How a "New Legal History" Might Be Possible: Recent Trends in Chinese Legal History Studies in the United States and Their Implications

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What is This?
How a “New Legal History” Might Be Possible: Recent Trends in Chinese Legal History Studies in the United States and Their Implications

Chenjun You

Abstract
The study of Chinese legal history has undergone a tremendous change in the United States since the 1990s. Antiquated views and biased opinions of past decades have been rethought and criticized to a considerable extent. At the cutting edge of this new academic trend is the UCLA research group of Chinese legal history. Their scholarship as a whole exemplifies the features of what this article calls a “new Chinese legal history”—namely, conjoining the empirical (the extensive use of judicial archives in China) with the theoretical (drawing upon and dialoguing with well-established theories in social sciences), with the intention of formulating new and illuminating middle-level concepts. Moreover, their keen “historical sense” helps us understand the historical roots of contemporary problems, thus overcoming the epistemological problem of Chinese legal history studies often being regarded as useless.

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Introduction: An Intellectual Earthquake?

In a book review published in the *American Historical Review* more than ten years ago, Neil J. Diamant emphasized that during the last decade, an intellectual earthquake has rumbled through legal history. Aptly, its epicenter has been Los Angeles, where a number of scholars and graduate students in the history department at the University of California, Los Angeles . . . have managed to shake the foundations of decades of received wisdom about Chinese law, particularly during the Qing dynasty (1644–1911). (Diamant, 2001: 546–47)

This “intellectual earthquake” began with the work of Philip C. C. Huang, who taught in the History Department at the University of California, Los Angeles (UCLA). It was under his leadership that a research group of Chinese legal historians at UCLA gathered in the 1990s and has since received considerable attention. This research group consists of three generations of scholars who come from the United States, China, Japan, and other countries. Philip Huang and Kathryn Bernhardt served as research supervisors to then PhD students like Bradly Reed, Christopher Isett, Margaret Kuo, Matthew Sommer, Jennifer Neighbors, and Yasuhiko Karasawa, who have already become accomplished early and mid-career scholars teaching in various universities in America or Japan.

There had been little research on Chinese legal history, especially in early American sinology studies, and it was not until sinology fell into decline and was gradually replaced by Chinese studies that any such research began in earnest. Among the best-known early studies of Chinese legal history, *Law in Imperial China, Exemplified by 190 Ch’ing Dynasty Cases* by Derk Bodde and Clarence Morris was acclaimed a masterpiece soon after its publication in 1967 (Bodde and Morris, 1967). From that time onward other American scholars, including Brian McKnight, David C. Buxbaum, Hugh T. Scogin, Jr., Jerome A. Cohen, Madeline Zelin, Randle Edwards, William C. Jones, and William P. Alford have produced important studies in the field of Chinese legal history. If we take such studies into account, how can we explain the so-called intellectual earthquake described by Neil J. Diamant? If what he said was not an exaggeration, we should ask what factors have distinguished the studies by the UCLA research group from those of other scholars. What
sets them apart? To answer these questions, we will begin with a review of Western studies of traditional Chinese law.

**Westerners' Misunderstandings of and Reflections on Traditional Chinese Law**

In an article published in 1997, William Alford reexamined a perplexing academic phenomenon. Although it may be an exaggeration to say that all Western scholars neglected the field of Chinese legal history prior to the 1990s, it is true that most Western scholars ignored or misunderstood the role law played in everyday Chinese life. Moreover, they often gave short shrift to China’s rich legal history. Thus when Alford began his graduate work in Chinese studies, renowned professor Arthur Wright asked why such a seemingly intelligent young man like him was intent on wasting his time on Chinese legal history (Alford, 1997: 398).

More than five years after Alford’s article, Thomas Michael Buoye, another American scholar engaged in the study of Chinese legal history, summed up the phenomenon that Alford had encountered:

For a variety of reasons ranging from the internalization of Confucian prejudices towards law leading to the confusion of legalism with positive law to imperialist condemnation of the brutality of traditional Chinese law as a justification for extraterritoriality to conflation of modern abuses of the administration of justice with the traditional legal system, many Western scholars found ample reasons to denigrate the traditional Chinese legal system despite ample evidence of a sophisticated legal tradition. (Buoye, 2004: 431–32)

In fact, David C. Buxbaum had reminded Western scholars more than 40 years ago that they should make serious efforts to avoid both ethnocentrism and extreme relativism when conducting research on Chinese law:

Many of our concepts of traditional Chinese law in action are based on reports by those ethnocentric 19th century diplomatic, religious, and commercial Westerners who felt they were spreading civilization to barbarians by bringing them Western goods, politics, law, and religion. In fact, much Western research on traditional Chinese law and unresearched conclusions are merely reaffirmations of the slogans of our brethren of that period and their compatriots, the pro-Western antidynasty Chinese. (Buxbaum, 1971: 277)
He also pointed out that it is for such reasons that “even the best of contemporary scholarship overestimates the harshness of Ch’ing law, overestimates the significance of criminal law, and underestimates the role of civil law” (Buxbaum, 1971: 255).

Buxbaum’s critique is on the mark. According to Su Yigong’s research,

Westerners began to encounter Chinese law in the middle of the sixteenth century. . . . But their understanding of Chinese law seemed to lag behind. Even in England, let alone other [Western] countries, until the end of the eighteenth century people were in a state of complete ignorance about the actual functioning of the Chinese legal system. (Su, 2003: 76–77)

Although we can find occasional praise of Chinese law by some Westerners at that time (e.g., Thomas Staunton, the first Western translator of the Qing code, appreciated the technical characteristics of legislation embodied in its statutes [Roberts, 2006: 23]), the majority of assessments of Chinese law by preachers, diplomats, and expatriates who had been in China for a long time were negative and misleading. Since that era, the repeated deprecatory focus on punishments and the prison system in China sabotaged the image of Chinese law as a whole. The image—though not the reality—of Chinese law in Western eyes entered what we could call a dark period.  

Taking a broad view, we can see the transformation of China’s image in Western eyes. Zhou Ning has pointed out that an image of China first emerged in the West around 1250. Then around 1650 a “China rush” began wherein China’s political/social systems, material culture, and philosophies became veritable objects of worship by Westerners. But the Western image of China hit a crucial turning point from abundant compliments in the early Enlightenment era to disparaging descriptions as an “immobile and declining” world of oriental despotism during the later Enlightenment era (Zhou Ning, 2006). The changing image of Chinese law in Western thought was just one part of this larger transformation of China’s overall image (Shi, 1999). The West’s centuries of altering admiration and criticism of Chinese law—from the high admiration of François Quesnay, Voltaire, and others to the “dark” images of Chinese law constructed in the West since the middle of the eighteenth century—were borne of varied intents. But the dominant reason for Westerners’ critique of Chinese law was the “practical purpose of establishing extraterritoriality in China. To fulfill this purpose, naturally, the first step was to prove that uncivilized and backward Chinese law was not worthy of the Westerner’s esteem and observance” (Su, 2003: 78).
Since the second half of the nineteenth century, and especially during the twentieth century, research on traditional Chinese law benefitted from the development of sinology and the establishment of China studies institutes and centers, but the specter of “Orientalism” (Said, 1979) still haunted the field. As Karen Turner once observed, “despite advancements in sinological studies in the West and the availability of new texts since Weber’s time, it is surprising how often Western sinologists have continued to echo Weber’s nineteenth-century vision of China.” *East Asia: The Great Tradition* (Reischauer and Fairbank, 1960), she noted, is just one example. Though such a “textbook . . . has probably influenced more students than any other American publication,” its descriptions of Chinese law are in essence plagiarizations of Max Weber’s characterizations (Turner, 2004: 24–25). Another example of such “Orientalism” is Roberto M. Unger’s criticism of the Chinese legal system (Unger, 1976), which was refuted by William Alford as an ironic misunderstanding based on specific values of modern Western society (Alford, 1986).

