Editor's Introduction

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From my decades of study of the history of Chinese civil justice and the writing of my trilogy (Vol. I: *Civil Justice in China: Representation and Practice in the Qing*, Stanford University Press, 1996; Vol. II: *Code, Custom, and Legal Practice in China: The Qing and the Republic Compared*, Stanford University Press, 2001; and Vol. III: *Chinese Civil Justice, Past and Present*, Rowman and Littlefield, 2010), I came to a simple basic understanding: the study of law must not be limited to just codified texts but must also consider judicial practice Although the representation and practice of law may be congruent with one another, they are also often divergent or even contradictory. Whatever the declared intent of a law, it must in actual application somehow adapt and adjust to social realities. It is precisely the two dimensions of representation and practice, and law and society, along with their partly conflictive and partly congruent relationship that together make up the entirety of a legal system. In a discipline that tends to emphasize codified texts far more than practice, this understanding amounts to a certain anti-"mainstream" position, but it is, I believe, essential to studying law. Otherwise, we would strip the law of its living and breathing side, and fall prey all too easily to mistaking textual representations for operative realities. Yet, at the same time, we must not limit ourselves only to the retrospective study of practice without considering prospective legal principles, for that too can cause us to overlook the continual tensions and interactions between the two, arguably the crucial driving force behind legal change.

To study the actual operative workings of the law requires that we set it into its social context, and a critical variable of that context is the differences between different social classes and status groups. In China's past, there were large differences between the "literati" and the peasants, men and women, and superior and inferior. In the present, there continues to be striking differences between the upper and lower classes, as well as between urban residents and rural peasants as status groups.

I wish to add here that, with my turn during this past decade from writing mainly for an English-language audience to writing in Chinese mainly for Chinese readers, and from a kind of passive involvement with (thinking about but not writing about) Chinese contemporary realities to an active engagement with them, I have come to appreciate all the more how crucially important the historical and social contexts are for an understanding of contemporary Chinese law. Only with an understanding of "whence did Chinese

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law come" can one think realistically about "whither might Chinese law go." To ignore the past is to engage in fanciful thinking about the present. It is also to fall easily into the trap of simple imitation-ism (transplantation-ism) or Westernism and modernism. At the same time, one must not disregard prospective norms and ideals, for that can mean falling into the trap of a blind conservatism, to be limited to simple retrospective-ism and nativism, even if rationalized as being realistic or practical. Without a prospective vision, one can overlook fundamental weaknesses of the system as it exists, as well as neglect certain unavoidable common trends in law that have come with globalization.

A prospective concern compels us to confront such theoretical issues as transplantationism 移植主义 vs. indigenous-ism 本土主义, Westernism or modernism vs. historicism or postmodernism, formalism vs. substantivism or pragmatism/realism, and capitalism vs. socialism. Given the hugely complex and paradoxical reality of present-day China, these are not ivory-tower issues, but problems of immediate urgency and practical significance.

From my own explorations into theory, I have come to see that none among the existing theoretical traditions of jurisprudence can capture fully these basic understandings gained from my empirical research. Even so, I have found that there are quite a few scholars who approach the study of law in ways similar to my own. I believe this is mainly because many people possess a sense of reality that will cause them to reject ideological and theoretical constructions that do not fit observable evidence, and insist instead on a pursuit of truth through accumulated evidence. But such scholars rarely engage in discussions of jurisprudential theory and method, leaving those matters to the theorists. Theorists, however, typically show at least a certain measure of Western-centrism, as well as a propensity to over-argue one or another theoretical position. Formalist theorists, especially, strongly favor logic over experience, codified articles over actual operation, and rules over practices. That is in part because they share a fundamental faith in deductive logic, which many consider the exclusive heritage of Western civilization. They will almost by instinct attempt to unify their "theoretical systems" with such logic, and to pursue their arguments to logical conclusions. Surprisingly, even those who are critical of such formalism often show the same inclination. Theoretical currents like legal pragmatism/realism, historical jurisprudence, legal sociology, and postmodernism, even though contributing importantly to correcting the excesses of legal formalism, have exhibited the same kind of tendency to overstate arguments, resulting in a host of either/or binary oppositions between different theoretical traditions.

In my view, the tendency to insist on logical unity and consistency is a critical weakness of any theoretical system, for such systems cannot possibly attend

to the basic givens of Chinese reality and history: namely, the unavoidable and necessary coexistence of Chinese with Western law, past history with the present, and the practical with the formal. Precisely because purely theoretical inquiries require logical integration and consistency, they cannot possibly attend to the multiple paradoxical and contradictory realities of present-day China, certainly not beyond simply insisting that reality be altered to conform to theoretical construction.

In my view, we need to proceed from actual legal practice in order to grasp not only the unavoidable contradictions and tensions between the Chinese and the Western in present-day China, but also the interaction, mutual adaptation, and amalgamation between the two. In contrast to theoretical constructions, practice does not demand simple logical integration and consistency, but will more closely reflect the complex illogical relationships that exist in reality. Only if we begin with actual legal practice and construct theoretical concepts therefrom can we search out a path of legal development for China that is both realistic and prospective.

For this reason, I have in recent years been advocating a new approach to legal theory. Put simply, it is to call for a "historical-social study of law" or, in other words, a "historical-social jurisprudence" that comes with a historical-social perspective as well as a theoretical concern. The choice of the new term "historical-social" study of law or jurisprudence (i.e., with theoretical and philosophical concerns) 历史社会法学 is not motivated by any merely utilitarian concern to seem novel for the sake of seeming novel, but rather represents a serious attempt to search out a new path for law and jurisprudence that can meet China's present needs to build a lasting legal system.

What follows is first some brief introductory summaries and comments about the articles assembled here, mostly by exceptional younger Chinese scholars whom I have had the privilege of teaching in the past decade. The articles are intended to illustrate more concretely what is intended in the way of the methods and principles of a "historical-social jurisprudence." This introduction will then move to a further elaboration of what I intend by the term, setting it into the larger context of existing traditions of jurisprudence.

Examples of the Historical-Social Study of Law

Women and the Law

1 The Peasantization of the Law

The first article included in this volume is Kathryn Bernhardt's understated critique of the fashionable tendency in American scholarship to argue for crucial "transitions" in dynastic change during the imperial period. The original

impulse of that body of what might be termed "transitions scholarship" was (the well-intended aim) to find equivalency to the West for China. The lead had been set by the Japanese scholar Naitō Kōnan (Torajirō), who argued that there was a "Tang-Song transition" comparable to the West's early modern period, and whose arguments came to be known in the literature as the "Naitō hypothesis." Following his lead, some later scholars argued for a "Ming-Qing Transition." Later, others began to argue for a so-called "Song-Yuan Transition." Speaking frankly (as a long retired senior professor), I suspect that at least part of the impulse of these later efforts was little more than an effort to enlarge the influence and importance of one's own dynastic specialty. The question Bernhardt raises about this body of scholarship is: from the point of view of women and the law, what does the Ming-Qing historical record actually show about change and non-change?

