

Legal Orientalism

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[The] world-wide ... diffusion of [Western culture] has protected us as man had never been protected before from having to take seriously the civilizations of other peoples; it has given to our culture a massive universality that we have long ceased to account for historically, and which we read off rather as necessary and inevitable.²

- Ruth Benedict

[In China,] animals are divided into: (a) belonging to the Emperor, (b) embalmed, (c) tame, (d) sucking pigs, (e) sirens, (f) fabulous, (g) stray dogs, (h) included in the present classification, (i) frenzied, (j) innumerable, (k) drawn with a very fine camel hair brush, (l) et cetera, (m) having just broken the water pitcher, (n) that from a long way off look like flies.³

- Michel Foucault

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² Ruth Benedict, *Patterns of Culture* 6 (1952).

Fifty years ago comparative law was a field in search of a paradigm. In the inaugural issue of the *American Journal of Comparative Law* in 1952, Myres McDougal remarked unhappily, "The greatest confusion continues to prevail about what is being compared, about the purposes of comparison, and about appropriate techniques."⁴ In short, there seemed to be very little in the field that was not in a state of confusion. Two decades later, referring to McDougal's bleak assessment, John Merryman saw no evidence of progress: "few comparative lawyers would suggest that matters have since improved."⁵ And only a few years ago, John Langbein suggested that comparative law remains in dire straits: "If the study of comparative law were to be banned from American law schools tomorrow morning, hardly anyone would notice."⁶

A certain amount of hand-wringing is thus de rigueur in any piece of comparative law scholarship that wants to be viewed as part of the solution rather than part of the problem. At the risk of perpetuating the notion that comparative lawyers suffer from a "Cinderella complex,"⁷ I too begin with the obligatory observation that comparative law remains a relatively underappreciated field in the legal academy. My main purpose, however, is to

³ Michel Foucault, *The Order of Things*, at xv (1993) [hereinafter Foucault, *The Order of Things*] (quoting a short story by Jorge Luis Borges, *The Analytical Language of John Wilkins*, in *Other Inquisitions, 1937-1952*, at 103 (Ruth Simms trans., 1964)).

⁴ Myres McDougal, *The Comparative Study of Law for Policy Purposes: Value Clarification as an Instrument of World Order*, 1 *Am. J. Comp. L.* 24, 28-29 (1952).

⁵ John Merryman, *Comparative Law and Scientific Explanation*, in *Law in the United States of America in Social and Technological Revolution* 81, 82 n.3 (John N. Hazard & Wenceslas J. Wagner eds., 1974); see also John Merryman, *The Loneliness of the Comparative Lawyer and Other Essays* (1999).

⁶ John Langbein, *The Influence of Comparative Procedure in the United States*, 43 *Am. J. Comp. L.* 545, 549 (1995). Mary Ann Glendon echoes the same observation: "American comparativists, in fact, often find that our colleagues abroad welcome our enterprise more than our colleagues at home." Mary Ann Glendon, *Why Cross Boundaries?*, 53 *Wash. & Lee L. Rev.* 971, 972 (1996).

⁷ Günther Frankenberg, *Critical Comparisons: Re-Thinking Comparative Law*, 26 *Harv. Int'l L.J.* 411, 419 (1985) (noting that comparative lawyers suffer from low disciplinary self-esteem).

join other recent voices seeking to invigorate the field by proposing new avenues of inquiry.⁸

Comparative law has existed in relative disciplinary isolation.⁹ This Article is part of a larger effort to bring the mainstream of comparative law into conversation with other literatures: the study of non-Western law, the growing body of postcolonial theory, as well as recent work in legal theory. I apply these theoretical frameworks to Chinese law and, more specifically, to the historic claim made by many Western observers that China lacks an indigenous tradition of "law." In the process, this Article traces a genealogy of certain Orientalist understandings of Chinese law and explores the broader questions of who gets to decide who has "law" and what the normative implications of its absence are. In answering these questions, I suggest that law is a crucial element in the constitution of the modern Western subject and that, historically, ideas of the lack of Chinese legal subjectivity have served to mark the outside of (Euro-American) law. My aim here is not to condemn that history, which has already been critiqued by others. Instead, my primary goal is to understand how history has shaped the field of knowledge in which the comparative study of Chinese law unfolds today, and how the West has come to understand itself through law. In these conditions, what are the ethics of comparison?

⁸ An eclectic bibliography of this growing literature includes the contributions to the 1997 Utah Law Review symposium, *New Approaches to Comparative Law*, 1997 Utah L. Rev. 255, as well as H. Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* (2000); Janet E. Ainsworth, *Categories and Culture: On the "Rectification of Names" in Comparative Law*, 82 Cornell L. Rev. 19 (1996); William Alford, *The Limits of "Grand Theory" in Comparative Law*, 61 Wash. L. Rev. 945 (1986) [hereinafter Alford, *The Limits of "Grand Theory"*]; Vivian Grosswald Curran, *Cultural Immersion, Difference, and Categories in U.S. Comparative Law*, 46 Am. J. Comp. L. 43, 45 (1998); Nora Demleitner, *Challenge, Opportunity and Risk: An Era of Change in Comparative Law*, 46 Am. J. Comp. L. 647 (1998); Nora Demleitner, *Combating Legal Ethnocentrism: Comparative Law Sets Boundaries*, 31 Ariz. St. L.J. 737 (1999); Frankenberger, *supra* note 7; David Gerber, *System Dynamics: Toward a Language of Comparative Law?*, 46 Am. J. Comp. L. 719 (1998); Sharon Hom, *Engendering Chinese Legal Studies*, 1994 Signs 1020 (Summer); Mitchel de S.-O.-L'E. Lasser, *"Lit. Theory" Put to the Test: A Comparative Literary Analysis of American Judicial Tests and French Judicial Discourse*, 111 Harv. L. Rev. 689 (1998); Pierre Legrand, *Comparative Legal Studies and Commitment to Theory*, 58 Mod. L. Rev. 262 (1995) (book review); Ugo Mattei & Alberto Monti, *Comparative Law & Economics: Borrowing and Resistance*, *Global Jurist Frontiers*, Vol. 1, Iss. 2, Art. 5 (2001), at <http://www.bepress.com/gj/frontiers/vol1/iss2/art5/>; Ugo Mattei & Anna di Robilant, *The Art and Science of Critical Scholarship: Postmodernism and International Style in the Legal Architecture of Europe*, 75 Tulane L. Rev. 1053 (2001); Anne Peters & Heiner Schwenke, *Comparative Law Beyond Post-Modernism*, 49 Int'l & Comp. L.Q. 800 (2000); Mathias Reimann, *Beyond National Systems: A Comparative Law for the International Age*, 75 Tulane L. Rev. 1103 (2001); Annelise Riles, *Wigmore's Treasure Box*, 40 Harv. Int'l L.J. 221 (1999); Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, 39 Am. J. Comp. L. 1 (1991).

⁹ Cf. William Twining, *Globalization and Legal Theory* 176-78 (2000) (observing comparative law's failure to follow the developments of legal theory).

I. Lack of "Law" in China

As there is a literary canon that establishes what is and what is not literature, there is also a legal canon that establishes what is and what is not law.¹⁰

- *Boaventura de Sousa Santos*

That the Chinese legal tradition is lacking is an observation as clichéd as the solicitude that is routinely expressed toward comparative law.¹¹ "To all intents and purposes foreigners are completely in the dark as to what and how law exists in China. Some persons whose reputation for scholarship stands high would deny the right of the Chinese to any law whatsoever - incredibly, but to my knowledge, a fact."¹² This was one Western commentator's melancholic observation at the end of the nineteenth century. The renowned anthropologist Marcel Granet indeed announced in 1934, "The Chinese notion of Order excludes, in all aspects, the idea of Law."¹³ And in William Alford's recent observation, Western students of China continue to ignore and misunderstand "the effect of law upon Chinese life."¹⁴

But just what does it mean to claim that China suffers from a (relative or absolute) lack of "law"? After all, only the most negligent observer could miss the fact that imperial China boasted dynastic legal codes going back to the Tang dynasty,¹⁵ and earlier. The point is usually a subtler one: whatever law China has known is a form that falls short of "real" law. This view is implicit in the oft-stated claim that Chinese law has been historically exclusively penal and associated with criminal sanctions.¹⁶ Especially in continental systems, civil law stands at the heart of jurisprudence, and its absence thus signifies a gaping hole at the center of the Chinese legal system.¹⁷ Sometimes, the implicit yardstick

¹⁰ Boaventura de Sousa Santos, *Toward a New Common Sense: Law, Science and Politics in Paradigmatic Transition* 473 (1995).

¹¹ I discuss this perception of Chinese law more fully in Teemu Ruskola, *Law Without Law, or Is "Chinese Law" an Oxymoron?*, *Wm. & Mary Bill Rts. J.* 655 (2002) [hereinafter Ruskola, *Law Without Law*].

¹² Ernest Alabaster, *Notes and Commentaries on Chinese Criminal Law and Cognate Topics with Special Relation to Ruling Cases with a Brief Excursus on the Law of Property*, at v (1899).

¹³ Marcel Granet, *Pensee Chinoise [Chinese Thought]* 590 (1934) ("La notion chinoise de l'Ordre exclut, sur tous ses aspects, l'idée de Loi.").

¹⁴ William Alford, *Law? What Law?*, in *The Limits of the Rule of Law in China* 45, 45 (Karen G. Turner et al. eds., 2000) [hereinafter Alford, *Law? What Law?*].

¹⁵ 618-907 C.E. Moreover, Legalism (fa-jia) was one of the leading schools of thought in classical China and as such indisputably a part of the Chinese tradition (even if it was subsequently eclipsed by Confucianism). See, e.g., Benjamin Schwartz, *The World of Thought in Ancient China* 321-49 (1985). Yet the Legalist conception of "law" was purely instrumental, and as such susceptible to an Orientalist critique as not "real" law. Cf. *infra* text accompanying notes 15-18.

¹⁶ See Teemu Ruskola, *Conceptualizing Corporations and Kinship: Comparative Law and Development Theory in a Chinese Perspective*, 52 *Stan. L. Rev.* 1599, 1618 (2000) [hereinafter Ruskola, *Conceptualizing Corporations and Kinship*], and sources cited therein.

for "real" law is formal legal rationality in the Weberian sense,¹⁸ while at other times it is a liberal legal order that constrains the state in a particular way - a configuration often referred to as "the rule of law."¹⁹ Legal historian Thomas Stephens has recently argued that Chinese law is not even worthy of the term "jurisprudence." As a more descriptive term for the study of Chinese non-law, Stephens offers the neologism "obsequiiprudence," presumably signifying the scholarly study of obsequious submission to authority and hierarchy.²⁰ Whatever the merits of Stephens' thesis may be, in the view of nineteenth-century international lawyers Chinese law was so "uncivilized" as to exclude China from the "Family of Nations," which in turn served as a justification for reducing the country to a semi-colonial status under a regime of Western extraterritorial privileges.²¹

The goal of this Article is not to defend Chinese law, whether past, present or future. Ultimately, the answer to the question whether or not there is law in China is always embedded in the premises of the questioner: it necessarily depends on the observer's definition of law. Hence, my aim here is not to "prove" that there is in fact such a thing as a tradition of Chinese "law." Indeed, there already exists a considerable scholarly literature on Chinese law (however defined), and among students of Chinese law the idea of China's inherent lawlessness - at

least in the crude form of the thesis - is a discredited notion.²²

However, outside of the academic study of Chinese law, ideas of China's lawlessness continue to abound. Indeed, one of the primary obstacles to a serious discussion of Chinese law are the blank stares with which one is frequently met upon confessing an interest in the subject: "What Chinese 'law'? There is no law in China!" (Sometimes followed by a more tentative, "Is there law in China?") Unlike the more traditional comparativist who studies French or German law, for example, the student of Chinese law frequently needs to convince her audience that the subject matter exists in the first place.

In this Article, however, I do not address the substantive arguments in the debate on law's existence in China. I do so not because there is no merit in engaging in this debate,²³ but because for present purposes, my primary interest is in analyzing how the West has constructed its cultural identity against China in terms of law. Why, despite vigorous efforts to debunk it, does the view of China's lawlessness continue to prevail - not only in the popular opinion and among policy-makers, but even among legal scholars who do not specialize in China as well as China scholars who do not specialize in law?²⁴ Chinese civil law, for example, has been discovered and re-discovered periodically in the West. What preconceptions make it possible for it to be discovered and forgotten again so quickly, leaving it to wait for yet another round of "discovery"?

There are no doubt multiple answers to this complex of questions. This Article directs the inquiry into a certain historiographic tradition it

¹⁷ Even in the view of common law observers, the mere presence of positive law - civil or criminal - does not, by itself, make for a "legal system." See Perry Keller, *Sources of Order in Chinese Law*, 42 *Am. J. Comp. L.* 711 (1994) (disputing that China has a "legal system").

¹⁸ See, e.g., Max Weber, *The Religion of China* 102, 148-50 (Hans H. Gerth trans., 1951) [hereinafter Weber, *The Religion of China*].

¹⁹ See generally W.J.F. Jenner, *The Tyranny of History: The Roots of China's Crisis* (1992) (describing China as the quintessential instance of the "rule of men," as opposed to the "rule of law"). Cf. Rene David, *On the Concept of "Western" Law*, 52 *U. Cin. L. Rev.* 126, 131 (1983) (identifying "Western law" with "the rule of law," the supremacy of law, [and] the *Rechtsstaat*). Even the eminent China historian John King Fairbank agrees with the general thesis that China lacks both a tradition of private law as well as a system of rule of law in general. See John King Fairbank, *China: A New History 185-86* (1992). Fairbank's life-long theme of Chinese lawlessness already permeates much of his masterly *Trade and Diplomacy on the China Coast: The Opening of the Treaty Ports 1842-1854* (1953). As Tani Barlow incisively analyzes *Trade and Diplomacy on the China Coast*:

What the West "had" that China did not, what in the end seduced China into passive acquiescence (made it Other) was Law. Or, to put it slightly differently, the universalist Law of treaty, human rights, science, and so on clarified the difference between China and the West as a relation of absence and presence, by pointing out the anarchic, ever multiplying, seething differences within China; China, alas, stood to Western Law as the particular stands to Universal. And, I would hazard, that is why the theme of "lawfulness" takes on such epic proportions in Fairbank's text. Tani E. Barlow, *Colonialism's Career in China Studies*, in *Formations of Colonial Modernity in East Asia* 373, 389-90 (Tani E. Barlow ed., 1997).

²⁰ Thomas B. Stephens, *Order and Discipline in China: The Shanghai Mixed Court 1911-27*, at 115 (1992). While one can in good faith argue about the possibility of comparative law across cultures and times, Stephens' coinage is gratuitously offensive. For a critical assessment of Stephens' view of Chinese law, see Ruskola, *Law Without Law*, supra note 11.

²¹ See generally Gerrit W. Gong, *The Standard of "Civilization" in International Society* 130-63 (1984).

²² For one thing, many studies have already debunked the thesis that the Chinese legal tradition is exclusively penal. See, e.g., *Civil Law in Qing and Republican China* (Kathryn Bernhardt & Philip C.C. Huang eds., 1994); Philip C.C. Huang, *Civil Justice in China: Representation and Practice in the Qing* (1996). Thomas Metzger goes so far as to suggest that by late Qing the Chinese suffered not from an absence of law but, if anything, an excessive concern for it, or "overlegality." Thomas A. Metzger, *The Internal Organization of Ch'ing Bureaucracy: Legal, Normative, and Communication Aspects* 18 (1973). In addition to the discovery of Chinese "civil law," there are also many defenses of Confucian traditions of "liberalism" and "constitutionalism" as well as various Chinese conceptions of "rights." An eclectic selection of this large literature includes Stephen C. Angle, *Human Rights and Chinese Thought* (2002); Confucianism and Human Rights (Wm. Theodore de Bary & Tu Weiming eds., 1998); Wm. Theodore de Bary, *The Liberal Tradition in China* (1983); Janet E. Ainsworth, *Interpreting Sacred Texts: Preliminary Reflections on Constitutional Discourse in China*, 43 *Hastings L.J.* 273 (1992); Wm. Theodore de Bary, *The "Constitutional Tradition" in China*, 9 *J. Chinese L.* 7 (1995); Ju-ao Mei, *China and the Rule of Law*, 5 *Pac. Aff.* 863 (1932); Richard Vuyllsteke, *Tung Chung-shu: A Philosophical Case for Rights in Chinese Philosophy*, in *Law and Society: Culture Learning Through Law* 303 (1977).

²³ I have participated in the debate myself by arguing that China in fact has a tradition of "corporation law" despite historic claims to the contrary. See Ruskola, *Conceptualizing Corporations and Kinship*, supra note 16.

²⁴ Cf. Alford, *Law? What Law?*, supra note 14.

calls "legal Orientalism." It starts from the premise that, in many ways, "history does not belong to us; we belong to it."²⁵ Inevitably, "our historical consciousness is always filled with a variety of voices in which the echo of the past is heard."²⁶ The Orientalist history of comparative law constitutes one important tradition from which the work of today's comparative lawyers emerges, and whether we consciously reject or embrace that tradition, it still provides the context against which that work is written, read, understood, and misunderstood. As David Halperin describes the marvelous efficiency with which prejudice relies on unstated "truths" in communication, "if the message is already waiting at the receiver's end, it doesn't even need to be sent; it just needs to be activated."²⁷ Whatever our own "prejudices" about Chinese law may be - and they may be either positive or negative - in our writings we are likely to be activating messages of which we are not even aware. By elaborating a genealogy of legal Orientalism, I hope to analyze some prevailing cultural prejudices that inform the interpretation of comparative scholarship on Chinese Law.

Stated differently, this Article is an attempt to take account of the context in which the study of Chinese law necessarily unfolds, and to understand the historicity of contemporary scholarship. What can we learn from the history of comparative law and, indeed, from the history of Chinese legal history?²⁸ I suggest that by considering legal Orientalism as an ongoing cultural tradition we can understand better why even today claims about the status of Chinese law are so relentlessly normative. Why is it that the statement that China lacks "law" (again, however defined) is almost never simply a factual claim but constitutes an implicit indictment of China and its cultural traditions?

Below, I analyze the processes by which claims of the putative absence of law in China have become part of the observers' cultural identity and, in turn, contribute to the contents of the observations themselves. In the final analysis, the object of my inquiry is certain Western representations of Chinese law and the notions of legality and legal subjectivity that they imply. The project is ultimately hermeneutical in Gadamer's sense: its goal is "not to develop a procedure" for understanding Chinese law "but to clarify the conditions in which [such] understanding takes place."²⁹ Whether we

like it or not, legal Orientalism is one condition of Western knowledge of Chinese law.

However, while we in the West are perhaps bemused to learn of the traditional Sinocentric worldview - the Chinese word for "China" means "Middle Kingdom" - we nevertheless accept with utmost unselfconsciousness the notion that we are the First World, twice-removed from the soi-disant Third World. To be sure, the distance is shrinking, as the Second World has essentially disappeared. Yet our occidental solipsism aside, cultures do not come labeled with ordinal numbers. Given the traditional Eurocentrism of legal scholarship,³⁰ perhaps the category of "law" obscures more than it illuminates; might we not be better off with the study of, say, "comparative social control," rather than comparative law?³¹

In the words of Dipesh Chakrabarty, European analytical categories are "both indispensable and inadequate in helping us to think through the experiences of political modernity in non-Western nations."³² Chakrabarty's response to this predicament is the project of "provincializing Europe": de-centering Western analytic categories and subjecting them and their histories to critical scrutiny. However, given the fact that European thought is now "everybody's heritage ... and affects us all," the task is not, and cannot be, the ultimate elimination of all analytic apparatuses of European thought, such as Western ideas of law. More productively, Chakrabarty wants to explore how European traditions "may be renewed from and for the margins."³³ One aspect of provincializing Europe must be provincializing - rather than discarding - Euro-American conceptions of law and its categories.³⁴ I do so here by analyzing the historical construction of the Euro-American legal subject against its Chinese counterpart, and the implications of that history for the study of Chinese law today.

What, then, are the connotations of "law" and how do they color our relationship to the political and cultural entity we refer to as "China"? The shortcomings of Chinese law are often blamed on a putative confusion of categories - the tendency of the Chinese to conflate law and morality, or law

²⁵ Hans-Georg Gadamer, *Truth and Method* 276 (Joel Weinsheimer & Donald G. Marshall eds., Crossroad 2d rev. ed. 1989) (1960).

²⁶ *Id.* at 284.

²⁷ David M. Halperin, *St. Foucault: Towards a Gay Hagiography* 13 (1995).

²⁸ *Cf. id.* at 299 ("Real historical thinking must take account of its own historicity.").

²⁹ *Id.* at 295.

³⁰ *Cf.* Kenneth B. Nunn, *Law as a Eurocentric Enterprise*, 15 *Law & Ineq.* 323 (1997).