To be fair, Chinese legal history is not the main research field of these scholars. For John King Fairbank it was a minor subject among his various research fields, while Unger used China mainly as a point of comparison. Their descriptions of Chinese law cannot be considered representative of the true level of specialized research on traditional Chinese law in the West (and especially in the United States) after World War II. With the emergence of a “China-centered approach” (Cohen, 1984), the 1970s saw the rise of a new generation of scholars in the field of China studies, among whom are some specialized researchers of Chinese law. Compared with their predecessors, they have both gained a broader view of the role law has played in Chinese society, and reconsidered and criticized the preconceived conceptions about Chinese traditional law held by older generations of China scholars. Although there existed both old views and new opinions during this period, the efforts of the new generation of scholars pushed research of Chinese traditional law ahead greatly.4

Then, as William Alford wrote in 1997,

the relative inattention of Western scholars to Chinese law has, in recent years, begun to abate. Such distinguished historians as Beatrice Bartlett, Kathryn Bernhardt, Philip Huang, William Kirby, Philip Kuhn, Susan Naquin, Jonathan Ocko, Jonathan Spence, and Frederic Wakeman have turned their eye toward legal materials both in and of themselves and for what they reveal more generally about the social, political, and intellectual tenor of late imperial and early Republican
China. Although none of these scholars was trained as a legal historian, each has dug deeply and richly into legal materials in the course of their broader inquiries and, in doing so, demonstrated the ways in which law played a far more discernible, if still unloved, role in the lives of both ordinary and exceptional Chinese. (Alford, 1997: 409)

All of these scholars have consciously pursued a “China-centered history of China” and have attempted to approach their subject matter free of preconceived notions. They have also taken advantage of the opening up to foreign scholars of the First Historical Archives of China as well as archives in various provinces and cities across the country.

**Judicial Archives and Research on Chinese Legal History**

As the treasure house of Qing documents opened to researchers from all over the world, Philip Kuhn wrote in *Soulstealers*:

> That China has opened her great repositories of Ch’ing documents to researchers from all nations must rank as one of the great events in the history of modern scholarship. We are only beginning to realize its significance for our understanding of the human condition. (Kuhn, 1990: Acknowledgments, vii)

Of these newly accessible stacks of documents, a considerable portion is judicial archives.

For example, although it had lost an untold number of documents through the “8,000 Hemp Sack Affair” 八千麻袋事件 during the Beiyang era, the First Historical Archives of China still houses more than ten million Ming and Qing documents, among which the number of routine memorials to the Ministry of Justice 刑科题本 alone is staggeringly huge. The archivists at the First Historical Archives of China indexed the ministry’s routine memorials, dividing them into various categories: autumn and spring assizes 秋审朝审类, homicides 命案类, robbery 盗案类, official corruption 贪污案类, prisons 监狱类, arrests and seizures 缉捕类, and “others” 其他. The category of homicides, for instance, is further divided into four subcategories: blows and affrays 打架斗殴类, land and debt 土地债务类, marriage and illicit sex 婚姻奸情类, and “others,” among which memorials on homicides relating to land and debt during the Qianlong reign alone number 56,850 (Buoye, 2000b: 230; 2004: 407). In addition to the Board of
Punishments Archives, the materials at the First Historical Archives related directly to legal research include, at a minimum, the archives of the Constitution Commission, the archives of the Supreme Court of Justice, the archives of the Bureau for the Revision of Laws, the Censorate Archives, and so on (Zhongguo diyi lishi dang'anguan, 1985: 77–78, 113–21).

Research materials for Chinese legal history are also available in the abundant collection of Qing judicial archives in the National Palace Museum in Taipei and at the Institute of History and Philology, Academia Sinica. The Qing judicial archives are largely documents from the provincial level and above, including the Imperially Rescripted Palace Memorials in the Imperial Court Archives, the Grand Council Copies of Palace Memorials, the Imperial Edicts Archives, the Imperial Diary Records, the Outer Court Records, the Published Memorials of the Six Offices of Scrutiny, various versions of the Treatise on Punishments, the Office for Compiling National History, the Qing History Office, the Imperially Rescripted Palace Memorials, the Imperial Edicts Archives, the Imperial Diary Records, the Outer Court Records, the Published Memorials of the Six Offices of Scrutiny, and so on (Zhuang, 2003: 278; Qin, 1994: 128–40). The Institute of History and Philology at the Academia Sinica houses the Three High Judicial Offices Archives, a renowned resource for research on Qing legal history with which both Chinese and foreign scholars have been familiar for some time (Liu Zhengyun, 1998; Chang, 1983).

Aside from these sorts of central archives, the judicial materials contained in Qing local archives are also deserving of mention here. The best known are the Danshui subprefecture, Xinzhu county, the Baxian county archives, the Baodi county archives in Shuntian prefecture, the Sichuan Nanbu county archives. Of these, the Danshui, the Baxian, and the Baodi archives have been available to researchers for decades while the Sichuan Nanbu county archives did not attract scholars’ attention until recent years. These archives aside, a great number of legal documents have been archived at other places around the country, but their exact quantity remains unknown.

The gradual opening of Chinese archives has offered scholars worldwide an unprecedented opportunity. Since the early 1980s, a number of Western scholars have come to China to take advantage of these valuable source materials. Beatrice Bartlett recalled that during her visit to Beijing in September 1974, she was not allowed access to the Qing archives so that her first trip
ended up as a reluctant sightseeing walk outside the walls of Wenhua Pavilion, where the documents are stored. When she tried to peek through a warped door, she was ordered to leave. But only six years after this regrettable incident, she was able to spend an entire academic year carrying out research in those same Ming-Qing archives (Bartlett, 1981: 81). Around the same time, the major journals of Chinese studies in the West, such as Ch’ing-shih wen-t’i (later renamed Late Imperial China) and Modern China, began to publish introductory articles on Ming- and Qing-era archival materials utilized by Western scholars in the Chinese mainland, Taiwan, and even in special library collections in the United States.

It was during this period that the Chinese scholar Chang Wejen wrote an article to introduce the Treasuries of the Grand Secretariat Archives housed at the Institute of History and Philology, Academia Sinica, to a Western audience. In his article, he particularly emphasized the importance of such archives to the study of Qing justice (Chang, 1981). Over a decade later, Nancy Park and Robert Antony published an article titled “Archival Research in Qing Legal History,” in which they drew on their three years of research in the First Historical Archives to provide a detailed introduction to the Grand Secretariat Archives, the Palace Imperial Court Archives, the Grand Council Archives, the Board of Punishments Archives, the Censorate Archives, the Supreme Court of Justice Archives, and the Legislative Revision Commission Archives of the Bureau for the Revision of Laws. Park and Antony noted that “the research potential of Qing law seems limitless, and the possibilities are enhanced by a wealth of virtually untapped primary and archival sources” (Park and Antony, 1993: 93).

