiar with the Helen Palsgraf case, a seminal case in American tort law.<sup>32</sup> Student vocabulary included terms current in American contract and tort law: "offeror," "offeree," "offer," "acceptance," "counteroffer," "trespass," "false imprisonment."<sup>33</sup>

Oratory was emphasized early in a law student's career. St. John's University, the parent university of the Soochow Law School that prepared some of its students for law school, sponsored student debates each year, a popular accompaniment to the pre-law course. The administration set aside a whole day for the event and suspended classes.<sup>34</sup> The event encouraged aggressive and precise oral skills. An observer wrote: "Their arguments, clear cut, logical, and fitting together as a finished whole, constituted a bulwark against which all the waves of the opposition beat in vain. In the rebuttal, [the opponent] showed ready wit and persuasive skill; his delivery was full of decision and vehemence."<sup>35</sup>

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27. By contrast, by 1900 in American academia, "[t]he elective had destroyed the classical concept of a liberal education . . . ." ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO 1980S*, 51 (1983).

28. See 1929 SOOCHOW ANN. 5, 5. See also 1932 SOOCHOW ANN. 7, 7-9.

29. Calculated from figures in THE NEW ATLANTIS 39 (1920) (on file with author). See also Charles Y.S. Yu, *Our Law Library*, 1945 WOOLSACK 2, 2-4.

30. THE NEW ATLANTIS, *supra* note 29, at 72.

31. SILI DONGWU DAXUE FALÜ XUEYUAN YILAN (私立東吳大學法律學院一覽) [A RECORD OF THE INDEPENDENT DONGWU UNIVERSITY LAW SCHOOL], 43-44 (1932) (on file with author).

32. *Judge for Yourself*, 1946 SOOCHOW ANN. 1, 1.

33. Waylee, *One Saturday Afternoon*, 1942 WOOLSACK 106, at 106. See also 1930 SOOCHOW ANN. 226, at 226.

34. THE NEW ATLANTIS, *supra* note 29, at 140.

35. *Id.* at 89.

The law school aimed to prepare students for oral advocacy.<sup>36</sup> For three decades the school ran a moot court for the students.<sup>37</sup> The secretary of the class of 1925 wrote that “[W]e fought! Fought vigorously—yet not with fists and arms, but with tongues and arguments, when we were appointed as lawyers during our moot court trials.”<sup>38</sup> Another student reported: “Strenuous effort is made in every session by each lawyer appointed to attack his opponent, to defend his case, or to present his arguments.”<sup>39</sup> The practice meetings culminated in a public moot court trial at commencement every spring at which local judges presided.<sup>40</sup>

Students wholeheartedly embraced the adversarial nature of their exercises. They enjoyed the litigation practice so much, they organized two literary debating societies that gave attention to honing public speaking and debate skills.<sup>41</sup> They met after class in their classroom, gatherings “always marked by long discussions and beautiful rhetoric. As budding lawyers we liked to argue.”<sup>42</sup> They prided themselves on the passion of their debates; one student speculated that such “fighting spirit . . . in itself is a necessity for the youth of any nation.”<sup>43</sup>

The students got time off for Christmas, the New Year on January 1st, and Easter.<sup>44</sup> Like Harvard’s *Veritas* and Yale’s *Lux Et Veritas*, the school sported a motto: “Unto A Full Grown Man.” Athletic teams played together regularly, and the sports cheer for these events was “Allabali, Allabala, Soochow, Soochow, Rah, Rah, Rah. We win, Siss Boom Bah!”<sup>45</sup> The law school adopted a school song, that was in English and went:

*Rise ye men of Tung Wu Law School, Stand in Strength  
today / The eyes of China are upon you, You cannot get*

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36. The practice sessions held every other Saturday alternated following United States court procedure and Chinese court procedure. See Alison W. Conner, *Training China’s Early Modern Lawyers: Soochow University Law School*, 8 J. CHINESE L. 1, 3 (1994).

37. *Id.*

38. 1924 WOOLSACK 65, 65.

39. *Id.*

40. Titus Y. Chang, *Moot Court*, 1924 WOOLSACK 75, 75; *Comparative Law School Holds Commencement*, 1924 WOOLSACK 91, at 91.

41. These societies were the Proculian Literary Society and the Sabinian Literary Society. 1924 WOOLSACK 94, 94–95.

42. *Id.*

43. 1930 SOOCHOW ANN. 226, 226.

44. THE NEW ATLANTIS, *supra* note 29, at 140.

45. *Id.* at 147.

*away / In the darkest hour or brightest, Faithful we shall  
be, Faithful to our school and country, Throughout eternity.*

The school set up a student-run law journal.<sup>46</sup> It promoted case law by publishing in every issue decisions of the country's supreme court, judicial opinions of local courts, and short student notes analyzing new national statutes and legal developments abroad.<sup>47</sup>

The students published a yearbook. In its first issues, the yearbook was written in English entitled *The Woolsack*. The name came from the coarse piece of wool cloth reputedly sat upon by the Chancellor of England whenever he presided over the courts of equity, the branch of English courts accessible to the underprivileged.<sup>48</sup>

The aspirations of students reflected a deeply ingrained belief in the separation of law and politics. In 1924, a student wrote an essay defining the law as something autonomous from government, whose main purpose was to protect the individual and his property from other individuals:

I [the law] protect the worker while producing the fruits of his toil, and in the enjoyment of them . . . With me, your lives, liberties, and property are safe, and your higher faculties left free for development . . . I am essential to you for your defense against the assailant, the thief and the anarchist—against the lawless . . . In the first rank of my legions stands the incorruptible and conscientious judge . . . In the second rank stands the able and upright attorney, pleading each suitor's cause according to his abilities, but always within the limits of honesty and decorum. And in the third rank, stands the plain citizen, not skilled in law . . . but rather in the arts of production and trade which I protect.<sup>49</sup>

This emphasis on the separation of law and government meant that lawyers expected judges to render decisions independent from

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46. It was the first student law journal in China and the first English language law journal published in China. Every year it published six issues in Chinese under the name of *Faxue jikan*, and four issues in English under the name of *The China Law Review*. See *The China Law Review*, 1924 WOOLSACK 81, 81.

47. *Id.* Dongwu also published a journal in Chinese called *Faxue Zazhi* (法學雜誌).

48. See *Woolsack*, OED ONLINE, <http://www.oed.com/viewdictionaryentry/Entry/230157> (last visited Apr. 15, 2012).

49. Y. L. Liang, *I Am the Law*, 1924 WOOLSACK, 100, 100.

pressures from the government. It also valued judges more than bureaucrats as arbiters of the law, and ultimately, as authorities capable of dispensing the goods of society.

### B. *Deri*

Independence of court and judge received less emphasis at the other type of law school, known as *deri* (German-Japanese). All of the founders<sup>50</sup> and most of the faculty held degrees from law schools in Japan.<sup>51</sup> Professors lectured, students took notes. Teachers told students what the law was, rather than trying to ferret answers out of them by asking questions or asking for their opinions. Case law was used in the classroom, but deemphasized, in favor of the memorization of statutes and principles. Teachers used cases not as vehicle for honing rhetorical skills in class and as the sole source of legal principles, but rather merely as examples to explain legal concepts, such as ownership or contract, concepts designed not by judges but by the authors of statutes.<sup>52</sup>

Teachers required students to buy two kinds of books: required reading texts (*bidushu*) and reference books (*cankaoshu*).<sup>53</sup> To prepare themselves for class, students read these and homegrown copies of notes of professors' lectures circulated by enterprising students. Collections of local judicial opinions were available for homework reading, but were not discussed in class.<sup>54</sup>

The law schools emphasized specialization, with a rich selection of programs. They offered up to five tracks of four-year study leading

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50. SHANGHAI FAXUEYUAN XIAOYOUHUI (上海法学院校友会) [ALUMNI ASSOCIATION OF SHANGHAI COLLEGE OF LAW], SHANGHAI FAXUEYUAN XIAOYOUHUI CHENGLI SIZHOUNIAN TEKAN (上海法学院校友会成立四周年特刊) [SPECIAL ISSUE FOR THE FOURTH ANNIVERSARY OF ALUMNI ASSOCIATION OF SHANGHAI COLLEGE OF LAW] 5, 8 (1990) [hereinafter SPECIAL ISSUE].

