

Washington University Global Studies Law Review

Volume 2

Issue 1 *Festschrift in Honor of Professor William C. Jones*

2003

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Recommended Citation

William P. Alford and Chien-Chang Wu, *Qing China and the Legal Treatment of Mental Infirmity: A Preliminary Sketch in Tribute to Professor William C. Jones*, 2 WASH. U. GLOBAL STUD. L. REV. 187 (2003), https://openscholarship.wustl.edu/law_globalstudies/vol2/iss1/7

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QING CHINA AND THE LEGAL TREATMENT OF MENTAL INFIRMITY: A PRELIMINARY SKETCH IN TRIBUTE TO PROFESSOR WILLIAM C. JONES

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It is difficult to thank Bill Jones adequately for the contributions that he has made to the study of Chinese law and legal history. The most obvious of these lie in the work that he led in translating the last major imperial Chinese legal code—the *Da Qing Lu Li* [*The Great Qing Code*]¹—and the first precursor of the civil code of the People’s Republic of China—the *Minfa Tongzhi* [*General Principles of the Civil Law*]²—into English, in each instance accompanied by an introductory essay of piercing insight situating the work both in Chinese history and legal history beyond China. This undertaking, which drew richly upon an understanding of Western legal history unparalleled by scholars of China, has had the desired impact of making these works accessible to a far broader swath of scholars than the small community of specialists in Chinese legal studies, even as it has markedly advanced interchange in that community. Beyond these larger projects, the scores of articles that Professor Jones has over the years produced on a range of subjects from matters of criminal law in the Qing Code to issues of civil law in contemporary China have been as powerful intellectually as anything written in their field in the twentieth century. In addition, one cannot take full account of Professor Jones’s professional life without acknowledging his generous nurturing of a broad panorama of younger scholars in law, history, and Sinology.

One of Professor Jones’s less obvious, but no less crucial, contributions can be found in his deep-seated appreciation of the complexity of the subject matter of his inquiry which, in turn, evidences his genuine respect for that he is examining, even if he is, at times, sharply critical of it. Stated differently, in his fierce determination to understand the internal logic of Chinese legal history and his no less earnest commitment to relate that to the experience of other civilizations, Professor Jones has managed to steer

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1. WILLIAM C. JONES, *THE GREAT QING CODE* (1994).

2. *BASIC PRINCIPLES OF CIVIL LAW IN CHINA* (William C. Jones ed., 1989).

clear of the excessive devotions to universalism or particularism that have tended increasingly to characterize a goodly proportion of American legal scholarship in recent years. The former and clearly predominant trend, with its emphasis on employing an economic, deconstructionist, or more idiosyncratically normative approach (typically drawn exclusively from Western experience and applied in broad strokes) runs a risk of slighting those very features of the history and experience of other societies that may be most novel and so stretch our imaginations. That trend, unfortunately, has been met in some circles by a no less constraining particularism that is so inherently relativistic that it stifles efforts to see genuinely common patterns and so, ironically, blurs what may, in fact, be most distinctive about the different ways in which societies separated by distance or time, may see and use law. Throughout his scholarly life, Professor Jones has been able to chart admirably a middle course, as exemplified by his preference to identify the questions that powerfully illuminate underlying patterns, rather than assert conclusive answers to them.

This short tribute to Professor Jones aspires toward the high standard he continues to set as it reports briefly on research being conducted into the legal treatment of madness in late imperial China. As the work of Michel Foucault, among others, has demonstrated, an inquiry into definitions, legal and otherwise, of insanity and the treatment thereof is revealing not only about its immediate subject matter, but as well for what it suggests about that which a society understands to be normal behavior.³ Notwithstanding the brilliant work by Arthur Kleinman on mental illness in Chinese society,⁴ and the alarming reports by Robin Munro on the abusive use of psychiatric confinement in the People's Republic of China,⁵ there is, however, surprisingly little written, whether by Chinese or Western scholars, regarding the legal construction of insanity in China.