Making use of these archives for research in Chinese law became a new trend in the West, especially in the United States, beginning in the 1990s. A new generation of scholars built on their predecessors’ research and surpassed them. When Derk Bodde and Clarence Morris selected 190 cases from the Conspectus of Penal Cases for analysis, they acknowledged that “it was quickly realized that it would be impossible to reach any statistically significant conclusions on the basis of such a small sampling” (Bodde and Morris, 1967: 156). Furthermore, the documents in the Conspectus of Penal Cases are condensed abstracts of detailed legal cases and thus do not provide adequate information about what actually occurred during the course of a trial. By comparison, the rich archival materials now available have provided a new generation of scholars a unique opportunity to delve into multiple new dimensions of traditional Chinese law. With a multilayered approach now possible, scholars can explore not just a one-sided elite perspective but
also the ways in which local society interacted with and experienced the legal system, thereby gaining a greater understanding of the actual practice of Chinese law. For example, traditional sources allow us to see only a top-down dynamic of magistrates asserting power over a submissive commoner population. The new archival sources allow us to see commoners negotiating the legal system and at times even working to exert “power” from the bottom up. Furthermore, the focus of the new generation of scholars is no longer limited to the process of law-making, but extends to various other processes including law enforcement; it is no longer limited to the center, but extends to the local and the periphery; it is no longer limited to criminal law, but extends to other fields including civil law, administrative law, commercial law, and so on. In brief, we are witnessing the making of a new tradition in Chinese legal history studies in the West.

In the United States, this new tradition can be traced back to David C. Buxbaum’s pioneering research in the Dan-Xin archives in the early 1970s (Buxbaum, 1971). Buxbaum had invited Professor Dai Yanhui 戴炎辉 of National Taiwan University to work with him at the University of Washington in Seattle. Dai microfilmed the original documents of the Dan-Xin archives into 33 files and brought them to the University of Washington’s East Asia Library. Buxbaum used these Dan-Xin records to discuss earlier scholarship on Qing law by Bodde and Morris and by Jerome Cohen, and began a more fundamental and detailed exploration of many neglected aspects of Qing law. In the article, Buxbaum discussed the differences between civil and criminal cases in Qing law as well as the characteristics of civil cases submitted to magistrates. Based on the Dan-Xin case records from 1789 to 1895, he found that 19.2 percent of all cases were “civil” 细事, while 31.9 percent were criminal 重案. Furthermore, those “civil” cases involved all sorts of mundane matters of daily life. He also discussed whether civil cases were handled as penal matters; whether the accused was considered guilty until proven innocent in criminal cases (concluding that “in any event, the presumption of guilt in ordinary civil or criminal cases does not seem to exist, Bodde and Morris to the contrary notwithstanding” [Buxbaum, 1971: 270]); and, whether the general populace considered entanglement with the legal system a terrifying prospect (concluding that they did not). To support his arguments, Buxbaum provided abundant data, for example detailing the number of administrative/civil/criminal cases per year, their duration, and the correlation between distance from court and the likelihood of being involved in litigation, all of which laid the groundwork for subsequent scholars’ research.

Buxbaum’s emphasis on the importance of legal case records reflected a new trend in modern Western historiography. Research conducted with the
aid of judicial archives can be found in works from the Annales school, practitioners of so-called microhistory, and those who advocate “new cultural history.” In his masterwork, *Montaillou, village occitan de 1294 à 1324*, Emmanuel Le Roy Ladurie, a major scholar of the third generation of the Annales school, made full use of the preserved records of 578 inquisitions to construct a panorama of the lives, thoughts, beliefs, and customs of peasants in a village in the southwest of France in the medieval era (Le Roy Ladurie, 1975). As the leading scholar of microhistory, Carlo Ginzburg published in Italy in 1966 his *Benandanti: Stregoneria e culti agrari tra Cinquecento e Seicento* (translated and published under the title *The Night Battles: Witchcraft and Agrarian Cults in the Sixteenth and Seventeenth Centuries* in the United States in 1983), in which he demonstrated how a kind of peculiar agrarian cult popular in the region of Friuli, Italy, was labeled heretical witchcraft by the church courts (Ginzburg, 1983). In *The Cheese and the Worms: The Cosmos of a Sixteenth-Century Miller*, first translated and published in America in 1976, Ginzburg illuminated the “popular culture” of the lower classes in sixteenth-century Italy by analyzing the mental world of a peasant nicknamed Menocchio, who lived in a remote village in northern Italy. The main materials used in this book were records of over a decade of interrogations conducted by local inquisitors, materials that Ginzburg discovered in the Archivio della Curia Arcivescovile of Udine in Friuli (Ginzburg, 1992). Natalie Zemon Davis, a representative of the new cultural history approach, is also well versed in the use of judicial records. Based on archived judicial records and other materials such as *Arrest Memorable*, her *The Return of Martin Guerre* narrated an extraordinary case of an imposter husband more than 400 years ago in a village in the Pyrenees, thereby revealing elements of folk life such as marriage, inheritance practices, and litigation (Davis, 1983). In *Fiction in the Archives: Pardon Tales and Their Tellers in Sixteenth-Century France*, she made full use of the French judicial archives, including the Archives Départementales du Rhône, the Archives d’Etat de Genève, the Archives Nationales, and the Archives de la Préfecture de la Police, Paris, to demonstrate the cultural background behind the pardons (Davis, 1987).

**Chinese Legal History**

**Studies and the Social Sciences**

The twentieth century saw the rapid development of the discipline of history in the West, during which a new trend would arise only to be rapidly replaced by another. One important constant has been the relationship between history
and the social sciences. From the early twentieth century, historians have advocated their integration and this trend swept across the historical field beginning in the mid-twentieth century.

As Wang Qingjia and Gu Weiying have argued, “the main interest in historical circles in the West during the early twentieth century was to introduce the methods of social science into the research of history” (Wang and Gu, 2006: 71). James Harvey Robison, known as the founder and advocate of “new history” during the early twentieth century in the United States, considered the social sciences “the new allies of history” and advocated combining history studies with the achievements of social science (Robison, 1922: chap. 3). Robison’s view was shared by fellow scholars such as Frederick J. Turner and Charles A. Beard. The Annales school adamantly insisted on the introduction of the concepts and methods of the social sciences into historical research. Indeed, the name of its core journal, founded in 1929, was changed to Annales: histoire et sciences sociales (Burke, 1990).

The integration of history and the social sciences reached a new phase in the early 1950s, the essential characteristic of which was a shift from an emphasis on the use of the broad general concepts of the social sciences in historical research to a focus on the very methodology of the social sciences (Barraclough, 1978: 47). The traditional historiography represented in Leopold von Ranke’s masterworks was quickly replaced by works that combined traditional historical methods with social science methods. As Geoffrey Barraclough argued, “the distinguishing feature in the United States was the steadily advancing alignment between history and the social or behavioural sciences” (Barraclough, 1978: 29). Leading this trend in the United States is the “new social history” school, the methodology of which became the mainstream among historians since the 1960s and was even referred to as “history-as-a-social-science” by some scholars.

