

## LAW WITHOUT LAW, OR IS “CHINESE LAW” AN OXYMORON?

Teemu Ruskola \*

*Not only has a wedge been driven between the logical aspects of law and the practical, thus defeating the purposes of the whole enterprise . . . but the forensic approach to juridical analysis and the ethnographic have been unusefully set against one another, so that the stream of books and articles with such titles as law without lawyers, law without sanctions, law without courts, or law without precedent would seem to be appropriately concluded only by one called law without law.<sup>1</sup>*

Clifford Geertz

As soon as I came upon the above statement in Geertz’s essay *Local Knowledge* several years ago, I knew that it was only a matter of time until I would write a law review piece entitled *Law Without Law* — the title proposed by Geertz is simply too good to waste. This symposium on the rule of law in China provides me with the perfect opportunity to fulfill that ambition. One of my central claims here is that Chinese law — or, only provisionally and in scare quotes, “Chinese law” — provides a paradigmatic example of what I will call here “law without law”: a normative order that falls radically short of “real” law, the kind that exists under the configuration we often call the “rule of law.”<sup>2</sup>

In this symposium contribution, I analyze the conceptual and historical relationship of China to the rule of law, and vice versa. I first ask why it is that China is generally viewed as lacking a tradition of rule of law. I then look at one historical example of Western efforts to transplant the rule of law in China, and the lessons it has for our understanding of law.

My analysis is organized as follows. In Parts I and II, I consider the nature of the rule of law as a political ideal, and then turn to its implicit, less analyzed counterpoint, the “rule of men.” The debate over just what the rule of law means

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\* Assistant Professor of Law, American University; Sabbatical Visitor at the Center for the Study of Law and Culture and Senior Fellow at the Center for Chinese Legal Studies, Columbia Law School. J.D. Yale; A.B., A.M. (East Asian Studies), Stanford. Many thanks to Lan Cao for her role in organizing this symposium, and to David Eng, Ben Liebman, and Julia Ya Qin for their comments on an earlier draft of this essay. My research was supported generously by Dean Claudio Grossman at American University.

<sup>1</sup> CLIFFORD GEERTZ, *Local Knowledge: Fact and Law in Comparative Perspective*, in *LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY* 167, 168 (1983).

<sup>2</sup> This symposium contribution grows out of a longer essay delineating a genealogy of “legal Orientalism,” or the ways in which Euro-American writings on Chinese law have served to confirm certain commonsense views of legality and the nature of the legal subject. See generally Teemu Ruskola, *Legal Orientalism*, 101 MICH. L. REV. 179 (2002).

remains unresolved, yet there is a remarkable consensus on what it is *not*: the rule of men. Insofar as the definition of the rule of law is a negative one — the rule of law *means* “not the rule of men” — this dichotomous understanding threatens always to condemn “Chinese law” to the status of an oxymoron, for historically Chinese legal institutions have been built on the ideological premise of rule of men (that is, men of either Confucian or socialist virtue). As a case study of the construction of Chinese law as congenitally lawless, and of the concomitant Western mandate to export law to China, I examine Thomas Stephens’s study of the International Mixed Court in early twentieth-century Shanghai.<sup>3</sup> In theory, this court was charged with applying Chinese law to the Chinese residents of the so-called International Settlement, a semi-colonial foreign enclave in Shanghai. Although originally a Chinese tribunal, after 1911 the Mixed Court was taken over by the foreign residents of the International Settlement. Contrasting what he calls the adjudicative and disciplinary models — essentially an instance of the rule-of-law/rule-of-men dichotomy — Stephens argues that the Mixed Court had no claim to legality by the standards of the Western adjudicative model. Ironically, given the foreign control of this court, the “Chinese law” that Stephens condemns as lawless was in fact a Chinese law fabricated by foreigners. Using Stephens’s analysis as an illustration, Part V concludes that the problem is not simply that “Chinese law” is an oxymoron, but that the category of “law” is itself a contradiction, an unstable mix of elements of adjudication and discipline, rule of law and rule of men. Ultimately, the rule-of-law/rule-of-men distinction is too moralistic and too black-and-white to be of analytic utility.

I. AMBIGUITY OF THE RULE OF LAW:  
BAD FOR LEGAL THEORY, GOOD FOR POLITICS

*The beauty of the “rule of law” is that it’s neutral. No one — the human rights community, the business community, the Chinese leadership — objects to it.*<sup>4</sup>

Anonymous U.S. State Department Official

The modern world has many attributes, but among the core ones are no doubt the global spread of technological development, capitalism, the nation-state, and the rule of law. Technology is a notoriously double-edged sword, capable of both aiding and destroying its creators, and capitalism (still) inspires ambivalence, as

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<sup>3</sup> THOMAS B. STEPHENS, ORDER AND DISCIPLINE IN CHINA: THE SHANGHAI MIXED COURT, 1911–1927 (1992).

