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The Field of Qing Legal History

Matthew H. Sommer

The field of Qing legal history in the United States can be divided into three generations, each characterized by the use of distinct genres of primary sources and informed by its own priorities and frame of analysis.[1] For each generation, I shall introduce exemplary scholars; a major focus will be how perspectives have changed over time, in response to the opening of Chinese archives in the post-Mao era. A basic question that remains unresolved is what standards, concepts, and vocabulary are most appropriate for the study of Qing law. To what extent should we measure the Chinese legal tradition against that of the West?

The first generation of scholars published in the 1950s and 1960s, coinciding with the establishment of the broader modern field of East Asian studies in the United States. Their work is informed by an assumption that the traditional institutions of China had failed; they assumed that a Weberian ideal type of "the modern West" was the standard by which Chinese inadequacy should be measured. In contrast to the dynamic, progressive West, Qing law had lacked separation of powers, due process, respect for individual rights, and civil law; instead, it had been chiefly a tool of autocratic control, penal in character, which was wielded to intimidate the populace.

Members of the second generation (of the 1970s and 1980s) reacted indignantly against the more extreme manifestations of this paradigm. Their strategy was to enumerate the idealized features of the modern Western model, and to attempt to find the same features in the Qing legal system. This strategy implied that to refute the claim of Chinese inferiority it was necessary to show that China was *the same* as the West. In other words, for both the first and second generations, the frame of reference was stubbornly Western, and the question was how well China measured up to that ideal. As simplistic as this approach may seem, in some respects the second generation represented a marked advance over the first. For example, second-generation scholars wanted to know how Qing law actually worked, rather than what was supposedly wrong with it, and one of their number, David Buxbaum, took the pathbreaking step of arguing that "civil law" did in fact exist in the Qing, supporting that claim with actual legal case records.

The distinctive feature of the third generation of scholarship (which continues to the present) is in-depth research with large numbers of original legal cases from Chinese archives, which became possible only with the normalization of diplomatic relations between Beijing and Washington. The opening of Qing legal archives effected a radical shift in perspective: from the top-down perspective of the imperial center to the grassroots perspective of local courts and society, from legal principles and theory to how the law worked in practice, and from what Qing law supposedly lacked to the purposes it actually served. The archives made it possible to explore the friction between ideology and

practice *within* the formal legal system but also the field of customary practice that flourished *outside* that system, sometimes in conflict with it.

There are two key figures in this story with whom Chinese readers may be familiar: Qu Tongzu (English: T'ung-tsu Ch'ü) and Philip C. C. Huang, who exemplify the best of the first and third generations of scholarship, respectively. Their biographies exemplify the transnational cross-fertilization that has increasingly characterized the American field of Chinese studies. Both men were born in China. On completing his education, Qu spent twenty years at North American universities, after which he returned to China and spent the rest of his career at the Academy of Social Sciences in Beijing.[2] As a youth Huang immigrated to the United States, where he matured and received his education and later founded the Center for Chinese Studies at the University of California, Los Angeles. Beginning in 1979, Huang visited China many times for research, playing a key role in introducing Qing legal archives to a Western scholarly audience, and he brought several senior Chinese legal historians to UCLA as visiting scholars; moreover, since retiring from UCLA, Huang has begun a second teaching career in Beijing. Both men's works are available in both English and Chinese.

Beginning with the third generation, all scholarship in this field has relied on in-depth archival research in China. This research typically requires individual scholars to visit China repeatedly, often for up to a year at a time. In the process, Americans meet and exchange ideas with Chinese scholars. Many have published in Chinese, as well as in English, and have also presented their findings at conferences in China. This field has never been exclusively "American," and its transnational dimension has become increasingly vital over time.

Qu Tongzu and the Weberian Paradigm

We begin with Qu Tongzu's classic, *Law and Society in Traditional China*, which remains required reading for anyone working in this field today.[3] The broad theme of this book is the question of what was *wrong* with "traditional" Chinese institutions, such that they "failed" to foster capitalism and modernization along Western lines. In this discourse, which measures China against an ideal type of "the modern West," China's failure is simply taken for granted: the purpose of historical inquiry is to illuminate the inadequacies that predestined its failure. This approach derives from Max Weber, who tested his theory about the rise of capitalism through a comparative analysis of two other civilizations where capitalism had *not* developed, namely, China and India. Unlike Europe, Weber argued, Chinese society was dominated by kinship (in India the problem was caste), which discouraged the development of individual rights, free contract, and the concept of the corporate person; domination by kinship inhibited the development of law, which Weber defined as formal rules enforced by autonomous authorities. The Chinese "patrimonial state" suppressed the development of autonomous corporations that might have threatened it politically, thereby further inhibiting the development of modern law. Moreover, China's Confucian elites lacked the autonomy of European elites, and China entirely lacked the autonomous "free" cities in which the bourgeoisie had gestated.[4] It is important to remember that Weber was interested in China and India less for their own sake than for their utility as counterfactual tests of his theories about the development of modernity in Europe; moreover, his understanding of non-European societies depended on the work available in European languages in his day—much

of which was authored by imperialist diplomats, soldiers, and missionaries—and it was limited and distorted accordingly.

One can hardly overstate the impact of the Weberian paradigm on scholars of Qing legal history. (Even Philip Huang, founder of the third generation of archives-based scholarship, devotes an entire chapter of his 1996 book to Weber.) Qu Tongzu rarely cites Weber, and of course his focus is China rather than Europe, but in both *Law and Society in Traditional China* and his other key book, *Local Government in China under the Ch'ing*, a Weberian ideal type of "the modern West" always lurks in the background.