³¹ Anthropologists John Comaroff and Simon Roberts answer this question affirmatively in the context of legal anthropology. "The argument for perpetuating a discrete anthropology of law, if it implies the continued reification 'the legal,' is not compelling," they argue, proposing instead the study of the logic of dispute processes in their cultural context. John Comaroff & Simon Roberts, *Rules and Processes: The Cultural Logic of Dispute in an African Context* 249 (1981).

³² Dipesh Chakrabarty, *Provincializing Europe: Postcolonial Thought and Historical Difference* 16 (2000).

³³ *Id.*

and custom, for example. Such claims have great intuitive appeal. Like the brilliantly patronizing Chinese encyclopaedia entry in one of the two epigraphs to this Article, described by Michel Foucault in the preface to *The Order of Things*,³⁵ they accord with expectations of Chinese taxonomical madness and irreducible cultural difference. Yet what many readers of Foucault ignore is that the amusing encyclopaedia entry that he quotes is not a real encyclopaedia entry at all. It is a quotation from a fable by Jorge Luis Borges which Foucault uses artfully to set up an epistemological foil for European systems of knowledge.³⁶ One assumes - though one cannot be quite sure - that Foucault is acting self-consciously in doing so.³⁷ In any event, what is certain is that many enduring Western notions of Chinese law are based on Orientalist fables and betray little self-awareness of this fact.

This fabulous Western jurisprudence of Chinese law is the subject matter of the remainder of this Article, which proceeds as follows. Part II first describes the limits of functionalism, the dominant theoretic paradigm in comparative law, and proposes the analysis of "legal Orientalism" as an alternative point of departure. Before turning to the Oriental other, Part III analyzes the general proces-

ses by which law participates in the construction of the culturally and nationally marked Western subject. Part IV, the core of the Article, sketches how the Euro-American legal subject has imagined its relationship, in various historical contexts, to its Oriental counterpart, the Chinese non-legal non-subject. Part V turns to the contemporary implications of the history of legal Orientalism. Since all understanding is situated, bias is inevitable and prejudice the very condition of knowledge. Rather than issuing an impossible call for an end to all Orientalism, I turn to an ethics of Orientalism. In an important sense, the process of comparison creates the objects of comparison. Therefore, how we compare ourselves to others produces both enabling conditions as well as obstacles to further communication. An ethical legal Orientalism attends to the conditions of legal subject formation: rather than positing the Chinese as simply lacking legal subjectivity, it allows for the possibility of differently constituted legal subjects. Indeed, a more open-ended approach to comparison may change our views not only of others as legal subjects, but also of ourselves.

II. Beyond Functionalism

One of the aims of this Article is to help move comparative law beyond functionalism. In order to do so, Section A provides a short account of functionalism, followed by an analysis of its limits in Section B. Section C develops a preliminary definition of "legal Orientalism." Section D in turn considers the methodological limits of the study of legal Orientalism.

A. Functionalism

Although much of the work in comparative law remains methodologically unselfconscious, the dominant methodology is without a doubt functionalism, whether or not expressly avowed by its practitioners. The basic idea of functionalism - originally imported into comparative law from the social sciences - is powerfully simple.³⁸ The functionalist's task is to identify some type of more or less universal problem shared by several societies, and then analyze how different legal systems solve the same problem; the legal solutions, by definition, will be functionally equivalent and hence comparable.³⁹ For instance, scholars of Chinese law have frequently observed that many of our legal dispute resolution functions were performed in traditional

³⁴ Cf. Mirjan Damaska, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* 199 (1986) (observing that a definition of "law" so narrow as to exclude China "smacks of the dogmatism of the untraveled"). This project of provincializing law has already begun on several fronts. Important examples of general, and growing, theoretical interest in analyzing the relationship between law and colonialism include *Laws of the Postcolonial* (Eve Darian-Smith & Peter Fitzpatrick eds., 1999); Peter Fitzpatrick, *Modernism and the Grounds of Law* (2001); Symposium, *Colonialism, Culture, and the Law*, 26 *Law & Soc. Inquiry* 305 (2001); Symposium, *Post-Colonial Law - Uses of Theory in Law Reform Projects*, 10 *Am. U. J. Gender Soc. Pol'y & L.* 535 (2001); and Symposium, *Re-Orienting Law and Sexuality*, 48 *Clev. St. L. Rev.* 1 (2000); Special Issue, *Postcolonialism, Globalization and Law*, 1999 *Third World Legal Stud.* 1. There are a growing number of postcolonial analyses in many legal sub-fields as well, including intellectual property (e.g., Rosemary J. Coombe, *The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy*, 6 *Can. J. L. & Juris.* 249 (1993)), immigration (e.g., Tayyab Mahmud, *Migration, Identity, and the Colonial Encounter*, 76 *Or. L. Rev.* 633 (1997)), environmental law (e.g., Benjamin J. Richardson, *Environmental Law in Postcolonial Societies: Straddling the Local-Global Institutional Spectrum*, 11 *Colo. J. Int'l Env't'l L. & Pol'y* 1 (2000)), and critical race theory (e.g., Chantal Thomas, *Critical Race Theory and Postcolonial Development Theory: Observations on Methodology*, 45 *Vill. L. Rev.* 1195 (2000)); Eric K. Yamamoto, *Rethinking Alliances: Agency, Responsibility and Interracial Justice*, 3 *Asian Pac. Am. L.J.* 33 (1995)). Increasingly, even "domestic" American legal phenomena are being viewed through the lens of colonialism. See, e.g., *Foreign in a Domestic Sense: Puerto Rico, American Expansion, and the Constitution* (Christina Duffy Burnett & Burke Marshall eds., 2001); Sally Engle Merry, *Colonizing Hawaii: The Cultural Power of Law* (2000); Wendy Nelson Espeland, *Bureaucrats and Indians in a Contemporary Colonial Encounter*, 26 *Law & Soc. Inquiry* 403 (2001); Laura Gomez, *Race, Colonialism, and Criminal Law: Mexicans and the American Criminal Justice System in Territorial New Mexico*, 34 *Law & Soc. Rev.* 1129 (2000); Efrén Rivera Ramos, *The Legal Construction of American Colonialism: The Insular Cases*, 65 *Rev. Jur. U.P.R.* 225 (1996); Ediberto Roman, *Empire Forgotten: The United States's Colonization of Puerto Rico*, 42 *Vill. L. Rev.* 1119 (1997).

³⁵ See supra note 3.

³⁶ Foucault does not provide a citation to Borges' story, although he does (correctly) identify Borges as the author. See Borges, supra note 3.

³⁷ Indeed, despite some effort to maintain distance to Borges' outrageous "Chinese encyclopaedia," Foucault ends up sounding utterly patronizing when he patiently suggests that we cannot dismiss "with complete certainty" the validity of the "Chinese" (!) classification of animals into "tame" and "embalmed," for instance. Foucault, supra note 3, at xix.

China by extra-judicial mechanisms, such as the family.⁴⁰ Likewise, prominent observers have argued that Confucian ritual (*li*) constituted the Chinese equivalent of natural law in early modern West.⁴¹

B. Limits of Functionalism

In the social sciences, functionalism largely exhausted itself by the 1980s. However, it retains a tenacious hold on the imagination of comparative lawyers.⁴² While it remains a useful tool in the hands of a sophisticated practitioner, functionalism (like all methods) has notable limits.⁴³ Despite its apparent value neutrality, it is premised on the identification of a problem that the law then solves. Yet it is not clear just what constitutes a "problem"; what is a problem in one culture may not be a problem in another.⁴⁴ Furthermore, functionalists often make implicit assumptions about which problems should be resolved by legal, rather than some other, means.⁴⁵ At its worst, functionalism leads to a kind of epistemological imperialism: either we find in foreign legal cultures confirmation of the (projected) universality of our own legal categories, or, equally troublingly, we find "proof" of the fact that other legal cultures lack some aspect or other of our law.

The colonial administration of British India offers a prime example of the first kind of conceptual colonialism. Describing the attempt of Sir William Jones to discover the principles of indigenous Hindu law, Bernard Cohn argues that what started "as a search for the "Ancient Indian Constitution,"

ended with what [Jones] had so much wanted to avoid - with English law as the law of India."⁴⁶ The reason was simple. As Jones set out to find "a Hindu civil law," his focus was on subjects that he, "a Whig in political and legal philosophy, was centrally concerned with - those rights, public and private, that affected the ownership and transmission of property."⁴⁷ Unsurprisingly, Jones found precisely what he set out to find, which is indeed the hallmark of an enterprising functionalist.

As a perhaps trivial, yet telling, example of the opposite danger - the failure to find equivalents of one's own categories - consider the following anecdote from the classroom. Upon reading Hugh Scogin's article on Chinese "contract law" in the Han dynasty⁴⁸ (and Scogin's highly contextualized study certainly indicates the need for the scare quotes),⁴⁹ a student of Janet Ainsworth's queried her urgently, "Tell me ... had the Chinese developed promissory estoppel [by the Han], too?" As Ainsworth observes tartly, the student apparently regarded the development of the concept of promissory estoppel as a natural evolutionary outgrowth of the law of contracts, such that any civilization possessed of a jurisprudence of contract doctrine would eventually produce the functional equivalent of Section 90 of the Restatement of Contracts.⁵⁰

⁴¹ See, e.g., Joseph Needham, *Human Laws and the Laws of Nature in China and the West*, in *2 Science and Civilisation in China* 518 (1956); Hu Shih, *The Natural Law in the Chinese Tradition*, in *5 University of Notre Dame Natural Law Institute Proceedings* 119 (Edward F. Barrett ed., 1953). Unless otherwise indicated, in the remainder of this Article I use the terms "Confucian" and "Confucianism" to refer to the state ideology perpetuated by the imperial civil service examination system, with full awareness that this definition does not exhaust alternative meanings. As I have noted previously, "On the one hand, this orthodox Confucianism, which grew increasingly rigid over time, stood in contrast to the philosophical Confucianisms in which it originated. On the other hand, it was also distinct from the Confucian officialdom's actual policies and administrative practices, which did not necessarily conform to the state's professed ideals." Ruskola, *Conceptualizing Corporations and Kinship*, supra note 16, at 1607 n.18.

⁴² Cf. June Starr & Jane Collier, Introduction, in *History and Power in the Study of Law: New Directions in Legal Anthropology* 5 (June Starr & Jane Collier eds., 1989) [hereinafter *History and Power in the Study of Law*] ("Many anthropologists who studied dispute management in the 1960s and 1970s experienced a sense of paradigm crisis by 1980, as did most social anthropologists, because functionalist theory (the framework within which we previously worked), was increasingly criticized.").

⁴³ That is to say, I am not rejecting functionalism in all forms and for all purposes. Indeed, if "function" is conceived broadly enough, the label "functionalism" can subsume almost any methodology. Even laws that seem to serve no function other than that of making an ideological statement (or, less tendentiously, expressing a collective value judgment) can be analyzed as serving an ideological (or expressive) function. However, I am not invested - either positively or negatively - in the label itself, and my goal here is simply to examine the limits of a particular mode of analysis that is conventionally associated with that label, viz., sociological functionalism. This mainstream functionalism has its uses and I have used it myself, suggesting that in late imperial China family law performed many of the economic functions that corporation law performs in the United States today. In recognition of its limits, however, I have sought to combine the functionalist inquiry with a hermeneutic analysis. See Ruskola, *Conceptualizing Corporations and Kinship*, supra note 16, at 1613 (arguing that while American and Chinese corporation law share many functional similarities, as systems of meaning they remain far apart).

³⁸ For a classic statement of sociological functionalism, see Talcott Parsons, *The Social System* (1951). The appeal of functionalism is by no means limited to comparative law. It animates much of law-and-society scholarship and legal history as well, where it implies an evolutionary paradigm for the understanding of legal change. In the words of Lawrence Friedman, for example, *Law, by and large, evolves; it changes in piecemeal fashion What is kept of old law is highly selective. Society in change may be slow, but it is ruthless. Neither evolution nor revolution is sentimental. Old rules of law and old legal institutions stay alive when they still have a purpose - or, at least, when they do not interfere with the demands of current life Working doctrines of law, however quaint they may seem, must be acting as the servants of some economic or social interest.* Lawrence Friedman, *History of American Law* 18, 23 (2d ed. 1985). On the role of functionalism (or "adaptationism," as Gordon calls it) in legal history, see generally Robert Gordon, *Historicism in Legal Scholarship*, 90 *Yale L.J.* 1017 (1981).

³⁹ For a textbook example, see *Law in Radically Different Cultures* (John Barton et al. eds., 1983) [hereinafter *Law in Radically Different Cultures*] (analyzing the treatment of "inheritance," "embezzlement," "contract," and "population control" in the laws of "the West," Egypt, Botswana, and China).

⁴⁰ See, e.g., Sybille van der Sprenkel, *Legal Institutions in Manchu China: A Sociological Analysis* 80-96 (1962). In employing the term "traditional China," I am aware that in the conventional division of Chinese history into "traditional" and "modern," the latter adjective "usually refers to the period of significant contact with the modern West." Paul A. Cohen, *Discovering History in China: American Historical Writings on the Recent Chinese Past* 58 (1984) [hereinafter *Cohen, Discovering History*]. In this Article (as elsewhere), I use the phrase "traditional China" simply to denote a certain historical period, without any intent to imply a particular normative vision of history. Cf. Ruskola, *Conceptualizing Corporations and Kinship*, supra note 16, at 1614 n.37.

At its extreme, a relentless insistence on exact equivalence can lead a functionalist to conclude that China lacks even the very category of "law."

In functionalism's favor, one should note that there is nothing about it as a methodology that compels one to find either a presence or an absence in (place of) the object of comparison.⁵¹ Historically, the more contemporary variants of functionalism - unlike, say, nineteenth-century evolutionary functionalisms - have in fact tended to find even "primitive" legal systems less, rather than more, lacking. Indeed, insofar as functionalism is premised on the existence of certain universally shared conditions, it embodies the potential to make the exotic Other seem ultimately rational, rather than merely "primitive." As Max Gluckman insists in his classic ethnography of tribal law, "it is unfortunately still necessary to demonstrate that Africans ... use processes of inductive and deductive reasoning which are in essence similar to those of the West, even if the premises be different."⁵²

C. Legal Orientalism

Indeed, understanding as a continuous intellectual endeavor is nothing but the rigorous critique of misunderstanding, misrepresentation, and all sorts of cultural myths and misconceptions.⁵³

- Zhang Longxi

If comparison is such an inherently risky enterprise, is there any way to talk about Chinese law without implicating oneself in the perilous act of comparison? Comparativists in fact often insist on a distinction between the study of "foreign law" and the discipline of "comparative law": the latter consists of the express comparison of two legal systems, rather than mere description of foreign legal systems.⁵⁴ Yet it seems inescapable that the description of foreign law - including Chinese law - is always an instance of comparative law: even in "mere description," the implicit point of reference is always our own system, against which we compare the object culture.⁵⁵

Indeed, the description of Chinese law does not occur in a vacuum. Edward Said, the literary scholar and leading postcolonial theorist, uses the term "Orientalism" to refer to the discourses that structure Westerners' understanding of the Orient.⁵⁶ He emphasizes the extent to which the identity of the colonial and postcolonial West is a rhetorical achievement. In a series of imperial gestures, we have reduced "the Orient" to a passive object, to be known by a cognitively privileged subject - ourselves, "the West." Exhorts Said,

Without examining Orientalism as a discourse one cannot possibly understand the enormously systematic discipline by which European culture was able to manage - even produce - the Orient

⁴⁴ The case of corporation law in China provides an extraordinary illustration: the central problem of American corporation law has become the solution to the key problem of Chinese business organization. Since the classic analysis by Berle and Means, the separation of ownership and management has constituted the so-called "agency problem" that American corporation law seeks to address. See generally Adolf A. Berle & Gardiner C. Means, *Modern Corporation and Private Property* (1937). When China enacted a Company Law, it did so with the express hope that creating a separation of ownership and management - the American agency problem - would solve the (very different) problems of its state-owner enterprises. This ironic twist has gone largely unremarked in the literature on Chinese business organization, except for Donald Clarke and William Simon. See Donald Clarke, *GATT Membership for China?*, 17 *Puget Sound L. Rev.* 517, 524 (1994); William H. Simon, *The Legal Structure of the Chinese "Socialist Market" Enterprise*, 21 *J. Corp. L.* 267 (1996); cf. Ronald J. Gilson & Mark J. Roe, *Understanding the Japanese Keiretsu: Overlaps Between Corporate Governance and Industrial Organization*, 102 *Yale L.J.* 871, 874 (1993) ("To date, comparative analyses of the Japanese corporate governance system have assumed that the central purpose of the Japanese system, like that of the American system, is solving the Berle-Means monitoring problem.").

⁴⁵ Günther Frankenberg criticizes this assumption as "legocentrism," or the tendency to treat law "as a given and a necessity, as the natural path to ideal, rational or optimal conflict resolution and ultimately to a social order guaranteeing peace and harmony." Frankenberg, *supra* note 7, at 445.

⁴⁶ Bernard S. Cohn, *Law and the Colonial State in India*, in *Colonialism and Its Forms of Knowledge* 57 (1996).

⁴⁷ *Id.* at 71.

⁴⁸ 206 B.C.E.-220 C.E.

⁴⁹ Hugh T. Scogin, Jr., *Between Heaven and Man: Contract and the State in Han Dynasty China*, 63 *S. Cal. L. Rev.* 1326 (1990).

⁵⁰ Ainsworth, *supra* note 8, at 20.

⁵¹ For Max Weber, for example, the main problem from which the Chinese legal tradition suffered was that it had no concept of "natural law." Weber, *The Religion of China*, *supra* note 18, at 147. This is precisely the opposite conclusion of two other eminent observers, Hu Shih, *supra* note 41, and Needham, *supra* note 41 - a prime illustration of the ultimate indeterminacy of functionalism.

⁵² Max Gluckman, *The Judicial Process Among the Barotse of Northern Rhodesia* (1955). Thanks to Don Clarke for pointing me to Gluckman, and to Haun Saussy for insisting on historically positive contributions of functionalism. Other similar analyses of "primitive law" include Karl Llewellyn & E. Adamson Hoebel, *The Cheyenne Way: Conflict and Caselaw in Primitive Jurisprudence* (1941); Bronislaw Malinowski, *Crime and Custom in Savage Society*. For an important recent example in the genre of a law school casebook, see *Law in Radically Different Cultures*, *supra* note 39.

⁵³ Zhang Longxi, *Mighty Opposites: From Dichotomies to Difference in the Comparative Study of China* 2 (1998).

⁵⁴ Merryman, *supra* note 5, at 82; cf. Twining, *supra* note 9, at 187 ("Comparatists sometimes insist on a quite sharp distinction between foreign and comparative law.").

⁵⁵ Cf. Curran, *supra* note 8, at 45 (arguing that "comparison is central to all legal analysis, as it is central even to the very process of understanding"). Indeed, while "description" is often used as an epithet to characterize legal scholarship, the difficulty of "mere description" itself is easily underestimated in the context of comparative law. See, e.g., Alford, *The Limits of "Grand Theory," supra* note 8 (emphasizing the importance of "thick description" in the Geertzian sense); cf. Clifford Geertz, *Thick Description: Toward an Interpretive Theory of Culture*, in *The Interpretation of Cultures* 3 (1973).

⁵⁶ Edward Said, *Orientalism* (1978) [hereinafter Said, *Orientalism*]; see also Edward Said, *Orientalism Reconsidered*, in *Literature, Politics, and Theory* 210 (Francis Barker et al. eds., 1986); Edward Said, *Orientalism: An Afterword*, 14 *Raritan* 32 (1995).

politically, sociologically, militarily, ideologically, scientifically, and imaginatively during the post-Enlightenment period.⁵⁷

What remains largely absent in comparative law is the study of specifically legal forms of Orientalism: the ways in which "the Orient" - as well as "the West"⁵⁸ - have been produced through the rhetoric of law. Below, this Article turns to Euro-American representations of Chinese law and analyzes their rhetorical processes as a kind of "legal Orientalism."

Before proceeding, however, I should emphasize that I am using the term "Orientalism" in this Article in the technical sense defined by Edward Said and elaborated by other postcolonial theorists.⁵⁹ There is an important existing literature criticizing legal notions held by Orientalist scholars, yet these critiques do not necessarily offer an "Orientalist" analysis in the postcolonial sense in which I employ the term. Although the existing critiques are too varied to be characterized as a single genre, they tend to be modernist in their orientation: by demonstrating the inaccuracies in classical Orientalist scholars' depictions, their preferred strategy is to rehabilitate the Chinese as authentic subjects of (legal) modernity. Postcolonial analyses differ in their emphasis. Rather than seeking to rescue China into a broader definition of modernity, they emphasize the historical construction of China, and the

"non-West" in general, as "traditional" and "pre-modern" by definition.⁶⁰

D. Limits of Legal Orientalism

Although no study of non-Western law can be complete without taking account of Orientalist discourses, such critical analyses (like their functionalist counterparts) have their limits, defined by the questions they ask.

