

THE X-FILES: PAST AND PRESENT PORTRAYALS OF CHINA'S ALIEN "LEGAL SYSTEM"

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The celebration of the seventy-fifth birthday of Professor William Jones, long one of the leading China-law scholars and educators in the United States, provides an appropriate occasion to reflect on developments in teaching and researching Chinese law in recent years and to look forward to the future. Critical self-reflection is especially important at this time because China's legal system has undergone significant changes in the last two and a half decades, creating unique challenges and opportunities for China legal specialists and comparative law scholars.

Limited access to China during much of the Mao era and particularly during the Cultural Revolution greatly impaired the ability of legal scholars to do research and understand legal developments. The situation improved in the 1980s as China began to open up to the outside world. However, China had only begun to rebuild legal institutions that had withered and in some cases died during the Mao era, and there was not much law to study yet. The ruling regime continued to keep close tabs on foreign scholars and to limit their ability to do research, especially in the early years. Most foreign scholars for their part were deeply suspicious of the ruling regime and whether it intended to pursue meaningful legal reforms. Nevertheless, legal reforms continued throughout the 1980s.¹ The Tiananmen incident in 1989 slowed the pace of reforms and deepened the suspicion of many observers about the regime's intentions with respect to legal reforms. Although some legal reforms continued even in the wake of Tiananmen, the pace of economic and legal reforms picked up once again when Deng Xiaoping made his now famous trip south in 1992 and threw his political weight behind further reforms. Capturing the essence of almost two decades of reforms and pointing the way toward the future, the new policy of "ruling the country in accordance with law, establishing a socialist rule of law state" was incorporated into the Constitution in 1999.²

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1. See RANDALL PEERENBOOM, CHINA'S LONG MARCH TOWARD RULE OF LAW (2002); CHENG LIANGYUAN, CONG FAZHI DAO FAZHI [FROM LEGAL SYSTEM TO RULE OF LAW] (1999).

2. Zhonghua Renmin Gongheguo Xianfa, [Constitution of the People's Republic of China]

These are exciting times to be a Chinese legal scholar. China's entrance into the WTO, its emergence as a major economic and political power, and its ongoing human rights abuses have all brought China's legal system into the spotlight. Foreign scholars now have access to more information than ever before. We can travel to China, practice as a lawyer, and even work in Chinese law firms. We can meet and have candid discussions with judges, prosecutors, legislators, and Chinese academics.³ We can attend any number of international conferences held in China and engage in collaborative research projects with our Chinese colleagues. Notwithstanding several persisting obstacles, we can conduct empirical research projects. Even without doing empirical work, the amount of information available is expanding exponentially. The pace of reform makes it difficult even for those within China to keep abreast of the latest developments. New laws and regulations are being issued at breakneck speed, old laws and regulations are amended continually, and whole new regulatory regimes and institutions are being created. Academic journals are popping up like mushrooms after a spring rain. Bookstores are filled with academic and popular books on every aspect of law from Qing legal history to case studies to detailed commentaries on new laws. Law is increasingly penetrating different areas of society and playing multiple roles in keeping with the increasing differentiation in Chinese society.

Given the explosion of information and the pace of change, Chinese legal scholars face a daunting challenge simply to obtain and present an accurate view of the legal system. But we face an even more daunting challenge in trying to analyze and conceptualize such changes. Reforms have undermined traditional understandings of China's legal system. Many old conceptual frameworks are obsolete or require major overhaul, and new categories and theories are desperately needed.

In Part I of this Article, I examine the recent attempt of the prominent comparative law scholar Ugo Mattei to develop a new taxonomy that takes into consideration developments in the legal systems of China and other Asian countries in an effort to bring them into the mainstream of

(1999).

3. I recently gave a talk on globalization and rule of law at an international seminar on globalization held at the Party School in Wuhan in which I discussed the four conceptions of rule of law described below and some of the challenges China faces in implementing rule of law, including the need for the Party's role to be more clearly defined in law and for Party organs to then follow the law. After my talk, a number of professors and members of the school openly questioned whether rule of law was possible in China without further political reforms and democratization, leading to a lively debate. There was also a discussion about what the proper role for the Party should be in a rule of law state. I was also told that the Central Party School was to address this along with other related issues in a conference to be held in Guangdong in fall 2002.

comparative law. While I applaud his motives and share his concerns about the need to bring Chinese legal studies into the mainstream of comparative law, I question his results. Mattei wishes to correct the Orientalist biases of prior taxonomies, but ends up imposing his own Orientalist views on Asian legal systems. In Part II of this Article, I discuss what seems to be a tendency in much foreign scholarship to portray China's legal system in excessively negative terms and to unduly dismiss developments and trends suggesting that China is moving toward some form of rule of law. I suggest that what is needed is a more balanced approach, informed by a broader historical and comparative perspective. Part III concludes with some observations about teaching and researching Chinese law.

I. OF ORIENTALISMS OLD AND NEW: THE MYTH THAT CHINA'S LEGAL SYSTEM REMAINS A TRADITIONAL LAW SYSTEM INCOMPATIBLE WITH RULE OF LAW

Attempts to classify the world's legal systems often begin with the concept of a modern legal system found in some economically advanced Western countries as the paradigmatic or core example. Max Weber, for instance, attributed the success of some Western countries in part to their legal systems, which he described as logical, formal, and rational.⁴ In such a system, autonomous legal professionals decide cases according to distinctively legal criteria and methods, applying general legal principles to the facts in particular cases. In contrast, in a substantively rational system, cases are decided on the basis of general ethical, political, or religious principles rather than legal principles and specific provisions of legal codes. Given that imperial magistrates appeared to decide cases based on such general non-legal principles, China's imperial legal system seemed to be substantively rational at best.⁵ Indeed, the standard account questions whether the system even merited the label of "substantively rational." Confucius objected to primary reliance on laws to govern in part because they were too broad to allow for a more particularized justice. Thus, according to the standard view, magistrates and even more so the literati responsible for the informal mediation of disputes—trained as they were in the Confucian classics—allegedly determined what was best in a

4. 2 MAX WEBER, *ECONOMY AND SOCIETY* 656-57, 844-45 (Guenther Roth & Claus Wittich eds., 1968).

5. For a discussion of imperial law as substantively rational, see PHILIP C.C. HUANG, *CIVIL JUSTICE IN CHINA: REPRESENTATION AND PRACTICE IN THE QING* 224-29 (1996).

given situation based on their own judgment and interpretation of customary norms (*li*) rather than by appeal to fixed standards or principles of general applicability, whether legal or nonlegal.⁶ In Weber's terminology, such a system is nothing more than a kind of arbitrary or irrational kadi justice.⁷

The legal systems of China and its Asian neighbors have fared no better in other more recent schemes,⁸ often being dumped into the category of religious or Oriental systems, or unceremoniously swept into the dustbin category of "other" (or in some cases not even considered to be legal systems at all).⁹ Rene David's taxonomy, for instance, consists of three families—civil, common, socialist—and the dreaded, descriptively empty, alien "other," into which he places China and Japan along with African countries and states with Islamic, Hindu, or Jewish legal systems.¹⁰

6. Benjamin Schwartz, *On Attitudes Toward Law in China*, in GOVERNMENT UNDER THE LAW AND INDIVIDUAL (American Council of Learned Societies ed., 1957); Chang Wejen, *Foreword*, in THE LIMITS OF THE RULE OF LAW IN CHINA viii (Karen Turner et al. eds., 1999). For a different view that portrays magistrates as much more constrained by law in their decision making, see Huang, *supra* note 5.

7. WEBER, *supra* note 4, at 976.

8. ROBERTO M. UNGER, LAW IN MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY 49-57 (1976) (categorizing legal systems in terms of customary law, bureaucratic or regulatory law, and rule of law; citing China as an example of customary law). *Id.* at 52, 88-109. Customary law is neither codified nor public but inheres in the norms and practices of a society. *Id.* at 49-50. Bureaucratic law arises when state and society become distinct. *Id.* at 58-64. The problem with bureaucratic law, which is similar to an instrumental rule by law or *rechtsstaat*, is that there is a tension if not contradiction between instrumentalism and legitimacy. *Id.* at 64. In contrast, in a rule of law legal order, law is general and autonomous, and thus allegedly more legitimate. *Id.* at 66-86. Unger argues that China's premodern legal system was unable to develop beyond bureaucratic law due largely to the absence of separation between state and society and the lack of a transcendent deity. For a critique of Unger's views of the Chinese legal system, see William Alford, *The Inscrutable Occidental? Implications of Roberto Unger's Uses and Abuses of the Chinese Past*, 64 TEX. L. REV. 915 (1986).

9. See *infra* notes 82, 83, 85 and accompanying text for views questioning whether China has a legal system.

10. David breaks down the Other category into Muslim, Hindu and Jewish law, Black Africa and Malagasy Republic, and the Far East. China and Japan fall into the Far East category, which is true enough but not very enlightening. The countries in these categories allegedly "remain very largely faithful to philosophies in which the place and function of law are very different from what they are in the West." RENE DAVID & JOHN E.C. BRIERLEY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY: AN INTRODUCTION TO THE COMPARATIVE STUDY OF THE LAW 27 (1985). As for China:

[T]here is no question of studying an ideal law distinct from rules laid down by legislators or simply followed in practice; here the very value of law itself has traditionally been put into question For the Chinese, law is an instrument of arbitrary action rather than the symbol of justice; it is a factor contributing to social disorder rather than to social order. The good citizen must not concern himself with law: he should live in a way which excludes any revendication of his rights or any recourse to the justice of courts. The conduct of individuals must, unflinchingly, be animated by the search for harmony and peace through methods other

Not surprisingly, such classification schemes have given rise to charges of Orientalism.¹¹ A particular kind of law is considered not only necessary for economic development, but an indicator of cultural achievement and civilization.¹² Whereas the West has law, order, rule, reason, rational bureaucracies, predictability, and certainty, others have violence, chaos, arbitrary tradition, and coercive despotism imposed by rulers with too much discretion.¹³ One of the often-noted, but nonetheless important

than the law; man's first concern should not be to respect the law. Reconciliation is a greater value than justice Laws may exist to serve as a method of intimidation or as a model; but law is not made with a view to being really applied, as in the West. Scorn is reserved for those who aspire to regulate matters according to law or whose preoccupation is its study or application

Id. at 28-30, 518-33.

Glenn's much praised recent work on comparative law, awarded the Grand Prize of the International Academy of Comparative Law in 1998, is divided into chapters rather than categories per se: (Chapter 3) A Chthonic Legal Tradition: to Recycle the World; (Chapter 4) A Talmudic Legal Tradition: the Perfect Author; (Chapter 5) A Civil Law Tradition: the Centrality of the Person; (Chapter 6) An Islamic Legal Tradition: the Law of a Later Revelation; (Chapter 7) A Common Law Tradition: the Ethic of Adjudication; (Chapter 8) A Hindu Legal Tradition: the Law as King, But Which Law? (Chapter 9) An Asian Legal Tradition: Make it New (with Marx?). H. PATRICK GLENN, *LEGAL TRADITIONS OF THE WORLD: SUSTAINABLE DIVERSITY IN LAW* (2000). Glenn suggests that there are underlying common attitudes toward law throughout much of Asia, despite the tremendous diversity. *Id.* at 279. These basic features are not set out in any neat summary, but seem to include the denial of a primary role of secular law-makers and the idea of sweeping religious law, together amounting to a denial of the primary role for law; an emphasis on persuasion rather than the coercive force of law to achieve social order, manifest in a preference for mediation rather than litigation; and legal pluralism. Despite noting the limited influence of Confucianism in many Asian countries and the existence of other thought systems including Islam, Daoism, Buddhism, Hinduism, Shintoism, and so forth, Glenn relies surprisingly heavily on a Confucian perspective of law; indeed, he relies on a fairly idealized, apologetic, philosophical account of Confucianism, citing frequently at key points de Bary and Ames (neither one a legal scholar but both known for their attempts to reinterpret Confucianism in a way that makes it relevant as a social-political philosophy for the modern world). Glenn sees imported Western-style laws and institutions being subject to Confucianization. He lists a series of problems with the current legal system, including weak and ineffective courts, judges being subject to pressure from external influences, lawyers having a lowly status, harsh treatment of criminal suspects, and so on. But none of these need be directly attributed to Confucianism. Moreover, China has taken steps to address all of these issues. With respect to the most likely candidate for direct Confucian influence, a preference for mediation over litigation, Glenn is simply wrong. Although he claims "mediation remains where it's at," in fact litigation has increased while mediation rates have fallen. *Id.* at 310. Mediation remains important, but not as important as before.

11. See, e.g., Veronica Taylor, *Beyond Legal Orientalism?*, in *ASIAN LAWS THROUGH AUSTRALIAN EYES* 47, 49 (Veronica Taylor ed., 1997); Teemu Ruskola, *Legal Orientalism*, *MICH. L. REV.* (forthcoming 2002).

12. It is interesting to note that only in the mid-1700s did "culture" come to take on the evaluative, superior sense of refined, cultivated, civilized. ROBERT C. YOUNG, *COLONIAL DESIRE* 31 (1995).

