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# ON SEEING CHINESE LAW FROM THE CHINESE POINT OF VIEW: AN APPRECIATIVE LOOK AT THE SCHOLARLY CAREER OF PROFESSOR WILLIAM JONES

JANET E. AINSWORTH\*

Upon the occasion of a scholar's attaining emeritus status, it is traditional for others in the discipline to take stock of that scholar's accomplishments, putting them into perspective in assessing the overall impact that the scholar has had on the field. It is difficult to overemphasize the contributions of Professor William Jones to the field of Chinese legal studies. Throughout his scholarly career, he has tackled an impressively wide range of topics in both imperial Chinese law and the contemporary legal system of the People's Republic of China, covering such disparate subject matter as the statutory treatment of theft by the legal code of the Qing Dynasty,<sup>1</sup> a legal interpretation of the mass campaign in socialist China,<sup>2</sup> and an assessment of the role of trade regulations in the administration of the modern Chinese state.<sup>3</sup>

In addition to his prolific output of scholarly articles, Professor Jones has also authored various translations of Chinese language primary source materials, including the translations of a recently enacted Chinese civil code,<sup>4</sup> a Chinese casebook with commentaries published for use in a Chinese law school,<sup>5</sup> and a collection of Chinese civil law cases.<sup>6</sup> His recent translation of the Qing Dynasty legal code, the *Da Qing Lu Li*, is truly the crowning achievement of a lifetime in the field of Chinese legal studies. The first English language translation of the Code in nearly two hundred years,<sup>7</sup> it is a

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1. William C. Jones, *Theft in the Qing Code*, 30 AM. J. COMP. L. 499 (1982).

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

3. William C. Jones, *An Approach to Chinese Law*, 4 REV. SOCIALIST L. 3 (1978).

4. William C. Jones, *A Translation of the Fourth Draft Civil Code (June 1982) of the People's Republic of China*, 10 REV. SOCIALIST L. 193 (1984).

5. William C. Jones, *Civil Law in China*, 18 CHINESE L. & GOV'T 7 (Fall-Winter 1985-86).

6. William C. Jones, *Collection of Civil Law Cases from the People's Republic of China*, 10 REV. SOCIALIST L. 169 (1984).

7. Until Professor Jones's translation was published, the only English language translation available of the Qing Code was the 1810 edition translated by Sir George Staunton. SIR GEORGE T.

meticulously crafted version of the Qing Dynasty's central source of law which, despite the stylistic stiffness inherent in any statutory code, nevertheless manages to be eminently readable and clear. The extraordinary nature of this accomplishment may not, however, be fully apparent to the reader upon casual examination. Classical Chinese texts present enormous obstacles even for those researchers completely fluent in modern day Chinese. Written in an archaic style without punctuation and frequently lacking obvious syntactic or morphological cues to sentence structure, classical Chinese texts are not so much read as decoded. Add to this the challenge of choosing English language equivalents for obscure Chinese imperial legal terminology and one begins to develop an appreciation for what a remarkable work of scholarship this translation represents. Generations of scholars will be in his debt for this masterful translation, which has made the Qing Code a more readily accessible resource to specialists in Chinese studies as well as to comparative law scholars less familiar with Chinese law.

In his translation of the Qing Code, as in all of his translations, Professor Jones demonstrates a keen awareness of the pitfalls that the translator faces in attempting to forge a linguistic bridge from one language into another.<sup>8</sup> No translation can be an exact equivalent, since the connotations of words are inevitably changed in the translation.<sup>9</sup> When, however, the languages are as

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STAUNTON, TA TSING LEU LEE (Ch'eng-wen Publishing 1966) (London, Cadell and Davies 1810). Staunton's translation is difficult for the modern reader, however, because of changes in English language usage since the early nineteenth century. In addition, the Staunton text, marred by numerous errors and spurious readings, has been characterized by Professor Jones as "so free as to be inaccurate." WILLIAM C. JONES, *THE GREAT QING CODE* at v (1994). Two French translations of the Qing Code exist: one a translation of the nineteenth century Annamite Code of Vietnam, which is substantially identical to the Qing Code from which it was derived; and the other a translation of portions of the Qing Code, albeit with many provisions truncated or omitted entirely. P.L.F. PHILASTRE, *LE CODE ANNAMITE, NOUVELLE TRADUCTION COMPLÈTE* (reprint 1967) (2d ed. 1909) (including a translation of the Vietnamese version of the Chinese Code and of some Qing commentaries on the Code); LE P. GUY BOULAIS, *MANUEL DU CODE CHINOIS* (reprint 1966) (1924) (omitting and abbreviating many Code sections). Neither of these French language translations can be even remotely characterized as complete or accurate, however, and neither, in any event, is widely available to comparativists in the United States.