First, there is no one definitive version of Orientalism.⁶¹ The West has many Oriental (and other) Others, which vary enormously in terms of their particular features and histories - even while they all share in being defined by their relationship to the West, with different Others confirming different aspects of the West's self-understanding.⁶² Postcolonial analyses of law tend to be further developed in the context of the Middle East and South Asia, due at least in part to the fact that many of the classic works of postcolonial theory focus on those geographic areas.⁶³ In this Article, Chinese law functions as one instance of Orientalism, not a paradigmatic case.⁶⁴ Indeed, there are multiple legal Orientalisms as well. Although I focus here on certain historically dominant representations of Chi-

⁵⁷ Said, *Orientalism*, supra note 56, at 3. In describing Orientalism as a "discourse," Said employs it in an explicitly Foucaultian sense, especially as developed in Michel Foucault, *The Archaeology of Knowledge and the Discourse on Language* (Alan Sheridan trans., 1972) and Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Alan Sheridan trans., 1977) [hereinafter Foucault, *Discipline and Punish*]. Yet just as Foucault has been faulted for lacking a concept of agency that would allow for more than merely local resistance to disciplinary discourses, Said's concept of Orientalism as a discourse has also been criticized as too hegemonic for not allowing "the Orient" a role in its construction. See, e.g., Dennis Porter, *Orientalism and Its Problems*, in *The Politics of Theory* 179 (Francis Barker et al. eds., 1983). Partly in response to such criticisms, in later work Said seeks to provide a broader study of imperialism that encompasses "a general world-wide pattern of imperial culture" and incorporates also "a historical experience of resistance against empire." Edward Said, *Culture and Imperialism*, at xii (1993). Indeed, much of the subsequent development of postcolonial theory - most notably the work of Gayatri Spivak and Homi Bhabha - can be viewed as an effort to resist totalizing readings of Orientalism, with increasing emphasis on the cultural hybridity, psychological ambivalence, and geographic diaspora of (post)colonial subjects.

⁵⁸ I use the term "the West" advisedly, acknowledging fully that "the West" does not exist as an undifferentiated, monolithic entity any more than "the Orient" does. As used in this Article, both terms refer to discursive constructions rather than fixed geographic locations. To state the obvious, both "Westerners" and "Orientals" live in space as well, not merely in "discourse." Yet, as Haun Saussy aptly observes, with reference to the idea of the West, "Western" is the accurately vague word." Haun Saussy, *Postmodernism in China*, in *Great Walls of Discourse and Other Adventures in Cultural China* 118, 120 (2001). Recent studies of Chinese transnationality illustrate that, geographically, Chinese cultural formations in fact span "the West" and "the East." See, e.g., Madeline Hsu, *Dreaming of Gold, Dreaming of Home: Transnationalism and Migration Between the United States and South China, 1882-1943* (2001); Adam McKeown, *Chinese Migrant Networks and Cultural Change: Peru, Chicago, Hawaii, 1900-1936* (2001); Aihwa Ong, *Flexible Citizenship: The Cultural Logics of Transnationality* (1999).

⁵⁹ While this Article seeks to analyze Chinese law through the lens of Orientalism, there are at least two other studies that also employ the term "legal Orientalism" - one in order to analyze the British colonial legal system in Burma, and the other to deconstruct the category of "Asian law" as used in Australia. See Hilary McGeachy, *The Invention of Burmese Buddhist Law: A Case Study in Legal Orientalism*, 4 *Aust. J. Asian L.* 31 (2002) (analyzing British colonial administration of Burma); Veronica Taylor, *Beyond Legal Orientalism*, in *Asian Laws Through Australian Eyes* 47 (Veronica Taylor ed., 1997) (contesting "Asian law" as a category).

⁶⁰ Indeed, what a postcolonial analysis adds to other critiques is demonstrating the mutually constitutive nature of categories such as "modern/traditional" and "Western/Oriental." That is to say, the "problem" to be addressed is not simply that individual scholars such as Hegel or Marx, for example, may have been "Orientalist" in their views but that "Orientalism" as a worldview is built into the very idea of modern (Western) legality - a point that emerges even more clearly when the postcolonial analysis is combined with the constitutive theory of law. See infra Section III.A. Although the modernist and postcolonial critiques that I have sketched here are analytically distinct, their interventions can be complementary. The claim that China lacks "law," for example, can be contested by either arguing how and why China does have law (in the modern sense), or by showing how law has been historically constructed to exclude China from it definitionally. Elsewhere, I have myself engaged in what I here call the modernist project: expanding the definition of Western "corporation law" to include the operation of Chinese family law. See Ruskola, *Conceptualizing Corporations and Kinship*, supra note 16. For important contemporary examples of critiques of Orientalist analyses of Chinese law - primarily, though not exclusively, in the modernist mode - see, e.g., Alford, supra note 8; William P. Alford, *The Inscrutable Occidental: Roberto Unger's Uses and Abuses of the Chinese Past*, 64 *Texas L. Rev.* 915 (1986) [hereinafter Alford, *The Inscrutable Occidental*]; Randall Peerenboom, *The X-Files: Past and Present Portrayals of China's Alien "Legal System"*, *Global Stud. L. Rev.* 2 (2003); Hugh Scogin, *Civil "Law" in Traditional China: History and Theory*, in *Civil Law in Qing and Republican China*, supra note 22, at 13.

⁶¹ Indeed, the term "postcolonial theory" itself is a placeholder for numerous theoretical positions of various degrees of historical specificity. Cf. Stephen Slemon, *The Scramble for Post-Colonialism*, in *De-Scribing Empire: Postcolonialism and Textuality* 15, 16 (Chris Tiffin & Alan Lawson eds., 1994) ("Post-colonialism," as it is now used in its various fields, describes a remarkably heterogeneous set of subject positions, professional fields, and critical enterprises.").

nese law, there are other stereotypical views, of various degrees of influence, that one might usefully analyze.

Second, the main focus here is on Western representations of Chinese law. These representations tell us far more about the Western idea, and ideology, of law than they do of any equivalent (or even nonequivalent) phenomenon in China. Hence, this Article has very little to say of Chinese law in China, in terms of either indigenous legal practices or indigenous representations of law. However, the solipsistic focus on Western representations of Chinese law is not meant to imply that comparative law is in disciplinary bankruptcy and that Chinese law cannot be known by Euro-American observers. Describing Chinese law and comparing it to, say, American law remains an important and viable - though difficult and always incomplete - enterprise.⁶⁵ Analyzing Chinese law from the perspective of postcolonial theory is not the terminus of the comparative enterprise, only its starting point.⁶⁶ Indeed, the project is perhaps best conceptualized as a meta-theoretical approach to comparison, a study of how we look at Chinese law and how those habits of perception in part constitute "us" as "the West."

Third, the distinction here between law as a system of representation and law as a material practice is only heuristic. As Robert Cover succinctly observes, law is defined by both "word" and "violence," and the two are intimately connected.⁶⁷ The references in this Article to "Chinese law" and "Western" or "American law" should thus be read as though they were in quotation marks, to emphasize that each is being considered primarily as an idea and a cultural representation - while still acknowledging that how we imagine ourselves through law affects also how we act,⁶⁸ and our actions in turn affect the material conditions that support and give rise to legal representations and legal ideologies.⁶⁹

Fourth, neither Western nor Chinese law exists in isolation of the other. How the West imagines China and Chinese law has colored its encounters with Chinese legal ideology and legal practices. These encounters in turn have further influenced - through interpretation and misinterpretation - the status of China and Chinese law in Western minds. Likewise, the Chinese have brought their own views of the West to these encounters, and their understandings and misunderstandings of Western law have changed correspondingly. Indeed, since the earliest Sino-European contacts, the Chinese too have used the West for their own instrumental purposes, to confirm their own self-understandings of what it means to be Chinese. Moreover, American and European observers do not have a monopoly on Orientalist understandings of Chinese law. Today, the idea of Western superiority enjoys global currency, and it has resulted in Chinese legal and cultural responses that can best be described as "self-Orientalism."⁷⁰

Put simply, both Chinese and Western law exist in both Chinese and Western imaginations and are intersubjectively linked. Boaventura de Sousa Santos refers to this kind of legal intersubjectivity aptly as "interlegality," which he defines as not the legal pluralism of traditional legal anthropology, in which the different legal orders are conceived as separate entities coexisting in the same political space, but rather, the conception of different legal

⁶² This structural feature of Orientalist discourse is indeed not even limited to ideas of the Orient, however it is defined geographically, culturally, or temporally. Consider, for example, the close affinity between Said's *Orientalism* and Toni Morrison's description of "Africanism," or the creation of an imaginary "Africa" in American literature: Africanism is the vehicle by which the American self knows itself as not enslaved, but free; not repulsive, but desirable; not helpless, but licensed and powerful; not history-less, but historical; not damned, but innocent; not a blind accident of evolution, but the progressive fulfillment of destiny.

Toni Morrison, *Playing in the Dark: Whiteness and the Literary Imagination* 52 (1992). For examples of what might be called "legal Africanism", or analyses of the ways in which Hegel's Africa has functioned as one of the West's several legal Others, see Fitzpatrick, *supra* note 34; Robert Bernasconi, *Hegel in the Courts of Ashanti*, in *Hegel After Derrida* 41 (Stuart Barnett ed., 1998). On the differentiation between Africa and Asia in the modern context, see also Gayatri Chakravorty Spivak, *Outside in the Teaching Machine* 53-54 (1993).

⁶³ For works on the subcontinent, see, for example, Radhika Singha, *A Despotism of Law: Crime and Justice in Early Colonial India* (1998); Upendra Baxi, "The State's Emissary": The Place of Law in Subaltern Studies, in *7 Subaltern Studies: Writings on South Asian History and Society* (Partha Chatterjee & Gyanendra Pandey eds., 1992); Ratna Kapur, *Postcolonial Erotic Disruptions: Legal Narratives of Culture, Sex and the Nation in India*, 10 *Colum. J. Gender & L.* 333 (2001); Prabha Kotiswaran, *Preparing for Civil Disobedience: Indian Sex Workers and the Law*, 21 *B.C. Third World L.J.* 161 (2001); Kunal Parker, "A Corporation of Superior Prostitutes": Anglo-Indian Conceptions of Temple Dancing Girls, 1800-1914, 32 *Mod. Asian St.* 559 (1998); Note, *Interpreting Oriental Cases: The Law of Alterity in the Colonial Courtroom*, 107 *Harv. L. Rev.* 1711 (1994). For important analyses of Orientalist understandings of law in the context of the Middle East, see Lama Abu-Odeh, *Comparatively Speaking: The "Honor" of the "East" and the "Passion" of the "West"*, 1997 *Utah L. Rev.* 287; Lama Abu-Odeh, *Crimes of Honour and the Construction of Gender in Arab Societies*, in *Feminism & Islam: Legal and Literary Perspectives* 141 (Mai Yamani ed., 1996); John Strawson, *Islamic Law and English Texts*, 6 *Law & Critique* 21 (1995); John Strawson, *Reflections on Edward Said and the Legal Narratives of Palestine: Israeli Settlements and Palestinian Self-Determination*, 20 *Penn. St. Int'l L. Rev.* 363 (2002). Furthermore, the fact that China as a whole was never formally colonized by the West seems to have prevented the appreciation of the many ways in which it was reduced to a de facto colonial status. See, e.g., Shu-mei Shih, *The Lure of the Modern: Writing Modernism in Semicolonial China, 1917-37* (2001); Barlow, *supra* note 19. In any event, the applicability of postcolonial theory does not depend solely on the precise degree to which a particular society has been colonized by a Western state. In a larger sense, this body of theory is concerned with the historical construction of the many different others against which the modern West defines itself. In so doing, postcolonial theory need not assume a singular colonial/postcolonial trajectory for all "non-Western" societies. Rather, it is a useful technique for analyzing the different ways in which the "non-West" has been produced and maintained in different places at different historical moments.

spaces superimposed, interpenetrated, and mixed in our minds, as much as in our actions...⁷¹

Thus, to the extent that we necessarily live our legal lives "in the intersection of different legal orders,"⁷² even as systems of representation Chinese and Western legal orders are not discrete.

Indeed, because of the interlegality of Chinese and Western law, the baggage that Westerners have brought to their understandings of Chinese law includes not only their "own" biases but often those of the Chinese as well. That is, the rhetoric of China's official Confucian ideology systematically privileged morality over law as a means of social control, even while in practice the state relied on a sophisticated legal system to govern the empire. However, in a process of "Confucianization," the law eventually came to embody the values of official Confucian morality, which in a sense allowed this Confucianized law to hide in plain sight.⁷³ As William Alford points out, Euro-American scholars in turn have failed to appreciate the role of law in China because of their tendency to take official Confucian pronouncements at face-value.⁷⁴ In effect, Western legal Orientalism thus reproduces some of the biases of the Confucian ideology.

Finally, I should acknowledge the implicit paradox in conceptualizing my application of the analytic tools of postcolonial theory as an intervention in the field of "comparative law." The discipline of comparative law, as conventionally practiced, relies on a notion of the world as a stable juridical formation consisting of naturalized nation-states, which is precisely the worldview that postcolonial theory contests, both descriptively and normatively. Yet as the above analysis suggests and as sophisticated comparative lawyers know, "law can no longer be thought of in exclusively national terms, and a clear distinction between national and foreign law can no longer be assumed."⁷⁵ Not only is the eroding distinction between domestic and foreign law throwing into question the domestic-foreign comparison as the bedrock of comparative law, but the blurring of categories between law-making also at the national and international levels brings even comparative and international lawyers into a shared, global field of interlegality.⁷⁶ That this Article takes comparative law as its rhetorical point of entry for a postcolonial legal analysis is primarily an artifact of disciplinary distinctions. A similar

⁶⁴ Indeed, Said's Orientalism focuses on ideas of the Middle East that enjoy currency in European literary works. While for Europeans "the Orient" connotes images of *The Tales of Arabian Nights*, for Americans "the Orient" invokes East Asia, which gives ideas of China greater prominence in American Orientalisms. Since Said, studies of Orientalism have proliferated, and this Article represents one of its many elaborations - British, French, Asian American, German, global, feminist, postmodernist, etc. See, e.g., Lisa Lowe, *Critical Terrains: French and British Orientalisms* (1991); Sheng-mei Ma, *The Deathly Embrace: Orientalism and Asian American Identity* (2000); Kamakshi P. Murti, *India: The Seductive and Seduced "Other" of German Orientalism* (2000); Bryan Turner, *Orientalism, Globalism, Postmodernism* (1994); Meyda Yegenoglu, *Colonial Fantasies: Towards a Feminist Reading of Orientalism* (1998).

⁶⁵ In a seminal study of the barriers to knowing the Other, and especially the non-elite Other ("subaltern," in the parlance of postcolonial studies), Gayatri Spivak poses the provocative question, "Can the subaltern speak?" Her first, passionate reply was "No!" See Gayatri Chakravorty Spivak, *Can the Subaltern Speak?*, in *Marxism and the Interpretation of Culture* 271 (Cary Nelson & Lawrence Grossberg eds., 1988) [hereinafter Spivak, *Can the Subaltern Speak?*]. In a subsequent revision of the essay, Spivak characterizes her initial response as "inadvisable" and notes the importance of remaining "upbeat" about the possibility of communicating with the subaltern, yet she cautions against a naive identification of one's academic interpretation of the Other "with the 'speaking' of the subaltern." Gayatri Chakravorty Spivak, *A Critique of Postcolonial Reason: Toward a History of the Vanishing Present* 309 (1999) [hereinafter Spivak, *A Critique of Postcolonial Reason*]; see also Gayatri Chakravorty Spivak, *Subaltern Studies: Deconstructing Historiography*, in *In Other Worlds: Essays in Cultural Politics* 197, 205 (1987) (elaborating a practice of the "strategic use of positivist essentialism in a scrupulously visible political interest" in representing subaltern subjectivity) [hereinafter Spivak, *Subaltern Studies*]. On the methodological questions of "subalternity" in the context of the study of China, see Gail Hershatter, *The Subaltern Talks Back: Reflections on Subaltern Theory and Chinese History*, 1 *Positions* 103 (1993). On the Marxist origins of the term "subaltern," see Antonio Gramsci, *Selections from the Prison Notebooks* 52-55 (Quintin Hoare & Geoffrey Nowell Smith trans., 1971).

⁶⁶ For a recent methodological inquiry into the next step, i.e., how one should go about describing Chinese law, see Donald Clarke, *Puzzling Observations About Chinese Law: When Is a Riddle Just a Mistake?* (unpublished working paper), at <http://papers.ssrn.com/sol3/papers.cfm?abstractid=293627> (last visited Oct. 24, 2002).

⁶⁷ Robert M. Cover, *Violence and the Word*, 95 *Yale L.J.* 1601 (1986). For a Marxist analysis of the materiality of ideology and its embeddedness in material practices of the state, see Louis Althusser, *Ideology and Ideological State Apparatuses (Notes Toward an Investigation)*, in *Lenin and Philosophy and Other Essays* 85, 112 (Ben Brewster trans., 2001) (1971) ("An ideology always exists in an apparatus, and its practice, or practices. This existence is material.").

⁶⁸ Cf. Clifford Geertz, *Local Knowledge: Fact and Law in Comparative Perspective*, in *Local Knowledge: Further Essays in Interpretive Anthropology* 167, 173 (1983) (describing law as "a distinctive manner of imagining the real").

⁶⁹ For an urgent call for Western theorists to keep in mind "Chinese reality," elusive as it may be, see Zhang Longxi, *Western Theory and Chinese Reality*, 19 *Critical Inquiry* 105 (1992).

⁷⁰ That is, the objects of Orientalist knowledge fulfill its prophecies by embracing it. Cf. Said, *Orientalism*, supra note 56, at 325 ("The modern Orient, in short, participates in its own Orientalizing.").

⁷¹ Santos, supra note 10, at 472-73 (1995). To be sure, like much of the literature that takes globalization as its reference point, Santos envisions his "interlegality" as a largely new, peculiarly postmodern form of legality, but the phenomenon is hardly new, although it is perhaps more pronounced today. Compare, e.g., H. Patrick Glenn, *North America as a Medieval Legal Construction*, 2 *Global Jurist Advances* 1 (2002), at <http://www.bepress.com/gj/advances/vol2/iss1/art1/> (likening the legal architecture of post-NAFTA North America to that of medieval Europe, with jurisdictional relations that are primarily "horizontal rather than vertical ... provisional rather than definitive ... and contrapuntal rather than conflictual") with Harold Berman, *Law and Revolution: The Formation of the Western Legal Tradition* 10 (1983) ("Perhaps the most distinctive feature of the Western legal tradition is the coexistence and competition within the same community of diverse jurisdictions and diverse legal systems."). For an emphatic challenge to the conventional view that China - and by implication, Chinese law - exist in millennial isolation from the rest of the world, see Joanna Waley-Cohen, *The Sixtants of Beijing: Global Currents in Chinese History* (1999). See also Lionel M. Jensen, *Manufacturing Confucianism: Chinese Traditions and Universal Civilization* (1997) (arguing that what we understand as "Confucianism" today is in fact a joint Sino-Western invention). For a recent analysis in comparative law of the intersubjectivity of Latin American and European legal understandings, see Jorge L. Esquirol, *The Fictions of Latin American Law (Part I)*, 1997 *Utah L. Rev.* 425 (analyzing the representation of Latin American law as "European" in the work of Rene David and suggesting that this "fiction" of European-ness has been internalized by Latin American jurists).

⁷² Santos, supra note 10.

intervention could proceed through international law as well, with an analysis of the legal construction of particularistic national identities and their relationship to "universal" international norms, for example.⁷⁷

III. Legal Construction of the National Subject

Where it is anything but a fiction, the opposition traditionally established between Orient and Occident is met nowhere more clearly than in the domain of law.⁷⁸

- Jean Escarra

The core of this Article is a comparative analysis of two legal subjects, the American and the Chinese.⁷⁹ Yet it is hardly self-evident what role - if any - the law plays in the formation of the nationally and culturally marked subject. Section A first describes the so-called constitutive view of law. Section B analyzes the ways in which the national subject is produced in part through legal discourses.

