

Establish Yourself at Thirty: My Decision to Study China's Legal System

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"Sanshi erli!" I first heard this famous Chinese phrase before I could understand it. Every educated Chinese knows it as one of a series of maxims coined by China's greatest sage, Confucius, as advice appropriate to life's successive decades.

I was about to turn thirty and confronting my most daring career decision. As a young, untenured professor of American public and international law who had just finished his first year of teaching at Berkeley, should I take up an extraordinary opportunity to study China, one that I had failed to persuade others to pursue?

This was not an opportunity that I had sought. Indeed, less than two years earlier, when as a Washington lawyer I had started to test the job market for law teachers, Dean Murray Schwartz of UCLA Law School, at a cocktail party designed to introduce me to his faculty, suddenly mused; "Somebody should study the law of Red China," as many Americans still called the People's Republic of China" in 1958. Without a moment's hesitation or thought, I responded: "That's the zaniest idea I've ever heard."

Only two weeks earlier, Dean E. Blythe Stason of the University of Michigan Law School had suggested that I agree to replace their retiring expert on comparative law, whose specialties included the legal systems of France and Germany. I replied that, while I had studied French at Yale College and during a pre-law Fulbright year in Lyon, I actually was unacquainted with French law. Moreover, the only German language I could muster was scraps picked up as a child trying to decipher my mother's discussions with her older sister - both had been born in Austria-Hungary - about topics they deemed too sensitive for my tender years. I soberly told Dean Stason that, while I might well want to take on French law, for me to start learning the difficult German language at the advanced age of twenty-eight, would be an act of hubris!

Yet, less than two years later, I was teetering on the brink of deciding to learn a language much more difficult than German and take on a great civilization I knew nothing about. At least I had spent a year studying in France and had traveled briefly to see Viennese cousins and German tourist sites. I had virtually no previous contacts with China.

Although China had undergone one of the world's most profound revolutions during my undergraduate, Fulbright and law school years, I had paid little attention, despite my desire to become a specialist in international relations and international law. I wrote my college thesis about the decisions made by Roosevelt, Churchill and

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Stalin at the February 1945 Yalta Conference that importantly influenced political and territorial arrangements for China and post-war Asia, but I had learned little about China itself. My supervisor, the prominent conservative historian of American diplomacy, Samuel Flagg Bemis, was much more interested in my investigating the role that the controversial American official Alger Hiss - later convicted of perjury in connection with espionage - may have played in influencing United States policy to favor the Soviet Union.

Nor had my Yale Law School interests in international law brought me much closer to events in China. Of course, I was aware of the PRC's entry into the Korean conflict and the issues raised by the armistice and the problem of repatriation of prisoners. I also noted China's 1954 sentencing of my college classmate, John T. Downey, Jr., to life imprisonment for spying, and Beijing's post-Korea policy of "peaceful coexistence." Yet, as a law student, I came nearest to East Asia when in class I hotly debated my revered mentor, Professor Myres McDougal, over the constitutionality and implications for international law of the U.S. mistreatment of Japanese resident aliens and even American citizens of Japanese descent during World War II.

The names of Korematsu and others who challenged America's outrageous wartime detentions and expropriations were more familiar to me than those of Mao Zedong and his comrades, even though the Maoists were exterminating millions of "counterrevolutionaries", confiscating private property and imposing "reform through labor" upon those who expressed dissatisfaction with "the people's democratic dictatorship".

Looking back more broadly, what early influences might seriously have tilted me toward studying China? Could it have been the clack of the tiles in our family living room every Wednesday afternoon in the late 1930s as my mother and her friends played Mahjongg? It never occurred to me to ask why they preferred Mahjongg to bridge, and, to my shame, I have never learned to play China's most famous game.

Could it have been the regular Sunday night dinners at the local Chinese restaurant that my family, like so many others in pre-World War II America, enjoyed on maid's night out? Yet the only thing other than chop suey that I remember is the smiles that our favorite waiter evoked when he invariably asked whether we wanted "lice or bled".

Even my four years in Washington, D.C. following law school yielded few potential clues. It is true that I contracted a bad case of "Asian flu" as I began law practice at the firm of Covington & Burling. More seriously, a talk with my favorite mentor, senior partner and former Secretary of State Dean Acheson, did make me temporarily curious about China. Acheson, whom I later came to fault for some of the Truman Administration's mistaken policies toward "Red China", was a brilliant lawyer and statesman. Yet he told me he did not believe China could become a great power, because it supposedly lacked the minerals he thought necessary.

