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## Review of “Law in Imperial China” By Derk Bodde & Clarence Morris, and of “The Criminal Process in the People’s Republic of China, (1949-1963)” By Jerome A. Cohen

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## BOOK REVIEW

**LAW IN IMPERIAL CHINA.** By Derk Bodde<sup>1</sup> & Clarence Morris.<sup>2</sup> Cambridge: Harvard University Press, 1967. Pp. xvi, 615. \$17.50.

**THE CRIMINAL PROCESS IN THE PEOPLE'S REPUBLIC OF CHINA 1949-1963.** By Jerome A. Cohen.<sup>3</sup> Cambridge: Harvard University Press, 1968. Pp. xvi, 706. \$15.00.

Though China has been a subject of considerable interest and fascination in the West for many centuries—perhaps since Marco Polo's day—it has had little place in the university. Now, of course, this is all changing. The study of Chinese is quite widespread and East Asian Institutes and such spring up in some very odd places indeed. In part, doubtless, this is due to the availability (or hoped-for availability) of large amounts of government and foundation money. The speed with which academia responds to the stimulus of large sums must be a source of continuous amazement to the student of organizational behavior.<sup>4</sup> But one likes to think that in part also it is the result of an increasing realization that China is terribly there and really has to be studied.

Comparative law is also rather in (though not so much so as formerly—the money, at the moment, being mostly in poverty). Most law schools offer a course in it, and it is a rare law review which does not, from time to time, offer its subscribers a glimpse into something like “Cardozo's Principle of Limiting the Scope of Persons Protected and the New Obligation Law of Katmandu,” thereby satisfying a number of demands, if not, perhaps, those of their readers. Even the bar, or some parts of it, can be interested in the subject, particularly if it is called “Problems of Doing Business Abroad.” Most of the serious work in the field, however, involves a comparison of “Anglo-American” law<sup>5</sup> and French or German law. Such comparisons unquestionably have a great deal of practical importance.<sup>6</sup> It is often

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1. Professor of Chinese, University of Pennsylvania.

2. Professor of Law, University of Pennsylvania Law School.

3. Professor of Law, Harvard Law School.

4. Sometimes even small sums. It depends on the academy or the academician.

5. Or “le droit anglo-saxon” as the French for some curious reason, call it. Though the thought of a probate judge in, say, Cook County, leafing through the results of Lady Stenton's researches in order to settle a doubtful point is one that has considerable charm.

6. Surely?

useful, even necessary, to know that the German code in its cumbersome way makes the acceptance effective on receipt rather than dispatch which is (I suppose) still our rule. But the important point, from another point of view, is that one asks the same question of both systems to find out whether there is a contract, and that the term "contract" means much the same to both sets of jurists. Indeed Professor Schlesinger was able to edit a treatise on the formation of contracts in ten countries which is based on answers by jurists from each country to the same questions.<sup>7</sup> Apparently almost all the questions were immediately recognizable in all countries and answerable in terms of their law. Can legal systems of which this is true be regarded as being significantly different?<sup>8</sup>

To be sure, the surprise would be if there were great differences among European legal systems. Still the fact of such strong identity seriously limits the value of comparative law studies based on those systems as a means of finding out more about the real nature of one's own law, or law in general, by comparing its solutions to those of another legal system within this group.

Hence the importance of the two books under review. China is clearly not within the European legal tradition, and it is, moreover, a large, highly developed, complex, self-consciously historical society, and has been so for centuries. It is, in other words, a society that is comparable, though unrelated, to ours. Hence, it is an ideal subject for comparison.<sup>9</sup> There have not, however, been many studies of

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7. FORMATION OF CONTRACTS. A STUDY OF THE COMMON CORE OF LEGAL SYSTEMS (Schlesinger ed. 1968). Actually, the study covers more than ten countries but divides them into ten systems. Thus Germany, Austria, and Switzerland are considered together, as are the Communist countries of eastern Europe except for Poland.