13. Rosemary Coombs, *Contingent Articulations: A Critical Cultural Studies of Law*, in *LAW AND THE DOMAINS OF CULTURE* 26 (Austin Sarat & Thomas R. Kearns eds., 2000). See also PETER FITZPATRICK, *THE MYTHOLOGY OF MODERN LAW* (1992).

features of law is that it tends to reify culture and make it unnoticable.¹⁴ Thus, when we look at our own system in the United States for example, we do not realize the impact of culture. Rather, we take our particular property regimes, our conceptions of who counts as a citizen, or our treatment of criminals as natural. However, when Westerners compare their legal systems to other systems found in Asia, Africa, Latin America, and Islamic countries, the latter often seem to have too much culture.¹⁵ The cited reasons for the failure of such states to develop a rational Weberian order or a modern professional rule of law system are their religious beliefs and philosophical traditions. In China, for instance, Confucianism and various “Chinese” cultural traits have been blamed for holding back modernity, in particular the realization of democracy, rule of law, human rights, and capitalism (at least until recently, when suddenly Confucianism became not an obstacle to, but a major cause of the economic success of the “Asian Tigers”).¹⁶

Like all legal systems, the legal systems of European countries and the

14. See, e.g., Robert Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 109 (1984) (the power of a legal regime “consists less in the force that it can bring to bear against violators of its rules than in its capacity to persuade people that the world described in its images and categories is the only attainable world in which a sane person would want to live”). See also Dorothy Roberts, *Why Culture Matters to Law: The Difference Culture Makes*, in CULTURAL PLURALISM, IDENTITY POLITICS, AND THE LAW 85, 89 (Austin Sarat & Thomas R. Kearns eds., 2001) (arguing that neutral legal principles that pretend to disregard culture in fact privilege dominant cultural norms and that “it is hard to notice the law’s bias because the dominant perspective has shaped the pre-existing language that composes our jurisprudence”). As Sarat and Kearns note, the process is not just unidirectional. The meaning of law is often contested, with the legal system constituting a site of struggle for political and economic power. We come to see ourselves as the law sees us in part because we participate in the construction of law’s meaning. Thus, “we are not merely the inert recipient’s of law’s external pressures; rather, law’s ‘demands’ tend to seem natural and necessary, hardly like demands at all.” *Id.* at 1, 7-8.

15. Roberts makes a similar point about minority cultures within the dominant white culture of the United States. Roberts, *supra* note 14, at 90 (“The more subordinated a community, the more culture it is seen to have People in power view their way of life not as culture but, rather, as the way things are just supposed to be.”).

16. See, e.g., Joseph Dellapenna, *The Lesson of the Triple Twisted Pine: Plum Blossoms on Mountain Peaks and the Future of Rule of Law in Hong Kong*, 30 VAND. J. TRANSNAT’L L. 637 (1997) (worrying that Chinese cultural traits with respect to law will erode rule of law in Hong Kong and citing the prevalence of corruption, connections (*guanxi*), informal dispute resolution, and an emphasis on family and less reliance on contracts and courts as threats). Despite alarmist claims for the imminent demise of rule of law in Hong Kong after its reversion to the mainland, Hong Kong has continued to enjoy rule of law. For an even-handed, detailed account of important cases and legal developments in Hong Kong since the handover, see Albert Chen, *Hong Kong’s Legal System in the New Constitutional Order*, in IMPLEMENTATION OF LAW IN THE PEOPLE’S REPUBLIC OF CHINA (Chen Jianfu et al. eds., 2001). See also Report of the Joseph R. Crowley Program, *One Country, Two Legal Systems?*, 23 FORDHAM INT’L L.J. 1 (1999); U.S. State Department Human Rights Report 2000, Hong Kong, U.S. Dep’t of State, at <http://www.usconsulate.org.hk/ushk/pi/20010731.htm> (Aug. 7, 2001). The Crowley report, which clearly assumes a liberal democratic orientation, was more critical of Hong Kong with respect to democracy than rule of law.

United States are based on certain cultural beliefs and philosophies. One of the values of comparative law is that in the process of comparing legal systems, the cultural beliefs and philosophical assumptions that may be taken for granted in Western states often resurface. Nevertheless, such beliefs and assumptions, associated with a modern legal system, economic growth, democracy, and human rights, may seem either superior or at least unavoidable if one wants the benefits of modernity. Law, as the institutionalized manifestation of a particular set of such cultural and philosophical beliefs, then becomes both a justification for and instrument of imperialism:

From the internal colonialisms of the sixteenth and seventeenth centuries to the overseas colonialism of the late eighteenth through the nineteenth centuries, this fully evolved [Western concept of law] . . . was the gift of civilization to be brought to others; as an incomparable vehicle for establishing peace and order, it was simultaneously the vehicle through which the forces of violence and disordering were legitimated.¹⁷

Dissatisfaction with the Orientalist character of some of the main classification schemes, along with a number of other recent events, has led comparative law scholars to rethink the existing schemes. The fall of the Soviet Union drastically reduced the potential candidates for the socialist category, while market-oriented economic reforms combined with substantial legal reforms in China and Vietnam call into question the utility of describing them as socialist systems. The convergence of civil and common law countries and the emergence of hybrid or mixed systems has challenged the classical schema. More generally, globalization and the increasingly important role of multinational companies have led to a convergence in legal systems or at least greater consensus as to the merits of rule of law. Although there is still considerable debate over how to conceptualize rule of law, the so-called Washington or Bretton Woods

17. Coombs, *supra* note 13, at 27. More recently, the original law and development of the 1970s exhibited some of the same well-intentioned imperialist zeal. However, the new law and development movement that has emerged in the last decade is more sensitive to cultural differences and context. The new movement tends to emphasize a thin rule of law and good governance, though some within the movement continue to push for a more robust substantive political agenda that would require adoption of the values and institutions of liberal democracies. Although some critics might argue that even thinner conceptions of rule of law are still too Western-centric, the empirical evidence demonstrates the need for a legal system that complies with thin rule of law standards to achieve sustained economic growth. See PEERENBOOM, *supra* note 1. Of course, foreign donor agencies and domestic reformers can be more or less sensitive in trying to build on and accommodate indigenous beliefs, practices and institutional arrangements.

consensus that economic development requires the legal foundations of capitalism and a regulatory framework sufficient to attract foreign direct investment is widely (if not universally) accepted (though debates rage about particular features of the program). Spurred on by international organizations such as the International Monetary Fund (IMF) and the World Bank, countries in Asia, Latin America, and Africa have begun to focus on rule of law and good governance and the institutional reforms required to bring them about. Although skeptics claim that they do so primarily to obtain economic assistance from foreign donors rather than out of a legitimate commitment to rule of law and good governance, the story is usually not so simple.¹⁸ As in the case of China, governments have their own reasons for carrying out legal reforms, even though they may reject the broader political and normative agenda of liberal democracy that are sometimes, but not always, packaged together with legal reforms and efforts to achieve good governance.¹⁹

A. Mattei's Tripartite Taxonomy

Rising to the challenge presented by such developments, Ugo Mattei has proposed a new taxonomy. He describes three types of legal systems based on whether the primary source of social norms and order is law, politics, or philosophical and religious tradition.²⁰ In a *rule of professional law* or *rule of law* system, law is the main mechanism for resolving disputes, and the state and state actors are subject to law. In addition, law is largely secularized and independent from religion, morality, and other social norms.²¹

In contrast, in a *rule of political law* system, the separation between law and politics is absent or minimal.²² Legal institutions are weak, and the law often does not bind government officials. Other indicators include: high levels of police coercion; drastic governmental economic regulatory and deregulatory intervention; continuous attempts at major legal reform; legal culture heavily influenced by foreign models usually marginalized by political power; scarcity of legal literature; limited distribution of judicial opinions; scarcity of legally trained personnel; and a highly bureaucratized

18. See Carol Rose, *The "New" Law and Development Movement in the Post-Cold War Era: A Vietnam Case Study*, 32 LAW & SOC'Y REV. 93 (1998).

19. See PEERENBOOM, *supra* note 1.

20. See Ugo Mattei, *Three Patterns of Law: Taxonomy and Change in the World's Legal Systems*, 45 AM. J. COMP. L. 5 (1997).

21. *Id.* at 25.

22. *Id.* at 27-29.

public decision making process.²³ This form of law is characteristic of former socialist states in transition and developing states.

The third category is *traditional law*, or what Mattei calls "the Oriental view of the law."²⁴ These systems lack a separation between law and religion and/or are based on a "traditional transcendental philosophy in which the individual's internal dimension and the societal dimension are not separated."²⁵ They are characterized by a reduced role for lawyers in dispute resolution and an increased role for mediators and "wise men," a high rate of survival of diversified local customs, an emphasis on duties rather than rights, a high value placed on harmony, the importance of a homogeneous population as a means of preserving social structure, family groups rather than individuals as the building blocks of society, a strongly hierarchical view of society, a high level of discretion left to decision-makers, a greater emphasis on the role of gender in society, a hurried and largely unsuccessful attempt to transplant Western legal codes and relationships, and a rhetoric of supernatural legitimization rather than an appeal to democracy and rule of law for legitimacy.²⁶

This family consists of Islamic law countries, Indian law and Hindu law countries, and countries with "other Asian and Confucian conceptions of law."²⁷ It includes such widely disparate Asian countries as Japan, China, Thailand, Laos, Cambodia, Burma, Indonesia, India, Malaysia, the Philippines, Vietnam, North and South Korea, and Mongolia. It also includes Islamic countries not in the Asian region such as Morocco, Tunisia, and Algeria.

One must wonder about the value of any category so broad as to include these very different countries. It seems highly unlikely that any single category will be able to capture all of the differences in legal systems in Asia, much less be able to do so in any meaningful way. Indeed, one might wonder more generally about what conceivable practical purpose such taxonomies serve, other than perhaps to satisfy the fetish of publishers for first year comparative law textbooks.²⁸ Of course,

23. *Id.* at 31.

24. *Id.* at 35.

25. *Id.* at 36.

26. *Id.* at 40-41.

27. *Id.* at 36.

28. As Mattei acknowledges, developing an adequate taxonomy is at best the first step in explaining or predicting how, when and why legal systems change and into what. *Id.* at 9. I have nothing against taxonomies per se. I believe taxonomies may play a valuable role as a heuristic device in understanding a legal system and differences within and among systems. They may also be useful in ensuring that legal reforms are appropriate for the particular type of system and existing conditions. See Peerenboom, *supra* note 1 (providing a taxonomy of competing thick conceptions of rule of law in

Mattei understands that there will be some close cases that do not fit neatly into the boxes and differences of opinion in other cases. He confesses to some doubt, for instance, about the Philippines, given its “early and deep exposure to the rule of professional law.”²⁹ China and Japan also present some difficulties, with the former showing signs of political law and the latter professional law. Mattei acknowledges that most, if not all, legal systems will contain some elements of each type of law. However, it is a question of degree. To be sure, in the absence of quantitative measures of degree, which Mattei does not see as forthcoming any time soon, we can only make qualitative assessments.³⁰ Based on his qualitative judgment, and in particular, the view that China and Japan exhibit at the level of deep structure a traditional basis, Mattei assigns the two countries to the traditional category, despite what he acknowledges to be their fundamental differences in political and economic structures.³¹

Mattei does allow, reasonably enough, that we can come up with additional categories depending on our purposes. For instance, rule of professional law could be divided into common law, civil law, and mixed systems; civil law could in turn be divided into French and German strands, etc.³² Similarly, rule of political law could be divided into states in transition (especially former Soviet states) and developing states, and traditional law could be divided into Far East and Islamic systems.³³ To add further nuance, Mattei points out—again, reasonably enough—that different areas of law within a legal system may fall into different

China). Rather, my objection is to taxonomies that attempt to reduce all of the world’s legal systems to a handful of categories. Such schemes are too general to be of much use, and do too much violence to the diverse systems of the world in trying to force them into little boxes. Depending on one’s purpose, there might be some value in a taxonomy of Asian legal systems. But even within Asia you would need to have several categories, some of which would presumably overlap in whole or in part with categories for some legal systems in the West. For a discussion of the different varieties, conceptions, and discourses of rule of law in Asia, see *ASIAN DISCOURSES OF RULE OF LAW: THEORY AND IMPLEMENTATION OF RULE OF LAW IN TWELVE ASIAN COUNTRIES, FRANCE AND THE UNITED STATES* (Randall Peerenboom ed., forthcoming 2003) [hereinafter *ASIAN DISCOURSES OF RULE OF LAW*].

29. Mattei, *supra* note 20, at 36 n.135.

30. Curiously, Mattei insists adamantly that he would “without doubt” keep Thailand, Laos, Cambodia, Myanmar, and Malaysia in the traditional camp even though they may tend toward political law, but then admits these are only “personal guesses from behind a veil of ignorance.” *Id.* One of the problems with devising such taxonomies is that they exceed the reasonable limits of expertise of a single scholar. No one scholar can possibly know enough about every legal system in the world to be able to make a reasonable assessment of how to classify each legal system or even whether the criteria and categories are appropriate. This is all the more impossible nowadays given the rapid change. Even area specialists often cannot agree about such fundamental issues as whether China is in the process of establishing some form of rule of law or simply perfecting a more instrumental rule by law.

