RESPONSE

Moving Beyond the Future Now Past of U.S.-China Legal Studies: Re-Opening the American Legal Mind?

JEDIDIAH J. KRONCKE*

Current American debates regarding Sino-American affairs are dominated by recriminations over the implications of China's recent illiberal turn. Dim prospects for Chinese political liberalization have caused many to defend their promotion of post-1978 American engagement which was often publicly justified as promoting eventual liberalization in China, especially by those who worked to impact Chinese legal development. As the leading luminary of modern American China legal studies, Jerome Cohen has been moved to contextualize his own efforts as one who contributed greatly to the development of U.S.-China relations in this era. In his recent essay Was Helping China Build Its Post-1978 Legal System a Mistake?*, Cohen defends his legacy amidst these recriminations while taking most direct aim at a reading of my book,* The Futility of Law and Development: China and the Dangers of Exporting American Law.

This essay explores Cohen's engagement with Futility *to clarify its arguments and its account of the Sino-American legal relationship over the past three centuries. It responds to Cohen's reading by highlighting how* Futility*'s history is predominantly concerned with the damage done to American legal culture as an early tradition of legal cosmopolitanism aimed at improving American law was traded for one exclusively focused on an ever unverified capacity to shape foreign legal development. This "closing of the American legal mind" not only stultified domestic legal innovation but also led to recurrent misperceptions of foreign legal systems like those which shaped our engagement with China throughout the twentieth century, including the post-1978 era. Moreover, the essay revisits how viewing U.S.-China relations through a unilateral frame of American influence has served to sustain deep-seated cultural resistance in the United States to revisiting our own domestic assumptions about the relationship between law, markets and democracy.*

* Associate Professor of Law, The University of Hong Kong. My specific thanks to critical comments from William Alford, Weitseng Chen, Jacque Delisle, Fu Hualing, Aziz Rana, Frank Upham, and, generously, Jerome Cohen.

Ultimately, the essay argues for grounding a revision of the U.S.-China relationship, and the American study of Chinese law, in a more introspective position that can facilitate a clear-sighted analysis of both countries. It foregrounds that the uncomfortable questions that China's illiberal turn holds are most acute for how American-led economic globalization became so accommodating to authoritarian regimes abroad while enervating democracy at home. Answering these questions will require re-opening the American legal mind, including a far more honest assessment of the international and domestic relationship of the American legal profession to democratic values. Refusing to answer such questions about ourselves, or presenting recent developments in the United States and China as simply aberrational or exceptional, risks promoting much uglier futures for both countries than those ardent and committed actors such as Cohen have long fought for.

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I. INTRODUCTION

The present moment is one of uncertainty. Even before the acute crises of 2020, there was a growing sense that much of what had been considered settled about the collective direction of human development was illusory. Nowhere was this more evident that in the once ascendant faith that deepening economic globalization would eventually spur universal political liberalization. Recent decades have rebuffed such confidence, as contemporary authoritarian regimes have proven resilient and formally liberal regimes have begun to exhibit significant democratic backsliding, often entangled with abiding economic discontent.

In such debates concerning modern social change, the place of China has always loomed large; what was it moving towards, and what did such movement mean? Discussion of engagement with China by the United States after its 1978 re-opening was popularly framed by how such engagement would contribute to China's inexorable future transformation.[1] A parallel concern—what engagement with China would mean for domestic American development—was rarely reciprocally framed in terms of a future transformed, if countenanced at all.

Over the last five years the integrity of this framing has taken a decided turn as the Xi regime has moved aggressively to repress any hints of a more politically liberal future for China.[2] Concurrently, the United States now faces its own version of the illiberal pressures and economic malaise manifest in democracies worldwide. Resurgent ethnic nationalism on both sides of the Pacific has in but a few short years transformed Sino-American relations into a central symbolic battleground for political orders under deep stress to shore up their domestic legitimacy. In this context, many who have devoted their lives to Sino-American engagement are struggling to reconcile this dual illiberal turn with the brighter future they had hoped to be working to realize. Instead, much darker futures are now imagined and feared for the U.S. and China alike.

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1. For contemporary discussions, see *infra* note 60. Much energy is spent in the current moment attempting to allocate individual blame or provide exculpatory accounts of post-1978 U.S. policy on China. Again, as will be recurrent in this essay, such recriminations in mainstream foreign policy circles rarely if ever consider inward looking critiques as to how any debate over "failure" in Sino-American affairs requires examining our assumptions about economic and political development in the United States during this era.

2. Eva Pils, *In Whose Service? The Transnational Legal Profession's Interaction with China and the Threat to Lawyers' Autonomy and Professional Integrity* 58 FORDHAM INT'L L. J. 1263 (2018) and Fu Hualing, *The July 9th Crackdown on Human Rights Lawyers: Legal Advocacy in an Authoritarian State*, 27 J. CONT. CHINA 554 (2018).

Standing out among many who committed their lives to such a brighter future is Jerome Cohen. To claim that Jerome Cohen has influenced American legal studies of contemporary China can only be an understatement. From the very moment I knew I had an academic interest in Chinese law, I encountered his work.[3] Over time, I came to appreciate that the great imprint Cohen had on the American study of Chinese law went beyond sustaining it as an academic field during the pre-1978 era. Wherever I traveled, I rarely met anyone who did not know him and had not benefited from his personal generosity. At the same time, my own consolidating perspective led me to pursue a career largely outside the world of Chinese legal studies that his accomplishments and mentorship helped forge. I came to appreciate that while Cohen and I may share some normative aspirations, our approaches could differ significantly.

Given Cohen's contributions, I was therefore not wholly surprised when I read his recent essay "Was Helping China Build Its Post-1978 Legal System a Mistake?"[4] The piece was first written for a late 2019 conference originally conceived as a celebration of forty years of U.S.-China legal exchange; the conference was ultimately anything but celebratory. Likewise, in this essay Cohen works through his personal legacy facing this current era of crisis and uncertainty. It naturally wrestles with a career grounded in hope for a more liberal future for China that is no longer on the immediate horizon. I was, however, surprised to find that Cohen spent much of the essay engaged with a particular reading of my book, *The Futility of Law and Development*: *China and the Dangers of Exporting American Law*.[5]

In this essay, I respond to Cohen largely to highlight questions about the nature of U.S.-China legal studies that are of particular significance in the contemporary moment. In part, I think that our differences have led Cohen to a reading of *Futility* that travels far from its core preoccupation—not the harm we have somehow done to China, but how ill-conceived

3. Seeking out every work on Chinese law I could find in the late 1990s, I came across Cohen's 1968 *The Criminal Process in the People's Republic of China*. There was simply nothing else like it. While my own thoughts on the American study of Chinese law were then very much in development, it stood out as a serious attempt to discern how the Chinese legal system operated in an era when I could otherwise rarely find anything that was more than bleakly summary in content and perspective. JEROME COHEN, THE CRIMINAL PROCESS IN THE PRC (1968). Other citations in *Futility* to Cohen's many contributions during this era can be found at JEDIDIAH KRONCKE, THE FUTILITY OF LAW AND DEVELOPMENT: CHINA AND THE DANGERS OF EXPORTING AMERICAN LAW 319 nn.140 & 142-143 (2016).

4. Jerome A. Cohen, *Was Helping China Build Its Post-1978 A Mistake?,* 61 VA. J. INT'L L. ONLINE 1 (2020).

5. KRONCKE, *supra* note 3.

assumptions about China and other foreign legal systems have damaged American legal culture itself. More broadly, *Futility* explores how over the twentieth century, the American legal mind closed itself off to the world of global legal experience in exchange for a fatally flawed preoccupation with influencing the development of other legal systems. This pathology is all the more pressing today, as its effects are centrally felt in our inability to clearly perceive foreign legal developments and in our diminished capacity for self-reflection and legal innovation.

In clarifying the larger context and import of *Futility*'s history, I hope Cohen will see that many of the charges he presumes are laid against him are not part of its ambitions or argument.[6] Thus, I write not to present a counter to Cohen's parry but out of a concern for our shared interest in moving forward when old futures imagined have been sidelined and much uglier futures are at risk of emerging in China and the United States.

Moreover, responding to Cohen's reading of *Futility* enables critical discussion of the recriminations that have now begun to be traded over the nature of Sino-American engagement after 1978. Such recriminations often focus on what has and what is happening in China. But what such discourse barely explores—if not directly avoids—is how past discussions about engagement were predicated on a particular set of misguided American ideas about the relationship between law, markets, and democracy. As *Futility* develops in detail, conversations about the domestic and foreign cannot be delinked in the context of Sino-American relations any more than they can be elsewhere. If there was something wrong about American engagement with China post-1978, then it is in equal measure rooted in errors of how we perceived ourselves as much as it was in how we perceived China.

There is now a profound risk that solely emphasizing the more repressive course that the Xi regime has taken in recent years will avoid asking ourselves the more challenging and broader questions which we should be directing inward. We must be able to diagnose the choices and assumptions that helped us arrive at this point of crisis in our relationship to China and our own domestic unease. Doing so will require re-opening our own collective legal mind as to how we view the world and how the world views us.

6. This clarification is achieved by exploring how most of the specific passages Cohen cites from *Futility* are presented solely in the fractional context that he suggests for his reader, parts of Chapter 8 and the Conclusion. Cohen, supra note 4, at 4.

II. EXPORTING AMERICAN LAW: DANGEROUS? TO WHOM?

In the Preface of *Futility*, I retell the story of how as a painfully overconfident sixteen-year old I arrogantly dismissed the personal testimony of Chinese dissident Harry Wu, then synonymous with the violence possible in the Chinese Communist Party's *laogai* labor camps.[7] With but a few years of study and a summer trip under my belt, I felt comfortable proclaiming to Wu that economic development would eventually bring human rights and democracy to China—and that focusing on rights violations of the moment would only delay such an emergent future. I began *Futility* this way not as an act of all-too-late contrition, but to show how such assumptions so permeated American discourse in the 1990s that I had unconsciously and immediately imbibed them without any clear inspiring source.

Even when I later began to question the narrative that Chinese economic growth would usher in all things otherwise socially desirable, it became evident that studying China in the United States was almost inextricably intertwined with ideas about where China was headed.[8] I did meet individual scholars who rejected the idea that American engagement with China, in particular American legal engagement, was promoting Chinese liberalization. Yet it was also quite evident that the complexity and nuances of these critical individual perspectives were drowned out in a professional and, most crucially, popular discourse steeped in the assumption that engagement with any legal system deemed "developing" was almost exclusively the subject of strategic debates about how to best instantiate American influence—taken to be self-evidently positive.

My own scholarship thus initially became preoccupied with understanding the nature of my insultingly callow youth as much as it was with understanding those American lawyers with whom I later came in contact. This preoccupation also extended to past and new Chinese interlocutors. During this process, I struggled with my disciplinary training in anthropology where the traditional frame of "legal imperialism" was sorely unproductive in examining U.S.-China relations. The idea that American lawyers were unilaterally impressing legal reform upon a passive and reluctant China seemed clearly unsubstantiated, even if the idea of such

7. KRONCKE, *supra* note 3 at xi.

8. *See generally* Jedidiah Kroncke, *Property Rights, Labor Rights, and Democratization*, 46 N.Y.U. J. INT'L L. & POL. 115 (2013).

was useful to some in certain symbolic contexts.[9]

The long journey to writing *Futility* was thus first born out of untangling a symbolic terrain dissonant with the reality I had experienced and studied. What started as a contemporary ethnographic effort to explain the deep commitment of American lawyers to influencing Chinese legal development ultimately shifted to a historical study of how such an objective had become pervasively normalized among other legal academics, lawyers, and, as I came to increasingly appreciate, American civil society writ large. Over time, participation, endorsement, and funding of such efforts had become seen as an essentially humanitarian effort, and collectively so even across sharp domestic American political divides.

I present this personalized introduction to help contextualize what the argument of *Futility* is and why it can sometimes be misapprehended. I do this as I believe it speaks directly to Professor Cohen's reading of the book. Cohen claims that "[t]he book's subtitle—"China and the Dangers of Exporting American Law"—reveals its thesis."[10] He presents *Futility* as acutely concerned with the American impact on China, and thus the "danger" so referred to as the dangers most often associated with the "legal imperialism" framework that I reject.[11] Most fundamentally, the danger alluded to in the sub-title of the book is decidedly not danger to China. It is a dual-headed danger to American legal culture itself. It is the danger of fundamentally misunderstanding and misjudging Chinese legal developments when solely framed as moving away from or towards idealizations of American legal values. And it is also the danger of perpetuating the historical and ongoing role of such beliefs in closing the American legal mind to interrogating foreign legal experience to inform its own self-reflection and legal innovation. Perhaps there is some fault in *Futility*'s title speaking less directly to this wider visage, but this central aim is clearly stated from its preface and Introduction onward.[12]

Moreover, in the process of writing *Futility* something deeper emerged. The transnational Sino-American legal history I uncovered revealed itself as

9. More sophisticated versions of the legal imperialism critique can be quite apt in contexts where cross-cultural power asymmetries are far greater than in the Sino-American context. *See generally* LAURA NADER & UGO MATTEI, PLUNDER: WHEN THE RULE OF LAW IS ILLEGAL (2008).