The thesis of *Law and Society* is that "traditional" law was a highly stable synthesis of legalist (法家) structure and Confucian (儒家) values: in effect, a legalist system was geared toward enforcing a Confucian vision of moral social order. After the "Confucianization (儒家化) of the law" during the early empire, "no significant change occurred until the early twentieth century when the Chinese government began to revise and modernize its law" (285). For more than a thousand years, "there were no fundamental changes until the promulgation of the modern law. We find stability and continuity in law and society, both dominated by the Confucian values" (1965: 289).

The key priority of this "Confucianized" (儒家化) law was to uphold "particularistic" hierarchies within the family (defined by generation, age, sex, and degree of kinship), as well as between legally defined "social classes" (階級) in society: officials (官吏), commoners (平民), and people of mean or debased status (賤民).

> Primary importance was given to particularism. . . . As a result, the law was primarily concerned with status-relationship and the corresponding obligations, paying little attention to such matters as individual rights, which were incompatible with particularism. Specifically, it was particularism which prevented the development of a universal law and abstract legal principles. The emphasis on particularism shaped the characteristics of Chinese law; it also set a limit on the development in Chinese law. (1965: 284)

It was this invidious "particularism" that prevented progress along Weberian lines.

Qu closes with a brief but revealing discussion of how the "modernization" of Chinese law at the end of the Qing failed. Reactionary officials like Zhang Zhidong 張之洞 stubbornly resisted modernization, despite the urgent need for reform; they succeeded in preventing the full elimination of particularism from the legal order, so that "the force of tradition remained very strong for decades after the revision" (1965: 287). Modernization was superficial and ineffective. Given the hostility toward "Red China" in the United States during Qu's time there, it might have been unwise for him to draw out this argument too explicitly. But the unmistakable implication is that far more fundamental change was needed to overcome the inertia of tradition: a revolution in culture that would target the Confucian "familism" that had underpinned the particularism of traditional law—and, perhaps, a social revolution that would target the reactionary elites who had defended tradition at the expense of the nation's future.

Bodde and Morris's *Law in Imperial China*

After Qu Tongzu's work, the most important study produced by the first generation is *Law in Imperial China: Exemplified by 190 Ch'ing Dynasty Cases*, published in 1967 by two professors at the University of Pennsylvania, Derk Bodde (1909–2003) and Clarence Morris (1903–85). Their book builds on and closely complements the work of Qu Tongzu. Derk Bodde was a prominent sinologist who taught in what was then the Department of Oriental Studies; Clarence Morris was a professor in the law school who added a lawyer's perspective to the project. Together they taught a seminar on law in imperial China, and they published their 1967 classic based on materials developed for their seminar.[5]

Law in Imperial China represented a major advance in a number of ways. First, it concentrates squarely on the Qing dynasty (whereas Qu Tongzu tends to jump back and forth between eras to reinforce the image of timeless stagnation); it provides a wealth of detail about the Qing system and how it was supposed to function (including the Qing code, the penal system, judicial review, and so on). Second, it provides translations of 190 brief summaries of actual legal cases selected from the nineteenth-century casebook *Xing'an huilan* (《刑案匯覽》, Conspectus of Penal Cases). Third, it uses these case summaries to investigate how Qing law worked in practice, and also to shed light on social conditions on the eve of the Opium War. These summaries provided an unparalleled glimpse of Qing legal practice in an era when Chinese legal archives were not yet open to Americans.

It is hard to discern a specific thesis in Bodde and Morris, but one effect of their detailed description of judicial machinery is to highlight its sheer sophistication, especially in its legalist dimension of central control: matching each offense to the appropriate statute, so that the punishment fits the crime exactly; scrutinizing the performance of lower officials to deter malfeasance; and so on.

In general the first generation adopted this top-down perspective, treating law mainly as an instrument of domination. It assumed that the legal system was essentially penal, that minor matters involving no serious crime were referred to lineage and community elders for mediation rather than being judged in court, that every court case ended with corporal punishment, and that ordinary people thus feared any involvement with the law. As Clarence Morris writes in *Law in Imperial China*, "[A]ny entanglement with the Chinese imperial penal system was a personal disaster. . . . It tended to terrify the public into good behavior, rather than to redress disharmony" (1967: 542).[6]

As this passage suggests, Bodde and Morris share Qu Tongzu's bias against "tradition." Bodde makes the following comment about the case summaries: "It is hoped that a reading of the cases, despite the gap of more than a century between them and the present day, will help make clear why the Chinese monarchy had to give way to a republic in 1911, and why the republic in turn had to be torn by further revolution" (1967: 160). He follows with a discussion of the crushing oppression of the individual by the hierarchical family system in "Confucian China," which he contrasts with the modern West. "Confucianism has long been officially dead in China, but the social and political patterns here summarized have never ceased to influence the painful process of change during the past half century" (1967: 199).

Here Bodde reveals his sympathy for the May Fourth critique of Chinese tradition (especially the Confucian family system) and for the Chinese revolution as a whole, which had consumed "the past half century" to which he alludes. Bodde had lived in Shanghai as a boy, and he later spent six

years studying in China during the 1930s; in 1948–49 he was back in Beijing (as the first recipient of a Fulbright Fellowship to China), where he witnessed the decadence of the Guomindang's last days, followed by the triumphant entry of the People's Liberation Army (of which he wrote a sympathetic account entitled *Peking Diary: A Year of Revolution*). After returning to the United States, Bodde became a target of "red baiting," but his career was protected by the University of Pennsylvania's tradition of academic freedom (Rickett 2003).

Clearly, Bodde's personal experiences and political views helped shape an interpretation of the Qing congruent with that of Qu Tongzu. The failures of China's traditional institutions—especially the inertia of familial particularism—had made revolution both necessary and inevitable.