8. Pierre Legrand has criticized comparative legal studies for its general inattention to this crucial matter of translation. Pierre Legrand, *How to Compare Now*, 16 *LEGAL STUD.* 232, 234-35 (1996).

9. The issue of whether, and how, it is possible to transparently transmit the meaning encoded in one language into a representation in another language can be seen as a philosophical puzzle as well as a technical linguistic challenge. For the classic treatment of translation as a problem in the philosophy of language, see WILLARD V.O. QUINE, *WORD AND OBJECT* (1960) (presenting the indeterminacy thesis of translation). For a discussion of the technical linguistic issues inherent in translation, see ROGER T. BELL, *TRANSLATION AND TRANSLATING: THEORY AND PRACTICE* (1991).

different as modern English is from classical Chinese, the inherent obstacles to achieving an accurate translation are compounded.<sup>10</sup> This problem is made even more acute when the legal culture to be represented in translation cannot be assumed to share our Western notions about law and legal categories. Western legal terminology, like linguistic categorization in general, is permeated by the culturally contingent normative content implicit in the concepts with which the Western legal scholar analyzes and describes a legal order.<sup>11</sup> For that reason, Jones consciously avoided using legal terminology "too charged with a precise legal meaning for English-speaking lawyers"<sup>12</sup> in his translation of the Qing Code. For example, he chose to use the expression "fornication with force" where other translators might have chosen the word "rape" expressly in order to circumvent the normative connotations inevitably associated with the use of that Western legal and cultural category.<sup>13</sup>

The sensitivity to choice of terminology displayed in his translation work is emblematic of a more general sensitivity to methodology that is a consistent characteristic of Professor Jones's scholarship. In fact, one could well maintain that Professor Jones's greatest contribution to the field is neither his substantive work in Chinese law nor even his authoritative translations, valuable as both of these bodies of work are. Rather, his most significant and enduring legacy is the methodological stance that he has developed towards the study of Chinese law. This stance supplies answers to three fundamental questions: "Why should we study Chinese law?"; "What should be included in the study of Chinese law?"; and "How should we undertake the study of Chinese law?"

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10. For further discussion on the problem of commensurability in translation, including aspects that are unique to the Chinese language, see Achilles Fang, *Some Reflections on the Difficulty of Translation*, in *STUDIES IN CHINESE THOUGHT* 263-85 (American Anthropological Ass'n Memoir No. 75, Arthur F. Wright ed., 1953); I.A. Richards, *Toward a Theory of Translating*, in *STUDIES IN CHINESE THOUGHT*, *supra* at 247-62; Arthur F. Wright, *The Chinese Language and Foreign Ideas*, in *STUDIES IN CHINESE THOUGHT*, *supra* at 286-303; see also JOHN E. SCHRECKER, *THE CHINESE REVOLUTION IN HISTORICAL PERSPECTIVE* 200-01 n.9 (1991) (noting that Western languages lack an adequate vocabulary to translate the Chinese terminology describing features of the social and political structure of imperial China).

11. Even legal scholarship that appears to be purely descriptive is infused with normative content. Pierre Schlag, *Normativity and the Politics of Form*, 139 U. PA. L. REV. 801, 811-14 (1991). Schlag investigates the normative aspects of "selecting, establishing, and organizing the so-called 'descriptive' categories deployed in legal thought." *Id.* at 812.