10. Cohen, *supra* note 4, at 14.

11. This is not meant to be dismissive of the impact of American ideas, legal or otherwise, have had over the last 150 years in China. But actual and intended influence and impact are routinely different phenomena, and some form of comparative law has been active in China throughout the twentieth century. For a critical review, see generally Taisu Zhang, *The Development of Comparative Law in Modern China*, *in* OXFORD HANDBOOK OF COMPARATIVE LAW (Reimman & Zimmerman eds., 2019).

12. KRONCKE, *supra* note 3 *passim*.

intimately tied to much broader and earlier movements in American legal and popular culture. *Futility* became a project to recover the role that China played in the very formation of modern American attitudes about foreign law reaching back to the eighteenth century. It also sought to expose how contemporary anti-cosmopolitan attitudes had not always been dominant in the United States, even when many thought the country to be in some terms globally exceptional. It became clear that pre-1949 Sino-American legal history was central to the pathologies of the post-1978 era that others had already begun to explicate.

Futility thus reaches back over three hundred years to retell the largely forgotten role that China played in influencing how America engaged with foreign legal systems. The history of Sino-American relations is especially key to understanding the development of American internationalism in the twentieth century as China served as a symbolic crucible for how American civil society came to understand its relationship to the larger world after the Spanish-American War and the occupation of the Philippines.[13] The idea that China in 1911 was on the precipice of Americanization legally, political, economically, and culturally without direct colonization was transformative to how mainstream American society viewed its altruistic role in the world.[14]

This broader vantage point required going beyond a full examination of Chinese law as a subject of American academic inquiry and delving into our political, economic, diplomatic, and cultural history. From battles over the identity of the modern American legal profession to the postmillennial visions of the Social Gospel movement, stateside stories had to be retold side-by-side with stories about China's tumultuous domestic struggles in a manner that was previously rare, but has since become de rigueur in transnational history. And in each era that *Futility* explores, it recounts not so much damage done to China but, rather, how the warping presumption

13. Debates over the American de facto assumption of the Spanish colonial project in the Philippines led to some of the most foundational debates over American foreign policy as the country became a global power. It is less acknowledged today that many in the United States were quite eager to go down the road of formal colonialism, and with strong support among the ranks of elite American lawyers. *Futility* argues that the indirect form of social transformation and induced development conceptually pioneered by religious missionaries was successful in displacing formal colonialism as the ideological premise of American foreign policy—even when usurping sovereignty through military action on foreign soil. KRONCKE, *supra* note 3 *passim*.

14. Over time, *Futility* shifted to focus on how the historical American engagement with China diverged from that of other European nations, especially England, in ways that are often conflated under the always misleading rubric of "Western." It became necessary to decouple American legal internationalism from formal colonialism even though on various social and intellectual terms the former was informed by the latter. *See, e.g.,* PAUL A. KRAMER, THE BLOOD OF GOVERNMENT (2006).

that China would transform itself by emulating America institutions and values materially undermined American engagement with China. Collectively, these stories trace how the American legal mind progressively became closed to any outside stimulation—first from China and later the whole of the world.

As a result, while a great deal of *Futility* is concerned with historical events in China, it is ultimately an argument about how comparative legal knowledge came to be produced and deployed in the United States. Its central preoccupation is inward-looking—concerned with how American legal culture developed its hostility to the idea that we could learn from foreign legal experience. From legal luminaries such as Frank Goodnow and Roscoe Pound to the early development of key institutions of American internationalism, *Futility* traces how this stultifying rejection was institutionally and ideological intertwined with new missions launched to influence legal development abroad. Such missions replaced critical review of foreign legal experience to improve American law for a self-aggrandizing dream of America as solely an exporter of legal knowledge.[15] Over time, learning from foreign legal experience came to be reflexively dismissed in professional contexts and repeatedly taken in popular debate as politically anathema.

I came to call the profoundly paradoxical quality of this discourse "parochial universalism," whereby American law could and should serve as a blueprint for any nation while America itself was immune to any such external stimulation. This quality continues to be symbolically expressed at the apex of the American legal profession through the Supreme Court's resistance to even empirical findings from foreign law. But it is much more profoundly and recurrently on display through the broad popular conviction that considering foreign legal experience, even in systemic domestic reform, is not only misguided, but an affront to American values.

The central historical finding that ties together *Futility*'s history was the pivotal post-Civil War role of American missionaries in structuring modern American internationalism. Missionaries collectively dominated the production, framing, and transmission of most every aspect of American international engagement with the non-European world at the end of the nineteenth century and up through the early decades of the twentieth century. This domination led to the deep penetration into broad swaths of

15. KRONCKE, supra note 3 *passim*. This focus on foreign reform was the counter-movement to the decline of American engagement with foreign knowledge and innovation detailed in DANIEL T. RODGERS, SOCIAL CROSSINGS: SOCIAL POLITICS IN A PROGRESSIVE AGE (2000).

American society of the idea that American influence on foreign social development was real and intensifying. And the American missionary movement rose to global prominence in large part through a fervent focus on China.

Long before debates about "modernization," this era was rife with vibrant debates about the relationship of Christianity, democracy, the common law, and capitalism—all refracted in *Futility* through seminally important lawyer-missionaries, but also through leading figures throughout American society. It recounts evangelical extraterritorial judges alongside missionary-founded American law schools that expressed more about the changing shape of American society than China itself.

Over time, the American legal profession itself drew directly from this image of transformative impact abroad when forging its modern identity in the early twentieth century, and in turn inherited much of the missionaries' proto-developmental thinking about how promoting American law abroad could catalyze foreign social change.[16] The American relationship to China's Nationalist regime from 1911 to 1949 became in many ways where a putative allegiance to American economic and legal models as an asserted precondition for political liberalization was first placed center stage as a matter of American academic and diplomatic presumption. Such presumption forced American understandings of Chinese legal developments into a conceptual straightjacket that led to recurrent misjudgment. *Futility* then reveals the deleterious impact of this conceptual inheritance up until it was generalized to the larger world during the Cold War,[17] even after the "loss" of China in 1949 took much of the American citizenry by surprise and led to the submergence of this earlier history in our

16. This religious dimension is perhaps again the most difficult for contemporary lawyers to accept, and commonly reflexively dismissed. *See*, e.g, Timothy Webster, *Jedidiah Kroncke, The Futility of Law & Development: China and the Dangers of Exporting American Law*, 65 AM. J. COMP. L. 968, 969-970 (2017) (book review). This resistance has long since been a lament of scholars of religion and law such as Harold Berman. It is a reality only recently undergoing strong revision in diplomatic and foreign policy history, notably spearheaded by Andrew Preston. ANDREW PRESTON, SWORD OF THE SPIRIT, SHIELD OF FAITH: RELIGION IN AMERICAN WAR AND DIPLOMACY (2012).

17. This missionary inheritance was recurrently noted by different scholars after 1949. Historian Paul Varg noted "Today the American government is seeking to convince people all over the world of the advantages of western institutions. . . . [T]he history of the missionary enterprise throws light on the problems to be met." PAUL VARG, MISSIONARIES, CHINESE, AND DIPLOMATS, viii (1958). James Thomson, himself the son of missionaries, noted how during the Cold War there was "not simply a massive increase in the export of benevolence, but also the secularization of that export." JAMES C. THOMSON JR., WHILE CHINA FACED WEST: AMERICAN REFORMERS IN NATIONALIST CHINA, 1928-1937 at xiii (1969).

collective popular consciousness.

Thus, *Futility*'s history is no descriptive account of isolated artifacts or personal initiatives; instead, it speaks to deep undercurrents within American civil society. We live today in a social reality where many responded positively to claims that our ongoing occupations in the Middle East were justified to spread the rule of law and Christianity. And before this, where General McArthur ordered thousands of Bibles as he oversaw the American legal work in Japan after World War II.[18] And over a century ago, where rural Americans were organized by their churches to protest railroad loan terms to China's new Nationalist regime. Thus, we can no longer look at Sino-American relations as an isolated set of strategic choices divorced from the foundational agency of these presumptions.[19]

In developing this historical narrative, I do not try to hide the fact that I have my own vision of what I call "legal cosmopolitanism." This ideal privileges the function of comparative law as providing fodder for domestic legal reform. In doing so, I reflect on how many of the Founding Fathers and other Revolutionary-era thinkers were deeply curious about Chinese law, with some rightly described as enthusiastic Sinophiles.[20] I highlight their examples not to endorse their particular conclusions about what dynastic Chinese legal experience might have held out for our emergent republic's systems of taxation or civil service—only their openness to the possibility. They wanted to use what knowledge they could find to critically think through what to make of their particularly American reinvention, though clearly they were not looking to idly copy even the successes of a very different nation. However fallible they may have otherwise been, in this

18. Here recent work on the American occupations of Japan and Germany is quite revealing as to how variations in racial and religious difference impacted these efforts. RANDE KOSTAL, LAYING DOWN THE LAW: THE AMERICAN LEGAL REVOLUTIONS IN OCCUPIED GERMANY AND JAPAN (2019).

19. I am not addressing the common point that many who played upon the public's belief in American liberalizing influence did not actually hold such beliefs. This simply reinforces the argument that personal belief is not exculpatory from the impact of public representation. *See* Paul Bové, *Rights Discourse in the Age of U.S./China Trade*, 33 NEW LIT. HIST. 171 (2002).

20. Many, representatively Thomas Jefferson, looked for what might be instrumentally useful about the Chinese experience for governing a geographically vast territory. A minority, most notably Benjamin Franklin, even took a deep humanistic interest in Chinese culture. Their access to information about Chinese law was low by contemporary standards—if not so low as contemporary expectations—and their own far-too-optimistic expectations about trade with China was symbolically important to the American Revolution. The interest of American Founders in China, intellectually but also diplomatically and economically, is discussed in JEDIDIAH KRONCKE, *The Reception of Chinese Law in Revolutionary America*, *in* THE FUTILITY OF LAW AND DEVELOPMENT: CHINA AND THE DANGERS OF EXPORTING AMERICAN LAW 15 under the sub-headings "China in the Imagination of the American Founders" (p. 21) and "The China Trade in the Revolutionary Struggle" (p. 25).

regard their collective minds were open to the outside world of legal experience. Today, ours is decidedly closed. *Futility*'s history is thus driven to explore how this cosmopolitanism was lost. This closure has and continues to sustain this dual-headed danger of foreign misperception and domestic stagnation.

III. RECALCITRANT AMERICAN DREAMS OF AGENCY ABROAD

Late in *Futility*, I discuss how Professor Cohen devoted his career to Chinese legal studies during the Cold War after he had earned numerous other, much easier and well-trod opportunities. He worked at improving Sino-American relations in the decades leading up to 1978, and I cite my admiration for his scholarship during this era.[21] Once China re-opened to the world in 1978, Cohen vigorously took to substantiating an academic field and a professional community that eagerly welcomed many who found an interest in Chinese law. The simple volume of human connections in the Sino-American relationship that Cohen helped form and nurture on both sides of the Pacific is unparalleled.

Today, human rights lawyers, many of whom call Cohen a friend, have been systematically imprisoned and abused in China with decided cruelty.[22] The Party has continued to subordinate the Chinese legal profession to its own interests. Widespread repression of dissent has grown and now touches on virtually every aspect of Chinese civil society. Cohen's *Was Helping China Build Its Post-1978 Legal System a Mistake?* centers on whether the post-1978 engagement he had such a prominent role in encouraging was a wasted effort given the CCP's continued resistance to liberalization. And he is not alone is feeling great angst over relationships and investments now at risk. These are inclusive of deeply affective threads of cross-cultural personal experience by any number of American and Chinese citizens. Cohen defends his engagement as ultimately beneficial in economic terms, even if not achieving its most optimistic aspirations. In doing so, he presents *Futility* as his most stinging critique.

In discussing his reading of *Futility*, Cohen states that I am the "foremost proponent" of what he terms "the law and development critique."[23] In first

21. KRONCKE, supra note 3 at 196.

22. Cohen maintains an active blog where he provides updates on the arrest and subsequent mistreatment of numerous human rights lawyers in China. Jerome A. Cohen, JERRY'S BLOG, http://www.jeromecohen.net/jerrys-blog (last visited Nov. 21, 2020).

23. Cohen, *supra* note 4, at 14.

repost, let me say that while it is flattering to be considered the foremost proponent of anything, I do not consider myself as such. My use of the term "futility" in the book's title reflects the sum force of my reading of the existing scholarship on U.S-China legal relations, as well as pre-existing evaluations of attempted American legal reform in many other parts of the world over the past century.