<sup>4</sup> Matthew C. Stephenson, *A Trojan Horse Behind Chinese Walls? Problems and Prospects of U.S.-Sponsored ‘Rule of Law’ Reform Projects in the People’s Republic of China*, 18 UCLA PAC. BASIN L.J. 64, 74 (2000).

globalizing markets bring both wealth and poverty in their wake. Even the nation-state is losing its appeal, as it is increasingly viewed as an agent of oppression of ethnic and other minorities. The rule of law, in contrast, shines brighter than ever, as likely the single most appealing index of modernity. Whatever Iron Cage of our own making we may find ourselves in,<sup>5</sup> we take comfort in the fact that at least we live our lives under the order of law. Moreover, whatever resistance other exports of Western civilization may face in the “non-Western” world, there is much indigenous demand for law.<sup>6</sup> As one metanarrative of modernity has crumbled after another, law has remained amazingly resilient.<sup>7</sup>

Although there is much unanimity on law as generally desirable, there is little consensus on just what constitutes “rule of law.” Legal theorists have proposed multiple definitions ranging from “thick” to “thin,”<sup>8</sup> from “instrumental” to “substantive.”<sup>9</sup> Ironically, while such indeterminacy may be bad for the development of legal theory, it is precisely the ambiguity of rule of law that makes it so appealing politically.<sup>10</sup> Like “human rights,” to which even human rights violators pay lip service, rhetorically the rule of law is just the kind of “unqualified

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<sup>5</sup> Cf. MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* 181–82 (Talcott Parson trans., Charles Scribner’s Sons 1958) (1904–05) (describing the “iron cage” of capitalist modernity).

<sup>6</sup> See Thomas Carothers, *The Rule of Law Revival*, FOREIGN AFF., Mar./Apr. 1998, at 95 [hereinafter Carothers, *The Rule of Law Revival*] (discussing the global spread of rule-of-law reforms). For two critical assessments of the export of U.S. based legal models — and, indeed, their implicit promise to export even “the pursuit of happiness” — see William P. Alford, *Exporting the Pursuit of Happiness*, 113 HARV. L. REV. 1677 (2000) (reviewing THOMAS CAROTHERS, *AIDING DEMOCRACY ABROAD: THE LEARNING CURVE* (1999)); Jacques deLisle, *Lex Americana?: United States Legal Assistance, American Legal Models, and Legal Change in the Post-Communist World and Beyond*, 20 U. PA. J. INT’L ECON. L. 179 (1999). For an assessment of the potential as well as the limits of one particular law reform project, see Paul Gewirtz, *The U.S.-China Rule of Law Initiative*, 11 WM. & MARY BILL RTS. J. 603 (2003).

<sup>7</sup> Cf. JEAN FRANÇOIS LYOTARD, *THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE* (Geoff Bennington & Brian Massumi trans., 1984) (announcing the end of “grand narratives”).

<sup>8</sup> See, e.g., Randall Peerenboom, *Ruling the Country in Accordance with Law: Reflections on the Rule and Role of Law in Contemporary China*, 11 CULTURAL DYNAMICS 315 (1999).

<sup>9</sup> See, e.g., Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781, 783–91 (1989).

<sup>10</sup> Cf. Stephenson, *supra* note 4, at 74 (“The [academic] ambiguity [of the term “rule of law”] is an advantage in political discourse, which may go a long way to explaining why ‘rule of law’ is used as the catchphrase for the China legal assistance projects.”). For more extensive analyses of the application of “rule of law” to China, see RANDALL PEERENBOOM, *CHINA’S LONG MARCH TOWARD RULE OF LAW* (2002); *THE LIMITS OF THE RULE OF LAW IN CHINA* (Karen G. Turner et al. eds., 2000).

human good” to which no sane person would object.<sup>11</sup> At the same time, the term’s ambiguity covers differing, even inconsistent agendas. In China, for example, the state’s keenness for the rule of law seems often driven by a desire for foreign investment and the construction of (limited) markets.<sup>12</sup> In contrast, when dissidents and political activists demand the rule of law, they typically associate it with the creation of the political institutions of democracy.<sup>13</sup>

Indeed, not only does the rule of law hold the promise to cure all manner of social ills from economic corruption to political tyranny, but it promises to do so in a nonpartisan manner. As one observer notes, “Despite the close ties of the rule of law to democracy and capitalism, it stands apart as a nonideological, even technical, solution.”<sup>14</sup> On this popularly held view, the rule of law is the rule of *rules*: a system of neutrally administered legal sanctions and incentives that provide for an orderly modern society.<sup>15</sup>

The rule of law does much more than establish an orderly modern society. Rules do not exist apart from the social context that gives them meaning. Whatever else it may be, the rule of law is a social practice.<sup>16</sup> At an even deeper level, the rule of law constitutes also the political epistemology in which those social practices are grounded. It is “a way of being in the world,”<sup>17</sup> with its own particular structure of beliefs about the proper constitution of that world.<sup>18</sup> To borrow from Geertz again, law is a “distinctive manner of imagining the real.”<sup>19</sup>

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<sup>11</sup> Cf. Owen M. Fiss, *The Autonomy of Law*, 26 YALE J. INT’L L. 517, 526 (2001); Morton Horwitz, *The Rule of Law: An Unqualified Human Good?*, 86 YALE L.J. 561, 565 (1977) (book review).