This development also had an enormous impact on research on Chinese history in the United States. The 1960s saw heated discussion among historians on how best to introduce the social sciences into China studies, as seen in the series of articles published in the Journal of Asian Studies in 1964. G. William Skinner was the first advocate, followed by scholars such as Benjamin Schwartz, Mary C. Wright, Maurice Freedman, Joseph R. Levenson, and Rhoads Murphey (Zhu, 2004: 58). Of the four features of what Paul A. Cohen calls the “China-centered” perspective that gained popularity in China studies in the United States since the 1970s, the last is that “it welcomes with enthusiasm the theories, methodologies, and techniques developed in disciplines other than history (mostly, but not exclusively, the social sciences)
and strives to integrate these into historical analysis” (Cohen, 1984: 186–87; see also Chen, 2003: 205–24).

For researchers of Chinese legal history, perhaps the most familiar among all the “theories, methodologies, and techniques developed in disciplines other than history” is the academic heritage left by Max Weber. According to Lin Duan,

[Weber’s] whole research of sociology aims mainly to display the Eigentümlichkeit [particularities] of the development of Western culture: why did the phenomenon of Rationalisierung und Intellektualisierung [rationalization and intellectualization] take place only in the West? Similarly, his sociology of legal science emphasizes the following feature of Western law: since the development of a formal-rational order in Western law is one of the indexes of Eigentümlichkeit during the course of the rationalization in the West, why did a coherent Logisierung des Rechts [legal logicalization] emerge only in certain areas in the modern West? (Lin, 2003: 5)

To show this problem more clearly, Weber selected the Chinese legal tradition as the Gegentypus (countertype) of modern Western law. He painstakingly detailed the points of opposition between the two systems in his ideal-type analysis. One of his best-known arguments is that justice in imperial China was Khadi justice, wherein a judge exercised arbitrary authority and thereby brought about results that were often beyond our expectations:

The Chinese judge, a typical patrimonial judge, discharged business in a thoroughly patriarchal fashion. That is, insofar as he was given leeway by sacred tradition he precisely did not adjudicate according to formal rules and “without regard to persons.” Just the reverse largely obtained; he judged persons according to their concrete qualities and in terms of the concrete situation, or according to equity and the appropriateness of the concrete result. This “Solomonic” Cadi-justice [Khadi-justice] also lacked a sacred book of laws such as Islamism had. The systematic imperial collection of laws was considered inviolate only insofar as it was supported by compelling magical tradition. (Weber, 1951 [1922]: 149)

It was due to the influence of these arguments that an “enlightening European-centric doctrine” became a “normative European-centric doctrine” (Lin, 2003: 21). What is more regrettable is that Weber’s arguments about traditional Chinese law became an enduring prejudice that dominated research on
Chinese legal history in the West and still has a strong but unfortunate legacy to this day.\footnote{This example confirms Paul Cohen’s concerns about the inevitable difficulties of combining social science with historical studies:}

Finding the right theory . . . and integrating it effectively with the data is only one hurdle that has to be surmounted. Another is what may be called the stylistic barriers: the challenge of incorporating social science concepts into historical narrative without succumbing to the almost total disregard of art to which formulators of the former seem disposed. A third hurdle, perhaps the most humbling of all, is the demand [for] the mastery of theories, methodologies, and strategies from a wide range of disparate disciplines. (Cohen, 1984: 184)

However, the difficulties do not mean that the attempt to integrate social science and Chinese legal history studies would be doomed from the outset. Ch’ü T’ung-tsü’s two masterpieces successfully combined the methodologies and as a result have remained renowned in the field since their publication in English in the early 1960s (Ch’ü, 1961, 1962). Following in his footsteps, other scholars of Chinese legal history are incorporating the insights of social science methodology. For example, in a recent book, Thomas Buoye made use of a number of the routine memorials to the Ministry of Justice to show the relationship between economic and social structural changes and the daily conflicts of ordinary people (Buoye, 2000a).

**Discovering a Historical Sense in the Meeting of Empiricism and Theory**

These two recent trends—taking advantage of newly available judicial archives and absorbing insights from social science theories—come together in the scholarship of a group of Western professors (Americans in particular) in Chinese legal history studies and thus jointly constitute the major features of the “new legal history” in the China field. Numerous monographs or edited volumes on Chinese legal history, possessing one or both of the two essential features, have been published in the United States since the 1990s.\footnote{As a result, there are multiple groups of American scholars whose academic works avail themselves of the style of the “new legal history,” of which the UCLA group in Chinese legal history is perhaps most representative. No other group has worked so tightly together as the UCLA}
group, nor made as much use of both judicial archives and social science research methods. UCLA became thereby a leading center of new legal history research.

In 1994, Stanford University Press initiated a new series, “Law, Society, and Culture in China,” which can be considered an important signal of the rise of “new legal history” in the United States. The series, of which Philip C. C. Huang and Kathryn Bernhardt were the editors, exerted a profound influence on Chinese legal history studies. Except for one volume of articles (Bernhardt and Huang, eds., 1994) and one monograph, by Melissa Ann Macauley (1998), the authors of the remaining five monographs were pivotal figures in the UCLA research group: Huang, Bernhardt, Matthew Sommer, and Bradly Reed. We can take their monographs as examples of how to put the methods of “new legal history” into practice.

Philip C. C. Huang first came to China to collect research materials at the end of the 1970s. In his keynote lecture at the annual conference of the Association for Asian Studies in 1981, he mentioned his research based on routine memorials to the Ministry of Justice and the archives of the Office of Punishments of Baodi county and introduced the Baxian county archives (Huang, 1982). Huang’s monograph, *Civil Justice in China: Representation and Practice in the Qing* (1996), relied largely on archival records of 628 cases selected from the Baxian county archives, Baodi county archives, and Dan-Xin archives, in addition to 128 case records from Shunyi county 顺义县 from the 1910s to 1930s. In another monograph, published in 2001, *Code, Custom, and Legal Practice in China: The Qing and the Republic Compared*, he used 875 local court case records. In this book, Qing cases were selected from the Baxian county archives, Baodi county archives, and Dan-Xin archives, while the Republican cases came from four counties: Shunyi in Hebei 河北顺义, Yibin in Sichuan 四川宜宾, Yueqing in Zhejiang 浙江乐清, and Wujiang in Jiangsu 江苏吴江. In both monographs, Huang also made full use of the field surveys of three villages in North China that were conducted by the Research Department of the South Manchurian Railway Company 南满洲铁道株式会社 (Minami Manshū Tetsudō Kabushiki Kaisha, or “Mantetsu” for short) from 1940 to 1942 (Huang, 1996, 2001). I will discuss some of Huang’s major arguments below.