A. Law as Constitutive

The West ... is not to be found by recourse to a compass.⁸⁰

- Harold J. Berman

Functionalist students of comparative law have a fairly thin view of law and hence no account of the ways in which law participates in the construction of our social worlds and, ultimately, of ourselves. Deconstructing the binary opposition that lawyers posit between "law" and "society," Robert Gordon argues that law is in fact "omnipresent in the very marrow of society," and law-making institutions are among "the primary sources of pictures of order and disorder, virtue and vice, reasonableness and craziness."⁸¹ Indeed, in Gordon's legal epistemology,

The power exerted by a legal regime consists less in the force that it can bring to bear against violators of its rules than in its capacity to persuade people that the world described in its images is the only attainable one in which a sane person would want to live.⁸²

This view that law is an inextricable part of the social world - often dubbed the "constitutive" view of law - accords law much power, but it is not the statist power of positive law.⁸³ Law matters, even terribly, but not always in officially sanctioned ways, and it certainly does not occupy a privileged place in the regulation of the world.⁸⁴

Consider the difference between the constitutive and positivist views of law in light of the Coase Theorem of law-and-economics, for example. The theorem posits that even when parties do not resort to courts, they bargain "in the shadow of the law" in the sense that they take their legal entitlements as the baseline for negotiation.⁸⁵ Challenging this assumption, Robert Ellickson's ethnographic study of California ranchers' dispute settlements provides

⁸⁰ Berman, *supra* note 71, at 2.

⁸¹ Robert Gordon, *Critical Legal Histories*, 36 *Stan. L. Rev.* 57, 109 (1984).
⁸² *Id.*

⁸³ For constitutive accounts of law, see, for example, Patricia Ewick, *The Common Place of Law: Stories from Everyday Life* (1998); Foucault, *Discipline and Punish*, *supra* note 56; Alan Hunt, *Explorations in Law and Society: Toward a Constitutive Theory of Law* (1993); Paul Kahn, *The Cultural Study of Law* (1999); Paul Kahn, *The Reign of Law: Marbury v. Madison and the Construction of America* (1997); *Law in Everyday Life* (Austin Sarat & Thomas R. Kearns eds., 1993); and Sally Engle Merry, *Getting Justice and Getting Even: Legal Consciousness Among Working-Class Americans* (1990). For a theoretical review of this literature, see Naomi Mezey, *Out of the Ordinary: Law, Power, Culture, and the Commonplace*, 26 *Law & Soc. Inquiry* 145 (2001).

⁸⁴ Indeed, law is not always and only constitutive, even if it has the capacity to be so sometimes (even often); law can also fail. See Kitty Calavita, *Blue Jeans, Rape, and the "De-Constitutive" Power of Law*, 35 *Law & Soc'y Rev.* 89 (2001); cf. *infra* text accompanying notes 114-116.

⁸⁵ See Ronald Coase, *The Problem of Social Cost*, 3 *J.L. & Econ.* 1 (1960); cf. Robert Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of Law: The Case of Divorce*, 88 *Yale L.J.* 950 (1979).

⁷³ For accounts of the Confucianization of Chinese law, see Derk Bodde & Clarence Morris, *Law in Imperial China* (1967), and Ch'u T'ung-tsu, *Law and Society in Traditional China* (1961).

⁷⁴ See Alford, *Law? What Law?*, *supra* note 14, at 48.

⁷⁵ Patrick Glenn, *Harmonization of Law, Foreign Law and Private International Law*, 1 *Eur. Rev. Private L.* 47, 63 (1993).

⁷⁶ Cf. George Bermann, *Comparative Law in the New European Community*, 21 *Hastings Int'l & Comp. L. Rev.* 865, 869 (1998) (observing the need for new comparative methodologies "in an unaccustomed environment shaped by new international legal processes").

⁷⁷ See David Kennedy, *New Approaches to Comparative Law: Comparativism and International Governance*, 1997 *Utah L. Rev.* 545. Postcolonial approaches seem to have claimed a relatively larger presence in international law than comparative law. Indeed, a comprehensive bibliography is no longer possible within the confines of a footnote, but examples in the field include Annelise Riles, *The Network Inside Out* (2000); Padideh Ala'i, *The Legacy of Geographical Morality and Colonialism: A Historical Assessment of the Current Crusade Against Corruption*, 33 *Vand. J. Transnat'l L.* 877 (2000); Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 *Harv. Int'l L.J.* 1 (1999); Antony Anghie, *On the Indians Lately Discovered and Sixteenth-Century International Law*, 92 *Am. Soc'y Int'l L. Proc.* 374 (1998); Nathaniel Berman, *In the Wake of Empire*, 14 *Am. U. Int'l L. Rev.* 1521 (1999); Lan Cao, *Corporate and Product Identity in the Postnational Economy: Rethinking U.S. Trade Laws*, 90 *Cal. L. Rev.* 401 (2002); Anupam Chander, *Diaspora Bonds*, 76 *N.Y.U. L. Rev.* 1005 (2001); Karen Engle, *Female Subjects of Public International Law: Human Rights and the Exotic Other Female*, 26 *N. Eng. L. Rev.* 1509 (1992); James Thuo Gathii, *Neoliberalism, Colonialism and International Governance: Decentering The International Law of Governmental Legitimacy*, 98 *Mich. L. Rev.* 1996 (2000); James Thuo Gathii, *International Law and Eurocentricity*, 9 *Eur. J. Int'l L.* 184 (1998); Ratna Kapur, *The Tragedy of Victimization Rhetoric: Resurrecting the "Native" Subject in International/Post-Colonial Feminist Legal Politics*, 15 *Harv. Hum. Rts. J.* 1 (2002); Lydia Liu, *Legislating the Universal: The Circulation of International Law in the Nineteenth Century, in Tokens of Exchange: The Problem of Translation in Global Circulations* 127 (Lydia H. Liu ed., 1999); Tayyab Mahmud, *Postcolonial Imaginaries: Alternative Development or Alternatives to Development?*, 9 *Transnat'l L. & Contemp. Probs.* 25 (1999); Edward Said, *Nationalism, Human Rights, and Interpretation, in Freedom and Interpretation* 175 (Barbara Johnson ed., 1992).

⁷⁸ Jean Escarra, *Chinese Law: Conception and Evolution, Legislative and Judicial Institutions, Science and Teaching* 9 (Gertrude R. Browne trans., 1936).

⁷⁹ See *infra* Part IV.

examples of ranchers' imperfect knowledge of the law. According to Ellickson, the ranchers believe, "almost as a proposition of natural law," that when a highway collision involving livestock takes place in an open range area, it is the owner of the livestock who "has the rights."⁸⁶ In fact, however, "all legal precedent on the issue indicates that the cattlemen's folklore on this subject is simply wrong."⁸⁷

Ellickson's study provides a dose of much-needed skepticism toward "legal centralism," or the privileging of law as a form of social control.⁸⁸ Nevertheless, the fact that the ranchers get the law "wrong" does not necessarily prove law's irrelevance, for ranchers' ideas of law still shape the social landscape - even if the law is technically "misinterpreted" or "misunderstood."⁸⁹ According to Ellickson, the ranchers' knowledge of the law of trespass is also incorrect, yet as one commentator puts it, legal "rights talk" on the range still has the power to turn "some incidents into 'trespass' and others into the 'realities of country life.'"⁹⁰

This interpretation turns the functionalist paradigm on its head: rather than being a disinterested umpire helping settle disputes brought before it, the law in fact creates them by giving them rhetorical form, such as "trespass."⁹¹ Without legal categories - however "misunderstood" - to accommodate them, "incidents" among ranchers might not be incidents at all, but merely life, part of the undifferentiated raw material of social existence.⁹²

Indeed, outside of comparative law critiques of functionalism have a distinguished pedigree, and some of the oldest critiques emphasize law's culturally productive power.⁹³ The criminal trial, for example, is an utter failure if viewed functionally:

⁸⁶ Robert Ellickson, *Order Without Law: How Neighbors Settle Disputes* 82 (1991).

⁸⁷ *Id.* at 88.

⁸⁸ *Id.*

⁸⁹ This focus on law's interpretation is not simply the legal realist distinction between "law on books" and "law in action," with the latter privileged as (more) "real." Cf. Roscoe Pound, *Law in Books and Law in Action*, 44 *Am. L. Rev.* 12 (1910). Rather, the law matters also in a third modality, that of "law in minds," to use William Ewald's apt phrase. William Ewald, *Comparative Jurisprudence (I): What Was It Like to Try a Rat?*, 143 *U. Pa. L. Rev.* 1889, 2111 (1995). That is, beyond the dichotomy of law-as-written and law-as-enforced, it also matters what people think the law is, how ordinary people understand it - however "mistakenly." See also James Q. Whitman, *The Moral Menace of Roman Law and the Making of Commerce*, 105 *Yale L.J.* 1841, 1888 (1996) ("We must know the work of learned jurists - but we must read that work, at least some of the time, through lay eyes.")

⁹⁰ Barbara Yngvesson, *Beastly Neighbors: Continuing Relations in Cattle Country*, 102 *Yale L.J.* 1787, 1798 (1993). Needless to add, although accepting the social world as constituted in legal categories restricts our choices by limiting our ability to imagine some (though certainly not all) alternative social worlds, it does not deprive us of all agency. Laura Nader's "user theory" of law, for example, emphasizes the ways in which resourceful plaintiffs can manipulate the law to their own advantage. Laura Nader, *The Plaintiff: A User Theory*, in *The Life of the Law: Anthropological Projects* 168 (2002).

"the rules of evidence are a woefully inefficient tool of investigation, the definitions of criminal responsibility rarely accord with sensible psychology, and the criminal sentence often fails to serve any social purpose."⁹⁴ In the words of the legal realist Thurman Arnold, "the only function which the criminal trial can perform is to express currently held ideals about crime and about trials." States Arnold.⁹⁵ Obviously, therefore, the public administration of criminal justice is not a method of controlling crime. It is rather one of the problems which must be faced by those who desire to control crime. Without the drama of criminal trial, it is difficult to imagine on just what institution we would hang our conflicting ideals of public morality.⁹⁶

In this view, law is primarily a text in which we inscribe our ideals. Its "function," if indeed we are to impute a function to it, is expressing who "we" are, or would like to imagine ourselves to be.⁹⁷

⁹¹ June Starr and Jane Collier wonder, "what is the anthropology of law if we doubt that legal systems settle conflicts?" Starr & Collier, *History and Power in the Study of Law*, *supra* note 42, at 5. The response to their rhetorical question is that law does not simply arise as an answer to problems emanating from society, as functionalists would claim. Instead, law often serves "functions" that it creates for itself. For analyses of the social productivity of law, see, for example, Michel Foucault, *Discipline and Punish*, *supra* note 57 (arguing that the main effect of modern penal institutions is the production, rather than elimination, of criminality); Michel Foucault, *On Popular Justice: A Discussion with the Maoists*, in *Power/Knowledge: Selected Interviews and Other Writings 1972-1977*, at 35 (1980) [hereinafter Foucault, *On Popular Justice*] ("The bourgeois judicial state apparatus, of which the visible, symbolic form is the court, has the basic function of introducing and augmenting contradictions among the masses."); Michel Foucault, *The History of Sexuality: Volume One* (Robert Hurley trans., 1978) (arguing that sexuality is the effect of attempts to regulate and repress it); Mark Kelman, *Consumption Theory, Production Theory, and Ideology in the Coase Theorem*, 52 *S. Cal. L. Rev.* 669, 677 (1979) (observing that legal liability rules always "inevitably affect tastes, which simply cannot be treated as independent, ahistorical, private psychic events").

⁹² As a more notorious illustration, consider the doctrine of standing. By requiring that plaintiffs show "actual injury" and then designating some injuries as "actual" and others as merely "ideological," the law again in effect produces injuries where none might have existed before its intervention. Conversely, it also delegitimizes other "injuries," some of which undoubtedly seemed perfectly "actual" to the injured themselves. See *Sierra Club v. Morton*, 405 U.S. 727 (1972) (denying standing to plaintiffs whose injuries are "ideological"). For a theoretical analysis of "injury" as validating a claim to (legal) subjectivity, see Wendy Brown, *States of Injury: Power and Freedom in Late Modernity* (1995).

⁹³ Perhaps the most notable exception to the wide adoption of functionalism within the discipline of comparative law is Alan Watson, who has been an ardent foe of functionalism for decades. He does not, however, subscribe to the constitutive theory of law. On the contrary, he views law as a system of technical rules that frequently make little or no difference in the "real" world. According to Watson, in the West the rules of private law have been and are in large measure out of step with the needs and desires of society and even of its ruling elite; to an extent which renders implausible the existing theories of legal development and of the relationship between law and society.

Alan Watson, *Society and Legal Change*, at ix (1977). For a committed functionalist, a truly dysfunctional law would be an oxymoron, while Watson insists on the contrary: "The ability and readiness of society to tolerate inappropriate private law is truly remarkable." *Id.*; see also Alan Watson, *Legal Transplants: An Approach to Comparative Law* (1974).

B. Law and Formation of the National Subject

To create a legal order is to write into law a sense of national unity and purpose ...⁹⁸

- June Starr & Jane Collier

The more different the cultural and historical context, the easier it is to see the limits of functionalism. As an example of legal proceedings that hardly lend themselves to a functionalist analysis, consider the practice in medieval Europe of prosecuting animals. Explaining in a functionalist framework why the medieval French chose to try rats, for example, would require considerable ingenuity. How would one even begin to frame the inquiry? ("How did the French deal with the problem of criminal rodents in the Middle Ages?" Or, "How did medieval French law address cross-species disputes?") A more culturally specific analysis is surely required: What were the assumptions that supported these trials? What makes them conceivable in certain places at certain times, but not others?⁹⁹ As historian Joseph Needham observes, Chinese cultural assumptions, in contrast to those of medieval Europe, provided little support to the idea of trying animals: "The Chinese were not so presumptuous as to suppose that they knew the laws laid down by God for non-human beings so well that they could proceed to indict an animal at law for transgressing them."¹⁰⁰

Observing connections between law and cultural practices is in fact not new even to the comparative lawyer. From the Enlightenment until the arrival of functionalism and its promise of a neutral social scientific paradigm, such observations provided the main theoretical grounding for compara-

tive law. Put simply, in this view each nation was defined by a unique cultural essence of which its laws were merely a reflection. Montesquieu's *Spirit of Laws* is the locus classicus for this culturalist mode of analysis: "The political and civil laws of each nation ... should be adapted in such a manner to the people for whom they are framed, that it is a great chance if those of one nation suit another."¹⁰¹

To a contemporary observer, this is cultural essentialism pure and simple, the cardinal sin of postmodern intellectual politics.¹⁰² Yet to the extent that postcolonial theory criticizes the universalist pretensions of functionalism and re-focuses our attention back on national identity, do we risk simply returning to the earlier culturalist analyses a la Montesquieu? Is postcolonialism just another case of taking one step forward and two steps back? In fact, combining a postcolonial analysis with the constitutive view of law radicalizes the received culturalist approach. For when the constitutive view is extended beyond the law's role in the construction of our social worlds to include its role in the construction of ourselves, as subjects, then law does not simply mirror "our" pre-given national identity but enacts that identity.¹⁰³ That is, the legal subject's consciousness is constituted in part by the categories enshrined in law. Therefore, no subject stands outside the law, and interpreting legal categories is not just something that we do to law; in the process, law also aids - and limits - us in our process of "self"-understanding.¹⁰⁴

Today, there are many analyses of the discursive production of racial, gender, and sexual identi-

⁹⁴ Guyora Binder & Robert Weisberg, *Cultural Criticism of Law*, 49 *Stan. L. Rev.* 1149, 1168 (1997) (summarizing Thurman Arnold's view of the criminal trial).

⁹⁵ Thurman W. Arnold, *The Symbols of Government* 147-48 (1935) (emphasis added).

⁹⁶ *Id.*

⁹⁷ To be sure, Nietzsche, the great philosopher of anti-morality, claims the exact opposite - law reflects, not who we are, but who we are not: It is a serious mistake to study the penal code of a people as if it gave expression to the national character. The laws do not betray what a people are but rather what seems to them foreign, strange, uncanny, outlandish. The laws refer to the exception to the morality of mores, and the severest penalties are provided for what accords with the mores of a neighboring people.

Friedrich Nietzsche, *The Gay Science* 109 (Walter Kaufmann trans., 1974) (1887). Yet whether people identify with their laws or not - whether they provide a model or a kind of anti-model against which to define oneself - in either event a purely functional analysis will miss the point.

⁹⁸ Starr & Collier, *History and Power in the Study of Law*, *supra* note 42, at 11.

⁹⁹ Cf. Ewald, *supra* note 89.

¹⁰⁰ Joseph Needham, *Science and Civilization in China* 518 (1956); see also Robert Darnton, *The Great Cat Massacre* 77 (1984) (recounting a mock-trial of cats in eighteenth-century Paris); Paul Schiff Berman, *An Observation and a Strange but True "Tale": What Might the Historical Trials of Animals Tell Us About the Transformative Potential of Law in American Culture?*, 52 *Hastings L.J.* 123 (2000).

¹⁰¹ Charles Secondat de Montesquieu, *The Spirit of the Laws*, ch. 3 (1748). A century later, Friedrich von Savigny analyzed the workings of the *Volksgeist*, "the spirit of the people," which is a variation on a theme: "It is the spirit of a people living and working in common in all individuals, which gives birth to positive law, which therefore is to the consciousness of each individual not accidentally but necessarily one and the same." Friedrich von Savigny, *System of the Modern Roman Law* 12 (William Holloway trans., 1867). For a discussion of Savigny and the so-called Historical School in Germany, and their views of the complex relationship between the German *Volksgeist* and Roman law, see James Q. Whitman, *The Legacy of Roman Law in the German Romantic Era* (1990).

¹⁰² Cf. Annelise Riles, *Aspiration and Control: International Legal Rhetoric and the Essentialization of Culture*, 106 *Harv. L. Rev.* 723 (1993).

¹⁰³ That is, law is performative. "Performativity", popularized by Judith Butler's analysis of sex and gender, has become perhaps the most important postmodern analytic in understanding how the discourses of race, gender, and sexuality constitute us as subjects. See generally *infra* note 104. It is noteworthy that Butler draws expressly on Austin's theory of "performative utterances," the key illustrations of which are legal statements. Law is perhaps not only incidentally but paradigmatically performative. See generally J.L. Austin, *How to Do Things with Words* (1962); J.L. Austin, *Performative Utterances*, in *Philosophical Papers* 220 (1961).

¹⁰⁴ In the words of Ian Haney Lopez, legal classifications of race both "legitimate the practice of categorization" and limit "the conceptions of who we are." Ian Haney Lopez, *White by Law* 126 (1996); cf. Mark Kelman, *A Guide to Critical Legal Studies* 255 (1987) ("Races may be defined in America in some significant part by their relationship to anti-discrimination law in addition to constituting an independent influence on that body of law.").

ties, for example.¹⁰⁵ Summarized crudely, the insight most critical to comparative law is that our seemingly fixed, real, and ontological selves are neither fixed nor ontologically stable, but rather a complex of socially and historically contingent identities, defined most notably by discourses of race, gender, and sexuality. Those discourses consist partly of law, and, in this, law "subjects" us - defines us in part as subjects.

Indeed, some of the most important accounts of subject formation emphasize how the social subject is produced through the language and practices of the law. For Foucault, for example, law is an important discourse that creates the modern subject as its effect.¹⁰⁶ The French philosopher Louis Althusser similarly insists that the fundamental achievement of legal ideology is the notion that "man is by nature a subject,"¹⁰⁷ or, as he elaborates, law is one of the "rituals of individual recognition, which guarantee for us that we are indeed concrete, individual, distinguishable and (naturally) irreplaceable subjects."¹⁰⁸ As an illustration of law's recognition of individuals as its subjects, Althusser provides the notorious example of "the most commonplace everyday police (or other) hailing: "Hey, you there!" "¹⁰⁹ He elaborates:

Assuming that the theoretical scene I have imagined takes place in the street, the hailed individual will turn round. By this mere one-hundred-and-eighty-degree physical conversion, he becomes a subject. Why? Because he has recognized that the hail was "really" addressed to him, and that "it was really him who was hailed" (and not someone else). Experience shows that the practical telecommunication of hailings is such that they hardly ever miss their man: verbal call or whistle, the one hailed always recognizes that it is really him who is being hailed.¹¹⁰

In this scene, the subject is occasioned "through language, as the effect of the authoritative voice

that hails the individual."¹¹¹ While law is not the only means of "hailing,"¹¹² it provides a paradigmatic example of a modern apparatus of "subjection."¹¹³ Of course, the scene of a policeman hailing a pedestrian in the street is ultimately allegorical. A "concrete individual" does not, one day, magically turn into a "subject" upon an accidental encounter with a policeman in the street. Rather, everyone is "always-already a subject, appointed as a subject in and by the specific familial ideological configuration in which [he or she] is 'expected' once [he or she] has been conceived."¹¹⁴ Even before we are born, the law is waiting for us, with birth certificates as well as sets of social security numbers ready to go the moment we enter the world - not to mention family law and the kinship structures it defines for us.