<sup>12</sup> See, e.g., PITMAN B. POTTER, FOREIGN BUSINESS LAW IN CHINA: PAST PROGRESS AND FUTURE CHALLENGES 5, 35 (1995).

<sup>13</sup> “Democracy,” of course, is as ill-defined and culturally inflected as “rule of law.” See generally ANDREW J. NATHAN, CHINESE DEMOCRACY (1985).

<sup>14</sup> Carothers, *The Rule of Law Revival*, *supra* note 6, at 99.

<sup>15</sup> For one famous reduction of the rule of law to a system of rules, see Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989). For a critique of Scalia’s view, see, e.g., STEVEN L. WINTER, A CLEARING IN THE FOREST: LAW, LIFE, AND MIND 186–222 (2001).

<sup>16</sup> See Radin, *supra* note 9, at 797–801 (describing a Wittgensteinian notion of rule of law as a social practice).

<sup>17</sup> PAUL W. KAHN, THE CULTURAL STUDY OF LAW 36 (1999).

<sup>18</sup> *Id.* (“To live under the rule of law is to maintain a set of beliefs about the self and community, time and space, authority and representation.”).

<sup>19</sup> GEERTZ, *supra* note 1, at 168. There are of course several alternative vocabularies to describe the ways in which structures of belief — legal and otherwise — ground social power. For two prominent Marxist analyses, see LOUIS ALTHUSSER, *Ideology and Ideological State Apparatuses (Notes Towards an Investigation)*, in LENIN AND PHILOSOPHY AND OTHER ESSAYS 121 (Ben Brewster trans., 1971); and SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI 55–60 (Quinton Hoare & Geoffrey Nowell Smith eds. & trans., 1971). See also Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601

It is this deep embeddedness of law, which is at once social, historical, and epistemological, that gives extraordinary power to an aspect of law's rule that is of special relevance to a comparative understanding of Chinese law: the contrast between the "rule of law" and the "rule of men."

## II. "GOVERNMENT OF LAWS, AND NOT OF MEN":

### ADJUDICATION VS. DISCIPLINE

*The government of the United States has been emphatically termed a government of laws, and not of men.*<sup>20</sup>

Chief Justice John Marshall

Although there is much debate over just what the rule of law means, there is a resounding consensus about what it is not: it is *not* the "rule of men." Indeed, the idea that the rule of law means *precisely* not the rule of men is so fundamental that the two terms are best understood as forming a singular expression — "rule of law, and not of men" — even when the clarifying phrase "and not of men" is not tagged to the end. In an important sense, the definition of "rule of law" is thus a negative one. As Paul Kahn observes, this contrast is constitutive of law itself: "Law is not the rule of men."<sup>21</sup>

Even in terms of the American self-understanding, the contrast is exaggerated and oversimplified.<sup>22</sup> However, it has even more drastic implications for our understanding of the Chinese political order. When we invariably pair law's rule with its negation, the rule of men, the effect is to "legitimat[e] law by excluding alternative forms of politics from making any positive appearance."<sup>23</sup> Historically, the Chinese political self-understanding has been premised on the very *ideal* of the rule of men (*ren-zhi*): a kind of political utopia where those in power derive their authority to govern from their superior virtue — either Confucian virtue, in the case of traditional China, or Communist virtue, in the case of socialist China.<sup>24</sup>

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(1986). I analyze the socially productive — or "constitutive" — role of law more fully in Ruskola, *supra* note 2.

<sup>20</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

<sup>21</sup> KAHN, *supra* note 17, at 36; *cf.* Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1499–50 (1988) ("[I]n the ordinary political self-understanding of Americans at large . . . the American people are politically free inasmuch as they are governed by laws and not men.").

<sup>22</sup> *Cf.* PAUL W. KAHN, *THE REIGN OF LAW* 26 (1997) ("[I]f the rule of law truly must stand in contrast to the rule of men, then the rule of law has never existed. No system of rule is independent of those who hold political office.").

<sup>23</sup> KAHN, *supra* note 17, at 67.

<sup>24</sup> See Teemu Ruskola, Note, *Law, Sexual Morality, and Gender Equality in Qing and Communist China*, 103 YALE L.J. 2531, 2531–42 (1994).