There had been a good deal of scholarship that focused on what is termed women's "agency," with the intent of demonstrating the independent agency that some women exercised in the "Ming-Qing transition" period. At bottom, those studies too were efforts to find "early modern" beginnings in China that might be likened to those in the West. However, as Bernhardt points out, their evidence is limited to women of the upper classes, mostly from the Jiangnan region (such as some famous "talented women" 才女 of the time); for the majority peasant women, there was really no evidence of such change.

Bernhardt's article sorts out the important changes for women in the millennium from the Tang-Song to the Ming-Qing. In the Tang-Song, a daughter who had no brothers was entitled to inherit the father's property; by the Ming-Qing, however, she could do so *only if* there was no possible male successor to the father among the paternal relatives within the five degrees of mourning. This shows not an expansion of her "agency" ("rights"), but rather a contraction. Similarly, in the Song, the dowry accompanying a woman in marriage was considered her personal property; in the Ming and Qing, however, it came to be seen as her husband's. In the Tang-Song, and Ming, a widow's remarriage was to be determined by her natal family; in the Qing, however, that control belonged to the husband's family. In the Tang-Song, an engaged woman was still seen by the law as the daughter of her natal family (so that if she killed her fiancé, it was considered a crime of one commoner against another); in the Qing, however, the law considered her already a member of the husband's family, so that the crime would be prosecuted as the killing of a husband, with more severe punishment.

Bernhardt suggests that these changes might have come from Ming and Qing law's increasing adaptation to the customary practices of the majority peasant population. Compared to the upper classes, the "bridal gift" (财礼, 彩礼, which

some would render as "brideprice") was a far heavier financial burden (relative to the total property of the family), and therefore came with correspondingly greater expectations. What the legal changes noted above reflected was precisely that social reality: because the husband's family had paid a heavy price for the woman, they should have the right to control the widow's remarriage (and receive the bridal gift from it). By the same reasoning, the husband's family was to have the right to select from among the patrilineal relatives a successor to the husband's property. By extension, the dowry of the woman was also to be considered the husband's family's property. And further by this same line of reasoning, once the woman's family received the bridal gift, even if the marriage ceremony had not yet taken place, she was to be considered by the law a member of the husband's family, not her natal family. What such legal changes point to is not the "early modern" rise of an urban bourgeoisie and of capitalism, but rather the further entrenchment of the peasant economy and society, and the penetration of its practices into codified law—what Bernhardt calls "the peasantization (or plebianization) of the law."

In other words, from a broad historical-social perspective and the point of view of legal history, the important changes came not from the relatively short time span of the "Ming-Qing transition" but rather the much longer span of the Tang-Song to the Ming-Qing. The nature of the changes was not unilinear "early modernization" but rather non-linear social-economic change, not the growing agency of women in the direction of modernization but rather its opposite. The dynamic behind the changes was mainly that the law more and more took into account the changing social realities of peasant lives, and no longer modeled itself mainly on upper-class life as it had done in the past.

2 Women's Choices under Qing and Republican Law

The second article is my own, also from a historical-social analysis of codified law and legal practice. It too explores the question of how women's independent agency changed and did not change, this in the Qing and Republican period. In addition to the pertinent legal codes, the article employs 193 related cases on "marriage and illicit sex" from three counties in the Qing and four counties in the Republic. The article demonstrates, first of all, that the Qing and Republican legal constructions of women's will were very different: in the Qing, women were seen as possessing only subordinate wills, their choices ranging only between consenting to something or not, never seen as autonomous. From this come the official legal categories of offenses of "consenting to illicit sex" 和奸, "consenting to be seduced" 和诱, and "consenting to be abducted" 和略, and the like. I call this conception of women's will "passive agency." Republican law, by contrast, followed imported modern Western law

and constructed women as exercising independent choice and will, in theory giving them independent property rights, free choice in marriage and divorce, and equal choices as the men with regard to sexual relations—thereby doing away completely with the "consenting to" construction of the Qing.

But changes in the way the law actually worked differed greatly from the surface changes in the legal texts. In actual operation, Qing law afforded women important protections, even as it imposed harsh penalties on them for not living up to the expectations of the law. Precisely because the law saw women as possessing only a subordinate will to consent or not to consent, a widow could in the name of maintaining her chastity 守志 gain the support of the court to make her marital relatives desist from forcing her to remarry (in order to get the bridal gift); a poor wife could also appeal to the court under the substatute of "buying and selling into marriage" 买休卖休 to compel her husband to desist from selling her into remarriage, and to the substatute of "pawning or hiring out a wife or daughter" 典雇妻女 to keep her husband or father from selling her into prostitution. At the same time, however, the law expected the woman, when faced with abuse, to resist at all costs without regard to personal harm, in order to maintain her "chastity;" she had to be able to provide concrete and conclusive evidence of her resistance, lest she face the suspicion of having committed the criminal offense of "consenting" to illicit sex, to be seduced, or to be abducted.

In the Republican period, a certain proportion of women—mainly of the educated urban bourgeoisie—were indeed able to obtain to a considerable degree equal property rights and freedom of marriage and divorce. However, women who were peasants or the urban poor, when violated or faced with the prospect of being violated, found that they had actually lost the protections afforded them by Qing law because of the way the law now saw them: a widow could no longer go to court to keep her marital relatives from forcing her to re-marry, and a wife could no longer go to court to deter her husband or father from selling her into prostitution. Precisely because the law now constructed her as a free agent possessing independent will and choice, it no longer gave her that kind of protection. Its logic was: how can a free agent of independent will go against her own will to marry another or engage in prostitution? That would be a logical contradiction. In the face of such formalistic logic, a woman in fact had to wait until she had actually been forced to remarry or engage in prostitution to charge her abuser after the fact with the crime of "interference with personal liberty" 妨害自由罪, and seek thereby to have him punished or else to obtain permission to divorce him. But for a woman who needed her husband in order to subsist, who wished neither to be divorced nor sold into remarriage or prostitution, this kind of law did not offer real protection.

Put simply, the "modern" Guomindang law, while affording bourgeois women expanded rights, also eliminated a host of protections given by Qing law to the majority of women who were in much weaker positions.

In method, what the article illustrates is that to understand the real meaning of a law, we must not look only at the law in words, but must see also how it operates—to grasp its actual practice. At the same time, we need to attend to differences in the social backgrounds of those involved (and do so with a certain measure of empathetic understanding for the lot of the common people and of those in positions of weakness) before we can understand the actual meaning of a law. What we see is definitely not a simple matter of linear change in the direction of "modernization" or "development," not any simple contrast between the "advanced" legal system of the West as opposed to the "backward" system of traditional China, but rather that women's agency in the Qing and the Republic demonstrated both expansion and contraction within the three dimensional context of codified law, social context, and judicial practice, and their interactions.