The Limits of the Weberian Paradigm and the Second Generation's Reaction

It is hard to argue with Qu Tongzu's premise that legal modernization along Western lines did not spontaneously occur during the Qing. The problem with Qu's analysis, rather, is his assumption that such modernization constitutes the only kind of change that matters. This assumption induces him to downplay or simply ignore any other kind of change. In other words, while the Weberian paradigm may help to illuminate what did *not* happen, it tends to obscure what actually *did* happen.[7]

The Weberian paradigm was second nature to the first generation of scholars. Its power derived from its forceful posing of questions that people convinced of China's failure wanted very badly to answer. For Chinese nationalists, the question was why China had failed to resist foreign aggression more effectively, and for those sympathetic to the revolution (in China and elsewhere), the priority was to show why revolution had been necessary. For many in the West (and for Chinese anticommunists as well), the question was why liberal politics had failed, so that China ended up "going communist." China's failure was often contrasted with Japan's success at becoming an industrial, military power and at avoiding a communist fate.

It is hard to reject entirely the argument of failure—after all, the Qing dynasty did collapse, along with the imperial system as a whole. On the other hand, from the vantage point of the present, it makes little sense to see "China" as a failure, so the paradigm that framed first generation scholarship no longer seems very relevant. But also one might pose the comparative question in a different way. If one compares the Qing dynasty to other ancien régimes that were its contemporaries, such as the Tokugawa shogunate or the Mughal Empire, instead of assuming the modern nation-state ("China," "Japan," or "India") or an ideal type of "the modern West" to be appropriate categories of analysis, then the Qing in fact looks remarkably successful. After all, the Qing dynasty lasted seventy years after the Opium War, despite a relentless series of crises, whereas the Tokugawa fell within fifteen years of the relatively innocuous visit of Matthew Perry's American naval squadron. The Qing dynasty (and the Republic that followed) also successfully resisted outright colonization, in contrast to the Mughal defeat and South Asia's total subjugation by a relative handful of British.

To frame the comparison in these terms is to highlight the Qing dynasty's relative success; the focus of inquiry then becomes the sources of dynastic strength. What was it about the dynasty's fundamental institutions—of which law was certainly one—that gave it such resilience? After all, for most of Chinese history, what appears to a modern scholar like Qu Tongzu as stagnation would have been

valued as stability and continuity. These qualities are all the more impressive when one considers that much of the Qing judicial system (including nearly the entire text of the original Qing code) was borrowed intact from the former Ming. If we take longevity as a measure of success, there are few legal systems in world history that can claim to have been more successful than that of late imperial China.

A second generation of scholars emerged in the nineteen-seventies and eighties to challenge the paradigm of Chinese failure. This was a wider movement in the American field of Chinese history, of which legal history is of course only one part.[8]

For example, urban historian William T. Rowe begins his study of Hankou by describing the Weberian ideal type of the European city, which past scholars had asserted could not be found in China; he then claims to identify in nineteenth-century Hankou all the features of that ideal type, the most important being autonomous urban elites who resembled the modern European bourgeoisie (1984). Rowe's second volume argues that by the late nineteenth century Hankou had developed something close to a "civil society" or "public sphere" along modern European lines (1989). While Rowe is universally respected, these aspects of his work have met with profound skepticism in some quarters (see, e.g., Wakeman 1993). Indeed, the structure of Rowe's argument suggests that in order to argue that China was not *inferior* to the West, it is necessary to claim that China was *exactly the same* as the West. Philip Huang has criticized this logical formula as "the discursive trap of countering an argument with its opposite"; ultimately, this becomes a theory-proving enterprise (in which the conclusion precedes and guides the evidence gathering, instead of the other way around) that risks obscuring more than it reveals (1996: 19).

In the field of legal history, one finds this sort of approach in the work of Harvard Law School professor William Alford—for example, his article on the famous case of Yang Naiwu (楊乃武) and the woman nicknamed Little Cabbage (小白菜), who were prosecuted for adultery and murder but eventually exonerated (Alford 1984). Alford uses this case to challenge scholars who had portrayed the Qing legal system as "essentially an instrument of state control little concerned with individual justice" (1185). He argues that the case "clearly illustrates that the imperial criminal justice process encompassed a broad range of sophisticated procedural and administrative measures designed to convict the guilty and acquit the innocent" (1242). He opines that "at least in this celebrated instance two seemingly incorrect capital sentences were reversed and officials who acted improperly were punished" (1243). It appears that Alford *wants* to argue—although he never quite goes this far—that the Qing system of appeals and review protected the rights of defendants, presuming innocence until guilt was proven (note his questionable assumption that the defendants were in fact innocent). Alford tends to discount the legalist function of the review system in jealously guarding against malfeasance, instead preferring to emphasize its role in exonerating "the innocent." Alford closes with a series of rhetorical questions, which can be summarized as follows: can we modern Americans really be sure that the Qing justice system was inferior to our own? (1248–49).[9]

As this question implies, both the Weberian paradigm and the indignant reaction to it share an idealized West as their frame of reference. All that seems to matter, ultimately, is how the Qing compares to the West—indeed, such approaches may ultimately tell us more about how some scholars fantasize the West than about the Qing itself.

The Turn to Archival Research

The first and second generations depended on published sources that were then available in libraries in North America: legal codes (法典), such as *The Great Qing Code*《大清律例》and *Qing huidian shili*《清會典事例》, and commentaries of senior jurists, such as *Du li cun yi*《讀例存疑》by Xue Yunsheng (薛允升); the legal treatises (刑法志) included in dynastic histories; casebooks such as *Conspectus of Penal Cases*《刑案匯覽》, which were published to serve as reference works for sitting magistrates; and handbooks and memoirs (官箴書) by famous officials, such as *A Complete Book of Happiness and Benevolence*《福惠全書》by Huang Liuhong (黃六鴻). These texts remain indispensable sources, but when used in isolation from archival records, they have significant limitations.