Contemporary scholarly understanding of the legal treatment of insanity in late imperial China is principally a product of the scholarship of Derk Bodde⁶ and Vivien Ng.⁷ Bodde's treatment is, to be sure, quite

3. MICHEL FOUCAULT, *MADNESS AND CIVILIZATION: A HISTORY OF INSANITY IN THE AGE OF REASON* (1965).

4. See, e.g., *NORMAL AND ABNORMAL BEHAVIOR IN CHINESE CULTURE* (Arthur Kleinman & Tsung-yi Lin, eds. 1981).

5. Robin Munro, *Judicial Psychiatry in China and Its Political Abuses*, 14 COLUM. J. ASIAN L. 1 (2000). Some, including Professor Kleinman, take issue with Munro's characterization of the PRC's abuse of psychiatry. See Elisabeth Rosenthal, *Psychiatric Group to Investigate China, But Resists Penalties*, N.Y. TIMES, Aug. 27, 2002, at A3.

6. See especially Derk Bodde, *Age, Youth and Infirmary in the Law of Ch'ing China*, in *ESSAYS*

brief, but as the leading historian of Chinese law of his generation, his characterization remains influential. Mental illness, for Bodde, was viewed so uneasily by the late Qing that the dynasty chose to accord it no legal weight, other than as a possible rationale that might be invoked to mitigate punishment in certain types of capital cases. The proof for this understanding, he suggests, lay in the absence of any mention of *feng* (madness in general), *diang* (madness generated by an excess of yin) or *guang* (madness generated by an excess of yang), save in the context of homicide, in the Qing Code itself, the principal official commentary on the Code, or the two most significant collections of Qing cases (the *Xing'an Huilan* (X AHL) or the *Xing'an Huilan Xubian* (X AHLXB)).⁸ This is in contrast to the appearance of *diang* and *guang* in Tang and other pre-Qing documents as categories of critically disabling madness.⁹

Ng offers a far more comprehensive account in her impressive book-length study of the changing characterization of madness over the course of late imperial Chinese history. Her book is grounded in both the legal and medical histories of late imperial China¹⁰ and displays an admirable appreciation of the sophistication with which at least some in Qing officialdom were able to address complex legal questions. Nonetheless, even as it charts how the state's approach moved over time from that regarding madness as "illness" to one of seeing it as "deviance," Ng's book seems driven by a determination to show a strong trend toward convergence in what she regards as a modern, highly rational treatment of this issue. Hence, the book concludes that:

[T]he humane quality of the Qing laws [is] . . . truly remarkable, especially in light of the fact that criminals in China did not have lawyers such as John Erskine or Alexander Cockburn [who defended Daniel M'Naghten in the famed British case bearing his name that provided the foundation for contemporary approaches to the issue of the criminal responsibility of the mentally ill] to formulate arguments in their defense. It is equally noteworthy that, even without the advocacy system, Qing jurists were able to arrive

IN CHINA'S LEGAL TRADITION 151 (Jerome Alan Cohen et al. eds., 1980).

7. VIVIEN W. NG, MADNESS IN LATE IMPERIAL CHINA: FROM ILLNESS TO DEVIANCE (1990).

8. XING'AN HUILAN [CONSPECTUS OF PENAL CASES] (Bao Shuyun ed., reprint 1968). XING'AN HUILAN XUBIAN [SUPPLEMENT TO THE CONSPECTUS OF PENAL CASES] (Wu Chao & He Xiyan eds., under the supervision of Xue Yunsheng, reprint 1970).

9. See 4 LI DAI XINGFA GAO [THE TREATISE ON PENAL LAW OF THE SUCCESSIVE DYNASTIES] 2202 (Shen Jiaben ed., reprint 1985).

10. For a fascinating exploration of the history of medicine in China, see PAUL U. UNSCHULD, MEDICINE IN CHINA: A HISTORY OF IDEAS (1985).

at tests of insanity that were similar to those delineated in the landmark *M’Naghten* case of 1843.¹¹

Our very preliminary work, focused on an examination of the principal private commentary on the Qing Code, as well as the century and a half of Qing cases contained in the *XAHL* and the *XAHLXB*, indicates that while the Qing did not confine its treatment of madness to cases of homicide, nor can one trace as distinct an evolutionary path toward the equivalent of the *M’Naghten* test as Ng suggests. Professor Bodde is, indeed, correct in directing our attention to homicide as we seek to understand where madness entered the thinking of Qing lawmakers. The majority of the almost sixty cases in the *XAHL* and *XAHLXB* that we identified concerning insanity—and that, in some instances, themselves subsequently formed the nucleus of new *li* (sub-statutes in the Code)—did, indeed, involve homicide. But our research also uncovered another nineteen cases involving insanity, including fourteen concerned with the application to persons said to be mad of statutes outlawing other behavior, and five regarding the detention by the authorities of alleged madmen other than in the setting of criminal accusations. From these treatments of the pertinence of the defendant’s madness in the application of statutory provisions, concerning matters ranging from unlawful entry onto imperial palace grounds to false accusation to physical injury to rape, one can see that Qing law regarding madness was not limited exclusively to homicide, but occasionally extended to other serious crimes, as well as to non-criminal situations.