3 Divorce Law Practices in the Revolutionary Base Areas

The third article, by Liu YANG, takes the same historical-social approach to explore divorce law practices in the Shaan-Gan-Ning (Shaanxi, Gansu, Ningxia) Border Region in the late 1930s and 1940s. The article is based mainly on the substantial numbers of case records pertaining to divorce litigation in that area. It demonstrates that, from the point of view of the practice of divorce law, society in the liberated area comprised mainly three status groups: the spouses of soldiers 抗属, the peasants 农民, and the revolutionary cadres 公家人 (*gongjiaren*, the widely used term of reference for the cadres-officials of the revolution 革命干部). First of all, these case records show us, surprisingly, that the main divorce litigants of the time were not so much those of our prevailing impression—from such writings as Ding Ling's "Thoughts on the Occasion of Women's Day," which criticized mainly male cadres who wished to leave their village wives for female comrades (often from the cities, educated, and pretty) with whom they had fallen in love—but rather progressive or revolutionary women who wanted to leave their peasant husbands to marry the gongjiaren cadres-officials. Yang demonstrates that, in the social and legal context of the time, it was hardest for spouses of soldiers to obtain permission for divorce, given the party's policy to protect the marriages of soldiers, lest their loyalty to the revolution be undermined. People who could most easily obtain permission for divorce were the progressive women or women cadres, who could appeal to the court either in the name of incompatibility in feelings with their husbands 感情不合 or a desire to better serve the revolution, this

even though for some the true motivation was likely a utilitarian one of leaving the peasant husband for a cadre-official who enjoyed special privileges. Falling between those two status groups in terms of the ease or difficulty of divorce were the common peasants.

This is a path-breaking study based on a new body of materials. It reveals the complex relationship between coded text and the actual operation of the law, and also provides a good look at social realities of the liberated areas of the time, including the nascent status differentiations that would emerge more fully with the party's transition from a revolutionary to a governing entity.

4 De Facto and Legal Separation (in Marriage)

The fourth article, by Hongying Li, is a study of "marital separation" 夫妻别居 in the Qing and the Republic. Qing law did not have a concept of legal marital separation. In real social life, a woman who wished to leave a miserable marriage generally resorted to going back to her natal family. Faced with such a "de facto separation," the husband generally could only resort to charging her with the legal offense of "running away from her husband" 背夫在逃, in order to use the authority of the courts to compel her to return home. But Guomindang law was different: it had a provision about the "obligation (for husband and wife) to live together" 同居义务 and allowed the husband to use that provision to keep his wife from living long-term with her natal families and to compel her to return home. At the same time, Guomindang law introduced the newly imported provision about legal "separation." Its intention was to make that an intermediate stage to divorce, in order to allow husband and wife a period of respite or transition before formal divorce, not as a way to satisfy the wish of some women to live separately from their husbands.

Hongying Li demonstrates, however, that in actual practice legal separation became something that many wives used not as a step toward divorce, but rather as a way both to continue the marriage, for needed maintenance from the husband, and yet live separately from him, for relief from the miseries of their marital life. The key here was the social realities of the time: most Republican period women could not support themselves, and legal separation for them was a way both to live apart from the husband and to survive. For some women, it was a way to cope with the husband's taking of a concubine, and one which the courts of the time commonly permitted. At the same time, the husband did have recourse to the "obligation to live together" legal provision to compel a wife to live with him. Legal separation under Republican law, Li concludes, should not be understood within the framework of divorce law, as a way station toward divorce, but rather should be understood as the

change from the de facto separation of Qing society to the legal separation of the Republic. The actual implications of the legal change were not as the letter of the law might suggest, nor what the lawmakers intended in their borrowings from Western law, but rather a reflection of the social realities of the Republican period and what they reveal about the meaning of the actual practice of the law.

5 "Privately Settling an Illicit Sex Offense" and the Third Realm of Justice

The fifth article, by Fenghua Jing, is a study of what I term (in my first volume on *Civil Justice in China: Representation and Practice in the Qing*) "the third realm of justice." What this "third realm" refers to is the intermediate space between community mediation and court adjudication. Upon the filing of a complaint, community mediators would generally redouble their efforts to resolve a dispute. During that process, all parties (mediators, the plaintiff, and the defendant) would take into account the court's initial and subsequent reactions to the complaint and the progress of the case, entering thereby into a process in which the formal court system and the informal community mediation system interacted.

Jing demonstrates that, when it came to matters of "illicit sex" 犯奸 (including [on the part of the man] getting a woman to consent to illicit sex and [on the part of the woman] "consenting to illicit sex" 和奸, tricking or being tricked into illicit sex 刁奸, and forcibly raping a woman 强奸), the Qing justice system actually went by two different principles: one was to encourage the communities to resolve their own disputes over "minor matters" 细事 without burdening the official court system; the other was to maintain good societal morals and make the private settlement 私和 of illicit sex 奸事 a punishable offense. In the third realm of Qing justice, these two principles in fact coexisted in continual tension, leading sometimes to privately negotiated settlements and sometimes to court intervention. The article shows that, in common matters of illicit sex, even if those were considered harmful to societal morality, the courts tended to allow the communities to settle the disputes themselves; however, when it came to matters of forcible rape, especially those involving serious injury or death, the courts would punish attempts at private settlement.

Entering into China's contemporary period, the law, on the one hand, reconfigured the "(getting a woman to) consent to illicit sex" formulation into *tongjian* 通奸, or engaging in illicit sex by mutual consent (a tendency already evident in practice in the Qing), such that the law would no longer intervene (excepting, that is, when spouses of soldiers are involved). As for rape (contemporary law, like Republican law before it, discarded the category "tricking

into illicit sex"), the law made it a matter for state prosecution. However, in actual practice, the victim and her family, out of consideration for the victim's reputation/privacy and/or a desire to obtain a large amount of compensation from the offender, often would prefer to settle matters privately. But contemporary law does not allow such settlement. That has led some victims to elect to falsely represent the rape as consensual, or even that she is in fact in love with the offender, going sometimes to the extent of overturning pre-existing testimony in order to gain the space for a private settlement.

There has accordingly arisen among legal scholars the opinion that calls for allowing the victim the right to decide whether or not to file a case against the offender, in the so-called "complaint by the victim herself" 亲告 procedure. But the problem is that in the present social context, some offenders (for example, local toughs 混混 or "black society" 黑社会 gang leaders, or powerful abusive officials) may be able to intimidate victims into not filing complaints, and rich offenders (for example, the children of the wealthy and powerful 富二代) may be able to pay compensation to escape punishment, even to commit offenses repeatedly. At present, how this aspect of the third realm of longstanding tradition will change and develop remains to be seen. Jing suggests that its conceptual and institutional underpinnings require further improvement.