31. *Id.* at 37.

32. *Id.* at 41.

33. *Id.*

categories.³⁴ Thus, it could be that the Chinese legal system is best characterized as traditional law with respect to family law issues, political law with respect to cases involving dissidents or perceived threats to the ruling regime, and professional law with respect to commercial cases.

Notwithstanding such qualifications, however, one must still wonder about the basic categorization that would place such different Asian countries in the traditional/Oriental box. Mattei clearly wants to avoid the Euro-American centricism evident in previous schemas: he explicitly states that one of his objectives is to incorporate "radically different conceptions" of the law within the mainstream of comparative law to avoid their marginalization into area studies.³⁵ Mattei also goes to great lengths to avoid charges of legal imperialism, steadfastly refusing to make normative judgments about the superiority of the various systems, notwithstanding the obvious shortcomings of political law.³⁶ He claims all three types of legal systems are entitled to the same standing no matter which pattern is dominant.³⁷ He also tries to avoid falling into the trap of the early law and development movement, which assumed that legal reforms will lead to economic growth, which will in turn lead to political reforms, and in particular to liberal democracy, (liberal democratic) rule of law, and a liberal interpretation of human rights.³⁸

Unfortunately, Mattei does not succeed in his main objectives. Setting aside the infelicitous phrase "the Oriental view of law," it is difficult to see how placing all of these countries in the traditional category brings them into "the mainstream" of comparative law. To be sure, it is not entirely clear what Mattei means by mainstream. In claiming that all three families have equal standing, Mattei is surely not making a normative claim about the relative merits of each system. It would seem rather that he is saying that each family is equally worthy of scholarly attention. That may be true, but previous taxonomies that dumped Asian legal systems into the religious, Oriental, or Other category produced just the opposite result—the privileging of the study of Western systems and the hindering or marginalization of the study of Asian systems. It is not clear why Mattei's system, which does the same thing, would have any other effect. Moreover, if he means by "same standing" that each system merits the same amount of time spent on them in comparative law courses or the

34. *Id.* at 40-41.

35. *Id.* at 8.

36. *Id.* at 32.

37. *Id.* at 16.

38. *Id.* at 20.

same amount of department resources, then that is an institutional issue, and even less promising. The number of scholars working on non-Western legal systems at U.S. law schools is surely less than the number of scholars working on Western countries, where comparative law classes continue to focus on Europe, England, the United States, and the distinction between common and civil law systems.³⁹ Yet, beseeching beleaguered deans for additional scarce resources to study “traditional” legal systems may not be as persuasive as a pitch based on the dynamic changes in the legal systems of Asian countries and how they reflect a wide range of responses (some similar to that of other countries and some not) to underlying trends such as globalization and the movement toward rule of law.

If anything, Mattei’s classifications seem to deny the possibility for meaningful comparative work because the static logic of the traditional category is at odds with the implicit dynamic logic of the other two categories. Although Mattei wants to avoid the teleological assumption that all legal systems are evolving toward a professional rule of law system, the transitional and developing nature of legal systems in the second category suggests some such evolution. Normatively, few today would deny the desirability of rule of law and a constitutional state system in which law trumps political expediency. Mattei even points out that many states claim they are in transition to democracy and rule of law and base their claims to legitimacy on such a transition.⁴⁰ Nevertheless, he refuses to say whether the objective will ever be reached, which is fair enough, given the difficulties many legal systems have encountered in implementing rule of law. Many systems may remain political law systems for years or simply be dysfunctional in ways that undermine any claim to rule of law. More puzzling, however, given his description of a political law system, is his refusal to say whether rule of law is desirable.⁴¹

On closer examination, Mattei does not appear to have as much problem accepting that the ultimate end point of political law systems is

39. See Michael Waxman, *Teaching Comparative Law in the 21st Century: Beyond the Civil/Common Law Dichotomy*, 51 J. LEGAL EDUC. 305, 307 nn.3-5 (2001) (observing that the overwhelming majority of comparative law courses in American law schools use RUDOLF SCHLESSINGER ET AL., *COMPARATIVE LAW* (6th ed. 1998), which follows the traditional pattern; however, increasingly, there are textbooks available that introduce diversity within the civil law tradition, focus on specialized topics such as environmental law, constitutional law or corporate law, or attempt to expose students to “the great legal and cultural differences between American and radically different societies”). One of the leading casebooks that includes treatment of Asian legal systems (primarily the Japanese system) is JOHN HENRY MERRYMAN ET AL., *THE CIVIL LAW TRADITION: EUROPE, LATIN AMERICA, AND EAST ASIA: CASES AND MATERIALS* (1994).

40. Mattei, *supra* note 20, at 27-29.

41. *Id.*

professional law as he does accepting that Asian countries might pursue rule of law. He is willing, for instance, to at least contemplate that the family of political law could disappear over time as (non-Asian) countries in the second category realize rule of law.⁴² Yet he is reluctant to accept that traditional law systems will disappear and evolve into or be replaced by professional systems.⁴³ Thus, while many would consider Japan's legal system to be a professional rule of law system,⁴⁴ Mattei emphasizes how the different traditions of Japan have affected the way institutions have developed.⁴⁵ He also suggests that in Islamic countries, the system of rule of traditional law, "represented by the sophisticated shariatic tradition, could conceivably work as a powerful alternative to *Western* professional law."⁴⁶

One implication is that comparative law scholars study traditional legal systems as separate systems, with their own logic and radically different trajectory. But denying that these legal systems could develop rule of law legal systems holds them out as "other" in the same fashion as previous Orientalist schemas. Asian countries are apparently so different that they can never adopt "our" Western legal institutions. Yet many Asian countries have expressly endorsed some form of rule of law as the goal, while others such as Japan, Hong Kong, Taiwan, and South Korea have legal systems that already comply with the basic requirements of a thin rule of law (described below).⁴⁷ Like earlier Orientalist approaches, this approach emphasizes differences in culture, especially religious beliefs and philosophical systems, rather than such factors as economics, international politics and pressure, the rise of the human rights movement, and the forces of globalization that contribute to convergence, and a similar (even if not identical) logic of development. In the process, it reifies, essentializes, and nationalizes culture, denying or downplaying the obvious changes that have occurred in the last few decades—not to mention centuries—and short-changing the different views and substrata within Asian countries that reveal a plurality of cultures.

42. *Id.* at 32.

43. *Id.* at 40.

44. See John O. Haley & Veronica Taylor, *The Rule of Law in Japan*, in *ASIAN DISCOURSES OF RULE OF LAW*, *supra* note 28.

45. Mattei, *supra* note 20, at 34.

46. *Id.* at 34 (emphasis added).

47. See the respective chapters in a forthcoming volume, *ASIAN DISCOURSES OF RULE OF LAW*, *supra* note 28.

B. *The Imperial System as “Traditional Law”: Fact or Fancy?*

In placing Mongolia, China, and especially Japan within the traditional camp, Mattei greatly overstates the importance of traditional elements in the contemporary legal systems of these countries.⁴⁸ In China’s case, there are even doubts as to how well Mattei’s criteria of traditional law square with the realities of law in imperial China. Recent scholarship calls into question the stereotypical view of Chinese as unwilling to litigate.⁴⁹ Even assuming relatively low litigation rates, there are many alternative explanations as to why parties would be reluctant to go to court, including rational choice and institutional arguments about the various costs, financial and otherwise, of litigation.

Similarly, scholars have challenged the view that decision-making was based on general moral principles.⁵⁰ However, the empirical data needed to resolve the debates is lacking, and it is doubtful that there will ever be enough examples of actual cases where law, custom, and general moral principles are at odds to settle the matter. But that cuts both ways. Given the convergence of law and general moral principles, it is equally impossible to demonstrate that magistrates were relying on moral principles as it is to show they were relying on law. Even if their training in the Confucian classics rather than law and the lack of citations to legal provisions suggests that magistrates may have been relying on general principles,⁵¹ to what extent this practice of judging differs from other systems is hard to say. Judges everywhere approach cases with a general

48. See Stewart Fenwick, *The Rule of Law in Mongolia—Constitutional Court and Conspiratorial Parliament*, 3 AUSTL. J. ASIAN L. 213 (2001) (challenging Mattei’s classification of Mongolia as a traditional system and arguing that despite elements of a political law system, Mongolia possesses the essential institutional framework necessary for a rule of law system, that the 1992 Constitution fits the broad liberal-democratic model and that there are signs of constitutional development). Japan is even harder to reconcile with the notion of a traditional legal system.

49. See, e.g., HUANG, *supra* note 5, at 173-81. Interestingly, Mattei cites Huang’s work.

50. See BRIAN MCKNIGHT & JAMES LIU, *THE ENLIGHTENED JUDGMENTS CH’ING MING CHI* (1999) (arguing that it would be a “serious misreading of the record” to claim that Sung judges could decide matters on the basis of their inner conviction” and noting in support that even though judges often fail to cite particular provisions, they frequently state that “the law says . . .” when making their judgment). See also HUANG, *supra* note 5. But see Mark Allee, *Code, Culture, and Custom: Foundations of Civil Case Verdicts in a Nineteenth Century County Court*, in *CIVIL LAW IN QING AND REPUBLICAN CHINA* 122, 124 (Kathryn Bernhardt & Philip C.C. Huang eds., 1994) [hereinafter *CIVIL LAW IN QING AND REPUBLICAN CHINA*].

51. Huang explains the lack of citation by pointing out that magistrates were directing their judgments to the parties who were legally unsophisticated and hierarchically subordinate. Philip C.C. Huang, *Codified Law and Magisterial Adjudication*, in *CIVIL LAW IN QING AND REPUBLICAN CHINA* *supra* note 50, at 142, 154-55. However, this explanation is not entirely satisfactory for reasons explained elsewhere. See PEERENBOOM, *supra* note 1.

sense of the issues framed by their moral views and legal principles that on the whole are consistent with moral principles prevalent in the community.

Classifying the Chinese legal tradition as a religious tradition is also highly dubious. The dominant view among specialists in Chinese legal history is that religion exerted only a minimal influence on law in China.⁵² Granted, the influence of religion on law in China depends in large part on what one means by religion and law. If one interprets religion broadly to include notions of *tian*, *dao*, *tian li* [天理] [heaven/nature, the way, heavenly/natural principles] and even Confucian *li* [礼] [rituals in a broad sense that include customs, norms, practices, and even institutions], then religious ideas and practices were reflected in particular laws, and may have provided a normative dimension to the legal system and tempered the harsh, amoral positivism of Legalism. But then, in most countries, the legal system as a whole and specific legal rules and decisions accord with some general prevailing, even if contested, ethical or religious norms.⁵³ In China, to the extent that *tian*, *dao* and *li* are religious or quasi-religious ideas or precepts, which is much contested,⁵⁴ they did not have much impact on the actual operation of the legal system in that they were not reflected in significant measure in legal institutions, laws or the implementation of laws.⁵⁵ Given Mattei's dominance test, such a minimal influence of religion would not be sufficient to classify the legal system as traditional.

It is equally difficult to lump Chinese law into the traditional category based on the alternative claim of an important role of "transcendental philosophy" in the legal system.⁵⁶ The imperial system was primarily influenced by Legalism and Confucianism. Legalism, a tough-minded "realist" political philosophy along the lines of Machiavellianism, was

52. See Randall Peerenboom, *Law and Religion in Early China*, in RELIGION, LAW, AND TRADITION (Andrew Huxley ed., 2002).

53. HAROLD BERMAN, FAITH AND ORDER: THE RECONCILIATION OF LAW AND RELIGION 277-88 (1993).

54. Some scholars would deny these are religious concepts or that they influenced law in any meaningful way. Needham, simply denies (incorrectly in my view) that China developed a natural law system grounded in the laws of nature. Others, such as Bodde, who claim *pace* Needham that early Chinese did conceive of the laws of nature as determining both the cosmic and social order, nevertheless deny that *tian/dao*/the natural order are religious concepts. See Peerenboom, *supra* note 52.

55. YONGPING LIU, ORIGINS OF CHINESE LAW 13 (1998) (claiming that even in its early days Chinese law was not significantly influenced by religion). See also Peerenboom, *supra* note 52.

56. As I am not quite sure what Mattei means by transcendental philosophy, the following discussion is based on the term as understood and used in contemporary philosophical discussions of Confucianism. As we have seen, Unger and others have argued that it was the lack of transcendent deity that impeded development of law in China. See Unger, *supra* note 8, at 104-10.

anything but transcendental. Rather, Legalists favored a form of amoral legal positivism that assumed human beings were self-interested rational actors and thus must be controlled through punishments and rewards codified in publicly available and consistently applied laws.⁵⁷ As for Confucianism, while some scholars have read the tradition in transcendental terms, others take the this-worldly, immanent organicism aspect to be central to Confucianism. Hall and Ames in particular have vigorously and effectively challenged the transcendental reading of Confucianism in a series of books over the last two decades.⁵⁸

In any event, Confucianism's primary influence on the legal system was not attributable to its allegedly transcendental dimension. Even assuming that *tian*, *dao*, and *li* are interpreted as transcendental concepts, they failed to provide a moral grounding for the legal system or to impose any meaningful restraints on the ruler in practice. Rather, Confucianism's influence was mainly as a hierarchical, context-specific, pragmatic ethical philosophy, as reflected in specific laws that distinguished between persons based on status, gender, and family role. In short, the state appears to have incorporated moral norms that it found useful in maintaining order. The emphasis on filial piety ensured that the family would be responsible for inculcating norms of obedience and deference to authority. The incorporation of status concerns allowed the state to purchase the allegiance of the elite, who were the main beneficiaries, in exchange for their political support.