51. Most of the foreign degrees held by *deri* law school professors were from Japan. For Shanghai College of Law faculty training, see Shanghai Fake Daxue Yilan (上海法科大学一览) [A Record of Shanghai College of Law], Shanghai Municipal Archives file Q247-1-142 (1928) (on file with author); Shanghai Faxueyuan Yilan (上海法学院一览) [A Record of Shanghai College of Law], Shanghai Municipal Archives file Q247-1-149, at 44–45 (1933) (on file with author).

52. My thanks to John Haley for his explanation for pedagogical methods in prewar Japanese law schools.

53. Plato's *Republic* was included among these reference books.

54. Interview with Su Huaiyi, Wang Shaoting, and Lu Beikang, in Shanghai (May 5, 1991). In 1931 the College of Law published a collection of judicial opinions from the Shanghai District Court and the Shanghai Special District Court for its students to read. JIANGSU SHANGHAI TEQU DIFANG FAYUAN PANJUE (江蘇上海特區地方法院判決) [DECISIONS OF JIANGSU SHANGHAI SPECIAL DISTRICT COURTS] (1931).

to the equivalent of the LL.B. or a bachelors degree in law. Students could choose from tracks in law, government, economics, banking, and accounting. Within the law track, students had to major either in judicial studies, administrative law, or international law, and there were no electives. Two and three-year programs were also offered.<sup>55</sup>

The schools viewed the legal profession as a direct route into bureaucratic civil service. The judicial major trained students for work in the judicial bureaucracy, and the administrative law major prepared students for careers drafting regulations or for a career in the procuracy. Regardless of their major, all *deri* law students were trained to apply statutes strictly and were trained in fact finding, proof taking, and in writing and researching legal documents, all functions of continental and Japanese civil law judges and prosecutors. The curriculum introduced real-world knowledge of an organizational sort, such as the writing and research of specialized legal documents valuable to a multi-layered state-run economy, such as China's was becoming in the 1920s and 1930s.<sup>56</sup>

Roman law, the basis of the continental civil law traditions imported in Japan, was a required course, as were international public law and international private law, both outgrowths of the civil law tradition.<sup>57</sup> Of the five civil law subjects taught, three used Japanese statutes.<sup>58</sup> The schools taught language courses in Japanese, German, French, and Russian, one of which was required, and of which would have made important European civil codes more accessible.<sup>59</sup> Multiple courses for administrative law were offered, while Anglo-American law was limited to a single and discrete subject.<sup>60</sup>

The pedagogy, curriculum, degree of specialization, libraries, faculty, and extracurricular activities of Shanghai's law schools reflected a bias either for or against a strong role for litigation, lawyers, and oral argument in the legal system. In the *yingmei* camp,

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55. For a description of the offerings, see Sili Shanghai Faxueyuan Yaolan (私立上海法学院要览) [A Record of Private Shanghai College of Law], Shanghai Municipal Archives file Q247-1-154 (Aug. 1937) (on file with author); Shanghai Fake Daxue Yilan (上海法科大学一览) [A Record of Shanghai College of Law], Shanghai Municipal Archives file Q247-1-142 (1928) (on file with author).

56. See generally PARKS M. COBLE, JR., *THE SHANGHAI CAPITALISTS AND THE NATIONALIST GOVERNMENT, 1927-1937* (2d ed., 1986).

57. See *supra* note 55.

58. The three subjects were general principles, debt, and property rights. Interview with Lin Wopeng, in Shanghai (May 11, 1991).

59. "IO" DOSSIERS, MUNICIPAL POLICE INTELLIGENCE REPORT (Aug. 5, 1926).

60. Shanghai Municipal Archives file 247.51.

lawyers were generalists and problem solvers, while in the *deri* camp, lawyers were specialized and more attuned to statutory interpretation and a bureaucratic government. These differences aligned with those between the widely recognized classification of European legal systems into Common Law and Civil Law systems.

## II. SIMILARITIES

As different as they were from one another, the two legal cultures both embraced foreign legal styles and shared a faith in and a scientific approach to law. Both beliefs fit with the pressures on Chinese in Shanghai at the time to adapt to the late nineteenth century versions of American, Japanese, and European law brought in through the dozens of international tribunals set up there during the period of Extraterritoriality (1844–1943).<sup>61</sup> And so, lawyers in both camps were attracted to the practice of law because it provided an avenue for upward mobility.

### A. *Turning Outward to Meet Local Needs*

Genuinely new legal models were needed for legal professionalism to take root. If there was going to be any professional specialization in law, legal education was needed, but the institution of the law school itself was alien to China. China had a long history of statutory law and law courts, but not of places to train legal specialists.<sup>62</sup>

The effort by Chinese elites to turn outward for legal models was serious. Within two decades, nearly a dozen law schools affiliated with foreign models were founded.<sup>63</sup> This is itself a testament to the depth of the commitment to learning from the outside, particularly when we consider that twenty years earlier at the turn of the twentieth century there were probably no universities in China, let alone law schools with fight songs.<sup>64</sup> Chinese legal scholars of the 1920s, 1930s and 1940s were trained in the best law schools in the world, including Harvard, Cornell, Northwestern, Michigan, the Sorbonne, the University of Berlin, and the University of Tokyo.<sup>65</sup> They learned English, German, Japanese, French, and Russian well enough to read

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61. See Lee, *Shanghai Mixed Court*, *supra* note 2.

62. See Conner, *supra* note 19, at 1.

63. Interview with Lin Wopeng, in Shanghai (May 11, 1991).

64. *Id.*

65. *Id.*

and analyze statutes and legal texts in those languages and to publish legal treatises in those languages.<sup>66</sup> At Dongwu, for example, students were required to study several years of English, and could take electives in advanced English.<sup>67</sup> At the *deri* schools, students also had to take a second language, either German, Japanese, French, or Russian, any of which made the imported European civil law more accessible.<sup>68</sup>

The libraries at the schools contained literature from all over the world,<sup>69</sup> and the curricula at both types of law schools reflected a serious effort to bring foreign law to China. For example, only twelve percent of the general required law curriculum at the College of Law and Politics looked at the Chinese context for the law students were studying (four out of 34 courses).<sup>70</sup> Of the five civil law subjects taught in that curriculum, only two—inheritance and divorce—used Chinese statutes.<sup>71</sup>

The commitment to foreign models reached the highest levels of the national government of China. The Nationalist government fully recognized Dongwu<sup>72</sup> and also actively promoted the German-Japanese model. Guomindang (Nationalist Party) loyalists founded the first *deri* school. Sun Yatsen's Minister of Justice Xu Qian, who was an expert in Roman law and Continental European law,<sup>73</sup> founded and served as the first President of the College of Law and Politics in 1924. Members of the Chinese Communist Party founded the second *deri* school, the College of Law, in 1926 in the French Concession.<sup>74</sup>

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66. *Id.*

67. *Id.*

68. *Id.*

69. In 1920, of a total of 1,301 books in the Dongwu law library, at least nine hundred were from the United States. THE NEW ATLANTIS, *supra* note 29, at 39. In 1932, of the 47 law journals in the library, 40 were foreign, 29 were from the United States, one was from India, one from Scotland, one from Britain, three from Germany, one from the Philippines, three from France, and one from Canada. Charles Y.S. Yu, *Our Law Library*, 1945 WOOLSACK, 2, 2–4.

70. Interview with Lin Wopeng, in Shanghai (May 11, 1991).

71. *Id.*

72. 1930 SOOCHOW ANN. preface.

73. Shanghai Fazheng Xueyuan Xiaoyouhui Diyi Lishihui: Gongzuo Baogao (上海法政学院校友会第一理事会: 工作报告) [First Council of Shanghai Institute of Law and Politics Alumni Association: Work Report] 1 (1990) [hereinafter SFFXT]; interview with Su Huaiyi, Shanghai (Aug. 12, 1990 and May 11, 1991).

74. The founders left Shanghai, however that same year, ostensibly to open a new school elsewhere. See SPECIAL ISSUE, *supra* note 50, at 5–6.

