ESSAY

Thoughts About Floyd Feeney: An Excellent Scholar and a Good Friend

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INTRODUCTION

The first time I met Floyd was in November 1994. This was a crucial time for China's Criminal Procedure Law ("CPL") reform. It was the first time, and maybe the last time, that the Standing Committee of the Legislative Affairs Office would authorize a university group from the China University of Political Science and Law ("CUPL") to prepare a draft criminal procedure law.[1] At the time, I was a young lecturer, and lucky to be invited to join this draft group as its youngest member. One of the tasks of the group was to organize an international conference. The Ford Foundation supported the CPL reform project and

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[1] *See* Liling Yue, *The Development of Chinese Criminal Procedure*, *in* FOUR CRIMINAL PROCEDURE CASE STUDIES IN COMPARATIVE PERSPECTIVE: CHINA-ITALY-RUSSIA-U.S.A. 23, 30 (Marco Fabri ed., Staempfli Verlag, Nomos, Jan Sramek Verlag 2016).

recommended Floyd Feeney as an outstanding expert of criminal procedure law. In 1994 Floyd visited China for the first time and participated in the judicial system reform project. He then visited Beijing at least another six times and, until he left us, accepted ten Chinese legal scholars and PhD students (including me) to study at the University of California, Davis, School of Law ("the law school"). He invited me to the law school three times, supported my Fulbright senior scholarship application, and welcomed me to the law school to carry out my research.

With this Essay, I want to convey my deepest appreciation and admiration of Floyd. I know that words cannot fully express how much his advice supported and advanced Chinese criminal procedure and criminal justice reform, and how much his mentorship meant to me, personally. And, my sincere intent is not only to honor Floyd, but also to conclude with the message to myself, and hopefully to others, that the void he left must be filled. I hope to encourage others to be as supportive of developing countries' law reform, as well as of their scholars and students, as Floyd was.

I. FLOYD'S CONTRIBUTION TO CHINESE CRIMINAL PROCEDURE LAW REFORM

As I mentioned above, I first met Floyd in November 1994 at the second International Conference for Criminal Procedure Law Reform. This was an important conference to draft a revision of the 1979 Code of CPL, and it was the first time since the Policy of Opening China began in the 1980s that an American scholar introduced the American criminal procedure system to the Chinese legal community. Floyd's lecture was titled "The Reform of Criminal Procedure in the United States: A Historical Examination of Two Reforms: Exclusionary Rules of Evidence and Open Plea Bargaining." I remember that the two concepts Floyd presented drew the utmost attention from both old and young generations of Chinese legal scholars.

As regards the exclusionary rule, the 1979 Code of CPL explicitly prohibited obtaining a confession illegally.[2] However, the law did not stipulate the consequence of violating the law. In practice, when torture resulted in a confession, judges would evaluate the confession and, if they believed that it could be true, it was accepted. Floyd's presentation awakened Chinese legislators and younger scholars, and I initiated

[2] CHINA CRIM. PRO. CODE, art. 32 (1979) (China) ("It shall be strictly forbidden to extort confessions by torture and to collect evidence by threat, enticement, deceit or other unlawful means.").

comparative research on this topic.[3] Unfortunately, after the 1996 CPL reform, the revised Code did not make any progress on our exclusionary rule. Perhaps a struggle of ideology within the Chinese legislature resulted in not explicitly reforming our judicial practice concerning the exclusion of evidence. By that time, the crime control model played a decisive role in Chinese criminal justice policies.

In 2002, on the occasion of the fiftieth anniversary of CUPL, Floyd was invited to attend its Symposium on Criminal Evidence. He gave a lecture entitled "Should Illegally Obtained Evidence be Used in Criminal Proceedings? A Brief History of the Exclusionary Rule in Common Law Countries." His talk was translated and published in the China Law Review in 2002.[4] The article has enlightened scholars, and continues to be cited to this day. In the 2012 CPL reform, exclusionary rules were finally established. In practice however, there are few cases where the illegally obtained confessions are excluded. Even if exclusion is ordered by a Chinese judge, the order does not carry the same effects as under the American exclusionary rule. In China, judges can read case files before the trial, and illegally obtained evidence may influence them and create preconceived ideas before a trial even starts. China may follow the road on which the United States has built its exclusionary rule for more than 100 years. Floyd guided me to think deeply about a key issue related to the exclusionary rule that has not yet come into Chinese legal scholars' and practitioners' sight: the purpose of the exclusionary rule.[5] Through comparative research, I recognized that the purpose of the exclusionary rule plays a decisive role in determining the application of technical doctrines that can result in the exclusion of relevant evidence. American courts tend to view the deterrence of police misconduct as the sole rationale for the rule. According to that view, if there is no misconduct, the rule is inapplicable, and the evidence must be submitted. However, that narrow conception overlooks the protection of other values such as judicial integrity and constitutional privacy rights. A broader conception of the exclusionary rule would