Of course, the picture is not completely wrong. Surely the imperial legal system did exhibit some of the traits of a traditional system. Yet the characterization of the imperial system as traditional law leans too heavily on the idealized self-image of elite Confucian philosophers and ignores other strands of thought and even more importantly the way the system actually worked in practice.⁵⁹

57. RANDALL PEERENBOOM, *LAW AND MORALITY IN ANCIENT CHINA* 98-99 (1993).

58. See DAVID HALL & ROGER T. AMES, *THINKING THROUGH CONFUCIUS* (1987); DAVID HALL & ROGER T. AMES, *ANTICIPATING CHINA: THINKING THROUGH THE NARRATIVES OF CHINESE AND WESTERN CULTURE* (1995); DAVID HALL & ROGER T. AMES, *THINKING FROM THE HAN: SELF, TRUTH, AND TRANSCENDENCE IN CHINESE AND WESTERN CULTURE* (1998).

59. Hugh Scogin, *Civil Law in Traditional China: History and Theory*, in *CIVIL LAW IN QING AND REPUBLICAN CHINA*, *supra* note 50, at 15-16 (noting the tendency to interpret the tradition in terms of an idealized philosophical account of Confucianism and calling for greater attention to how the system actually operated). Mattei also cites this work.

C. *The Mischaracterization of China's Contemporary Legal System as Traditional Law*

Regardless of the applicability of the various criteria to the imperial legal system, to characterize China's *current* legal system in terms of traditional law is highly anachronistic to say the least. Few elements of the traditional legal system even managed to survive the intervening Mao period and the implementation of a socialist legal system.⁶⁰ To be sure, one still often hears many stereotypical, old school Orientalist claims about Chinese law: Chinese prefer mediation and do not like to litigate because of a cultural preference for harmony; Chinese do not like contracts, particularly detailed contracts, and so on. But these claims are hard to take seriously anymore.⁶¹ I can attest from personal experiences with painfully protracted contract negotiations in China that Chinese parties want detail when specifying their rights and prefer vagueness when it comes to delineating their obligations.⁶² Moreover, the rapid rise in litigation (and the use of lawyers) combined with the steady decrease of mediation show that Chinese citizens are not averse to litigate.⁶³ The rise of litigation is all the more remarkable given the weakness of the courts as an institution, widespread local protectionism, and serious judicial corruption—all of which render the outcomes more uncertain and undermine the confidence of parties contracting *ex ante* that they will be able to obtain a fair settlement of their disputes. Of course, many Chinese parties may still not like to litigate—but then nobody does. Litigation is expensive and likely to damage any ongoing relationship. Thus, business people in the United States as well avoid litigation where possible.⁶⁴

Nor does the Chinese government rely on some mysterious rhetoric of supernatural legitimization. In fact, one of the government's most pressing problems is the unavailability of traditional bases of legitimacy and a moral vacuum resulting from the demise of traditional ethical systems. Socialism is surely insufficient as an ideology. The charisma of revolutionary leaders such as Mao and Deng who beat down the foreign

60. For a discussion of similarities and differences between the legal systems in the Mao era and the imperial era, see PEERENBOOM, *supra* note 1.

61. This obviously does not mean that contracting practices are identical in all respects in all countries.

62. Even in the Qing, business people took care to specify their rights in contracts. See Rosser Brockman, *Commercial Contract Law in Late Nineteenth-Century Taiwan*, in *ESSAYS ON CHINA'S LEGAL TRADITION* (Jerome Alan Cohen et al. eds., 1980).

63. See STANLEY LUBMAN, *BIRD IN A CAGE: LEGAL REFORMS IN CHINA AFTER MAO* (1999).

64. Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 *AM. SOC. REV.* 55 (1963).

imperialists and helped China stand on its own feet is no longer available to today's leaders. Nowadays, the ruling regime relies primarily on appeals to economic growth and self-interest (in particular the material interests of citizens in a higher standard of living), nationalism, and as discussed below, rule of law.

The Chinese Communist Party (CCP) has been searching rather desperately for some way to revamp its ideological basis by latching on to such vague and uninspiring ideas as a Chinese socialist civilization, and even toying with the idea of a transformation into a social democratic party.⁶⁵ The ruling regime has also tried to revive Confucianism. However, after years of attack, the level of support for Confucianism is weak and its relevance debatable. At any rate, the Party's appeal to Confucianism is not based on some supernatural connection to *tian* but rather on much more mundane pragmatic considerations. Confucian values—the importance of family, an emphasis on education and hard work, meritocratic advancement, a commitment to public service—are seen as conducive to economic growth and stability. From the Party's perspective, the politically conservative aspects of Confucianism—deference to authority, the lack of democracy, and the importance attached to order and political stability—are also attractive. From the perspective of reform-minded intellectuals, on the other hand, “New Confucianism” offers the possibility of a credible, alternative social-political philosophy to Western liberalism, one that is compatible with the main hallmarks of modernity—capitalism, democracy, rule of law, and human rights—but at the same time more faithful to China's indigenous traditions and current contingent circumstances (*guoqing*). Today, even most diehard leftists do not go so far as to reject outright the legitimacy of rights or to portray them simply as a bourgeois tool for class oppression as in the Mao era. On occasion, one can still come across articles about the relationship between rights and duties and whether one or the other should be taken as the basis or be considered more fundamental. However, there is precious little support for the view that privileges duties over rights, with proponents limited to the politically marginalized extreme socialist camp. In practice, rights are central to the legal system, while duties play only a minor role (other than in the sense that a right implies a corresponding duty). The debate has long since moved on to other issues, including the relationship between civil and political rights and economic, social, cultural, and collective rights, and where to draw the line in balancing the interests of the individual

65. PEERENBOOM, *supra* note 1.

against the interest of the majority.

Again, as in the case of the imperial legal system, some of the picture is true. But most of what fits simply reflects a system in transition toward some form of rule of law. Thus, we do see, for example, a high rate of survival of diversified local customs, a high level of discretion left to decision-makers, and a hurried and ongoing attempt to transplant Western legal codes and relationships. But these characteristics fit more naturally with the second category of transitional systems, where the political system frequently overrides a weak and still developing legal system.

It is no doubt true that China's legal system exhibits many of the characteristics of the second category. There have been continuous attempts at major legal reform for the last twenty years, with many reforms being modeled on Western laws and institutional arrangements. Nevertheless, the public decision-making process remains highly bureaucratized, legal institutions are still relatively weak, and law often does not bind government officials.

But such shortcomings are to be expected. Establishing a modern rule of law system takes time—several centuries in the case of European countries. The government is aware of the many problems in the legal system and is taking steps to address them.⁶⁶ For example, the State Council has recently confirmed a change in policy toward deregulation and greater reliance on market forces, issuing new regulations that will overhaul the approval process for foreign and domestic companies alike in an effort to enhance efficiency, reduce corruption and red tape.⁶⁷ There have also been a number of other administrative law reforms aimed at reining in wayward bureaucrats and strengthening the judiciary and other legal institutions.⁶⁸

China's current legal system fits Mattei's rule of transitional political law system better than it does a traditional system. Mattei acknowledges that the legal system exhibits many of the elements of a rule of political law, but he apparently still feels compelled to force China into the Oriental box along with such disparate countries as India, Japan, and Morocco. Part of the problem is that China seems to be moving toward some form of rule

66. *Id.* (discussing attempts to strengthen the judiciary, the legal profession, the legislative system and the administrative law system).

67. Opinion Regarding the Implementation of Reform of the Approval System, issued by the Bureau of Supervision, issued by the State Council Office of Legal Affairs, State Council System Reform Office and the Central Party Editorial Office on October 9, 2001.

68. See Randall Peerenboom, *Globalization, Path Dependency and the Limits of Law: Administrative Law Reform and the Rule of Law in the People's Republic of China*, 19 BERKELEY J. INT'L L. 161 (2000).

of law, but not the liberal democratic form of rule of law that Mattei implicitly uses as his benchmark for a professional law system.⁶⁹ Thus, some of the traits found in China are hard to reconcile with such a system: a hierarchical society, an emphasis on family, different gender roles,⁷⁰ different conceptions of rights or at least a different balance between the interests of the individual and group, and different justifications and rationales for those outcomes (and one could add a different balance in the role of law as strengthening or limiting the state, different conceptions of and limits to civil society, as well as a different balance between freedom and order/stability). But these features are not at odds with rule of law per se, just with one particular version. Differences in culture, fundamental values, and social-political philosophies may be relevant, but not in the way or to the extent Mattei suggests. They need not be an insurmountable bar to the development of a legal system compatible with the basic requirements of a thin rule of law. Although Mattei starts out with good intentions, in the end, the fate of Asian legal systems remains largely the same. They are treated as one, despite their obvious diversity; and by emphasizing certain traditional aspects, the many major changes in Asian legal systems are overlooked.

D. Rule of Law: Comparative Conceptions

Mattei mischaracterizes China and other Asian countries in part because he equates rule of law with Western liberal democracy and thinks that Asian countries simply cannot adopt such a system, largely for cultural reasons having to do with religion or philosophical traditions. He is therefore forced to shove states with well-developed legal systems such as Japan, South Korea, and presumably Singapore and Hong Kong into the “Oriental” box. Mattei is not alone in this assumption about rule of law.

69. Mattei allows that “Western-style rule of law” would be an acceptable alternative name for rule of professional law. See Mattei, *supra* note 20, at 19 n.62.

70. China has enacted a number of laws aimed at eliminating discrimination based on gender and promoting equality of women. Nevertheless, as in many Western states, such legal norms have not necessarily taken hold among various segments of society or been fully implemented in practice. For an insightful and nuanced account of how women have fared in the post-Mao reform era, see Margaret Woo, *Law and the Gendered Citizen*, in *CHANGING MEANINGS OF CITIZENSHIP IN CONTEMPORARY CHINA*, 308 (Elizabeth Perry & Merle Goodman eds., 2002). While urban and rural, rich and poor women have been affected differently, on the whole Woo observes that “Chinese women face an increase in reported violence (including domestic violence), a higher rate of divorce, and discrimination in hiring, firing, reemployment, and pay.” *Id.* at 314. Heightened rights consciousness has resulted in women turning increasingly to the legal system and courts for relief, although a number of regulatory, institutional, and cultural obstacles have limited the effectiveness of reliance on courts as a means of redressing many issues.

For many, "the rule of law" means a liberal democratic version of rule of law.⁷¹

The tendency to equate rule of law with liberal democratic rule of law has led some Asian commentators to portray the attempts of Western governments and international organizations such as the World Bank and IMF to promote rule of law in Asian countries as a form of cultural, political, economic, and legal hegemony.⁷² Critics claim that liberal democratic rule of law is excessively individualist in its orientation and privileges individual autonomy and rights over duties and obligations to others, the interests of society, and social solidarity and harmony.

Orientalism therefore can take at least two forms that at first seem diametrically opposed. In Mattei's case, it takes the form of denying out of hand that Asian countries could obtain rule of law: we in western countries have it, and they in Asian countries do not have it and never will. Alternatively, it may take the form of an imposition of a particular conception of rule of law on Asian countries. Despite the difference in form, however, the root problem is the same: the initial assumption of too narrow a conception of rule of law, one defined in terms of the contingent values and institutional arrangements of contemporary Western liberal democracies.⁷³

It may help in sorting out matters to distinguish between thick and thin versions of rule of law.⁷⁴ Briefly put, a thin theory stresses the formal or instrumental aspects of rule of law—those features that any legal system allegedly must possess to function effectively as a system of laws, regardless of whether the legal system is part of a democratic or non-democratic society, capitalist or socialist, liberal or theocratic. Although

71. See, e.g., INTERNATIONAL CONGRESS OF JURISTS (1959: NEW DELHI), THE RULE OF LAW IN A FREE SOCIETY: A REPORT BY NORMAN S. MARSH (1959) (containing an influential statement of rule of law). Given the many possible conceptions of rule of law, I avoid reference to "the rule of law," which suggests that there is a single type of rule of law. Alternatively, one could refer to the *concept* of "the rule of law," for which there are different possible conceptions. The thin theory of rule of law would define the core concept of rule of law, with the various thick theories constituting different conceptions. From the perspective of philosophical pragmatism, how one defines a term depends on one's purposes and the consequences that attach to defining a term in a particular way. As thick and thin theories serve different purposes, I do not want to privilege thin theories over thick theories by declaring the thin version to be "the rule of law."