Both schools later claimed founding by the Nationalist Minister of Education and maintained close ties with the Guomindang. Many of the students at the College of Law participated in Guomindang political work, and the school published a pro-Guomindang periodical called *Dangtao Jukan* (*The Party Word*). Chiang Kai-shek's regime appointed prominent graduates of both types of law schools to high posts. The Guomindang flag hung in the moot courtroom of Dongwu<sup>75</sup> and in the assembly room of the Shanghai College of Law.<sup>76</sup> Madame Cheng Sumei, an active Guomindang politician, served as the College of Law's President. Its board of directors was made up almost entirely of Guomindang government bureaucrats or former provincial assembly members or bureaucrats in the Republic of China before 1927, some of whom were appointed by the Judicial Yuan.<sup>77</sup> The teaching faculty also had ties to the Guomindang. In 1928, 24% of the faculty were bureaucrats, civilian judges, or prosecutors in the Guomindang government.<sup>78</sup> A few were judges in Guomindang military courts.<sup>79</sup> General Feng Yuxiang and members of the Guomindang heavily subsidized both the College of Law and the College of Law and Politics.<sup>80</sup>

The turning outward occasioned by the growth of the *yingmei* and *deri* legal cultures was not the equivalent of a quickly passing fad. First, the popularity of law among potential practitioners was not limited to a few. In 1930, 18 years after the founding of the Shanghai Bar Association, over one hundred lawyers had joined it, more than the number of active barristers in England just thirty years earlier.<sup>81</sup> Nor was the turning outward a superficial, slavish borrowing out of professed infatuation with foreign things. The two local legal cultures sparked nothing less than twin revolutions in Chinese legal culture: the transformation of law into a positive instrument for social good, and the introduction of methodological approaches to legal problems. Both revolutions were in the process of assignation into Shanghai

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75. *Moot Court*, 1929 SOOCHOW ANN. 144, 144.

76. Shanghai Fake Daxue Yilan (上海法科大学一览) [A Record of Shanghai College of Law], Shanghai Municipal Archives file Q247-1-142 (1928) (on file with author).

77. Of the 19 directors at the Shanghai College of law serving in 1928, nine were bureaucrats, military judges, or prosecutors in the Guomindang government, 14 bureaucrats or judges in regimes before 1927. Shanghai Fazheng Xueyuan Xiaoyouhui" (上海法政学院校友会) [Shanghai Institute of Law and Politics Alumni Association], at 1 (on file with author).

78. *See Law Faculty*, 1943 SOOCHOW ANN. 43–50 (1929).

79. *Id.*

80. "IO" DOSSIERS, *supra* note 59.

81. STEVENS, *supra* note 27, at 131.



society by the time the Chinese Communist Party assumed the reigns of national government in 1949.

*B. Faith in Law*

Those who belonged to either of these legal communities professed faith in the law. Unlike the view of law as the punishment of subjects and unruly bureaucrats that marked the imperial dynasties preceding the Republic,<sup>82</sup> in the *yingmei* and *deri* schools law was perceived as a positive force in society.

Dongwu's dean, John Wu, felt like a participant in the universal march toward intellectual and social progress in which law provided unprecedented opportunities for personal and societal advancement. He wrote, "if I were living under the old regime [Qing], I would never have thought of becoming a student of law."<sup>83</sup> His motives for promoting *yingmei* were lofty and his optimism about the law unbounded. He believed that China's legal system was a way to draw China into the circle of prosperous nations of the world and make it prominent again. A man who had begun his schooling in the sciences, Wu believed that law was a scientific panacea, a civilizer.<sup>84</sup>

*Yingmei* students were trained to respect the law. One member of the class of 1924 wrote that he wished to become a "legal admirer."<sup>85</sup> In 1930, a recent Dongwu graduate then studying at Cornell Law School wrote:

Many people accuse the lawyer of being a cheat and a rascal. This is a wrong view . . . . Some people use the study of law as a means of earning a livelihood; others use it to sharpen their wits and to broaden their vision and foresight so as to better solve the intricate problems of life. It is the former type of lawyers that are accused of being rascals and oftentimes rightly so. When asked what a lawyer is, someone answered, 'A lawyer is a man who induces two other men to strip off their clothes for a fight and then runs off with their clothes.' In law, as in other

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82. See Edward Farmer, *The Despot as Lawgiver: The Codes of the Founding Ming Emperor* (Mar. 28, 1993) (unpublished manuscript) (on file with author). See also, GEOFFREY MACCORMACK, *TRADITIONAL CHINESE PENAL LAW 100-60* (1990) (discussing punishments for citizens and officials).

83. John C.H. Wu, *Some Contrasts Between Occidental and Oriental Law*, CHINA L.J., Apr. 15, 1931, at 11, 12.

84. *Id.* at 11-12.

85. *Who Are the Seniors?*, 1924 WOOLSACK 89, 89.

things, what tells in the long run is not talent but character. In America the great statesmen and leaders of the nation have been lawyers. In China to-day the so-called heads of the people are soldiers of the fortunes of war, men who great [sic] as rascals and cheats. When militarism gives way to law and order, then the position of the lawyer and statesman will be one of power and influence. But has China a sufficient number of competent lawyers and jurists to lead, serve, and guide the destiny of the nation? As a student I have regarded the study of law as a preparation for the life, the ultimate purpose of which, like any other form of education, is to make man noble, and helpful, and good.<sup>86</sup>

*Deri* culture heralded the concept of *zhengfa*, “politics and law,” as a new system of thinking about statecraft. It was a concept imbued with great optimism and faith in the healing power of law. In *zhengfa* politics was tied to law not in the negative sense known in the United States, where something is out of joint when law masks political agendas, but in the positive sense of two helpmates that mutually complement one another. Of course, the marriage of law and government was not new to China, but the new terminology captured a new concept of law untainted by the negative connotations attached to the word for law, *fa*, in the Chinese past. *Zhengfa* interwove into the study of government a positive conception of *fa*. By itself, *fa* meant not punishment, but coupled with *zheng*, government, *fa* became the organizing and limiting principle of Chinese government.

*Deri* student activities reflected a positive conception of the law. Students at the College of Law and Politics formed thirty associations organized around aspects of their study of law.<sup>87</sup> Two of the groups, the “New Voice Society” and the “China *Zhengfa* Study Society,” could only have been formed by students inspired by a sense of the limitless possibilities of their profession.<sup>88</sup> Students formed the “New Voice Society” because they wanted “to add glory to techniques for researching party principles.”<sup>89</sup> The connection between governance

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86. 1930 SOOCHOW ANN. 377, 377.

87. SHANGHAI FAZHENG DAXUE WUZHOU JINIANKAN (上海法政大學五周紀念刊) [SHANGHAI COLLEGE OF LAW AND POLITICS FIFTH ANNIVERSARY MEMORIAL VOLUME] 1-3 (1929) (table entitled “Shanghai Fazheng Daxue Xuesheng Kewai Zuzhi Yilanbiao (上海法政大學學生課外組織一覽表) [Chart of Shanghai College of Law and Politics Students Extra-Curricular Associations]”) (on file with author).

88. *Id.*

89. *Id.*

and law so intrigued students, that they formed the “China *Zhengfa* Study Society” to explore the connection.<sup>90</sup> For them, *Zhengfa* was a grand thing, the key to the big picture, a new concept, a way to reconstruct society.<sup>91</sup>

C. *Scientific and Socially-Oriented Methodologies*

As law teachers and students in Shanghai came to view law as an approach to solving problems, they began to conceive of law as a method as much as a set of principles. *Yingmei* used the case method, introduced by Michigan Law school graduates William Wirt Blume and George Sellet twenty-five years after the Socratic method had been adopted in all leading U.S. law schools.<sup>92</sup> Dean Wu may have been responsible for preserving the case method at Dongwu after its American introducers had left the school. Wu’s own name for the method, “The Logic of Would-Be,”<sup>93</sup> shows his admiration for the emphasis on logical and precise reasoning that the method brought to the law. The method purported to be scientific and to produce correct answers from mere knowledge of the facts of the present case and the facts, rationale, and holdings of leading case precedents.<sup>94</sup> Roscoe Pound, the dean of Harvard Law School from 1916 to 1936, though personally skeptical of the case method, nonetheless preserved it at Harvard during the peak of Harvard’s own influence in the academy.<sup>95</sup> Pound was Wu’s mentor when Wu studied at Harvard, and Wu was likely to have assumed that the case law method, fully entrenched as the cornerstone of not just American legal education but the American legal process itself, was the tried-and-true product of decades of the finest legal educators.<sup>96</sup>

*Deri* culture brought social science methodologies into the mainstream of legal thinking in Shanghai.<sup>97</sup> Through a few law school electives in sociology social public policy, and “social

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90. *Id.*

91. *Id.*

92. The case method was adopted in the leading United States law schools by 1891. STEVENS, *supra* note 27, at 57.

93. *Class History of 1931 (Law School)*, 1930 SOOCHOW ANN. 219.