12. JONES, *THE GREAT QING CODE*, *supra* note 7, at vi.

13. *Id.*

### A. *Why Study Chinese Law?*

The question of why anyone should study Chinese law is, of course, the specific analog of the more general question that all comparative legal scholars must answer: why study comparative law? In recent years, comparative legal scholars have found that question increasingly difficult to answer with assurance. An air of malaise hangs over the field of comparative law,<sup>14</sup> a nagging sense that any proper discipline ought to have a distinctive methodology as well as an animating *raison d'être*;<sup>15</sup> neither of which comparative legal scholars seem able to agree upon. Comparative law tends to be defined by its subject matter rather than its methodology—by what is studied, not how and why it is studied.<sup>16</sup>

Partly as a result of this vacuum in methodological justification, a great deal of comparative legal scholarship seems to be oriented to the needs of legal practitioners,<sup>17</sup> both those who wish to interact with foreign legal actors and systems and those who hope to mine foreign legal orders for solutions to problems that we face in our own society.<sup>18</sup> The bulk of American scholarship on Chinese law partakes of this instrumentalist character—not surprising, perhaps, given the fact that the career trajectories of many Chinese legal

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14. William Ewald, *Comparative Jurisprudence (I): What Was It Like to Try a Rat?*, 143 PA. L. REV. 1889, 1891-93 (1995). See also Legrand, *supra* note 8, at 233-34 (quoting various scholars' on their disappointment with the quality of comparative legal scholarship).

15. Comparative law is not, of course, the only scholarly field beset by methodological anxiety. Anthropology has likewise been in the throes of what has been called a "crisis" of identity and methodology. See CLIFFORD GEERTZ, *AFTER THE FACT: TWO COUNTRIES, FOUR DECADES, ONE ANTHROPOLOGIST* 96-99 (1995).

16. The lack of attention to theory and methodology in comparative law has been blamed for causing fundamental misconceptions about the nature of non-Western legal systems. See, e.g., Bogumila Puchalska-Tych & Michael Salter, *Comparing Legal Cultures of Eastern Europe: The Need for a Dialectical Analysis*, 16 LEGAL STUD. 157 (1996); Legrand, *supra* note 8, at 238 (arguing that "a commitment to theory [ought to be] paramount if comparative legal studies is to take place in any credible form").

17. Ewald, *supra* note 14, at 1953-54 (arguing that much traditional comparative law scholarship has been designed to be useful to practicing lawyers, though maintaining that it has been largely unsuccessful on those terms).

18. See, e.g., Christopher J. Whelan, *Labor Law and Comparative Law*, 63 TEX. L. REV. 1425 (1985) (contrasting the uses and misuses of comparative law as an aid to reform our legal system). Comparativists who are relatively sanguine about the possibility of successfully transplanting legal practices and institutions from one culture to another lend support to this instrumentalist perspective on the utility of comparative law. See, e.g., ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* (1974) (arguing that legal institutions and doctrines have been borrowed and successfully adapted to foreign cultural contexts); cf. Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1 (1974) (expressing skepticism about the transferability of foreign legal systems and practices).

scholars involve shuttling back and forth between academia and law firm employment. Law firms need definitive answers to questions such as the following: "What do we need to know to structure a joint venture in China?"; "What protection will our clients have for their trademarks if they do business in China?"; and "What protections will our clients have in case of breach of contract by their Chinese counterparts?" American scholars of the Chinese legal system have obliged them by supplying answers to such questions in their writings. Less common in American scholarship on Chinese law is the instrumentalist flip side of the coin—scholarship seeking to derive lessons from the Chinese legal experience that can profitably be applied to the American legal order.<sup>19</sup> Both of these instrumentalist perspectives on the use of comparative law may be inherently unsatisfying to the scholar, however, implying that the comparative scholar's role is strictly a supporting role to the work-a-day world of legal practice; and a bit player at that.

An alternative justification for comparative legal scholarship is that, like other scholars in the liberal arts academy, the comparativist is adding incrementally to the world's storehouse of knowledge by carefully cataloging and preserving data about some aspect of existence, in this case, a foreign legal system. If the scholar-as-ancillary-to-practitioner role is unsatisfyingly prosaic, the scholar-as-collector-of-exotic-but-useless-information role is equally unattractive. Here the comparativist is portrayed as an inconsequential eccentric, busily adding random facts to the unorganized antheap of human knowledge, worshipping the "Muse *Trivia*—the same Goddess who inspires stamp collectors, accountants, and the hoarders of baseball statistics."<sup>20</sup>

Those researching issues in Chinese law, like other comparative law scholars, must confront the question of why anyone should pursue this field. One way to begin to answer this question is to ask whether scholars of Chinese law are primarily Sinologists, studying Chinese law in order to learn more about China, or primarily legal scholars, studying Chinese law in order to reveal something significant about the nature of law and jurisprudence. Or,