The Qing code is mainly concerned with "major cases" (重大案件) that involve serious violence or threats of a political or ideological nature, and it has an overwhelmingly penal emphasis: nearly every statute (律) and substatute (例) states with a high degree of specificity that someone who commits a given crime will receive a given penalty. On that basis, it is not surprising that earlier scholars imagined the courtroom above all as a terrifying scene of punishment. Given their intended purpose as reference works, the casebooks tend to highlight unusual, tricky cases for which there was no exact measure to be found in the code, or that required magistrates to balance competing principles. For this reason, one cannot take their contents as a reflection of how routine cases were handled, or how often different kinds of cases actually occurred. The texts written by famous officials pose a different challenge: a principal purpose of such works was to portray their authors as wise and benevolent "incorruptible officials" (*qing guan* 清官), and they cannot be taken at face value.

The hallmark of the third generation of scholarship on Qing legal history is the use of large numbers of original legal cases to focus on how law worked in practice at the grassroots level, rather than a shared intellectual framework comparable to the old Weberian paradigm. There are two main categories of case records that American scholars have used: routine memorials on criminal matters (刑科題本) submitted by provincial governors to the palace for central review (held at the First Historical Archive 中國第一歷史檔案館 in Beijing and at the Academia Sinica 中央研究院 in Taiwan), and case records from local courts at the district (縣/州/廳) level. The only large collections of local court cases that are known to survive are from Danshui/Xinzhu (淡水廳/新竹縣) in Taiwan (the originals are held at National Taiwan University 國立臺灣大學), Baodi County (寶坻縣) in Hebei (held at the First Historical Archive), and Ba County (巴縣) and Nanbu County (南部縣), both in Sichuan (held at the Sichuan Provincial Archive 四川省檔案館 and the Nanchong Municipal Archive 南充市檔案館, respectively).[10] American scholars have played a leading role in using all of these archives to study Qing legal history. Only recently have a few Chinese scholars begun to use large numbers of actual legal case records from the archives in order to study Qing law,[11] and I know of no Japanese scholar who has done so to date, with the sole exception of Karasawa Yasuhiko 唐澤靖彥 (who was trained by Philip Huang at UCLA and therefore can be considered a member of the American field).

This shift to archival research began with David Buxbaum's seminal 1971 article on "civil cases" from Danshui/Xinzhu (淡水/新竹) in Taiwan, which I discuss below. Other scholars also played a role (e.g., Zelin 1986; and Allee 1994). But Philip Huang deserves the principal credit for opening up Chinese legal archives to American scholarship and for fostering a third generation solidly grounded in archival

research—through his efforts to publicize these resources (1982); his use of them for his own research (1985, 1996, 2001); his training of graduate students at UCLA, many of whom would go on to become major scholars in their own right;[12] and his coeditorship (with his wife and UCLA colleague, Kathryn Bernhardt 白凱) of a book series, *Law, Society, and Culture in China*, for Stanford University Press.[13]

David Buxbaum's Discovery of Qing "Civil Law"

When scholars first began looking at local court archives, it became obvious that some basic assumptions of the first generation were wrong. For example, Qing magistrates in fact adjudicated large numbers of "minor matters related to household, marriage, and land" (戶婚田土細事) as a matter of routine; moreover they did so in a consistent manner that often involved no punishment of any party. Local archives also made it obvious that ordinary people were not afraid to go to court and even humble people could afford to do so. In short, Qing law was not simply a device for terrorizing the population into submission, nor yet simply a system for punishing violent crime. On the contrary, the dynasty's local courts served an important social function by adjudicating mundane disputes that arose in the daily lives of the people. Buxbaum was the first American scholar to make these observations, on the basis of the Danshui/Xinzhu cases, which showed him Qing law "in action at the trial level" (1971: 255). Buxbaum belongs to the second generation of Qing legal scholarship, in that his aim was to refute claims of Chinese inferiority by showing similarity to the West, but he also constitutes a bridge to the third generation, in that he was the first to introduce local case records to American scholarship. The findings of his seminal 1971 article set much of the agenda for Philip Huang's subsequent work on "civil justice."

Buxbaum is operating within the Weberian paradigm, although he seeks to refute its bias against Chinese tradition. After rehearsing Weber's criteria for modern "rational" law, Buxbaum concludes that "many, if indeed not most, of the attributes of modern law can be found in Chinese law of the period under discussion," and he attests to its "rationality" (1971: 273–74). In his view, past scholarship on the Qing "overestimates the significance of criminal law, and underestimates the role of civil law" (255). Indeed, Buxbaum's argument that Qing law was modern and rational depends heavily on his claim that it included a significant measure of civil law.

As Buxbaum is aware, Qing law had no exact equivalent in either discourse or procedure to the criminal/civil distinction that comes from the Western legal tradition. He surmounts this difficulty by equating the Qing category "minor matters of household, marriage and real property" (戶婚田土細事) with "what we would normally term civil law matters" (1971: 261–62). This equation rests on subject matter: "minor matters" involved everyday disputes over family, property, and the like. Buxbaum also argues that the Qing code's section of "Household Statutes" (戶律) should be considered "civil law" because it addresses the same sort of subject matter (even though the individual measures in this section are nearly all penal in nature). But Buxbaum makes a further suggestion that seems to imply a lack of confidence in his own classificatory scheme:

> One of the ways in which criminal cases may be differentiated from civil cases at this point in the proceedings is by the nature of the decision. If criminal punishment were forthcoming, then we could, *at least from hindsight*, regard the case as criminal in nature. If, on the other hand, the court decreed

> specific performance of a contract, damages, reformation of a deed, and so forth, we *might* assume such cases were civil (1971: 264, emphasis added).