In 1957 Acheson's preoccupation with the Chinese Revolution seemed limited to the endless Republican political attacks against him for allegedly being "the man

who lost China". With a deep sigh, he once asked me: "Do you think that will be on my tombstone?" Understandably, Acheson, who did not suffer fools gladly, was not amused when I asked him how he could possibly have been so absent-minded! Nor did he think the counterattacks against his Republican successor at the State Department, John Foster Dulles, which he asked me to write for the Democratic Party in my leisure hours, were ever spicy enough to meet his taste.

Perhaps my main China stimulus during Washington days came from a criminal prosecution initiated by the local police against a respected businessman and his wife whose hobby led them to privately publish three books on sex as depicted in pre-modern Asian art. One was entitled "Erotic Aspects of Chinese Art". As the prosecutor put in charge of the case by the United State Attorney, I had the duty to interview some of Washington's leading experts on Chinese art history and also to evaluate the defendants' private collection of traditional sex objects as well as the offending books themselves. This is not the place for the detailed scrutiny this case deserves as one of the more colorful episodes in my early practice of law. Here I simply note that it did not do much to hone my interest in contemporary China.

So how did the opportunity to become a specialist in Chinese law arise, and why did I seize it when other law professors shunned it? The role of chance was important.

In April 1960, toward the end of my first year teaching at Boalt Hall, the law school of the University of California at Berkeley, my senior colleague Professor Frank Newman and I were driving to Sacramento, the state capital, for a legislation seminar with our students. Newman, who was about to become the law school's new dean, told me of a conversation he had just had in New York with his former law school classmate, Dean Rusk, who was then head of the Rockefeller Foundation.

Newman, a far-sighted and innovative character, asked Rusk to have the Foundation establish a chair in African law at Berkeley. Although an African law program at a West coast school seemed geographically improbable in those days, Newman was excited about the prospect. Just before I left Washington for Berkeley in the summer of 1959, he had been inspired by the visit of a South African law professor named Dennis Cowan, who was on a barnstorming tour to heighten American interest in South Africa's human rights problems. Moreover, this was a time when the British and French colonies in Africa were coming to independence, and some observers were predicting that Africa might become the wave of the future, the way that many others - more correctly - saw the promise of East Asia.

Newman's request caused Rusk to ask a question that Newman thought distinctive enough to tell me about. Rusk wanted to know whether there was anyone in the U.S. specializing not in African law but in the legal system of China. Behind that question lay a story.

Rusk, before joining Rockefeller in 1953, had served under President Truman and Secretary Acheson as Assistant Secretary of State for East Asia. That was his job when the Korean conflict broke out in June 1950. Several months later, the major decision had to be made whether to allow the American-led United Nations forces,

which had forced the North Korean invaders out of South Korea, to pursue them into North Korea and possibly bring down their regime.

Washington officialdom was divided about what to do. Some argued that, if the UN forces crossed into the North, China would enter the war in order to prevent collapse of its invaluable buffer state. That, they emphasized, would be a calamitous expansion of the war whose consequences could not be foreseen or limited. Indeed, China's Prime Minister Zhou Enlai had secretly passed a message to this effect to Washington via the Indian ambassador to Beijing. Many other officials, however, argued that the new Chinese Communist regime, which had assumed nationwide control only the year before, was bluffing and wouldn't dare take on the world's greatest power and its allies. The latter group proved more influential and, as my beloved Yale Law School professor, the German refugee Fritz Kessler, liked to say during contracts class, they "couldn't have been wronger."

One conclusion Dean Rusk drew from the debacle of China's entry into the war was that both the U.S. government and American society needed a new generation of China specialists who might better understand the "New China" and more accurately predict its policies. Moreover, by the time Rusk reached the Rockefeller Foundation in 1953, thanks to the depredations of Wisconsin's Senator Joe McCarthy and other rabid anti-Communist politicians, some of America's foremost diplomats and scholars specializing in China matters had lost public confidence as well as their jobs or been relegated to obscurity.

Thus, one of Rusk's interests at Rockefeller was to sponsor the training of the new generation of China experts that he and many others believed was urgently needed. That was why he immediately turned Newman's request for a chair in African law into the question whether American law faculties already boasted expertise in the legal system of China. Newman assured him they did not.

About a month later, Kenneth Thompson, an able political scientist then advising Rockefeller, called Robert Scalapino, one of America's best known scholars of East Asian studies and the most prominent of Berkeley's impressive group of social scientists and historians working on China. Thompson told him that, while African law was a worthy and important subject, the Foundation had decided that it was more urgent to train someone in China's legal system. He asked whether Boalt Hall would be an appropriate institution to undertake the task and would be willing to do so.

By then, Newman had taken the reins from retiring Dean William L. Prosser, author of the famed "Prosser on Torts", the "hornbook" that helped every law student survive the first year. When Scalapino called to tell Newman of this exotic opportunity, Newman enthusiastically called me in to ask for help in seizing what would be his first administrative initiative.