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19. This kind of scholarship is premised on the assumption that we Americans have something to learn from the Chinese legal experience. Perhaps it is the general American sense of cultural superiority that makes such scholarship uncommon, or perhaps the belief that Chinese law is far less well-developed and sophisticated than our own. One aspect of Chinese law that has spawned such scholarship, however, is the Chinese practice of dispute resolution, particularly its mediation processes. See, e.g., Robert F. Utter, *Dispute Resolution in China*, 62 WASH. L. REV. 383, 396 (1987); see also Eric J. Glassman, *The Function of Mediation in China: Examining the Impact of Regulations Governing the People's Mediation Committees*, 10 UCLA PAC. BASIN L.J. 460, 461 & n.11 (1992) (noting that many Western lawyers and legal authorities have visited China to observe Chinese mediation in action).

20. Ewald, *supra* note 14, at 1892.

to put it somewhat bluntly, do scholars of Chinese law belong in Chinese studies departments or in law schools?<sup>21</sup> Of course, the easy answer is that Chinese legal studies has significance for both academic areas, shedding light equally on aspects of Chinese culture and civilization and on fundamental questions about the nature of law. Inevitably, however, one of these two perspectives must dominate Chinese legal scholarship, with one assuming the role of figure and the other background.<sup>22</sup> That is, any particular work of scholarship in Chinese legal studies must put the primary accent on "Chinese" or on "legal."

Professor Jones generally puts the accent in his Chinese legal scholarship on its essential Chineseness rather than its essential legality. For example, in his translation of a collection of civil law cases from contemporary China, Professor Jones acknowledges the value of this resource for those interested in Chinese law. He goes on to say, however, that this

is not their only value: perhaps not even their greatest value. Court decisions from any country are a terribly rich source of information about that society. . . . [They give] one of the very few opportunities we have to see ordinary Chinese life as it appears to Chinese.

. . . Cases like these give us a little information about another China, one that is very hard to learn about anywhere else.<sup>23</sup>

Similarly, in his introduction to his translation of the Qing Dynasty legal code, Professor Jones tells the reader that an understanding of the Code is of "considerable importance for Chinese studies generally,"<sup>24</sup> because an appreciation that the Code represents "one of the major products of the Chinese intellectual tradition . . . would cause considerable rethinking of many presently held views of Chinese thought and civilization."<sup>25</sup> He does

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21. Those of us who write in this area are all too familiar with a variation on this question: Does this scholarship belong in law reviews or in social science journals? We often answer the question, however, based not on methodological or disciplinary considerations, but rather on the more prosaic and self-serving consideration of what placement would most impress our tenure and promotion committees.

22. The contrast between figure and background in human perception is most apparent in the context of those familiar optical illusions with two competing interpretations, such as the duck versus rabbit, the old woman versus young woman, or two faces in profile versus a vase. In these illusions, the viewer can go back and forth between interpretations by reversing what is seen as figure and what is seen as background, but cannot simultaneously perceive both images. See generally RICHARD L. GREGORY, *EYE AND BRAIN: THE PSYCHOLOGY OF SEEING* 9-14 (3d ed. 1978).

23. Jones, *Civil Law in China*, *supra* note 5, at 17-18.

24. JONES, *THE GREAT QING CODE*, *supra* note 7, at 28.

25. *Id.*

acknowledge that the study of Chinese law is a valuable corrective to the tendency of comparative legal scholars to focus on European law to the exclusion of all other legal traditions.<sup>26</sup> It is his hope that the study of Chinese law will be the vehicle through which legal scholars can escape what he calls "the strait-jacket of Europe-centred thinking."<sup>27</sup> Nevertheless, the center of gravity in Professor Jones's scholarship is in Chinese studies rather than in jurisprudence.