72. See Rose, *supra* note 18; Barry Hager, *The Rule of Law*, in THE RULE OF LAW: PERSPECTIVES FROM THE PACIFIC RIM (2000), available at <http://www.mcpa.org/rol/perspectives.htm> (summarizing complaints of critics).

73. While there is some merit in exposing "Orientalisms," I must confess that I am uneasy with the term, as it is often used in an overly polemical way to attack individuals and their motives rather than to focus on the substance of arguments.

74. See PEERENBOOM, *supra* note 1.

proponents of thin interpretations of rule of law define it in slightly different ways, there is considerable common ground, with many building on or modifying Lon Fuller's influential account that laws be general, public, prospective, clear, consistent, capable of being followed, stable, and enforced.⁷⁵

In contrast to thin versions, thick or substantive conceptions begin with the basic elements of a thin conception, but then incorporate elements of political morality such as particular economic arrangements (free-market capitalism, central planning, etc.), forms of government (democratic, single party socialism, etc.), or conceptions of human rights (liberal, communitarian, collectivist, "Asian values," etc.).

In China and other Asian countries for that matter, there is little debate about the requirements of a thin theory and the basic principle that rule of law refers to a system in which law is able to impose meaningful restraints on the state and individual members of the ruling elite, as captured in the rhetorically powerful if overly simplistic notions of a government of laws, the supremacy of the law, and equality of all before the law. However, there is considerable debate about competing thick conceptions of rule of law. I have discussed at length four competing conceptions of rule of law in China—Liberal Democratic, Statist Socialist, Neo-authoritarian, and Communitarian—sketching their differences with respect to the form of economy and economic policies, the political system, theory and practice of human rights, the purposes of law, legal institutions, legal rules and practices, and outcomes with respect to particular issues.⁷⁶ I argue that we

75. LON FULLER, *THE MORALITY OF LAW* (1977).

76. PEERENBOOM, *supra* note 1. To summarize some of the main features, the Liberal Democratic version of rule of law incorporates free market capitalism (subject to qualifications that would allow various degrees of "legitimate" government regulation of the market), multiparty democracy in which citizens may choose their representatives at all levels of government, and a liberal interpretation of human rights that gives priority to civil and political rights over economic, social, cultural, and collective or group rights.

Statist Socialists endorse a state-centered socialist rule of law defined by, *inter alia*, a socialist form of economy (which in today's China means an increasingly market-based economy but one in which public ownership still plays a somewhat larger role than in other market economies); a non-democratic system in which the Party plays a leading role; and an interpretation of rights that emphasizes stability, collective rights over individual rights, and subsistence as the basic right rather than civil and political rights.

There is also support for various forms of rule of law that fall between the Statist Socialism and the Liberal Democratic version. For example, there is some support for a democratic but non-liberal (New Confucian) Communitarian variant built on market capitalism, perhaps with a somewhat greater degree of government intervention than in the liberal version; some genuine form of multiparty democracy in which citizens choose their representatives at all levels of government; plus a communitarian or collectivist interpretation of rights that attaches relatively greater weight to the interests of the majority and collective rights as opposed to the civil and political rights of individuals.

Another variant is a Neo-authoritarian or Soft Authoritarian form of rule of law that, like the

need not presume that China's legal system will become a liberal democratic one, at least any time soon, and that imposing the conceptual framework of a liberal democratic rule of law is likely to lead to misinterpretations of the significance of legal developments in China.

Discussions about different thick conceptions quickly turn into discussions of social-political philosophies. As such, where one stands on a particular conception of law often depends on one's more fundamental political commitments. Assertions that rule of law means liberal democratic rule of law are frequently claims about the normative superiority of liberal democracy as compared to socialism, neo-authoritarianism or communitarianism.⁷⁷ In my view, while the conditions for genuine democracy may not exist in China at present, in the long run, China will need to democratize to overcome what is likely to become a growing legitimacy deficit, to address accountability problems, and to ameliorate intensifying social cleavages.⁷⁸ But even if China democratizes,

Communitarian version, rejects a liberal interpretation of rights, but unlike its Communitarian cousin, also rejects democracy. Whereas Communitarians adopt a genuine multiparty democracy in which citizens choose their representatives at all levels of government, Neo-authoritarians permit democracy only at lower levels of government or not at all.

77. Sometimes the argument that rule of law and democracy are inevitably linked is made on historical grounds, theoretical grounds or conceptual grounds, or a combination of historical, conceptual and normative grounds. Sun Xianzhong's arguments in favor of liberal democratic rule of law and against neo-authoritarianism combine all three types of claims. Sun Xianzhong, *Zhongguo Fazhi Gaige Xueshu Taolunhui Fayan Zhaiyao*, FAXUE YANJIU [STUDIES IN LAW] no. 2, 32, 32-33 (1989). Habermas argues on highly abstract theoretical grounds that a legitimate legal system requires rule of law and liberal democracy. JURGEN HABERMAS, *BETWEEN FACTS AND NORMS* (William Rheg trans., 1996). One can question the value of Habermas's "what-if?" (legal systems and particular legal rules were legitimate) approach, given that no legal system (and certainly not every legal rule or decision) actually satisfies Habermas' criteria for legitimacy. Although it may be informative as to what rule of law might entail in a legitimate legal system whose legitimacy is measured by compliance with the standards of an idealistic discourse theory, it does not shed much light on what rule of law entails in legal systems that do not measure up to such exacting standards. At minimum, the conceptual link between rule of law and democracy is severed for those who do not assume his consent-based approach to legitimacy.

78. A genuine democracy requires at minimum open, competitive elections, under universal franchise, of those in posts where actual policy decisions are made (the electoral dimension). It also requires sufficient freedom of association, assembly, speech, and press to ensure that candidates are able to make their views known and compete effectively in the elections, and so that citizens are able to participate with reasonable effectiveness in the electoral process (the participatory process dimension). In addition, it requires the legal institutions to ensure that these freedoms are in fact realized and the election is carried out fairly (the rule of law dimension). Democracy therefore implies rule of law, but not vice versa. In this view, elections are a necessary but not sufficient condition for democracy. Democratization is also a process, which can occur even within a single party state, even though full realization of genuine democracy is not possible in such a state.

The Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (ICCPR) do not expressly require democracy in their operative clauses regarding political participation (though both restrict limitations on certain rights to those necessary in a democratic society). Rather the ICCPR, art. 25, provides:

it need not become a liberal democracy.⁷⁹ Rather, a more communitarian or collectivist form might emerge. However, we are now squarely in the midst of the contentious social, political, and economic debates that divide socialists, neo-authoritarians, communitarians, and liberals. It is well beyond the scope of this article to try to sort out these debates or even to canvass the main issues and the main arguments for each side.⁸⁰

II. THE CONTEMPORARY LEGAL SYSTEM: A PLEA FOR MODERATION AND A BROADER COMPARATIVE PERSPECTIVE

Mattei is, of course, not a China-law specialist. As a non-specialist, perhaps he can be excused for failing to have kept abreast of recent changes, given the rapid pace of reforms. But he may also have been led astray by the outdated and excessively negative depictions of the Chinese legal system that one frequently encounters in the popular press and even academic journals. The unfinished nature of reforms in China provides ample ground for disagreement as to the significance of current reforms and the future direction of the legal system. Perhaps the most fundamental difference of opinion is over whether China should be characterized as a type of rule by law, a nascent rule of law, or simply in transition to some form of rule of law.⁸¹ This debate turns on various conceptual issues about

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.

International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR]. These provisions are vague in several respects. They do not explicitly require contested elections at all levels of government between multiple parties, nor do they define what is required by way of political participation beyond elections, if anything. See Henry Steiner, *Political Participation as a Human Right*, 1 HARV. HUM. RTS. J. 77 (1988).

79. See PEERENBOOM, *supra* note 1.

80. I discuss some of the issues and debates in PEERENBOOM, *supra* note 1.

81. *Id.* (arguing the legal system is best characterized as in transition toward rule of law). China's legal system is often characterized as rule by law rather than rule of law because of the instrumental nature of law. See Richard Baum, *Modernization and Legal Reform in Post-Mao China: The Rebirth of Socialist Legality*, 19 STUD. IN COMP. COMMUNISM 69 (1986); PITMAN B. POTTER, FOREIGN BUSINESS LAW IN CHINA 5-7 (1995); Yu Xingzhong, *Legal Pragmatism in the People's Republic of China*, 3 J. CHINESE L. 29 (1989). Cf. LUBMAN, *supra* note 63, at 130-135 (highlighting instrumental aspects of PRC law and the primacy of policy); Edward Epstein, *Law and Legitimation in Post-Mao China*, in DOMESTIC LAW REFORMS IN POST-MAO CHINA 19 (Pitman Potter ed., 1994) (describing tension between instrumental and autonomous aspects of law in China). Of course, law is used instrumentally in every legal system. Thus, a distinction must be made between pernicious instrumentalism and acceptable instrumentalism. Legal systems in which the law is *only or primarily* a tool of the state are best described as rule by law, whereas legal systems in which the law imposes

how to define rule by law and rule of law, on interpretive issues regarding the significance of recent developments and ongoing obstacles to the implementation of rule of law, and on who bears the burden of proof. Rule of law is an ideal, and all systems fall short of it. Of course, some systems fall shorter than others. As typical of transitional states, China's legal system often falls quite short of what is expected of a rule of law legal system.

Nevertheless, at times scholarly and popular commentary makes the system out to be much worse than it is or gives the impression that China's legal system is so radically dysfunctional that it must be treated as a separate kind of animal altogether.⁸² Stanley Lubman, for instance, makes the surprising claim that China does not even have a legal system.⁸³ Even when understood in Lubman's intended sense as a comment on China's lack of a unified concept of law, gaps in the institutional framework, and weaknesses in existing institutions, the description is at odds with ordinary understandings and leading jurisprudential conceptions of a legal system.⁸⁴ Setting such a high standard for what constitutes a legal system dooms, in advance, all developing legal systems (and depending on how strictly one interprets the requirement of a unified conception of law, probably the legal systems of most countries, including the United States).

Whereas Lubman challenges the notion that China has a legal *system*, Donald Clarke questions whether China has a *legal* system. Clarke objects to what he calls the "imperfect realization of an ideal" or "IRI" approach to comparative law.⁸⁵ According to Clarke, under this "essentially teleological approach," the Chinese legal system is identified and measured in terms of an ideal end-state chosen by the analyst.⁸⁶ He notes that the IRI approach could work with any end-state, but "in fact it is always invariably used in conjunction with an end-state posited as the Western rule of law ideal. This rule of law ideal constitutes the paradigm, in the Kuhnian sense, that governs the entire enterprise of analyzing the Chinese legal system."⁸⁷ Clarke claims that practitioners of the IRI

meaningful limits on state actors merit the label rule of law.

82. See Dellapenna, *supra* note 16, at 653 (arguing in 1997 that China remains "essentially a nonlegal culture").

83. LUBMAN, *supra* note 63, at 317-18.

84. For a more extended discussion, see PEERENBOOM, *supra* note 1.

85. Donald Clarke, *Alternative Approaches to Chinese Law: Beyond the "Rule of Law" Paradigm*, WASEDA PROC. OF COMP. L. 2 (1998-1999).

86. *Id.* at 51.

87. *Id.* In a longer revised version of the article, Clarke refers to the Ideal Western Legal Order rather than "the Western rule of law ideal." See Donald Clarke, *Puzzling Observations in Chinese Law: When Is a Riddle Just a Mistake?* (2001) (unpublished manuscript, on file with author).

approach assume without argumentation or support “that China has legal institutions” and that the legal system is developing toward some form of rule of law:

In other words, the IRI approach assumes that we can talk meaningfully about Chinese law and legal institutions; that China has a set of institutions that can meaningfully be grouped together under a single rubric, and that it is meaningful (*i.e.*, it clarifies more than it obscures) to label this rubric “legal”—the same word we use to describe a set of institutions in our own society. Thus, even to embark on the study of something called “Chinese legal institutions” involves an *a priori* assumption that China has a set of institutions largely similar to the institutions we call “legal” in our society. If the institutions were not largely congruent—if, for example, we were discussing churches or the movie industry—we would not call the institutions “legal” in the first place. More specifically, the very act of naming certain institutions involves drawing conclusions about them before the investigation has even begun. If we call a certain institution a “court,” then we are claiming that this word conveys to the listener a more complete and accurate picture of the institution in question than some other word. We could equally well call the institution a “team,” or an “office,” or a “bureau”; the decision *not* to use those words represents an implicit assertion about the nature of the institution in question. The problem is that this assertion *precedes*, rather than follows, inquiry into the nature of the institution.⁸⁸

Clarke is surely right to caution against an *a priori* assumption that Chinese institutions are meant to serve the same purposes as those in some Western liberal democracies. He is also surely correct to point out that we are likely to misinterpret phenomena and go awry in our predictions as to how China will develop if we impose without questioning our own modern Western (or worse yet, U.S.-based) notion of how a legal system must function. However, while China is distinctive in some respects, it increasingly confronts similar challenges to those faced by other states with a market economy and a more pluralistic populace. China has also already become more entwined in a global economy and international legal order. Not surprisingly, there has been considerable convergence in its legal system, including with respect to the legislature, judiciary, and

88. Clarke, *supra* note 85, at 52.

administrative agencies. No one would confuse these institutions with churches or the movie industry, to use Clarke's rhetorical examples, or even with the much more politicized entities of the Mao era.