Of course, however social subjects are produced - legally or otherwise - they are never fully achieved. For one thing, we are all subjects of many discourses, or multiply interpellated.¹¹⁵ The criminal is perhaps the clearest example of a (partially) failed legal interpellation, a subject who has not internalized all of law's interdictions. Yet no criminal can - or would even want to - flout all laws, as law is simply so pervasive in our social worlds that it

¹⁰⁵ The literature is voluminous. As representative examples, consider the following. In Butler's formulation, "gender is not a performance that a prior subject elects to do, but gender is performative in the sense that it constitutes as an effect the very subject it appears to express." Judith Butler, *Imitation and Gender Subordination*, in *Inside/Out: Lesbian Theories, Gay Theories* 24 (Diana Fuss ed., 1991); see also Judith Butler, *Bodies That Matter: On the Discursive Limits of "Sex"* (1993); Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (1990). Perhaps the strongest statement on the discursive production of "race" is that of Anthony Appiah: "The truth is that there are no races ... [Where race] works, it works as an attempt at metonym for culture, and it does so only at the price of biologizing of what is culture, ideology." Anthony Appiah, *In My Father's House: Africa in the Philosophy of Culture* 45 (1992). On the discursive construction of sexual orientation, see, for example, Eve Kosofsky Sedgwick, *Epistemology of the Closet* (1990), and Monique Wittig, *The Straight Mind and Other Essays* (1992). Needless to add, by arguing that subjects are constituted by performance/culture/discourse, none of the above theorists intends to suggest that they are therefore somehow "not real." Indeed, insofar as "the real" is constituted by them, performance/culture/discourse all have profound - often grievous - material implications for their subjects.

¹⁰⁶ To be sure, law is only one discourse, in the Foucaultian sense, among many. From a broader perspective, Foucault's oeuvre is a study of the ways in which human beings have become subjects of various modern discourses, such as law, medicine and science. As Foucault observes in *Discipline and Punish*, the "soul," or subjectivity, that we believe to inhabit the body, is in fact "the effect and instrument of a political anatomy; the soul is the prison of the body." Foucault, *Discipline and Punish*, supra note 56, at 30. While I read Foucault's history of the emergence of modern penal institutions as a legal analysis, Foucault himself frequently adopts a narrower, positivist conception of law where law seems to constitute little more than the express command (or, more frequently, prohibition) of the sovereign. As Duncan Kennedy observes, Foucault typically opposes this narrowly operating "juridical power" to "disciplinary power," viewing juridical power as "only the technical form" or 'crystallization' of processes of power that take place at a distance from legal institutions." Duncan Kennedy, *The Stakes of Law*, or *Hale and Foucault*, in *Sexy Dressing Etc.* 83, 120 (1993); see also Hugh Baxter, *Bringing Foucault into Law and Law into Foucault*, 48 *Stan. L. Rev.* 449 (1996) (noting Foucault's tendency toward legal positivism). Indeed, in an interview on the possibility of popular Maoist justice, for example, Foucault reduces law to "the bourgeois judicial state apparatus." Foucault, *On Popular Justice*, supra note 91. From the perspective of Foucault's larger enterprise, however, it seems more accurate to view law as one of several modern disciplinary discourses rather than merely the express command of the state. For a deployment of such a Foucaultian understanding of law, see Kendall Thomas, *Beyond the Privacy Principle*, 92 *Colum. L. Rev.* 1431 (1992).

¹⁰⁷ Althusser, supra note 67, at 115 n.15. In Althusser's view, the seeming obviousness the "you and I are subjects" is the very effect of ideology, so that the notion of an "ideological subject" is itself "a tautological proposition." *Id.* at 116. Turning "concrete individuals" into subjects is what ideology does. By comparing Foucault's "discourse" to Althusser's "ideology," I am not implying an identity between the two concepts. Indeed, Foucault intends his notion of "discourse" to complicate a simple Marxist dichotomy between the material base and ideology. Elaborating the theoretical relationship between discourse and ideology - though a productive enterprise - is far beyond the scope of this Article.

¹⁰⁸ *Id.* at 117.

¹⁰⁹ *Id.* at 118.

¹¹⁰ *Id.*

¹¹¹ Judith Butler, *The Psychic Life of Power: Theories in Subjection* 5 (1997).

can be violated only at chosen points at chosen times; to exist in complete, continuous violation of all law would be to be mad. Consider also Holmes's notoriously amoral "bad man."¹¹⁶ He is no criminal, nor is he insane, but his instrumental approach to law ("How much can I get away with?") certainly manifests a fractured legal subjectivity, a configuration where homo juridicus meets homo economicus. Being a legal subject does not imply being a perfect legal subject or being only law's subject.¹¹⁷

If we accept that law defines in part who and what we are as subjects, then laws are part of a people's identity as a people. It is a commonplace of postcolonial theory that "nations" and "peoples" do not exist as inert facts of nature any more than our ostensibly individual selves do; nations are, in Benedict Anderson's evocative conceptualization, "imagined communities."¹¹⁸ If anything, China is even more of an imagined community than most other nations. For the greater part of its history, China has in fact not existed as a unified country, yet even during extensive periods of disunity the notion of a single China has persisted as a historical

and cultural ideal demanding to be realized.¹¹⁹ We should thus expect that legal discourses have played a role in the process of creating and maintaining the identity of the normative universe known as "China."¹²⁰

But before trying to understand Chinese legal understandings of "China," the first analytic move should be to consider how we imagine ourselves legally, and how those conceptions draw support from particular notions of Chinese law.

IV. Legal Subjects of Orientalism

The education of colonial subjects complements their production in law.¹²¹

- *Gayatri Chakravorty Spivak*

Structurally, Orientalism as a discourse entails the projection onto the Oriental Other of various sorts of things that "we" are not. Given law's role in the constitution of subjects and national "imagined communities," how do Americans imagine themselves as legal subjects? How does the American legal subject (Section A) differ from the Chinese legal subject (Section B)? A fully contextualized genealogy of legal Orientalism is hardly possible within the confines of a single article. What follows is a sketch of the broad outlines of one possible genealogy, focusing on the ways in which legal subjectivity has constituted a standard for measuring non-Western societies' - here, China's - civilizational fitness to enter into "law's republic."¹²²

A. American Legal Subject

Americans are a very legal people indeed, to the point that to say so is a cliché. In the words of Alexis de Tocqueville, Americans "borrow, in their daily controversies, the ideas and even the language, peculiar to judicial proceedings."¹²³ As the

¹¹² Althusser refers to the process of subject-formation also as both "interpellation" and "hailing." Kaja Silverman distinguishes between them by viewing the former as an outcome and the latter as the form of address whereby the outcome is achieved. See Kaja Silverman, *The Subject of Semiotics* 48 (1983). As Silverman puts it evocatively, "interpellation occurs when the person to whom the agent speaks recognizes him or herself in that speech and takes up subjective residence there." *Id.* at 49.

¹¹³ Althusser is acutely aware of "the ambiguity of the term subject," meaning both "a free subjectivity ... responsible for its actions" as well as "a subjected being, who submits to a higher authority, and is therefore stripped of all freedom." Althusser, *supra* note 67, at 123. Paradoxically, law can make us "free" only if we submit to it.

In Althusser's example, the law hails the individual from above, in the authoritative voice of a policeman. While Althusser does not contemplate the possibility that law emanates from many directions, it is possible, as Janet Halley observes, for law to interpellate us - and thus subject us, in both relevant senses - "from below" as well: in the hands of activists who advocate legally on behalf of identity-based groups such as gays and lesbians, "identity can be deployed to harm its own subjects." See Janet Halley, *Gay Rights and Identity Imitation: Issues in the Ethics of Representation*, in *The Politics of Law: A Progressive Critique* 115, 140 (David Kairys ed., 3d ed. 1998).

Just as Foucault recognizes the multiplicity of overlapping discourses - from the juridical to the medical to the religious - so Althusser too notes the existence of several "ideological state apparatuses," of which law is only one. It is noteworthy, however, that law is one of the two main examples of interpellation he provides. His other chief example is that of religious ideology and interpellation through the divine voice of God. Althusser, *supra* note 67, at 120-24. Indeed, there are several analyses of the emergence of modern "rule of law" as the establishment of a kind of secular religion. See Sanford Levinson, "The Constitution" in American Civil Religion, in *The Supreme Court Review* 123, 151 (Philip Kurland & Gerhard Casper eds., 1979); Thomas C. Grey, *The Constitution as Scripture*, 37 *Stan. L. Rev.* 1 (1984); Jonathan Macey, *Civic Education and Interest Group Formation in the American Law School*, 45 *Stan. L. Rev.* 1937, 1938 (1993) (observing tendency to view the legal profession as a quasi-religious "calling").

¹¹⁴ Althusser, *supra* note 67, at 119.

¹¹⁵ Norma Alarcon, *The Theoretical Subject(s) of "This Bridge Called My Back" and Anglo-American Feminism*, in *Making Face, Making Soul: Haciendo Caras* 356 (Gloria Anzaldúa ed., 1990).

¹¹⁶ See Oliver Wendell Holmes, *The Path of the Law*, 10 *Harv. L. Rev.* 457, 459 (1897).

¹¹⁷ This, in turn, is only a corollary of the general poststructuralist observation that subjects are never complete.

¹¹⁸ Benedict Anderson, *Imagined Communities: Reflections of the Origin and Spread of Nationalism* (1983).

¹¹⁹ Mark Elvin, *The Pattern of the Chinese Past* (1973); Andrew L. March, *The Idea of China: Myth and Theory in Geographic Thought* 118 (1974) (analyzing the "parts of fact, theory and myth that go into ideas about China"). For a study of the emergence of modern Chinese nationalism written from a postcolonial perspective, see Prasenjit Duara, *Rescuing History from the Nation: Questioning Narratives of Modern China* (1995).

¹²⁰ Of course, legal subjects are not the products merely of domestic laws, but also of international law, which indeed demands cultural differentiation among "nations." As Nathaniel Berman observes, "groups' identities and tactics come to be defined by themselves and by international authorities in response to a cultural conjecture partly constructed by [the] categories [of international law]." Nathaniel Berman, *The International Law of Nationalism: Group Identity and Legal History*, in *International Law and Ethnic Conflict* 29 (David Wippman ed., 1998). In Santos's terms, this is an instance of "interlegality" of identity. Cf. text accompanying notes 70-71.

¹²¹ Spivak, *Can the Subaltern Speak?*, *supra* note 65, at 282.

¹²² Cf. Frank Michelman, *Law's Republic*, 97 *Yale L.J.* 1493 (1988).

¹²³ 1 Alexis de Tocqueville, *Democracy in America* 280 (Vintage Classics 1990) (1835).

French observer concluded, "Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question."¹²⁴ This is perhaps not very surprising when one considers that America's foundational myths are also peculiarly legal.

As a political idea, the United States embodies the ambitions of the Enlightenment, which also gave birth to "modern" law: the first French civil code, the first Declaration of the Rights of Man and, finally, the United States Constitution - the closest thing to a people's effort to negotiate a real-life "social contract." Even ordinary Americans' faith in law's redemptive power often rivals that of the Enlightenment philosophers. Perhaps the most extraordinary example of such faith is Frederick Douglass: faced with a "state legal order no more likely to hold slavery unconstitutional than to declare the imminent kingship of Jesus Christ on earth,"¹²⁵ a man born as a slave in antebellum America nevertheless believed in the ultimate unconstitutionality of slavery.¹²⁶

To an outsider today, it is almost equally remarkable to observe how Americans habitually invoke their constitutional rights. That they do so in apparently trivial contexts makes it only more remarkable. "You can't do that to me; it's unconstitutional," ordinary people protest in varied everyday situations, whether they are being bumped off an overbooked flight or overcharged for a purchase. The Constitution and the rights it guarantees - in the popular imagination if not in the courtroom - are simply part of what it means to identify as an American.¹²⁷

As a powerful historical example of Americans' attachment to law, consider the clash of legal traditions in Mexican California prior to its annexation to the United States in 1846. Anglo-American expa-

triate traders were dismayed at the Mexican legal institutions which they deemed inadequate for the purposes of contract enforcement.¹²⁸ Paradoxically, in their dealings among themselves the traders nevertheless continued using fastidiously drafted "legal" contracts (based on laymen's recollections) even when there was no prospect of their enforcement.¹²⁹ What was the point of going through such quasi-legal motions? David Langum suggests an answer in the Anglo-American expatriates' shared mercantile culture: To a significant extent that culture included law. It was for that reason that in the face of potential breakdown of contractual relations, these men could make technical legal claims on one another, claims of which they had no subjective hope of enforcement in the local courts, but with every hope that they could convince their opponent of the rightfulness of their positions.¹³⁰

De Tocqueville could hardly have asked for a better example of Americans who "borrow, in their daily controversies, the ideas and even the language, peculiar to judicial proceedings."¹³¹ Apparently unable to imagine commercial exchange apart from "contract," even in an extralegal setting these expatriate traders continued to conceptualize their commercial relations in Anglo-American legal terms. As an inseparable part of their conceptual apparatus, they carried "law" in their heads even into the alien territory of Mexican California.¹³²

To be sure, most Americans' relationship to law is deeply ambivalent. A strong attachment to law - one observer diagnoses this condition as "hyperle-

¹²⁴ *Id.*

¹²⁵ Cover, *supra* note 67, at 39.

¹²⁶ In Douglass's own words,

I was conducted to the conclusion that the Constitution of the United States - inaugurated to "form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty" - could not well have been designed at the same time to maintain and perpetuate a system of rapine and murder-like slavery, especially as not one word can be found in the Constitution to authorize such a belief.

Frederick Douglass, *The Life and Times of Frederick Douglass* 261-62 (R. Logan ed., 1967). Indeed, Douglass's identification with law has in turn become part of American cultural identity. See Priscilla C. Wald, *Neither Citizen Nor Alien: National Narratives, Frederick Douglass, and the Politics of Self-Definition*, in *Constituting Americans: Cultural Anxiety and Narrative Form* 14 (1995) (analyzing a series of nineteenth-century Supreme Court cases together with Douglass's autobiography as constitutive of American identity).

¹²⁷ In Lawrence Friedman's phrase, Americans have increasingly come to expect from law "total justice." See Lawrence M. Friedman, *Total Justice* (1994). On the increasing insistence on legal rights, see also Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (1991).

¹²⁸ David J. Langum, *Law and Community on the Mexican California Frontier: Anglo-American Expatriates and the Clash of Legal Traditions, 1821-1846*, at 163-186 (1987).

¹²⁹ *Id.*

¹³⁰ *Id.* at 186.

¹³¹ de Tocqueville, *supra* note 123, at 280.

¹³² The expatriate traders were exceedingly self-conscious as well as self-righteous about how their attachment to law set them apart from, and above, the native Californios. The fact that *alcaldes*, the local Mexican officials roughly analogous to justices of the peace, performed a combination of judicial as well as administrative functions occasioned American cries of the violation of separation of powers. Langum, *supra* note 128, at 51. Similarly, the Mexican preference for conciliation over adjudication offended a growing Anglo-American emphasis on the need for judicial predictability and certainty as part of the legal infrastructure of capitalism. That this clash of legal values implicated deeply Americans' identity qua Americans is evident from the contemporaneous debate over proposals to create American "conciliation courts." In New York, such a proposal was met with the summary objection that "such courts belonged only to a despotic government, where the people were ignorant, and a superior class over them, and not for our free Yankee population; who consider they are competent to judge for themselves in such matters." W. Bishop & W. Attree, *Report on the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of New York* 58 (1846), quoted in Langum, *supra* note 128, at 143. Asked to consider conciliation as a mandatory procedure, the California Supreme Court in 1850 noted in similarly supercilious language that while conciliation was perhaps suitable for Mexicans, "amongst the American people it can be looked upon in no other light than as a useless and dilatory formality." *Von Schmidt v. Huntington*, 1 Cal. 55, 65 (1850). Ironically, today "alternative dispute resolution" represents, not backwardness, but the cutting edge of legal reform.

xis¹³³ - alternates with a fear of law. (Recall, for example, Learned Hand's terror at the prospect of being dragged to court: "As a litigant, I should dread a lawsuit beyond almost anything short of sickness and death."¹³⁴) Yet whether they view law as the promise of a better society or as vexatious litigation, or both, Americans' identification with law remains extraordinarily strong.¹³⁵ Numerous ethnographies describe American communities where the actual behavioral norm is the avoidance of formal law.¹³⁶ Yet, as Carol Greenhouse observes, even in the face of evidence to the contrary, "many Americans are ready to believe, almost to the point of insistence, in their own allegedly litigious character."¹³⁷

B. Chinese Non-Legal Non-Subject

With the Chinese law ... we are carried back to a position whence we can survey, so to speak, a living past, and converse with fossil men.¹³⁸

- Edward Harper Parker

If such is the self-understanding of the American legal subject, how do Orientalist discourses perceive the Chinese legal subject? Legal Orientalisms come in many varieties, such as classical European Orientalism described in Section 1 below and the American anti-immigration Orientalism of Section 2. Indeed, Orientalist views of China can be both negative and positive, as illustrated in Section 3. However, what the many Orientalisms described below share is a tendency to posit the Chinese as non-legal and lacking in subjectivity - effectively non-legal non-subjects.

1. European Legal Orientalism

"Europe" remains the sovereign, theoretical subject of all histories, including the ones we call "Indian," "Chinese," "Kenyan," and so on.¹³⁹

- Dipesh Chakrabarty

I begin the account of Chinese legal subjectivity, or its absence, by outlining Hegel's vision of China in his *Philosophy of History*. I do so without any implication that Hegel "invented" Orientalism or is

somehow singularly responsible for it. Uninterested in either accusing or excusing its author,¹⁴⁰ I use the *Philosophy of History* simply as a textual case study, for it happens to provide a truly classic statement of many Orientalist ideas that continue to structure the perception of Chinese law even today.

According to Hegel, "The history of the world travels from East to West, for Europe is absolutely the end of History, Asia the beginning."¹⁴¹ In Hegel's dual ontology, Oriental states "belong to mere space," or "un-Historical History," while the West exists in the "Form of time."¹⁴² According to Hegel, With the Empire of China History has to begin, for it is the oldest, as far as history gives us any information, and its principle has such substantiality, that for the empire in question it is at once the oldest and the newest. Early do we see China advancing to the condition in which it is found at this day, for as the contrast between objective existence and subjective freedom of movement within it, is still wanting, every change is excluded, and the fixedness of character which recurs perpetually takes the place of what we should call the truly historical.¹⁴³

¹³⁷ Carol J. Greenhouse, *Interpreting American Litigiousness, in History and Power in the Study of Law*, supra note 42, at 252. The point is ultimately not an empirical one about Americans' actual litigiousness. Rather, it is a claim about law's role in cultural representation and self-understanding. In the legal academy in particular, writers who question the role of law in causing social change are often angrily dismissed. When Gerald Rosenberg and Michael Klarman argued that Brown v. Board of Education had only a limited real-world effect on school segregation, the claim was met with immediate denunciations. Compare Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (1991) and Michael Klarman, Brown, Racial Change and the Civil Rights Movement, 80 Va. L. Rev. 7 (1994) with David J. Garrow, *Hopelessly Hollow History: Revisionist Devaluing of Brown v. Board of Education*, 80 Va. L. Rev. 151 (1994); see also Richard Abel, *Politics by Other Means: Law in the Struggle Against Apartheid, 1980-1994*, at 523 (1995) ("The centrality of law in the American labor, civil rights, feminist, welfare rights, consumer, environmentalist, and gay rights movements can tempt observers to parochial and ahistorical exaggerations of its capacity to effect social change.").

Legal elites' attachment to law is of course understandable in that it confirms their own significance. In this light, the extent to which "law" constitutes an important dimension of American national identity may well depend in part on one's social location. Reva Siegel, for example, observes that although the judicially eviscerated Equal Protection Clause no longer protects, "in this area of constitutional law, the nation articulates its identity aspirationally." Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 Stan. L. Rev. 1111, 1146 (1997). Notions of equal protection are certainly part of American-ness, but it is perhaps the classes that can afford to live without judicial protection that also most strongly identify with an Equal Protection Clause that does not in fact protect, as Siegel pointedly observes.

¹³⁸ Edward Harper Parker, *Comparative Chinese Family Law*, 8 China Rev. 67, 69 (1879).

¹³⁹ Chakrabarty, supra note 32, at 27.

¹⁴⁰ Cf. Spivak, *A Critique of Postcolonial Reason*, supra note 65, at 97-98 (elaborating a deconstructionist politics of reading whose "challenge is not to excuse, but to suspend accusation to examine with painstaking care if the protocols of the text contain a moment that can produce something that will generate a new and useful reading").

¹⁴¹ Georg Wilhelm Hegel, *The Philosophy of History* 103 (J. Sibree trans., 1956).

¹⁴² Id. at 105-06.

¹³³ Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. Rev. 4, 64 (1983) (contrasting elites' counterfactual perceptions of excessive litigation with empirical data and analyzing "elite ways of interpreting these phenomena").

¹³⁴ 3 Learned Hand, *Deficiencies of Trial to Reach the Truth of the Matter*, in *Lectures on Legal Topics (1921-22)*, at 89, 105 (James N. Rosenburg et al. eds., 1926).