*B. What Is Chinese Law And How Can It Be Recognized?*

One of the fundamental questions of comparative law has been described in this way: "Which legal institutions in what legal cultures can be compared with each other in a meaningful way?"<sup>28</sup> This question cannot be answered, however, unless first there is an agreement about what counts as a "legal institution" or "legal practice." In short, the comparative legal enterprise must first develop a satisfactory answer to the question, "What is law, and how do I recognize it in a foreign cultural context?" Yet this fundamental question is given surprisingly short shrift in comparative legal studies.<sup>29</sup> Perhaps one reason for the lack of attention to this question is that the comparative law field has traditionally been dominated by scholars concerned with comparisons between the Anglo-American common law system and the Roman law-derived civil law system.<sup>30</sup> Each of these legal systems emanate from European societies with a largely shared cultural heritage and a long history of continued institutional and social contact. Given the cultural resonances among the various European countries, then, one would expect that analogous legal concepts and practices would be quite simple to identify in comparing the European common law and civil law systems. In light of the obvious parallels in European legal institutions and practices, only the willfully obtuse scholar of a European-rooted legal system would bother asking, "What is law, and how will I recognize it?"

When the field of inquiry shifts to China, on the other hand, the familiar

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26. Jones notes that comparative law treatises and texts books are virtually silent about non-Western legal systems. In the eyes of most comparativists, "real law is European law." *Id.* at 1-2.

27. *Id.* at 2.

28. Bernhard Grossfeld, *Geography and Law*, 82 MICH. L. REV. 1510, 1510 (1984).

29. As William Ewald has noted, "[A]ny theory of comparative law will . . . have to stake itself on some conception of law. The problem with the traditional approaches is that they have done so in silence and indeed without troubling to give the matter much thought." Ewald, *supra* note 14, at 1951.

30. Kurt Schwerin, *Comparative Law Reflections: A Bibliographic Survey*, 79 NW. U. L. REV. 1315, 1317 (1985).



landmarks of the civil and common law systems are no longer at hand to guide our search for "law." One of the hallmarks of Professor Jones's scholarly writings is his constant awareness of the centrality of this problem.<sup>31</sup> In probing the interstices of the Chinese legal order, his work always foregrounds the question, "What is law? And where in the Chinese normative and social order will I be likely to find it?" Or, to put it another way, "What am I looking for? And what exactly am I looking at when I think I have found what I was looking for?" Throughout his scholarly work, whether on imperial China or socialist China, Professor Jones has insisted that this fundamental question be the starting point of the inquiry, rejecting a priori assumptions about what must count, or could not count, as "law." For example, it is frequently argued that law did not exist during the Cultural Revolution, a period in which statutes were constructively abrogated, courts shuttered, and law schools disbanded.<sup>32</sup> But, in the view of Professor Jones, such an interpretation is based on an excessively narrow Western view of what constitutes "law." Formal law in China, he argues, can be seen as "the central government's plans and its mechanisms for carrying them out."<sup>33</sup> That being the case, the fact that organized economic activities continued even at the height of this supposedly "lawless" period suggests that Western observers are wrong to conclude that law ceased to exist during that time.<sup>34</sup> If, as has recently been suggested, critical legal studies ("CLS") means taking nothing for granted about the nature of law,<sup>35</sup> then Professor Jones must surely be the godfather of the CLS wing of Chinese legal studies.

In his work, Jones has been consistently skeptical about the utility of using

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31. See, e.g., William C. Jones, *Reflections on the Modern Chinese Legal System*, 59 WASH. U. L.Q. 1221, 1221 (1982) (noting the importance of being able "to ascertain which phenomena are to be considered 'law' or 'legal'").

32. Paul D. Reynolds, *The Role of Law in China's Modernisation*, POLY L. REV., Autumn 1980, at 12, 12-13.

33. William C. Jones, *Some Questions Regarding the Significance of the General Provisions of Civil Law of the People's Republic of China*, 28 HARV. INT'L L.J. 309, 324 (1987) [hereinafter Jones, *Some Questions*].

34. *Id.* at 330-31. Professor Jones notes:

Even during the most violent period of the Cultural Revolution, 1966-71, grain continued to be produced, procured, and marketed, fuel got to factories and public utilities, electricity was produced, trains, ships and planes functioned, and factories continued to operate. They required raw materials and product distribution. And this meant that there was government direction going on. The informal system also operated. People got married, died, left property to favorite nephews, arranged to buy materials for manufacture, etc.

*Id.*

35. Louis E. Wolcher, *What We Do Not Doubt: A Critical Legal Perspective*, 46 HASTINGS L.J. 1783, 1783 (1995) ("In legal scholarship . . . being critical means taking very little for granted about what is discussed.").