I should then openly state that academic critiques of American legal engagement with China were well established from 1978 onward.[24] It is not difficult to find a range of scholars in and outside of the law in the last forty years who had identified the questionable assumptions undergirding Sino-American legal relations, or who had been reform participants but later distanced themselves from such work.[25] When I began my graduate education in the early 2000s, in one notable burst, Jacques deLisle, William Alford, Matthew Stephenson, and Sophia Woodman all analyzed such reform projects and reached conclusions that would require special effort to portray as anything but "failures" on their implicit or explicit public terms.[26]

If I am foremost in any small regard for contemporary law and development studies, I hope it is in integrating this scholarship into the larger law and development and comparative law scholarship outside of China. In previous writing, I have highlighted how scholarship on rule of law efforts in China resonates with analyses of American legal reform efforts which had begun to take a roaming interest in particular areas of the world after 1949. Such earlier writing emphasized how this interest continued unabated by shifting geographic focus after efforts in one part of the world yet again failed to live up to expectations, rather than stoking larger self-reflection.[27] It is the collective result of this cyclical pattern for American legal reform work aborad which Bryant Garth called the "paradox of

24. For an early systemic critique, see William P. Alford, *"Seek Truth from Facts"—Especially When They Are Unpleasant: America's Understanding of China's Efforts at Law Reform,* 8 UCLA PAC. BASIN L. J. 177 (1990).

25. *See, e.g.,* Robert C. Berring, Farewell to All That, 19 LOY. L.A. INT'L & COMP. L. REV. 431 (1997).

26. 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); William P. Alford, *Exporting the 'Pursuit of Happiness*,' 113 HARV. L. REV. 1677 (2000); 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 (2000); Sophia Woodman, *Bilateral Aid to Improve Human Rights*, 51. CHINA PERSP. 28 (2004).

27. One longtime analyst discussed it as a field marked by "discarded fads, crisscrossed by swinging pendulums, and afflicted with frequent bouts of group amnesia." THOMAS CAROTHERS, PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 336 (2006).

perpetual disappointing results."[28]

Thus, while others noted the durability of the modern American "rule of law industry" as rooted in various contemporary institutional and ideological factors, it was seeing this recurrent global pattern of American engagement that moved me to work backwards from this contemporary scholarship and rediscover the largely invisibilized aspects of pre-1949 Sino-American history.[29] It was here that I repeatedly found deeper connections to domestic American diplomatic and religious history that more completely explained why such recurrently failed projects remained so resolutely popular, if not considered a core aspect of American legal and national identity.

Yet discomfort with such geographical or historical linkages is not what inspires Cohen's engagement with *Futility*. It is the linkage between *Futility*'s core historical finding that the post-Civil War American religious missionary movement had foundationally shaped modern American legal internationalism and thus continued to shape the nature of American engagement with China post-1978. In this direct sense, I cannot avoid Cohen's charge that I place him within this historical trajectory. In *Futility*'s Conclusion I show how such modern efforts in China drew on the full naturalization of missionary thinking in the American legal profession and American civil society writ large, and how such linkage provides larger context for the critical contemporary scholarship noted earlier. Here I also note that Cohen himself at the outset of 1978 cautioned against the "missionary spirit" among those who rushed to engage with China of the era. But in this same footnote I state that after 1978 Cohen left the "core missionary assumptions of American legal internationalism undisturbed."[30]

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28. Bryant G. Garth, *Building Strong and Independent Judiciaries through the New Law and Development: Behind the Paradox of Consensus Programs and Perpetually Disappointing Results*, 52 DEPAUL L. REV. 388 *passim* (2002).

29. In fact, I find it frustrating when people still refer to the "law and development movement" in the United States as starting in the 1960s and 1970s as *Futility* importantly debunks this cutting-off of its antecedent history which had clear precedents as early as the late nineteenth-century. KRONCKE, supra note 3 at ch. 3. If anything, many who still work in the law and development field bristle when I argue that the term itself should be abandoned to reflect the inability to fully rescue it from its historical baggage. *See* Mariana Prado, *The Futility of Law and Development: Review and Response*, 1 ASIAN J. COMP. L. 197 (2018). For the general obscuring of the intensity of pre-1949 U.S.-China relations after the rise of the CCP, *see* Philip Beidler, *China Magic: America's Great Reality Hiatus, 1948-73*, 47 MICH. Q. REV. 1513 ("The erasure of a whole apparatus of golden-age American popular Sinophilia that for decades preceding had seemed omnipresent in the mass-culture media.")

30. "The re-opening of China in 1978 transformed the career of Jerome Cohen, early defender

I believe that Cohen's predominant emphasis on the final chapters of *Futility* leads to perhaps an overly harsh reading of its implications for his legacy. Cohen states that he approves of my "pre-1949 critique,"[31] but it appears that, as with his diagnosis of the "danger" at issue, there might be some misapprehension as to what my critique was. Most acutely, this begs the question of what are these "core missionary assumptions."

The core assumptions can be reduced to three: 1) that engagement with foreign societies can be strategically orchestrated to catalyze their social development, 2) that the foundation of such impact is derived from expertise with one's own social ideologies or institutions, and 3) that critical feedback only works to recalibrate tactical re-engagement and never to rework the social ideologies and institutions that are the basis of such expertise. This is easiest to see in the religious context, as reversing any of these three assumptions would force one to become apostate.[32]

Futility spends much of its early chapters showing how these assumptions were transmitted to secular American reform efforts, bridged by the many missionaries who wedded their religious work to expertise in law and the whole gamut of new applied sciences emergent at the beginning of the twentieth century. And some once-ardent believers in such missions did individually renounce this faith, though with little effect on the larger American terms of engagement.[33]

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of Chinese legal studies discussed in the Chapter 8. Cohen initially cautioned against the revival of the missionary spirit: 'Sometimes I get the feeling that they are engaging in the worse kind of comparative law exercise—comparing our theories with their practice. . . . We cannot revive the missionary spirit, and yet the missionary spirit dies hard.' However, Cohen eventually became a leading figure in its re-emergence. Even as he fought against the Cold War dismissal of Chinese law, Cohen left the core missionary assumptions of American legal internationalism undisturbed, openly embracing them in his later writing once reform work was again possible in China. Here Cohen's work is reminiscent of the thoughtful, but ever evangelical, missionary historian Kenneth Latourette who came to criticize both the CCP and GMD, but did so by rooting their problems in their rejection of American law." KRONCKE, supra note 3 at 229 n.82 (citations omitted).

31. Cohen, *supra* note 4 at 15.

32. There were diverse perspectives among religious missionaries concerning their approaches and evaluative rubrics. It is at the heart of some of the resistance to the application of this missionary influence on secular work that it is presumed that such religious motivations precluded critical debate over applied strategy grounded in direct empiricism. Yet, missionary debates from the late nineteenth century discussed various tactical and conceptual issues such as "de-Westernizing" Christianity, the need for local leadership, sectarian funding divides and any number of issues that are part and parcel of modern "rule of law" literature. KRONCKE, *supra* note 3 at 86-91. *Compare* Jedidiah Kroncke, *Law & Development as Anti-Comparative Law*, 45 VAN. J. TRANSNAT'L L. 477 (2012).

33. Similarly, in some instances there were devout missionaries who did privately undergo a more radical personal revision, even if hidden from public view. David Hollinger's book on the domestic legacy of American missionaries is productively read with *Futility*. Hollinger emphasizes how the

If we take these three assumptions from *Futility*, I believe that Cohen's portrayal of his own work in *Was It a Mistake?* makes the attribution not wholly unfair. The future Cohen hoped to bring into reality was one where his efforts would lead to an improved Chinese legal system inclusive of values Cohen unimpeachably holds dear: "due process, fairness, and a sense of professional responsibility."[34] In his response, he also notes that he and his colleagues believed that legal development would "promote domestic economic progress and foreign business cooperation"[35] as well as "[help] produce a coherent national legal system that improved the lives of the Chinese people and their country's relations with the world."[36] Moreover, such engagement could reduce wrongful convictions, lessen pre-trial detention, protect activist lawyers, and promote equal rights for women.[37] All this development would presumably be supported by "an independent legal profession" created as a by-product of their efforts.[38]

These by themselves are strong causal arguments, and each belies ongoing critical debates about the impact of legal reform on China's development.[39] In parallel, Cohen also makes strong claims about the beneficial impact of American legal efforts in Taiwan and South Korea, which are also still quite contested areas of scholarship for predominately civil law countries with regulatory logics far removed from the mainstream of American legal thought.[40]

There is a tension then in Cohen's defense, as such claims are advanced while he also asserts that "we hoped that the contemplated Chinese system

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experiences American missionaries underwent overseas led them to take on important social roles in challenging and improving American society. DAVID A. HOLLINGER, PROTESTANTS ABROAD: HOW MISSIONARIES TRIED TO CHANGE THE WORLD BUT CHANGED AMERICA 30-31, 44-46 (2017). I would still argue that very few missionaries forwarded so radical a vision of American foreign policy that it would undercut the idea of America's transformative international mission—they sought only to reorient it.

34. Cohen, *supra* note 4 at 12.

35. Cohen, *supra* note 4 at 1.

36. Cohen, *supra* note 4 at 1.

37. Cohen, *supra* note 4 at 8.

38. *Cf.* Cohen, *supra* note 4 at 1.

39. Even if one takes the impact of legal certainty on levels of foreign direct investment (FDI), less so stronger claims about FDI and liberalization, the empirical track record is far from clear. *See, e.g.* MARY ELIZABETH GALLAGHER, CONTAGIOUS CAPITALISM: GLOBALIZATION AND THE POLITICS OF LABOR IN CHINA (2005).

40. *Compare* Cohen, *supra* note 4 at 7 *with* Weitseng Chen, *Twins of Opposites: Why China Will Not Follow Taiwan's Model of Rule of Law Transition Toward Democracy*, 66 AM. J. COMP. L. 481 (2018). It is critical to note that in structural terms, the Taiwanese legal system "imported" few if any American legal institutions, from the common law itself to American models of judicial selection, legal education, or lawyer regulation.

would contain the principal tenets of any respectable legal system—due process, fairness and a sense of professional responsibility—as necessary concomitants of the technical topics we were overtly discussing."[41] Is there a non-rule of law regime that has due process, fairness, and a sense of professional responsibility,[42] much less an independent legal profession? Even if Cohen in this particular essay stops short of claiming anything but a contribution to the thinnest rule of law in China, *Futility* cites the extensive repetition over the twentieth century of how the "rule of law" was taken in popular and academic discourse as a starting point for the causal chain of catalytic change which was the core conceptual legacy of the missionary enterprise—and thus leading to any number of desirable foreign political and social changes inclusive of democratization.[43]

Cohen also forthrightly admits a strategic calculus whereby he knew that such contributions may lead to strengthening the long-term stability of the CCP regime, which would have to be justified by achieving these other aims.[44] And while certainly cosmopolitan by many standards, he also admits "since American law and its international involvements were all we knew, we contributed what China wanted, which is all we had to offer."[45]

These preceding paragraphs substantiate attribution of the first two missionary assumptions so outlined. The last assumption concerns critical feedback, and is the subject of a large part of *Futility*'s Chapter 4 sub-titled "The Missionary Model of Cyclical Critique and Eternal Optimism."[46] Tracing the diffusion of this pattern of how critical feedback from foreign engagement is marginalized is perhaps the most important aspect of my

41. Cohen, *supra* note 4 at 8.

42. It is important to mention that *Futility* describes how the particular content of what American influence would putatively catalyze foreign social change shifts over time, moving back and forth in era and by actor/institution. Christianity was foremost for missionaries, but even at the turn of the nineteenth century it was mixed with democracy, capitalism and the "the rule of law," as well as any number of intermediate institutions such as property rights or professional bar associations. The causal relationship between any of these factors could vary, and conceptual consistency was less common than insistency on the larger transformative collage.

43. In his pre-1978 writings, Cohen made numerous parallel critiques of American views of Chinese legal development. Notably, he described the use of "judicial independence" as a "talismanic phrase" meant to carry great transformative agency abroad even its very nature was highly contested in the United States. Jerome Alan Cohen, *The Chinese Communist Party and "Judicial Independence": 1949-1959,* 82 HARV. L. REV. 971 (1969).

44. Cohen, *supra* note 4 at 8, 11.

45. Cohen, *supra* note 4 at 26. The point that Cohen raises that the CCP at the time had no interest in pre-1949 Chinese law is unimpeachably true, as is the CCP's deeply ironic 21st century return to idealizing aspects of dynastic Chinese society as a source of political legitimacy. Cohen, *supra* note 4 at 28.

46. KRONCKE, *supra* note 3 at 86.

argument concerning the conceptual legacy which missionaries' transmitted to formally secular projects. For under the missionary model, no matter the critical feedback received, a defense of individual psychological optimism is recurrently asserted rather than a revisiting of the assumptions that would force one into either apostasy or perceived fatalism.

It is crucial here that Cohen overstates the singularity of my work, in line with others who have already cited *Futility* as a new shorthand for extant critiques or an extension of the "legal imperialism" frame. So much of rule of law scholarship on China and elsewhere has traditionally mentioned critical perspectives as routine warning but only to justify nebulous calls to be "humble" or "cautious" or any number of other psychologically uncontroversial but nonetheless uncritical positions that do not dive deeply into the substance of critiques which are often structural and methodological rather than tactical in nature. This becomes important, as the next section will detail, when personal psychological grit or determination, often necessary for any social activism, helps disable the development of any truly critical public discourse on how America relates to China and the larger world.