94. *Id.*

95. *Id.*

96. Wu also may have looked to Pound’s deanship as a model for his own. *See* STEVENS, *supra* note 27, at 136 (discussing Roscoe Pound’s long and energetic tenure as Dean of Harvard Law School).

97. *Id.*

regulations;”<sup>98</sup> a paper requirement that favored empirical research; and a collection of books from Japan categorized as *shehui* (society), the *deri* schools emphasized a quantitative and a macro-oriented approach to defining problem solving.<sup>99</sup> *Shehui* derived from the discipline of the social sciences recently imported by Japan in the 1920s and 1930s.<sup>100</sup> A contemporary observer described them as “studies of sociological character, made by both private and governmental organizations, based upon detailed surveys of specific local areas,” and they “reveal[ed] the actual conditions and customs among the people.”<sup>101</sup>

#### D. *An Avenue for Upward Mobility*

Both models looked attractive to Chinese elites because of the crisis of faith in China’s own tradition and a lack of domestic avenues for upward mobility. Lu Xun became one of China’s most famous writers of the twentieth century by articulating a national sense of humiliation and despair.<sup>102</sup> In such conditions, domestic legal models for courts or lawyering could not be considered as pointing the way forward.<sup>103</sup>

Chinese in the 1910s and 1920s looked abroad for their legal models amidst a surging nationalist movement. The May Fourth Movement, beginning with the Beijing University student protests in 1919, inaugurated among Chinese intellectuals a period of profound self-questioning and self-criticism.<sup>104</sup> The use of the German-Japanese model from 1924 to 1949 is even more surprising in light of Germany’s international humiliation in 1919, and in light of the fact that more than half of the period in which the schools were in existence was during Japanese military aggression in China.

Anyone working or studying in a law school in Shanghai was made keenly aware of the threats from foreign powers, especially

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98. “IO” DOSSIERS, *supra* note 59. “Social regulations” probably referred to the growing body of local administrative law that dealt with labor disputes in Shanghai.

99. Xiaoshi (校史) [History of Shanghai College of Law] 9 (on file with author).

100. Miriam Silverberg, Comments at the UCLA Conference on Law and Society in Post-War Japan (Jan. 24–26, 1991).

101. See Peake, *supra* note 14, at 136.

102. See generally JONATHAN D. SPENCE, THE GATE OF HEAVENLY PEACE: THE CHINESE AND THEIR REVOLUTION, 1895–1980 (1981) [hereinafter SPENCE, HEAVENLY PEACE].

103. See generally William Kirby, *China Unincorporated: Company Law and Business Enterprise in Twentieth-Century China*, 54 J. ASIAN STUD. 43 (1995).

104. See JEFFREY N. WASSERSTROM, STUDENT PROTESTS IN TWENTIETH CENTURY CHINA: THE VIEW FROM SHANGHAI ch. 2 (1997).

Japan, and those threats only intensified throughout the first half of the twentieth century. Japanese aggression brought hardship deep into the lives of those teaching and studying in all of Shanghai's law schools.<sup>105</sup>

War-related chaos disrupted the operations of the Shanghai College of Law for 14 years. In the spring of 1932, plundering and arson from the "1-2-8 incident" destroyed the College of Law's campus building in Zhabei, the northern district of Shanghai, where it had headquartered since 1928.<sup>106</sup> The school temporarily held classes in Hangzhou until the fall, when it moved to rented lodgings in Shanghai, and finally back to its Zhabei campus in the fall of 1933, after its board of directors had raised some money for repairs of the damage.<sup>107</sup> In August 1937, the school was again forced to abandon its Zhabei campus, this time to Guomindang troops.<sup>108</sup> The school moved to cramped lodgings in the International Settlement, where it held classes until the Japanese invaded the Settlement in 1941.<sup>109</sup> After the outbreak of the Sino-Japanese war in the suburbs of Beijing in 1937, the students of the Shanghai College of Law and Politics (Shanghai Fazheng Xueyuan) built facilities on their campus for a military hospital.<sup>110</sup> The school's administration was forced to

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105. The Japanese occupation of Shanghai was a nightmare for all the city's residents. On August 14, 1937, Chiang Kai-shek's air force missed its Japanese targets—the Japanese navy fleet docked in Shanghai—and instead dropped their bombs on the city of Shanghai and killed thousands of civilians. Chinese and Japanese forces clashed with ferocity in Shanghai for the next three months. GEORGE BRUCE, SHANGHAI'S UNDECLARED WAR 11 (1938). *See also*, SPENCE, *supra* note 102 at 447, 449.

106. History of Shanghai College of Law, *supra* note 99, at 10.

107. Sili Shanghai Faxueyuan Yaolan (私立上海法学院要览) [A Record of Private Shanghai College of Law], Shanghai Municipal Archives file Q247-1-154 (Aug. 1937) (on file with author).

108. *Id.*

109. *Id.*

110. The Shanghai College of Law and Politics moved to the district of Xiuding in Wannan, the part of Anhui province that is south of the Yangzi River. Letters July 16, 1947, Apr. 7, 1948, Shanghai Municipal Archives file 248.21. In the spring of 1942 the Department of Education moved Dongwu to Chongqing, the wartime capital of the Republic of China, where it found accommodations in a high school. Though the law school continued graduating students every year between 1942 and 1946, the experience was terribly disruptive, even for the teachers and students who stayed in Shanghai and continued classes in what they called "The Comparative Law School of China." The law school had to change its name, dropping the geographically specific name Dongwu (Eastern Shanghai—Wu was an accidental name for the Shanghai area) and adopting the more generic name Dongfa (Eastern law school), until 1946 when the rest of the school moved back to Shanghai. *See generally* 1946 SOOCHOW ANN 1. In the spring of 1942, part of the College of Law relocated first to a location in Zhejiang province, and then when Japanese troops advanced into the area, joined the College of Law and Politics in Wannan, south of the Yangzi river. More than 200 students and professors from the commerce, banking, and accounting graduate

replace law in the curriculum with training in mundane, practical skills.<sup>111</sup> Once hostilities ceased, the return to Shanghai was not completed until early 1946.<sup>112</sup>

Civil servants and lawyers were the new brokers of China in the 1920s and 1930s. At the lofty end of their functions, lawyers were power brokers. Trading on their expertise in foreign ways and negotiation, they supplemented and replaced the Compradore. At the lower end of their functions, lawyers were conflict brokers, supplementing and replacing the *dibao*, or neighborhood elder.

This middleman position for some time had been ubiquitous in local Chinese society, but it was a role that was never before performed by legal professionals. The law schools held themselves out as places where Chinese could prepare for this new middleman role. The training at the *yingmei* law school, and to a lesser extent at the *deri* law schools, drew on the Anglo-American tradition of lawyer as an independent contractor, a fixer, who worked free from any institution to solve the problems of whoever hired him. The degree of LL.B. granted by both the *yingmei* and *deri* schools qualified the holder immediately to begin the private practice of law, which most of the city's law school graduates did.

As they built and expanded a legal profession, lawyers in Shanghai in the early twentieth century legal models exerted a profound effect on the development of Shanghai's legal profession. Genuinely new legal models were needed for legal professionalism to take root. If there was going to be any professional specialization in law, legal education was needed. China had a long history of statutory law and law courts, but, as mentioned above, not of places to train legal specialists.

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departments moved there to set up a branch campus. It was a desolate area with no roads or telecommunications. The exodus continued through January 1943. By the fall of 1944, four hundred students were studying there. A few of its professors set up another branch of the school in Sichuan province. Some students from the law school's economics department attended Dongnanlian University, and the undergraduate departments of law, economics, and accounting merged with Dongnanlian at that time. Letter from Dean of Private Shanghai College of Law, Chu Fucheng (褚辅成), section entitled "Sili Shanghai Faxueyuan Yaolan" (on file with author); Shanghai Faxueyuan Wanxian Fenyuan Jianshi Ziliao, in SPECIAL ISSUE, *supra* note 50, at 19.