Western categories to describe or analyze Chinese legal practice.<sup>36</sup> "Categories of Western law do not work,"<sup>37</sup> he unequivocally tells us, and Western-trained scholars of Chinese law must be constantly on guard for the unwitting or unconscious importation of Western legal concepts into their scholarship if we are to understand the Chinese legal order.<sup>38</sup> One reason why Western legal categories are so misleading in the Chinese context is because Chinese and Western law stem from completely different foundational premises. Western law, according to Professor Jones, is based on the assumption that a legal system exists to allow private individuals to make claims against other individuals or against the state, whereas Chinese law is based on the assumption that law exists for the protection and promotion of the interests of the state.<sup>39</sup> Consequently, the Western dichotomy between civil and criminal law, or that between public and private law, simply cannot be accurately applied in the Chinese context because the fundamental assumptions driving these dichotomies derive from our Western concepts about the primacy of the individual's private interests in our legal order.<sup>40</sup>

Jones warns that one of the dangers in using Western legal categories as the basis for analyzing Chinese law is that we will tend to concentrate our attention on those aspects of the Chinese legal order that seem most similar to our own legal doctrines and practices, regardless of whether these aspects are

36. See, e.g., Jones, *Theft in the Qing Code*, *supra* note 1, at 499, 521. Jones observed that the Chinese "system is so radically different from anything that we are accustomed to that it cannot be approached by the use of purely western legal terms," *id.* at 499, and that "the danger that we will be seeing western concepts and missing Chinese concepts is too great," *id.* at 521. Accord, JONES, THE GREAT QING CODE, *supra* note 7, at 4, 7; William C. Jones, *Approaches to Chinese Law: A Reply to Comments by Dr. F. Münzel*, 4 REV. SOCIALIST L. 329, 334 (1978) [hereinafter Jones, *A Reply*]; Jones, *Civil Law in China*, *supra* note 5, at 14-15.

37. JONES, THE GREAT QING CODE, *supra* note 7, at 8.

38. See *id.* at 14.

39. *Id.* at 4-6. As a result of this distinction, the Western perspective on what law is and how it functions is precisely inverted from the Chinese view.

Our law has grown outward, as it were, from the concerns of individuals or 'persons'. It fulfils large social purposes, but it does so indirectly by dealing with the affairs of individuals, largely from their points of view. . . . As the interests of individuals are served, societal interests get an indirect benefit.

In China, precisely the reverse was the case. The state promulgated laws to make sure that its interests were advanced. As this was done, the interests of individuals were often protected as an indirect result.

*Id.* at 9.

40. *Id.* at 7. An examination of the structure of the imperial Chinese legal code suggests that our Western concept of criminal law as opposed to and distinct from civil law is not at all consonant with the Qing Dynasty's conception of criminal law, since in the Qing Code it was one of six categories, not one of two. Jones, *Theft in the Qing Code*, *supra* note 1, at 505.

indeed central in the Chinese legal context.<sup>41</sup> Our Western presumptions about the centrality of private dispute resolution to the legal order, for instance, will predispose the Western-trained scholar to look for such practices as contracts and mortgages, and, indeed, similar practices do in fact exist in China. But they do not occupy the same position of importance in the Chinese legal order as they do in the West, and consequently ought not be the central focus of our study.<sup>42</sup> Moreover, even when the Chinese legal institutions or practices at issue are unquestionably important within the Chinese legal order, their superficial similarity to Western legal concepts may cause the Western comparativist to misinterpret their meaning within that order. For example, the elements of crimes as defined in the Qing Dynasty legal code are remarkably similar to those in the equivalent Western criminal laws. Yet, Jones cautions us, the concept of "criminal law" inherent in the Qing Code is fundamentally different from that in Western culture.<sup>43</sup> Whereas Western criminal law sees crime as a violation of the right of individuals to be secure in their persons and property, the imperial Chinese legal order saw crime as a disruption of governmental control.<sup>44</sup> Taking surface similarities between Chinese and Western law at face value, then, obscures the fundamental differences that may exist between these two legal orders.