¹³⁵ Or, in Duncan Kennedy's formulation, American legal thought generally displays "an odd combination of utter faith and utter distrust in law." Duncan Kennedy, *A Critique of Adjudication: Fin de Siecle* 73 (1997).

¹³⁶ See, e.g., M.P. Baumgartner, *The Moral Order of a Suburb* 127-28 (1988) ("The evidence from the suburbs suggests ... that the penetration of law into American life has been considerably more limited in its range and effect than is commonly believed."); Ellickson, supra note 86.

Hegel's statement of China's extraordinary stability is no doubt extreme, yet it has many historical variations.¹⁴⁴ In Marx's scathing metaphor, China "vegetates in the teeth of time,"¹⁴⁵ while Weber saw in Confucianism a religion that worshipped the status quo and thus radically impeded China's passage into modernity.¹⁴⁶

In Hegel's particular teleological view, History's end goal is the accomplishment of freedom, which coincidentally culminates in the political system of Prussia. In contrast, China, standing at the threshold of History, is the paradigmatic example of "Oriental Despotism." Despotism is in fact the natural form of government for the Chinese, for the simple reason that they do not exist as individual subjects. In Hegel's words, in China "all that we call subjectivity is concentrated in the supreme Head of the State,"¹⁴⁷ while "individuals remain mere accidents."¹⁴⁸ This despotism results in part from a confusion between family and state: "The Chinese regard themselves as belonging to the family, and at the same as children of the state."¹⁴⁹ By implication, the Chinese also lack a proper distinction between law and morality: moral dicta are expressed in the form of laws, but lacking subjectivity, the Chinese obey these laws merely as external forces, like children who fear parental punishment.¹⁵⁰

Analyzed as an Orientalist discourse, Hegel's account accomplishes several things. First, the purported fact that China is timeless and static implies

that the West is not.¹⁵¹ Second, imputing to the Chinese a lack of subjectivity and moral character suggests that Westerners do not lack those progressive qualities. Third, observing that the Chinese are confused about the real nature of "law" establishes the European legal ordering as proper. The Orientalist implications are not difficult to grasp: China is an anti-model and stands for everything that we would not wish to be - or admit to being. This is an entirely negative definition: China is basically just a "glimpse of what it itself is not," viz., we, the Occident.¹⁵²

2. American Legal Orientalism

Hegel, Marx, and Weber are classical European Orientalists whose work ultimately affirms the superiority of Western civilization and law.¹⁵³ However, they do not exhaust the universe of legal Orientalisms, which vary by historical and cultural context. The anti-immigrant Orientalism of nineteenth-century United States provides an example of a peculiarly American form of Orientalism.¹⁵⁴ As one historian of Chinese immigration observes, nineteenth-century Americans viewed almost every aspect of Chinese life as an illustration of their backwardness: "wearing white for mourning, purchasing a coffin while still alive, dressing women in pants and men in skirts, shaking hands with oneself in greeting a friend, writing up and down the page, eating sweets first and soup last, etc."¹⁵⁵

The usefulness of this particular Orientalist discourse lay in its role in justifying the legal exclusion of Chinese immigrants at that historical moment.

¹⁴³ Id. at 116.

¹⁴⁴ The view of China as existing in space but not in time finds a place even in Foucault. Borges's "Chinese encyclopaedia" leads Foucault to find a curiously atemporal culture "at the other extremity of the earth we inhabit, a culture devoted entirely to the ordering of space, but one that does not distribute the multiplicity of existing things into any of the categories that make it possible for us to name, speak, and think." Foucault, *The Order of Things*, supra note 3, at xix.

¹⁴⁵ Karl Marx on Colonialism and Modernization 323 (Shlomo Avineri ed., 1968); see also Marx on China, 1853-1860: Articles from the New York Daily Tribune (Dona Torr ed., 1951). For an elaboration of the theoretical place of China in Marx's thought, see Donald M. Lowe, *The Function of "China" in Marx, Lenin, and Mao* (1966).

¹⁴⁶ Weber, in particular, defines China in relentlessly negative terms, by what it is not. He attributes China's "failure" to develop a rational bourgeois capitalism to the "absence" of a dynamic religious ethic of the Protestant variety: "Chinese intellectual life remained completely static, and despite seemingly favorable conditions modern capitalism simply did not appear." Weber, supra note 18, at 55; cf. Max Weber, *The Protestant Ethic and the Spirit of Capitalism* (Talcott Parsons trans., 1992). While Weber has many fascinating local insights into Chinese law, his global view suffers from the essentially negative nature of his general approach. See generally Gary G. Hamilton, *Why No Capitalism in China? Negative Questions in Historical Comparative Research*, 1 J. Developing Societies 187 (1985).

¹⁴⁷ Hegel, supra note 141, at 113.

¹⁴⁸ Id. at 105. For a twentieth-century version of the enduring idea of Oriental Despotism, updated for the needs of the Cold War, see Karl A. Wittfogel, *Oriental Despotism: A Comparative Study of Total Power* (1957).

¹⁴⁹ Hegel, supra note 141, at 121.

¹⁵⁰ Id. at 111 ("Moral distinctions and requirements are expressed as Laws, but so that the subjective will is governed by these Laws as by an external force.").

¹⁵¹ The Orientalist emphasis on China's static nature is indeed a key component of China's negative definition; while the West is dynamic, changing, and progressive, China is forever stagnant. Most understandings of China, whether damning or praising, operate on the assumption of Chinese "immobilism," to borrow Derrida's term. See Jacques Derrida, *The Pit and the Pyramid: Introduction to Hegel's Semiology*, in *Margins of Philosophy* 69 (Alan Bass trans., 1982) [hereinafter Derrida, *The Pit and the Pyramid*]. Frozen in time, China never changes. And even if it does - well, plus ça change, plus c'est la même chose. The fact that China has gone through devastating revolutions, catastrophic famines, bloody rebellions, and violent dynastic transitions, and the like, ultimately fits into a predictable cycle of quasi-Nietzschean eternal recurrence. Consider, for example, Edward Parker's rather oxymoronic complaint that "Chinese legal changes" constitute a "monotonous history." Edward H. Parker, *The Principles of Chinese Law and Equity*, 22 Law Q. Rev. 190, 209 (1906). The notion of a changeless China is of course a fiction, for, as the historian Paul Cohen notes, "all societies undergo change all the time." Cohen, *Discovering History*, supra note 40, at 6. However, "the degree to which such change is deemed significant, is 'noticed,' is ultimately a relative matter, dependent upon what a particular historian living in a particular society at a particular time happens to regard as important." Id. As Cohen concludes, "because Westerners on the whole and Americans in particular happen to place a high cultural valuation on change, or at least certain forms of it, the vision of a nonchanging or trivially changing China is implicitly condescending." Id. For an important correction to Weber's version of the changeless-China thesis, see Thomas A. Metzger, *Escape from Predicament: Neo-Confucianism and China's Evolving Political Culture* (1977).

¹⁵² Haun Saussy, *Hegel's Chinese Imagination*, in *The Problem of a Chinese Aesthetic* 161 (1993).

Indeed, the text of a 1878 report by the California State Senate Committee on Chinese Immigration sounds as though it had been excerpted directly from Hegel's *Philosophy of History*:

The Chinese are ... able to underbid the whites in every kind of labor. They can be hired in masses; they can be managed and controlled like unthinking slaves. But our laborer has an individual life, cannot be controlled as a slave by brutal masters, and this individuality has been required by the genius of our institutions, and upon these elements of character the State depends for defense and growth.¹⁵⁶

Such sentiments may have very much a nineteenth-century flavor, but consider also the following analysis of the Chinese immigration exclusion, made by a federal judge in the 1920s:

The yellow or brown racial color is the hallmark of Oriental despotisms, or was at the time the original naturalization law was enacted. It was deemed that the subjects of these despotisms, with their fixed and ingrained pride in the type of their civilization, which works for its welfare by subordinating the individual to the personal authority of the sovereign, as the embodiment of the state, were

not fitted and suited to make for the success of a republican form of Government. Hence they were denied citizenship.¹⁵⁷

To the judge, it was thus self-evident that the Congress's exclusion of the Chinese from immigration was not based on "color" but cultural disqualification for citizenship.¹⁵⁸ That is, the Chinese were so radically "un-legal" that they were simply not capable of the kind of self-governance that was required by America's "republican form of Government."

3. Positive and Negative Orientalisms: Rationality and Chinese Law

Terms chosen for the Chinese formed strange oxymorons, so that the Chinese were "deceitful" and "absolutely trustworthy" in the same sentence.¹⁵⁹

- *Stuart Creighton Miller*

In its administration the government of China is despotic and democratic.¹⁶⁰

- *Thomas R. Jernigan*

Bleak as many characterizations of China and the Chinese are, Orientalist discourses by no means need always be relentlessly negative.¹⁶¹ Quite the contrary, there are many instances of fervid idealization of the Chinese. Jacques Derrida refers to China as a "sort of European hallucination" which represents different things to different observers.¹⁶² In an effortless volte-face, Nietzsche, for example, is able to use China as a negative example for Europeans on one page, and then as a model only a few pages later.¹⁶³ Instead of being simply "a dull half-conscious brooding spirit" in the darkness, as Hegel describes China,¹⁶⁴ for the French philosophes,

¹⁵³ To be sure, in Marx's case even the modern Western legal civilization may ultimately be destined to wither away together with the state, but as the penultimate way station to Utopia it certainly represents a higher stage in the development of historical materialism than the despotic law of Oriental civilizations. As Marx states unequivocally, colonial rule in Asia had a dual mission, "one destructive, the other regenerating - the annihilation of old Asiatic society, and the laying of the material foundations of Western society in Asia." Karl Marx, *The Future Results of British Rule in India*, in *The Marx-Engels Reader* 659, 659 (Robert C. Tucker ed., 2d ed. 1978). Again, wishing to neither accuse nor excuse the three thinkers considered here, cf. supra note 140, I am evaluating their work along only one narrow dimension: what their work has to say about China and its relation to the West. That is, I am not seeking to shame them in an act of "postcolonial revenge" (to borrow Leela Gandhi's stark phrase) but simply examining them as historical artifacts. See Leela Gandhi, *Postcolonial Theory*, at x (1998). Or, as Said might put it, I am viewing Orientalist texts as part of the worlds in which they existed, since texts, "even when they appear to deny it ... are nevertheless part of the social world, human life, and of course the historical moments in which they are located and interpreted." Edward Said, *The World, the Text, and the Critic* 4 (1983).

¹⁵⁴ See generally Keith Aoki, "Foreign-ness" and Asian American Identities, 4 *UCLA Asian Pac. Am. L.J.* 1, 7-44 (1996) (describing the history of "American Orientalism"); Neil Gotanda, *Exclusion and Inclusion: Immigration and American Orientalism*, in *Across the Pacific: Asian Americans and Globalization* 129 (Evelyn Hu-DeHart ed., 1999); see also Lisa Lowe, *Immigrant Acts: On Asian American Cultural Politics* 1-36 (1996).

¹⁵⁵ Stuart Creighton Miller, *The Unwelcome Immigrant: The American Image of the Chinese 1785-1885*, at 27-28 (1969).

¹⁵⁶ State of California, Senate Special Committee on Chinese Immigration, quoted in Tomas Almaguer, *Racial Fault Lines: The Historical Origins of White Supremacy in California* 174 (1994). These conclusions were foreshadowed by a joint special committee of the U.S. Congress: "To admit these vast numbers of aliens to citizenship and the ballot would practically destroy republican institutions on the Pacific coast, for the Chinese have no comprehension of any form of government but despotism, and have not the words in their own language to describe intelligibly the principles of our representative system." Report of Joint Special Committee to Investigate Chinese Immigration, S. Rep. No. 689, 44th Cong., 2d Sess. (1877), quoted in Leti Volpp, "Obnoxious to Their Very Nature": Asian Americans and Constitutional Citizenship, 5 *Citizenship Stud.* 57, 63 (2001).

¹⁵⁷ *Terrace v. Thompson*, 274 F. 841, 849 (W.D. Wash. 1921), aff'd, 263 U.S. 197 (1923).

¹⁵⁸ Id. ("It is obvious that the objection on the part of Congress is not due to color, as color, but only to color as an evidence of a type of civilization which it characterizes.") (emphasis added).

¹⁵⁹ Miller, supra note 155, at 10 (describing a study of American racial stereotypes of the Chinese).

¹⁶⁰ Thomas R. Jernigan, *China in Law and Commerce*, at v (1905).

¹⁶¹ Moreover, as Homi Bhabha emphasizes, even the seemingly most negative stereotypes are ultimately ambivalent and open to resignification. See generally Homi K. Bhabha, *Of Mimicry and Man: The Ambivalence of Colonial Discourse*, in *The Location of Culture* 85 (1994). Insofar as Orientalist discourses are always overdetermined, the subject positions they produce are also never stable - either for the Oriental Other or the Western observer. As Bhabha explains, "Stereotyping is not the setting up of a false image which becomes the scapegoat of discriminatory practices. It is a much more ambivalent text of projection and introjection, metaphoric and metonymic strategies, displacement, overdetermination, guilt, aggressivity; the masking and splitting of 'official' and phantasmatic knowledges" Homi Bhabha, *The Other Question: Stereotype, Discrimination and the Discourse of Colonialism*, in *The Location of Culture*, supra, at 66, 81-82.

¹⁶² Jacques Derrida, *Of Grammatology as a Positive Science*, in *Of Grammatology* 74, 80 (Gayatri Chakravorty Spivak trans., 1976) [hereinafter Derrida, *Of Grammatology*].

¹⁶³ Compare id. at 108, with Nietzsche, supra note 97, at 99.

China is a source of Enlightenment: ex Oriente lux - and even lex. An ardent Sinophile, Voltaire, for example, marvels at the religious tolerance of the Chinese bureaucratic state.¹⁶⁵ Similarly, reports by sixteenth-century Jesuit missionaries to China extol Chinese criminal justice "which these Gentiles have great care to performe."¹⁶⁶ Nevertheless, even these positive portrayals have ultimately far less to do with China than with their authors, who are motivated primarily by their desire to criticize their own domestic conditions - by pointing out that even the Chinese had done better. As Derrida observes, in such cases China still remains a "domestic representation" that is praised "only for the purpose of designating a lack and to define the necessary corrections"¹⁶⁷ - or, in the words of a Portuguese merchant in Macao, to make it "known how farre these Gentiles do herein exceed many Christians."¹⁶⁸

The oscillation in Western evaluations of Chinese law reflects in part shifting evaluations of the rationality of the Chinese language. Rationality, after all, is one of the identifying features of modern law,¹⁶⁹ and law in turn is intimately connected with language and the categories it offers for legal expression. Again, the footprints lead to Hegel, who operationalizes his entire Orientalist arsenal to describe the nature of the Chinese language. That the Chinese language is not phonetic but "represents the ideas themselves by signs" is evidence to Hegel that it has not "matured" and reached the level of Western languages. Indeed, because of the multiplicity of pictorial representations required, the Chinese writing system is a fundamentally inadequate instrument "for representing and imparting thought."¹⁷⁰ The same notion echoes in Weber, who observes that "Chinese thought has remained rather stuck in the pictorial and the descriptive."¹⁷¹ And, like Hegel, Weber confirms the dire conse-

quences of this unfortunate "fact": "The power of logos, of defining and reasoning, has not been accessible to the Chinese,"¹⁷² and, indeed, "the very concept of logic remained absolutely alien" to Chinese thought.¹⁷³

As a counterexample, consider Leibniz, a Sinophile par excellence. For him, the ideographic, unphonetic Chinese script was a blueprint for the great Enlightenment project of a "universal" language that communicates ideas "directly," like algebraic signs.¹⁷⁴ Leibniz's analysis ignores the fact that the Chinese script does include phonetic elements. Yet, whether it was considered an anachronism or a kind of potential linguistic algebra, the Chinese language constituted a nearly insuperable barrier to many Westerners. From early on, legal observers of China emphasized the problem of studying a legal system "buried in a language by far the least accessible to a foreign student of any that was ever invented by man," as Sir George Thomas Staunton put it hyperbolically in the introduction to his pioneering 1810 translation of the Qing Code.¹⁷⁵ Given Orientalism's facile assumptions about the close interrelations between language, ahistoricity, and the irrationality of the Chinese, we are hardly surprised to learn that, in the opinion of an officer of the British East India Company, "so arbitrary" are the laws of Chinese as to be "contrary to all reason and justice."¹⁷⁶

¹⁷² Id.

¹⁷³ Id.

¹⁷⁴ See Olivier Roy, *Leibniz et le Chinois comme langue universelle* [Leibniz and Chinese as universal language], in *Leibniz et la Chine* [Leibniz and China] 135 (Librairie Philosophique, Paris, 1972). Ironically, what ultimately makes Chinese writing such an attractive model to Leibniz is precisely its (now idealized, not demonized) ahistoricity: "What liberates [the unphonetic] Chinese script from the voice is also that which, arbitrarily and by the artifice of invention, wrenches it from history and gives it to philosophy." Derrida, *Of Grammatology*, supra note 162, at 76. For analyses of Leibniz's project of finding a universal basis for Christianity and Confucianism, see David Mungello, *Leibniz and Confucianism: The Search for Accord* (1977); Christia Mercer, *Leibniz's Metaphysics: Its Origins and Development* 50-51 (2001) (describing Leibniz's "ecumenical optimism" in discovering of elements of Christianity and natural law in Confucianism); see also Gottfried Wilhelm Leibniz, *Writings on China* (Daniel J. Cook & Henry Rosemont, Jr. trans., 1994).

¹⁷⁵ Sir George Thomas Staunton, *Translator's Preface*, in *Ta Tsing Leu Lee; Being the Fundamental Laws, and a Selection from Supplementary Statutes of the Penal Code of China* V, at xiii (Strahan & Preston, London, 1810) (emphasis added).

¹⁷⁶ Hosea Ballou Morse, *Chronicles of the East India Company to China, 1635-1834*, at 168 (1926). It is noteworthy that although Western images of Chinese law have never been monolithic, Jesuits' and other early modern observers' accounts were predominantly positive. However, as missionaries were replaced by traders as the dominant group of Westerners in China, the perceptions of Chinese law grew increasingly dim. See, e.g., Miller, supra note 155, at 24-25 (observing that American nineteenth-century traders' images of China were dominated by "criticism of China's despotism, vindictive system of law, and social injustice"); see also Gregory Blue, *China and Western Social Thought in the Modern Period, in China and Historical Capitalism: Genealogies of Sinological Knowledge* 57 (Timothy Brook & Gregory Blue eds., 1999) (analyzing emergence of increasingly negative views of China in European social thought).

¹⁶⁴ Hegel, supra note 141, at 142.

¹⁶⁵ See generally Basil Guy, *The French Image of China Before and After Voltaire* 261 (1963) (observing, for example, Voltaire's high regard for what he viewed as the Chinese "cult of justice" and "the absence of fanaticism or religious prejudice").

¹⁶⁶ John Wigmore, *A Panorama of the World's Legal Systems* 178 (1936) (quoting a Spanish missionary); see also Matteo Ricci, *China in the Sixteenth Century: The Journals of Matteo Ricci: 1583-1610*, at 43 (Louis J. Gallagher trans., 1953) (finding Chinese law predictable and non-arbitrary in that a code, once promulgated by the founder of a dynasty, "cannot be changed without good reason").

¹⁶⁷ Derrida, *Of Grammatology*, supra note 162, at 179. Ironically, the engagement of Derrida himself with China is not necessarily much deeper: "the East is never seriously studied or deconstructed in the Derridean text." Gayatri Chakravorty Spivak, *Preface*, in id., at lxxxii.

¹⁶⁸ Wigmore, supra note 166, at 155 (quoting a Portuguese merchant).

¹⁶⁹ See Anthony T. Kronman, *Max Weber* (1983) (analyzing the place of "formal legal rationality" in Weber's sociology).

¹⁷⁰ Hegel, supra note 141, at 135. For more extensive analyses of Hegel's (mis)understanding of the Chinese language, see Derrida, *The Pit and the Pyramid*, supra note 151, at 69, and Saussy, supra note 152.

¹⁷¹ Weber, *The Religion of China*, supra note 18, at 125.