In line with this pattern, Cohen notes in his essay the work of Jonathan Spence, whose 1969 book *To Change China* chronicled many Western actors who attempted to influence China's development over the past few centuries. [47] Cohen believes that he and his colleagues serve as a counterpoint to Spence's diverse cast of luminaries who all failed in their personal quests to impact China's development.[48] Cohen's claim, setting aside its material merits, is noteworthy, as throughout my early career, I saw Spence's work cited in very similar fashion by so many American lawyers engaged in foreign reform efforts: Yes, Spence's work is "a sobering historical caution," but "No, I am not like those he catalogued." *To Change China* is now the classic example of a thorough and systematic treatment of the missionary assumptions I outline, but whose cautions are almost ritualistically cited by those who continue to embrace them while charging full steam ahead.[49]

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47. *See* JONATHAN SPENCE, TO CHANGE CHINA: WESTERN ADVISORS IN CHINA 1620-1960 *passim* (1969).

48. Cohen, *supra* note 4 at 13-14.

49. *To Change China* thus became the very grist for the mill of the "missionary model of cyclical critique and eternal optimism" that reduces all critique to a series of psychological tensions. In such citation, very little attention is given to actually dissecting the varied characters Spence relates, whose

T*o Change China* was thus an original inspiration for *Futility* that drove me to look deeper into the American experience to see how, after thirty years, it could still be praised so highly but its core insight relegated to only a speed bump-like caution. I had hoped that by extending and specifying Spence's original insight through cyclical repetition over three hundred years of American history—and demonstrating its systemically deleterious effects on American legal culture—the burden for seeking to impact China would have shifted away from mere caution to justification. How many centuries must pass before a durable precedent is required for going down the same path? I believe *Futility* establishes a clear empirical foundation so that if one wants to engage China, much less any other legal system in the world, with a presumption of influence, then a much greater threshold of evidence and persuasion is needed to be overcome than proclamations of psychological self-chastisement.

It is thus natural that Cohen's reading of *Futility* is itself not singular. It is in reaction to these historical and ideological linkages where differences among reviews of *Futility* are most stark. Beyond its initial endorsements, *Futility* has to date received eleven reviews in four languages.[50] The reviews have been made in journals of varied focuses and by scholars of quite varied backgrounds. Most take the common tactic of presenting a summary of *Futility*'s main argument and substance, and then emphasizing particular aspects of interest. Almost every review states *Futility*'s focus on the nature of American comparative law, what insight it may hold for aspects of Sino-American history, and various concerns touching on law and religion,

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backgrounds and assumptions are far from uniform. *To Change China* also includes those rare individuals like Edward Hume who actually broke this cycle by rejecting the very premise of their original mission. KRONCKE, *supra* note 3 at 275 n.183.

50. Aziz Rana, *Legal Export and the Transformation of American Identity,* JOTWELL (2015) (book review); Margaret Lewis, The Futility of Law and Development: China and the Dangers of Exporting American Law *by Jedidiah J. Kroncke,* 22 CHINA REV. INT'L 47 (2015) (book review); C.W. Herrick, *The Futility of Law and Development: China and the Dangers of Exporting American Law*, 53 CHOICE 1679 (2016) (book review); Stefan Kroll, *China als Spiegel der amerikanischen Rechtsidentität*, 25 RECHTSGESCHICHTE [Legal History] 388 (2017) (book review); Giorgio Mocavini, *Jedidiah J. Kroncke,* 2017 RIVISTA TRIMESTRALE DI DIRITTO PUBBLICO [Public Law Quarterly] 527 (2017) (book review); Martin Flaherty, *The Futility of Law and Development: China and the Dangers of Exporting American Law,* 104 J. AM. HIST. 163 (2017) (book review); Webster, *supra* note 16; Rande Kostal, *Jedidiah Joseph Kroncke*, The Futility of Law and Development: China and the Dangers of Exporting American Law, 35 LAW & HIST. REV. 829 (2017) (book review); Mark Fathi Massoud, *Legal Development in China*, 5 ASIAN J.L. & SOC'Y 213 (2018) (book review); Prado, *supra* note 29; and Teng Kaiwei (滕凯炜), Ping Kelanke: Falü yü Fazhan de Tulao: Zhongguo yü Shuchu Meiguofa de Weixian (评科朗克《法律与发展的徒劳：中国与输出美国法的危险》) [Reviewing Kroncke, The Futility of Law and Development: China and the Dangers of Exporting American Law] 15 Quanqiushi Pinglun (全球史评论) [Glob. History Rev.] 238 (2018) (book review).

comparative science, or American internationalism. For some foreign reviewers, this interest stemmed from curiosity to understand why American lawyers remain so steadfastly devoted to such overseas reform projects, even those with whom they otherwise share quite close normative commitments or critiques of American foreign policy.

The reviews that stand out are two that present a reading of *Futility* similar to Cohen's, and whose authors also share similar individual commitment to engagement with China as a medium of external influence.[51] They are notable in that they are the only reviews that omit almost entirely *Futility*'s inward-looking central argument about the nature of American comparative law and present little engagement with the bulk of its historical arguments. Instead, they focus almost exclusively on its Conclusion. In doing so, they avoid discussion of the book's religious or professional legal American historical content and present *Futility* as foremost in advancing the argument of the "failure" of such external influence untethered to this history and with little reference to the well-established critical literature by other scholars. As this type of reading resists any acknowledgment of the missionary linkage it can only presents *Futility* as leaving the contemporary legal activist with only fatalism in the face of injustice.[52]

Such presentation points to a key point of disjuncture. It is that the missionary model takes as its foundation the agency of the individual. While not all religious proselytization, Christian or otherwise, takes actual conversion or material consequence as its most important points of evaluation, the secular missionary model is in fact inextricably wedded to justification by material impact. A large part of resistance to *Futility*'s arguments is that contemporary rule of law discourse conceives of itself in scientific terms—deploying and developing rational expertise—and as less

51. *See* Flaherty, *supra* note 50 at 163-164; Webster, *supra* note 16 at 972. The most telling contrast is the review by Professor Margaret Lewis. Lewis accurately relates the basic premise of *Futility*'s arguments, and then sincerely grapples with what it would mean to consider study of Chinese law more dialogically in her area of expertise, criminal law. Such openness did not disable Lewis from remaining a notable scholar-activist in the U.S.-China sphere. Lewis, *supra* note 50.

52. One of these reviews is cited by Cohen in his text. It spends much of its content concerned with the claim that *Futility* would induce indifference to the plight of human rights lawyers in China today. Such concern is ethically understandable, but as presented requires avoiding again discussion of *Futility*'s most relevant content. Such content would include the plight of dissidents under the Guomindang regime, and the role of foreign engagement in the cartelization of the American legal profession as spearheaded by American Bar Association. There is evidence that perhaps our perspectives on the issue have subsequently moved closer to convergence though not agreement. *See* Martin S. Flaherty, *Facing the Unraveling of Reform: Domestic and International Perspectives on the Changing Role of China's Rights Lawyers*, 41 FORD. INT'L L.J. 1091, 1105 (2018).

morally or culturally insensitive than religious missionaries are often stereotyped to be. Thus, if engagement can be properly tactically modulated, then agency can be applied to achieve increasingly more robust and socially desirable outcomes. This is why I argue that the secular legal missionary model is even more deeply bound to calls for optimism when faced with disappointing outcomes, as it cannot countenance that there are transcendental assumptions that it has also placed beyond empirical analysis. One such assumption is that there is a privileged space for elite individual agency among much larger systems of economic, political and cultural engagement in the Sino-American context, and, indeed, anywhere else such work is undertaken.

It is useful to stop for a moment and pull back to the first, brief defense that Cohen's essay makes of his legacy responding to what he deems the "Frankenstein" critique. This is the charge that those who engaged with China after 1978—lawyers central among them—"like Frankenstein, had created a monster" in modern China.[53] Certainly there has been growing academic recognition that CCP authoritarianism may not succumb to the vectors of democratization long advanced by some social theorists, such as the asserted democratic force of the internet, a rising-middle class, or integration with the institutions of international law. This newer thread of argument, at least in the mainstream, specifically claims that participants in legal assistance with China helped provide the regime with the tools of its now "resilient authoritarianism" which can use law to help manage those problems or pressures to which earlier authoritarian regimes succumbed.[54]

Cohen spends less time exploring this argument, and such charges are indeed a broadside against a large swath of diverse American actors. Cohen does not identify my book with this argument, and indeed it is not one I explore.[55] But it is important to add to his defense that any such critical judgment would have to contemplate that the vast statistical super-majority of American lawyers active in China after 1978 have been transactional corporate lawyers serving only profit-seeking actors—not academics,

53. Cohen, *supra* note 4 at 3.

54. *Id.* The idea that Chinese authoritarianism would resist liberalization has been fodder for debate throughout the post-Soviet era. *See* Andrew Nathan, *China's Changing of the Guard: Authoritarian Resilience*, 14 J. DEMOCRACY 6 (2003). These debates now go beyond China to examine the many authoritarian developments in democracies. *See* Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545 (2018).

55. In forthcoming work I do explore the complicity of the American legal profession in China's modern authoritarianism, less as a causal force but more as an indictment of the profession's claims to social mission in larger debates over the relationships of markets and democracy. Jedidiah Kroncke, *Legal Complicity in an Age of Resurgent Authoritarianism* (forthcoming, 2021).

human rights lawyers, and other public-minded actors who are too often mistaken as the presence of "American law" in China. In this light, if we consider the type of specialized work Cohen and his colleagues were doing in the early 1980s, it is difficult to find much causal connection between such individual choices and what the Frankenstein critique points to today.

What I would say is most important here is that the Frankenstein critique and Cohen's defense both give all too much agency and causal import to individual American actors. As Cohen notes "[the CCP] were determined to take from us only what they deemed useful for their purposes, not to swallow wholesale what we had to offer. People's Republic of China was no banana republic!"[56] This is a statement that thoroughly resonates with *Futility*'s history, and one that Cohen's reading leads him to underemphasize. If anything, *Futility* shows how even those lawyers who openly claimed they were in China to propel its full transformation were routinely out-maneuvered by more sophisticated and self-aware Chinese interests.[57]

However, it is key that claims to agency, especially by those less-than-representative altruistic American actors in China, were disproportionately impactful of professional and civil society discourse stateside. Here perhaps it is clearest where Cohen and I do disagree. I see long-term, systemically damaging effects of the missionary assumptions on American legal culture and society. Such efforts, however noble in intent, are not worth these larger costs. The resort to optimism is only compelling if the action undertaken is seen as having no downside, and the only other option total inaction. This is not an issue of sincerity.[58]

For even if one claims that there is great injustice to be combated,

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56. Cohen, *supra* note 4 at 11.

57. Many American missionaries knew Chinese social politics well, and many Chinese reformers had quite partial understandings of American society. At the same time, I have reservations about Cohen's confidence that at any point in time what interlocutors, much less the Chinese population, "wanted" was clear or justifiably relied on. Cohen, *supra* note 4 at 4-5.

58. Cohen, *supra* note 4 at 17. William Alford has written of the reflexive personal resistance to any critique of foreign legal reform efforts that are seen by its practitioners as humanitarian in nature "lest we appear to be dismissive of the worthiness of the objective in question, doubtful of the sincerity of its proponents, or indifferent to the fate of the would-be beneficiaries." William P. Alford, *Exporting the 'Pursuit of Happiness,'* 113 HARV. L. REV. 1681, 1684 (2000). In this sense I feel a bit of kinship, however self-indulgent, with Mark Twain writing his anti-imperialist critiques of American missionaries regarding their complicity in the late nineteenth century American experience with direct colonialism. The charge laid against Twain was that, by advancing any critique, he cared nothing for the suffering and injustice outside the United States. But such resistance is grounded in a very specific individual frame of evaluation. Only if structural realities are set aside can the terms of contest be righteously reduced to simply action or inaction in the face of injustice.

righteousness which excludes critical self-reflection has a poor historical track record of meeting such ends. And this is what I believe underlies Cohen's reading of *Futility*—once you accept that there are costs you would have to weigh them in a process where optimism is not an intellectual virtue, but rather a debilitating material handicap. And the stakes at issue instead go well beyond who was wrong or right about how individuals applied their personal agency, but how those individual choices helped sustain a broader American discourse that stubbornly refused to question basic, foundational assumptions about its role in the world or the nature of its economic and political development.

IV. MYTHS OF ENGAGEMENT: THE HIGH STAKES OF PUBLIC REPRESENTATION

Many who were supportive of America's post-1978 engagement have begun to undertake a battle of recrimination over what exactly was claimed about the terms of our relationship with China.[59] Part of the acrimony is that while there has been a long academic debate on the topic, the formal policy of the American government of the era has been one of relatively unrestrained economic coupling with public invocation of such coupling's promotion of political liberalization.[60] Cohen's essay can be placed among this recent genre of retrospective evaluation and defense. Herein the most biting aspect of Cohen's reading of *Futility* is that current events might imply that he was uninformed or naïve.[61]

Futility attempted to pause whenever possible to dive into the lives of the historical figures that constituted Sino-American legal relations. Driven by my own experiences, I wanted to uncover how such actors reconciled their nuanced private contemplations with their strategic public representations. I was primarily concerned with how such public representations then shaped larger professional and public understandings of China and sustained less desirable characteristics of American legal internationalism.

