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.52

— 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.53 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.54

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.55 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 politically, sociologically, militarily, ideologically, scientifically, and imaginatively during the post-Enlightenment period.56

52. ZHANG LONGXI, MIGHTY OPPOSITES: FROM DICHOTOMIES TO DIFFERENCE IN THE COMPARATIVE STUDY OF CHINA 2 (1998).

53. Merryman, supra note 4, at 82; cf. Twining, supra note 8, at 187 ("Comparativists sometimes insist on a quite sharp distinction between foreign and comparative law.").

54. Cf. Curran, supra note 7, at 45 (arguing that "comparision 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 7 (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. SAID, ORIENTALISM, supra note 55, at 3. In describing Orientalism as a "discourse," Said employs it in an explicitly Foucaultian sense, especially as developed in MICHEL
October 2002]  Legal Orientalism  193

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" — 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. 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.

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.

57. 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: TRANSCENDALISM 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 TRANSCENDALISM (1999).

58. 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).
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.60 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.61

59. 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 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 IIIA. Although 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 definitively. 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 15. 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 7; 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. (forthcoming 2003); Hugh Scogin, Civil "Law" in Traditional China: History and Theory, in CIVIL LAW IN QING AND REPUBLICAN CHINA, supra note 21, at 13.

60. Indeed, the term "postcolonial theory" itself is a placeholder for numerous theoretical positions of various degrees of historical specificity. Cf. Stephen Sennett, The Scramble for Post-Colonialism, in DESCRIBING 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.).

61. 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.
Legal Orientalism

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. In this Article, Chinese law functions as one instance of Orientalism, not a paradigmatic case. Indeed, there are multiple legal Orientalisms as well. Although I focus here on certain historically dominant representations of Chinese law, there are other

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 33; 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).

62. For works on the subcontinent, see, for example, Radhika Singh, A Despotism of Law: Crime and Justice in Early Colonial India (1996); Utpendra 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); Prabhakar 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 Superstar 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 (Mal 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 Shi, The Lure of the Modern: Writing Modernism in Semicolonial China, 1917-37 (2001); Barlow, supra note 18. 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.

63. 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: Toward a Feminist Reading of Orientalism (1998).
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. Analyzing Chinese law from an anti-Orientalist perspective is not the terminus of the comparative enterprise, only its starting point. Indeed, the project is perhaps best conceptualized as a metatheoretical 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. The references in this Article to

64. 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 Gali Hershatter, The Subaltern Talks Back: Reflections on Subaltern Theory and Chinese History, I 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. Robert M. Cover, Violence and the Word. 95 YALE L.J. 1801 (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
October 2002] Legal Orientalism

"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,67 and our actions in turn affect the material conditions that support and give rise to legal representations and legal ideologies.68

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."69

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 spaces superimposed, interpenetrated, and mixed in our minds, as much as in our actions...70

---

67. 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").

68. For an urgent call for Western theorizers to keep in mind "Chinese reality," elusive as it may be, see Zhang Longxi, Western Theory and Chinese Reality, 19 CRITICAL INQUIRY 105 (1992).

69. That is, the objects of Orientalist knowledge fulfill its prophecies by embracing it. cf. SAID, ORIENTALISM, supra note 55, at 325 ("[T]he modern Orient, in short, participates in its own Orientalizing.").

70. SANTOS, supra note 9, at 472-73 (1995). To be sure, like much of the literature that takes globalization as its reference point, Santos envisages 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
Thus, to the extent that we necessarily live our legal lives "in the intersection of different legal orders," 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. 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. 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 distinct-

http://www.bepress.com/gi/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 confictual") with HAROLD BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 10 (1983) ("[P]erhaps 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 SEXTANTS OF BEIJING: GLOBAL CURSANTS IN CHINESE HISTORY (1999). See also LIONEL M. JENSON, 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 René David and suggesting that this "fiction" of European-ness has been internalized by Latin American jurists).

71. SANTOS, supra note 9.
72. For accounts of the Confucianization of Chinese law, see DERRICK BODDE & CLARENCE MORRIS, LAW IN IMPERIAL CHINA (1967), and CH'Ü T'UNG-TSU, LAW AND SOCIETY IN TRADITIONAL CHINA (1961).
tion between national and foreign law can no longer be assumed."  

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. 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 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.  