Dated as the debates on the putative irrationality of the Chinese language may sound, they have their contemporary variants. With China having assumed sovereignty over Hong Kong, the common law of the former British colony is now being translated into Chinese. The debate surrounding this project betrays a persistent Orientalist skepticism regarding the possibility of crossing what Joseph Needham calls "the great barrier between ideographic and alphabetic languages,"¹⁷⁷ and, by extension, the feasibility of administering justice in Chinese.¹⁷⁸ Indeed, one can only recall the predominantly French origins of the common law and the early Francophones' ardent belief that "really the Law is scarcely expressible properly in English."¹⁷⁹

In any event, even as the West lurches from "ethnocentric scorn" to "an hyperbolic admiration" and back - as Derrida characterizes West's self-referential histories of the Orient - China remains a powerful signifier.¹⁸⁰ Continuing this pattern, in an ostensibly dramatic reversal of American Orientalism, Chinese Americans appear to have undergone a striking metamorphosis in the late twentieth-century: Orientalist discourses no longer operate to exclude the Chinese from immigration, and Chinese Americans have been promoted from representatives of the "Yellow Peril" to members of the so-called "Model Minority."¹⁸¹ Nevertheless, although Chinese Americans are seen

as having successfully integrated into the American economy, they are still notably distrusted as legal and political subjects.¹⁸² Rather than expressing their political will primarily through voting or other regular channels of participatory democracy, Chinese Americans now use their superior economic power to finance political campaigns, the media suggest¹⁸³ - or else they simply sell national secrets to China, or to whoever pays the most.¹⁸⁴

Although the power of Orientalist tropes lies precisely in their irrefutability by empirical evidence, it bears repeating that even historically, from the very genesis of the Chinese immigration exclusion, the perception of Chinese Americans as being either unable or unwilling to resort to law for their rights has been simply inaccurate. Even though one prominent justification for the Chinese exclusion laws was the putative inability of the Chinese even to comprehend the notion of individual rights and thus qualify for America's "Republican form of Government,"¹⁸⁵ ironically the immediate response of the Chinese to their exclusion was the paradigmatically "American" one: to insist on their legal rights in federal court.¹⁸⁶

V. Toward an Ethics of Orientalism

China ... is the reward of the right kind of reading Each got the China he deserved and to which his understanding of figural language entitled him.¹⁸⁷

- *Haun Saussy*

Although the focus of this Article is on sketching the broad contours of certain historically dominant representations of Chinese law in the West, one may still fairly ask what, if anything, all of this has to do with understanding China and Chinese law today. How should we use "law" to understand China, or "China" to understand law?

The moral of this Article is not to issue a categorical imperative that comparative lawyers must cease Orientalizing China, that it must never constitute a mere means in our own projects of legal self-

¹⁷⁷ Joseph Needham, *The Translation of Old Scientific and Technical Texts*, in *Aspects of Translation* 12 (A.H. Smith ed., 1958). For postcolonial analyses of the problems of translation, see Lydia H. Liu, *Translingual Practice: Literature, National Culture, and Translated Modernity - China, 1900-1937* (1995) and Gayatri Chakravorty Spivak, *The Politics of Translation*, in *Outside in the Teaching Machine* 179 (1993).

¹⁷⁸ For a review of the terms of this debate, see Derek Roebuck & King-kui Sin, *The Ego and I and Ngo: Theoretical Problems in the Translation of the Common Law into Chinese*, in *Hong Kong, China and 1997: Essays in Legal Theory* 185 (Raymond Wacks ed., 1993).

¹⁷⁹ Roger North, *A Discourse on the Study of Laws* 13 (London 1824), quoted in Roebuck & Sin, *supra* note 178, at 193. Of course, once the English did establish their language as a "legal" one, it was used to maintain their identity as a "rational" people by having parliamentary committees make "findings" about the neighboring linguistic communities - such as, "The Welsh language distorts the truth, favors fraud, and abets perjury." Reginald Coupland, *Welsh and Scottish Nationalism* 186 (1954) (quoting education commissioners for the House of Commons in 1846). The Irish received similar treatment as subjects of language and law: "the English regarded traditional Irish culture - and its most impressive achievement, the Brehon laws - with the utmost disdain, as the work of mere barbarians. Gaelic, like Welsh, was not conducive to rational expression." Michael Hechter, *Internal Colonialism: The Celtic Fringe in British National Development, 1536-1966*, at 77 (1975) (citation omitted).

¹⁸⁰ Derrida, *Of Grammatology*, *supra* note 162, at 80.

¹⁸¹ See Robert S. Chang, *Disoriented: Asian Americans, Law, and the Nation-State* 53-58 (1999). That is, Asian Americans as a group are perceived to be diligent, well-educated and economically successful - i.e., a Model Minority. Although the Model Minority myth has been debunked repeatedly, it retains its dual appeal: it generates and maintains an image of "bad" minorities, and at the same time it masks the ways in which Asian Americans in fact remain socially and economically marginalized. See Bob H. Suzuki, *Education and the Socialization of Asian Americans: A Revisionist Analysis of the "Model Minority" Thesis*, 4 *Amerasia* J. 23 (no. 2, 1977); see also Natsu Taylor Saito, *Model Minority, Yellow Peril: Functions of "Foreignness" in the Construction of Asian American Legal Identity*, 4 *Asian L.J.* 71 (1997).

¹⁸² For an analysis of Asian Americans' ineligibility for full political citizenship, see generally Volpp, *supra* note 156. See also the classic study of the political and social exclusion of Chinese-Americans by Victor G. Nee & Brett de Bary Nee, *Longtime Californ: A Documentary Study of an American Chinatown* (1972).

¹⁸³ See L. Ling-chi Wang, *Race, Class, Citizenship and Extraterritoriality: Asian Americans and the 1996 Campaign Finance Scandal*, 24 *Amerasia* 1 (1998).

¹⁸⁴ See Wen Ho Lee & Helen Zia, *My Country Versus Me* (2001); Neil Gotanda, *Racialization of Asian Americans and African Americans: Racial Profiling and the Wen Ho Lee Case*, 47 *UCLA L. Rev.* 1689 (2000).

¹⁸⁵ Cf. *supra* text accompanying note 156.

¹⁸⁶ See Christian G. Fritz, *A Nineteenth Century "Habeas Corpus Mill": The Chinese Before the Federal Courts in California*, 32 *Am. J. Legal Hist.* 347 (1988).

¹⁸⁷ Saussy, *supra* note 152, at 151.

definition. While such moralizing is perhaps rhetorically satisfying, a categorically anti-Orientalist morality is simply not possible. Prejudices, in the neutral Gadamerian sense, can only be managed, not eliminated. As Gadamer observes, for better or worse, "the fundamental prejudice of the Enlightenment is the prejudice against prejudice itself, which denies tradition its power."¹⁸⁸ In the end, "belonging to a tradition is a condition of hermeneutics,"¹⁸⁹ and traditions inevitably prejudice us in the sense of disposing us to see the world in light of our preconceptions - whether those preconceptions be positive or negative.

Thus, there is no innocent knowledge to be had, and we have little choice but to Orientalize - to always anticipate China and its legal traditions in terms of our own biases. Moreover, not only are we inevitably always engaged in Othering and essentializing China and Chinese law as we seek to understand them, but the Chinese, likewise, essentialize us, the West. Moreover, both we and the Chinese essentialize our own traditions as well: the Chinese "self-Orientalize" and Americans "self-Americanize," as it were.

As examples of Chinese self-essentialization, consider again the fact that for centuries it was the official, state-sponsored Confucian view that law played only a minimal role in governance of the Chinese empire which was ideally ruled by morality - yet in fact the state developed a sophisticated legal system to carry out its policies. But insofar as Confucianism privileged law over morality and the state identified Chinese-ness with Confucianism, it was ideologically imperative to insist that China was a government of men (of superior virtue), not of (mere instrumental) laws.¹⁹⁰

Consider again also the notion of a stable, enduring China. This myth is not just a Western fantasy but a Confucian one as well. Confucius himself insisted, rather disingenuously, that his project of reforming Chinese state and society was simply a return to a past Golden Age - a mere reaffirmation of an ancient tradition rather than a fundamental reorganization of a world that he found corrupt and lacking in morality.¹⁹¹ Indeed, ever since Confucius (and even before him), nearly all Chinese projects of fundamental social transformation have sought to retroject their Utopias onto a distant past,

so as to honor a strong cultural prejudice against radical change.

To be sure, since the Communists' rise to power in 1949, at least the Chinese state has rejected the past unequivocally as a source of legitimacy. However, even that rejection is premised on a self-Orientalization of that past. That is, although the Sinicized version of Marxism may well represent a significant transformation, even the Maoist variety is ultimately driven by a need to see the Chinese past as irredeemably "feudal", stagnantly waiting for Communism to rescue it from its ahistorical trap. Hence, many Chinese historians have internalized some of Marx's Orientalist understandings of the world as part of their self-understanding.¹⁹² The accomplished legal historian Jing Junjian, for example, paints a rich, even dynamic view of the legal regulation of the economy during the Qing - yet, almost contradicting his own evidence, in the end he nevertheless concludes that "Chinese law was permeated by the same basic principles from beginning to end."¹⁹³

And just as the Chinese tend to self-Orientalize their own past as lawless and unchanging, I have suggested above that Americans tend to "self-Americanize" themselves as inherently legal. Intriguingly, although Americans often do "place a high cultural valuation on change,"¹⁹⁴ which also serves to condemn China's legal tradition as "stagnant," in the domestic context Americans are capable of valuing lack of change as well. Just as Confucianism sought political stability in respecting the forms of governance established by the founder of each dynasty, so many Americans too take pride in the fact that their Constitution has remained unaltered since its adoption in the wake of the Found-

¹⁸⁸ Gadamer, *supra* note 25, at 270.

¹⁸⁹ *Id.* at 291; see also *id.* at 277 ("It is necessary to fundamentally rehabilitate the concept of prejudice.").

¹⁹⁰ Cf. *supra* text accompanying notes 72-73.

¹⁹¹ Cf. Confucius, *The Analects*, Bk. VII, Ch. 1 (D.C. Lau trans., 1979) ("The Master said, 'I transmit but do not innovate; I am truthful in what I say and devoted to antiquity ...'").

¹⁹² On Marxist historiography in China, see generally Arif Dirlik, *Revolution and History: Origins of Marxist Historiography in China, 1919-1937* (1978). Cf. Partha Chatterjee, *Nationalist Thought and the Colonial World: A Derivative Discourse?* (1986) (analyzing the adoption of the European ideology of "nationalism" by the Indian state). To the extent that "Chineseness" is premised on not being "Western," Wang Ning calls the phenomenon "Occidentalism" - ultimately another mode of self-Orientalism in that it still defines itself primarily in relation to "the West." See Wang Ning, *Orientalism versus Occidentalism?*, 28 *New Literary Hist.* 57 (1997). As an example, consider the satirical observation made by Lu Xun, China's leading literary modernist, in 1934:

Because we have been suffering from [foreign] aggression for years, we make enemies to this 'foreign air.' We even go one step further and deliberately run counter to this 'foreign air': as they like to act, we would sit still; as they talk science, we would depend on divination; as they dress in short shirts, we would put on long robes; as they emphasize hygiene, we would eat flies; as they are strong and healthy, we would rather stay sick.

Lu Xun, *Reflections Starting from My Son's Photographs*, quoted in Zhang Longxi, *Western Theory and Chinese Reality*, *supra* note 69, at 105-06; see also Chen Xiaomei, *Occidentalism: A Theory of Counter-Discourse in Post-Mao China* 5 (1995) (observing that Chinese "Occidentalism," or self-definition against the Western Other, is "primarily a discourse that has been evoked by various and competing groups within Chinese society for a variety of different ends, largely, though not exclusively, within domestic Chinese politics"). For an alternative definition of "Occidentalism" (referring to the West's self-essentialization), see *infra* note 195.

ing.¹⁹⁵ Yet while a real or perceived lack of change in China's political culture is usually classified negatively as "stagnation," a similar lack of change in the American case represents the positive quality of "stability": not slavery to tradition but an admirable fidelity to who We the People "really" are. Indeed, consider the tremendous amounts of scholarly energy that constitutional Originalists, for example, devote to explaining why contemporary Americans ought to be ruled by an agreement hammered out by a group of property-owning white men in Philadelphia in 1789. The expectation that these men should be able to rule us from their graves is surely as much a form of ancestor worship as any advocated by Confucius, yet here it is one that confirms Americans' identity as essentially, solidly American.¹⁹⁶

But if this is indeed the melancholic conclusion - we cannot help essentializing others, and even ourselves - what is a comparative lawyer to do? If we accept the premise that prejudices ultimately constitute the very "conditions of understanding,"¹⁹⁷ we need not find an Archimedean point of observation in order to understand at all: perfection is not required, even if we may wish to strive for it. Instead of a simplistic morality of anti-Orientalism -

"Thou shalt not Orientalize" - which would effectively end comparative law, we are allowed to proceed with our enterprise. Indeed, comparison is ultimately the only way for us to encounter and enter into relationships with others.¹⁹⁸

Yet while morality may have no place in comparative law, ethics must. By "morality," I mean normative systems that posit a pre-given moral subject and then elaborate guidelines for proper actions by that subject.¹⁹⁹ By "ethics," in contrast, I refer to normative systems that are concerned, not with what a pre-given subject may or may not do, but rather with the construction of that subject. Instead of assuming an ethical subject and then regulating it, ethics regulates the conditions under which subjects emerge. What comparative law needs, then, is an ethics of Orientalism, rather than an impossible morality of anti-Orientalism.

That is, even as we continue to compare and necessarily Orientalize as well, we must consider the effects that our comparisons have on others.²⁰⁰ To the extent that the categories we employ always impose limits on what we can discover in the world, it is a fundamental effect of our acts of comparison that they in part produce the objects that are being compared - for example, the American "legal subject" and the Chinese "non-legal non-subject." We must therefore consider the ways in which our comparisons subject others, in both senses of the term: recognize them as free subjects and also limit their freedom as subjects.²⁰¹

In light of this ethical imperative, how should we go about evaluating various legal Orientalisms? Let us consider, for example, the application of Chinese law in Hong Kong in recent times. It has often

¹⁹³ Jing Junjian, *Legislation Related to the Civil Economy in the Qing Dynasty, in Civil Law in Qing and Republican China*, supra note 22, at 42, 82; see also Chen Duanhong, *Opposition - The Future of Chinese Constitutionalism from the Perspective of Administrative Litigation*, 4 *Zhongwai Faxue* [Peking U. L.J.] 1 (1995) (painting a Hegelian image of traditional Chinese law as paternalistic rule where subjects were reduced to the position of children); Liang Zhiping, *Explicating "Law": A Comparative Perspective of Chinese and Western Legal Culture*, 3 *J. Chinese L.* 55, 91 (1989) ("Obviously, China's traditional legal concepts are incapable of accommodating the rich essence of modern legal concepts... We must expose and criticize past history and consciously recognize the traditions that we inherited unintentionally."). And just as the indigenous Chinese legal tradition tends to be reduced to an Orientalist stereotype, idealized notions of Western law have come to constitute the paradigmatic form of "law." See, e.g., Gao Hongjun, *Two Modes of the Rule of Law, in Yifa Zhiguo, Jianshe Shehui Zhuyi Fazhi Guojia* [Ruling the Country According to Law, Constructing a Socialist Rule of Law State] 262, 266-67 (Liu Hainian et al. eds., 1996) (relying on Roberto Unger's Eurocentric account of legal development). Cf. Alford, *The Inscrutable Occidental*, supra note 60. Ironically, the "cutting edge" of much contemporary Chinese legal theory thus consists of retellings of European Enlightenment narratives. See, e.g., Yan Cunsheng, *Rationalization Is the Core of Legal Modernization*, 1 *Faxue* [Law Science Monthly] 8 (1997); Du Wanhua, *The Dualistic Social Structure and Jurisprudential Reflections Thereon*, 1 *Xiandai Faxue* [Modern Legal Studies] 5 (1996) (drawing on Hobbes, Kant, Locke and Rousseau, among others); Bei Yue, *Human Rational Agreement and the Origin of Legal Rules*, 1 *Xiandai Faxue* [Modern Legal Studies] 8 (1997) (social contract narrative). To be sure, there is nothing "wrong" about legal self-Orientalism. As Gayatri Spivak observes, "Programs of cultural self-representation are never correct or incorrect. They are the substance of cultural inscriptions." Spivak, *A Critique of Postcolonial Reason*, supra note 65, at 341. Yet insofar as legal self-Orientalism is based on an incomplete reading of the Chinese past, it can at least be criticized for seeking to ground itself in untenable history and for unnecessarily restricting the ability of contemporary Chinese law reformers to draw on the resources of China's legal past. In this context, it is perhaps noteworthy, as Xiaobing Tang observes, that Said's critique of Orientalism "has never really entered into the general cultural-intellectual discourse [of contemporary China] with a palpable impact." Xiaobing Tang, *Orientalism and the Question of Universality: The Language of Contemporary Chinese Literary Theory*, 1 *Positions* 389, 389 (1993).

¹⁹⁴ Cohen, *Discovering History*, supra note 40, at 6.

¹⁹⁵ To be sure, the Constitution has been amended several times, but at least in the popular view - if not that of constitutional theorists - Americans continue to live under the "same" Constitution. Cf. Bruce Ackerman, *We the People: Foundations* (1991).

¹⁹⁶ As another example of Confucian-like self-projection into tradition, consider Western appeals to an idealized "classical antiquity" (to be strictly distinguished from Eastern-influenced Hellenism, for example) and the need to "preserve[] it within Western culture as the heritage of the past." Gadamer, supra note 25, at 287. Reminding us that Orientalist discourses are constitutive not only of the Oriental as an object but also of the Western subject, James Carrier uses the term "Occidentalism" in a similar fashion to describe the ways in which anthropological studies of "the Orient" have contributed to the idealization of "the West." James G. Carrier, *Occidentalism: The World Turned Upside-Down*, 19 *Am. Ethnologist* 195 (1992).

¹⁹⁷ Gadamer, supra note 25, at 277-307.

¹⁹⁸ Cf. Charles Taylor, *Comparison, History, Truth*, in *Philosophical Arguments* 147, 150 (1995) ("Other-understanding is always in a sense comparative.").

¹⁹⁹ Christianity and Kantian ethics are paradigmatic examples of morality in this sense.

²⁰⁰ The ethical conception of Orientalism can be also thought of as a kind of "strategic essentialism," as elaborated by Spivak, *Subaltern Studies*, supra note 64, i.e., a practice of essentializing the other for only certain purposes and with an awareness of its consequences.

²⁰¹ Cf. supra note 113.

consisted of translating Orientalist notions into practice. Indeed, in the colonial legal system the distinction between Western representations of Chinese law and Chinese law as a local material practice essentially collapsed, as the British courts in Hong Kong frequently turned to Orientalist accounts of Chinese law to construct a body of law that the courts then applied to the native population as their own, idiosyncratic notion of "Chinese law." Technically, this was accomplished with the aid of expert witnesses and by interpreting Western observers' historical writings on the subject.²⁰² The reason for the need to consult outside experts lay in one of the foundational legal axioms of British colonialism: "as native law is foreign law, it must be proved as any other fact."²⁰³ This principle - worthy of Borges - swiftly and effectively confounded "native" and "foreign" as well as "law" and "fact," so that by the time the British were done with it, native Chinese law was neither "native" nor "law." And once the resulting vacuum was filled with Orientalist projections, what was left was often less than "Chinese" as well.

Thus, if legal Orientalism is ordinarily a set of Western representations of Chinese law that have grown out of, and around, actual legal practices - even when those representations may themselves be quite fantastic - in Hong Kong the dynamic has been reversed: there, legal practices have frequently been material enactments of legal Orientalism.²⁰⁴

²⁰² This written corpus consists of a hodgepodge of archaic - often openly hostile - legal anecdotes by missionaries, Orientalist historians, armchair anthropologists, and the occasional British lawyer. In a chain of judicial citation, over time this dubious jurisprudence acquired an authority that required no basis other than its own status as precedent: "one author synthesizes various sources, is cited in a judgment which becomes a precedent to be compared with other authors using the same sources, and so on." Peter Wesley-Smith, *The Sources of Hong Kong Law* 216 (1994). It is indeed quite astonishing that as late as the end of the 1980s - by which time there certainly existed detailed, far more competent studies of late-Qing Chinese law and custom - Hong Kong courts continued to rely on a dated committee report that in turn cited as "authority" various archaic nineteenth-century texts. See, for example, *In re Estate of Ng Shum* (No. 2), [1990] 1 H.K.L.R. 67, which draws repeatedly on Hongkong Committee on Chinese Law and Custom (1953), a report compiled by a governor's committee commissioned in 1948. The case expressly cites to the report's references to such Orientalist gems as a social "history" written by the British Archdeacon of Hongkong, John Henry Gray, *China: A History of the Laws, Manners, and Customs of the People* (1878), and J. Dyer Ball, *Things Chinese: Being Notes on Various Subjects Connected with China* 392 (1892) (containing entries such as "Topsy-Turvydom... The Chinese are not only at our antipodes with regard to position on the globe, but they are our opposites in almost every action and thought."). Going beyond the report's contents, the case even cites Edward Harper Parker's relentless effort to reduce late-Qing family law to the categories of early Roman law - on the conceit that Qing law was at the developmental stage "of the Roman law anterior to the publication of the Twelve Tables, - 2,200 years ago." Parker, *supra* note 138, at 69. Although modern Hong Kong courts have used expert witnesses as well, those expert witnesses have tended simply to corroborate the inherited jurisprudence. As Peter Wesley-Smith described the situation toward the end of the British colonial rule, most "expert 'witnesses' " had no direct knowledge of the subject of their testimony; rather, their expertise lay in the fact that they were "scholars learned in the small corpus of literature on Chinese law and custom." Wesley-Smith, *supra*, at 216.