Given the convergence with respect to the purposes of the legal system, legal rules, and the functions and practices of the various institutions, one can reasonably describe China's institutions as *legal* institutions. It is difficult to imagine how else to describe them. To be sure, China's institutions are embedded in a very different context from that of economically advanced Western liberal democracies. Thus, there are likely to be significant differences in the institutions. But to deny that China's institutions are legal institutions simply because they differ in significant ways from institutions in some modern Western liberal democracies is to assume that institutions other than ours are not legal institutions in the proper sense.

At this point, it is unlikely that China will develop a legal system so radically different as to render a thin rule of law conceptually inapplicable. The applicability of a thin theory of rule of law is not therefore simply the unreflective *a priori* imposition of a Western ideal. Actually, it is not an *imposition* of a Western ideal at all because there is widespread acceptance of, and support for, a legal system that meets the requirements of a thin rule of law in China. China's distinctiveness is likely to be reflected in variations in thick theories compatible with a thin theory, rather than in some sustainable, normatively acceptable and feasible alternative to a thin theory.

One of the problems in heeding Clarke's warning about relying on rule of law as a benchmark is that there is no other credible theory that better describes the current system. This is not to claim that Clarke or someone else could not come up with a new theory that better describes the system than "the Western rule of law ideal." In fact, if by the Western rule of law ideal one means Liberal Democratic rule of law, then I fully agree that any of the three alternatives discussed previously (Statist Socialist, Neo-Authoritarian, or Communitarian) and possibly others as well are likely to be more useful for understanding the future path of development in China (though all are still rule of law theories). Although Clarke claims that the main problem with the IRI approach, "is that its practitioners tend to leave unstated and unjustified its most crucial component: the ideal against which the Chinese legal system is identified and measured," Clarke

himself never defines in detail what he means by “the Western rule of law ideal.”⁸⁹

Rule of law is a contested concept, even in the West. In thinking about the role of law in China and the possible path of future development, we need to distinguish between thin and thick theories and between different types of thick theories. By so doing, predictions about rule of law in China become more open-ended and *less* teleological (although obviously even the standards of a thin theory, while allowing some diversity in institutions and practices, are teleological in nature).

As Clarke says, the ultimate standard for any definition, label, or paradigm is whether it is useful: does it serve the purpose it was intended to serve (and is that purpose itself useful)? Lubman and others may therefore use “legal system” as a technical term of art that does not comply with ordinary usage in order to call attention to certain shortcomings in China’s legal regime, and comparative law scholars and China specialists may stipulate a narrow definition of law or legal system in order to bring out more sharply the contrasts between different systems. Some might wish to reserve “*legal* system” for a particular type of legal regime, such as that found in modern Western liberal democracies (just as some scholars would define rule of law as a Liberal Democratic rule of law). A country in which “law” (or to avoid begging the question—certain kinds of rules) was meant to serve a significantly different purpose and the various state institutions such as “courts” and “government agencies” played a significantly different role from that in some modern Western liberal democracies would then be described as a different type of order. Taking this approach, Stephens has described China’s imperial system as a disciplinarian system rather than a legal system.⁹⁰ In light of the significantly different purposes of law, courts, legislatures, and administrative agencies during the Mao era, one might also argue that the system during the Mao period was not a legal system at all.

However, these approaches may lead the analyst to exaggerate the differences between legal systems and to make a system appear more alien and dysfunctional than it is, particularly with respect to the contemporary system.⁹¹ An alternative, and more common, approach is to refer to the

89. Clarke, *supra* note 85, at 53.

90. THOMAS STEPHENS, ORDER AND DISCIPLINE IN CHINA: THE SHANGHAI MIXED COURT 1911-1927 (1992).

91. Clarke, of course, would argue that the system only appears dysfunctional if you assume it is meant to be a legal system, or at least a legal system that meets the standards of the Western ideal of rule of law.

contemporary system as a legal system, given the significant structural similarities and the internal view among those working within such a system that they are part of a legal system, and then distinguish between different types of legal systems.⁹² Which of these strategies one adopts will depend on theoretical considerations, such as whether there is sufficient common ground to justify reference to a single term or concept—with variations then constituting different conceptions of the core concept—and on pragmatic considerations, such as the rhetorical impact of declaring dramatically that China lacks a legal system. In the absence of a better theoretical framework to describe China's contemporary system than as a *legal* system, and in light of the problems that arise in setting such high standards for a legal *system*, the better approach would seem to be to describe what exists in China today as a *legal system*. But whatever one's views on these theoretical issues, the scales would seem to tip heavily toward avoiding claims that China does not have a legal system when one considers the extremely prejudicial effect of such statements and the likelihood that they will give rise to misperceptions and cause those not familiar with China to dismiss the significant progress that China has made in developing its "legal system" in the last two decades.

Ignoring Lubman's more nuanced position, some commentators have picked up and repeated, in soundbite fashion, the assertion that "China lacks a legal system," without qualification or specification of Lubman's intended meaning. Thus, critics inadvertently or perhaps not so inadvertently, dismiss China's achievements in establishing a legal system that increasingly meet the standards of a thin rule of law. I was surprised, for instance, to hear a former senior judge from Hong Kong, when questioned about the Court of Final Appeal's ill-fated decision in the illegal immigration cases to challenge the authority of the National People's Congress (NPC), acknowledge in a public forum that he knew little about PRC law. I was even more surprised when he then blithely dismissed the role of law in China on the ground that, as far as he understood, China "lacked a legal system."

In some cases, the negative views reflect a deep suspicion about the Party's goals in carrying out reforms or overstate the role of the Party in the day-to-day operation of the legal system. It was quite common in the 1980s to claim that legal reforms were only intended to hoodwink

92. I discuss the minimal conditions for a legal system in greater detail in PEERENBOOM, *supra* note 1.

foreigners into investing in China.⁹³ In support, advocates of this view noted that much of the legislation was in the area of foreign investment. Setting aside the possibility that it might have made perfectly good economic sense for the government to seek and attract foreign investment to jump-start its economic reforms, this view either overlooked or grossly underestimated the amount of general institution building that was occurring. It also tended to assume that a viable legal system was somehow less important to the domestic economy, either because China's economy was still largely centrally planned or, once market reforms took off, because the domestic economy was characterized by a kind of Chinese capitalism where enforceable contracts were less important.⁹⁴ But the

93. For example, Lynn Chu has declared:

American business people and exiled Chinese can often be heard to mutter in private that China trumpeted attempts at "structural legal reform" not to foster any real rule of law—but certainly not to create checks and balances on the power of Party bosses—but quite cynically, as public relations, to attract Western investors and give them a false sense of security by creating the appearance of a Chinese commitment to fundamental reforms. . . . At bottom, to China's rulers the law obviously always remained a tool for entrenching their own political positions, not for checking such power in the service of abstract justice. Law was a mere rationale, through which any kind of repression might conveniently be legitimized by surrounding it with suitable legal theater.

Lynn Chu, *The Chimera of the China Market: American Investments in China*, ATLANTIC MONTHLY, Oct., 1990, at 56.

94. Although Pitman Potter does not go so far as to describe early legal reforms as an attempt to deceive foreigners, he has emphasized at least in the past the instrumental nature of PRC law and the attempt to limit legal reforms to the foreign investment sector. Potter states:

(i) The Chinese legal regime for managing foreign economic relations is governed by basic approaches [to the role of law] that emphasize instrumentalism and formalism in the content and operation of law. Law is conceived of as an instrument of rule . . . [L]aws and regulations are enacted explicitly to achieve immediate policy objectives of the regime. Law is not a limit on state power; it is a mechanism by which state power is exercised. (ii) Foreign investment rules were originally conceived of as necessary means to bring foreign capital to China, but were not indicative of the ways in which Chinese leaders wanted the domestic economy to run.

PITMAN B. POTTER, FOREIGN BUSINESS LAW IN CHINA: PAST PROGRESS AND FUTURE CHALLENGES 5, 35 (1995). It is true that *one* of the main reasons for embarking on legal reform was to attract foreign investment and stimulate economic growth. It is also true that laws in China are used instrumentally, as they are in every legal system, to pursue economic growth, and that laws reflect the policies of the ruling regime, as is also the case in other countries with parliamentary systems (of course China's systems differs in significant ways, most notably that state leaders are not elected). What is not true is that the laws were/are *only* an instrument for Party rule or that law did/does not limit state power. A host of administrative laws limit state power, albeit imperfectly (which is also true in other systems but to a much greater degree in China). See Peerenboom, *supra* note 68 (discussing the many factors that limit the effectiveness of the administrative law system). The actions of state actors are also increasingly limited by a host of other laws. The reach of the law may be limited in some cases, especially with respect to senior most officials. But government officials no longer can afford to simply disregard laws with impunity. Further, even assuming that Chinese leaders initially wanted to limit legal reforms to foreign investment rather than simply deciding as a matter of priority to begin with that sector in light of its economic importance, it is clearly the case now that the domestic

biggest problem was the assumption, sometimes implicit and sometimes explicit, that a socialist system that rejected liberal democracy could not be serious about legal reforms and rule of law.⁹⁵

This assumption/bias is evident in the way many Western reporters and some academics translate the phrase *fazhi* [法治]. This phrase by itself could be translated as either rule of law or rule by law, as there are no prepositions in the Chinese language. However, the phrase is part of a longer *tifa* or official policy statement of *yifa zhiguo, jianshe shehuizhuyi fazhiguo* [依法治国, 建设社会主义法治国][govern the country according to law, establish a socialist rule of law country]. The commitment to governing the country according to law reflects the central tenet of rule of law: law is supreme and binds government officials and citizens alike. Indeed, the principle of supremacy of law and the notion that no party or person is above the law is explicitly stated in both the state and Party constitutions. Significantly, an alternative phrase *yifa zhiguo* [以法治国] using a different first character, which means "use law to govern the country," was explicitly rejected because it could be interpreted to support an instrumental rule by law rather than a rule of law in which all are bound by law. Because the difference between the two phrases had been the subject of much academic debate, the significance of the choice was well-known to all. There has also been considerable discussion of the difference between an instrumental rule by law and rule of law among academics. PRC legal scholars who have given lectures on rule of law to Jiang Zemin and other senior leaders confirm that they understand the distinction between rule by law, in which government actors are not bound by law, and rule of law in which law is supreme.⁹⁶

Nevertheless, many reporters and some scholars insist on translating *fazhi* as rule by law and sometimes even go so far as to translate *yifa zhiguo* [依法治国] as "relying on law to rule the country" or "using law to

economic regime has been increasingly subject to legal regulation. Moreover, even before China's entrance to the WTO, the trend was toward a merger of the domestic and foreign economic regimes. China's accession to the WTO will only accelerate the merger, though it bears noting that like any other country China may and will continue to have some separate rules regulating foreign investment and trade.

95. Leslie Palmer, *Conclusion: Conditions for Rule of Law*, in *STATE AND LAW IN EASTERN ASIA* 141 (1996) ("[I]t is certainly not possible to speak of the rule of law, and not even of the rule by law. It is clear . . . that the country's rulers, namely the Communist Party, regard such rules as simply Western 'bourgeois' conventions which limit their freedom of action; arbitrary government, which recognizes no restraint, is usual."). See also Chu, *supra* note 93.

96. RONALD C. KEITH & ZHIQIU LIN, *LAW AND JUSTICE IN CHINA'S NEW MARKETPLACE* 28 (2001).

govern” and other such more instrumental renderings.⁹⁷ Such translations are not translations in the sense of direct rendering of the ordinary meaning of the words in Chinese. Rather, they are interpretations that reflect the translators’ biases or assumptions about the nature of legal reforms in China. Reporters and academics are free to comment on the nature of reforms in China and describe them as they see fit. They may claim that the government has adopted a policy of rule of law but in their view actually still pursues rule by law. However, they do not have license as translators to take ordinary words and freely inject them with their own meanings any more than Chinese translators in the Mao era could take “rule of law” in English and “translate” it into Chinese as “bourgeois rule in which the capitalist class oppresses the proletariat.”