[3] *See* LILING YUE, PROCEEDINGS OF THE FIRST WORLD CONFERENCE ON NEW TRENDS IN CRIMINAL INVESTIGATION AND EVIDENCE 367-368 (J.F. Nijboer & J.M. Reijntjes eds., Koninklijke vermande 1997).

[4] *See* Floyd Feeney, *If Illegally Obtained Evidence Could Be Used in Criminal Proceedings? — Brief History on Exclusionary Rule in Common Law Countries*, 2 CHINA L. REV. 157 (2002).

[5] *See* Liling Yue, *Comparing German and American Exclusionary Rules — The Experience of China's Establishing Criminal Evidence Rule*, J. CHINA U. POL. SCI. & L., June 2003, at 178-191.

authorize judges to weigh those other considerations in a balancing approach.[6]

The center segment of the 1994 Conference group photo; Professor Feeney is fourth from the left in the front row. Printed with permission of the Criminal Justice Center and Professor Guangzhong Chen.

[6] Liling Yue, *Theories and Practice of Evidence Exclusion in Germany*, PEKING U. L.J., 2003, at 107, 107-118.

The right section of the 1994 Conference group photo; Professor Yue is at the far right in the top row. Printed with permission of the Criminal Justice Center and Professor Guangzhong Chen.

When Floyd first mentioned plea bargaining at the 1994 international conference, few books introduced U.S. law to Chinese scholars. Most scholars did not have private computers, and I did not know how to translate the term "plea bargaining" into proper Chinese. By that time, China was trying to reform its legal system. Because it retained the traditional Continental Law's trial model, however, it seemed to me that plea bargaining did not fit into our system. Through discussions with Floyd and my own research, a decade later, I changed my position. I concluded that plea bargaining, based on negotiation and consent between the prosecution and the defense, was an innovative idea that China should consider adopting. In the Chinese version of *One Case Two Systems*, I therefore criticized the Chinese model's traditional exclusive reliance on formal plea proceedings. The accused has no right to initiate such a proceeding; only the prosecutors and judges do. Allocating that decision to prosecutors and judges gave them a central role in promoting crime control. Moreover, a plea proceeding did save the court's time, since the proceeding was faster than a normal trial. However, the traditional model lacked balance. By denying the accused the right to initiate a plea proceeding, the model gave the accused no right to make choices.[7] Since then, the conversation in China has moved

[7] *See* FLOYD FEENEY, JOACHIM HERRMANN & LILING YUE, ONE CASE — TWO SYSTEMS, A COMPARATIVE VIEW OF AMERICAN AND GERMAN CRIMINAL JUSTICE (CHINESE) 425-27 (Zhiyuan Guo trans., 2006) [hereinafter ONE CASE (CHINESE)].

in the direction of recognizing a form of plea bargaining. In 2018, the CPL was revised again. The so-called "Leniency for Guilty Pleas" proceeding was adopted. This reform allows the suspect and the accused to plead guilty during the investigation phase and at trial. If the judge accepts the plea and the sentence suggested by the prosecutor, the case can be terminated. Although some issues continue to be debated, it took two decades for this reform to be adopted after Floyd introduced the U.S. plea bargaining system to China.

II. FLOYD'S SUPPORT OF COMPARATIVE RESEARCH

After the 1996 CPL reform, the implementation of the law has become a more important task for Chinese legal practitioners, legislators, and scholars. The Ford Foundation Office in Beijing recognized these needs, and the program Officer, Ms. Phillis Chang (a J.D. graduate from UC Berkeley), thought comparative research could help China's legal reform. She invited Floyd, Professor Joachim Herrmann from Augsburg University, and me to form a group to carry out comparative criminal procedure research. However, by that time, there were only a few students and scholars who had completed their study abroad programs and returned to China. There were also few available books on the American criminal justice system. We therefore decided to write two books, one with the title *One Case — Two Systems: A Comparative View of American and German Criminal Justice Systems*.[8] I organized the translation and added a comparative chapter. The book was then published in China in 2006.[9] Another book was edited by Floyd and me. It carries the title *Selected Classic Readings and Cases on American Criminal Procedure*.[10] These two books have become very important reference materials for Chinese law students and scholars. The volumes are also currently on display in the UC Davis law library.