The article, though relatively short, considers at once historical change and societal background, codified text and actual operation, the past and the present, and develops its analytical concepts therefrom. It is in fact a good illustration of the "historical-social study of law."

Custom, Mediation, and Law

1 The Third Realm between Societal Mediation and Court Adjudication

My article on the "third realm" of Qing justice was based on 628 cases from Baxian (Ba county), Baodi county (Shuntian prefecture), and Danshui-Xinzhu counties (in Taiwan), and details the concrete particulars of this intermediate sphere between the official courts and societal mediation. The main idea has already been summarized above in the discussion of Fenghua Jing's article and will not be repeated here.

What I wish to do here is to discuss the concept a bit more. If we borrow Max Weber's ideal-types of the formalist and the substantive, the traditional Chinese system of societal mediation was without doubt "substantive," because it was guided mainly by moral values (such as humaneness 仁, forbearance 忍, yielding 让, and harmony 和) and not by rights and formalist logic, and by compromise and the practical concern of resolving a dispute and not by formal-

ist laws about rights, procedures, and court adjudication of right and wrong. In my book on the representation and practice of civil justice in the Qing, I argue that even codified law in the Qing should be considered mainly "substantive," because it was guided mainly by moral principles and not formal logic, and emphasized substantive truth more than what might be called "courtroom truth" established within the boundaries of formalist procedures. At the same time, the system was fairly consistent and predictable, and in that sense met part of Weber's criteria for "rational." Therefore, the system could be quite well described by the "substantive rational" ideal-type in Weber's typology.

But it also contained formalistic dimensions and characteristics, such as requiring magistrates to render clear-cut decisions 断案. It also set certain procedures, especially in practice (such as, for example, specifying certain time periods for accepting lawsuits over "minor matters," fixing the forms and procedures to be used in filing complaints, and so on). Even its seemingly strictly substantivist principle of relying on "compassionate sense" 情 (*qing*) to adjudicate cases came with the expectation of relying on "(Confucian) reason" or "principles" 理 (*li*) (hence the compound term 情理). The word "compassionate sense" 情, moreover, included within its multiple meanings not just acting in accord with moral compassion, but also acting in accord with the "facts" 实情 or 情实.

In the Republican and contemporary periods, along with the importation of Western formalist laws, the legal system became still more formalized. If Qing law included certain formalistic dimensions over and above its basic substantive nature, such is even more the case in Republican and contemporary Chinese law. As I have already mentioned above, a basic given condition of the present-day legal system is the coexistence of the traditional substantivist legal system (most clearly seen in its system of mediation) with the imported formalist legal system. What I term the "third realm" is that sphere in which the (partly formalized) official and the (substantive) unofficial systems overlap and interact, revealing at once tensions and problems, but also aspects and dimensions in which the two complement and merge with one another. The full creative potential that can be released from that coexistence remains to be seen.

We can use the above framework to comprehend the relationship between law and custom. Societal mediation can be seen as one particularly striking aspect of Chinese custom, both a distinguishing characteristic of the Chinese (and East Asian) legal tradition (when faced with a dispute, the first choice of most Chinese people remains mediation, with going to court only a second-order resort, while for Americans, litigation remains a first-order resort) and

an important resource for future legal innovation. In the past century, Chinese mediation has undergone many changes, but it remains a vital aspect of the legal system today, a necessary part that must not be neglected.

2 "Customary Law"

The second article is Shengfeng Yu's piece on so-called "customary law" 习惯法 with normative powers as juxtaposed against the "positive law" 制定法 of the state, studied through the perspective of comparative law. The article demonstrates that in the late Qing and early Republican period, Chinese legal thought once placed great emphasis on "customary law." The term was initially taken from the 1907 Swiss Civil Code. In the late Qing and the early Republic, legislators modeled themselves on Article 1 of the Swiss Code, which stated that "in the absence of a provision, the court shall decide in accordance with customary law . . .," and actually undertook large-scale investigations of local customs in preparation for new lawmaking. In this orientation, they were guided for a time by the notion of "China (custom) for substance and the West for application" 中体西用, but they soon discovered that there were great variations in customs across the country which were well-nigh impossible to unify. In the early Republic, lawmakers in fact did not promulgate the civil code drafted in the late Qing 大清民律草案 that had given much weight to custom, but rather retained in use the old Qing code's "civil portions in effect" 大清现行刑律，民事有效部分, pending the drafting and promulgation of a new Republican civil code. Subsequently, the Guomindang's key legislators came to the view that most existing Chinese customs were "bad customs" 劣俗 not fit to serve as the basis for new legislation. The decision was then made to abandon the approach of developing laws on the basis of "customary law," and instead to import wholesale German civil law. Yu himself seems partial to the "customary law" approach, calling legislation of the early Republic (of the Beiyang period) the "golden period" of "customary law" and characterizing the Guomindang's legislation (in the post-golden period) as rife with "internal contradictions" (perhaps even as stagnant and declining?).

If we read between the lines in Yu's article, we can see that the juxtaposition of "customary law" against "positive law" comes also with a deeper juxtaposition of Anglo-American common law against continental law, and the equation of the former with lawmaking by popular customs from below as opposed to lawmaking by the dictates of the state from above. By implication, the unspoken issue is whether law and lawmaking should follow the more "democratic" path of common law or the more authoritarian path of positive law. Yu himself, it would seem, identifies more with indigenous customs and

the Anglo-American common law tradition, and is critical of what he sees as more authoritarian German formalist law.

From the standpoint of the "historical-social jurisprudence" that is being advocated here, the strength of Yu's article consists in its broad comparative perspective and its exploration into legal thought. What it demonstrates is that the "customary law" path of lawmaking was at one time in modern China an important possible choice. At the same time, the article serves to illustrate the nativism-populism + democracy current of legal thought that enjoys considerable influence in China today.

If the article has shortcomings, it would be that it does not give sufficient attention to legal practice. Actually, judicial practice of the early Republican period does not really show any more reliance on custom than Guomindang law. As Yu's article itself shows, of the 2000 plus case examples of the early Republican supreme court (Daliyuan), there were only thirty some that called on the force of custom. We should note in addition here that the Guomindang legal system in actual practice not only continued many old customs—especially community mediation as noted above, male inheritance of property in the countryside, the widespread reliance in the countryside on the customary use of old-age support land, and so on—but also, even in codified law, retained those popular customs that had been written into law, including "dian (conditional sale) rights," and strict requirements for children to provide their parents with old-age support (for a full discussion, see my *Code, Custom, and Legal Practice in China: The Qing and the Republic Compared*). In light of such facts, the argument for a "golden period" of "customary law" (and its subsequent decline) can perhaps apply to the sphere of legal thought and theory, but is rather questionable when it comes to the actual operations of the law. The inclusion of the article in this volume may be seen in part as an attempt at clarification of the differences between the "historical-social jurisprudence" being advocated here as opposed to the older "historical jurisprudence" tradition that carried with it strongly nativist sentiments (more below).