111. Letter from Shanghai College of Law and Politics to Shanghai News (Apr. 7, 1948) (on file with author).

112. History of Shanghai College of Law, *supra* note 99, at 9–12; Interview with Gao, Graduate of the Shanghai College of Law Class of 1945, Shanghai (May 12, 1991); Letter from Shanghai College of Law and Politics (July 16, 1947) (on file with author); Letter to Shanghai College of Law and Politics (Apr. 7, 1948) (on file with author).

A swelling body of China's elites resided in Shanghai by the late nineteenth century attracted from diverse parts of China by the city's consumer goods, pleasurable diversions, commercial opportunities, and political freedoms. Many came from Ningbo and Shaoxing, centers of finance, commerce, and learning. They were elites insofar as they paid tuition and were attended to by servants. They were diverse insofar as they came from various parts of China. It was this group that by the 1910s and 1920s proved receptive to the professional opportunities created by the two legal cultures and the courts of Shanghai. To ambitious, hardworking, and even patriotic individuals, these alien legal models offered routes to leadership, prestige, and wealth.

Aspects of American and Japanese legal cultures of the 1910s and 1920s catered to the personal desires and varied intellectual tastes of these young Chinese elites. The two cultures' rich variety offered something for everyone. For one thing, their approaches to legal reasoning and sources of law catered to a wide range of intellectual predilections. Those who preferred reasoning their way through fact situations chose one, and those who preferred memorization chose the other.

The two models offered to Chinese elites several perquisites of their status that they appeared to be in danger of losing in the 1910s and 1920s: leadership positions, prestige, wealth, and the moral high ground. The law degree granted by both *yingmei* and *deri* schools in Shanghai qualified its holder to assume the prestigious positions of teacher, judge, civil servant, prosecutor, and the newly prestigious businessman.<sup>113</sup> With the imperial examinations abolished in 1905, the children of Chinese elites in the first decades of the twentieth century formed the first generation in centuries that had to find a new way to credential themselves. Naturally, they sought an avenue to vocations analogous in prestige to those of the Qing scholar-bureaucrats. The legal cultures of both *yingmei* and *deri* offered such a credential, and so offered new hope to Chinese elites for placing

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113. Interview with Zhu Lanye (朱榄叶), Professor, East China University of Politics and Law, Shanghai (Jan. 7, 1991). Of three hundred Dongwu graduates by 1932, forty-eight percent, became legal practitioners, by far the largest proportion. As the next most popular choices, fourteen percent were teachers, nine percent judges, eight percent bureaucrats, and six percent in business and industry. *Appendices*, 1932 SOOCHOW ANN. 13, 13. At Fazheng only eight percent of the graduates became bureaucrats, four percent went to work in courts as judges or office personnel other than prosecutors, and three percent went into the procuracy. *Id.* In addition, five percent went into business or banking, and three percent became educators. *Id.*

themselves at the forefront of a new China. In the Anglo-American legal systems, legal training groomed lawyers to be leaders. In the United States, prominent diplomats, scholars and national religious leaders possessed law degrees. Also, judges were prestigious figures, “culture hero[s]” observes John Merryman.<sup>114</sup> Dongwu students aspired to be leaders, a sign that this aspect of *yingmei* culture was attractive to them.<sup>115</sup>

In the German-Japanese systems, a professional specialization in law channeled one into the national bureaucracy.<sup>116</sup> While judges were less illustrious beings than their counterparts in the Anglo-American systems, legal scholars in Germany were demi-gods.<sup>117</sup> In Germany in the sixteenth and seventeenth centuries, in the tradition of the Roman *jurisconsult*, judges and legislators sought and followed the advice of law professors.<sup>118</sup> With the codification movement of the eighteenth and nineteenth centuries, law professors continued to shape the legal system through their debates and writings.<sup>119</sup> Law schools in the nineteenth century were hotbeds of political debate and influence.<sup>120</sup> Codification required a great deal of research and theorizing about the big picture, and the codes themselves required interpretation, all natural occupations of scholars.<sup>121</sup>

Law in the United States was a ticket to wealth. The swelling numbers of American and British lawyers hanging out their shingle in Shanghai and the hefty fees they charged were testimony enough that law offered a lucrative career track<sup>122</sup> and hopes for recreating China’s ailing legal system. Not surprisingly, then, Chinese also aspired to the new legal profession for its profitability. Profiting from

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114. JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* 35 (1969).

115. *See Who Are the Seniors?*, *supra* note 85, at 89.

116. *See* MERRYMAN, *supra* note 114, at 109–10 (discussing the career-track rigidity in civil law countries relative to the United States).

117. *See id.* at 39 (explaining that in civil law, legal scholars and legislators are far more important and famous than judges). *See also id.* at 59–64 (describing the role of scholars in civil law countries).

118. *Id.* at 60.

119. *See id.* at 66 (discussing the codification movement that started in Germany).

120. *See id.* at 36–37.

121. For example, law professors debated questions of land reform, and their doctrinal innovations exerted a direct impact on property rights and agrarian life in Germany in the early nineteenth century. JAMES Q. WHITMAN, *THE LEGACY OF ROMAN LAW IN THE GERMAN ROMANTIC ERA: HISTORICAL VISION AND LEGAL CHANGE 188–90* (1990).

122. *See generally* NORWOOD F. ALLMAN, *SHANGHAI LAWYER* (1943) (giving a personal account by an American lawyer who worked in Shanghai from the 1920s to the early 1940s).



law was not a false hope for all Dongwu graduates, however. One of the busiest lawyers in private practice in Shanghai was Jiang Bingfan, a Dongwu alumnus.<sup>123</sup> He handled over 3,000 cases a year throughout the 1940s.<sup>124</sup>

The *yingmei* and *deri* camps in Shanghai's legal profession shared fundamental similarities despite their different orientations toward the sources of law and the role of lawyers and courts in the legal system. Adherents of both turned outward to find solutions to local problems and to adapt to the local court system and globalizing business opportunities. Both had faith in the law to meet a variety of local and national needs. Both aimed to use scientific and socially-oriented methodologies in their legal work. And both looked to the legal profession for a chance at upward mobility.

### III. THE PURPOSE OF THE *YINGMEI-DERI* DISTINCTION

Though they divided into two separate sets of law schools in Shanghai in the early twentieth century, each spawning self-consciously separate professional networks, philosophy, and standards, *yingmei* and *deri* shared several important similarities.<sup>125</sup> What then, was the purpose of this bifurcation? Bourdieu's and Dezalay's sociological theory of the legal field posits that competition among different camps in the legal profession breeds prestige and legitimacy, and so legal professionals will always strive toward the kinds of distinctions that will allow for competition.<sup>126</sup> Did the distinction between *yingmei* and *deri* exist simply to enhance the prestige and legitimacy of Shanghai's emerging legal profession? To answer this question, let us first turn to a more detailed look at Bourdieu's and Dezalay's theory, and then highlight several additional purposes served by the distinction between *yingmei* and *deri*.

According to Bourdieu, who developed the concept of the social "field" in writings in the 1970s, members of a legal profession operate within one such field, a "legal field" (*champs juridique*).<sup>127</sup> Each field has its own culture, which is "a body of internal protocols and assumptions, characteristic behaviors and self sustaining

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123. Interview with Jiang Bingfan, in Shanghai (May, 1991).

124. *Id.*

125. *See generally supra* Parts I & II.

126. *See generally* BOURDIEU & WACQUANT, *supra* note 3.

127. *Id.*

values.”<sup>128</sup> Without realizing it, the theory holds, judges and lawyers maintain their legal field autonomously by engaging in “the production of law” in their work and discourse, and the field’s culture inexorably shapes their work and discourse.<sup>129</sup> Bourdieu’s writings place great value upon the study of history and practices, which he considers to be just as meaningful as, or more meaningful than, officially authoritative texts such as laws.<sup>130</sup>

Although law in reality is not autonomous from or external to society, according to Bourdieu and Dezalay, the elite ranks of lawyers and judges operate autonomously from any state authority or rule of law.<sup>131</sup> A “legal field” is autonomous from the state in the sense that it controls the “production” of its “law.”<sup>132</sup> Its elite members concentrate in themselves the authority to articulate the law and mask the arbitrary and self-interested nature of their decisions with discourse that abstracts facts into rules and principles.<sup>133</sup> In Dezalay’s elaboration of the concept of the legal field and application to European and American lawyers, he argued that the elite ranks of both judges and lawyers favored judicial opinions as sources of law in order to monopolize the articulation of the law, and created the fiction that law is autonomous from society and politics in order to stimulate demand for their services, boost their own legitimacy, and mask the arbitrary exercise of power.<sup>134</sup>

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128. *Id.*

129. Bourdieu, *Force of Law*, *supra* note 5, at 806. For a list of Bourdieu’s major publications, see *id.* at 805, n.1.