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59. For just one summary in an ongoing flurry, see Hal Brands, *Every U.S. President Since Reagan Was Wrong About China,* JAPAN TIMES (July 29, 2019) and compare with Alastair Iain Johnston, *The Failures of the 'Failure of Engagement' with China*, 42 WASH. Q. 99 (2019). For a more systematic take on the interlinked socio-political assumptions of foreign and domestic American policy of this era, see Adam Tooze, *Whose Century?,* 42 LONDON REVIEW OF BOOKS (July 30, 2020).

60. BRUCE GILLEY, CHINA'S DEMOCRATIC FUTURE: HOW IT WILL HAPPEN AND WHERE IT WILL LEAD (2004) and JAMES MANN, THE CHINA FANTASY: HOW OUR LEADERS EXPLAIN AWAY CHINESE REPRESSION (2007).

61. Cohen, *supra* note 4 at 10.

It is thus relevant to note that I would hope any reader of *Futility* would appreciate that my portrayal of missionaries was not one of a band of naïve or uninformed interlocutors.[62] Quite the contrary. The great historical influence of missionaries on American understandings of China and the larger world at the turn of the twentieth century stemmed from the very fact that they were the predominant group committed to learning about foreign languages and cultures. They were not simply experts; they were *the* experts. One empirical cornerstone of *Futility* is demonstrating how heavily—in some cases completely—American institutions relied on missionary expertise, starting with the earliest philanthropic foundations, foreign policy missions, journalistic enterprises, and the staffing of university faculties. These networks were the foundation on which other formally foreign secular efforts were later made, ranging from disaster relief to professional and legal academic exchanges. This reliance was only possible because so many missionaries devoted their lives to their work abroad, while creating the first nationally extensive private fundraising and promotional system in American history. More personally, for many Americans of the era, missionaries were the only people they ever met who had lived abroad. Notably, the children and grandchildren of missionaries dominated the ranks of American internationalism well into the mid-twentieth century.

In this context, the seriousness and sophistication of intra-missionary debates made them far from superficial. Reading late nineteenth-century missionary journals was perhaps the seminal moment when I realized how they structurally paralleled contemporary professional and academic writing on foreign rule of law efforts. In the self-aware and self-critical approach of some missionaries I could find no fault, even as someone who shared none of their religious convictions. They were in many cases far from foolish, but I came to see their basic presumptions, and the strategic choices they often made, as both wrong as an empirical matter and deleterious to U.S.-China relations.[63]

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62. There were significant debates about the training required for overseas religious service among missionaries. One of the recurrent critiques by seasoned missionaries was the idea that earnest faith was not enough to be effective. However, much of this criticism was made internally and not openly broadcast so as to prevent disrupting public enthusiasm. Again, this parallels critiques made by longer-serving rule of law practitioners, as they still face the same bind of soliciting public funding and popular support to continue their work.

63. A key case study from *Futility* is the example of Frank Goodnow, who became embroiled in an attempt by Yuan Shikai to re-establish a monarchy in China during the 1910's. Previous accounts gave little recognition to the fact that Goodnow was an erudite and sophisticated comparative scholar

Thus, I find nothing to object to in Cohen's defense that he and his colleagues were savvy and knowledgeable.[64] Furthermore, as he notes: "The motives of Americans who supported normalization of relations and cooperation with the PRC were many."[65] All true. A great many were far less sophisticated than Cohen, even if he himself knew well enough that common law juries were not about to pop up after 1978. Again, for *Futility*'s arguments engaging with the private complexities of individual agency was secondary to such agent's public participation sustaining the fundamental premises of American engagement with China.

It is thus critical to emphasize that whatever private beliefs or deliberations may have transpired, it is easy to find repeated statements from the highest levels of government from 1978 onwards that such an overt link between legal engagement and Chinese liberalization was a foundational rationale of American policy.[66] The open mission of the Bureau of Democracy, Human Rights and Labor originally founded in 1977 makes this presumptive public position clear,[67] as does the consistent framing of debates within the Congressional-Executive Commission on China.[68]

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par excellence. He developed a great deal of knowledge about China to the extent that he wrote an article for National Geographic reviewing a host of non-legal knowledge about the country. Goodnow's fate was largely decided by factors well beyond his personal expertise, and which became endemic to American foreign reform work. *Frank Goodnow and the False Cosmopolitanism of Technocracy, in* JEDIDIAH KRONCKE, THE FUTILITY OF LAW AND DEVELOPMENT: CHINA AND THE DANGERS OF EXPORTING AMERICAN LAW 133 (2016).

64. "[We] did not harbor the illusion that we were going to convert the Chinese Communists into emulating our system of government, including its legal premises and institutions…If we were indeed missionaries, we did not think our mission was to export the American dream." Cohen, 10. Again, Cohen and I disagree as to whether he was consistent in this position, especially in his public engagement.

65. Cohen, *supra* note 4 at 9.

66. For just a few of many clarion statements: President George Bush, Sr.: "As people have commercial incentives, whether it's in China or in other totalitarian countries, the move to democracy becomes inexorable." David Skidmore & William Gates, *After Tiananmen: The Struggle over U.S. Policy toward China in the Bush Administration*, 27 PRESIDENTIAL STUD. Q. 514, 519 (1997). President Bill Clinton: "The more we bring China into the world, the more the world will bring change and freedom to China." Bill Clinton, State of the Union (January 19th, 1999). Clinton again: "The choice between economic rights and human rights, between economic security and national security, is a false one." Bill Clinton, Remarks at the Paul H. Nitze School of Advanced International Studies (March 8th, 2000). For a concise summary of this faith's inexorable impact from the era, *see* James Dorn, *The Death of Communism in China*, J. Comm. (March 4th, 1999); *see,* MANN, *supra* note 60.

67. THOMAS LUM, CONG. RSCH. SERV., RS 22663, U.S. ASSISTANCE PROGRAMS IN CHINA (2014); *see also* BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, *About Us,* UNITED STATES DEPARTMENT OF STATE, https://www.state.gov/about-us-bureau-of-democracy-human-rights-and-labor/ (last visited Nov. 21, 2020).

68. The CECC produces annual reports as well as publications relating to episodic hearings. Its legislative mandate states its general mission quite clearly. People's Republic of China—Trade

Moreover, little effort is required to find rule of law projects, perhaps most prominently at Yale Law School,[69] that were stimulated by the public promise of such influence and transformation open to American lawyers regardless of background.

This was the very commonsense I had internalized in but a few years of youthful exposure as one whose interest in China developed during this era. It was the era of Gordon Chang's ever-approaching *The Coming Collapse of China* and Francis Fukuyama's *The End of History and the Last Man*.[70] In Cohen's own words: "For years, many of us have been taught, 'Political liberalization follows economic liberalization, as Tuesday follows Monday.' Indeed, Condoleezza Rice once described this to me as an 'iron law.'"[71]

Beyond the clear institutional and ideological legacy *Futility* details, this is perhaps what is so striking about post-1978 American engagement's continuity with our pre-1949 relationship. They were both grounded in a public-facing interpretation of American foreign policy as a site where there were no genuine contradictions to be overcome, only mutual gain.

It is here that Cohen's career is telling not simply because of his influence on the whole gamut of contemporary U.S.-China legal relations but also because he represents a very particular model of elite international lawyering that has been central to contemporary American economic globalization.[72] Cohen has achieved what many in the American legal profession hold out as the sterling ideal: dual public and private service that also touches on all the institutions of American internationalism, both academic and governmental. It is dizzying to consider the different roles that Cohen has played as retold in his essay. At times he was a pioneering corporate lawyer, at others a proponent of international human rights. At times he was an active participant in legal exchange, at others he was a scholarly observer. In assuming these roles he was sometimes an idealist;

Relations, tit. III, Pub. L. No. 106-286, 114 Stat. 880 (establishing the CECC). For a more general review of the dominance of this framing during this era, see generally Jacques DeLisle, *Chasing the God of Wealth*, *in* DEVELOPMENT AND DEMOCRACY 277 (SUNDER RAMASWAMY & JEFFERY CASON eds., 2003).

69. *Compare* Stephenson, *supra* note 26 *with* Paul Gewirtz, *The U.S.-China Rule of Law Initiative*, 11 WM. & MARY BILL RTS. J. 603 (2003).

70. FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN (2002) and GORDON CHANG, THE COMING COLLAPSE OF CHINA (2001).

71. Jay Nordlinger, *Cohen of China*, NAT'L REV. (Apr. 12th, 2018), https://www.nationalreview.com/2018/04/cohen-of-china/. To his credit, Cohen responded to the question "Is China defying that law?" with "The answer is complicated." When dominant popular and professional opinion is so entrenched, is this answer decades later enough?

72. Philip Alston, *The Myopia of the Handmaidens*, 8 EURO. J. INT'L L. 435, 440 (1997).

sometimes a realist. Sometimes a pessimist; sometimes an optimist. Sometimes he was reactive to China; sometimes proactive.

In this regard he is like many of the early American missionaries to China who moved seamlessly in-between realms economic, diplomatic, academic, and cultural.[73] And like those missionaries, to take all of these different positions requires privileging a form of engagement that draws few hard edges. It is a model of engagement, and in particular a view of lawyering, that presents the possibility of escaping tradeoffs. It is grounded in the apex American aspiration that promoting markets and democracy synergistically go hand-in-hand. And if one assumes that a version of free markets and liberal democracy are mutually constitutive, one can serve many masters without contradiction. The very power of the missionary impact on American internationalism, and then in turn American international lawyering, was that it presented a world where one could simultaneously pursue in robust measure economic and moral gain.[74] Under such an assumption, engagement becomes a good unto itself, and critics of unrestrained engagement become one's only enemies.

In this context, I am certain that Cohen and his colleagues did not privately express unrestrained hope that their efforts would democratize China, even if others involved were less restrained. Though herein lies the rub. Even if they were cautious, how did their work relate to these now ingrained assumptions about American legal internationalism held throughout American society?[75]

Thus, I would hope that Professor Cohen would concede to some

73. If we review the particular colleagues that Cohen cites, we can see profiles which parallel the expertise of many of the missionaries who went to China a century earlier. Walter Surrey had a storied, if controversial, career touching on all aspects of American law and influencing the shape of American international legal practice—from defending John Patton Davies against McCarthyism to eventually lobbying on behalf of the CCP itself. Stephen Orlins turned an interest in China spurred by the Vietnam War into a pioneering career in international private equity and he now remains perhaps one of the leading proponents of Sino-American cultural diplomacy. Stanley Lubman has made a long career of practicing while writing academically on Chinese law. Michael Moser and David Buxbaum both acquired doctorates in Chinese studies and contributed original research to the field. Buxbaum's historical work in particular I noted in *Futility* precisely because it challenged the notion that dynastic Chinese law was inherently less rational than Western law. KRONCKE, *supra* note 3 at 136 n.198.

74. Such arguments were also part of the successful effort of the American legal profession to secure for itself the strongest and most durable powers of self-regulation among any legal profession in the modern world. The breakdown of the argument that American lawyers deliver a particular social benefit rooted in this independence is the part and parcel of general controversies regarding the profession and its self-regulatory powers today.

75. I discovered over time that many American lawyers working in China had quite nuanced private beliefs that struggled with these overt missionary assumptions. Yet, they felt constrained by the beliefs of other far less expert but more influential—often acutely so younger lawyers and scholars who perceived little room for dissent to secure a quite narrow set of professional trajectories.

degree that, while he may not have held the strongest-form beliefs about transforming China through the export of American law, he has lived through times when such beliefs were the dominant norm and he was a dominant actor. Consider Cohen's admission that

> There may well have been, in addition, some American government officials, bar association leaders, foundation executives, lawyers and scholars who hoped that the PRC's newfound eagerness to learn foreign and international law might lead to reforms that would finally transform China's legal system in accordance with an American model and perhaps even stimulate Western-style democracy.[76]

How were such beliefs sustained if those most expert in Chinese law did not confront them?[77] Cohen himself has always been cautious but has allowed others to quote him to the effect that the WTO would lead to the rule of law in China,[78] or that a rising middle class in China would ask "why they have to go without freedom, democracy, and the rule of law."[79] These were the very answers on which the entire gamut of Sino-American engagement was presented to the American public.[80]

The question then becomes in how many contexts was implicit normalization granted to individuals with no comparative, much less

76. Cohen, *supra* note 49.

77. If we return to Cohen's learned colleagues, we can see similar choices. Walter Surrey was by any measure a Cold War realist, and one who had been personally warned by Deng Xiaoping that public dissent would be violently repressed by the CCP even as he tirelessly lobbied for increased economic interdependence as head of the National Council for U.S.-China Trade. Owen Nee's primarily private career was interspersed with comments to non-experts that shareholder democracy in American corporate law would have spillover effects in Chinese society and that a liberal democratic future for China was not far from the horizon. Jamie Horsley, long committed to a career promoting Sino-American legal exchange, has often written of small reforms with the potential to reshape China. CHRISTIAN TALLEY, FORGOTTEN VANGUARD, INFORMAL DIPLOMACY AND THE RISE OF UNITED STATES-CHINA TRADE, 1972–1980 123 (2018); Owen Nee, *China's Company Law Sets out the Next Stage of Reform*, 13 INT'L FIN. L. REV. 13, 15 (1994); Interview for MERGERS AND ACQUISITIONS IN CHINA (3rd ed., 2014), http://www.sweetandmaxwell.com.hk/AboutUs/ourauthors.asp?g=m06x2&ec=YLVYECUPGZPYTD; Thomas Lum & Hannah Fisched, Human Rights in China: Trends and Policy Implications 19 (Congressional Research Service, Jan. 25th 2010).