This self-understanding is undoubtedly no less mythical and exaggerated than the American one. In many ways, it is the mirror image of the valorization of law over personal virtue. Yet insofar as it provides the traditional normative justification for the Chinese political order, it also means that, from a comparative perspective, any law that we are likely to find in that order will not qualify as “real” law. For if the rule of law means “not the rule of men,” then any would-be Chinese law is an oxymoron, a transparent alibi for law’s corruption under Oriental Despotism.<sup>25</sup>

Although law as the organizing principle of political modernity may strike lawyers as just the kind of truth we hold to be self-evident, there surely are other acceptable ways of organizing a society. As French sociologist Pierre Bourdieu observes, “Nothing is *less* ‘natural’ than the ‘need for the law’ or, to put it differently, than the impression of an injustice which leads someone to appeal to the services of a professional.”<sup>26</sup> In fact, Americans are quite capable of imagining social worlds where “law” is irrelevant and even destructive of their essence. The sphere of the family is perhaps the paradigmatic example of such a world: in the reigning liberal conception, intimate relations are best left to self-regulation, beyond the scope of law.<sup>27</sup>

Thomas Stephens’s *Order and Discipline in China* provides a textbook example of what happens when we apply an unqualified rule-of-law/rule-of-men dichotomy to the comparative study of Chinese law. Stephens’s analysis focuses on the operation of the International Mixed Court in Shanghai from 1911 until 1927, which he considers an early Western attempt to replace the rule of men with the rule of law.<sup>28</sup> Stephens’s account is filled with fascinating historical detail, and my goal here is not to provide a general evaluation of his work.<sup>29</sup> Rather, I turn to it with the

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<sup>25</sup> As David Hall and Roger Ames put it in their study of Chinese democracy, “Westerners cannot think of the ‘rule of man’ as anything other than an invitation to despotism.” DAVID L. HALL & ROGER T. AMES, *THE DEMOCRACY OF THE DEAD: DEWEY, CONFUCIUS, AND THE HOPE FOR DEMOCRACY IN CHINA* 216 (1999).

<sup>26</sup> Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 805, 833 (1987) (emphasis added).

<sup>27</sup> Of course, this is not to suggest that law does not, in fact, structure and regulate the family in myriad ways, yet at least in principle its primary function is seen as maintaining the integrity of the family against the spheres of the market and the state; within those other spheres, law stakes a much greater ideological claim to the regulation of economic and political relations. See, e.g., Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983).

<sup>28</sup> STEPHENS, *supra* note 3, at xi–xiv.

<sup>29</sup> For a historical and sinological review, see Tahirih V. Lee, Book Review, 67 PAC. AFF. 445 (1994) (reviewing STEPHENS, *supra* note 3). For other historical studies, see ANATOL M. KOTENEV, *SHANGHAI: ITS MIXED COURT AND COUNCIL* (1925); Tahirih V. Lee, *Risky Business: Courts, Culture, and the Marketplace*, 47 U. MIAMI L. REV. 1335 (1993); Tahirih V. Lee, Law and Local Autonomy at the International Mixed Court of Shanghai

much narrower aim of illustrating the elusive quality of the “rule of law” and how its ultimately negative definition as “not the rule of men” always seems to banish China outside of law’s empire.<sup>30</sup>

Stephens insists that, methodologically, we cannot truly appreciate the difference between Western and Chinese normative orders unless we approach them in terms of the broader epistemological, and even cosmological, principles on which they are premised.<sup>31</sup> One would be hard-pressed to articulate a better methodology for the comparative study of Chinese law. Yet Stephens ultimately comes to a conclusion that goes directly against his wise methodological caveat: in the final analysis, the differences between Chinese and Western law are not epistemological but *ontological*. That is, according to Stephens, no real exchange is possible between the normative orders of China and the West: like “oil and water,” they mutually repel each other, making it simply impossible for China “to be drawn into the mainstream of Western jurisprudence.”<sup>32</sup>

Stephens builds his view of Chinese law (or lack thereof) on a contrast between what he calls the adjudicative model and the disciplinary model. The Western adjudicative model is premised on the application of “rigid, universal, specific imperatives” to everyone equally.<sup>33</sup> In contrast, the disciplinary — or “parental” — model is premised on “[o]bedience to superiors in a hierarchy of authority.”<sup>34</sup> Just as it is a child’s duty to obey her parents, so it is a subject’s duty to obey the emperor and his magistrates.

Stephens’s contrast between adjudication and discipline is ultimately yet another instance of the contrast between the rule of law and rule of men, which indeed structures scores of comparative studies of Chinese law. My purpose here is not merely to question this simplistic contrast. Rather, what is particularly interesting about Stephen’s analysis is the way he manipulates the contrast — or, even the converse, the contrast manipulates him — in his study of the interaction between the two systems within the context of the International Mixed Court in early twentieth-century Shanghai.

To appreciate the historical background of Stephens’s analysis, a brief history of the court is in order.

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(1990) (unpublished Ph.D. dissertation, Yale University).

<sup>30</sup> To be sure, whether “law” is metaphorically organized as a “republic” or an “empire” is a matter of intellectual taste (and one’s choice of metaphor quite telling), but in either case it is clear that residence in this figurative polity is normatively desirable. Compare RONALD DWORKIN, *LAW’S EMPIRE* (1986), with Michelman, *supra* note 21.