Knowing my earlier skepticism about the "zany idea" of specializing in Chinese law and eager for me to continue to take an active part in teaching domestic public law and energizing law school life, Newman was not thinking that I might grasp the opportunity. He recognized that it would require several years of almost monk-like seclusion while learning Chinese and acquiring the vast accumulation of

knowledge associated with understanding the country and the place and future of its legal system. Rather, he wanted me to find someone else to take up the unique opportunity.

“You’re a young fellow, and I can tell you what to do”, he joked. “Find me somebody for this offer,” he said, “so the law school doesn’t lose the chance. Find me an East German who has studied law in China. Find me a social science grad student who knows Chinese and is willing to study law. Find me a Chinese graduate of an American law school who can meet faculty standards. Find me somebody.”

I dutifully tried all of the above plus some of my young Boalt colleagues, but there were no takers. One of them said politely: “Don’t you think that would be a rather narrow specialty?” Floored by his response, I said something like: “Compared to administrative law?”, a topic he was pursuing.

Although discouraged by my lack of success in finding a candidate, I had become increasingly interested in the challenge. I had failed to persuade anyone else, but I had begun to persuade myself. The school year had ended. It was time for me to write something if I was to qualify for promotion during the coming year. I was having a hard time deciding among the many topics suggested while fulfilling my first year teaching obligations, which were overly broad for a new boy – criminal justice, civil procedure remedies, administrative law and United Nations Law.

What to write about? In principle, I wanted to choose an international law topic, but worried that I had no practical experience in that field and couldn’t seem to find a proper entry point for a scholarly article. Having clerked at the Supreme Court for two years and spent some time as a federal prosecutor after that, I was leaning toward an essay on criminal justice. Before I got started, however, the China assignment appeared and claimed my attention.

I wanted to do something significant with my life. I had left Washington for academe after careful thought. I had been attracted by the excitement of the rough and tumble of the practice of public law in the nation’s capital, enjoyed both trial and appellate work and loved Washington’s links between law and political reform. Moreover, when I made my decision to go to Berkeley, the 1960 presidential election was looming, with the prospect of a possible Democratic victory that might move the country out of the seemingly lethargic Eisenhower era. Many older Washington hands urged me not to leave town but to stay on with a view to joining them in the new administration.

Yet I yearned even more for the independence that academic life promised. I did not want a career that depended on the uncertainties of politics and required hanging on to the shirttails of senior political figures for satisfaction and promotion.

More importantly, I went to law school during the McCarthy years and admired those of my professors who stood up to McCarthyism. As one of the greatest of them, Thomas Emerson, told me, permanent academic tenure’s protection against external pressures was the best available guarantee of personal, professional and political independence. Unless, of course, one had the good fortune to inherit a fortune, which I did not.

I also wanted the chance to think, read, write and publish in an unhurried way and to add to public knowledge and debate. It was hard not to fall under the spell of Justice Felix Frankfurter, for whom I had clerked during the U.S. Supreme Court's 1956 Term. His academic accomplishments and popular impact while teaching at Harvard Law School offered an attractive model of a life well-spent long before he reached judicial eminence.

My father, a poor boy who could not afford to go to college and who had to work during the day while studying at New Jersey Law School at night, had found the law teaching offered there to be very dry, especially in contrast to the later thrill and satisfaction of litigation. But I had been excited by the teaching at Yale Law School and the chance to edit and contribute articles to the Yale Law Journal. By my second year I had decided that the life of a law professor would be even more rewarding than the life of an international lawyer that had occupied my teenage thoughts.

Yet, as I began to consult academic colleagues and other friends about whether to take the China plunge, many thought that would be going too far afield and would even be outside the usual area of "comparative law," as that subject was studied in the West. I was especially touched by the concern of Dean Prosser, who took the initiative to drop by my office in an effort to dissuade me from what he had heard I was contemplating. "If you don't want to teach torts (the subject that made him famous)," he said, "then at least teach constitutional law, although I don't think that really amounts to law. But don't throw away your career on China. No one will ever pay attention to your work except once a year when the Ford Foundation comes around and asks whether anything interesting is going on. Then the faculty will trot you out from the back room, but the rest of the year you will be forgotten."

Perhaps that kind of advice only strengthened my determination to challenge convention, something I had been tempted to do on lesser occasions. I felt a bit puzzled and frustrated by the inability of so many others to see the future importance of a recently-mobilized China and the role that law would inevitably play in its development and relations with the world.