3 "Protesting with a Corpse"

Chenjun You's article is about a host of "protesting with a corpse" cases in the Reform period, including especially incidents in which common people who, faced with basic-level governments' abuse of power, along with violent oppression leading to wrongful deaths, resorted to the use of the deceased's corpse as a mode of protest. Because of the deeply symbolic meaning of funerary rites and the customary notion that comfort for the dead can only come with burial in the earth 入土为安, surviving relatives' extreme measure of not burying the

dead in order to protest an injustice is something that can incite with considerable emotional force, and also carries with it a certain measure of legitimacy. In some of the incidents of this type, the local authorities resorted to extra-legal measures to calm things down, sometimes even having the implicated officials investigated for breaches of discipline. Those "successful" incidents of protest, in turn, have helped to encourage later protestors to resort to the same strategy and tactics, to the extent that "protesting with a corpse" has almost gained the stature of a definable "type" of protest, with adverse effects on the prestige of the government and its rule of law. The article sorts out a variety of protests, including some among just the common people, and discusses a multitude of related analyses and the different dimensions they emphasize. Its final conclusion is that the government should improve the laws to cope with such situations, and not resort to ad hoc extra-legal measures just for the sake of maintaining stability.

The article cites and draws upon, albeit with reservations, Liang Zhiping's (and others') influential analytical frame of the binary juxtaposition of "customary law" vs. "positive law." As I pointed out above in my discussion of Shengfeng Yu's article, Liang's type of analysis is motivated by both nativist sentiments and democratic aspirations. While I am very much in support of a certain measure of nativism as well as of democratic aspirations, I am convinced that "customary law" as an analytical category for historical research is much too muddled a notion that mixes up customs with state laws. It is unable to distinguish between those customs that were not adopted by the state's laws, even if they held considerable normative power (like the right to first refusal by the relatives and neighbors of a plot of land for sale, discussed in Yu's article), those that were adopted by the state's laws (like dian [conditional sale] rights discussed above), and those that were rejected by the state's laws (like topsoil rights). If one further conflates "customary law" with Anglo-American common law, and with legal pluralism and democratic lawmaking, as Liang Zhiping does, then the confusion becomes that much greater. The original choice of problem of Chenjun You's article might have come in part from Liang's binary dichotomy. Be that as it may, in my view, if we continue to insist on the usage of the category "customary law," we should limit the term from the start to those customs that are adopted by the state's laws, and call the others simply customs. In fact, the clearest and most precise way is to use simply the term "custom," and then inquire into the differing relationships between given customs and state laws. That would help to prevent us from mixing up a motley of different things under a fuzzy and confusing concept.

The System of "Turning Oneself In" in Criminal Justice

Zhengyang Jiang explores the system of "turning oneself in" 自首 in Chinese criminal justice. This is a system with a long tradition and distinctive Chinese characteristics, and one which had led in the period of the Chinese Revolution to the development of the (now deeply entrenched) criminal policy of "leniency to those who confess, severity to those who resist" 坦白从宽、抗拒从严. Both contrast sharply with the American system of the suspect's right to remain silent ("Miranda rights"). Jiang's article first sorts out the Qing provisions for turning oneself in: the intent, she shows, was to give the criminal the opportunity to repent and change, and to restore the original order of things, and on that basis to either reduce or waive the punishment. There was a series of procedural provisions, such as the criminal must turn himself in before the details of the crime are discovered by the authorities; the criminal must not be a repeat offender or one who has killed or caused severe injury; and, in lieu of the criminal himself, family members may confess in his stead. There was also the system of the criminal confessing or revealing the truth directly to the victim, righting the wrong, and thus settling the matter privately 首服、首露. In the contemporary system, however, such private settlement is no longer allowed, and greater restrictions have been placed on the extent to which family members may turn the criminal in, with more emphasis placed now on the offender's own will as an individual.

Jiang goes on to demonstrate that Qing case records already showed that, in actual practice, the state might not grant a reduction in punishment if the crime was particularly pernicious. In the contemporary system, this has become all the more true. From the original idea in which a reduction in punishment was to be expected, contemporary Chinese law now provides that punishment may be reduced 可以减轻 only if circumstances warrant it.

Even more important, Qing law forbad junior members of a family to accuse their seniors 干名犯义, at the same time as it provided that confession by family members may qualify as turning oneself in so as to encourage family members to confess in the offender's stead. Jiang provides a specific case example to illustrate the tensions between the two principles: an elder brother was murdered, but the father settled matters privately with the murderer. The younger brother confesses the crime in the father's stead, thereby revealing his father's offense of engaging in a private settlement, while also thereby formally accusing the murderer. The Board of Punishment, in reviewing a lower court's judgment, arrived at a verdict that applied the two principles simultaneously: the father's punishment was reduced because his son had confessed for him, but the son had to be punished for the offense of accusing his father of a crime. The reasoning was: such a verdict would allow the son to serve the sentence in

his father's stead (in accordance with filial piety), while also avenging his elder brother; at the same time, the law's provision against a son accusing his father (for the sake of maintaining filial piety) was still upheld and enforced. That verdict, Jiang argues, contains its own kind of reasonableness. It also shows how much more family-oriented Qing law was than individualist modern Western law. At the same time, it allowed two apparently contradictory principles to operate together, something not possible under the dictates of the formalist logic of modern Western law.

By calling on case examples from the contemporary period, the article demonstrates other ways in which contemporary Chinese law has become more individualistic in emphasis than Qing law. Contemporary law has also shown greater utilitarian leanings, concerned more with facilitating the state's administration of the law than seeing the criminal repent and mend his/her ways.

Despite the changes, however, contemporary Chinese law has retained the core of the Qing's system of urging criminals to turn themselves in and, through its experience in the revolution (for dealing with captured enemies), to develop it further into the system of "leniency to those who confess." Chinese law, Jiang suggests, should perhaps, in addition to the powerful tide of imitating Western modernism, attend also to searching out the strong points of the traditional system, to view the latter as a resource that can provide comparative perspective, causes for reflection, and selective adaptations for use today.

We might add here the following observation. The system of encouraging criminals to turn themselves in and the system of "leniency to those who confess" have, to be sure, served the useful functions of encouraging criminals to repent and reform and of facilitating the state's administration of the law. The problem for the future is how to better protect the rights of the accused in order to put an end to such abuses as the still widespread use of coercive interrogation for the convenience of the state's administration of the law, which has led to unacceptably large numbers who are wrongfully prosecuted and sentenced (see my article《中西法律如何融合？道德、权力与实用》("How to Amalgamate Chinese and Western Law: Morality, Rights, and Practical Use"), appended to the third volume of my trilogy being republished by the Falü chubanshe).