8. Of course if there were not substantial similarity, there could be no comparison at all. The situation is at times reminiscent of Gertrude Stein's statement, "Everything is the same and everything is different," and her reply, when quizzed on it by two Cambridge students, "Well just look at you two dear boys." I suppose the problem is how much difference must there be to make comparison useful. So far as Professor Schlesinger's book is concerned (note 4, *supra*), it may be said to deal only with European legal systems, all of which have an historically traceable "common core." He does not really purport to deal with law outside that tradition.

9. This is, it is an ideal subject for comparison as opposed to comparisons with primitive societies. Even if one is willing to admit the value of such comparisons, of the lessons to be learned from the study of the Cheyenne, Barotse, Melansians, etc. (and I certainly am), still one has (anyway I have) the feeling at times that a difference in quantity is a difference in kind. While human beings living together, in whatever manner, are likely to exhibit some similar characteristics, some of which may be clearer in a small group than in a large one, still differences between two groups may be occasioned simply by size, technological development, interest in and ability to record history and the like. If one eliminates or reduces these differences, then differences and similarities in the legal systems are more significant.

Chinese law. In part, this is doubtless due to the difficulties involved, notably the language. However, it seems to me that it is also in part the result of a feeling that law was not terribly important in Chinese society. The Chinese themselves say this.<sup>10</sup> For Communist China, it would be easy to say that law is even less important than it was in traditional China, if one were to judge from government statements and such facts as the government's refusal to promulgate codes after abolishing the Nationalist laws. Yet, as both of these books show clearly, China has had, and has, a vigorous legal system of great social importance which is both very different from, and (at least until the Revolution) totally uninfluenced by, our system.<sup>11</sup>

The book by Professors Bodde and Morris appends to the title the phrase, "Exemplified by 190 Ch'ing Dynasty Cases (translated from the *Hsing-an hui-lan*) with historical social and juridical commentaries." It could equally well be described as a treatise on Ch'ing law accompanied by a heavily annotated selection of translated cases. The result is an exceedingly rich collection of materials for study. So rich, indeed, that it is difficult to know where to begin with them. To me, the most striking feature of the materials—the most striking difference which they indicate from our legal world—is the structure or procedure of Chinese criminal law which they disclose. In all western systems that I am acquainted with, including that of the Soviet Union, (not that I know much about any of them), the outward form of the criminal trial and appeals system does not differ greatly from that of the civil system, and all are very similar to each other. There is a trial which is conducted essentially by the lawyers of the parties (regarding the state as a party) under the supervision of a relatively neutral professional judge (with or without lay assistants). Guilt is decided on the basis of a decision as to facts

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10. See, e.g., J. COHEN, *THE CRIMINAL PROCESS IN THE PEOPLE'S REPUBLIC OF CHINA 1949-1963*, at 4 (1968) [hereinafter cited as COHEN, *CRIMINAL PROCESS*] where there is quoted a statement from a Hong Kong barrister denigrating the concept of the "rule of law." See also COHEN, *CRIMINAL PROCESS* at 4-7. Both books quote the letter of the Sixth Century B.C. by Shu Hsiang to Tzu Ch'an protesting the latter's publication of what were, in effect, codes of law. COHEN, *CRIMINAL PROCESS* at 296-97, D. BODDE & C. MORRIS, *LAW IN IMPERIAL CHINA* at 16-17 (1967) [hereinafter cited as BODDE & MORRIS]. See also BODDE & MORRIS at 3-7.

11. At least as far as I know there was no direct influence. Obviously influences of many sorts have been passing back and forth between China and the West for millennia, particularly if one includes India in the concept of "West." Buddhism is doubtless the most important. It seems unlikely that there would have been much legal influence since there was little official or military contact except with central Asia. Certain institutions of private law such as negotiability might, I suppose, have been transmitted in either direction.