Since 1997, I have offered a course on comparative criminal justice at my university. Floyd gave me valuable suggestions and advice for the course and its syllabus. China's teaching style is quite different from the American approach. Most professors lecture from the beginning of the class to the end, without many interactions between professors and students. I always wondered how much students learned from my course. However, though I recognized the problem with our teaching

[8] FLOYD FEENEY & JOACHIM HERRMANN, ONE CASE — TWO SYSTEMS, A COMPARATIVE VIEW OF AMERICAN AND GERMAN CRIMINAL JUSTICE (2005).

[9] FEENEY ET AL., ONE CASE (CHINESE), *supra* note 7.

[10] FLOYD FEENEY & LILING YUE, SELECTED CLASSIC READINGS AND CASES ON AMERICAN CRIMINAL PROCEDURE (2006).

format, it was hard to make any changes. This is especially so for compulsory courses, such as criminal procedure law, because those who do the teaching do not choose the main textbook, draft the syllabus, write exam questions, or even schedule the course.

In 2008, Floyd invited me to teach a comparative criminal justice course with him. In the course, students were divided into groups that dealt with American, German, or Chinese criminal law and criminal procedure law. Floyd created a hypothetical case, the groups deliberated, and speakers from each group explained the charges that would be made in the case and the main steps of criminal proceedings in their assigned jurisdiction. Following the students' presentations, Floyd and I provided comments. This teaching method gave me fresh ideas on teaching a comparative course. I believe that when students participate in finding solutions and engaging in discussion they learn more and their knowledge lasts longer.

In the book *One Case-Two Systems*, Chapter Five, "A Response from An American Point of View," in the part on "arrest," Floyd mentioned that "[t]he comparison of 'arrests' in the two countries, however, is much more complicated than it sounds. A tangled series of definitional, terminological, translation, and statistical issues confound and confuse the comparison."[11] What Floyd indicated is exactly the most difficult point I have experienced in comparative research. Before I met Floyd in 1994, although I had already taught comparative criminal procedure for seven years, I could not understand why in some U.S. jurisdictions, after the suspect is arrested, the prosecutor must bring forward a charge, normally within forty-eight hours. In China, after the investigation is completed, the prosecutor can take one month, or even an additional fifteen days, to review the case and decide whether to prosecute.[12] Through discussions with Floyd, I realized that the Common Law term "charge" is totally different from the Civil Law term "prosecution." In the Common Law system, charging is done by the prosecutor during pretrial proceedings, followed by further investigation, and for felony cases in which a grand jury makes the decision to prosecute, it is called an "indictment." In the Common Law, a "charge" is not the same as a "prosecution," however, in our Continental Law System, there is no preliminary "charge" by the prosecutor. We only have a formal "prosecution" that is begun by the prosecutor only after the investigation has been completed. Confusion occurs because, in Chinese, " charge" and "prosecution" have been translated to one legal

[11] FEENEY & HERRMANN, *supra* note 8.

[12] CHINA CRIM. PRO. CODE § 172 (amended 2018).

term "*Qi Su*" (起诉) — I think this is why our students become confused by these two English terms. I also noticed that Chinese criminal procedure terminology is different from that of most of the world's jurisdictions. In most foreign countries' criminal procedure laws, the word "arrest" concerns police power, and dictates the shortest period that police can hold a suspect. However, in Chinese criminal proceedings, we address the police's power to hold a suspect for a short term as "detention" (*Ju Liu* 拘留) and call the longer period of pretrial detention "arrest" (*Dai Bu* 逮捕). For several years I tried to discover the origin of this difference. Eventually, I found that it most possibly came from a translation error in the former Soviet Union Criminal Procedure Code. This terminology problem confuses students and scholars, and unfortunately, has not been corrected.