Administration and Law

Lei Tian's article takes us into a brand new area of study. What it explores is the protracted dispute between two provincial governments over their respective interests in the Weishan Lake 微山湖 area that lies between the two provinces of Shandong and Jiangsu. The periodic contraction and expansion of the lake

surface has led to disputes and fights over lakeside land and over the water products of the lake. The problem is that the disputes occur at the border under the jurisdictions of both governments, thus unavoidably drawing both in, while the boundaries between them remain fuzzy, hence the protracted seesaw conflict between them.

Under the typical modern (Weberian rational) bureaucracy, such disputes would simply be resolved "by law/rules" or, in the case of a centralized authoritarian state like China, by central directive. What is unexpected, as Tian's article demonstrates in detail, is that the central government did not approach the matter either by means of (modern) bureaucratic administration or by central command, but rather through protracted mediation. The role played by the Center has been almost like that of the community mediator for societal civil disputes; it tries to see to the interests of both sides, going back and forth between them to work out a resolution acceptable to both. According to Tian, what the Center has done also resembles what I termed in my earlier work on basic-level governance "centralized minimalism," namely, for the government to rely widely on unsalaried quasi-officials drawn from the community, and to intervene only in the event of a dispute. Here, what the Center's behavior reveals is both centralism (when necessary, what the Center says goes) and minimalism (intervening only in the event of a dispute), and with resort to mediation rather than simple command.

What this case example tells about is, first of all, the longstanding intertwining of administration 政 with law 法 in the Chinese legal tradition. Law, instead of being a matter of protection of individual rights as in modern Western law, is rather more an instrument of governance. There has been a strong and persistent tendency for law to be administrative-ized, and for administration to be judicialized. And the judicial method of resolution adopted in the case of the Shandong vs. Jiangsu dispute over Weishan Lake is not formalist law but rather that of mediation stemming from China's substantivist legal tradition. This kind of operational logic can be seen not only in the way basic-level governments dealt with the populace in the past, but also in the way the Center deals with the local administrations in the present. What the Tian article makes clear is that Chinese administration is neither that of the totalitarian model (one phone call from the Center does it), nor that of "fragmented authoritarianism" (à la Michel Oksenberg), but more like the delicate and subtle relationship between the Center and the localities of the "initiatives from two ends" 两个积极性 formulation that had emerged in the Great Leap Forward and came to be widely applied in the Reform period. It is a relationship that contains both centralized leadership and local initiative and experimentation, both commandism and consultation and negotiation,

both formalist Weberian bureaucratic governance and substantivist governance by mediation and minimalism.

Tian's study may be considered an illustration of what might be called "historical-social jurisprudence" or "historical-social political science," for it comes with both a historical-social perspective and contemporary concerns. More important, perhaps, is that it is not simply imitative of Western scholarship (under the official dictum) to "link up with what is international" 与国际接轨, but rather, on the basis of solid empirical research, searches for concepts and theories that are more appropriate for Chinese realities.

International Law

Junnan Lai's article first deconstructs the representation of 19th-century Western international law. The latter employed the construct of "civilization" to set up normative standards for international relations. For the founders, the intent was perhaps indeed high-minded (and set the foundations for later international law). At the same time, however, that line of thinking depicted victims of imperialist aggression like China as being less than civilized, and therefore not entitled to the rights to equal and civilized treatment as envisioned by international law. The evidence adduced by Lai in support of his argument consists mainly of texts and quotations from the leading international law scholars of the time and carries persuasive force. Under the reality of imperialism of the time, Lai goes on, "international law" in fact did not help to check invasion and aggression, nor promote civilized, equal relations among nations. What happened instead was the use of the euphemism of "international treaties" for the reality of "unequal treaties" forced upon victim nations by war.

What Lai narrates is what might be considered a painful lesson in China's legal history. Before and after the Sino-Japanese War of 1894–1895, the Qing government, out of arrogance and ignorance, interpreted Western international law in terms of its own predilections toward moralistic and unrealistic thinking, accepting the construction of international law as "the just law of all nations" 万国公法, without awareness of the sharp divergence between its universalistic representation and its imperialistic reality, without understanding of its potential practical consequences, and without consideration of what China needed to do in response. Japan, by contrast, acted very deliberately to acquire control of this discursive weapon, and understood very clearly how to counter it and use it. As the article demonstrates, before and after the Sino-Japanese War of 1894–1895, Japan made every effort, including sending students abroad to study international law and to publish in prominent international law journals, to portray itself as having followed international

conventions in the war, in contrast to China's disregard for international law on matters of treatment of prisoners and property. The result was that Japan succeeded in gaining the acceptance by some very prominent academic authorities of international law and by the Western nations as a country that had earned a place among the civilized Western world, while China continued to be seen as an uncivilized barbaric nation. On hindsight, Lai concludes, we can say that China's defeat in the war of discourse was as completely devastating as its defeat in the naval battle.

Here we should point out that although Lai's method is the currently fashionable one of narrative and discourse analysis, he brings to it a very keen sense of historical reality, with a very clear grasp of the disjunctures between representation and practice. The article demonstrates that the universalistic representation of "civilization" and "the modern" is a two-edged sword, which can serve both as the normative standard of behavior for nations and as the weapon for (imperialistic) aggression, and both as something victims can use for resistance and, as in the case of Japan, also a weapon for use in the same kind of aggression. This is a point with important implications for understanding contemporary international law. What it shows is precisely the method of "historical-social jurisprudence" being advocated here, something very different from the simple analyses of discourse (or of "Orientalism") without consideration of their relationship to historical reality and of their practical consequences. It is an important and exemplary study.

Theoretical Explorations

1 Pierre Bourdieu's "Symbolic Capital" and "Logic of Practice"

Haixia Wang's article explicates Bourdieu's concept of "symbolic capital," emphasizing that it must be understood and applied in conjunction with Bourdieu's core concept of "the logic of practice." First, the article demonstrates that Bourdieu himself was no mere academic theorist, but someone engaged in social and political actions on behalf of laboring people. Use of Bourdieu's symbolic capital concept, Wang argues, must attend also to practice and practical consequences, which makes it very different from simple postmodernist discourse analysis. At the same time, Bourdieu's conception of "symbolic capital" needs to be understood in the same way as Marxist notions of material capital—in terms of its associated power relations and exploitative oppression. Current users of the concept who interpret symbolic capital to mean just "symbolic resources" (or "social capital" or "social networks"), therefore, have missed Bourdieu's real intent.

For the purpose of explaining and illustrating symbolic capital, the article discusses a range of China-related research using the concept. Those contain

a host of illuminating insights and evidence, but Wang's own main point is that symbolic capital needs to be understood as something that enables its possessor to oppress and engage in (symbolic) violence against others, something that applies not just to "(symbolic) capitalists," but also officials and state organs wielding such capital.