²⁰³ *Hughes v. Davies*, Renn. 550, 551 (1909).

This fact in itself is of course not an indictment of the resulting body of law, as purity of cultural or national origin is hardly a guarantee of quality, nor is such purity even attainable, except by self-Orientalization of one's past. What is ethically suspect about this Orientalism is its paradigmatically colonial relationship to the Chinese non-legal non-subject: the law affords no role in its construction for the Chinese who live under it.

Yet Hong Kong, unlike most of the rest of China, has an actual colonial history, and it is thus no surprise that the local legal subject has been colonized by the West. But what about legal Orientalism in understanding the People's Republic of China, for example? Since the end of the Cold War, law has become a major American export item.²⁰⁵ Various rule of law projects are being offered to China with a particular vigor.²⁰⁶ These projects draw implicitly on the idea that China's indigenous legal resources are inadequate to the task of governing China and that China is dependent on Western assistance in putting together a "real" legal order. The underlying view is, again, that China is essentially static and would be consigned to the dustbin of History, but for the interventions of the West. This implicit view has come under criticism in the social sciences, where critics call it the impact-response paradigm. The main structural assumption of the paradigm is that China's so-called "modernization" has indeed been a "response" to the "impact" of its nineteenth-century meeting with the West.²⁰⁷

Today, many American policy-makers still view the Chinese as essentially law-less and unindividuated subjects of Oriental Despotism, the latest

²⁰⁴ This description applies certainly to much of the production of "Chinese law" in colonial Hong Kong. The status of that body of law - essentially late-Qing law and custom - in postcolonial Hong Kong is murkier, but at least under a formal analysis it still remains valid to the extent that the British still enforced it on the eve of the handover. See Ruskola, *Conceptualizing Corporations and Kinship*, *supra* note 16, at 1725-26; see also Barbara E. Ward, *Rediscovering Our Social and Cultural Heritage in the New Territories*, 20 *J. Hong Kong Branch J. Royal Asiatic Soc.* 116, 121 (1980) (noting that British colonialism has functioned "in one sense like a refrigerator, 'freezing' the local social and cultural systems at more or less the stage they had been when the British first arrived, and to a surprisingly large extent inhibiting changes that might otherwise have happened").

²⁰⁵ See e.g., Thomas Carothers, *The Rule of Law Revival*, 77 *Foreign Affairs* 95 (1998). For a critical analysis, see Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 *B.U. L. Rev.* 781 (1989).

²⁰⁶ See generally Matthew C. Stephenson, *A Trojan Horse Behind Chinese Walls? Problems and Prospects of U.S.-Sponsored 'Rule of Law' Reform Projects in the People's Republic of China*, 18 *Pac. Basin L.J.* 64 (2000). On the multiplicity of meanings of "rule of law" in the context of China, see Deborah Cao, "Fazhi" vs/and/or Rule of Law? A Semiotic Venture into Chinese Law, 14 *Int'l J. Semiotics L.* 223 (2001); Randall Peerenboom, *Ruling the Country in Accordance with Law: Reflections on the Rule and Role of Law in Contemporary China*, 11 *Cultural Dynamics* 315 (1999); see also Albert H.Y. Chen, *Toward a Legal Enlightenment: Discussions in Contemporary China on the Rule of Law*, 17 *UCLA Pac. Basin L.J.* 125 (1999); Carol A.G. Jones, *Capitalism, Globalization and Rule of Law: An Alternative Trajectory of Legal Change in China*, 3 *Soc. & Legal Stud.* 195 (1994).

despot being the Communist Party, rather than the imperial state. In its current incarnation this view underwrites the political and economic project of making China open its markets for Western investment and trade: those favoring China's entry into the World Trade Organization and other international commercial and trade law regimes claim that China's participation will eventually transform its population into viable subjects of the rule of law. This particular Orientalist view risks rendering the mission of American law in China from (relatively harmless) legal tourism to the imposition of neo-liberalism under the alibi of law reform.²⁰⁸

There is also a deep irony to this view, given that in the American domestic context it is precisely the all too successful economic integration of Chinese Americans that renders them suspect as legal subjects: even as citizens, they are believed to exercise their agency primarily through economic rather than legal and political means, at least according to their media portrayals.²⁰⁹

Yet whatever the differences among the above Orientalisms, they support an overly idealized self-image of the American legal subject and an unduly negative view of the Chinese (non)legal (non)subject: Chinese are ruled by morality, Americans by law; Chinese are lemmings, Americans individuals; Chinese are despotic, Americans democratic; China is changeless, America dynamic. Together, these notions form an analytically indissoluble complex of meanings so that often to invoke one is to invoke them all. The problem is not that these Orientalisms make assumptions about Chinese legal subjectivity - that is unavoidable - but that these assumptions essentially foreclose the possibility of any real communication between the American legal subject and its Chinese would-be counterpart. To the extent that they view the American legal subject as the paradigmatic and authentic case, they implicitly authorize it to teach the Chinese how to become (real) legal subjects. And until that lesson has been imparted, there is little that Chinese law can offer to

American law, which is hardly a promising recipe for cross-cultural understanding. Indeed, insofar as this conception of the legal subject holds the potential for delegitimizing all other legal traditions, legal Orientalism is built into the very definition of "law," which, along with the kind of individual subjectivity it implies, becomes one of the West's key contributions to the modern world.²¹⁰

Although legal narcissism may not be fatal and perhaps only gives us the (dim) view of Chinese law that we deserve, the Chinese certainly deserve better. To be sure, it is only because of certain "fundamental, enabling prejudices"²¹¹ that we can communicate with others in the first place: our preconceptions of others in part enable those others to emerge as subjects. Yet the same enabling prejudices inevitably also constrain those others: subjectivity never implies perfect freedom. What distinguishes one Orientalism from another, then, are its uses and its effects:²¹² How does it subject the other?

The ethical distinction is thus not between Orientalisms with negative rather than positive prejudices, even if in the context of law Orientalist myths tend to be quite overwhelmingly negative.²¹³ Communitarian and other idealizations of the Chinese genius for mediation and harmony, for example, tend to rely on similar notions of Chinese non-legal non-subjectivity.²¹⁴ Often, they represent an uncritical Occidental acceptance of the Confucian ideological fiction that the Chinese naturally delight in submitting themselves to the dictates of group morality. And, like their negative counterparts, these positive Orientalisms tend to posit law as inherently "Western" and "modern," effectively excluding the Chinese from both law as well as modernity. To be sure, the point of such adoring Orientalisms is typically to criticize (the excesses of) Western legality, but by using Chinese non-legality as their counter-example, they reduce the Chinese to the juridical equivalents of the noble savage: primitives happily untainted by legal modernity.

Since it does not insist on a categorical distinction between positive and negative Orientalisms, an ethics of comparison does not require isolating Chinese legal practices from criticism.²¹⁵ Enlightenment humanism may well have been deeply implicated in the rise of Western imperia-

²⁰⁷ See Cohen, *Discovering History*, supra note 40, at 58-96. The classic articulation of the paradigm in its modern form is the influential *China's Response to the West*, first published in 1954. See John K. Fairbank & Su-yu Teng, *China's Response to the West* (1954). For a corrective view, see, for example, Jonathan Spence, *To Change China: Western Advisors in China 1620-1960* (1980). See also Alford, *Law? What Law?*, supra note 14, at 49-50; Ruskola, *Conceptualizing Corporations and Kinship*, supra note 16, at 1717.

²⁰⁸ This is not to suggest that there is no indigenous Chinese demand for law reform. Quite clearly, many Chinese do favor law reform, as well as China's participation in the W.T.O. There is nothing inherently objectionable about the pursuit of these goals in themselves. What is questionable is these projects' implicit assumption (made equally commonly by both American law-exporters and Chinese law-importers) about the self-evident Western-ness of all possible forms of legal modernity, and the expectation that the expansion of markets will naturally "civilize" Chinese subjects of despotism into (liberal) legal subjects.

²⁰⁹ Cf. supra text accompanying notes 182-183.

²¹⁰ As Peter Fitzpatrick observes, manufacturing myths about other societies' law is an inevitable part of legitimating one's own. See Peter Fitzpatrick, *The Mythology of Modern Law* (1992).

²¹¹ Gadamer, supra note 25, at 295.

²¹² Cf. Alford, *The Inscrutable Occidental*, supra note 60.

²¹³ Cf. supra Section IV.B.

²¹⁴ See, e.g., David Hall & Roger Ames, *Democracy of the Dead* 216-20 (1999).

lism, but as Dipesh Chakrabarty observes, it "has historically provided a strong foundation on which to erect - both in Europe and outside - critiques of socially unjust practices."²¹⁶ In fact, we have an ethical duty to be concerned about the practices of subjection - the ways in which legal subjects are both enabled as well as disabled - in China as well as at home.

Indeed, while insisting that our conception of the rule of law must not be so closed and rigid as to categorically delegitimize all alternatives to political and social organization, I do not mean to suggest that rule of law itself cannot be a legitimate model, for ourselves as well as for others. Even if one supports the project of conceptualizing the notion of rule of law broadly, it seems beyond argument - tautological, in fact - that China does not have rule of law in the Anglo-American sense of the term.²¹⁷ Hence, it seems more sensible not to ask "is there rule of law in China?", but rather "should there be rule of law in China as we currently conceive the concept?"²¹⁸ In answering that question, we ought to remain realistic about what the rule of law can and cannot accomplish. This is not to prejudge the question: even if we admit to the shortcomings of the rule of law, we may still find it ultimately desirable.²¹⁹ However, it is not to anyone's benefit to sell it for more than it is worth.²²⁰

Yet whether we articulate our criticisms in terms of human rights or some other discourse, we must not proceed to condemn China without a fair hearing. Often, Chinese legal practices are judged by irrelevant character evidence, based on assumptions about the "despotic" and "irrational" nature of

the Chinese, for example. Equally frequently, the Chinese legal system is presumed guilty before evidence has been even offered - or when it is offered, too often it is Orientalist hearsay with a history of several centuries. And all too often the entire process seems to center around us, and the project of proving the innocence of our norms and practices, derivatively by challenging those of China. Finally, there is the ultimate structural question of all Orientalist epistemologies: why is China always cast as the defendant and the West as the judge - and the jury?²²¹

Indeed, a judicial hearing is hardly the best metaphor for understanding Chinese law. To return to Gadamer, his notion of the interpretive process as a "hermeneutic circle" is more descriptive of the process of comparison as well, and normatively it certainly provides a more desirable model for it. In Gadamer's terms, we begin our study of Chinese law by projecting our own preconceptions, which we derive from our own historical givens. Ideally, those preconceptions constitute only a provisional point of departure which we revise over time - in order to project it again and again back on the world, with revisions each time, depending on the extent to which (we believe) our prejudices in fact describe the world. Yet at each point, our descriptions of the world also affect its organization, so that there is no final terminus for this enterprise. It is not the search for a fixed historical truth. Instead, the process itself constitutes a truth produced by and in history.

²¹⁵ For an account of how human rights have figured in Chinese foreign relations in the past decade or so, see Ming Wan, *Human Rights in Chinese Foreign Relations: Defining and Defending National Interests* (2001).

²¹⁶ Chakrabarty, *supra* note 32, at 4.

²¹⁷ This definition is of course not the sole legitimate one. Randall Peerenboom, for example, observes that Chinese "single-party socialism in which the Party plays a leading role is in theory compatible with [the] rule of law - albeit not a liberal democratic version of rule of law." Randall Peerenboom, *Globalization, Path Dependency and the Limits of Law: Administrative Law Reform and Rule of Law in the People's Republic of China*, 19 *Berkeley J. Int'l L.* 161, 167 (2001).

²¹⁸ Michael Dowdle, *Heretical Laments: China and the Fallacies of "Rule of Law"*, 11 *Cultural Dynamics* 287, 287 (1999) (emphasis added). As Donald Clarke notes, the claim that China lacks a system of "rule of law" typically "leaves ... unjustified its most crucial component: the ideal against which the Chinese legal system is identified and measured." Clarke, *supra* note 66, at 9. A claim that the Chinese legal system is "lacking," even if accurate, should be accompanied by an argument as to why any particular "lack" is undesirable in the Chinese cultural, political, historical, and social context. There may well be good arguments to support such claims, but those arguments must be made explicitly, not merely implied, as if they followed inexorably from the mere fact that China regulates itself differently.

²¹⁹ As Yuanyuan Shen notes, whatever the conceptual and practical shortcomings of the rule of law may be, it may well be "still useful for today's China." Yuanyuan Shen, *Conceptions and Receptions of Legality*, in *The Limits of the Rule of Law in China*, *supra* note 14, at 20, 21.

²²⁰ In this context, consider also the heated debates about the significance of "judicial independence." Judicial independence may be a desirable goal, but, like rule of law itself, it is ultimately only an instrumental value, not an end in itself. As Mark Ramseyer observes, "Basic comparative research shows that independent judiciaries ... are not common to freedom-loving nations everywhere." J. Mark Ramseyer, *The Puzzling (In)Dependence of Courts: A Comparative Approach*, 23 *J. Leg. Stud.* 721, 721-22 (1994). Indeed, presumably few Americans would wish to have a truly independent judiciary, a kind of unconstrained judicial aristocracy; as Jerome Cohen cautions, "an independent judiciary can frustrate effective democratic government as easily as it can frustrate effective totalitarian government." Jerome Alan Cohen, *The Chinese Communist Party and "Judicial Independence": 1949-1959*, 82 *Harv. L. Rev.* 967, 973 (1969); see also Jose J. Toharia, *Judicial Independence in an Authoritarian Regime: The Case of Contemporary Spain*, 9 *Law & Soc'y Rev.* 475 (1975) (observing the coexistence of political authoritarianism with a considerable degree of judicial independence). Moreover, "judicial independence" does not exist in unqualified form even in its contemporary variant, nor has it had a stable historical meaning even in the United States. See, e.g., Stephen B. Bright, *Can Judicial Independence Be Attained in the South? Overcoming History, Elections, and Misperceptions about the Role of the Judiciary*, 14 *Ga. St. U. L. Rev.* 817, 856 (1998) (criticizing many contemporary Southern state judges as "not independent and committed to the rule of law"); Christine A. Desan, *Remaking Constitutional Tradition at the Margin of the Empire: The Creation of Legislative Adjudication in Colonial New York*, 16 *Law & Hist. Rev.* 257, 316 (1998) (calling for a recognition that the colonial system of "legislative adjudication" - judicial decision-making by legislatures - constitutes an integral part of the history of "American legality").

²²¹ Cf. Leti Volpp, *Feminism vs. Multiculturalism*, 101 *Colum. L. Rev.* 1181 (2001) (analyzing ways in which discourses of Western legal feminism posit non-Western cultural practices as patriarchal and thus find multiculturalism oppositional to feminism).

The term "hermeneutic circle" in fact sounds more static than it need be. It is not just a kind of infinite loop that makes us permanent hostages of our current prejudices. On the contrary, "the circle possesses an ontologically positive significance."²²² It always entails the possibility of a "fusion of horizons," a genuine encounter between different hermeneutic systems.²²³ We have no choice but to bring our own legal categories, our own mental apparatuses to the encounter, but as we approach the Chinese legal system, we can question our categories. Although we cannot put all of them at issue at once, we can certainly question them at least one, or a few, at a time. Thus, while the hermeneutic circle is circular by definition, it is not static but can shift over time. Its movement is not teleological, directed toward a final resting place where the circle collapses on itself and shrinks into a singular bull's eye, signifying that we have attained a complete, final understanding. Rather, the circle moves as a circle in directions that are not predetermined: to the left or the right, up or down, East or West.²²⁴

Consider what happened to Herbert Fingarette, a philosopher trained in the Western canons, after he started paying serious attention to Chinese thought:

When I began to read Confucius, I found him to be a prosaic and parochial moralizer; his collected sayings, the Analects, seemed to me an archaic irrelevance. Later, and with increasing force, I found him a thinker with profound insight and with an imaginative vision of man equal in its grandeur to any I know.²²⁵

The interpretation of Chinese law - and the interpretation of just what constitutes "law" - implicates us inevitably in the process of interpreting ourselves as well: Who are we, as (legal) subjects? Thus, to the extent that "law is truly an interpretive practice and interpretation is ontological, we

always risk change through our acts of legal interpretation."²²⁶

Thus, however marginalized comparative lawyers may feel themselves, comparative law matters. In the broadest sense, we are all comparative lawyers in that we necessarily understand ourselves legally against our ideas of others. Thus conceived, comparative law is one site of subject formation, a practice through which we create others as well as ourselves. This power should not cause us to shrink from acts of comparison - which we could not do even if we wanted to - but simply to wield that power ethically, in ways that enable different kinds of legal subjects to emerge, rather than fix and classify historical subjects on the basis of the authenticity of their legal subjectivity.

VI. Epilogue

Law is neither wrong nor right,
Law is only crime
Punished by place and times,
Law is only the clothes men wear
Anytime, anywhere,
Law is Good-morning and Good-night.²²⁷
- *W. H. Auden*

No matter how many times lawyers proclaim *res ipsa loquitur*, things do not speak for themselves, and the uninterpreted fact remains a legal and social fiction.²²⁸ Yet all too often, Western observers unselfconsciously claim ultimate interpretive authority over Chinese law. For an explanation of why this should be so, consider David Henry Hwang's play *M. Butterfly*, in which he analyzes orientalized notions of gender (among other things). One of Hwang's characters offers a simple explanation for why a man can impersonate a woman perfectly: "Because only a man knows how a woman is supposed to act."²²⁹ That is, to the

²²² Gadamer, *supra* note 25, at 266.

²²³ *Id.* at 306 ("Understanding is always the fusion of these horizons supposedly existing by themselves.") (emphases omitted). To be sure, the language of separate horizons coming together and fusing is infelicitous from the perspective of postcolonial comparative law, insofar as it implies the existence of discrete legal systems or discrete "legal horizons." Yet Gadamer himself clarifies elsewhere that "these horizons supposedly existing by themselves" are never discrete, never completely closed:

Just as the individual is never simply an individual because he is always in understanding with others, so too the closed horizon that is supposed to enclose a culture is an abstraction. The historical movement of human life consists in the fact that it is never absolutely bound to any one standpoint, and can hence never have a truly closed horizon. The horizon is, rather, something into which we move and that moves with us. Horizons change for a person that is moving.
Id. at 304.

²²⁴ Thanks to Erika Evasdottir for suggesting the idea of a hermeneutic circle that moves in space.

²²⁵ Herbert Fingarette, *Confucius: The Secular as Sacred*, at vii (1972).

²²⁶ J.M. Balkin, *Understanding Legal Understanding: The Legal Subject and the Problem of Coherence*, 103 *Yale L.J.* 105, 163 (1993). Drawing on Gadamer, Balkin emphasizes the "existential" or "ontological" nature of legal interpretation, *id.* at 159, observing that "accounts of coherence in the social world ... are, at bottom, driven by our need to believe that our own beliefs are ordered, coherent, and rational." *Id.* at 115. Thus, many of us are ontologically committed "to believing that [we] live in a basically just society, and that elements of arbitrariness, unreasonableness, or injustice are the exception rather than the rule." *Id.* at 147. When the assumptions of the Chinese legal tradition contradict those of our own, they have the potential to throw into question the very coherence of our social world. Or, as Balkin puts it, "where the legal system becomes identified with general social authority, attacks on the coherence of legal norms may be interpreted as attacks on the society itself." *Id.* at n.80.

²²⁷ W.H. Auden, *Law Like Love*, in *Collected Shorter Poems 1927-1957*, at 154 (1966), quoted in Mezey, *supra* note 83, at 5.

²²⁸ Cf. Geertz, *supra* note 68, at 173 ("'Fact configurations' are not merely things found lying about in the world and carried bodily into court.")

²²⁹ David Henry Hwang, *M. Butterfly* (1988). For an analysis of the sexual and racial politics of *M. Butterfly*, see David L. Eng, *Heterosexuality in the Face of Whiteness*, in *Racial Castration: Managing Masculinity in Asian America* 137 (2001).

extent that a "real woman" is ultimately a male fantasy, it is men who hold the key to the "truth" about "women." Our fetishized views of law are no different. So long as we insist that "real" law is a Western notion, it will always be the West that holds the key to the truth about law.

Alas, there is no cross-cultural standard that would help us arrive at a final definition of "law." Although natural law theories have (for the most part) suffered a well-deserved death, in our less self-conscious moments we nevertheless operate as though their discredited notions were still good law, and we forget that even the seemingly most natural legal categories are ultimately cultural artifacts. Yet the only natural law is that in China as elsewhere, people are born and die - and, in between, they strive to instill the world, and their selves, with meaning. In that project, law is one resource of signification.