and law made in what is supposed to be a rational manner (as opposed, say, to lot, ordeal, or the like). There will be review at one or two levels by professional judges before whom the parties' lawyers will argue. These decisions may serve as precedents to be used by lawyers in subsequent cases in forming their arguments. In China, the situation was completely different. There was a similar pyramidal structure, but it was not our familiar judicial hierarchy. Rather, it was that of an administrative bureaucracy. As is well known, imperial China had a highly developed career civil service selected by competitive examination, and members of this group, the district magistrates,<sup>12</sup> similar in some respects to the French prefect, represented the crown at the local level. A magistrate tried cases as one of many administrative tasks, and had no legal training, although he usually had a secretary who had some legal knowledge. As the result of complaint, or on his own initiative, he would investigate crimes. If the crime was minor, he would decide the issue and order punishment to be inflicted (bamboo strokes mostly). Of course, he might order acquittal. In more serious cases, a recommended decision would be transmitted to the next administrative level—the Prefecture—where it would often simply be transmitted to the Provincial Governor. There it would be referred to a judicial commissioner—the first legally trained person to consider it officially. He would conduct what was, in effect, a trial *de novo* and would hear the witnesses, so that this hearing might be regarded as an appeal (or *Berufung*) in the continental, rather than in the Anglo-American sense. In more serious cases there was a subsequent review in Peking by the Board of Punishments. This could, but normally did not, involve the examination of witnesses. In the most serious cases there was review by the Three High Courts, and then finally by the Emperor himself. At no point in this proceeding were there any lawyers. Any legal expertise was in the “court,” and decisions were made on the basis of their investigation and understanding of the facts and law.<sup>13</sup> The decisions in this book are the opinions of the Board of

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12. BODDE & MORRIS at 4-5, 113-14. The Scholar Gentry or a portion of them. The Chinese had apparently more or less achieved that state so dreaded in *Iolanthe* of having “a Duke’s exalted station . . . attainable by competitive examination.” Did Gilbert know? Perhaps. At least there is a certain insight into oriental ways in Yum Yum’s lament: “. . . [S]ometimes I sit and wonder, in my artless Japanese way why it is that I am so much more attractive than anybody else in the whole world. . . .”

13. BODDE & MORRIS at 115-21.

Punishments in Peking, and they were collected by a member of the Board and printed for the use of other members—a sort of internal administrative handbook printed under private auspices.<sup>14</sup> The entire procedure is, in other words, one which is quite familiar to us, but it is one that we use for such matters as deciding to build a post office of such and such a size in such and such a place, matters which we characterize as administrative.<sup>15</sup> If a matter is characterized as “legal,” then we immediately use quite a different procedure, the essential element of which is, it seems to me, that it is adversary in nature.

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<sup>14</sup> *Id.* at 144-56.

<sup>15</sup> Though curiously enough we have, or had until very recently, one institution that is very similar to the Ch'ing system: the system of military and naval justice prior to the Uniform Code of Military Justice, 10 U.S.C. § 801 *et seq.* (1964) [hereinafter cited as U.C.M.J.]. I seem not to be able to find in the Washington University library anything relative to the Navy prior to the U.C.M.J. According to my recollection—mercifully dim and doubtless inaccurate—however, in the case of a General Court Martial, the record was sent to the convening authority, for example, the Commandant of a Naval District, for review by his staff judge advocate. Then, in the more serious cases, it was sent to the Judge Advocate General of the Navy in Washington, who prepared a recommendation for the Secretary of the Navy acting for the President. Only then could it be executed. Records of other cases were kept and forwarded en masse though sentences could be executed previously. The members of the court-martial were all officers but, except by accident, not lawyers. The review in Washington would be by officers with legal training (normally persons commissioned as line officers who would later receive legal training and who might sometimes in addition have other specialized training such as that required for submarine duty). The review by the convening authority did not need to be by an officer with legal training, although I suppose it usually was. Of course there were differences. For one thing the accused was usually represented by counsel, although not necessarily by one with legal training. The Army system seems to have been roughly along these lines. See A. SCHILLER, *MILITARY LAW AND DEFENSE LEGISLATION* 485-86 (1941). There are other aspects of the military system which are comparable to the Chinese. This is notably the case with Captain's Mast, or non-judicial punishment now regulated by Article 15 of the U.C.M.J. This proceeding enabled (and to a lesser degree enables) a commanding officer to inflict minor punishments—up to seven days confinement, or three days bread and water, or two weeks confinement prior to the recent amendment, as well as certain reprimands, reductions in rate, etc., without being subject to the normal review. The purpose was to maintain discipline—a taut ship—and in that connection, to bring into line a man who had erred slightly when the more serious criminal proceedings were not deemed appropriate. The difference was in the stigma attached to courts-martial since the penalties inflicted by a Summary or Deck Court might well have been no greater than those inflicted at Captain's Mast. The similarities with the powers of the police in China today under the Security Administration Punishment Act are striking. COHEN, *CRIMINAL PROCESS* at 200-37. There are also interesting similarities to the Informal Adjustment Proceedings in the previous chapter. COHEN, *CRIMINAL PROCESS* at 97-199. The military idea of a general crime as “conduct to the prejudice of good order and discipline” and “conduct unbecoming an officer and gentleman” is cited for comparison in COHEN, *CRIMINAL PROCESS* at 341. It seems also to have Ch'ing counterparts, notably “doing what ought not to be done.” BODDE & MORRIS at 440.