Kathryn Bernhardt’s *Women and Property in China, 960–1949* focuses on the evolution of Chinese women’s property rights, undermining the static picture of property inheritance painted by former scholars. Her major point is that previous scholarship did not distinguish two separate processes and conceptual complexes in the system of property inheritance—household division 分家, which comes into play when a man has birth sons, and patrilineal succession 承祧, which comes into play when he does not. With the aid of
population studies showing that one family out of every five did not have sons who survived to adulthood, Bernhardt reveals that although the more common system of household division remained relatively static over the centuries, the system of patrilineal succession experienced significant changes from the Song dynasty to the Qing dynasty. Turning to the Republican era, Bernhardt demonstrates that what actually occurred in legal practice ran counter to the original expectations of Republican lawmakers: Guomindang 国民党 lawmakers intended to abolish the old inheritance regime and allow women equal rights with men. However, Bernhardt shows that while a widowed wife did gain a portion of her husband’s property, she lost her custodial powers over her dead husband’s entire estate. Widowed concubines and widowed daughters-in-law were affected more seriously. Even daughters’ equal right in inheritance with their brothers, established in the law for the first time, was rather fragile, because such a new right could be realized only when post-mortem inheritance occurred. In other words, if a father divided the household’s property before he died, his daughter’s new right to inherit under the law could not come into play. All in all, women lost as much they gained when it came to property in the Republic. To substantiate these arguments, Bernhardt uses a large number of original judicial archives, including local-level archival records for 68 inheritance-related cases of the Qing period, and original archival records for 370 inheritance cases from the Republican era, including 96 appeals cases from the Supreme Court of Justice 大理院 in the 1910s and 1920s, 134 appeals cases heard by the Capital Superior Court 京师高等审判厅, and 140 case records from the Capital District Court 京师地方审判厅 and its successor, the Beijing District Court 北京地方法院, from the 1910s to the 1940s. In addition, Bernhardt also draws on the diaries and autobiographies of local magistrates as well as published collections of court cases (Bernhardt, 1999).

Matthew Sommer’s Sex, Law, and Society in Late Imperial China tackles changes in legal regulations relating to sex, including rape, adultery, prostitution, and homosexuality, and the effects of those regulations on ordinary people from the Tang dynasty to the Qing dynasty. Sommer argues that although the state consistently used the same term, jian 奸, to label sex offences from the Tang to the Qing, the law actually experienced numerous subtle changes. In the first place, the representation of both hypothetical rapists and ideal victims in the statutes underwent a transformation during this period. In the Tang dynasty, rapists were usually imagined to be the male slaves or worker-serfs of elite households and victims were imagined to be their masters’ wives or daughters. By the Qing, they had been replaced, respectively, by guanggun 光棍 (i.e., “bare sticks” or “rootless rascals”) and women and adolescent boys of
better-off households. Second, the standards by which sexuality was regulated in the statutes underwent a gradual change “from status performance to gender performance.” After the abolishment of the liangmin/jianmin 良民/贱民 (i.e., free commoners/legally debased-status persons) dichotomy during the Yongzheng 雍正 reign, the general standards of sexual morality and criminal responsibility that used to be applied only to commoners now extended to various other classes. Where once different status groups were held to different standards of sexual morality, now all people were to conform to the gender roles defined by marriage. Sommer bases his arguments on archival research materials, judicial records from both the central and local level, including 500 Baxian case records from the period 1758–1852, 160 Shuntian prefecture cases, 600 routine memorials to the Ministry of Justice of the Grand Secretariat 内阁刑科题本, and 80 records of crimes subject to “immediate examination” 现审案件 by the Board of Punishments (Sommer, 2000).

Bradly Reed’s monograph, Talons and Teeth: County Clerks and Runners in the Qing Dynasty, explores the roles clerks and runners played in Qing local government, illuminating the effects that their actions had on the relationship between state and society. Nearly all Confucian-influenced scholarly works on Qing local government portrayed clerks and runners as an undifferentiated mass of corrupt ne’er-do-wells, single-mindedly bent on the pursuit of their own self-interest. These works more often than not considered the large number of clerks and runners as exceeding the legally stipulated quota for yamen staff, and thus as a sign of disorderly administration across the empire. Reed’s research presents a completely different picture by showing that the clerks and runners in Baxian county created and then followed a detailed set of customary practices, norms, and procedures in the handling of recruitment, advancement, and the distribution of various profitable opportunities. He also shows how clerks and runners engaged in a degree of self-policing, to some extent regulating their own behavior through internal sanctions against extreme corruption and abuse of power in order to avoid official investigation. These practices, norms, and procedures were accepted as a form of customary administrative law by magistrates, who often ordered compliance with these customary practices in the course of settling intra-yamen disputes. However, such practices were never formally codified despite their functioning as “administrative law.” In fact, some practices, such as the collection of customary fees 陋规, were illegal under codified Qing law. Thus, Reed called this an “extrastutatory system”: practices that were not legitimizes by formal law but that filled in the loopholes created by the absence of legally pronounced administrative norms. All in all, what Reed has illuminated is completely different from Weber’s description of modern
rationalized bureaucratic administration. It is another mode of administration that cannot be generalized by Weber’s ideal types. Reed based his arguments on painstaking research using hundreds of administrative or judicial documents contained in the Baxian county archives (Reed, 2000).

In addition to their use of judicial archival materials, these five monographs, and in particular Huang’s two books, all either used the methods of social science research or engaged in dialogue with the social science community. In one place in his earlier book, Huang devoted a full chapter (chapter nine) to challenging the still influential Weberian theories that have shaped our view of the Qing legal and political systems. Huang gave new meaning to Weberian terms. For instance, Huang adopted the term “substantive rationality” to illuminate the paradoxical combinations of substantivism with rationality, as well as formal adjudication with informal mediation in Qing legal culture. Huang’s latter monograph likewise utilized well-known social science theories of Clifford Geertz and Pierre Bourdieu, integrating them with his own new perspective.

These distinctive features of the monographs in the Stanford series are reflected in the volume of articles Research from Archival Case Records: Law, Society, and Culture in China (Huang and You, 2009). The judicial archives used in this volume span the Qing and Republican periods and were collected from Baxian county, Sichuan; Baodi county, Shuntian prefecture; Danshui subprefecture and Xinzhu county, Taiwan; Bodune military yamen 伯都纳副都统衙门, located in the northeastern imperial China; Huailu county 获鹿县, Hebei; Haicheng county 海城县, Fengtian; Xinmin county 新民县, Liaoning; and other areas, as well as the Board of Punishments located in Beijing; the Grand Secretariat; the Shengjing Board of Revenue 盛京户部, and Imperial Household Department in Shengjing 盛京内务府; Beijing District Court; Sichuan Superior Court 四川高等法院; Provincial Civil Affairs Department of Sichuan 四川省民政厅; Hebei Superior Court 河北省高等法院; Jiangsu Superior Court 江苏省高等法院; Shanghai First Special District Court 上海第一特区地方法院; and other institutions. In addition, there are some other post-1949 archives from counties in north China as well as south of the Yangtze River and a county in south China. The authors also engaged a range of theories and theoretical issues, such as “civil society/public sphere,” “the relationship between state and society,” the sources of social power, and “cultural networks of power.”

With their emphasis on the connection between empiricism and theory, the UCLA group not only worked to correct misconceptions of China’s traditional and even modern law but also undermined certain so-called authoritative conclusions, including conventional presumptions that there was no
“real” civil law in Qing China and that the Qing yamen seldom adjudicated civil cases according to formal law. Their studies also helped correct the unfounded view that during the transformation from Qing to Guomindang law, China was merely imitating Western law in every aspect: shifting from irrationality to rationality as well as from the “Khadi justice” of substantivism and instrumental rationality to what is called modern law. As well, what they have done as a research group has broadened the horizon of Chinese legal history studies, revealing the complicated realities of Chinese law and society. At the same time, their scholarship has brought about unabated academic debates, one well-known example of which is the exchange between American and Japanese scholars.