<sup>31</sup> STEPHENS, *supra* note 3.

<sup>32</sup> *Id.* at 113.

<sup>33</sup> *Id.* at 4; see also *id.* at 98 (describing a “corpus of universal, predetermined, transcendent imperatives of conduct” as “the *sine qua non* of the adjudicative concept”).

<sup>34</sup> *Id.* at 5.

## III. THE SHANGHAI MIXED COURT

The semi-colonial International Mixed Court existed at the intersection of the Chinese legal system and Western extraterritorial regimes in China. After the Opium War (1839–1842), European powers — joined by the United States and, later, Japan — extracted a series of concessions from China, the key features of which included opening China for trade with the West and obtaining the right of “extraterritoriality” for their citizens.<sup>35</sup> The demand for extraterritoriality was justified on the grounds that Chinese law was too “barbaric” to apply to Westerners and therefore they should be subject only to their own laws, even while on sovereign Chinese territory.<sup>36</sup>

In Shanghai, most of the citizens of the so-called Treaty Powers — states that had extraterritoriality treaties with China — lived in the International Settlement, a physically separate enclave that was politically independent of China and Chinese control.<sup>37</sup> However, even in the International Settlement foreigners constituted only a minority of the population.<sup>38</sup> The Mixed Court was first established as a branch office of the Shanghai magistrate’s court with jurisdiction over the Chinese residing in the International Settlement.<sup>39</sup> Its specifically “mixed” character was the result of the Treaty Powers’ demand that the Chinese judges should share the bench with foreign “assessors,” whose presence was to ensure that the interests of the Treaty Powers would be observed as well.<sup>40</sup>

However successfully the Mixed Court may or may not have operated during the imperial era, the collapse of the imperial state in 1911 resulted in the Treaty Powers taking control of all the functions of the court. They started appointing the Chinese judges on their own, and thereafter, as Stephens notes, “the court never failed to respect and to act upon the directives of the consuls [of the Treaty Powers], if and when the consuls saw fit to issue any.”<sup>41</sup> Even though “the proceedings were conducted as far as possible according to Western ideals of criminal administration and judicial independence and probity,”<sup>42</sup> in the end the Western assessors were “junior consular officers responsible to their consuls-general and bound to accept directions if and when their superiors saw fit to give any.”<sup>43</sup> Although the Chinese

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<sup>35</sup> See generally WESLEY R. FISHEL, *THE END OF EXTRATERRITORIALITY IN CHINA* (1952); 1–2 GEORGE W. KEETON, *THE DEVELOPMENT OF EXTRATERRITORIALITY IN CHINA* (1928).

<sup>36</sup> See generally GERRIT W. GONG, *THE STANDARD OF CIVILIZATION IN INTERNATIONAL SOCIETY* 130–63 (1984) (describing the exclusion of China from international society).

<sup>37</sup> STEPHENS, *supra* note 3, at xi.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 44.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 95.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 95.



government protested the foreign takeover of the Mixed Court, the system continued until 1927. At that time, the Shanghai city administration declared that it would no longer enforce the court's judgments. Thereafter, to escape its judgment, Chinese defendants would only have to cross from the International Settlement to the Chinese city, and the court lost all its effective power.<sup>44</sup>

#### IV. MIXED COURT'S MIXED LAW

When Stephens enters through the looking glass into the world of the Mixed Court, something strange happens: in this hybrid legal system, anything that corresponds to the definition of "law" becomes identified as Western, while everything that is "not-law" is identified as Chinese.

According to Stephens's verdict, the Mixed Court had no claim to legality by the standards of Western jurisprudence, and its authority was grounded in nothing more than brute power — the fact that it *could* enforce its judgments, as it ultimately was backed by the military might of the Treaty Powers.<sup>45</sup> Officially, the court was charged with applying "the laws of China," but that "glib phrase" had no coherent content,<sup>46</sup> Stephens claims, although he does admit that the court "was able most of the time to reflect in its proceedings the adjudicative mode and to relate its decisions to some written provision or another, somewhere, that could be made to do duty as a predetermined inexorable imperative."<sup>47</sup>

The lack of legality did not bother the Chinese under the court's jurisdiction, Stephens argues, because of the Chinese disciplinary, rather than legal, orientation: since the court's procedures "had been formally promulgated by an acknowledged superior authority," their application as compulsory "was accepted by all subordinate Chinese without a murmur."<sup>48</sup> Indeed, "[i]n the minds of the Chinese," it was sufficient that "[i]mmediate superior authority had spoken."<sup>49</sup>

There is a great irony here. Even accepting, for the moment, Stephens's characterization of the functioning of the Mixed Court as a disciplinary rather than legal institution (and putting aside his disturbing depiction of the Chinese as happy slaves to power), it is simply not clear why the Mixed Court should prove either the practical or conceptual impossibility of "Chinese law." As Stephens himself acknowledges, after 1911, the court was controlled entirely by *foreigners*:

After [the post-1911] reforms the effective power of appointment to the

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<sup>44</sup> *Id.* at 62–63.