130. See BOURDIEU AND WACQUANT, *supra* note 3, at 42–43, 79–80 (emphasizing that he “repeatedly denounced both [a] pessimistic functionalism and the dehistoricizing that follows from a strictly structuralist standpoint,” even though Bourdieu’s critics accused him of these very tendencies).

131. See *supra* note 4.

132. See *supra* note 4 and accompanying text.

133. See generally Bourdieu, *supra* note 5; Dezalay, *supra* note 5; Sousa Santos, *supra* note 5.

134. YVES DEZALAY, BATAILLES TERRITORIALES ET RIVALITES DE COUSINAGE: JURISTES ET COMPTABLES SUR LE MARCHE EUROPEEN DU CONSEIL AUX ENTREPRISES [TERRITORIAL BATTLES AND TRIBAL DISPUTES: JURISTS AND ACCOUNTANTS IN THE EUROPEAN MARKET FOR BUSINESS CONSULTING] (1998) (Fr.); YVES DEZALAY, MARCHANDS DE DROIT: LA RESTRUCTURATION DE L’ORDRE JURIDIQUE INTERNATIONAL PAR LES MULTINATIONALES DU DROIT [MERCHANTS OF LAW: LEGAL MULTINATIONALS AND THE RESTRUCTURING OF THE INTERNATIONAL LEGAL ORDER] (1992); Yves Dezalay, *From Mediation to Pure Law: Practice and Scholarly Representation Within the Legal Sphere*, 14 INT’L J. SOC. L. 89, 90, 92, 96–97 (1986); Yves Dezalay, *Multinationales de l’Expertise et ‘Deperissement de l’Etat’: La Restructuration de la Regulation Transnationale de l’Activite Economique Par les Nouveaux Clercs-mercenaires du Droit des Affaires*, [Multinational Law Consultancies and the “Withering-Away of the State”: The Restructuring of Transnational Regulation of

Clearly, adherents of *yingmei* disagreed with the adherents of *deri* about the degree to which lawyers and courts should operate independent from the government and control the creation of law. One purpose served by the distinction between *yingmei* and *deri*, apart from the need to legitimize and define Shanghai's legal profession, is that it reflected disagreement among Shanghai's elites and its growing middle class about what type of legal system they should be building for China's future.

In Shanghai in the early twentieth century, the availability of distinct choices based on foreign legal models reflected a high degree of sophistication among those who reached beyond China for legal models. It entailed a recognition that Europe was not all one tradition. The detailed differences between *yingmei* and *deri* also reflected a great degree of assimilation into Shanghai and a serious practical adaptation of foreign legal cultures. The embrace of foreign legal orientations was not a generic one, but an embrace of the legal cultures as they actually operated outside of China.

Additionally, individual lawyers did not all choose one camp or the other and adhere to it single mindedly for the rest of their careers. The most accomplished of Shanghai's lawyers were able to merge and transcend the two orientations toward law. Lin Wopeng, for example, rose above the rivalry and the demands of personal connections to innovate what was best for the legal profession as a whole. Attention to classics did not prevent *deri* from providing practical training. Ingenious *deri* jurists in Shanghai developed a curriculum and pedagogy well adapted to China's increasingly administrative legal institutions and the growing body of translated German and Swiss statutes foisted upon the Shanghai courts during the second half of the Nanjing decade. *Deri* was blessed with talent up to the task. Lin Wopeng was versatile, multi-lingual, an innovative educator and a profound thinker, sensitive to the needs of his times. It reflects on the breadth of *deri* that Lin first mastered *yingmei* and then went beyond it to make *deri* into a new brand of legal culture, one suited to the needs of China's emerging national court system, and yet more in step with the economic and political climate of

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*Economic Activity by the New Mercenary Practitioners of Business Law*] in ACTES DE LA RECHERCHE [RECORDS OF RESEARCH] (1993) (Fr.); Yves Dezalay, *Territorial Battles and Tribal Disputes*, 54 MOD. L. REV. 792 (1991); Yves Dezalay, *Du fait au droit: Les juridictions disciplinaires comme institutionnalisation de l'interaction entre l'ordre domestique et l'ordre juridique* [From Fact To Law: Disciplinary Jurisdictions as Institutionalization of the Interaction Between the Domestic Order and the Legal Order] (1985) (unpublished manuscript) (on file with the author).

Shanghai College of Law and Politics in 1930. Yet he was so well-versed in Anglo-American law that the *yingmei* Dongwu hired him to teach it in English to their students.

While serving as President of the Jiangsu High Court, Lin taught Anglo-American law at his alma mater and developed its pedagogy by mixing the best of *yingmei* and *deri* to fit China's needs for legal services, a testament to the freedom to experiment enjoyed by law professors in Shanghai.<sup>135</sup> While *deri* professors copied Japanese law professors by lecturing to the students about what the law was and what the law should be, thus teaching substantive rules, Lin blended the pedagogical styles of the United States and Japan to teach the written argumentation needed to process lawsuits and draft regulations in china's administrative state.<sup>136</sup> He gave his students hypothetical fact situations, a *yingmei* device, but rather than ask for the appropriate legal rules and outcomes in the form of oral answers, he had the students write the answers in practice judicial opinions.<sup>137</sup>

In another example of Lin's creative adaptation of China's legal needs, Lin set up a moot court at the College of Law and Politics.<sup>138</sup> According to Lin, Dongwu's moot court copied their American counterparts.<sup>139</sup> Judges and professors sat as moot court judges and evaluated students' oral performance, testing their ability to think on their feet by grilling them with unexpected questions about the facts and holdings of similar cases.<sup>140</sup> Lin set up a modified version of this model called *dabanzhuang*. The term itself was a stroke of genius: its literal meaning, "verbal self-defense against a written accusation," captured the mechanics of this teaching tool.<sup>141</sup> Students played all the roles in the courtroom, not just those of the advocates, but also the judges and the parties, and were evaluated on their written as well as their oral product.<sup>142</sup> Student plaintiffs practiced writing petitions, defendant students practiced writing responses, student lawyers wrote briefs, and student judges wrote opinions. It was an ingenious pedagogical tool on many levels.<sup>143</sup> By training students to be judges

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135. Interview with Su Huaiyi, Wang Shaoting, and Lu Beikang, in Shanghai (May 5, 1991).

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

as well as attorneys and to argue in writing as well as orally, the *dabanzhuang* fit into legal culture that emphasized written law and tracked students into administrative posts.<sup>144</sup> At the same time, the term *dabanzhuang* would have inspired students with a sense of academic greatness, the possibility of lofty attainment, and a positive sense of their roots: during the Qing period, *zhuang* referred to the top successful candidate in the imperial examinations. On top of all this, the *dabanzhuang* made learning the legal method enjoyable: everyone had a little fun with it; teachers assigned students to the different roles based on their personality, and then sat back and watched the performance, giving students a wide berth to test their abilities. The student party who lost was free to appeal the judgment to a higher moot court, and repeat the exercise.<sup>145</sup>

It is fair to say that the longer the models informed the two legal cultures, the more their foreignness became a surface underneath which flourished original ideas and creative adaptations of the models to China's and Shanghai's current problems. Three aspects of the transformation—its localized character, the degree of assimilation of the foreign models, and the use of foreign models to debate the role of indigenous law in China's emerging legal system—show the transformation to be more about reinvigoration and reinvention to suit local needs than simply replacement.

#### A. *Localization*

Despite their affiliation with foreign legal cultures, *deri* and *yingmei* aimed to become local legal cultures. In a quest for usefulness, relevance, and financial survival, the two legal cultures geared their proponents to produce solutions to local economic and social challenges. The experimentation with methodologies was a part of this response to local needs and pressures; Chinese lawyers hope that the sociological studies would help make statutes fit the needs of localities and facilitate their implementation.<sup>146</sup> Dongwu groomed individual minds to approach legal problems from the ground up, as law finders with a variety of compasses at their disposal, and so prepared students to meet the complexities of the local court system in the 1920s and 1930s.