During September 21–23, 1996, an international conference on “Law, Society, and Culture in Late Imperial China: A Dialogue between American and Japanese Scholars” was held in Kamakura, Japan. The chief representatives of each side were Philip C. C. Huang and Shiga Shūzō, a world-famous expert on Chinese legal history. The clash between these two sides can be traced back to 1993, when Huang began to publish papers in which he expressed criticism of some of Shiga’s views (Huang, 1993, 1994). Huang’s criticism brought a response from Terada Hiroaki, one of Shiga’s best students (Terada, 1997b, 1998). Although Terada modestly called himself “a half-person involved in this debate” (Terada, 1999: 604), in fact, he was the Japanese scholar who participated most actively in this debate and is thus best representative of that side.

According to Terada, the core of the disagreement between Shiga and Huang lay in differing interpretations of the role and actions of Qing magistrates—whether they adjudicated unequivocally, drawing a clear line between right and wrong according to formal law and protecting the legitimate rights of the litigants. Shiga, borrowing a concept from Dan Fenno Henderson, deemed civil justice in the Qing to be “didactic conciliation” (Shiga, 1981). In contrast, Philip Huang argued that magistrates were in fact guided closely by the legal code, resulting in a ruling for one party or the other in civil disputes (Huang, 1996). This debate over “conciliation” versus “adjudication” has still not been fully resolved.

Huang has pointed out that this debate arose from differences in historical outlook as well as methodology: one party attached importance to actual legal practice and the possible options of the persons involved, while the other party attempted to explore core, unchanging legal principles. In addition, I would like to remind readers of another important distinction: the different sources each used.
Huang based his conclusions on empirical analysis of newly accessible archival case records, giving him insight into what had been neglected by previous scholars, especially commoners’ choices when faced with a lawsuit. In contrast, Shiga and other Japanese scholars mainly drew on more conventional materials such as historiographical books 正史, readers on admonitions for officials 政书, local gazetteers, legal codes, and magistrates’ handbooks (e.g., Wang Huizu’s Subjective Views on Learning Governance 學治臆说). Although Japanese scholars in Chinese legal history studies were widely noted for using detailed and accurate materials and even emphasized the importance of research based on judicial archives (Terada, 1989a, 1989b), it seems that there were still comparatively few who made systematic use of specific judicial archives for empirical research. Even those who did use cases used them in the style of Clifford Geertz’s “thick description” of a single case or a limited number of cases, to illuminate core principles of the so-called legal tradition and sometimes even the whole society and culture.14 Relatively little attention was given to drawing on a great number of judicial archives systematically. Although some recent works have begun to use judicial archives more systematically (e.g., Fuma, 2011), there is still room for improvement as far as the whole of Japanese academia is concerned.

Since different methods have their own advantages and disadvantages, we should not favor one more than another and fault the more traditional methods used by Japanese scholars. However, it is the materials and techniques adopted by each group that led to the debate between the American and Japanese scholars. As to some misunderstandings in the debate, perhaps it is just as Philip Huang said: “this problem will be resolved spontaneously as more and more people make use of archives in the future” (Huang, 1999: 367).

In one of his articles, Terada noted of Philip Huang’s 1996 book on civil justice in the Qing that the distinctions between American and Japanese scholars lie in “the diverse ways of observation or the starting points of their theories”:

Professor Shiga based his views on the comparison of Chinese and Western legal cultures, while Professor Huang paid close attention to the historical succession between the legal orders of the Qing and Republican, and further, modern China since the inception of the reform [era]. (Terada, 1999: 611)

Even so, in the conclusion to another article, Terada allowed that Huang’s notion of “disjunctions between official representation and practice” is
persuasive as a whole, and his main reason was the continuity of legal practice from the Qing to the Republican era (Terada, 1998). In my opinion, Terada’s analysis unconsciously revealed another essential feature of the “new legal history” emphasized by Philip Huang.

In the preface of his 2001 monograph, Philip Huang talked about his plan to write three volumes chronicling the legal history of the Qing, the Republic, and the People’s Republic (Huang, 2001: preface). In my opinion, what motivated Huang’s ambitious plan was a profound understanding that transcended conventional views of Chinese legal history. He emphasized repeatedly that contemporary Chinese law “comprises traditions inherited both from the Qing and from the Chinese Revolution (setting aside, of course, its totalistic, or ‘totalitarian,’ aspects) and, in addition to those, transplanted elements from the West (selected and adapted by the Guomindang government)” (Huang, 2007: 170). If we link this argument with his research style, the implied meaning is that since there is no legal reality without its history, in order to understand the present legal reality, those engaged in the study of Chinese legal history should try to establish connections between historical phases and discover what changed and what remained unchanged over time. To borrow a phrase from Gan Yang (2007), Huang is calling on scholars to “connect three traditions” in their research on Chinese legal history.

I call this idea “historical sense,” which is one of the three fundamental features of the “new legal history.” It was under the guidance of this “historical sense” that Philip Huang formulated his own unique concepts and theories—for example, “the disjunction between representation and practice,” “practical moralism,” and “centralized minimalism in governance.” In other words, a genuine “new legal history” can be achieved only if we, led by a “historical sense,” conjoin the empirical (the extensive use of valuable judicial archives) with the theoretical (drawing upon the theories of the social sciences) to formulate our own informed new middle-level concepts. As Huang himself wrote,

From the angle of empirical research, it [the “new legal history”] can provide new information for us. From the view of theoretical research, it might help us find proper concepts and theories that fit in with the practice of Chinese history. More importantly, the new legal history might help us stride across the present generation gap that exists among the “new” cultural history, the “old” social and economic history, and the “old” legal history, in other words, the wide gulf between subjectivism and objectivism. (Huang, 1999: 376)
Stones from Other Hills May Serve to Polish the Jade of This One 他山之石，可以攻玉: The UCLA Research Group’s Achievements and Chinese Introspection

Since the 1990s, Chinese translations of overseas scholarship on Chinese legal history have become a significant academic resource for Chinese scholars. In addition to the works already discussed, other major writings on Chinese legal history translated and published in Chinese include Bodde and Morris (1993); Karen Turner, Gao Hongjun, and He Weifang (1994, 2004); Shiga et al. (1998); Zhang Zhongqiu (2002); Shiga (2003); Chü T’ung-tsu (2003); Yang Yifang (2003); and Dikötter (2008). These authors include overseas Chinese as well as scholars from the U.S., Japan, and Europe. Numerous articles have also been translated into Chinese and published in various journals and collections of articles.

Given the ever-increasing number of translated works, what, then, is the significance of the writings of the UCLA research group for Chinese academics? In my opinion, besides revising previous views and assumptions about Chinese legal history, what is perhaps most important are the research practices and methodology shared by the UCLA research group and their “new legal history.”