<sup>45</sup> *Id.* at 63–64.

<sup>46</sup> *Id.* at 79.

<sup>47</sup> *Id.* at 88.

<sup>48</sup> *Id.* at 85.

<sup>49</sup> *Id.* at 85.

Mixed Court remained at all times with the consular body, and no appointee was ever in doubt that he owed his appointment to that body and that it was the consuls he must satisfy if he were to keep it.<sup>50</sup>

While much of the court's work may have been "lawless" (and there is certainly much in Stephens's account that suggests so), it surely proves not the impossibility of *Chinese* law but only that the foreign Treaty Powers in Shanghai were acting lawlessly — hardly a stunning conclusion anyway, considering the semi-colonial status to which the Treaty Powers had reduced the city.

To be sure, even under foreign direction the Mixed Court always purported to be applying "Chinese law."<sup>51</sup> This claim, however, was little more than an act of legal ventriloquism. The foreign assessors on the court ultimately determined what "Chinese law" was, even if the Chinese magistrates formally announced it. Indeed, in cases where the Chinese magistrate refused to support the assessor, it was the assessor's opinion that was enforceable, not the magistrate's.<sup>52</sup> One British assessor admitted explicitly to have "not been guided by any legal principles or any rule of law" other than his own sense of justice.<sup>53</sup> If this was "Chinese law," it was a Chinese law that was fabricated by foreigners.

Yet in Stephens's interpretation, the Shanghai Mixed Court is not evidence just of the failure of "Chinese law" as a category. He claims paradoxically that the court also constituted a *positive* example from which the Chinese *should* have learned Western law and their failure to do so in turn signifies China's inability "to be drawn into the mainstream of Western jurisprudence."<sup>54</sup> In the end, the court's work counts thus as both Chinese non-law *and* Western law: The ways in which it fell short of "law" and acted in a disciplinary mode count *against* the possibility of Chinese law and prove its non-existence, whereas the ways in which it did approximate the adjudicative mode count *as Western law* from which the Chinese should have learned — and their alleged failure to learn counts as even further proof of the un-legality of the Chinese. Stephens's analytic framework makes his "findings" ultimately inevitable: whatever is *not* law is Chinese, and whatever *is* law is Western.

Yet Stephens's account of the heroic ways in which the court sought "to apply the adjudicative mode in disciplinary situation" provides a fascinating analysis of the creation of the *appearance* of law and legality.<sup>55</sup> Although Stephens insists that

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<sup>50</sup> *Id.* at 52.

<sup>51</sup> *Id.* at 79.

<sup>52</sup> *Id.* at 62.

<sup>53</sup> *Id.* at 93 (quoting Chang Shih-chao v. Wu ting-fang, N. CHINA HERALD, May 1, 1920, at 287, June 5, 1920, at 615 (Shanghai Mixed Ct. 1920)).

<sup>54</sup> *Id.* at 93.

<sup>55</sup> *Id.* at 112.

“in the final analysis” the court can “best” be interpreted as a disciplinary institution, he notes that the court always “*represented itself* as an adjudicative tribunal.”<sup>56</sup> In Stephens’s assessment, the British and American assessors worked hard “to wean the Chinese magistrates away from the disciplinary mode and to introduce the principles of the adjudicative mode and of judicial independence.”<sup>57</sup> Hence, in the end, the court’s proceedings “*look[ed]* very like the proceedings of an adjudicative tribunal.”<sup>58</sup> Moreover, Stephens argues that not only did the assessors work “earnestly and sincerely” toward the adjudicative ideal, but that “most of the time [they] truly *believed* in their own minds that they were succeeding.”<sup>59</sup> In short, whatever its “actual” failures, “[i]n its day-to-day workings the court presented a very close facsimile of the Western notion of a judicial tribunal and certainly came close enough to demonstrate the stark contrast between the Chinese and the Western concepts.”<sup>60</sup>

What are we to make of this strange world of Western appearances on Chinese soil? How should we understand the role of “judges” who are not real judges even though they look like judges and believe themselves to be judges, “law” that appears to be law but is not, and “courts” that are only replicas of real courts? Was the Mixed Court simply a misguided dramatic performance by people who did not realize that they were merely play-acting? This is surely too harsh a conclusion. To be sure, just as the reality of drama is made possible by a temporary suspension of disbelief, law’s reality is equally dependent on our faith in it, but that hardly makes it any less “law.”<sup>61</sup> On the contrary, it would be the actors’ *failure* to believe in what they were doing that would undo the legality of their “law” and reduce it to a cynical exercise of power.

One possible way to understand the Mixed Court is to view the period between 1911 and 1927 not as a kind of dramatic suspension of disbelief, but as one of *actual* belief in “law” — or at least a period of struggle between genuine belief and disbelief, which came to an end in 1927 when that belief was no longer sustainable. To be sure, law is not *just* a structure of belief and political imagination. It is also a system of organized violence backed by force. But belief and force are hardly independent; we have far greater incentives to believe those who possess force. It is no accident that the court’s imaginative and political persuasiveness quickly eroded as the threat of an actual foreign military occupation of Shanghai became less credible.