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144. *Id.*

145. *Id.*

146. Peake, *supra* note 14, at 136.

Dongwu faculty tried to enhance the relevance of the *yingmei* culture by turning from U.S. court cases to local cases and teaching sociology and empirical research on local topics, approaches that were also gaining ground in the United States in the 1920s and 1930s.<sup>147</sup> In the 1940s, Dongwu's professors and students attempted to retool the practical side of its training by looking beyond oral courtroom pleading and commercial contract drafting for something more helpful to the Chinese public. A 1944 essay by Professor Wu reflected the heightened practicality of the school in its third decade when he argued that municipal government courses should focus on China's actual system of district (*xian*) government and that political science departments should become political administration departments.<sup>148</sup>

Links with local institutions enhanced the law schools relevance to the locality. The schools forged ties to local authorities, such as the Shanghai Municipal Council, one of the city's most powerful governing bodies,<sup>149</sup> General Feng Yuxiang,<sup>150</sup> and famous and wealthy Shanghai residents such as national Finance Minister H. H. Kong and gangster kingpin Du Yuesheng.<sup>151</sup> Accomplished American and Chinese jurists linked the courts and law schools.<sup>152</sup> The law faculties had close ties to the Shanghai courts.<sup>153</sup> The city's busy financial and commercial districts and its civil courts provided

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147. STEVENS, *supra* note 27, at 134.

148. *See generally* Wu *supra* note 83.

149. THE NEW ATLANTIS, *supra* note 29, at 22; 1924 WOOLSACK 19, 19–20; 1932 SOOCHOW ANN. 12, 12.

150. General Yuxiang donated 50,000 yuan to build the campus of the Shanghai College of Law and Politics, consisting of a large three-story classroom building and a dormitory facility in the Xujiahui district. Interview with Su Huaiyi in Shanghai (May 11, 1991).

151. They joined General Feng on the board of directors of the Shanghai College of Law and Politics.

152. For an example of one American lawyer who worked both as law professor and litigator in Shanghai, see the autobiographical account of George Sellett, an American lawyer in Shanghai. Stirling Fessenden, in another example, served on the faculty of the Soochow Comparative Law School from 1915 to 1918 and was also the head of the Shanghai Municipal Council during the 1920s. *See* 2 WOOLSACK 23 (1924).

153. Four teachers at Dongwu worked in the United States for China, others were the most active attorneys in the Mixed Court Bar, one was President of the Shanghai Provisional Court, the Mixed Court's reincarnation between 1927 and 1930. In 1929, forty percent of the faculty were judges on the Shanghai Provisional Court. Two were judges on the Court after 1930 when it was reconstituted as the Shanghai Special District Court. In 1933 the Ministry of Justice appointed a professor at the Shanghai College of Law and Politics to the highest judicial post in Shanghai, the Presidency of the First Branch of the High Court of Jiangsu Province. One of his colleagues was appointed to be President of the Shanghai District Court. Interview with Lin Wopeng and other members of the Shanghai Institute of Law and Politics Alumni Association, in Shanghai (May 11, 1991).

law graduates with much of the legal business they looked forward to practicing. Eight years after its founding Dongwu moved from the university in the neighboring city of Suzhou to Qinsan Road in the heart of Shanghai.<sup>154</sup> The neighboring district near the largest local court was under renovation. Location near the banks, courts, and firms of the city pushed students closer to the courts and the center of commerce and crime for the entire East China region and, therefore, closer to where the private practice jobs were in both civil and criminal law.

Local needs shaped the kind of training Chinese lawyers received, students used lecture notes copied in-house, and practice-oriented treatises published in Shanghai, Beijing, and Nanjing, with lessons in how to negotiate and renegotiate contracts on behalf of a client, how to conduct a prosecution in the local Chinese courts, how to represent a client in local civil court, and how to accommodate different nationalities of clients. Both the notes and the treatises aimed to familiarize students with the kind of polyglot Chinese-foreign commercial law that lawyers practiced in Shanghai. Both types of schools taught the comparative method, a useful skill in a city where merchants came from 41 different nations, and a dozen nations operated their own courts.

### B. Assimilation

The two cultures were never pure representations of their foreign models. In their early years, the *deri* schools of the Shanghai College of Law and the Shanghai College of Law and Politics borrowed heavily from the *yingmei* curriculum, and the former produced a casebook. At Dongwu, a course in Roman law was required as it was in the *deri* schools, and in it students learned—in the words of one student—that Roman law “gave us law, crimes, court organization, family relations, succession, and all that will make us future lawyers, jurists, and men.”<sup>155</sup>

Though the Ministry of Education promoted specialization in the law school curriculum, local *deri* administrators took care not to allow specialization to bring rigidity.<sup>156</sup> They built some freedom into the curriculum by adopting the *yingmei* practice of choosing

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154. 1924 WOOLSACK 132, 132; 1930 SOOCHOW ANN. 51, 51–53.

155. 1930 SOOCHOW ANN. 226, 226.

156. Shanghai Faxueyuan Yilan (上海法学院一览) [A Record of Shanghai College of Law], Shanghai Municipal Archives file Q247-1-149 (1933) (on file with author).

electives, modified to serve their agenda of training civil servants.<sup>157</sup> The choices available at the College of Law in the 1920s and 1930s allowed students to specialize even further and prepare themselves for careers as bureaucrats, judges, or prosecutors.<sup>158</sup> Most of the 21 electives were policy-oriented,<sup>159</sup> or geared toward the problems of judicial decision-making<sup>160</sup> or to the practicalities of criminal prosecution. The most credit-intensive elective was a course on official documents, a course of great value to a future bureaucrat.<sup>161</sup>

Nor did *deri* professors allow specialization to breed narrowness, a handicap in times of rapid change and importation of foreign statutes. Instead, the *deri* curriculum helped broaden the intellectual perspectives of students by allowing them to take comparative and legal history courses.<sup>162</sup>

Both types of cultures resonated with China's then-current legal agenda. Both types of law schools permitted the national government to tinker with their curricula, and so linked law schools to Chiang's Department of Education in 1928 and persuaded the President of the College of Law to set up a banking department with ties to Shanghai's banking establishment.<sup>163</sup> In 1930, the Department of Education turned the banking department into a two-year commerce program, and added a statistics and accounting track.<sup>164</sup> The quantitative emphasis persisted through 1933, when the Department of Education prompted the College of Law to run an international trade research department.<sup>165</sup> Dongwu started granting degrees in accounting in 1941.

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157. *Id.*

158. *Id.*

159. *Id.* For example, criminal policy and social public policy.

160. *Id.* Such as judicial philosophy, jurisprudence, and conflicts of law (known as "the law of jurisdictional implementation").

161. *Id.*

162. *Id.* The College of Law offered as electives Chinese legal history, European and American legal history, world legal history, history of legal thought, comparative civil law, comparative criminal law, statistics, and local self-government.

163. Vice Dean Chu Fengyi (褚凤仪), *Shijiu Nianlai Fuwu Benyuan zhi Huigu* (十九年来服务本院之回顾) [Reflections on the Past Nineteen Years of Service at Our School] 64 (unpublished manuscript) (on file with author); Shanghai Faxueyuan Xiaoshi Ziliao (上海法学院校史资料) [History Information of Shanghai College of Law], SPECIAL ISSUE, *supra* note 50, at 10. For an in-depth archival study of Chiang's consolidation of control over Shanghai's banks, see generally COBLE, *supra* note 56.

164. A Record of Shanghai College of Law, *supra* note 51.

165. *Id.* (collecting 32 regulations concerning the international trade research department).



