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Book Review. Law in Imperial China: Exemplified by 190 Ch'ing Dynasty Cases by Derk Bodde and Clarence Morris

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30 years ago, perhaps, the opposite was true. I sense no decline, however, in navel-gazing in the law teaching business. Dean Pollak's piece in this collection points out that even in traditional areas of lawyer competence policemen and bureaucrats are doing a neat end run around legal norms established by the courts. To a lawyer that might suggest improving the legal norms; someone else might think that nonlegal (or at least nonjudicial) devices might be more productive. With few exceptions, law professors do not seem interested in the alternatives.

A gnawing doubt about the significance of our profession—and its right to claim a heavy investment of students and research funds—has grown in my mind as a result of reading these essays. There is nothing new in the assertion by lawyers and law teachers that ours is a learned and significant profession guiding the destinies of individuals and nations. Presumably lawyers have been talking for generations about how important they are. I do wonder, however, whether the conceit of the profession has not grown into a collective neurosis obstructing our view of reality. Of course lawyers do useful things for people, but so do dentists. The latter at least have the decency to use new techniques when they are developed. There is, of course, a difference: We have a shortage of dentists, whereas the legal profession is rather overcrowded. Might not the nation benefit from a shortage of lawyers so that, perhaps, there would be less of an economic brake on reform?

It might also help if we didn't take ourselves quite so seriously.

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Robert L. Birmingham*

It has been argued that "[o]ne of the virtues of legal comparison ... is that it allows a scholar to place himself outside the labyrinth of minutiae in which legal thinking so easily loses its way and to see the great contours of the law and its dominant characteristics." An introductory survey of the civil law system, the customary offering in comparative law in American

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law schools, provides stimulating exposure to alternative approaches to familiar problems in such fields as tort and contract law, but more fundamental questions concerning the nature of law have been less amenable to comparative analysis because both common law and civil law systems are products of a single Western cultural base. Even the law of European Communist states is largely derived from this tradition.

The lack of teaching materials motivating inquiry into the basic premises of our legal system through presentation of the contrasting concerns of a different civilization has recently been remedied by publication of Professors Derk Bodde and Clarence Morris' casebook dealing with prerevolutionary Chinese law. The authors are, respectively, Professor of Chinese and Professor of Law at the University of Pennsylvania. Their book, developed from materials presented in a course they have taught jointly since 1961, combines annotated translations with an extensive introductory discussion and a concluding comparative analysis. Decisions rendered during the first third of the 19th century by the Board of Punishments, the highest imperial judicial organ, make up the bulk of the translations. A number of directives, edicts, and rescripts are also included.

Tension between systems of legal and moral obligation, the focus of recent spirited debate among British and American scholars, has been fundamental to the development of Chinese Law: Bodde and Morris contrast the Confucian belief that instruction and persuasion can best assure social harmony with legalist reliance on control of behavior through the use of criminal sanctions. The first authenticated Chinese publication of rules of law, in 536 B.C., is best remembered for the criticism it evoked:

Originally, sir, I had hope in you, but now that is all over. Anciently, the early kings ... did not put their punishments and penalties [into writing], fearing that this would create a contentiousness among the people which could not be checked. ... [W]hen the people know what the penalties are, they lose their fear of authority .... Today, sir, as prime minister of the state of Cheng, you have ... cast [bronze vessels inscribed with] books of punishment. ... As soon as the people know the grounds on which to conduct disputation, they will reject the [unwritten] accepted ways of behavior (h) and make their appeal to the written

4. Confucius (551-479 B.C.) argued: "[L]ead the people by regulations, keep them in order by punishments (hsing), and they will flee from you and lose all self-respect. But lead them by virtue and keep them in order by established morality (h), and they will keep their self-respect and come to you." Analects, II, 3, quoted at pp. 21-22.
5. Han Fei-tzu, who died in 233 B.C., urged: "In his rule of a state, the sage does not rely on men doing good of themselves, but uses them in such a way that they can do no wrong. Within the frontiers, those who can be relied on to do good of themselves are not enough to be counted in tens, whereas if men be used so as to do no wrong, the entire state may be equably administered. He who rules makes use of the many while disregarding the few, and hence he concerns himself not with virtue but with law (fa)." Quoted at p. 26.
word, arguing to the last over the tip of an awl or knife. Disorderly litigations will multiply and bribery will become current. By the end of your era, Cheng will be ruined. I have heard it said that a state which is about to perish is sure to have many governmental regulations.  

Nevertheless, by the end of the third century A.D., a criminal code of more than 7 million characters and over 26,000 paragraphs was being applied throughout China.  