To one from our European culture, the words "court," "law," and "legal proceeding" imply an adversary proceeding. Of course, this proceeding may be a sham. The result of the trial may be predetermined, and the defendant's "counsel" afraid to open his mouth, or in the employ of the state. Still, that is the form, and we can expect to see it observed. It seems to be ingrained in our culture. It permeates, for instance, that most European of organizations, the Roman Catholic Church—extending even to its naming of saints. Can one imagine an *advocatus diaboli* in China? Yet the notion is a commonplace with us. Nor is it a matter of "democracy." Justinian's empire was certainly as authoritarian as that of the Ch'ing (or if not, it was not for want of trying), but in his courts, there was an adversary procedure.<sup>16</sup> In China, there does not seem to be a trace of it. Whatever may have been the situation among the ancient Chinese and pre-Chinese,—to say nothing of the various tribes of central Asia which have settled in China,—in historical times, the Chinese seem to have known nothing of a system of dispute settling whereby the two parties fought it in a more or less symbolic way. Dispute settling was evidently a royal function and was carried on by the imperial government.

One way of approaching Professor Cohen's book, is to use it to answer the question, does this tradition continue in the People's Republic? To be sure, the question is not treated directly but since in form the book follows the model of a law school "cases and materials," there are plenty of data on which to base an answer. Of course there are no "cases" in the normal sense in China, no opinions of appellate courts. Consequently, Professor Cohen has constructed

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16. See I A. JONES, *THE LATER ROMAN EMPIRE 479-522* (1964) [hereinafter cited as JONES]. Though it is perhaps unnecessary to consider anything other than Paul's trial before Felix and later Festus (and Agrippa). *Acts* 24-26. To be sure this was from a considerably earlier period. It should be noted also that there seem to have been rather striking similarities between the criminal procedure of the Dominate and that of the Ch'ing. Thus there was a general feeling that there should be a confession, best obtained by torture, although this could not be administered to the upper classes—*honestiores*. There seems also to have been a tendency to keep accused persons in prison for a long time prior to trial, principally as the result of the delays inherent in the Roman court system at the time. Many prisoners died in prison. Moreover, most trials resulted from private prosecution and the prosecutor suffered serious penalties if there was no conviction. JONES, *supra* at 518-22. The development of modern European procedure out of this bureaucratic procedure of the later empire is described in F. WIEACKER, *PRIVATRECHTSGESCHICHTE DER NEUZEIT 182-89* (2d ed. 1967). Professor Wieacker does not say much about the adversary nature of the procedure. He simply assumes the constant presence of an adversary proceeding. This seems to me to be significant.

reports of what happened at the pre-trial and trial levels in a number of cases. These reports are based mostly on official Communist sources and on interviews with refugees from China.<sup>17</sup> There is, in addition, a great deal of background and explanatory material from a variety of sources. It seems to be clear from all this material that there is no direct continuity whatever between the Ch'ing and Communist systems (though Professor Cohen indicates that there has begun to be some interest on the part of the Communists in the older law<sup>18</sup>). The Ch'ing legal system was completely destroyed long before 1949 and was replaced by a western (mainly German-Japanese) system which continues on Taiwan.<sup>19</sup> The Communists reshaped this along the Russian model, more or less. The system which resulted gives, on paper, the very familiar impression to a westerner of trial court, appeal court, supreme court, procurator, and defense counsel.<sup>20</sup> But, as Professor Cohen points out, both explicitly<sup>21</sup> and by means of his "cases,"<sup>22</sup> the formal system does not control in fact. One could

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17. Professor Cohen described the process of obtaining the reports from refugees in considerable detail in *Interviewing Chinese Refugees: Indispensable Aid to Legal Research on China*, 20 J. OF LEGAL EDUC. 33 (1967).