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<sup>56</sup> *Id.* at 109–10 (emphasis added).

<sup>57</sup> *Id.* at 98.

<sup>58</sup> *Id.* (emphasis added).

<sup>59</sup> *Id.* at 84 (emphasis added).

<sup>60</sup> *Id.* at 116.

<sup>61</sup> *Cf.* KAHN, *supra* note 22, at 5 (“[The rule of law] is not an object or set of objects in the world but a drama in which we are actors, and the moral of the play is the life we lead.”).

At first glance, it seems like a stunning conceptual *non sequitur* for Stephens to use the Mixed Court first as an instance of law's absence in China and then as an example of law's promise and potential, from which the Chinese should have learned. How can a single court signify both law and discipline, both rule of law and its antithesis? The simplest answer is the soundest one: the two are in fact not antithetical, even if they are so construed rhetorically.

To be sure, there is perhaps an even simpler answer to Stephens's conceptual predicament. One might still regard his radical distinction between the rule of law and the rule of men as a valid and useful one, and simply view his choice of the Mixed Court as a bad illustration of an otherwise good distinction. Maybe "Chinese law" *really* is an oxymoron, even if the Mixed Court happens to be bad evidence for the proposition.

Yet the point of my critique of Stephens is neither to prove nor disprove the historical existence of Chinese law. The answer to the question of whether there is, or has been, law in China is always already embedded in the premises of the questioner: it necessarily depends on the observer's definition of law.<sup>62</sup> Yet whatever definition we may prefer, the radical rule-of-law/rule-of-men distinction that structures — explicitly or implicitly — so much of our comparative understanding of Chinese law is simply not a helpful analytic framework. Despite their formally symmetrical relationship to each other, the categories "rule of law" and "rule of men" are never neutral or culturally equivalent: one is always pre-identified as "Western" (and hence modern) and the other as "non-Western" (and hence pre-modern).

In the end, Stephens's analysis illustrates that the problem is not simply that "Chinese law" is an oxymoron but that the category of "law" is itself a contradiction — a living, often useful, perhaps even necessary, contradiction, but a contradiction nonetheless.<sup>63</sup> Since we can observe the Mixed Court from a temporal and cultural distance, it is perhaps easier for us to see law's operation in ways we cannot at home, where discipline often remains hidden in plain sight. It is instructive that for

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<sup>62</sup> Cf. Ruskola, *supra* note 2, at 183.

<sup>63</sup> One useful source for analyzing this contradiction would seem to be MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (Alan Sheridan trans., Allen Lane 1977) (1975). However, Stephens omits any discussion of Foucault, claiming that there is no systematic Western analysis of disciplinary order. Admittedly, Foucault's notion of discipline is different from Stephens's, but it could have enriched his analysis considerably. In any event, one need not even resort to Foucault to accommodate China within "law." Mirjan Damaska, for example, has provided a typology of law in which the law of Maoist China constitutes the "limiting case," yet remains within a "legal" analysis. See MIRJAN R. DAMASKA, *THE FACES OF JUSTICE AND STATE AUTHORITY* 199 (1986). As Damaska observes, a definition of law that would exclude China altogether "is clearly too narrow for those groping toward a legal language common to mankind in the late twentieth-century." *Id.* at 199.

Stephens the perception of law in the operations of the Mixed Court is only a kind of optical illusion, “an instance of the projection of the images of Western jurisprudence upon the realities of the Chinese disciplinary system.”<sup>64</sup> When we look at China as legal outsiders, it seems that most of the time “law” recedes to the periphery and all we can see is the residue that is “discipline.” And conversely, when we look at our own courts, what we tend to see is “law,” while “discipline” remains an invisible aura around it.

Needless to say, this is not to suggest that Chinese law and American law are the same. Law is always a creature of time and place, and no two times and no two places are ever the same. But whatever the differences between Chinese and American law may be, they are matters of degree only.

#### V. BEYOND “RULE OF LAW”

Questioning the analytic utility of the term “rule of law,” at least for the purposes of a comparative understanding of Chinese law, need not lead to throwing law out altogether as either a concept or a political and social institution. For one thing, as moderns there is very little else left for us to believe in, and law is surely capable of much good, even if its historical record has been mixed.<sup>65</sup> To be sure, the benefits of the rule of law have probably been oversold to us as well as to others.<sup>66</sup> But, to borrow Paul Kahn’s formulation, my concern here is not the instrumental one “whether law makes us better off, but rather what it is that the law makes *us*.”<sup>67</sup> By that criterion, insofar as the “rule of law” is always and irreducibly “not the rule of men,” as a cultural ideal it also inevitably makes us *not* Chinese, and the Chinese not *us*. Thus, so long as we continue to employ this negative definition of the rule of law, China will remain banished to indefinite legal alterity. Ironically, at the same time “we take law’s rule as our own unique practice but believe it to be the only possible ‘correct’ form of government,”<sup>68</sup> so that “[l]aw is both uniquely ours *and* our message to the world.”<sup>69</sup>

In the end, the solution to the rule-of-law/rule-of-men dichotomy cannot be merely to transvalue it — to idealize the rule of men over the rule of law in the

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<sup>64</sup> STEPHENS, *supra* note 3, at 99.