The Chinese code resulted from a synthesis of the competing Confucian and legalist traditions during the Han Dynasty (206 B.C.-A.D. 220). Essentially a compilation of criminal sanctions to be imposed on those failing to adhere to Confucian standards of proper behavior, the code elaborately categorized conduct required of individuals with respect to other members of the community. Obligations to persons outside the family were based on rigid class distinctions. Family relationships were meticulously differentiated: The fifth degree of mourning, for example, included "such unlikely possibilities as male ego's grandfather's spinster first cousin, or female ego's husband's grand-nephew's wife." Subservience to and veneration of senior relatives were duties of high priority. That they could supersede those normally owed to the state itself is indicated by a code provision sentencing one accusing his older brother or a paternal uncle or aunt of criminal conduct to 100 blows of the heavy bamboo even if his allegations had been verified. A mourning period of 27 months following the death of a parent was required of all officials and the T'ang code of A.D. 653 punished conception of a child during this interval by imprisonment of the offending couple for 1 year. Bodde and Morris note:

[S]o extreme are the differences maintained between senior and junior family generation that they enable an adulterous father to suffer only one year of penal servitude for murdering his critical son, in contrast to the daughter-in-law whose sentence of immediate decapitation for having fatally injured her father-in-law "by mischance" is a mitigation from death by slicing.  

Although the code, frequently revised, remained the basis of all Chinese law until the 20th century, use of the courts was not encouraged: "[T]o in-
dulge in litigation was regarded as immoral. The ‘first best’ and socially proper way to settle disputes, used by the ‘superior man,’ was by the method of mediation, following the ethics of the ‘middle way.’ The corruptness of the magistrates and their subordinates, frequent use of torture, and “insistence upon at least token punishment for anyone becoming entangled with the law, regardless of circumstances,” made resort to law and the courts almost always imprudent. Redress was intentionally impeded:

[L]awsuits would tend to increase, to a frightful amount, if people were not afraid of the tribunals, and if they felt confident of always finding in them ready and perfect justice. . . . I desire, therefore, that those who have recourse to the tribunals should be treated without any pity, and in such a manner that they shall be disgusted with law, and tremble to appear before a magistrate. . . . As for those who are troublesome, obstinate and quarrelsome, let them be ruined in the law-courts—that is the justice that is due to them.¹⁴

In order to compensate for the inadequacy of state-authorized solutions, informal methods of dispute settlement were developed at the village, clan, and guild levels.¹⁵

A primary duty of Chinese courts was to restore through the imposition of metaphysically appropriate punishments the natural harmony that presumably had been disturbed by litigation or its causes. Since a counterbalancing sentence was believed necessary in all cases, a finding that a defendant was innocent subjected his accuser to criminal sanctions, regardless of the accuser’s good faith.¹⁶ Death, even though caused accidentally, could in theory frequently be offset only by execution of the responsible individual.¹⁷ However, the harshness of such a requirement was alleviated through the development of fictions reminiscent of benefit of clergy, applied in similar circumstances by English law.¹⁸ The death penalty could not be imposed without the approval of the emperor; executions were forbidden during most of the year. Capital punishment seems to have been ultimately the product of a stochastic process:

[T]he names of the condemned were written on a large sheet (more probably it was several sheets) “not alphabetically, or by chance, but so that the names of those

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16. P. 353.
17. British colonial law appears not to have been completely free of such rigidity. See Ricks, Book Review, N.Y. Rev. of Books, Dec. 21, 1967, at 12.
prisoners who are, in the opinion of the Board, less guilty than the others are placed either at the corners or in the centre. The list is then submitted to the Emperor who, with a brush dipped in vermilion, makes a circle on it at seeming, and to some extent real, hazard, and the criminals whose names are traversed by the red line are ordered for execution. The others remain on the list until the next year.”

Although participation in the judicial process, even as an innocent complainant, involved inevitable humiliation and the risk of more serious harm, a broad criminal responsibility for death did offer to those understandably reluctant to appear before the court an ultimate means of retaliation: suicide. “Pressing a person into committing suicide” was to the Chinese one of the most important categories of criminal conduct, and individual provisions punished many specific forms of such behavior. One particularly striking rule required exile of children “whose poverty prevents them from supporting their parents, so that the latter commit suicide.” The magnitude of the sacrifice here required to elicit judicial response illustrates both the inadequacy of legal remedies afforded the individual and the unwillingness of officials to intervene except when confronted with dramatic evidence of social disharmony.

The role of judicial organs is central to Law in Imperial China: Since most of the general principles of Chinese law presented by Professors Bodde and Morris have been previously introduced into the English language, the value of their book lies primarily in its translation of and commentary on individual decisions. Close scrutiny of the cases reveals a surprising pattern: In spite of the Confucian distaste for use of courts, and in spite of elaborate codes that purportedly “always endeavored to foresee all possible variations of any given offense and to provide specific penalties for each,” the Chinese appear also to have developed judicial processes remarkably similar to those of the common law. This anomalous result followed from the specificity of Chinese legislation and unrestrained use of analogy and catch-all statutes.