18. COHEN, CRIMINAL PROCESS at 4.

19. *Id.* at 7.

20. *Id.* at 18-19, 139-141, 425-460.

21. *Id.* at 49-50.

22. *See, e.g.*, Item 252 of COHEN, CRIMINAL PROCESS at 542. This can best be shown by a quotation in extenso.

In 1959, Liao and his brother Lin-tse were arrested and prosecuted on a charge of murdering the deputy Party secretary of a rural commune. . . . Since one of the county basic level court judges had participated in the joint investigating team that had prepared the case for adjudication and was already familiar with the file, the county court quickly completed its consideration of the case. In view of the fact that the case was important and involved a capital offense, the chief judge and the president of the court could not decide upon the sentence by themselves but presented the problem to the political-legal Party group consisting of the president of the court, the chief of the public security bureau, chief procurator, and the deputy party secretary for legal affairs. It decided to sentence Liao to death and Lin-tse to fifteen years of imprisonment. These sentences were discussed with and approved by the first secretary of the county Party committee.

Subsequently, the case was reviewed by an intermediate appellate court and the high court. A member of the intermediate court had participated in the investigation, but since no member of the high court had, they sent a member to investigate along with a member of the public security department. After all this a trial was held. After approval by the high court of the death sentence (as the result apparently of the report of its own investigator, not because of the receipt of the record of the trial if there was one), a mass trial was held. At the conclusion of this, "The president of the court then announced the sentences, stating that the death sentence for Liao had already been approved by the Supreme Court. The meeting adjourned, and Liao was taken to a nearby field and executed by a firing squad in front of a large number of curious spectators."



say, it seems to me, that in fact an administrative determination is made which is reviewable in the way other administrative determinations are. Thus, the various administrators responsible for a particular area decide after investigation and mutual consultation that a certain person is guilty of a certain crime and should be given a certain punishment. The individual will then receive the punishment. There may be a very brief proceeding, consisting mostly of filling out forms, or he may be put through the full drill of a western trial, or given the special Chinese treatment—the mass trial—but this is incidental to the decision which was made previously.

If this analysis is correct, then there are several interesting consequences. For one thing, there is a Chinese legal tradition quite different from ours. It continues and it works. One of the most interesting features of both books is the way in which it is made clear that the administrative procedure does seem to result in the law being followed as it was intended to be. In other words, assuming one wants to have a system whereby magistrates decide impersonally in accordance with the "law" and not in accordance with their own whim, to decide in a relatively predictable way, then both the Ch'ing cases and Communist materials indicate that this desire is met, at least much of the time. We tend to distrust administrative procedure which is not reviewed by an outside agency (a court) nor is this idea limited to the United States. In France, for example, there has been a very strong tendency to provide judicial review of administrative acts, and the same is true for many other countries. In China, this does not seem to be necessary in order to achieve the aims that the Chinese have had for their legal system. To be sure, there was probably quite a lot of hanky-panky covered up by the no-doubt elegant calligraphy of the Board of Punishments in their recommendations to the Emperor. The official pronouncements in Communist sources and even reports of refugees are open to much question. Nevertheless, the total impression obtained must be, it seems to me, one of conformance to law (if one uses that term to mean commands of the ruler whether published or not). In the case of the Ch'ing cases, their volume alone<sup>23</sup> would seem to indicate that whatever defects there may have been at the trial level, once the case got in the mill, it was

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23. *Id.* The basic text of the *Hsing-anhui-lan* contains 5,650 cases, most of them from a fifty-year period, 1784-1834. These are, however, selected cases. The total number decided during the period was presumably much greater. BODDE & MORRIS at 146-53.