Applied to China's Land Reform, symbolic capital understood in this way attends not just to discursive change (the revolutionary replacement of one system of discourse with another) but also the subtle inter-relationships between discourse and social reality: it was precisely when the revolution had destroyed the material bases of class that "class" became the most crucially important signifier. Thereafter it became ever more removed from any material bases, leading in the end to extraordinary modes of oppression and violence (such as in the Cultural Revolution). In addition, Wang argues, the state was able to capture exclusive rights to land through its new symbolic constructions of class and property, something that would prove to be profoundly important in the subsequent exercise of state power. It was precisely through the subtle mutual inter-transformations between the symbolic and the material, and their practical consequences, that we can discern the logic of practice of symbolic capital.

In such an understanding, the concept of symbolic capital becomes a more powerful tool of analysis than discourse analysis. It also explains and illustrates how and why we need to attend to both the representation and practice of law. Bourdieu's "logic of practice" in fact points in the direction of the epistemological method being advocated here: to excavate from practice concepts contained therein and to construct theory therefrom.

2 Weber's Legal Sociology

Junnan Lai, finally, first sorts out Weber's four-way typology of legal systems: the formal irrational, the substantive irrational, the formal rational, and the substantive rational. As Lai shows, Weber in his actual narrative and analysis of the history of the world's major legal systems in fact employs mainly only two of the four ideal-types: the formal rational and the substantive irrational, turning them into almost a binary juxtaposition.

The article points out in passing that, for a variety of reasons, the logical thread of the section on legal sociology in Weber's *Economy and Society* is less than clear, and its organization rather confused. (From my own experience of teaching Weber these past ten years, chapter 8 of the book, titled "Sociology of Law" and translated by Kang Le 康乐 and Jian Huimei 简惠美 into a book with the title *Legal Sociology*《法律社会学》[Guizhou: Guangxi shifan daxue chubanshe, 2005, which is the best translation available in Chinese to date] begins with three "chapters" that are especially confusing [with the exception

of the end of the first chapter, which lays out the four-way typology], but the subsequent "chapters" are much clearer and easier for the student to grasp. The first-time reader would actually do better to skip the first three chapters.) Lai's sorting out of the problem of the text should be of help to students reading Weber for the first time.

The article then goes on to demonstrate that the formal-rational ideal-type has a special "elective affinity" (using Weber's words) with capitalism. Weber himself, Lai shows, reacted rather negatively to the workers' movements of his time, and maintained that socialist rule would be strongly inclined toward substantive irrationality in law. At the same time, Weber paid little attention to the monopolistic tendencies in capitalism evident in the late-19th and early-20th century, despite all the evident problems. In the end, the article points out, despite the respect Weber the historian showed toward empirical evidence, the thinking of Weber the theorist was at bottom powerfully determined by his idealistic predilections. Here we might note in addition that the mode of thinking that Lai shows to be basic to Weber is very much the same as Weber's own construction of his preferred ideal-type of "formal rationalism."

Lai's analysis is coincidentally similar to my own (see especially the overarching preface to the republished edition of my trilogy from the Falü chubanshe). As I demonstrate, although Weber suggested in passing that socialist law might be characterized as "substantive rational," in a seemingly value-neutral judgment, in his actual analysis, he repeatedly denigrated this ideal-type, arguing that it would not be a system based on formal logic and legal specialists like formal-rational law, but would rather be governed by moral values from outside the legal system. In Weber's view, this is why socialist legal systems cannot become independent and autonomous, but would be prone to outside interference. In fact, Weber's own special approval of the formal-rational ideal-type is inseparable from his approval of capitalism, market economy, democracy, and the three-way division of legislative, executive and judicial powers of government. It was on that basis that he came to characterize the imperial Chinese legal system as "substantive irrational" (or *kadi* justice). When it comes to contemporary China's party-state system and its frequent use of moralistic representations, there can be little doubt that Weber would have characterized it too as "substantive irrational." What he employed with respect to China was in the end a binary juxtaposition of the Western formal-rational with what he considered the Chinese substantive-irrational. On this point, postmodernists are correct to point out that for Weber, China was/is in the end merely "the Other," used as a foil for affirming the West's own values.

Even so, Weber was like Marx for his hugely broad and comparative perspective, and also for his attention to both historical change and theoretical

ideal-types. Weber's four-way typology remains a useful theoretical system, and dialoguing with it can help broaden and raise the level of our own perspective. As already mentioned above, the big question facing China's legal system is: given the basic historical pre-condition of the coexistence of imported Western formalist law and traditional Chinese substantive law, in addition to attending to the unavoidable tensions and contradictions between the two, is there room also for excavating the creative potential therein that Weber had not considered at all? For example, are socialist aspirations for social equity and justice really intrinsically incompatible with a systematic and rational legal system? By the same token, are traditional Chinese ideals of humaneness and harmony necessarily mutually exclusive with modern Western law's emphasis on individual rights? Further, are Weber's and Marx's historical sociology and historical political economy necessarily completely incompatible, or is it possible that selected aspects of each can correct and make up for each other's excesses and weaknesses? Aside from the evident tensions between them, is there not also the potential for creative extension and innovation that would go beyond both?

The Historical-Social Study of Law

Today, the "mainstream" position in Chinese law schools is occupied by legal formalism. As Weber made clear, such formalism relies heavily on legal logic to develop and integrate the law into a tightly unified whole. In the view of its most influential advocate in the United States, jurisprudence is likened to Euclidean geometry: it starts with a few axioms and through logic arrives at a host of theorems, to be applied by legal logic to fit all fact situations. This perspective formed the core of what is called the "classical orthodoxy" of American law associated with Christopher Columbus Langdell (1826–1906). The tradition of formalist jurisprudence can also be seen most especially in the "formal-rational" tradition of German law, articulated and analyzed by Weber (1864–1920). It is a jurisprudential tradition with a weighty background in scholarship.

But legal formalism also has obvious weaknesses. It leans very much toward abstraction and theory over experience, attempting to isolate and construct law independently of its social context; it leans toward a heavy emphasis on codified text, and often ignores actual practice; it believes legal principles to be universally applicable, regardless of time and space. For this reason, both in Germany and in the United States, there arose different jurisprudential traditions in opposition to formalism, such as legal sociology in Germany

(and Austria) (Rudolph von Jhering, 1818–1892; Eugen Ehrlich, 1862–1922), and legal pragmatism and realism in the United States (Oliver Wendell Holmes, 1809–1894; Roscoe Pound, 1870–1964; Karl Llewellyn, 1893–1962), and the Law and Society Movement to which they gave rise. Those jurisprudential schools emphasized most centrally the interconnectedness of law and society. Since the 1970s, there has been in the United States the rise of the "New Legal Pragmatism" (Thomas C. Grey), and also the "Critical Legal Studies" movement, with distinct influences from Marxism and postmodernism (Roberto Unger, Duncan Kennedy). What those latter theoretical traditions share in common is the rejection of the formalist view of law as non-changing and universally applicable. They argue instead that law changes with social change, both necessarily so and desirably so. They hold that jurisprudence should emphasize practical use and realities. Legal pragmatism and realism, especially, have long existed in opposition to and in a seesaw relationship with the formalist orthodoxy, attaining an almost comparably mainstream position in the United States. These non-formalist and anti-formalist traditions have served the important function of making up for the inadequacies of legal formalism and helping to lend the American legal system better balance.