Professor Jones's wariness about imposing Western legal categories on Chinese law means that he does not assume that institutions or practices that are clearly central in the Western legal order necessarily occupy a parallel place in the Chinese legal landscape. For example, Jones concludes that courts in contemporary China, unlike those in the West, are not central institutional constituents of the formal legal system, but are instead of only marginal significance.<sup>45</sup> This skepticism towards the utility of Western legal categories in analyzing Chinese law sometimes leads Jones to identify aspects of the Chinese legal order that would seem to a Westerner to be non-legal,

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41. JONES, *THE GREAT QING CODE*, *supra* note 7, at 8.

42. Jones, *A Reply*, *supra* note 36, at 331.

This seems to be a very difficult concept for westerners to accept. That is, that one can have a society in which there is law—fairly complicated law that cannot be dismissed as custom—and where there are contracts and mortgages, but where the law is not much concerned with them. They are what law is all about as far as we are concerned. But not as far as the Chinese were concerned.

*Id.*; accord, William C. Jones, *Studying the Ch'ing Code—The Ta Ch'ing Lü Li*, 22 AM. J. COMP. L. 330, 356 (1974) (arguing that the rules governing private relations in the imperial legal code were not central to the Code) [hereinafter Jones, *Studying the Ch'ing Code*].

43. Jones, *Theft in the Qing Code*, *supra* note 1, at 505.

44. Jones, *Studying the Ch'ing Code*, *supra* note 42, at 355.

45. Jones, *Some Questions*, *supra* note 33, at 318 ("The courts are not the formal legal system in China, at least in civil matters. They deal with fringe activities and only in an erratic way.").

and other times to label seemingly legal practices in China as essentially non-legal in their Chinese context. For example, he suggests that the mass campaign in socialist China<sup>46</sup> can be seen as an aspect of the Chinese legal order, although most scholars would identify it as a “political” practice rather than a “legal” one. Where a typical comparative law approach would be limited to merely looking for similarities and differences between Western and Chinese trials, Jones went further, transcending the simple application of the “trial” category to ask what makes trials the kind of normative event that they are for us in the West. Because he does not begin with Western preconceptions about what kinds of practices are inherently “legal,” Jones is able to recognize the extent to which the mass campaign serves many of the same normative functions that publicized litigation serves in the West for the public dissemination of contests over fundamental values.<sup>47</sup>

By the same token, Jones’s skepticism over the applicability of Western legal categories to China allows him to interpret seemingly “legal” institutions and practices as being fundamentally non-legal in the Chinese context. For instance, he concluded that the enactment of certain statutes in contemporary China is better understood as a political event than a legal one.<sup>48</sup> A more traditional comparative law approach would assume that statutes are by definition legal creations, and must therefore be analyzed as a constituent aspect of Chinese law. The result of “trying to force Chinese phenomena into Western categories,” Jones cautions, is that we may “assume that the Chinese are doing the Western thing although they are not doing it very well.”<sup>49</sup>

### *C. How Should We Study Chinese Law?*

Because his work is informed to such a great degree by methodological concerns, Professor Jones recognizes that Chinese legal scholars should

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46. The mass campaign, designed to mobilize popular awareness of and support for current government priorities and goals, has been an enduring feature of political life in the People’s Republic of China. Launched by a central government directive defining its objectives and scope, a mass campaign is pursued by local government, mass organizations, and the mass media. For a fuller description of this distinctly Chinese form of mass mobilization, see JAMES R. TOWNSEND, *POLITICAL PARTICIPATION IN COMMUNIST CHINA* (1967); and Lucian W. Pye, *Mass Participation in Communist China: Its Limitations and the Continuity of Culture*, in *CHINA: MANAGEMENT OF A REVOLUTIONARY SOCIETY* 3-33 (John M.H. Lindbeck ed., 1971).

47. See generally Jones, *On the Campaign Trail in China*, *supra* note 2.

48. Jones, *Some Questions*, *supra* note 33, at 325 (“[T]here is a strong possibility that the General Provisions were meant primarily as a political statement.”).