Furthermore, I liked the idea of becoming an academic pioneer. Why abandon a stimulating and possibly lucrative career in law practice simply to join the already abundant ranks of able professors of American law? My Berkeley salary was only \$10,800 per year, and my wife Joan was expecting our third child. Yet we were comfortable with the decision to enter fulltime scholarly life. Having made that decision, however, I asked myself why not take full advantage of it by doing something that no practicing lawyer or government official would have time to undertake and no other law professor wanted to do— spend a lifetime studying the Chinese legal system, past and present?

Certainly the challenge of China would be immense. The difficulty of acquiring the language was only the most obvious hurdle. How to learn about law and legal institutions as they developed through the millennia of one of the world's oldest legal systems would require knowledge of history, philosophy, society, economics, politics and culture as well as analysis of usual and unusual legal materials.

Moreover, contemporary obstacles added to the task. In 1960, the United States and the People's Republic of China were still a long way from establishing diplomatic relations, and even unofficial government contacts were only occasional and extremely limited. Americans were not allowed to travel to China, nor were PRC nationals permitted to come to America. Communications between residents of the two countries were monitored, and access to current Chinese publications was restricted by the PRC.

Seven years after the Korean armistice, American public opinion remained very hostile to "Red China". In the 1960 federal elections, three of the four members of Congress who had supported a recent proposal merely to bring the PRC into the United Nations General Assembly, but not to replace Taiwan's rival government in the Security Council and General Assembly, were defeated. As President Eisenhower accompanied John F. Kennedy down Pennsylvania Avenue to his inauguration, Ike warned JFK that the only thing that would bring Ike out of retirement would be an attempt by the new administration to negotiate diplomatic relations with the PRC.

In these circumstances, friends understandably wondered why I wanted to choose China. One or two of the kindest even hinted that I might be suffering from some psychological infirmity. Others fretted about the career risks and satisfactions involved. What if I could not cope with the language? What if no one followed my lead and this proved the path to a blind alley?

Yet, despite all the doubts, when a Chinese literature colleague I consulted shortly before my thirtieth birthday – July 1, 1960 - quoted the Confucian maxim about establishing oneself at thirty, something in me immediately responded, and I decided to try to establish myself in this foreign and hostile terrain.

Joan was very supportive. Although Smith College had given her a solid education in Western art history, following her graduation in 1954 she had written Smith's president a letter noting the absence of similar offerings in Asian art. A subsequent year of work at Yale's art museum while "putting hubby through" law school spiked her interest in China's legendary but mysterious artistic traditions. When she heard I wanted to accept the Rockefeller fellowship, she said: "Fine. You study their law and I'll study their art, which I have always hoped to do." Her only concern was that I was opting to become a specialist in a field of law where no one presumably would want to consult me professionally and add to our modest academic income!

Law school reactions to my decision were mostly polite but unenthusiastic. Fortunately, Dean Newman gave me his strong support, although I was surprised when he quipped: "The only problem you'll have is: what will you talk about at cocktail parties?" I was buoyed by the warm encouragement of Columbia Law School's Professor Richard Gardner, a young but already distinguished expert in public international law whom I had invited to speak at a program I was running that summer for aspiring law teachers. He still remembers that conversation!

Justice Frankfurter's reaction was by far the most interesting and most important to me. His first response was understandable but disappointing since he emphasized that, by choosing China, I was declining to build upon the unprecedented

experience of having served as law clerk to Chief Justice Earl Warren for a year followed by a second year at the Supreme Court with “FF” himself. “You are throwing away a whole accumulation”, he wrote.

Joan and I were close to the Justice and had continued to see him during the two years we remained in Washington after I completed my clerkship with him. He was godfather to both of our sons who were born in Washington, and we felt that we knew him reasonably well. Those who did often recognized that he was a person of strong likes and dislikes that could occasionally be manipulated. When I received his first response to my news, I decided, somewhat impishly, to try to play upon one of his dislikes. For reasons that remain opaque from this vantage point, perhaps relating to a year Dean Prosser had spent teaching at Harvard, Frankfurter disdained Prosser, as he had made clear when I told him I planned to leave Washington for Berkeley.

So I started my answer to Frankfurter’s letter by stating: “Dear Mr. Justice, I quite understand the reasons why you are reluctant to support my decision. Indeed, Dean Prosser said exactly the same thing only the other day.” That drew a rapid second response that I can still see in my mind’s eye well over half a century later. Written by hand on a sheet from a lined yellow pad favored by lawyers, the Justice’s note began: “Given the role that China is destined to play in your lifetime and that of your children, of course you are doing the right thing. Tell Prosser to go to Hell!!”

Both bolstered and amused by that reluctant assurance, I took my first Chinese lesson at 9 am on August 15, 1960. It was the fifteenth anniversary of Japan’s World War II surrender, which had marked the start of the Asian – and Chinese – century.

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