The fact that the legal treatment of madness in the Qing extended beyond homicide does not necessarily lead, however, to the conclusion that it took on key features associated with the treatment of such issues in the modern west, as Professor Ng’s argument suggests. To be sure, the rather stripped-down nature of the cases contained in the *XAHL* and the *XAHLXB* does complicate any effort to make conclusive assertions as to the legal reasoning that informed late Qing officialdom as it sought to apply the law. Nonetheless, our preliminary examination of the fifty-nine cases addressing madness indicates the Qing did not frame the issue along the lines of the *M’Naghten* test. That test focused on ascertaining whether the defendant’s mental illness was such as to preclude the establishment of

11. Ng, *supra* note 7, at 171. The *M’Naghten* test provides, in the words of Lord Chief Justice Tindal, that “it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from the disease of the mind, as not to know the nature and the quality of the act he was doing: or, if he did know it, that he did not know what he was doing was wrong.” *M’Naghten’s Case*, 8 ENG. REP. 718, 722 (H.L. 1843).

mens rea, in the sense of the defendant having understood at the time that “what he was doing was wrong,” as stated by Lord Chief Justice Tindal. In the Qing cases we examined, the defendant’s thought processes or appreciation of the consequences of his actions mattered far less than the actual actions undertaken and hence, could not serve as a rationalization for or excuse of such actions. Social order having been rent asunder, there was, in effect, a societal need to provide redress, even in instances where the offending action seems to have sprung from madness more than deliberate deed.

The foregoing distinction is borne out by those two cases from the *XAHLXB* containing the fullest discussion of the legal consequence of madness. The first, arising in 1867, involved accusations of murder by one Han Ming of his employer’s wife.¹² Han was reported by witnesses to have suffered from intermittent madness over the years. Eventually, Han’s employer discharged him, leading Han to make entreaties to the victim. When these were rebuffed, Han wounded her fatally with a knife, with which he then wounded himself. Notwithstanding the district magistrate’s acceptance of this account of the fatality, the Board of Punishment took a quite different tack, indicating, in effect, that Han’s awareness of the rightness or wrongness of his actions was, in the end, less important than the fact of his having committed the murder. Similarly, in a case arising in 1854, concerning an accusation of decapitation by one Yu Sheng, who was reported to have been mad since his teenage days, the Board chose not to inquire into Yu’s state of mind, in effect, determining that the actions involved spoke for themselves.¹³

To observe the absence of a *M’Naghten* like test, or something akin to a contemporary notion of *mens rea* is not to suggest that the Qing was indifferent to madness or conflated the intentional and unintentional. Article 292 of the Qing Code,¹⁴ for instance, does not concern madness but does hold out the possibility of the monetary redemption by those causing certain accidental deaths, while the *XAHL* and *XAHLXB* do contain a number of cases in which evidence of madness appears clearly to have led to a mitigation of punishment. We refrain here from asserting that, at this stage in our research, we have a definitive answer to this seeming paradox or that what we have so far unearthed establishes either unmistakable convergence with or absolute divergence from Western models. Suggestively, however, we would note that even if the defendant’s mental

12. See XING’AN HUILAN XUBIAN, *supra* note 8, at 3003-05.

13. *Id.*

14. JONES, *supra* note 1, art. 292.

state might not absolve him of criminal responsibility and placate society's need for redress, diminished mental capacity might well justify the imposition of a lesser sanction by a self-described awesome, but benevolent state, provided, of course, that the offense in question did not itself directly challenge state authority.¹⁵

Clearly, there is a great deal more that we and other scholars need to do before we are able to make definitive statements about the legal construction and treatment of madness in late imperial Chinese law. Still, in an effort to pay homage to Professor Jones and his asking of the telling question, we hope that this brief report of an early exploration of late Qing law will prove of use, even as we acknowledge our inability to put to rest the issues it seeks to raise.

15. Violations of any of the *shi o* [ten heinous offenses] were dealt with severely, even if they did not involve homicide. Indeed, some (such as those involving impiety towards one's parents) called for greater sanctions than homicide involving a stranger.