First would be their use of judicial archives. It is ironic that in mainland China relatively few scholars of Chinese legal history made full use of such archives in their research before this century. As a result, legal history research in mainland China lags behind not only some of its Western academic counterparts in this regard, but also some mainland Chinese works on other historical subjects—especially Chinese economic and social history. While Chinese legal historians rely almost exclusively on codes, compendia, and other traditional sources in their research, scholars of Chinese social and economic history (such as Li Wenzhi, Liu Yongcheng, Feng Erkang, and Zhou Yuanlian) have long made good use of the routine memorials to the Ministry of Justice (Li, 1957; Zhongguo renmin daxue, 1979; Zhongguo lishi diyi dang’anguan and Zhongguo shehui kexueyuan lishi yanjiusuo, 1982, 1988; Zhou and Xie, 1986), thus establishing a well-grounded academic tradition that emphasizes use of routine memorials to advance research in their respective fields (Guo, 2000; Wang, 2000, 2003). The absence of such in the scholarship by Chinese legal historians several decades ago might be understandable, but even today the routine memorials are still rarely used—at most only some fragmentary parts of the archives have been drawn upon, and only by a few people some ten years ago (e.g., Zheng and Zhao, 1999).
Mainland Chinese legal historians also have not taken advantage of the other sorts of judicial archives. I have heard more than once that while some names of foreign scholars can be found in the registry of the Baxian county archives, the names of many “famous” mainland Chinese legal historians seldom or even never appear. The First Historical Archives of China has held international academic conferences every ten years, the theme of which is the relationship between Ming–Qing archives and historical research. Regrettfully, we find hardly any articles written by Chinese legal historians in the volumes of conference articles (Zhongguo diyi lishi dang’anguan, 1988, 2000, 2008). During my visit to Taipei in 2005, when a professor who was helping draw up the list of the invitees for an upcoming conference on power and culture in Ming–Qing judicial operations asked me to recommend some mainland scholars who had made full use of Ming–Qing judicial archives in his or her research, though I might have been ill-informed, I was hard put to come up with any appropriate names on the spot.

Only in recent years, especially with the arrival of a new generation of Chinese scholars, have the judicial archives begun to attract the attention they deserve. For example, Yu Jiang (2007a, 2007b) drew on the archives of the xingfang 刑房 of Baodi county to investigate issues of property inheritance; Deng Jianpeng (2005, 2007a, 2007b, 2007c) explored the Qing litigation system with the aid of the Huangyan judicial archives 黄岩诉讼档案; Zhao Weini (2007), Wu Peilin (2008), and Li Zan (2010), all using the Nanbu county archives in Sichuan, discussed lawsuits relating to marriage, the system of guandaishu 官代书 (persons who prepared litigation documents for others), and how the magistrate heard cases and rendered judgment in the Qing, respectively; A Feng (2009) used the Dan-Xin archives and Huizhou documents 徽州文书 to explore women’s rights in the Ming and Qing dynasties; Liu Xinjie (2011) used the judicial archives of Xinfan county 新繁县 in Sichuan for a detailed study of the role of rights and custom in judicial practice during the Republic of China; and Zhang Qing (2012) drew on local archives from various places in Liaoning province to examine the transformation of civil justice in Fengtian province 奉天省 during the late Qing and the early Republic.

However, such archival research is still too limited when compared with the hundreds of other monographs and articles published in mainland China every year. In recent years, the Chinese legal history community has been greatly attracted to the issue of whether there was “certainty” (a concept related to Max Weber’s important notion—“formally rational” in essence) in traditional Chinese justice. However, few of the Chinese scholars engaged in this debate have drawn on judicial archives. Instead, they tend to
make general statements based on the rather vague notion of so-called legal culture. In fact, conclusions based on thorough research of archival materials would be far more persuasive for such a discussion. Taking a broad view of all Chinese-speaking areas, we see that mainland Chinese academia even lags to some extent behind Taiwanese academia (e.g., the scholarship of Huang Yuansheng, Lai Huimin, Qiu Pengsheng, and others) in the use of judicial archives.

Now let us turn to the problem of how to engage and utilize well-established social science theories. Liang Zhiping, a leading mainland scholar, has pointed out that, as far as recent Chinese legal history studies in the mainland are concerned,

although the mainstream paradigm, with textbooks at its core, has not sunk into a crunch of resource deficiency, it has for a long time experienced a normative crisis. This is partly due to the paradigm’s over-maturity, and partly because of its strong constraint on reflection. The refusal to engage in reflection has led to a dogmatism in the use of theories, which has not only restrained researchers’ interest in theory but also has harmed their ability to think. (Liang, 2003: 218–19)

In my opinion, rather than “a dogmatism in the use of theories,” “treating theories as ornaments” or even “theorizing as nihilism” is a more accurate description of the situation. Since the 1990s, Chinese scholars have begun to engage in influential comparative studies of Chinese and Western legal cultures, and thanks to the efforts of Liang Zhiping, Zhang Zhongqiu, Fan Zhongxin, and other scholars, they have obtained fruitful results. One main contribution is that such comparative studies allow theories in sociology and anthropology, in addition to history, to play a role in scholarship on Chinese legal history. However, the main paradigm that dominates Chinese legal history studies is still one that pays major attention to textual research and minimizes the role of theory. As a result, despite some excellent achievements, most research on Chinese legal history has not taken advantage of current social science theories. In comparison, Western historical research appears to be increasingly theoretical, although this trend is not of course necessarily desirable. Even when Chinese legal historians occasionally delve into the realm of theory, they usually use theory merely as a fragmentary embellishment and do not engage in sustained dialogue with it or with the leading developments in the international academic community. Even worse, some scholars deride social science theories immediately upon hearing their names, completely rejecting the thought that they might have any merit. All
in all, by clinging to a traditional paradigm, mainland Chinese research is often inclined to simple empiricism and appears reluctant to explore new academic resources.

It is necessary, of course, to be vigilant in how we approach social science theories (see Huang, 1998). However, if we ignore their potential benefits to the field of history, we miss the opportunity to broaden our historical vision, to raise new and important questions, and to engage in dialogue with scholars of related subjects, as well as to form our own new concepts through the process of these dialogues. Fu Sinian, the founder of the Institute of History and Philology, Academia Sinica, once said, “Modern historical science is only a science of historical materials” (Fu, 1997 [1928]: 40). While such a statement may sound reasonable to some extent, it has been strongly criticized for its excessive narrowness. As far as contemporary Chinese legal history studies are concerned, we perhaps should heed Philip Huang’s suggestion to engage in dialogue with theory as we conduct our research, resulting in studies that are well informed both theoretically and empirically.

Finally, I would like to address the issue of a “historical sense.” In Chinese law schools, Chinese legal history is usually considered xuxue (虚学) (a subject of relatively little practical value), and as a result, is increasingly marginalized. Those who are alarmed by this trend try to convince others of legal history’s contemporary relevance by asserting that the current legal reform process can be aided by an understanding of China’s legal past. Although such an argument invokes the power of nationalistic emotions, it lacks real persuasiveness. What would be more effective would be to elucidate how the Chinese legal system of today is the result of the intersection and integration of three different traditions—the classical Chinese legal tradition (especially, the legal system of the Qing dynasty), the communist legal tradition which came into being during the period of the liberated areas, and the modern Western legal tradition that developed during the ongoing course of legal transplantation since the late Qing. Modern Chinese legal history studies should not be considered research on “treasures in a museum” (Levenson, 2000: 337–43).