worked over by intelligent men following the rules and principles they were supposed to follow. As for the Communist cases, the impressive thing to me is the testimony of the refugees which indicates that the cadres were, in fact, worried that innocent men might be found guilty, or that the proper procedures were not being followed.<sup>24</sup> One could say, in other words, that there is a viable alternative legal system to the western which has been able to assimilate many western influences and still retain its separate identity.<sup>25</sup>

Or is there? Professor Cohen's book is essentially a work of legal history—very modern history to be sure, but still history of a period that is over. Most of the materials deal with events in the years 1953-63. This period began with the promulgation of a constitution and the establishment of a Soviet-European style system of criminal justice. Various procedural protections were given (on paper) and provision was made for "people's lawyers." Drafting of a criminal code began. This movement towards "legality" was reversed as a part of the anti-rightist movement in 1957-58, and there is no indication of any change during the time his materials cover.<sup>26</sup> Since 1963, particularly during the last three years, western influences have doubtless been even more firmly rejected. I should suppose it was impossible now to make any very accurate statement about Chinese law of the moment.

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24. See, e.g., the case of Tou, COHEN, *CRIMINAL PROCESS* at 415-16, where the investigating officials at several levels were in doubt as to whether a forcible rape had occurred and spent a great deal of time, about 30 days, investigating and discussing the matter before finally deciding to prosecute. To be sure, apparently once the decision as to guilt was made by the various administrators, the conviction was only a formality.

25. The trial proceedings in China under the Ch'ing—and under earlier dynasties for that matter—were, of course, not of the sort that would be approved by the American Judicature Society or the American Civil Liberties Union. They must have been frightening, indeed, to the average accused. See VAN DER SPENKEL, *LEGAL INSTITUTIONS IN MANCHU CHINA* 70-77 (1962). But it must be remembered that accused in England were not permitted counsel until 1837 and could not testify in their own behalf until 1898, and torture was used at least until some time in the seventeenth century. See T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW*, 431-37 (5th ed. 1956). While the prisoners were not forced to kow-tow, they were imprisoned prior to trial in quarters that must have been comparably awful to those of China. In China there seems in addition to have been quite a lot of corruption, perhaps more than in England. Still, the conclusion which must be drawn from a reading of the cases in *BODDE & MORRIS* is, it seems to me anyway, that the system worked more or less as it was supposed to, recognizing that in any system there is usually considerable discrepancy in many cases between theory and practice. So also under the Communists. The method of conviction may well be frequently contrary to our own notions of how men should be convicted of crime. But the evidence in Professor Cohen's book seems to indicate that these proceedings are conducted generally in accordance with the directives from the central government.

26. COHEN, *CRIMINAL PROCESS* at 10-18, 53.

(Perhaps I am wrong, but I have not seen any.) So one could say that the western influences have been totally rejected. And they may have been. However, there is another possibility. The Revolution of 1911 and the subsequent Republican governments pretty effectively demolished the Ch'ing criminal law system. It was replaced by a very western system but this apparently never sank deep roots in China. Indeed, it seems unlikely that most Chinese knew much about it. This system, in turn, was rejected by the Communists as one of their first acts, so that speaking conservatively, almost no Chinese under 35 knows anything about any system of national law except what has existed under the Communists. There might have been the development of entirely new and revolutionary techniques, and indeed there has been, to a certain extent. But there was also the adoption of a western structure, referred to above, for a brief period in the 'Fifties. As a result, though the westernized system was in turn rejected, still it forms part of Communist history and many of the forms then adopted still exist on paper. The western system may now be part of the consciousness of persons trained as Communist cadres.<sup>27</sup> At times, this influence is strengthened by the form of the rejection; so, for example, in the article by Su I on the function of the defense counsel quoted by Professor Cohen and the discussion of his right not to reveal facts unfavorable to the accused to which the latter has not confessed.<sup>28</sup> The author rejects the idea that the defense counsel has such a right, but after one has read the article, even if one has had no other contact with western law, one knows something about this doctrine. One has had, in a sense, a course in it.<sup>29</sup> Though, at the time, the reader may simply go along with the characterization of such and such an institution as bad, he knows about it. If, later, there should be a reversal in the present tendency of the law and government (as doubtless there will be) then might these western ideas occur to such persons as an alternative system?<sup>30</sup>

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27. Professor Cohen has suggested that possibly the concept of judicial independence which is included in the constitution is one of these. Cohen, *The Party and the Courts 1949-1959*, 38 CHINA QUARTERLY 120, 154-57 (1969).

