

A TRIBUTE TO JEROME ALAN COHEN ON HIS EIGHTIETH BIRTHDAY

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Jerry's career is one to envy. He started out as a star: Phi Beta Kappa as an undergraduate, Fulbright Scholar to France immediately thereafter, first in his class and Editor-in-Chief at Yale Law, Supreme Court clerk not only to Earl Warren but also to Felix Frankfurter, Covington & Burling, Assistant U.S. Attorney, and professor of law at Boalt Hall at the University of California at Berkeley. Impressive as it is, however, this trajectory is repeated by many eager young scholars every year. What distinguishes Jerry is what he did after leaping through all the conventional hoops. In 1960 he gave up the assured track and started studying Chinese, a time when the chances of making a successful legal career based on Chinese law must have seemed remote indeed.

This issue of the *Journal of International Law and Politics* celebrates his 80th birthday and the first fifty-five years of that career, and in this brief introduction I attempt to capture some of the highlights up to this point. There remains much work to be done, however, and those of us who know Jerry will use the occasion not only to look back fondly on a life of enormous achievement, but also to look forward to his continuing contributions to the legal profession, comparative law scholarship, and justice. What this essay will not attempt is to give the reader any sense of what he has meant in the personal lives of his past and present students, but I will exercise my privilege as author to note that I am only one of dozens who have been inspired, challenged,² financed, employed, and inspired again by Jerry's direct, generous, and patient intervention in our lives.

1. Wilf Family Professor of Property Law at New York University School of Law. Thanks to Jeremy Daum and Margaret Lewis.

2. In late May, 1989, when momentum was building toward the Tiananmen massacre, the State Department advised me not to go to China and was telling all Americans there to leave immediately. When I asked Jerry his opinion, he simply asked me whether I wanted to "witness history or not." I went.

Betting your career on China, even Chinese law, may seem an easy choice now, but Jerry virtually had to imagine the field and create his own methodology. Most immediately, as an American citizen, Jerry could not enter the People's Republic of China, much less gather information freely. Then there was the fundamental question of what to research. Although the 1949 communist revolution was followed by a period of socialist legal construction modeled on the Soviet Union, by the 1960s China had turned inward and dramatically away from law, even in the broadest sense the term. Nor did the methodological state of American legal academics help. Dominated by the legal process school and doctrinal analysis, interdisciplinary and empirical scholarship was rare, and legal research and scholarship on a society with few formal legal institutions must have seemed almost unimaginable. Nonetheless, Jerry and his wife, Joan Lebold Cohen, whose career in contemporary Chinese art has matched Jerry's every step of the way, headed for Hong Kong with their three young sons, and Jerry began interviewing refugees and others leaving the mainland.

He decided to focus on the criminal process, an area where even the most authoritarian and unpredictable regimes must rely on some level of rules, standards, and bureaucratic institutions. The result was *The Criminal Process in the People's Republic of China, 1949-1963: An Introduction* published by Harvard University Press in 1968. In a pattern followed by Jerry ever since, it asked all the big comparative law questions, from the effectiveness of legal transplants to the possibility of a "lawless" society, but he complemented that discussion with hundreds of pages of translated primary sources: legal documents, policy statements, articles from legal journals, selections from interviews, and written accounts by people with firsthand experience with the Chinese criminal process.

At a time when comparative law meant Europe with perhaps a brief field trip to Latin America or some other civilian outpost, Jerry's book and a handful of works by other pioneers reminded American legal scholars that it is indeed a big world. For me, however, the book's even greater achievement was its unrelenting attention to what was actually happening in the name of law. In today's world of interdisciplinary legal scholarship, it may seem commonplace to interview systematically dozens of subjects and actors of the Chinese criminal justice

system, but it was revolutionary during an era when comparative law consisted primarily of the exegesis of code provisions.

Jerry next turned to international law, and with the collaboration of Professor Hungdah Chiu, now emeritus at the University of Maryland School of Law, produced *People's China and International Law: A Documentary Study*, published by the Princeton University Press in 1974. An over 1,500-page, exhaustive (but not exhausting, at least if you were in class with Jerry) compilation, annotation, and analysis of documents relating to the international law practice of the People's Republic of China up to that point, it was awarded the American Society of International Law prize for best documentary study on international law. As with *The Criminal Process in the People's Republic of China*, it represented more than just the authors' opinions; its wealth of material made China available to other scholars without the linguistic tools to study Chinese law directly.

Jerry's role in building the field of Asian legal studies has been at least as great as his direct scholarly contribution. During his seventeen years as a professor at Harvard Law School, he created the school's East Asian Legal Studies program. At the time, the only other American law school paying systematic attention to Asia was the University of Washington, and it did not seem inevitable either that East Asia would become an integral part of American law school curricula or that law-related research would become influential in East Asian studies programs and scholarship. Jerry's success in not only encouraging legal research but also in stressing the importance of interdisciplinary approaches, like those of legal historians William Shaw and Wejen Chang, has helped put East Asian studies into the mainstream of American academics. The impact was not felt solely within the United States. Jerry was a pioneer in identifying Asian funding sources for academic programs, and he used those resources aggressively to invite Japanese, Korean, Taiwanese, and Chinese professors and practitioners to teach and study at Harvard.