III. MENTORSHIP, FRIENDSHIP

I believe that time is the most valuable commodity for everyone, and spending time to help others is an unselfish, important support for them. Floyd was a person, professor, scholar, and friend who contributed his time and energy to help not only me, but many Chinese scholars and PhD students. If he had used the time to write articles or books instead, he certainly could have published more. For some of his help, he would think it was only tiny and insignificant, but for the beneficiaries it was great and important. Several stories show Floyd's important support for my career.

In 1998, I was invited by the Department of State to join the "International Visitor Program on the U.S. Judiciary and the Rule of Law." It was the first and most valuable opportunity for me to get the whole picture of the U.S. legal system after I start teaching American law in 1987. Several events happened during that year of travel in the United States that caused a lot of discussion. One was the Thurston High School shooting case in Oregon, which sparked debate on gun control policy. I really could not understand why gun control law was so difficult to establish in the United States. Floyd explained to me the history and background of the debate and told me that he personally supported gun control policies. Unfortunately, after two decades, there is still no U.S. solution. Another was the case of President Clinton's impeachment. I had no knowledge of impeachment, so Floyd patiently explained the legal points and proceedings. It was the first time I understood the meaning of the "separation of powers" and the "rule of law." My one month schedule in the United States was tight, and I

needed background information to understand the American political and judicial system. Our State Department visit was during June and July, when the law school was on summer vacation. I believed that Floyd had a lot of things to do, but he sent me background materials every day and phoned me every possible day to discuss the events and answer my questions.

The highlight of our trip was to visit the Supreme Court and meet with Justice Sandra Day O'Connor. Floyd not only sent me the background material about Justice O'Connor, but also explained the judicial review process based on his experience as a clerk to Justice Black. During the discussion with Justice O'Connor, she expressed surprise that a developing country's scholar could know so much about her. She was interested in visiting China, my university, and China's Supreme People's Court. In 2002, Justice O'Connor led a judges' delegation to China. The U.S. Embassy invited me to join a discussion with them, and when Floyd heard, he sent me the dissent Justice O'Connor wrote for the case *Atwater v. City of Lago Vista*.[13] I then understood better what proportionality means in practice. After her retirement, Justice O'Connor visited my university, where she gave a lecture.

In 2008, when Floyd invited me to co-teach the course on Comparative Criminal Justice, I told him I had difficulties understanding the structure of U.S. police forces. Right away, Floyd wrote to the chief of police at the Davis Police Station and helped me to apply for a ride along with the police for half a day. It was the first time I heard this term. It was a very interesting afternoon, and I experienced how the police handled a dispute between a renter and landlord, a civil dispute. I saw how the police sent a court order to an accused individual who was charged with domestic violence. Throughout the day, the police also answered my questions on how cooperation works between sister states. The ride along experience made a distinct impression on me. I realized that although I had read a good deal of written material about American criminal procedure, I lacked an understanding of how American law worked in practice. Later, when I was interviewed as a part of my application for a Fulbright grant to visit the United States, I mentioned that experience; in light of that experience, I knew that I had to spend more time in the United States to study its criminal procedure law in action.

In 2011, when I conducted my Fulbright research in Davis, on one rainy day, I got a ticket from the police for driving too slowly! Because

[13] 532 U.S. 318 (2001).

I wanted to turn right where there was a yield sign, I believed that I had to pause to give other drivers a high priority. Floyd went to the "crime scene" and thought the police had made a wrong decision. When I received the notification from the court that told me to appear for trial, I was so excited, because it was an opportunity to experience a court trial myself. Floyd revised my planned defense statement and drove me to the court in Sacramento. Although I lost the case, it was a unique experience.

CONCLUSION

I witnessed Floyd's marvelous support for the reform of China's criminal procedure law. He helped me to build up the foundation of comparative research in my country. In my career, he gave me sound support at every crucial step, including a lengthy letter of recommendation supporting my promotion to tenure. He supported my application for a Fulbright Senior Scholarship and hosted my research. On many occasions he revised my English publications and the outlines of my lectures. Although we lived thousands of miles away from each other, whenever I had questions or difficulties, he was the person who could be reached, and he listened. I benefited and learned so much from him.

Floyd's passing away is the saddest thing in my life. What I can do in the future is continue to convey Floyd's spirit of selflessness to others. Floyd will live in my heart forever.

LL. Yue with Floyd Feeney at UC Davis School of Law. Printed with permission of the author.