Objectively speaking, there are some practical reasons for the problems facing China’s legal history studies community, among which perhaps the most troublesome one is the inconvenience in accessing judicial archives. As bemoaned by Luo Zhitian (2001), Western scholars often can spend more than a year in China collecting archival materials relevant to their research because they have adequate financial support, while in China, doctoral candidates’ research funding is minimal (generally less than 1,000 RMB) and thus their access to archival sources is usually severely limited. Even scholars
from history departments, who usually place more importance on collecting
original historical materials, find it difficult to spend any length of time in
archives, not to mention researchers engaged in Chinese legal history studies
at China’s law schools. On top of difficulties in just getting to the archives,
reproduction fees there can be prohibitively expensive. Archives usually
charge high “protection” fees to prevent the original sources from excessive
and thereby destructive use. As a result, scholars are often forced to tran-
scribe the original materials by hand.

Despite these difficulties, judicial archives are not completely inaccessible
to Chinese scholars. Those who live in major cities such as Beijing, Shanghai,
Chengdu, and Nanjing can examine most of the original sources directly in
the archives even though they cannot afford the “protection” fees to copy
them. Furthermore, some of these judicial archives, including the Baxian
county archives, the Dan-Xin archives, and the routine memorials to the
Ministry of Justice, have been collated and published. Although the pub-
lished archival volumes represent just a very small portion of all existing
judicial archives, they would be sufficient for certain topics if research is
supplemented with other related materials.

To some extent, this article was written to warn people of “the emperor’s new
clothes.” We legal historians in China have received too many compliments at
domestic annual conferences about our field’s continuous advancements in the
depth as well as breadth of our research. For this reason, what I have said here
might be regarded as improperly belittling of Chinese research. I am not attempt-
ing to praise foreign research while disparaging our own. On the contrary, what
I intend is to draw lessons from overseas research. In an era when various bub-
bles of “isms” and theoretical paradigms prevail, a scholar should keep an open
mind, be aware of the deficiencies of his or her own research, draw lessons from
the achievements of others worldwide, and finally, taking inspiration from
them, provide a fresh perspective on his or her subject of study. Scholars of
Chinese legal history should, of course, be no exception. Perhaps we should
take a cue from our counterparts in Taiwan, where Qiu Pengsheng (2008) and
other scholars have made notable achievements. If we mainland legal histori-
ans cannot engage in a thorough self-examination, we are most likely to lag far
behind and be left marginalized in the global academic community.

Conclusion

As far as Chinese researchers are concerned, we should of course not accept
all of the writings and assertions of the UCLA research school wholesale. We
need to read and think both actively and critically. Nevertheless, we would
do well to heed the advice of Liu Dong, who, for more than twenty years, arranged for the translation of overseas works on Chinese studies:

Nobody can assure himself that he can attain an adequate understanding of China just because he is “Chinese” by birth. On the contrary, to avoid rigid thinking, he must keep his mind open to all the academic research on China, including [Western-based] sinology, and embrace a vigorous and changing “China.” (Liu Dong, 2003: 2)

In my view, what a famous Chinese poem—“I can’t tell the true shape of Lu Shan mountain because I myself am on it” 不识庐山真面目，只缘身在此山中—portrays is precisely another aspect of today’s cross-cultural communication. The best approach is to train ourselves to receive the gift, in the words of Scottish poet Robert Burns, “to see ourselves as others see us.” With such self-knowledge and continued openness to new materials and new approaches, hopefully we will soon be able to trace the next cutting-edge trends in Chinese legal history research to the scholarly community in mainland China.

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Notes

2. For a basic overview of American scholars’ major works on legal history of the Qing dynasty, see Ma, 2005; and 2007: 212–32. For a concise introduction to Chinese legal history studies in America, see Liang, 2003: 228–35.

3. A book recently published in China shows vividly Westerners’ early attitudes toward Chinese law by using about a hundred pictures of criminal penalties mainly selected from various Western publications (Tian and Li, 2007). Also see Zhang Shiming, 2011.


6. The original Dan-Xin archives are housed at the National Taiwan University library and are divided into three sections: administrative documents 行政门, civil documents 民事门, and criminal documents 刑事门, with 1,143 cases in total (You and Fan, 2008). The original documents in the Baxian county archives, from the Qianlong reign to the Xuantong reign, are housed at the Sichuan Provincial Archives, and consist of 112,841 files 卷 in total, of which the major portion, nearly 88 percent, are judicial archives (Zhang and Li, 1986). The Baodi county archives, of which the documents from the Criminal Office 刑房 constitute the majority, are housed by the First Historical Archives of China and are included in the Shuntian prefecture archives. The Sichuan Nanbu county archives, containing documents from the years 1656 to 1911, are housed in the Nanchong City Archives, in Sichuan, and consist of 18,070 volumes 卷 and more than 80,000 pieces 件, of which the judicial archives amount to more than 11,000 files.


8. Aside from these two parts, the rest of the documents, consisting of almost half of the total number, are related to administrative matters.

9. For a recent reflection on Weber’s argument, see Marsh, 2000.


11. The papers presented at this conference, divided into two volumes, were published in Chūgoku—shakai to bunka, vols. 12 and 13. For an introduction to the distinct viewpoints expressed by various American and Japanese scholars at the conference, see Terada, 1997a; Yi Ping, 1999.

12. Xu, 2006: 57–58, provides a detailed summary of other research related to this debated topic.
13. Philip Huang’s summary of these differences are as follows: (1) A difference in method: (a) The method he himself used required, first of all, that a distinction be made among the official representations of various levels, and second, that attention be paid to the distinction between official representation and commoners’ representations, especially the disjunctions between them. However, the disjunctions between representation and actual practice are the most important. (b) The Japanese researchers of the Shiga school, mainly influenced by the jurisprudence in the German tradition, aimed to grasp the enduring core principles of the legal tradition and, by extension, of the whole society and culture. (2) A difference in historical outlook: (a) For scholars like Huang, who are undertaking social /legal history, attention should be paid not just to institutional structures and systems, but also to the subjective choices of the people involved. (b) By and large, Shiga Shūzō did not take the later into account (Huang, 1999: 366–68).

14. For example, Terada, 2003: 56–78.

15. Huang’s plan has been completed, with the publication of the third and final volume in 2010. See Huang, 1996, 2001, 2010.

16. Two conferences were held to examine this issue during recent years in China. One, a symposium on traditional Chinese justice, was convened by the Law School at Tsinghua University in November 11, 2006. The other, a conference on “The Certainty of Ancient Chinese Law,” was convened by the East China University of Political Science and Law 华东政法大学 on April 12, 2008.

17. These archival materials include: Taiwan yinhang jingji yanjiushi, 1957–1971; Wu Micha, 1993–2010 (The Dan-Xin archives have all been edited and published from 1993 to 2010. Volumes 1 to 16 constitute the whole administrative section; volumes 17 to 28, the civil section; and volumes 29 to 36, the criminal section); Sichuan sheng dang’anguan, 1991, 2011; Sichuan daxue lishi xi and Sichuan sheng dang’anguan, 1989, 1996; Zheng and Zhao, 1999; Du, 2008; Tian, Xu, and Wang, 2004. Moreover, a portion of the Ziyang county archive 紫阳县档案 and Mianning county archive 冕宁县档案 of the Qing dynasty are being collated.

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