To confuse matters further, Buxbaum also provides examples of what he calls "quasi-civil" and "quasi-criminal" cases (278–79).

Clearly, Buxbaum is imposing a classificatory scheme that did not operate in the minds of Qing magistrates.[14] The key binary distinction in Qing judicial practice distinguished "minor matters" (細事), which involved no significant violence and required no severe punishments, and thus could be handled at the local magistrate's discretion, from the smaller number of "major cases" (重大案件), which had to be reported up the chain of command and therefore should be adjudicated strictly and explicitly according to the code (Sommer 2009a). Many minor matters involved relatively petty offenses (brawling, false accusation, marriage fraud, wife selling, adultery, and so on), and it was not unusual for magistrates to impose at least some corporal punishments in such cases, although they did not always do so.[15] What distinguished such routine cases was not the absence of crime and punishment but rather their low level of severity. Nevertheless, for Buxbaum a great deal is at stake in claiming that the Qing dynasty had civil law. This claim is necessary to sustain his larger argument that the Qing measured up very well according to the Weberian ideal.

Philip Huang and the Paradoxes of the Qing Civil Justice System

The full potential of legal archives for historical research was demonstrated in Philip Huang's 1996 *Civil Justice in China: Representation and Practice in the Qing*, which exploited 628 cases from the archives of three county courts to build on Buxbaum's empirical and conceptual findings.[16] Huang's text is very rich, and I will address just a few of its contributions and the questions they raise.

Like Buxbaum, Huang equates "minor matters" with "civil cases"; he uses these cases in conjunction with surveys of North China villages conducted by Japanese investigators in the 1930s to analyze what he calls the Qing "civil justice system." Huang divides this system into three "realms," which operated according to different principles and procedures. In the "informal" realm of village mediation, disputes were settled by local worthies through compromise. Most disputes never went beyond this level, but if mediation failed, one or another party would likely file a lawsuit at the county *yamen*. In the "formal" realm, magistrates adjudicated these lawsuits according to the Qing code in formal court hearings, usually finding in favor of one of the parties at the expense of the other. In the "third realm," which lay in between, disputants would file lawsuits while continuing to negotiate but usually would settle out of court on the basis of clues about the likely outcome of a formal court hearing, which they found in the rescripts (批文) that magistrates wrote on their plaints (告狀).

These and many other empirical contributions have transformed our understanding of how Qing local courts worked. But the book's central thesis is that the Qing civil justice system should be understood as a paradoxical conjoining of representation and practice. Huang argues that past scholarship made the mistake of looking at only one dimension or the other (usually mistaking representation for reality), whereas the system cannot be fully understood without taking both into account. For example, local magistrates represented themselves in the Confucian tradition as benevolent "father and mother officials," but in practice, Huang argues, magistrates in the courtroom operated more in

a bureaucratic and legalist mode: they acted not as mediators but instead almost always "adjudicated unequivocally according to the Qing Code" (1996: 78, 233). Similarly, Qing codified law appears to be almost completely penal in character, and yet, according to Huang, it contains implicit "civil law" principles that magistrates consistently used as the basis for adjudicating routine "civil cases" (78–79, 86–87, 104–8). Again, Qing judicial discourse contained no doctrine of "rights" comparable to that of the Western constitutional tradition, nor even any word for that concept; nevertheless, in Huang's view, Qing courts actually protected ordinary litigants' rights on a regular basis (e.g., by safeguarding property against theft). Hence, Qing law can be said to have had "rights in practice" even though it lacked "rights in theory" (15, 108, 235–36).

Huang closes by borrowing Weberian language to argue that this paradoxical system is best summed up as "substantive rationality," by which he means "a combination of patrimonial-substantive representations with bureaucratic-rational practices" (1996: 236). Huang's Weberian formulation recalls Qu Tongzu's classic argument that the Confucianization of the law resulted in a paradoxical but stable system that deployed legalist means to enforce a Confucian vision of moral order.

Huang's elucidation of these paradoxes is powerful, but it also provokes questions, and in some quarters, considerable skepticism.[17] Take, for example, the question of rights. I believe we should respect the fact that Qing judicial discourse did not have a word for the Western legal concept of "rights," and that fact should make us skeptical about whether any substantially similar concept existed either. Does it make sense to import the Western legal concept of rights into this context? By "rights in practice," Huang means that people could seek protection against theft, assault, fraud, and so on. But by definition, *any* legal order must provide protection against such things, just as it must provide some coherent forum in which people can settle disputes; the alternative would be vendetta and anarchy. For security reasons, the Qing state had a vital interest in preventing local disputes from getting out of hand, just as it had an interest in clarifying property claims so as to establish tax liability; also it derived a certain legitimacy from the magistrate's pose as a defender of the weak against powerful wrongdoers. But that is not the same as endowing people with rights. Moreover, what Huang calls "rights in theory" (i.e., civil rights explicitly recognized by the state) is a definitive part of rights doctrine as it has evolved in Western legal systems: the existence of rights without rights in theory appears to be less a paradox than an oxymoron. It seems that this particular paradox derives from Huang's insistence on using an anachronistic vocabulary rather than from any quality inherent to Qing law.

I have similar doubts about the utility of using the term "civil law" in the Qing context. Like Buxbaum, Huang equates "minor matters" with "civil cases" (1996: 1–2). For Buxbaum, as we have seen, this equation is necessary to sustain his argument that Qing law met the Weberian standard of modern rationality. Huang chides Buxbaum for naively replacing inferiority to the West with *sameness* with the West (7n). But given this rejection of Buxbaum, it is not at all clear what Huang gains by substituting the Western concept for the Qing term "minor matters."