Nor does it help to fall back on claims about meaning and authorial intent or theories that blur the line between translation and interpretation. In some instances, one must interpret the meaning of what is said in light of the context, including what one knows about the speaker and his or her intent and actual practice. However, in this case, the phrase is not that of a particular speaker, but the official policy first popularized by a number of academics, then endorsed by Jiang Zemin and the Party, and finally incorporated by amendment into the Constitution. It is not even clear whose intent should be controlling. In reality, the understanding of senior leaders may be relevant for how the phrase is implemented in practice. But as noted, senior leaders seem to understand the difference between rule of law and rule by law and have accepted the official wording. Why then assume “the Party’s” view would be rule by law? There is no official Party interpretation. There may even be a diversity of views within the Party. Even assuming a single Party view, why privilege that view over the view(s) of lower level government officials and judges who implement the

97. See, e.g., *CPC Official Elaborates on “Outline” for Ethics Building*, BEIJING XINHUA DOMESTIC SERV., Oct. 25, 2001, in FBIS DAILY REP.: CHINA (FBIS-CHI-2001-1025) (Nov. 16, 2001) (translating *yifa zhiguo* as “rule the country by law,” and *fazhi* as “rule by law”), at http://wnc.fedworld.gov/cgi-bin/retrieve.cgi?IOI=FBIS_clear&docname=0gmwat202ebtxx&CID=C499908447265625237402921; *PRC’s Li Peng Presides Over NPC Administrative Law Reform*, BEIJING XINHUA DOMESTIC SERV., Oct. 27, 2001, in FBIS DAILY REP.: CHINA (FBIS-CHI-2001-1027) (Oct. 30, 2001) (translating *jianshe shehui zhuyi fazhiguo* as “construct a socialist state ruled by law”), at http://wnc.fedworld.gov/cgi-bin/retrieve.cgi?IOI=FBIS_clear&docname=0gm0vko0323g54&CID=C499908447265625237402921. It should be noted that FBIS is not consistent in its translation, generally translating *yifa zhiguo* as “to govern according to law” and frequently translating *fazhi* as rule of law. See also ANN KENT, CHINA, THE UNITED NATIONS AND HUMAN RIGHTS 202 (1999) (translating *yifa zhiguo* as “ruling by law,” or allegedly more literally as “by means of law, rule the country,” and claiming with respect to *fazhi* as used in Jiang Zemin’s Fifteenth Party Congress speech that “within the context established by Jiang of norms within [the] socialist system . . . the implication here was that *fazhi* should be translated as “rule by law”).

law on a daily basis or the NPC Standing Committee? As a matter of law, the NPC Standing Committee has the right to interpret the phrase. Academics and citizens may also have different views about the meaning of the phrase, though it would seem most would prefer an interpretation as rule of law. In glossing *yifa zhiguo* and *fazhi* as instrumental rule by law, Western commentators ignore the ordinary meaning of words and override linguistic conventions, and end up imposing their own skeptical views about the nature(s) and purpose(s) of legal reforms in China.

Also reflective of the tendency to detect the heavy hand of the oppressive Party lurking behind every corner, one scholar recently submitted a manuscript to a major academic publisher arguing that the government contains political control over the type of person who can enter the legal field, citing as proof that the materials for the 1988 examination included long speeches by Deng Xiaoping.⁹⁸ Fast-forwarding to the new millennium, the author also suggested that lawyers today are beholden to the Party because many lawyers are Party members, and there is supposed to be a Party cell in law firms with more than three Party members. But there is no evidence that such cells are actually established or that they play any role. Nor does being a member of the Party nowadays say much about one's beliefs. Lawyers who oppose the Party politically may still join the Party simply as a strategic career move for the economic opportunities it might bring.

The author also made much of the fact that the 1982 provisional regulations on lawyers described lawyers as workers of the state even though that phrase no longer appears in the Lawyers Law passed in 1996. Instead, the author noted that according to an allegedly "official interpretation" of the Lawyers Law, lawyers were supposed to serve socialism by supplying law. What "official" means in this context is not clear. The Lawyers Law actually defines a lawyer as a legal practitioner who holds a certificate to practice law and who provides legal services *to society*, not to the state or to socialism.⁹⁹ But even assuming the Lawyers

98. Manuscript on file with author, cited with permission of author. As the manuscript has not been published, and much of the research is from the 1980s and early 1990s, the author may revise the text before publication. Nevertheless, it reflects a certain mindset that still exists today and thus merits comment, even if the author ultimately alters his or her views. I should also note that the manuscript contains many insightful points and arguments on other matters not discussed here. In fact, I am in basic agreement with the general thesis of the manuscript, which is not affected by these differing views regarding the politicization of the legal profession.

99. Law of the People's Republic of China on Lawyers (Lawyers Law), art. 2, adopted at the Nineteenth Meeting of the Standing Committee of the Eighth People's Congress on May 15, 1996, in Legislative Affairs Commission of the Standing Committee of the National People's Congress of the People's Republic of China, 8 THE LAWS OF THE PRC 162 (1996). According to Article 5, the Lawyers

Law had stated lawyers were supposed to serve socialism by providing legal services, one need not assume anything devious is afoot. China is a socialist state. Lawyers in China could serve socialism just as lawyers in liberal democratic states could serve liberal democracy by providing legal services. In these days of economic reform, lawyers serve their paying clients. Unless more is said about the way in which lawyers are allegedly required to serve socialism, this kind of claim says little. The author did acknowledge that lawyers were given greater autonomy under the Lawyers Law, but then complained that this greater independence stripped lawyers of some of their effectiveness. Without the support of the state, lawyers were left “twisting in the wind,” and the threat that they would use the legal system to challenge the state was neutralized by their lack of resources. One wonders what the ruling regime should do. Either way, it is condemned. If it keeps lawyers on the government payroll, the regime is criticized for undermining the independence of the legal profession. If it turns them loose, it is criticized for not providing lawyers the material resources to effectively carry out their role as challengers of the state.

In practice, lawyers are defending clients more often and more aggressively than ever before. Faced with this troublesome fact, the author claims that lawyers are forced by a tight legal market to undertake ill-paid and politically dangerous criminal defense work and to represent indigent clients who cannot afford the legal fees.¹⁰⁰ The Ministry of Justice (MOJ),

Law is intended to maximize the active role of lawyers in developing the *socialist legalist system*. As I have noted elsewhere, despite changes in the definition of lawyer, the Lawyers Law retains enough of the rhetoric of socialism to alarm sceptics. For example, lawyers required to abide by the PRC Constitution, which requires all citizens to protect the public order, respect social ethics, and refrain from committing any acts detrimental to the security, honor and interests of the motherland, and enshrines the four cardinal principles: the leading role of the Party, adherence to socialism, the dictatorship of the proletariat and adherence to Marxism-Leninism-Mao Zedong thought. But we should not overstate the importance of socialist rhetoric. For many lawyers today, such rhetoric is simply irrelevant and not something to be taken seriously or that impacts their practice. See RANDALL PEERENBOOM, *LAWYERS IN CHINA: OBSTACLES TO INDEPENDENCE AND THE DEFENSE OF RIGHTS* (1998). In the United States, lawyers are also supposed to serve the public interest. As officers of the court, their duty to their clients is limited by their obligations to the court and society. For a discussion of how the balance between a lawyer's duty to clients and to society is likely to differ in Liberal Democratic, Communitarian, Neo-Authoritarian, and Statist Socialist rule of law regimes, see Peerenboom, *supra* note 1, at 373-76.

100. It is hard to fault the government for imposing punishment on lawyers who bribe judges or arbitrators—though the author suggests that by imposing punishment on such behavior, the authorities are discouraging lawyers from representing criminal clients and engaging in litigation and pushing them towards transactional work. The author draws a similar conclusion from the fact that lawyers have more flexibility in negotiating fees for commercial matters. But another, more reasonable, conclusion would be that the government wants to ensure that criminal defendants and those seeking divorce or dealing with child custody issues have access to justice and are not prevented from obtaining a lawyer by high fees. Recent regulations that waive court fees in such cases further support

allegedly seeing pro bono work as a potential seed-bed for ideas about how to use the court system to enforce rights against the state, reportedly reacted swiftly to regulate it. The MOJ supposedly attempted to monopolize the legal aid sector by setting up and funding legal aid centers where the lawyers were selected by the government. But the proliferation of legal aid centers, including non-state funded quasi-Non-Governmental Organizations (NGOs), that handle all manner of cases and hire their own lawyers undermines this view.¹⁰¹ This theory implies that the Party needs to control legal aid centers to avoid challenges to the State. However, most cases involving indigent citizens do not constitute a threat to the State. The only interest the ruling regime has in most commercial, family, tort, and even criminal and administrative cases is that the courts render a fair verdict that will be accepted by the parties and their fellow citizens. A much bigger threat to the ruling regime, and hence a much more likely explanation of why the government has so actively promoted legal aid centers, is that citizens who are unable to turn to the courts to secure their severance pay and retirement benefits when they are laid-off from state-owned enterprises or to overturn an administrative agency's wrongful denial of their business license will seek other channels of protest. As for why the MOJ is so eager to get involved, one possibility is that they are increasingly seen as irrelevant and out of step with market and legal reforms. The MOJ apparently has even considered merger with the Procuracy to stave off extinction. Finally, it is most likely true the Party would prefer to limit the use of the legal system to challenge its power, and Party organs still determine the outcome in some politically sensitive cases. However, the ruling regime does not need to micromanage the caseloads of lawyers in legal aid centers to accomplish its objectives. It has much more targeted channels for influencing the outcome in those few politically sensitive cases that do constitute a threat to the regime.

this view. (In July 2000, the SPC issued the Regulations for the Provision of Judicial Assistance to Indigent Parties.) Commercial clients are more able to afford higher fees, and so the government lets the market determine the rate.

101. By June 1998, there were some 180 legal aid centers or offices. According to the MOJ, they handled more than 70,000 cases in 1997. By the end of 2000, there were reportedly 1853 legal aid offices, with 6109 full-time employees. These offices handled more than 170,000 cases on behalf of more than 228,000 people, in addition to providing legal advice to some 830,000 people. By June 1998, there were some 180 legal aid centers or offices. According to the MOJ, they handled more than 70,000 cases in 1997. By the end of 2000, there were reportedly 1853 legal aid offices, with 6109 full-time employees. These offices handled more than 170,000 cases on behalf of more than 228,000 people, in addition to providing legal advice to some 830,000 people. *See China Offers More Judicial Assistance to Citizens*, BEIJING XINHUA DOMESTIC SERV., Apr. 9, 2001, in FBIS DAILY REP.: CHINA (FBIS-CHI-2001-0409) (Apr. 10, 2001), at http://wnc.fedworld.gov/cgi-bin/retrieve.cgi?IOI=FBIS_clear&docname=0gbkxfz00hfw9s&CID=C499908447265625237402921.

Nowhere is there greater suspicion of the ruling regime than when it comes to human rights issues. When China announced that it was going to sign the International Covenant on Economic, Social, and Cultural Rights (ICESCR), a number of human rights activists, political scientists, and legal scholars were quick to dismiss the act as a cynical attempt to manipulate international opinion in light of the pending decision regarding China's bid for the Olympics and the annual attempt of the United States and other countries to sponsor a resolution in Geneva censuring China for human rights violations.¹⁰² I would think that Beijing's actions were both "manipulative" and genuine. Beijing acted manipulatively in the sense that it announced the signing when it did rather than later because of political considerations such as the Olympics, the U.S. State Department report on human rights in China, and the annual show in Geneva. But this merely demonstrates that Beijing may be learning from other countries and getting better at political spinning, and dealing with international public opinion.

More problematically, why should we assume that the Beijing is somehow hostile to the ICESCR? On the contrary, there are good reasons to believe China's decision also reflects a genuine commitment to improving economic, social, and cultural rights. The right to rule, couched in terms of the mandate of heaven, has always imposed a quasi-fiduciary obligation on China's leaders to provide for the material well-being of its citizenry or risk revolt. Today, whatever legitimacy the ruling regime enjoys is derived mainly from its unprecedented record of economic growth and its ability to improve the lives of citizens during the last two decades. Except for Article 8 regarding the right to form trade unions and strike,¹⁰³ to which it made a reservation,¹⁰⁴ the Treaty is generally

102. This view was expressed by a number of participants on a list serve for political scientists, reporters and sinologists. See also Center for Religious Freedom, *Religious Deterioration is Reason to Reject China's Olympic Bid, States Freedom House: Athletes and Spectators Risk Having Religious Rights Denied* (Jan. 29, 2001), at <http://www.freedomhouse.org/religion/news/bn2001/bn-2001-01-29.htm> ("China's announcement that it would soon ratify the International Covenant on Economic, Social and Cultural Rights is a cynical attempt to deflect attention from an indisputably abysmal human rights record. It would be unjustifiable to bypass other cities where human rights and religious freedom are upheld to confer the honor of Olympic host on Beijing."); Henry Chu, *China Ratifies U.N. Accord on Human Rights*, L.A. TIMES, Mar. 1, 2001, at A9; Anthony Kuhn, *China Rebutts U.N. Rights Chief, Assails U.S.*, L.A. TIMES, Feb. 28, 2001, at A4; *On Eve of Geneva Rights Talks, China Agrees to Sign U.N. Pact*, N.Y. TIMES, Mar. 13, 1998, at A6.

103. International Covenant on Economic, Social and Cultural Rights, pt. III, art. 8, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 166, U.N. Doc. A/6316 (1966) [hereinafter ICESCR].