But legal sociology and legal pragmatism too have obvious weaknesses. Although some among their theorists have given serious attention to historical background and change, on the whole, like sociology (and economics and other social sciences), they have tended to focus more on the synchronic than the diachronic, and often lack the perspective of long-term historical change. The Law and Society Movement of the 1960s and 1970s, moreover, according to the retrospective analyses and reflections of its own major proponents (David M. Trubek, Marc Galanter), also carried strong predilections toward positivism (scientism) and Western- (or U.S.-) centrism. Subsequently, with the influence of "Critical Legal Studies" and postmodernism, some of those involved in the Law and Society Movement developed critical reflections on their earlier work, but the self-aggrandizing tendencies of the original movement have been inherited to a considerable extent by the influential current of the later Law and Economics Movement that is closely tied to neoliberal economic thought.

In contrast to the mainly synchronic preoccupations of the Law and Society and Law and Economics movements, the 19th-century German "Historical Jurisprudence" school arose precisely in order to highlight the historical dimension, emphasizing how law and lawmaking are necessarily intertwined with the nation's cultural heritage (Friedrich Karl von Savigny, 1779–1861). That "Historical Jurisprudence" school helped to promote research into legal history, and in so doing also contributed to making up for the lack of attention to the diachronic dimension in legal formalism and legal sociology. (But Germany's

Historical School later evolved toward an excessive concern with an unchanging Volksgeist that came with strongly nativist and ultra-nationalistic tendencies, as well as tendencies toward formalistic universal claims, which provoked strong criticisms from American legal realists like Roscoe Pound. In my view, the Historical School is particularly lacking in deeper understanding of social and economic relations.)

The reason we have called here for a new "historical-social study of law" or "historical-social jurisprudence" is, first of all, to emphasize that all three dimensions—historical, social, and legal—are essential to legal study. China's jurisprudence needs to come with a social concern (lest the continued usage of the term socialism to characterize China becomes entirely hollow rhetoric). But we have not employed the term "legal sociology" for this new jurisprudential discipline, because of its deeply laden tendencies toward Western- and modern-centrism, and also because that would be merely imitative of something that already has more than a century's background in scholarship in the West. Legal sociology, moreover, tends to become subsumed under the discipline of sociology, and can give way to the mere use of sociological methods, especially quantitative tools, to study law, losing the clarity of the original insight of continual two-way interaction between law and society. We are particularly emphatic about the need for a historical perspective, the more so given China's deep and weighty historical tradition.

We have also rejected the term "historical sociology," for it too can easily come to be subsumed under sociology intellectually and institutionally, and become imitative of a relatively well established discipline in the West. In terms of the existing genealogy of knowledge, we are most inclined toward an identification with classical political economy, and with the kinds of broad vision of history and society (and economy and politics) represented by Karl Marx and Max Weber. At the same time, in our conception, "historical-social jurisprudence" is a discipline with deep roots both in scholarly traditions outside China (in addition to formalist theory, also legal pragmatism/realism, legal sociology and historical jurisprudence) and in China's own tradition in law and jurisprudence, as well in its modern socialist revolutionary tradition.

Nevertheless, what we envisage is not a jurisprudence that would merely be somehow "comprehensive," but rather one with fresh and distinctive characteristics. At present we can as yet only point to a direction of intent: in addition to simultaneous emphasis on the three dimensions of history, society, and law, and of formalism, pragmatism, and historicism, we intend for this jurisprudence to succeed selectively to China's own tradition in jurisprudence. For example, its longstanding mode of thinking that insists on linking the conceptual to the concrete and the theoretical to the experiential, this in

order to correct for China's recent tendency to imitate legal formalism and its favoring of the abstract and conceptual over the concrete and experiential. Instead of merely importing legal theories from the West, we are much more inclined toward searching out from China's past and present the accumulated practical wisdom contained in its changing legal practice, and to construct legal concepts and theories therefrom, in a deliberately chosen research method of going from the empirical to the theoretical and then back to the empirical/practical, rather than the reverse of starting with theoretical suppositions, searching out empirical support for them, and then returning to the theoretical. In my view, one approach allows for accommodations of multiple paradoxes, innovation, and change, while the other tends to remain confined within its original premises and the demand for logical consistency with those premises.

At the same time, we shall draw deliberately on the prospective visions in traditional Chinese moral philosophy as a usable resource, that too in order to correct for the recent tendency to simply imitate the mainstream formalist jurisprudential tradition imported from the West. For example, we want to ask: must the starting premise of law be that of rights that are so much intertwined with individualism and capitalism? Can it not be even broader moral values like the Confucian "humaneness" 仁 and "harmony" 和? In place of individualism, can there not be an even greater emphasis on human relations and families as in Confucianism? Then there are the legacies of the revolutionary ideal of social justice, as well as its institutional innovations such as court mediation. Those have shown continued vitality in China's present-day legal system. As for international law, we ask: can the ideal of national sovereignty not be augmented with the traditional Chinese ideal of the "Great Harmony" 大同 and the modern revolutionary ideal of "peaceful coexistence" 和平共处, those in order to correct for big power hegemony? A great deal of work has been done in the Reform era to bring in formalist laws from the West, many of which can indeed help make up for the weaknesses of traditional Chinese law; going forward, however, we believe the emphasis should switch to drawing from the dual traditions of China's imperial past as well as its modern revolution, and from its accumulated experience in actual legal practice, in order to remedy the many problems that have arisen from the artificial grafting of Western laws on to Chinese realities.

As an approach to studying and theorizing about law, what we are able to do at present is merely to outline preliminary ideas about a direction of development, still some distance removed from a completely articulated jurisprudential theory. The declaration and definition of a new approach is not a goal that one person or a group of people, or even an entire generation,

can accomplish. But our overall intent is a clear one: to build a legal system and jurisprudence that synthesizes and merges the Chinese and the Western, the past and the present. Compared to the present binary opposition in China between transplantation-ism and indigenousism, such an approach has greater creative potential, is more encompassing, more realistic, and more sustainable, and also more able to make a distinctively Chinese contribution to the world.