In the Western legal tradition, the criminal-civil dichotomy parallels that of public-private in that criminal law concerns offenses against public order that are prosecuted and punished by the state, whereas civil law (a synonym for which is "private law") concerns purely private disputes in which the state acts as an impartial umpire, finding (at most) liability that may be compensated for with monetary damages paid by one party to the other. The two legal modes are distinguished in terms of

conceptualization, procedure, and outcome. The term "civil" in this context refers to the same thing it does in "civil society," namely, a sphere of private social and economic activity that exists apart from and in contradistinction to the state. To be fair, Huang does attempt to distinguish his use of the term "civil law" from these associations, making clear that he does not mean to imply the existence in the Qing of civil society or civil rights (1996: 6–9). But if that is the case, why use the term at all?

Philip Huang is on record as an eloquent critic of William Rowe and others who argue that something like a civil society or public sphere existed during the Qing (e.g., Huang 1991). It is a supreme irony, therefore, that Rowe has seized on Huang's claims about Qing law to support his own view that "early modern" Europe and China were fundamentally similar.

> As Philip Huang has conclusively demonstrated on the base of county magistrates' citations of the Qing code in civil judgments, a clearly understood (albeit unstated) "positive principle" of the code was that private property rights did in fact exist and were to be vigorously defended by the state. (Rowe 2001: 190)

No doubt Huang would reject this application of his argument, but Rowe would probably reply that he is simply following it to its logical conclusion.

It should be clear that we still have no consensus about what vocabulary and concepts are most appropriate for the study of Qing law. It seems to me, however, that by importing a Western vocabulary that has no direct counterparts in Qing discourse we inevitably imply that the similarities between the Qing and the West outweighed their differences—and such indeed is the goal of Buxbaum and Rowe, if not Huang. Instead of illuminating the Qing legal system on its own terms, such usage imprisons our thinking within a Western frame of reference, so that some idealized image of the modern West is always implied as the standard of judgment.

The Reach of the State

Another question that arises from the work of the third generation is what role the local courts played in the imperial state's efforts to impose its will on local society. An old stereotype held that law was an autocratic instrument used to inspire fear; it reflects the Weberian view that the Chinese elites lacked the autonomy of their European counterparts, instead depending entirely on the imperial state.[18] But how does the balance of power between state and society appear from the perspective of routine adjudication, as studied by the third generation of scholarship?

As we have seen, Huang argues that once a dispute reached the formal realm of a court hearing, "magisterial adjudication was governed above all by codified law" (1996: 136). In other words, adjudication constituted an expression of power, not an act of conciliation: the state imposed its will on litigants, whether they liked it or not. In most of the cases Huang examines—involving routine transactions related to land, inheritance, marriage, and debt—there were no sharp contradictions between the codified law and normal social practice. It makes sense, then, that he is able to identify a high degree of coherence between *implicit* principles in the code and *implicit* principles guiding the judgment of such cases. On this basis, Huang argues that when cases reached a formal court hearing, Qing magistrates nearly always "adjudicated unequivocally by the code" (78; see also 79–81, 86–87).

But Huang also notes that magistrates almost never cited the code or referred to it in any explicit way (hence his need to deduce the *implicit* principles guiding their judgments); nor did they usually impose the penalties it prescribed.[19] Seen in that light, the evidence for Huang's claim hardly seems "unequivocal." On the contrary, it seems to me that by means of their reticence magistrates actually left ambiguous exactly what they were enforcing: social norms or the Qing code or perhaps both at the same time. In other words, the coherence between social norms and the code in the kinds of cases Huang examines means that magistrates did not have to make an explicit choice between the two, leaving unanswered the question of how far the state could really impose its will and influence behavior through the local courts.

Huang's analysis of his sources may be accurate, but an examination of different kinds of cases produces a markedly different picture. For example, I have recently analyzed several hundred cases of illegal wife selling from the local courts of Ba County, Nanbu County, and Baodi County, which include the judgments of several dozen different magistrates (Sommer 2009a). These cases, too, were "minor matters" handled expeditiously at the county level without superior review. In most circumstances, wife selling (defined as the crime of "buying or selling a divorce" 買休賣休) was banned by the Qing code; nevertheless, it was a widespread survival strategy driven by poverty (a wife sale enabled a poor couple to survive by separating, the husband using his wife's "body price" as emergency funds while she escaped poverty by becoming the wife of a more prosperous man). Unlike most of Huang's case sample, wife selling poses a sharp contradiction between widespread social practice and the prohibitions of the Qing code. Under the circumstances, when an illegal wife sale ended up in court, what did magistrates do?

They certainly did not adjudicate unequivocally by the code. Rather, they judged flexibly and pragmatically, on a case-by-case basis, guided by the particular circumstances that brought a given dispute to court. Sometimes magistrates enforced the law, which required the woman to separate from both husbands and return to her natal family; but in nearly half of my cases, magistrates either allowed the second marriage to stand or simply returned the woman to her first husband. Despite what the code required, they rarely confiscated the money paid for the woman, and they imposed corporal penalties selectively, depending on the details of a given case.

The work of two other former graduate students of Philip Huang suggests a similar conclusion. Bradly Reed used Ba County's administrative records to provide an unprecedented insider view of how a county *yamen* actually functioned during the Qing. Reed finds that the clerks and runners of Ba County developed a form of "customary law" for regulating their own affairs; magistrates adjudicated intra-*yamen* disputes by enforcing this customary law, which the clerks and runners themselves recorded in writing. These rules included the division of fees from legal cases, which, it turns out, provided the fiscal basis for much of the *yamen*'s operations. Moreover, the numbers of clerks and runners actually needed to do the *yamen*'s work far exceeded statutory limits, so magistrates simply followed local precedent in hiring the necessary numbers while concealing this act from their superiors. The lingering image is of the outsider magistrate's temporary presence on the local scene, the tenacity and autonomy of local personnel with their own enforceable customary norms, and the sheer irrelevance of directives from the imperial center (Reed 2000).