78. "Because he believes that through international contacts, contracts, and cooperation, China will gradually adopt and follow the rule of law." Pamela Kruger, *China's Legal Lion*, NYU Law Magazine (2009). Available at: blogs.law.nyu.edu/magazine/2009/jerome-cohen-profile/.

79. Jay Nordlinger, *supra* note 71.

80. Such a claim is far from asserting that Americans uniformly believed in the claims of engagement as liberalization. But it was not only dominant, but shared across multiple administrations headed by the disparate parties of mainstream American politics.

Chinese, legal expertise being sent off to China as purported reformers? How many grant proposals were reviewed and submitted that made claims about rule of law efforts' impact that concluded with contributing to Chinese political liberalization?[81] How many professional associations laid claim to such altruistic efforts as its self-interested members publicly proclaimed a hoary sense of mission?[82] How many politicians' grand claims were civilly let stand without comment?

For legal academics who, in the American context, often sit at the nexus of a wide range of public and private fonts of influence, it can be alluring to think that deploying more subtle perspectives or engaging more honestly among each other is the proper place to put such truer beliefs on display. In one probative exchange on *Futility*, I dialogued with Mariana Prado—one of the world's leading and most sophisticated scholars of law and development. Herein she objects to my broader claim that foreign reform efforts are inherently methodologically compromised. Prado rightly cites the very same scholars I recurrently meet at conferences who reflect critically on such work, and have, especially outside the United States, largely distanced themselves from law and development's historical parochial baggage and develop even primarily inward-looking comparative disciplines under its nomenclature. Where our exchange resolves is that I am not so much concerned with what sophisticated academics discuss at conferences, but what non-specialist lawyers think and, of greatest import, how foreign law is popularly perceived in any particular legal culture.

Beyond our differences over the missionary presumptions, here is where likely the largest disagreement between myself and Cohen exists. It was not that he was an imperialist, or naïve, or even normatively mistaken. It was that whatever personal ambivalences were had, a core strategic choice was made not to more fully chasten those who advanced these conceptions and allowed the worst form of the missionary endeavor to continue to be the norm.

Taking any opportunity to stimulate American interest in China in an era of such self-congratulatory presumptions creates the very liability we are facing today. For when such promises do not manifest, the American resort has never been self-reflection, but a turn to the ugly cultural tropes which

81. Prado, *supra* note 29.

82. As they have the least empirical contact with Chinese law, most non-specialist lawyers and academics are often those most captured by this larger framework. It is very difficult to speak to many American lawyers about learning from foreign law without almost instantly devolving into a debate about whose law, in whatever fixed sense, is "better." Such is the ever-misleading legacy of the language of "legal transplants."

are at risk of infecting us once again. *Futility* recounts how when American reforms in any particular part of the world have failed there routinely arises a decidedly ugly nationalist backend to explain away such failure; a decided enemy of self-reflection and learning.

Here consider that Cohen takes particular aim at my citation of French Jesuit missionary Andre Bonnichon and his testimony about Chinese law after his detention post-1949.[83] Cohen defends Bonnichon primarily by asserting that my critique is undermined by clear evidence that Bonnichon accurately criticized CCP law.[84] But what exactly was my critique of Bonnichon?[85] Was the CCP regime post-1949 something I found normatively desirable? No. In retrospect, was the legal system in the years after 1949 up to the standards of even contemporary China? Clearly not.[86] But Bonnichon's statements, and how he presented them, did not exist in a vacuum.[87] Instead, my discussion of Bonnichon was concerned with how

83. I only devote two paragraphs to Bonnichon in *Futility*, and primarily as a prelude to the chapter-length case study of Roscoe Pound's tenure in China. Pound, once a leading proponent of applying comparative legal expertise to reform American law, regrettably descended into quite strident McCarthyism after the "loss" in 1949. His example is much more telling for the problematic process of legal reform abroad being transformed into a de facto form of legal nationalism during the Cold War.

84. Cohen, *supra* note 4 at 12. He notes my objection that Bonnichon's testimony reduces Chinese law to "communist law." In support, Cohen cites later reports and his own work that "[c]onfirmed the accuracy of those Western indictments of Chinese Communist injustice." Frederic Wakeman, who wrote frequently about the police in Shanghai during and after the Chinese Civil War, is one of few modern academics who engaged with Bonnichon's testimony, noting his partiality and then giving a more comprehensive view of the continuities between GMD and CCP arbitrary detention during this era. Frederic Wakeman Jr., *'Liberation': The Shanghai Police, 1942-1952*, *in* CITADINS ET CITOYENS DANS LA CHINESE DU XX SIECEL 497, 506, 510 (Yves Chevrier et al. eds., 2010).

85. Moreover, like too many reformers of the pre-1949 era, Bonnichon made no public outcry concerning the levels of arbitrary detention widely and routinely practiced by the GMD as long as he was granted some sense of reformist agency. Strategically ignoring the crimes of a regime in which you feel empowered to reform is a treacherous trap that many foreign reformers fell into. However, it should be clear that *Futility* was not directly concerned with cataloguing the injustices of various Chinese regimes just as I do not dwell on the injustices of American law except where relevant to the larger argument.

86. In discussing Bonnichon, Cohen notes that "Kroncke himself [succumbs] to the 18th century syndrome when he condemns those who pointed out that contemporary Chinese law in the '50s was 'solely communist law.'" Cohen, *supra* note 4 at 18. The Sinophilic syndrome so referred is one of foreign idealization to argue for domestic emulation. While I do not preclude in total the possibility that in China's vast legal system there may at some point be something worth emulating on a technical level this has not been the aim of my scholarship as discussed below. *Infra* at 150.

87. Take the cited statement that "In recounting his trial, Bonnichon also invoked all the emotive and performative qualities that made the trial such a powerful symbol in 19th-century legal writings." Cohen, *supra* note 4 at 16-17. What is the point of such a citation? One would have to return *to Futility's* earliest chapters which discuss how sensationalistic accounts of Chinese trials were often the dominant

his testimony played upon many of the damaging racial tropes I had traced throughout the book which became part and parcel of the dubiously titled "loss of China" after 1949.[88]

As Teemu Ruskola has prominently illuminated, the near-reflexive Western dismissal of Chinese law has a dangerous history linked to anti-Chinese sentiment that continues to be ever near the surface in modern American popular and legal culture.[89] Thus I emphasize how the nature of Bonnichon's testimony fed into a larger vein of cultural racism which was the flipside to paternalistic legal uplift and his often clear endorsement of European colonialism to enable missionary work. [90] Cohen omits Bonnichon's statements such as "this procedure so extraordinary in our eyes but logical in China,"[91] or that the foreign observer would never be able to make sense of the bizarre "subtleties of [Chinese] logic."[92] Such racialized reasoning was part of Bonnichon's larger controversial body of writing on

medium through which Chinese law was cast as thoroughly savage and thus not worthy of systemic study. For representative citation, *see* Robert Michaelis, *Le droit de la Chine Communiste,* 24 ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALS PRIVATRECHT 583 (1959) (book review) (Ger.). *Contra* Arthur Stahnke, *The Background and Evolution of Party Policy on the Drafting of Legal Codes in Communist China*, 15 AM. J. COMP. L. 506, 506 (1966). Similarly, my mention that Bonnichon cites the self-evident criticism that China lacks juries and private lawyers underscores the way in which the absence of increasingly American-specific legal institutions was also asserted as automatic evidence of cultural backwardness.

88. Here I would be remiss if I did not cite work that proceeded and, in many dimensions, exceeded my own. Teemu Ruskola's 2013 book *Legal Orientalism* was followed shortly thereafter by Li Chen's 2016 *Chinese Law in Imperial Eyes*. These works focus in on the pernicious effects of racialized reasoning regarding Chinese law including and beyond the American experience, and are well-accompanied by critical histories of the effect of commentaries about Chinese society on Chinese-Americans. *E.g.* TEEMU RUSKOLA, LEGAL ORIENTALISM (2013); LI CHEN, CHINESE LAW IN IMPERIAL EYES (2016).

89. Teemu Ruskola, *Legal Orientalism*, 101 MICH. L. REV. 179 (2002). Ruskola's work also provides context for Cohen's query over my citation of Benjamin Schwartz's work. Cohen states that I describe Schwartz's work as where a "'basically dismissive understanding of Chinese law' was 'exhaustively catalogued.'" Cohen, *supra* note 4 at 16. The actual language in *Futlity* is "The ubiquity of Chinese law in opposition to American law was exhaustively catalogued in [Schwartz's article]." KRONCKE, *supra* note 3 at 196. Mapping the persistent representation of Chinese law as in binary definitional opposition to "Western law" is one of Ruskola's primary contributions in this article, and Ruskola also demonstrates how such oppositional definition routinely lead to reflexive dismissal of Chinese law's historical content or study of its practical realities.

90. KRONCKE, *supra* note 3 at 194-195. *See also infra* note 94.

91. ANDRE BONNICHON, LAW IN COMMUNIST CHINA 8-9 (1956). I find distressing Cohen's endorsement of the related statement "this program was bound to please the Chinese people easily discouraged by procedural formalities and traditionally wary of the written rule." If socio-legal studies of law have taught us anything, *humans* dislike procedural formalities, including the vast supermajority of Americans.

92. *Id.* at 34.

colonial law.[93] Without much further digression, it is for similar reasons that I cite Richard Walker's problematic Cold War writings for the American Bar Association.[94] Given the total lack of such sentiment in Cohen's life and work, I would hope he would agree that such context is problematic no matter the validity of some of its underlying descriptive claims.[95]

As U.S.-China relations have now become so thoroughly disrupted, it is ever-more critical that we consider the historical patterns and liabilities of not just that last forty years, but the last three hundred that *Futility* grapples with. There is no constructive way forward that preoccupies itself with individual choices without those most expert thinking through how to address new terms of engagement in the context of this larger past. If the illusions of no tradeoffs and uncritical engagement have now been shorn off, we cannot replace them with old and distasteful responses that lead us away from long postponed, if painful, questions.

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93. Bonnichon wrote with admiration about the legal impacts of European colonialism. Yerri Urban, Race et nationalité dans le droit colonial français (1865-1955) (June 19, 2009) (Ph.D. dissertation, University of Burgundy) (unpublished manuscript), https://hal.archives-ouvertes.fr/tel-01630611/document. Bonnichon couched even his comments on African independence in terms of the success of French colonial tutelage ("Ceci est désiré formellement par les Etats africains et par la France, habitués à une longue symbios") and its civilizing mission. Andre Bonnichon, "L'ordre public colonial, un facteur d'évolution du droit indigène," L'Action populaire, (January 10th, 1932) and André Bonnichon, *Indépendances africaines*, 306 DANS ÉTUDES 23 (1960). Even in intra-missionary debates, Bonnichon cast developing a local Chinese clergy as a threat to the "European church." As such, he was particularly concerned with the impact of anticolonial nationalism on the missionary enterprise and he was criticized by African church leaders for his racialized reasoning. ELIZABETH FOSTER, AFRICAN CATHOLIC: DECOLONIZATION AND THE TRANSFORMATION OF THE CHURCH 84 n.113 (2019). Some of his last writings from the Philippines were penned with similar paternalistic presumption. "We have reason to think that they write from gross ignorance of things about which they ought to learn." Andre Bonnichon, *The Church in China, a Church Being Strangled*, 14 PHILIPPINE STUD. 481, 485 (1966).

94. Cohen, *supra* note 4 at 18. I do not question the empirical grounds Walker drew on. Like Bonnichon, I singled him out because of his resort to the same sort of racialized reasoning by invoking China's "cultural inscrutability" and claiming that it was a mistake "to project onto [China] the same norms of rationality within which we operate." RICHARD WALKER, THE CHINA DANGER 94 (1996). Notably, Walker became well-known for trivializing McCarthyism, proclaiming himself the true victim of suppression, repeatedly claiming that John Fairbank was a communist sympathizer, and also trumpeting that in the end no one was sent to a gulag or killed in the process. Richard Walker, *China Studies in McCarthy's Shadow: A Personal Memoir*, NAT'L INT. 101 (1998)

95. Here I have to thus directly rebut Cohen's claim that "[Kroncke claims] I became a leading figure in the re-emergence of the missionary-like 'denigrating' portrait of Chinese justice that I had cautioned against in the era before." Cohen, *supra* note 4 at 2. I never link Cohen to this denigrating tradition. Instead, he operated within a reform tradition which presumed the cultural compatibility of Chinese culture with Western law

V. MOVING FORWARD IN AN ERA OF UGLY FUTURES

Like Cohen, I imagine a different future for Sino-American relations than the present moment portends. Perhaps our final difference is that I now imagine such a future grounded in changes on the American, rather than the Chinese, side. Any new imagination of a more constructive future requires not only a thorough re-consideration of the aims and aspirations of American studies of Chinese law, but also a deeper probing of the larger questions of economic and political development upon which any future Sino-American engagement will be built.