With its emphasis on memorization and written, codified law, *deri* culture complemented China's centuries of experience with law codes.<sup>166</sup> In addition, the link between politics and law in *deri* jibed with a long tradition in China of combining judicial and administrative functions within the same branches of the Chinese bureaucracy.<sup>167</sup> Moreover, the content of *deri* law courses did not completely depart from traditional Chinese education. As in the Qing period, students at the College of Law and Politics prepared for civil service by reading classic works of philosophy.<sup>168</sup> Foreign classics joined the canon, however. Alongside Kongzi and Mengzi on the reading list were Plato, Aristotle, Socrates, Montesquieu, and Bertrand Russell in English and French.<sup>169</sup>

*C. A Way to Debate the Role of Indigenous Law in the New Legal System*

Original ideas have enjoyed a long history of suppression in Ming and Qing China. Emphasis on orthodoxy, in various periods pushed to an extreme, made the propagation of original ideas dangerous. Original ideas made one stand out if they failed and drew blame upon oneself if they succeeded because others were jealous. When political winds shift in China, this tendency has been brought to the fore.<sup>170</sup>

*Deri* was compatible with a national Chinese bureaucracy and law code, and so for those concerned that indigenous practices were disappearing, *deri* promised a temporary first stage toward restoration and resinicization of Shanghai's legal system. While Chiang Kai-shek's regime expanded its bureaucracy, *deri* emphasized written argumentation, the primary vehicle for communication in the bureaucracy.

Codification was a pressing part of the national agenda. Soon after the founding of the first *deri* law school in Shanghai, the Nanjing government imported from Japan entire German and Swiss law codes and translated them into Chinese for application by all

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166. Interview with Su Huaiyi, graduate of Shanghai faheng xueyuan, in Shanghai (May 11, 1991) (on file with author).

167. *Id.*

168. *Id.*

169. *Id.*

170. See generally WILLIAM C. ALFORD, *TO STEAL IS AN ELEGANT OFFENSE* (1991); JONATHAN D. SPENCE, *FROM MING TO CHING: CONQUEST, REGION AND CONTINUITY IN SEVENTEENTH CENTURY CHINA* (1979).

courts in China. *Deri's* emphasis on statutory law and Napoleonic style codes, the very type adopted by the Nanjing government, made *deri* amenable to serving this agenda. The very fact that China's national leaders borrowed statutes from abroad itself may have propelled jurists to look abroad for legal culture, reading the importation as a signal that China's own legal tradition did not offer models compatible with modernization.

The recodification movement did not doom *yingmei* to irrelevancy. The imported statutes were not deeply integrated into the practice of law, as courts rarely cited to them. *Yingmei's* focus on reasoning through fact situations to arrive tabula-rasa-style at legal principles made sense in a legal culture where statutes proved difficult to implement.

Foreign systems had achieved success not only abroad, but to a limited extent in China. *Yingmei* proved a popular approach to law in Shanghai by the early 1920s, in part because of the adversarial nature of most of the courts in Shanghai in the first half of the twentieth century and the presence of hundreds of foreign lawyers changed the relationship between judge and litigant, and even between government and merchant, and between merchant and guild. Chinese merchants in Shanghai by the 1900s were no longer exclusively relying on longer, collusive, guild-like arrangements to do business, but were also using foreign lawyers to draw up contracts, to register land-title deeds, and to represent them in court. Not fully political leaders, not mere civil servants, lawyers were the new brokers of China in the 1920s and 1930s. At the lofty end of their functions, lawyers were power brokers. Trading on their expertise in foreign ways and in negotiation, they supplemented and replaced the Compradore. At the lower end of their functions, lawyers were conflict brokers, supplementing and replacing the neighborhood elder, known as the *dibao*.<sup>171</sup>

Some of the *deri* Shanghai law schools were founded by people who genuinely admired the German way of doing things in the 1910s and 1920s.<sup>172</sup> After Japan's defeat of Russia and China in 1895,<sup>173</sup> a broad base of Chinese admired Japan for its already achieved success

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171. See generally Tahirih V. Lee, *Risky Business: Courts, Culture and the Marketplace*, 47 U. MIAMI L. REV. 1335 (1993).

172. See generally WILLIAM C. KIRBY, *GERMANY AND REPUBLICAN CHINA* (1984).

173. 1930 SOOCHOW ANN. 51, 51 (1930) (describing how Japanese jurists gave lectures at Beijing's Ministry of Law in the late 1890s through 1900s).

in beating westerners and in expunging foreign dominance.<sup>174</sup> For the most worldly of Shanghai's elites, *deri* came with fancy packaging, the prestige of a tried-and-true foreign legal system that rapidly had given rise to the strong states of Germany and Japan by the 1910s and 1920s.<sup>175</sup> The German-Japanese model offered discipline, unity, and order.<sup>176</sup> It was exactly what someone living in chaos and in a state of siege would long for.

#### CONCLUSION

For four decades before the Communist Revolution of 1949, Shanghai's lawyers disagreed amongst themselves about the sources and processes inherent in the law. Two camps, *yingmei* and *deri* emerged, approaching their careers either to oral advocacy and analyzing court decisions or to code-based research and bureaucratic procedures. These camps embodied a profound local disagreement about how best to shape China's legal system. Yet, these two camps shared fundamental similarities. Both turned to foreign legal models in a sophisticated and complex way to find solutions to local problems and to adapt to the local court system and globalizing business opportunities. Both had faith in the law to meet challenges and act as a force for good.

But their embrace of foreign legal systems was at odds with the rising nationalism of all elites in China during the 1920s and 1930s. Extraterritoriality compelled Chinese lawyers to temper any pride in Chinese tradition with mastery of alien legal practices. It did, however, make them well equipped to argue cases before the city's dozen-plus international tribunals and to service the globalized businesses that operated in the city. This back and forth was part of a larger process of working out how far Shanghai should stray from tradition.

In the end, the legal profession in Shanghai did not adopt either of the models in their pure form, nor did they adopt them in their entirety. Selected elements of both models proved useful to the development of Shanghai in the early twentieth century. *Yingmei*, with its case method and its effort to train advocates and law brokers to serve individual clients, suited a decentralized system where courts more than statutes influenced business decisions, the type of place

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174. See generally KIRBY, *supra* note 172.

175. *Id.*

176. *Id.*

that Shanghai was in the first half of this century. *Deri's* emphasis on centralized and codified law both jibed with China's experience with law under two millennia of imperial rule and with China's program to recentralize, underway by the late 1920s. *Deri* become so assimilated that it left several legacies that endure to the present day.

One such legacy lies in legal education. Today law students and professors in Shanghai memorize statutes, circulate copied lecture notes, and buy reference books on philosophy for background reading. Their professors lecture straight from textbooks on what the law is. A moot court is compulsory, with students assuming the roles of judges and prosecuting attorneys, only now, teachers instead of students play the roles of the plaintiff and defendant. And graduates go on to become civil servants in the national bureaucracy.

The two camps remained separate despite fundamental similarities to serve several purposes. Bourdieu and Dezalay argue that polar opposites mask fundamental overlaps of interests and views, but nonetheless form a necessary conceit for the creation of space within which a legal profession can function. Opposition creates competition, which in turn creates hierarchical structures such as appellate courts, elite law firms, and law schools, all of which form "symbolic capital" which bolsters the prestige of legal specialists, particularly those accorded a higher status within the field.<sup>177</sup>

The two camps in early twentieth century Shanghai fit this theory, at least to some extent. Given the high caliber of their literacy, their fluency in foreign languages, and their aspirations to serve China's government and urban businesses, the law students of yingmei and deri schools must have been raised as elites. Either camp promised elite status, but the competition between the two sharpened the identify of each, and in this way may have enhanced the prestige of both. What is more, adherents of both camps aimed to bolster the prestige of law, lawyers in Shanghai, and, more generally, China. Law was not prestigious or polarized or very distinct from the rest of society before the twentieth century in China except insofar as legal experts not employed in the government bureaucracy were vilified, suppressed, and pitted against the state, so creating a polarity within the legal profession might have helped raise the profile of the profession.

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177. See generally Bourdieu, *supra* note 5; Dezalay, *supra* note 5; Sousa Santos, *supra* note 5.

The distinction between the two camps served other purposes as well, reflecting the availability of distinct choices of foreign legal models, requiring a degree of assimilation and adaptation of foreign legal cultures into Shanghai. The distinction also provided a means for disagreement about the degree to which law in Shanghai should diverge from indigenous approaches.

Awareness of the cleavage between *yingmei* and *deri* at the heart of Shanghai's legal profession in the early twentieth century helps us better understand the practice of law in Shanghai today. These lawyers not only survived the Cultural Revolution to take part in the resurrection of China's legal system in the 1980s, but also opened doors for future lawyers to stake out bold differences in approach to the law and to change the orientation of China's legal profession.