28. COHEN, CRIMINAL PROCESS at 468.

29. One thinks of Mary McCarthy's introduction to some interesting heretics as the result of the nuns' efforts to warn the girls off. M. MCCARTHY, MEMORIES OF A CATHOLIC GIRLHOOD 104-105 (1957). Though, to be sure, most Sacred Heart girls seem not to have the same reaction, and it is difficult to think of Miss McCarthy not discovering Voltaire.

30. Of course it might be a little difficult for them to find this material. It is not clear (to me) how available the materials which Professor Cohen uses are in China. Indeed, it is a curious fact

Whether this particular notion or set of notions is of any interest or not, the fact that one has the data to justify making such speculations indicates the peculiar value of these two books for the study of comparative law. Together they constitute a history of Chinese criminal law for the past 200 years or so with only one significant gap – that of the Republican period, 1911-1949. That would, in itself, make them works of great value. Owing, however, to the accident that both books were prepared to be used in classes in American law schools, and hence are “case-books” in form, they are, it seems to me, much more useful than would be the case if they were treatises of the normal sort. Because of the fact that one has in these texts the actual materials, or many of them, which the Chinese had to work with, it seems justifiable to suppose that, after studying them, one has acquired some feel for the way the system works. One has, in addition, the actual materials to compare to their American (or other) counterparts. One can oneself form a few theories as to the nature of the legal process in China along the lines suggested by Professor Morris in his chapter on statutory interpretation.<sup>31</sup> If these were simply treatises in which one had, in effect, only the authors’ conclusions accompanied by paraphrases of some data, then the only real dialogue that could be developed would be between the authors and others who had read the same sources, and, from the nature of the case, these will always be very few. As it is, the presentation of the primary sources themselves, backed up with a great deal of background material, makes it anybody’s game.<sup>32</sup>

Of course, any conclusions or theories must obviously be regarded as tentative in the extreme. One can take one’s clue from the modesty of the authors. They are very hesitant to advance theories and indicate

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that despite the enormous difficulties of writing anything accurate about Communist China, Professor Cohen has managed, I would guess, to produce a book which gives a more accurate picture of legal life in “red” China than anything available there. Perhaps, if a copy is smuggled in, it will become an underground item like many poems among the Soviet literati.

31. BODDE & MORRIS at 493-542. Professor MORRIS points out, *inter alia*, that to the Chinese the important thing was not the definition of the crime but rather the punishment, and that the purpose of punishment was to restore the natural harmony which a crime had disturbed and not to prevent the crime. This explains much about the way the Board of Punishment interpreted statutes. It is curious that a theory with such a strong hold on Chinese thought should have been completely reversed by the Communists who concentrate on the criminal and not the crime. *Id.* at 513. Indeed the change is so drastic that one wonders if it can in fact have taken place, although admittedly all the evidence points that way.

32. This feature of Bodde & Morris will apparently make it very useful to non-lawyers as well. See Hucker, Book Review, 89 J. AM. ORIENTAL SOC’Y 220, 222 (1969).

how tentative these theories are, though they are naturally in a far better position to draw definitive conclusions than any reader can be. The history of misunderstandings between China and the West as the result of apparent similarities and dissimilarities which are misapprehended because of a lack of appreciation of the background in which the institution was developed<sup>33</sup> should make one cautious indeed in a field as difficult as law. Still, so long as this difficulty is recognized, I should say the more theories—however wild—the better. That is, after all, the way in which knowledge is supposed to be advanced scientifically: by the advancing and refutation of hypotheses based on observed data. This is an area in which there is plenty of room for advancement.