Similarly, Christopher Isett has used legal cases to analyze the illegal sale of banner and noble land to Han Chinese immigrants in Qing Manchuria (2004, 2007). These transactions required the systematic falsification of contracts and double bookkeeping on a massive scale (similar subterfuges facilitated the illegal alienation of native land to Han immigrants in Yunnan, Taiwan, and other frontier zones). When such transactions ended up in court, they were canceled and punished, but prosecution was rare because at the grassroots level no one had an interest in upsetting locally convenient arrangements. Over time immigrants managed to transplant the customary land tenure system of the North China plain, even though this posed a direct threat to the vital interests of the dynasty's conquest elite. The legal system was impotent in the face of this threat, and by the mid–nineteenth century the vast majority of Manchuria's inhabitants were Han peasants.

The evidence produced by Reed, Isett, and myself in our respective studies suggests that when tenacious social practice sharply contradicted the mandates of the Qing code, the imperial center was not so strong after all. On the contrary, its mandates ended up being compromised through pragmatic flexibility or, in the long run, met with utter defeat. In fact these examples point to a vast field of social practice, including enforcement by customary means, which operated outside the courts and in defiance of the formal law of the imperial state. When people had their own good reasons for doing things prohibited by the state, they found their own ways of doing them. Whereas Huang's tripartite structure integrated the informal realm smoothly into a coherent civil justice system with magisterial adjudication at its apex, these studies suggest the many ways in which that informal realm might stand in opposition to the imperial state.

Huang himself provides a glimpse of long-term decline in the face of social forces beyond the dynasty's ability to cope (1996: chap. 6). Whereas for most of his study, Huang lumps his three-county sample of cases together, in one chapter he differentiates them in two distinct patterns, each with its own temporality. The first pattern, found in Baodi County, consists of simple cases resolved quickly, after one or at most two formal hearings. Baodi had a small peasant economy, with low levels of commercialization and landlordism and very few gentry. For Huang, Baodi represents the past: an earlier era of simplicity when the Qing justice system was set up and worked fairly well. The second pattern comprises the cases from Danshui-Xinzhu, which was economically and socially far more complex than Baodi, with higher levels of commercialization and many influential local elites who would not defer so readily to a magistrate; their archives include lawsuits that continued unresolved for years, despite multiple court hearings. Ba County represents a transitional point in between but moving in the direction of Danshui-Xinzhu. Here we find a new set of conditions to which the Qing judiciary adapted poorly: they are a harbinger of a future in which the institutions of a less complex era would eventually break down.[20]

Conclusion

Whither the study of Qing legal history? Two things are clear. American scholars will continue to develop the transnational character of our field, eventually helping to build, I hope, a single unified field that transcends boundaries of nation and language. At the same time, as long as Chinese archives remain open to American scholars, we shall continue the in-depth research with original legal case records that has become the hallmark of our field.

Is there anything left to salvage from the old Weberian paradigm? After three decades of phenomenal economic growth in China, the question of "failure" no longer seems like a useful problematic; on the contrary, China today is an enviable success, at least in terms of the classic goals of "wealth and power" (富国强兵). Nevertheless, the big comparative questions continue to fire people's imaginations, as shown by the "great divergence" debate provoked by Kenneth Pomeranz's eponymous book (2000).[21] The tired orientalist generalizations of an earlier generation notwithstanding, there is much fruitful work to be done on Qing law that should help us understand late imperial China's developmental trajectory in a broader perspective. The big picture for the peasant economy is already pretty clear.[22] But the fundamental question of how political and legal institutions helped shape economic behavior has yet to be fully explored using the rich evidence that the archives offer. How did the legal system influence business decisions? Did it raise or lower "transaction costs"? Did courts play a major role in enforcing contracts and protecting long-distance exchange—or did business firms prefer extrajudicial venues for securing deals and solving disputes? If the latter, then can we speak of a parallel system of "customary" business law that flourished outside the formal legal system of the state? How did the legal environment for business change under the Unequal Treaties, as Chinese firms found themselves competing with foreign ones?[23]

The answers to these and many other intriguing questions are waiting to be found in the hundreds of thousands of legal cases that survive in Chinese archives. All that is necessary is for scholars to go look for them.

Notes

Matthew H. Sommer received his BA at Swarthmore College, his MA at the University of Washington, and his PhD in Chinese history at the University of California, Los Angeles, where he studied with Philip C. C. Huang. He taught at the University of Pennsylvania for seven years before moving to Stanford University in 2002, where he teaches in the History Department. He is the author of *Sex, Law, and Society in Late Imperial China* (Stanford University Press, 2000), and he is now completing a book entitled *Polyandry and Wife-Selling in Qing Dynasty China: Survival Strategies and Judicial interventions* (under contract to Stanford University Press). His long-term plans include a book on male same-sex relations and masculinity in eighteenth-century China.

Author's note: This article was written in August 2009 to be published in Chinese translation. My mandate was to introduce highlights of American scholarship to an audience in the People's Republic of China, and for this reason scholarship from other countries was excluded. Because of strict limits on length, I could cover only a narrow range of topics and works, so I chose a few that seemed most likely to be pertinent and meaningful to the intended audience. A more thorough treatment would have to cover the scholarship on political crime, penalties and judicial torture, review and appeals, litigation masters, corruption, contracts, and the legal regulation of gender roles and sexual behavior—to name just a few of the important topics that are largely neglected here.