A. A Field Defined by Teleology Cannot Stand, Nor Enlighten

Futility and my other writings lay out a vision of a cosmopolitan comparative law directed at analyzing foreign law to understand it on its own terms.[96] This view relegates the comparativists neither to humanistic butterfly-collecting nor normative circumscription via post-structural relativism. Its aim is to understand what is happening in foreign legal systems so we can critically evaluate them as a matter of foreign policy, but most powerfully as empirical stimulus to help work through our own systemic domestic challenges. I do not see any other tactic that has clear positive precedents. Even if there are other versions of comparative law possible,[97] the American legal mind has been so firmly shut for the last century that much proactive effort will be required to re-open it.

As a result of the history *Futility* unravels, American legal academic knowledge produced about Chinese law has far too often been implicitly comparative in nature.[98] Today, the vast majority of what is categorized as "comparative law" within American legal studies, and acutely so in regards to China, is actually not comparative in methodology. This means that a critical perspective on American law is too commonly completely absent.

96. For a congenial methodological take, see Donald Clarke, *Puzzling Observations in Chinese Law: When Is a Riddle Just a Mistake?*, *in* UNDERSTANDING CHINA'S LEGAL SYSTEM 93 (C. Stephen Hsu ed., 2003).

97. Cohen describes in his essay several potential projects that would be worthwhile. I and a Taiwanese colleague have a long-delayed project to look at the content of American efforts post-1949 in Taiwan—especially as initial research shows that much of the content of these efforts was far from the orthodoxy of American ideas about law at the time.

98. Cohen provides ample evidence that "we wanted to learn about Chinese law" and that he and his colleagues wanted to "learn rather than to preach." Cohen *supra* note 4 at 9, 23. But it is a rejoinder only if the two are held to be mutually exclusive. As discussed earlier, many missionaries become leading experts in various allied fields during their tenures in China. But did this learning challenge the terms of their engagement, or force them to revisit their knowledge about their home society?

Rather than contribute to their genuine interrogation, China can only be used empirically to support or undermine existing presumptions of law. Such is the outcome of perceiving China as either moving away from or towards American legal values—on one hand a teleological Chinese law and the on other hand a static American law. Perhaps more importantly, the value of this work to those outside of the specialist field is recursively straitjacketed by the presumptions of the larger mindset of American legal culture and civil society on these terms. Challenging this legacy requires more than simply not expecting China to liberalize.[99]

In this vein, *Futility* addresses directly how its history speaks to the very fabric of modern American comparative legal thinking as it became naturalized in Cold War thinking about development and modernization theory. Under the sub-heading "The World Becomes China,"[100] I illustrate how after the dream of an Americanizing Republican China was dashed in 1949, the legal system of almost every "developing" country in the world was seen through the lens developed in Sino-American relations, and was then made routine in Cold War American public and private overseas efforts.

This development contextualizes Cohen's claim that he and his colleagues were "happily unaware of the alleged chastening experiences of our American counterparts."[101] Cohen cannot be blamed for what had then become fully entrenched as the common sense of American legal internationalism, even if it did ironically originate earlier in the Sino-American context. He also notes how few American comparativists existed to engage with and the lack of interest in China among the then new wave of law and development scholars.[102] Under such conditions, it would have

99. I have detailed elsewhere what would be necessary to re-orient American comparative law studies and their relationship to American legal innovation writ large. Kroncke, *supra* note 32. Also see, Jedidiah Kroncke, *Legal Innovation as Global Public Good*, *in* THE GLOBAL SOUTH AND COMPARATIVE CONSTITUTIONAL LAW (Phillip Dann et al. eds, 2020) Again, many others before me have documented and critiqued the marginality of comparative law in modern American legal culture; in this sense such claims are again not my own novelty.

100. KRONCKE, *supra* note 3 at 199.

101. Cohen, *supra* note 4 at 26.

102. It is telling that only in the last decade have serious scholarly attempts been made to re-visit Cohen's own pioneering work from the 1960s on pre-1978 law. *See* Glenn Tiffert, Judging Revolution: Beijing and the Birth of the PRC Judicial System xx, 323 (2015) (Ph.D. dissertation, UC Berkeley) (unpublished manuscript), https://escholarship.org/uc/item/2gh4c96c ("This work has begun to rebalance a Western understanding of the early PRC legal system that has until now derived mainly from extra-judicial terror and criminal law. But it does not directly address the formation or internal

been difficult to carry out an integrated comparative study of Chinese law because this frame was so little valued by anyone else.[103] It is notable that the presence of American comparative legal expertise in other areas of the world was even smaller, and would continue to exist often only as the legacy of other nation's perceived American influence or competition.[104]

What thus emerged in the post-1978 era was a field of U.S.-China legal studies largely lent external relevance only to the extent that it spoke to the confidence in China's liberalizing trajectory. Even basic familiarity with the civil law and Soviet legal traditions on which Chinese reforms were built after 1978 was far less common than was a recurrent invocation of reductive notions of cultural difference. Cohen notes that any clear-sighted view of the CCP since 1978 is one that should speak in the language of strategic experimentation.[105] Yet so much energy was solely spent looking for that which was deficient in Chinese law, or looking for signals heralding its liberalization—with the 1990s scholarship asserting an emergent Chinese practice of judicial review or the impact of clinical legal education the most startling in this regard.[106] This state of affairs in legl scholarship sharply contrasts with the expansive post-1978 growth of Chinese studies in so many other disciplines, where the Chinese experience was often at the bleeding edge of challenging old truisms.

One area that has witnessed an exemplifying counter-shift in recent years is scholarship on Chinese property rights. For too long, China's modern property rights development was seen as an inconvenient thorn to

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dynamics of the judiciary and the courts, and that poses problems for more than just historians…The consequences of this are breathtaking. The last major work of Western scholarship that inquired into the actual operation of the early PRC judicial system was written nearly fifty years ago").

103. I have to demur from Cohen's claim that his student Victor Li's pioneering work was ignored in the late 1970s as a matter of timing—it clearly operated well outside the bounds of anything that would have led to his employment at an American law school in the late 1970s. Cohen, *supra* note 4 at 15. It is further telling that even leading American law schools with large Chinese student populations and rule of law programming in China for decades had no full-time faculty with China expertise, or even a consistently offered a comparative law course.

104. I discuss in *Futility* the contrasting study of Japanese law, which even after the post-World War II American legal efforts was never enveloped by the missionary model—in larger part due to the different place of Japan in the American public imagination because of its successful marginalization of missionaries. Only during the 1980s when Japan was seen as a potential competitor was there a small resurgence of interest in Japanese law in the American legal academy. With only notable exceptions, for most every other area of the world, law faculty engagement was linked primarily to foreign reform efforts. KRONCKE, *supra* note 3 at 43-44, 108.

105. Cohen, *supra* note 4 at 15.

106. Again, it is not that these legal practices would not be normatively desirable if emergent. It is that there was no structural login within the Chinese legal system through which to coherently extrapolate their impact and, in the most decisively important terms, such extrapolations were not grounded in critical understandings of how such practices developed historically in American law.

be plucked from the side of strong ideological American priors about their political and economic import. Yet recent works on Chinese property rights have emerged that are made in richly comparative empirical and theoretical frame.[107] The end result of this work is both to advance some concrete understanding of Chinese developments while also aiming to reshape our general understanding of how property rights operate without requiring any explicit comparative normative judgment. Such a perspective provides an entry way for non-specialists to engage in a productive comparative conversation about American property law that itself generates even thoughtful critiques still almost exclusively focused on American empirical examples.

In my own writing on labor and property rights, I place Chinese and American legal developments in tandem with the primary aim of showing that what we "learn" from such analysis is not reducible to a crude conversation about whose law should be copied by the other. Instead, I suggest that comparative analysis helps us both better understand Chinese developments and test our own misconceptions about American law. This learning has included claims that Chinese experiments with local union elections and sectoral bargaining challenge our presumptions about the delinking of economic and political democratic development, while also questioning the general desirability of internal democratic procedures in American unions. Elsewhere I have argued that we can revisit our presumptions about the relationship of property rights to liberalism by looking at their embrace by authoritarian regimes such as China, while also criticizing utopian ideals of communitarian land ownership advanced by some using mischaracterizations of the Chinese experience.[108] If anything, the thrust of my own comparative legal practice is that insufficient American attention has been given to the import of democratic values, not by championing them in the abstract, but in how modern economic practices

107. Taisu Zhang, *Cultural Paradigms in Property Institutions*, 41 YALE J. INT'L L. 347 (2016); SHITONG QIAO, CHINESE SMALL PROPERTY (2017); and FRANK UPHAM, THE GREAT PROPERTY FALLACY (2018); *see also* Jedidiah Kroncke, *The Inescapable Comparative Empiricism of Modern Property Law Scholarship,* NEW RAMBLER (forthcoming 2021). This current work also builds on the long-time contribution of Donald Clarke's critical writing on Chinese property rights. *See, e.g.* Donald Clarke, *Economic Development and the Rights Hypothesis: The China Problem,* 51 AM. J. COMP. L. 89 (2003); Donald Clarke, *China's Stealth Urban Land Revolution*, 62 AM. J. COMP. L. 323 (2014).

108. Here I must demur strongly from Cohen's claim that I argue that "true comparativists—should be ferreting out and transmitting only positive legal experiences from China." Cohen, *supra* note 4 at 19. It is not an issue of negative or positive evaluation, but to what purpose and in what context such evaluations are deployed.

in and between the United States and China speak to their practical enervation.

All of which goes to demonstrate that there is much to comparative law when it is not bogged down by teleology, and which does not require descent into apologia to "learn" from a legal system that may have very difference normative foundations. Beyond reaching back to Revolutionary-era thinkers, *Futility* demonstrates—along with much new transnational history—that up through the early twentieth century this type of legal cosmopolitanism was an important stimulant to American legal development. These practices were lost once influencing the future of foreign legal systems became the only frame through which to justify any comparative American legal exercise. In an era where we contemplate systemic legal reform on any number of fronts, even those who cast themselves as radical reformers in the United States rarely challenge themselves to look critically beyond our borders.[109]

I predict Professor Cohen would not object to this model for studies of Chinese law for its "theoretical and practical benefits" moving forward, to put it in his terms.[110] But in concluding his essay, Cohen returns to question the orthogonal nature of such methodological issues to the driving concern of his career—combating arbitrary detention in China. Setting aside how we might differ on the arbitrariness of detention for large swaths of the American population, this question of how to fight injustice in China would seem to still carve out ambitions for American legal influence, even scholarship, beyond this type of domestically-oriented comparative law.

B. Reforming Ourselves is the Only Way Forward

It is true that even an ideally constructed academic method cannot stand in as the basis for the full gamut of Sino-American relations. Recent events have shaken the dominant frame of engagement and now beg the question of what a new frame should or could be. Cohen is rightly concerned with this reconfiguration given his long commitment to serving as a bridge between China and the United States beyond his role as a scholar.

Here we must return to the intractable point of whether there is any

109. While health care reform was a common target of this critique in the last decade, radical policing reform is now advanced that still nevertheless rarely looks critically to policing practices in other countries. For some theoretical inquiries in the lessons of comparative policing derived from authoritarian regimes, see POLICING AND AUTHORITARIAN LEGALITY IN ASIA (Weitseng Chen & Hualing Fu eds., 2021).

110. Cohen, *supra* note 4 at 29.

genuine mechanism for American actors to consciously and reliably impact Chinese developments. I do believe that even if one recognizes injustice in China today there are no paths forward which retain any of the missionary assumptions that tie individual effort to social transformation. I routinely ask others to consider their counterpart in another nation of the world. Who has externally influenced American law? Whose theory or history of American law did they privilege? How did they decide to do so? Are you similarly situated?[111]

There are so many ways to devote oneself to fighting injustice that it is a mistake to conflate a claim that one particular pathway is foreclosed with a call for inaction. Any ethical form of humanitarian action requires a comprehensive examination of benefits and costs—a balancing that is undermined by weighing unverified benefits while refusing to considering an costs. Even so, such individualized balancing, no matter its humanitarian purity, also cannot answer larger questions of engagement in which the individual is but particulate matter.

In reconsidering the terms of Sino-American engagement, it is then far more important that we collectively admit that something went wrong than engage in personal recrimination. We must instead ask ourselves dispassionately: "How did we get here?" Not solely how did China evolve into something beyond the imagined futures of our recent past, but how and why did we as a society speak to ourselves in such misleading terms? What exactly was wrong about our presumptions concerning China? But most centrally, what was wrong about our presumptions about ourselves concerning these much larger questions about the relationship between law, markets and democracy? It is these questions that now fundamentally challenge our social politics after decades of unfounded certainties.[112]

Here is where *Futility*'s arguments about the link between comparative knowledge production and foreign policy squarely sit. Unless we have a critical view of ourselves, and the relationship between American law and American democracy, we will not be able to effectively understand the true mechanics of our relationship to China, or any other country.[113]

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111. Mauro Bussani, *Deglobalizing Rule of Law and Democracy: Hunting Down Rhetoric through Comparative Law*, 67 AM. J. COMP. L. 701 (2019).