<sup>65</sup> Cf. Robin West, *Reconstructing the Rule of Law*, 90 GEO. L.J. 215 (2001) (defending rule of law as a moral ideal).

<sup>66</sup> As William Alford describes the enthusiasm for exporting American-style law reforms, this enthusiasm has made it “difficult . . . to probe underlying assumptions, lest we appear to be dismissive of the objective in question, doubtful of the sincerity of its proponents, or indifferent to the fate of the would-be beneficiaries.” Alford, *supra* note 6, at 1681.

<sup>67</sup> KAHN, *supra* note 17, at 6 (emphasis added).

<sup>68</sup> *Id.* at 58.

<sup>69</sup> *Id.* (emphasis added).

manner of the putative “Asian values” approach, which has essentially co-opted the Confucian political vision to defend modern autocracy.<sup>70</sup> Rather, we must deconstruct the radical normative contrast between the rule of law and the rule of men, and use more modest and definable concepts instead. As David Kairys observes, “Criticism or praise in terms of a grand, amorphous notion of the rule of law, which we cannot define without controversy among ourselves, is not constructively focused, useful, or fair.”<sup>71</sup> A moralistic black-and-white division of states into those having and those lacking the “rule of law” runs the risk of being — and certainly being perceived as — an act of self-congratulation by those who deem themselves ruled by law. To avoid this, any criticisms we have of another ought to be made in terms of the substantive content of particular laws and the specific institutional structures for their enactment and enforcement.<sup>72</sup>

Of course, giving up the rule-of-law/rule-of-men distinction may be harder than we might suspect, given how deeply the distinction structures our political vision. But even if we cannot surrender it completely, at a minimum we ought to inhabit its contradictions more candidly. At least since Legal Realism, we have known how to recognize many of law’s contradictions and live with them. As perhaps the most obvious example, we are all aware that the person of the judge matters; otherwise, confirmation battles over judicial appointees would be simply incomprehensible.<sup>73</sup> But although the critique of the naive view of the rule of law has been made domestically over and over, to the point that it has been internalized by all of us,<sup>74</sup> this self-awareness dissipates all too quickly when we turn to analyzing Chinese

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<sup>70</sup> See, e.g., WM. THEODORE DE BARY, ASIAN VALUES AND HUMAN RIGHTS: A CONFUCIAN COMMUNITARIAN PERSPECTIVE 3 (1998) (“[T]he Singaporean conception of Asian values has become identified with authoritarian rule . . .”).

<sup>71</sup> David Kairys, *Searching for the Rule of Law*, 36 SUFFOLK U. L. REV. 307, 319 (2003).

<sup>72</sup> Cf. *id.* at 318–19 (“If a country’s political process is undemocratic, by all means, let’s say so. If there are not sufficient limits on government, such as human rights, or sufficiently reliable contractual rights, let’s say so. That is different from saying another country does not have the rule of law.”).

<sup>73</sup> See, e.g., STEPHEN L. CARTER, THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS (1994).

<sup>74</sup> In the aphoristic hyperbole of Legal Realism’s insight about the subjectivity of judicial decision-making, “law is only a matter of what the judge had for breakfast.” DWORKIN, *supra* note 30, at 36 (characterizing Legal Realism). See also KAHN, *supra* note 22, at 26–27 (“We know that the rule of law remains deeply embedded in the rule of particular men and women. We know this, however, not as a fact that negates law but as an argument that always attaches to the rule of law.”). It is noteworthy that even in the kind of “offshore litigation” that characterizes today’s international commercial arbitration, YVES DEZALAY & BRYANT G. GARTH, DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER 173 (1996), the highly professionalized and judicialized arbitrators nevertheless present themselves as “merchants of virtue” — a kind of contemporary capitalist version of the Confucian “rule of men” ideal. *Id.* at 290.

law. While we can understand (or at least gloss over) the contradictions and shortcomings of the rule of law at home, we become far more uncompromising in evaluating traditions elsewhere.

Admittedly, giving up the rule-of-law/rule-of-men dichotomy might have some unforeseen consequences. It may well be that the rule of law *demand*s that we view it uncompromisingly; perhaps it is precisely the suppression of law's contradictions that makes it work. In the end, "honest views of 'law' may result in psychological changes in how we view law."<sup>75</sup> But if we wish to enter into a serious conversation with the Chinese legal tradition — or any other, for that matter — that is the risk we have to accept.

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<sup>75</sup> Radin, *supra* note 9, at 808.