[1] The views expressed here are my own, but I owe the basic generational framework of analysis to my doctoral adviser, Philip C. C. Huang, with whom I discussed these issues many times as a student at UCLA in 1989–94 (cf. Huang 1991: esp. 322–23).Useful discussions of many of these issues can be found in Bernhardt and Huang 1994: 1–12; Huang 1996: 1–20; Reed 2000: xiii–xvii, 1–25; and Sommer 2000: 1–29.

[2] See "瞿同祖先生年表" (in 瞿同祖著 2003); and Ch'ü 1965: preface.

[3] This book has appeared in at least three versions: the original Chinese, published in China in 1947; a revised version in English, published in Europe in 1961; and a further revised English version, published in 1965. My quotations here are from the 1965 version, which elaborates these themes most explicitly.

[4] See especially Weber's *The Religion of China* (first published in 1915).

[5] Bodde wrote most of the book and supervised the translations; Morris added a chapter on "statutory interpretation."

[6] Two other representative works of the first generation are van der Sprenkel 1962 and Cohen 1966.

[7] See also Sommer 2000: 4, 262–64.

[8] See also Huang 1991: 303, 320–24; and Huang 1996: 19.

[9] Also see Alford's scathing review of Unger 1976: "Unger is indifferent to the integrity of the Chinese past. Consequently, virtually every major dimension of his attempt to portray that past is exaggerated or misleading, if not simply wrong" (1986: 917). For a perceptive critique of Alford's Yang Naiwu article, see Dong 1995.

[10] For a recent report on the Ba and Nanbu County archives, see Karasawa et al. 2005.

[11] Economic historians in the PRC such as 李文治 and 刘永成 made a great contribution by studying data on wages, prices, and land relations found in 刑科题本; their work inspired Huang's use of these documents for his 1985 book.

[12] One can speak of a "UCLA School" of Chinese legal history, which includes Huang himself and Kathryn Bernhardt (1999), as well as Huang's former graduate students (many of whom also worked with Bernhardt): David Wakefield (1998), Bradly Reed (2000), Matthew Sommer (2000, 2005, 2009a, b), Guangyuan Zhou, Karasawa Yasuhiko [唐泽靖彦] (2007a, b), Christopher Isett (2004, 2007), Jennifer Neighbors, Margaret Kuo, and Lisa Tran. For highlights of the UCLA School's work (translated into Chinese), see 黄宗智、尤陈俊主编 2009.

[13] So far the series consists of Bernhardt and Huang 1994; Huang 1996, 2001; Macauley 1998; Bernhardt 1999; Reed 2000; and Sommer 2000.

[14] The Danshui-Xinzhu cases were sorted into "civil," "criminal," and "administrative" categories by Taiwan scholar Dai Yanhui according to his own criteria; they were not originally organized this way. Buxbaum based his article on the cases that Dai classified as civil (Buxbaum 1971: 256–57), and Philip Huang would later follow suit (1996: table 7 and appendix A). Both Qu Tongzu (Ch'ü 1962: 116–19) and Bodde and Morris (1967: 118–19) had already drawn a parallel between minor matters and civil cases, but, in contrast to Buxbaum, they believed such cases constituted a relatively insignificant part of the Qing judicial system.

[15] Philip Huang has no qualms about including such cases in his sample of "civil cases," even when they included punishment for crimes listed in the Qing code (see Huang 1996: chap. 4, e.g., 95–97).

[16] There were 308 cases from Ba County, 118 from Baodi County, and 202 from Danshui-Xinzhu.

[17] For example, see the work of Japanese legal historians Shiga Shūzo 滋賀秀三 (1998) and Terada Hiroaki 寺田浩明 (1998) and the French legal historian Jérôme Bourgon (2002, 2004, 2009).

[18] This largely discredited view continues to resonate in such works as Philip Kuhn's *Soulstealers*, which portrays a paranoid emperor terrorizing his ministers into extracting false confessions by torture, and Timothy Brook et al.'s *Death by a Thousand Cuts*, a study of death by dismemberment (*lingchi* 凌遲) that tends to reinforce (even as it claims to debunk) the orientalist stereotype of imperial China as "a realm of cruelty."

19 "My ordering [of cases] by statute is based almost wholly on *my own interpretation* of what laws obtained, *not* on the texts of the magistrates' judgments. . . . My argument here is simply that even in the absence of specific citations, a close reading of magisterial judgments in conjunction with the code leaves no doubt about their basis in law. The relevant statutes are *implicit but obvious* in virtually all these judgments" (Huang 1996: 86–87, emphasis added).

[20] In his 2001 book, Huang appears to back off from his "unequivocal adjudication by the code" formula: "Where there was congruency between code and custom, court actions may be mainly a matter of applying the letter of the law. . . . Where there were continual tensions or outright opposition between code and custom, legal practice could follow a number of different patterns. . . . [The courts] could follow the code in suppressing custom . . . or they could accommodate social practice" (2001: 6–7).

[21] For a critical summary of this debate, see Brenner and Isett 2003. In my view, Pomeranz's book is simply the latest version of the old logical fallacy of arguing that China was not inferior to the West because it was exactly the same as the West. Pomeranz never addresses the role that legal and political institutions may have played in shaping the distinct developmental trajectories of Ming-Qing China and early modern Europe.

[22] See, for example, Brenner and Isett 2003; Isett 2007: 277–304; and Isett's essay in this volume.

[23] Some of the essays in Zelin et al., eds. 2004 begin to pursue this line of inquiry, as does the work of Taiwan historian Qiu Pengsheng (邱澎生).