112. *See, e.g.,* Jedediah Britton-Purdy et al., *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784 (2020).

113. *Futility* cites scholarship which points to strong historical parallels in our relationship to other parts of the world, most immediately evident in the Middle East. *See, e.g.* JOSEPH GRABILL,

I deeply worry that we find ourselves already heading down the path that the United States followed after 1949 with the "loss of China." Reaction then to "the loss" parallels discussions today about how and why China did not follow the path we felt we had helped set it upon. Instead of being a cause for self-reflection, after 1949 the United States largely doubled-down on the very same presumptions which had led to the widespread and deep American misunderstanding of Chinese politics. It was then argued that only weakness of belief in the American mission of transformation abroad was to blame for the "loss," and not the belief itself. Those who dared to speak against these presumptions were cast as disloyal, and a generation of China experts was subsequently purged from American diplomatic ranks. It is not my novel insight, if less openly discussed, that this reaction to the "loss" contributed to decisions as calamitous as the Vietnam War to seek a relitigation of this failed aspiration.[114]

As discussed earlier, "the loss" also led to the same resurgence in ugly racial sentiment that is always on the flip-side of spurned American paternalism abroad used to explain away it failures. The trap again emerges that any critique of past engagement yields to the self-aggrandizing, accusatory rhetoric now saturating both sides of Sino-American relations. This is in part why *Futility* focused so much on how critiques of Chinese law were presented over time, as there was a recurrent cycle where China was only ever seen as a reformable recipient of American influence or as a culturally irredeemable alien/enemy. Neither option has ever led to anything good in the world.

Revolutionary-era American thinkers, for all their many other faults, saw their impact on the world through exemplification. This is what drove them to look for lessons from around the world to reforge in the American context. Exemplification was the guiding principle by which Senator Fulbright first imagined the influence of the foreign exchange programs he

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PROTESTANT DIPLOMACY AND THE NEAR EAST (1971). The Conclusion of *Futility* also touches on the fall of the Soviet Union, and how disappointing evaluations of American influence on the outcomes for any number of post-Soviet nations, including Russia, forced us for a brief moment to look critically about our assumptions about the relationship between law, democracy and capitalism. And then to forget again.

114. FREDRIK LOGEVALL, EMBERS OF WAR 429 (2012); DAVID MILNE, AMERICA'S RASPUTIN 85 (2008). The interpretation of the "loss of China" led to far more bewildering predictions than even the "domino theory" which presumed communism would transcend nationalism in Asia. For example, Cohen notes Bonnichon's thought that Taiwan would be the future of law in Asia. For Bonnichon and many others after 1949, the depth of this misperception meant they actually thought the GMD could successfully launch a military invasion to retake the mainland. Such hope was also linked to claims that the GMD then, not in the future, practiced a form of liberal law before 1949.

spearheaded and which now are under attack.[115] I do think it is likely that Cohen and I see the depths of our failure of exemplification differently.

It is seductive to think that these issues started with the most recent American administration, and the already too-common desire to return to what was before obscures these deeper issues.[116] As far as the current American administration has fallen towards damaging the American image abroad, our many hypocrisies and domestic crises have been decades in the making. And the impact of this hypocrisy cannot be swept away by the sins of the CCP or other countries. The biggest mistake possible now is advancing the idea that what has been experienced recently in the United States or China is aberrational or exceptional, and that a return to prior confidences will stave off all ills.

Especially when it comes to law, there is a very long tradition of eager Chinese citizens traveling to the United States and finding disillusionment in the gap between our rhetoric and reality. *Futility* opens with a poem of lament by late Qing official and reformer Huang Zunxian, who came to US in the 1880s as one of the many Chinese intellectuals of the era who were enamored of American Revolutionary-era thinkers. The ugly politics he saw in America was far from the future that his reading of George Washington had led him to imagine. Many volumes have now been devoted to the complex relationship of Chinese citizens who saw value in using ideals about America in domestic debates but who felt betrayed by the knowledge that such ideals were not in practice fully validated.[117]

To say we now risk the most severe costs of such hypocrisy can only be an understatement. Gaps between American legal rhetoric and reality are today instantly perceived and discussed globally. The underlying currents of paternalism, at best, and often outright racism, at worst, in the experiences of Chinese citizens in the United States is a motor engine of the continued denigration of liberalism and democracy within China. Especially as the CCP has improved its authoritarian capacities, these negative experiences

115. JAMES FULBRIGHT, THE ARROGANCE OF POWER 344 (1966).

116. For the cumulative and now acute impact of a general lack of investment in American research on China, see David Moser, *A Fearful Asymmetry: Covid-19 and America's Information Deficit with China*, 18 ASIA PAC. J. 5(2020)

117. In this regard, I am much less sanguine than Cohen that we again simply need patience and optimism to see China naturally return to a liberalizing trajectory, even as many within China may of their own accord need to imagine such a future to sustain their own activism. Cohen, *supra* note 4 at 9, 8 ("One can then expect another swing of the political pendulum toward a more moderate polity…When that day dawns, the sustained American and other foreign law reform cooperation that persists even now in China may be highly appreciated and useful to further progress").

are meaningful as we are well-served to remember that China is no monolith.[118] Those who are working towards a less repressive China are not always those that speak the loudest to American audiences, and neither is CCP control over all information absolute.[119]

We have to be honest about how others see us and not how we wish to be seen. This is no less true for American lawyers.[120] The ideal of American lawyering as embedded in a collective set of democratic values, rather than market logics, is not something most foreign observers believe and equally so something very few Americans outside the profession now believe. Recursively, those outside the United States are able to access this disbelief as readily as they do the hollow proclamations of fidelity to social virtue by our professional associations.[121]

Again, instead of doubling down and exteriorizing blame, we must ask ourselves what presumptions moved us to collectively ignore the very clear signals from the CCP concerning the future it imagined for itself.[122] In his essay, Cohen devotes two sentences to the events of 1989 at Tiananmen.[123] But this moment should be a central focal point of our current self-reflection. It was a moment when any easy certainty about China's liberalization should have been permanently destabilized. But in a

118. As the Chinese translation of *Futility* nears publication, neither could I have imagined that China would increasingly take on so many of these damaging attributes for itself by increasingly demonizing foreign legal experience and using legal chauvinism to prop up its own form of legal nationalism.

119. Here again I have to demur to claims that "Chinese friends have privately emphasized, the American effort has importantly helped to reinforce the Chinese people's longing for 'equal justice under law." Cohen, 8. I could very easily relate private communications over the last two decades that American efforts often have had quite the opposite effect, as well as point to scholarship that substantiates this claim. History is unpredictable, and I, like many, do see the Xi's repressive turn as recognition that the CCP's rule is far from invulnerable. But the historical track record of relying on personal assurances over clear and legible patterns of economic and political power claims few, if any, victories.

120. For a critique of how historical idealization of American lawyering impacts contemporary debates, see William Alford, *Of Lawyers Lost and Found: Searching for Legal Professionalism in the People's Republic of China*, *in* RAISING THE BAR: THE EMERGING LEGAL PROFESSION IN EAST ASIA 287 (William Alford ed., 2007). Mischaracterizing American legal history to foreign interlocutors who in any way base their reform strategies on such mischaracterization has to be now seen as deeply unethical.

121. It is clear that Cohen was drawn to China by "more than the lure of commercial success." Cohen, *supra* note 4 at 8. But I doubt that many foreign observers of American lawyers believe that as a class they have engaged with China for anything more than profit-seeking, even as they still collectively trumpet their shared professional principles.

122. For the same reasons stated above, I cannot share Cohen's confidence that "Although the lack of transparency within the PRC prevents us from confirming the extent of dissatisfaction among today's legal elite, many of us receive more than hints of the adverse impact of the past decade's repressive policies upon this elite, especially Xi Jinping's enhanced control of the legal system." Cohen, *supra* note 4 at 14.

123. Cohen, *supra* note 4 at 6.

shockingly swift moment this faith was reignited as the basis of American policy with new vigor.[124] What was required for arguments about political liberalization in China driven by economic development to still hold any water after this point? What were we so afraid of acknowledging then, and still now, about the nature of economic globalization that we as a nation had shaped and continue to shape?

We must consider that our economic "engagement" with China has not been made up of a simple flow of goods. The legal and material medium of modern U.S.-China relations has been predominately through private American corporations—not academic and diplomatic delegations—and whose internal logics are anything but democratic in nature.[125] During this same time frame, we have thoroughly de-democratized our economy and yet still somehow expect American economic engagement to spur positive political change abroad. Similarly, engagement—as with domestic economic development—cannot be evaluated through a simple calculus of benefits accrued to either country without considering the very different strata of citizens so impacted.

Herein, we can no longer coherently disconnect the foreign from the domestic, just as we cannot disconnect our relationship with China from our stance from any number of authoritarian regimes with which we still engage, if not outright support. We must view the past forty years of Sino-American affairs with the same complexity with which we address our own contentious domestic politics now so full of polarized discontent.[126]

It is looking at our own failures wherein lie the questions we did not want to ask ourselves after Tiananmen, and which we still resist asking, even as some now speak critically on Chinese abuses whose previous silence was

124. I should note that many who engaged in Sino-American legal exchanges did in fact step back from such work after 1989, leading to a high survivorship bias in the views of those who remained engaged in subsequent legal reform efforts.

125. This is far from a uniquely American problem. Consider that German codetermination, so often used as a counterpoint to American director primacy, is neither required nor encouraged in German joint-ventures outside of Germany.

126. Even egregious issues such as use of forced labor in Uyghur re-education camps cannot be grounded in a frame of our own pristine virtue—such will only blunt progress on policies focused on ending the use of forced labor globally. Here we must consider that every benefit the CCP derives from such injustice is symbiotically enabled by a failure of the corporate governance of those foreign entities it relates to—a symbiosis that otherwise follows doctrines to maximize shareholder value. We have become so passive about the nature of economic citizenship under our democracy that we continue to presume without question the deeply illusory idea that we can have "value-based" trade policy without comprehensive capital controls

secured by such illusions.[127] This speaks to the depths of the self-reform necessary to even begin to think about how we could have any liberalizing effect on the larger world.

Thus, the only real way forward is to ground any larger engagement policy in a longer-term process of reforming ourselves to exemplify the democratic values we seek to persuade others have merit. At the heart of this reconsideration is not a return to some real politick about global power which seeks solely to more effectively censure China, but instead sits the fundamental question: How did our own assumptions given birth to a form of economic globalization that is so accommodating to illiberal institutions at home and abroad? This is far from a uniquely American affliction today, though again we do little to force others to live up to shared ideals when we do not do so ourselves.[128]

I forward this writing from Hong Kong, which has become the most acute symbolic site for both the Chinese and American regimes to distract from their domestic crises, with little regard for those most impacted by their policies. My world is awash in a sea of misrepresentations, short-sighted alliances, warped histories and growing tribal polarization springing from so many speaking with Manichean certainty. I hope for a different future than the one emerging for my friends and colleagues who do not enjoy or want easy egress, and for my students who have to imagine their lives so disrupted by the tempestuousness of others. Yet, I fear that any future I might now imagine will be trampled on both sides by continued resorts to critiquing the other to avoid self-reflection.[129] I hope that Cohen and I can agree that, no matter our differences, such a future is one we should firmly resist.

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127. It is notable that few, if any, scholars of Chinese labor law—a field that is forced to look beyond formal law to fundamental relations of social power—have ever made optimistic predictions about where the CCP's reform agenda was heading, even when it allowed experimentation at the margins with legalized collective bargaining. See CHING KWAN LEE, AGAINST THE LAW (2007) and ELI FRIEDMAN, THE INSURGENCY TRAP: LABOR POLITICS IN POSTSOCIALIST CHINA (2014).

128. German Economic Minister Peter Altmaier very recently made the astonishing claim that "I have always been convinced and I still believe that [change in China] can be achieved through trade." Matthew Karnitschnig & Jakob Hanke Vela, Germany's Economy Minister Defends Berlin's Muted Response to China's Crackdown in Hong Kong, POLITICO (July 15th, 2020), https://www.politico.com/news/2020/07/15/germany-hong-kong-china-365499.

129. There was an early point in time when I was slightly more optimistic about the Chinese practice of comparative law, though that limited optimism seems to have been as unfounded as any other. Here again we have an unhappy convergence between the impact of cultural chauvinism on both sides of the Pacific. For a more presciently insightful analysis of attitudes toward comparative law in China, see SAMULI SEPPANEN, IDEOLOGICAL CONFLICT AND THE RULE OF LAW IN CONTEMPORARY CHINA: USEFUL PARADOXES (2016) and Samuli Seppanen, *After Difference: A Meta-Comparative Study of Chinese Encounters with Foreign Comparative Law,* AM. J. COMP. L. (2020).