The most common of the catch-all statutes, cited in 10 of the 190 cases, provided alternative penalties of 80 blows of the heavy bamboo or 40 blows

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19. P. 140. The description may not be completely accurate. See pp. 140-41.
20. P. 179. Bodde and Morris point out: “In a single case . . . we find references to statutes and sub-statutes covering the following ways of committing suicide: making improper verbal advances to a woman that cause her to commit suicide; committing adultery with a woman, the exposure of which shames her into killing herself; robbing someone and thereby pushing him into suicide; suicide resulting from falsely accusing a person of theft, from deceptions practiced by knavish fellows, from extortions practiced by rapacious governmental underlings, or by impersonators of servants of government officials; beating which inflicts fatal injuries upon the victim, thereby inducing him to kill himself before the injuries take effect . . . .” P. 190. See also pp. 231-35 (case 17.1 (1818)).
21. P. 496.
22. The example of French tort doctrines has shown how the civil law itself often owes much to judicial inventiveness. See A. von Mehren, supra note 2, at 367-414.
of the light bamboo for “doing what ought not to be done.” It was applied, for example, to a pupil “prosecuted for stupidly bothering officialdom” who, after informing the authorities that he planned to commit suicide to join his deceased teacher, sought to delay his departure; the court noted that “[t]he Code provides no penalty for someone proposing to commit suicide to honor his teacher.” Statutes punishing “vicious scoundrels who repeatedly create disturbances and without reason molest decent people” or acts “violating imperial decrees” or “violating ordinances” also were used to fill the interstices of the code. The code provided specifically for decision by analogy: “[T]here may be cases to which no laws or statutes are precisely applicable; such cases may be determined, by an accurate comparison with others which are already provided for, and which approach most nearly to those under investigation...” This offered opportunity for the exercise of judicial imagination. In one case an officer who “often went to the residence of his top commanding officer, where under various excuses he would seek an interview to present a complaint, “was given 100 blows of the heavy bamboo and 3 years of penal servitude after consideration of a statute that begins: “If a knavish fellow...from outside [the capital], with a yellow square of cloth on his back, a yellow banner planted upon his head, and accusations issuing from his mouth, rushes into a government office in order to exercise coercion upon the officials...’” In another case, a scholar who in a biography of his father incorrectly used a character reserved for description of imperial behavior received the same penalty by analogy to a paragraph dealing with “the contumacious use of silks bearing the figures of the dragon or phoenix.”

Less obvious parallels were sometimes deemed sufficient. One convicted of enticing others into prostitution was sentenced through use of a rule punishing “a woman bringing false accusations against another person in court or...who commits a theft and thus induces her own or her husband’s parents or grandparents to commit suicide out of fear of criminal involvement.” Direct application of provisions not covering the conduct in question also occurred. A Mrs. Feng, “who worshipped a paper image left to her by her aunt and also used such things as tea leaves and dragon-embracing pills...to treat sick patients,” received 100 blows of the heavy bamboo.

24. P. 531. See pp. 440–41 (case 237.1 (1819)).
25. P. 441.
27. Id.
28. P. 179.
29. Quoted at p. 520.
30. Pp. 397–99 (case 195.2 (1881)).
31. Pp. 481–86 (case 267.2 (1779)).
32. Pp. 227–28 (case 12.2 (1830)).
bamboo as one of the "followers of the Red Male sect who worship the Patriarch Who Soars Aloft on the Whirlwind." 33

Portions of the Chinese code thus had more in common with a body of case law than with the codes of civil law states. Many provisions, little more general than common law decisions, served primarily as aids to the solution of problems to which they were literally inapplicable. 34 Case law, although not often mentioned in opinions, apparently performed a precedential function as well. 35

An English scholar has stated that "in old Chinese law ... we are accustomed to find ... reversals of our European notions." 36 The legal system portrayed by Professors Bodde and Morris, however, is not the negation of our own but rather the product of centuries of independent evolution in response to the demands of a civilization largely unfamiliar to us. Their materials demonstrate that usually unquestioned premises of Western law are not absolutes but in part reflect local cultural pressures. The absence of parallel distortions in Chinese and common law solutions resulting from mutual exposure to the same historical patterns makes appropriate the application of comparative techniques to the most fundamental of shared legal problems. The casebook under review provides a valuable teaching vehicle for such analysis.

33. Pp. 355-56 (case 171.6 (1817)).
34. "[T]he judge ... will (within limits) simply think of the legal code as providing certain guidelines but in his judgment will rely very heavily on the unique features of the circumstances of the case." Schwartz, On Attitudes Toward Law in China, in Government Under Law and the Individual 27, 34 (M. Katz ed. 1957).
35. "[T]hough Chinese jurists no doubt searched carefully for helpful precedents when faced by difficult cases—after all, the need for a convenient repertory of such precedents was probably the primary reason for compiling the Conspectus—they apparently did not feel obliged to cite them explicitly as often as this is done by Anglo-American judges." Pp. 179-80.