49. Jones, *Civil Law in China*, *supra* note 5, at 14.

approach their scholarly task cautiously, and with careful regard in interpreting the significance of what is found. For example, most commentators on the imperial Chinese legal system have maintained that many of its characteristics—its emphasis on hierarchical status and on male dominance over women, for instance—show the influence of Confucian ideology on the Chinese legal order. Professor Jones, on the other hand, acknowledges the plausibility of this interpretation, but cautions that the mere fact that these legal doctrines are consistent with Confucian values does not necessarily mean that these aspects of Chinese law were actually derived from Confucian teachings, since traditional European law might appear equally “Confucian” in its patriarchal characteristics.<sup>50</sup>

Jones maintains that the proper stance for a comparative legal scholar to take in interpreting Chinese legal culture is one designed to provoke thought and further investigation rather than hurried, definitive pronouncements about the nature of Chinese law. It is no accident, then, that Professor Jones’s articles have titles such as *Some Questions Regarding the Significance of the General Provisions of Civil Law of the People’s Republic of China*,<sup>51</sup> and *Reflections on the Modern Chinese Legal System*.<sup>52</sup> This is not the pretense of false modesty sometimes affected by scholars, but a keen recognition of the inherent tentativeness of any interpretation of the Chinese legal order made from a Western vantage point.

To truly understand Chinese law for Professor Jones is to see it from the Chinese point of view.<sup>53</sup> Although the imperial Chinese did not leave a body of jurisprudence to tell us what they considered to be their fundamental legal principles,<sup>54</sup> they did leave us abundant primary source materials from which we can attempt to reconstruct their jurisprudence. Professor Jones insists that these materials can be systematically analyzed to find patterns and structures that will reveal the coherent body of concepts that constitute the Chinese legal sensibility.<sup>55</sup> It is this perspective that leads him to the careful analysis of the Qing Code, looking for its “underlying conceptual structure,”<sup>56</sup> that has been such a prominent feature of his scholarly career. Jones’s close textual reading

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50. See JONES, THE GREAT QING CODE, *supra* note 7, at 17.

51. 28 HARV. INT’L L.J. 309 (1987).

52. 59 WASH. U. L.Q. 1221 (1982).

53. Jones, *Theft in the Qing Code*, *supra* note 1, at 499.

54. *Id.*; Jones, *Studying the Ch’ing Code*, *supra* note 42, at 331.

55. Jones, *Theft in the Qing Code*, *supra* note 1, at 500-01; JONES, THE GREAT QING CODE, *supra* note 7, at 3; see also Jones, *A Reply*, *supra* note 36, at 331 (observing that modern Chinese law, too, should be studied by attempting to discern its common conceptual framework).

56. Jones, *Theft in the Qing Code*, *supra* note 1, at 521.

of the Qing Code concentrates on its structural aspects, with textual placement of provisions, internal cross-references, and definitions of terms seen as key to understanding Chinese principles of legal thought.<sup>57</sup> This methodology, which is equally applicable to the study of contemporary Chinese law, assumes that the Chinese legal order has an underlying coherence that can be reconstructed from a rigorous structural analysis of the concrete products of the Chinese legal sensibility such as their enacted bodies of law. Professor Jones's extensive body of work on the Qing Code is an exemplary example of this methodology in action.

Professor Jones's impressive body of scholarship serves to demonstrate that sensitivity to issues of methodology is indispensable for the comparative legal scholar. His work is marked both by an awareness of the methodological difficulties faced by the comparativist and a confidence that it nonetheless is possible to transcend these difficulties and make a meaningful contribution to the development of an understanding of a foreign legal order. The comparative legal scholar, striving to achieve an intelligible representation of the Chinese legal order for the reader whose frame of reference is Western law, must simultaneously preserve the essence of what is unique and incommensurable in that world and at the same time render it comprehensible to the outsider looking in.<sup>58</sup> In that respect, Professor Jones's work sets a very high standard for succeeding generations of scholars in the field of Chinese studies. Without question, his contributions will influence future generations of scholars following in his footsteps as they devise their own answers to those three nagging questions—why, what, and how to study Chinese law.

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57. *Id.* at 506.

58. This is a dilemma shared with historians and anthropologists as well, who must struggle with the representation of the incommensurable. See DAVID LOWENTHAL, *THE PAST IS A FOREIGN COUNTRY* at xvi (1985) (“[L]ife [in the past] was based on ways of being and believing incommensurable with our own.”); Vincent Crapanzano, *Hermes' Dilemma: The Masking of Subversion in Ethnographic Description*, in *WRITING CULTURE: THE POETICS AND POLITICS OF ETHNOGRAPHY* 51-52 (James Clifford & George E. Marcus eds., 1986) (describing the “paradox” of the anthropologist who must “render the foreign familiar and preserve its very foreignness at one and the same time”).

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