One hesitates, however, to say that everyone ought to read a work in a field like comparative law since, obviously, very few people are going to. Still, if it is nonsense to be governed by a doctrine merely because it was the law in the time of Henry IV, surely it is equally ridiculous to adhere to a rule merely because it was or is Anglo-American (assuming there is such a thing). To consider a case, a great number of people on both right and left are questioning the American system of criminal law and its enforcement today. They do not seem to be much moved by the traditional arguments which lawyers are accustomed to trot out on the value of protecting the accused in the way we say we do. The Chinese have never had such a system, and the present Communist government refuses to adopt it. In the system which they have set up, they seem to adopt the criticism of both right and left. They do not permit "legal technicalities" to prevent the state or society from protecting itself against anti-social acts and individuals.<sup>34</sup> On the other hand, the legal system is devoted to reforming the criminal and making him again a useful member of society insofar as this is possible. If it is not possible he is

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33. See also, e.g., the discussion of the distorted view of China prevalent in 18th century Europe in J. FAIRBANK, E. REISCHAUER & A. CRAIG, *EAST ASIA, THE MODERN TRANSFORMATION* 64-66 (1965).

34. It would be accurate to say, despite the strictures of the U.S.C., COHEN, *CRIMINAL PROCESS*, *passim*. One can, however, do it more conventionally too. See COHEN, *CRIMINAL PROCESS* at 412 where, in a criticism of rightists, T'an Chengwen says of them:

They also emphasize trivial legal procedures and the rights and position of the criminal and open the door of convenience to the criminal. In litigation activity they one-sidedly or improperly emphasize the completeness of 'procedure' (certain procedures are necessary) and erroneously emphasize the rights and position of the defendant. . . . The procedure that we adopt is for the purpose of accurately, promptly, and lawfully attacking the enemy and not for the purpose of binding our own hands and feet. . . .

eliminated.<sup>35</sup> There is some evidence that they have considerable success in this aim—considerably more than we have with our muddled aims.<sup>36</sup> It ought then to be useful to look at the Chinese experience both in order to look at our system from a different point of view to see whether it really is justified in its results or whether it is just an historical accident, and, on the other hand, to see many of the reforms suggested for our system actually being practiced (with rather chilling results).<sup>37</sup>

Of course, as indicated, not many people will do this, so perhaps it is best to say simply that these books are remarkable works worth the serious attention of anyone in the field of comparative law or government, and one can only hope that the future volumes in the series will be as good. If so, we shall have the curious situation of its being easier for an English speaking person to learn about the law of the Far East than about that of Mexico, to say nothing of France, Germany, and Italy. It is to be hoped that there is not too much significance in this.

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35 See, e.g., the quotation from Mao's "On the People's Democratic Dictatorship." COHEN, *CRIMINAL PROCESS* at 71-73.

36. That is, there seems to be a great deal of conformity with the government's standards even by persons who at first resisted. See COHEN, *CRIMINAL PROCESS*, at 240-244, 598-622, particularly the quotation from A. BARNETT, *COMMUNIST CHINA: THE EARLY YEARS, 1949-55*, at 601-10 (1964) The total failure of our penal system to do anything except turn amateur criminals into professionals (and to provide certain types of diversion elsewhere difficult to come by) needs no citation. Of course, one could say, China as a whole is one large reform school.

37. They seem chilling to me anyway. From this point of view the regime seems to be a ruthless, powerful and determined prosecution which is intended to make sure that acts contrary to its wishes are eliminated to the extent that this is humanly possible, and in which use is made of every available type of coercion, physical and mental, to break down internal resistance to the system. But what, after all, is the aim of our more advanced penology, except to adjust the criminal? To be sure, it doesn't work here. So far as external compliance is concerned, the present Assistant Attorney General (for the Criminal Division) of the United States would seem not to share my problems. He is quoted as saying:

Clark's trouble was that he was philosophically concerned with the rights of the individual. Our concern is more an orderly society through law enforcement. Clark put too many restraints on the law enforcement agencies. He was like a football coach warning his players not to violate the rules, when he should have been telling them to go in there and win. I'm not opposed to civil liberties, but I think they come from good law enforcement

M. Viorst, *The Justice Department is an Institution for Law Enforcement, Not Social Improvement*, N.Y. Times, 10 Aug. 1969, § 6 (Magazine), at 10, 75.

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