Today, any American law school of size and ambition feels the need for faculty with Asian interest and expertise. The annual conferences and journals of the Association of Asian Studies and similar organizations regularly have panels and papers on legal topics, and the law faculties of Japan, Taiwan, Korea, and China include many professors with teaching and

research experience in American universities and law schools. Of course I cannot give Jerry all the credit. Japan's threat to take over the world in the '80s, and its replacement by the current, even greater, hysteria over China's rise, get some credit, but Jerry's fingerprints are all over many of the most established programs. His ideas, energy, and idealism drove our establishment of New York University's U.S.-Asia Law Institute (USALI), from which many of my colleagues and I benefit, and before USALI he was one of the catalysts for inviting many of Asia's top legal scholars to come to Washington Square as part of the Hauser Global Law School Program. Columbia's Asian law program, which has endowed chairs for both Japanese and Chinese law, was founded under the leadership of Randy Edwards, a Cohen student and close associate, and Jerry's former students and protégées are at law schools around the country. This year there were eightieth-birthday celebrations at Columbia, Cornell, George Washington, Georgetown, Harvard, Hawaii, NYU, and Yale law schools (these are only the American ones, and I am probably missing some of them), each hosted by someone indebted on some level to Jerry for institutional, intellectual, or personal help over the decades.

Being at the center of creating an academic sub-field, building institutions with influence beyond the United States, and watching students go on to have illustrious careers including in and outside of academia (Ma Ying-jeou, current President of Taiwan³ and Clark Randt, Jr., former U.S. ambassador to Beijing, are two examples of "real world" impact) would be a full career for most of us, but Jerry has been almost as central in building a legal practice field as well. When Mao died and Deng Xiaoping announced a series of economic and legal reforms that promised to open China to the rest of the world, Jerry resigned from Harvard to devote himself to a commercial practice with China. Working first with Coudert Brothers, and then Paul Weiss, he used his contacts in the Chinese leadership—he is one of few Westerners to have personally met with both Zhou Enlai and Deng Xiaoping—to become one of the first American lawyers to work in post-reform China. Living at

3. Jerry has consistently emphasized the importance of the study of Taiwan's legal institutions, not only in their own right but also as a guide to the evolution of China's legal system.

the Beijing Hotel with Joan and enduring—or perhaps enjoying, given their senses of humor and abilities to see the humanity in the other side—constant police surveillance, he started shepherding eager but apprehensive clients through the process of investing in China. In doing so, he simultaneously helped build the domestic institutions that have made China one of the world's top destinations for foreign direct investment.

Part of his impact was perhaps inevitable given the importance of his clients and the Chinese desire for economic growth, but Jerry was influential beyond the role of a persistent advocate for his clients. He was important because the Chinese leadership trusted him to keep China's long-term interests in mind when advising them in their efforts to create a legal and bureaucratic framework that would make the most of the huge influx of cash. Why they trusted him brings us to the fourth of Jerry's careers, that of public intellectual and human rights advocate.

Jerry is undoubtedly best known now as a defender of Chinese dissidents and their lawyers and, hence, as a critic of the communist regime. Among other things, he has a biweekly column in Hong Kong's *South China Morning Post* that more often than not points out the injustice, illegality, and frequently counterproductive nature of the regime's treatment of political dissidents, many of whom have done no more than point out the regime's violation of its own laws and principles. Given Jerry's unremitting vigilance and attention to the regime's most controversial and politically outspoken domestic critics, one might wonder why he is still able not only to travel to China several times a year but also to bring legal reform missions under the aegis of USALI to collaborate with Chinese host institutions on some of the most sensitive legal issues, such as the death penalty, the exclusion of forced confessions, the procedural rights of criminal suspects and defendants, and the need for judicial independence. The reasons are complex, and certainly include the fact that Jerry's ideas are shared by many within the regime and that the political cost to Beijing would be significant if it denied a visa to one of its most prominent and respected critics, but I am confident that another reason is that China's leaders remember that Jerry has always been China's friend as well as a critic. Simply put, he has al-

ways been an honest broker, and never more so than when it comes to Sino-American relations.

The story of Jerry's role in American policy toward China is too long even to be summarized here, and it is available elsewhere.⁴ A few highlights should suffice to give some sense of what Jerry himself recently referred to as "a long track record in China," and his confidence that "people [in China] know that I've invested many years in improving relations with China."⁵ More than forty years ago, he was the chair of a group of American scholars who confidentially urged the Nixon administration in the late '60s to re-establish direct contact with the PRC, efforts that contributed to Kissinger's secret trip in 1971 and Nixon's earthshaking trip a year later. ("Nixon goes to China!" remains a media cliché for a monumental and unexpected break with past dogma.) When normalization stalled, he continued to work for its realization, eventually seeing success under the Carter administration. He later played a similar, if less lonely, role in urging China's admission to the World Trade Organization. Then there is the non-trivial effect of the foreign direct investment that he facilitated in the '80s and '90s, as well as his assistance in shaping China's international trade institutions, which have helped the regime to bring hundreds of millions out of extreme poverty.

Another aspect of Jerry's interaction with China deserves mention in this context. He has never adopted the naïve and arrogant stance of many American critics of China's human rights record. He has always been as quick to criticize the self-serving and hypocritical positions of the United States as he has those of China. Although one may have to wait for Hu Jintao's or Wen Jiabao's memoirs to know for sure, it may have been these decades of straight talk and constructive engagement that have allowed Jerry to become one of the most consistent and effective critics of the regime's continuing failure to live up to its own professed ideals and, even more so, of its frequently apparently gratuitous cruelty to even the weakest of internal dissidents.

4. See Pamela Kruger, *China's Legal Lion*, N.Y.U. L. SCH. MAG., 2009. For those interested in more depth, Vanessa Hope and the U.S.-Asia Law Institute have prepared a sixteen-hour video oral history of Jerry's Career, titled *Life, Law and Asia*. It is available on the USALI website, <http://www.usasia.law.org/?cat=23>.

5. Kruger, *supra* note 4.