104. Rights activists were generally critical of China's reservation regarding trade unions. See, e.g., *The China Rights Forum*, in HUM. RTS. CHINA, at http://iso.hrichina.org:8151/iso/article.adp?article_id=475&subcategory_id=11 (Spring 2001) ("On February 28, 2001, China ratified the

consistent with Beijing's announced policy on human rights. China has long argued that the international human rights community is biased toward civil and political rights, and does not pay enough attention to economic, social, and cultural rights, while ignoring the vast improvements in the living standards of most Chinese in the last twenty years.¹⁰⁵ The ratification now gives Beijing one more ground to criticize the United States, which has failed to ratify the Treaty,¹⁰⁶ and to argue that economic, cultural, and social rights—including the right to development—are as important as civil and political rights. As such, China's accession to the ICESCR plays into the North-South, developed-developing country conflict so evident in the Bangkok Declaration.¹⁰⁷

Furthermore, the ICESCR sets forth vague, programmatic rights, which are subject to resource constraints and are to be realized "progressively" over time.¹⁰⁸ This approach reflects China's stated position on human rights that they are to be interpreted and implemented in light of the particular circumstances of each country. As with most other rights

International Covenant on Economic, Social and Cultural Rights (ICESCR). However, it also entered a reservation on Article 8, which guarantees the right to form and join trade unions of one's choice.").

105. *Human Rights in China*, 34 BEIJING REV., Nov. 4-10, 1991.

106. Not only has the U.S. refused to ratify the ICESCR, the U.S. Supreme Court held in the famous *Deshaney* case that the U.S. Constitution is one of negative rights rather than positive rights: "[O]ur cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." *Deshaney v. Winnebago County Dept. of Soc. Servs.* 489 U.S. 189, 196 (1988) (emphasis added). In *Deshaney*, the relatives of a child who was beaten into a coma by his abusive father sued the Department of Social Services (DSS) in Wisconsin on the ground that the DSS had an affirmative obligation to protect the child from abuse once the DSS had become aware of repeated instances of apparent abuse and had intervened repeatedly in various ways. *Id.* at 195.

The United States has signed and ratified the ICCPR, but not the Optional Protocol that would allow individuals to bring complaints against the United States for violations of the treaty. However, by attaching a laundry list of reservations, declarations and understandings, the United States has ensured that the ICCPR, like other rights treaties, will have no domestic effect and will not give rise to any new rights not already provided for under U.S. law. In fact, the United States attached so many declarations that the U.N. was moved to issue a general comment trying to limit the number and kinds of reservations. HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 918-22 (1996). Even some of the United State's allies formally objected. *Id.* at 773. The problem is that given the choice between allowing a country to sign a human rights treaties with reservations or not to sign at all, there is usually little to be gained by refusing to let the country sign with reservations.

107. *World Conference on Human Rights, Regional Meeting for Asia, Bangkok, Thailand*, Mar. 29-Apr. 2, 1993, The Bangkok Declaration is available at <http://www.unhcr.ch/html/menu5/wcbangk.htm> [hereinafter Bangkok Declaration].

108. ICESCR, *supra* note 93, at art. 2. "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures." (emphasis added).

treaties, the enforcement mechanism for the ICESCR consists primarily of a reporting mechanism, whereby the country must submit periodic reports to a committee, which can issue comments. Given the difficulty of actually coming up with ways to resolve issues such as poverty even when a country is willing, the ICESCR committee generally adopts a more conciliatory and less adversarial approach than the International Covenant on Civil and Political Rights (ICCPR) Committee.¹⁰⁹ Moreover, because the attention of most NGOs, the U.S. State Department, and most of the media is on civil and political rights, it is unlikely that ICESCR would become an issue. If one wanted to be a cynic, one could argue that China ratified the ICESCR because it is notoriously weak, even for human rights treaties. Thus, ratifying it comes at little cost and actually has some propaganda benefit for Beijing. But that is being perhaps too cynical. It is true that ratifying the ICESCR may not mean much in practice—as is the case in other countries. But ratification still has some value. Rights advocates may use the treaty as a basis for justifying their claims, even if such claims are not justiciable in PRC courts or anywhere else.

Make no mistake about it—there are clearly human rights violations in China, and they need to be exposed. But even in the human rights area, a balanced approach is needed. All too often, criticisms of Chinese human rights tend to be one-sided, fail to acknowledge significant progress, and fail to treat oftentimes complex and difficult issues with the nuance they deserve.¹¹⁰ Nor would a change in regime be sufficient to address many of the most pressing issues of poverty, social, and cultural rights. With respect to civil and political rights, it is doubtful that even a democratic

109. STEINER & ALSTON, *supra* note 106, at 274-75, 1132-40.

110. For a similar argument, see Tom Grunfeld, *Human Rights and the People's Republic of China*, 9 *TOURO INT'L L. REV.* 71, 72 (2001) (arguing that reporting on China in general and human rights in particular emphasizes the negative and is so unrealistic and skewed that many American's conceptions of what China is like today are profoundly distorted). For a balanced account, see Denny Roy, *China*, in *THE POLITICS OF HUMAN RIGHTS IN EAST ASIA* 219, 232 (2001) (noting that while serious problems remain, "the CCP can truthfully claim that the average Chinese is better off than before the establishment of the CCP regime, and indeed the total human rights situation (that is, including socioeconomic as well as civil/political rights) today is the best in China's history"). None of this is to deny that there is still considerable poverty and suffering, and hence considerable room for improvement even with respect to socioeconomic rights. Civil and political rights are even more problematic. For an account of human rights in China, see U.S. State Department Human Rights Report 2000, Hong Kong, *supra* note 16. See also KENT, *supra* note 97. For a discussion of China's position on human rights and attempt to set rights issues in a broader philosophical framework, see chapter 11 of PEERENBOOM, *supra* note 1; Randall Peerenboom, *What's Wrong with Chinese Rights? Toward a Theory of Rights with Chinese Characteristics*, 6 *HARV. HUM. RTS. J.* 29 (1993); Randall Peerenboom, *Rights, Interests, and the Interests in Rights in China*, 31 *STAN. J. INT'L L.* 359 (1995).

China would protect individual liberties and freedoms to the extent desired by liberals.¹¹¹

In yet another example of preoccupation with the omnipresent evil Party that illustrates the complexity of many rights issues, one commentator attributed the government's crackdown on multi-level direct marketing primarily to the regime's alleged fear that direct marketing organizations, which form extensive, tightly-knit networks based on a common economic interest, could suddenly morph into self-motivated political forces.¹¹² The author notes, but downplays the government's express reasons for banning direct marketing sales: that direct marketing plans are often nothing more than pyramid schemes that end up swindling gullible citizens out of their hard-earned savings.¹¹³ Now, it is possible that Jiang Zemin and his colleagues lay awake at night worrying about armies of Mary Kay cosmetics salespeople marching arm in arm toward Zhongnanhai. But the Party has tolerated—or been forced to accept—the rise of countless business interest groups, many of which have organized along industrial lines and/or joined chambers of commerce that cross industrial lines.¹¹⁴ Moreover, the government first tried less restrictive measures to deal with the scams associated with direct marketing activities. As the author notes, the government carried out two rectification campaigns that resulted in the closure of hundreds of illegal operations.¹¹⁵ After a seven-month moratorium on direct sales, during which time the State Industrial and Commerce Bureau carried out a thorough investigation, the government issued new rules prohibiting direct sales *in some areas* and also imposed various consumer-protection requirements such as mandatory training of all sales personnel. When problems continued, the government issued an across-the-board ban, which was no doubt too broad in the sense that it caught in its web legitimate direct-sales businesses that were not pyramid schemes. After protests from foreign and domestic companies and trade representatives from various countries, the

111. See *Rights, Interests and the Interests in Rights in China*, *supra* note 110.

112. See Michele Wong, *China's Direct Marketing Ban: A Case Study of China's Response to Capital-Based Social Networks*, 11 PAC. RIM L. & POL'Y J. 257 (2002). The overgeneralization of the second half of the title is telling: the regime has not banned *all* capital-based social networks, just direct-marketing ones.

113. Direct sales also raise complicated income and VAT tax issues and are likely to result in the state collecting less tax revenues.

114. Although these groups are registered and thus at least in theory more subject to the control of the State, the State's capacity to monitor social groups has greatly diminished during the reform era. See Tony Saich, *Negotiating the State: The Development of Social Organizations in China*, 161 CHINA Q. 124 (2000).

115. See Wong, *supra* note 112, at 266.

government worked out a compromise whereby companies such as Amway are allowed to carry on their activities with various modifications. The modifications made them more like other retailers and imposed certain additional costs, but have helped avoid the social evils that resulted from various direct marketing schemes.

Unquestionably, the ruling regime is very concerned about social stability and tends to overreact to any perceived threats to its legitimacy and authority. Even allowing that the potential for instability in China is great,¹¹⁶ the regime appears to be overly restrictive of social organizations in some cases. In this case, the government was worried about instability in the sense that direct marketing could lead to massive consumer fraud. It is also no doubt worried about the potential for unemployed citizens to band together and challenge the government, as is happening with increasing frequency, and is likely to become even more prevalent now that China has entered the World Trade Organization (WTO). Unlike other economic groups such as chambers of commerce, direct marketing groups are potentially more dangerous to the State because they could lead to cross-regional relationships among a potentially volatile group of disenfranchised people who have not benefited from economic reforms and may have no other source of employment. But for that very reason, the government is unlikely to want to ban direct marketing activities that provide jobs to the unemployed.

To be sure, even if one agrees with the substantive merits of the regime's decisions to limit certain social organizations, the failure to comply with legal procedures in some cases undermines the government's attempt to bolster its legitimacy by living up to its commitment to rule in accordance with law.¹¹⁷ Nevertheless, we should be wary about laying too much of the blame for China's failure to fully implement rule of law on the Party. Even if China were to become democratic tomorrow, it would still be years before China could fully implement rule of law, given the many institutional, historical, and cultural obstacles.

Of course, we also need to be wary about overstating cultural obstacles or treating culture as monolithic and unchanging. In some cases, problems

116. There is considerable disagreement on this issue. A number of leading China scholars surveyed a series of potential trouble spots and concluded that while there is some risk of instability, China appears to be relatively stable at the moment. *See IS CHINA UNSTABLE?* (David Shambaugh ed., 2000). In contrast, lawyer and long-time China resident Gordon Chang, going over much of the same terrain, has written a sensationalist, somewhat hyperventilating tale that portrays China on the verge of collapse. *See GORDON CHANG, THE COMING COLLAPSE OF CHINA* (2001).

117. For a discussion of the government's handling of Falunggong, see PEERENBOOM, *supra* note 1.

in the Chinese legal system are not attributed to the Party but to certain (Oriental?) beliefs or principles that seem inconsistent with the modern conception of a legal system. For example, the high level of inconsistency between national and local legislation is sometimes said to reflect a different sense of consistency than in other systems, namely that lower level legislation need only be consistent with the spirit, rather than the letter, of superior laws.¹¹⁸ Again, there are many other possible explanations for the high level of inconsistency, including the rapid pace of reforms, the change in incentive structure whereby local cadres were evaluated and promoted based on local economic growth, bureaucratic turf-struggles, ideological conflicts, and so on.¹¹⁹ In any event, recent developments show that this view is no longer the dominant view, if it ever was. For years, the Supreme Court and other official sources have regularly complained about the high level of inconsistency.¹²⁰ One of the express purposes of the Law on Legislation was to address the issue of inconsistency, and the Law does clarify, to some extent, the legislative hierarchy while creating new mechanisms for dealing with inconsistent legislation. Similarly, the drafters of the Administrative Licensing Law took great pains to limit the discretion of lower level entities to establish licensing systems incompatible with superior legislation.¹²¹ The State Council has also limited the authority of lower level entities to impose approval requirements, broadly understood to include any type of registration, licensing, verification, or consent. In the process, the State Council expressly noted that lower level entities must follow the letter and the spirit of the law, and may not take advantage of general statements of

118. See PETER HOWARD CORNE, *FOREIGN INVESTMENT IN CHINA: THE ADMINISTRATIVE LEGAL SYSTEM* 147-48 (1997). Corne cites the views of Ying Songnian and Dong Hao in support. However, Ying and Dong expressly state that lower level regulations may not infringe the Constitution, laws or administrative regulations. They do allow some inconsistencies between lower level local or regional regulations or ministry level regulations. Nevertheless, Corne concludes:

Thus, in the Chinese legal system a rule or regulation is not considered to conflict with the Constitution *per se* or with rules or regulations enacted by other administrative or legislative bodies at the same or higher level, even if it appears to do so on its face, as long as it fulfills the primary objective of being within the enacting organ's entrusted or inherent power.

Id. I do not see how this conclusion can be squared with Ying and Dong's comments.

119. See PEERENBOOM, *supra* note 1.

120. See, e.g., *PRC's Li Peng Presides Over NPC Administrative Law Reform*, *supra* note 97; *Li Peng, Jiang Chunyun Urge Strict Implementation of Law on Legislation*, BEIJING XINHUA DOMESTIC SERV., in *FBIS DAILY REP.: CHINA* (FBIS-CHI-2001-1106) (Nov. 21, 2001), at http://wnc.fedworld.gov/cgi-bin/retrieve.cgi?IOI=FBIS_clear&docname=0gn5lfe006h6rg&CID=C499908447265625237402921.

121. See PEERENBOOM, *supra* note 1.

purpose such as the need to strengthen supervision or management as an excuse to establish approval requirements.¹²²

In some cases, what was once perhaps true is no longer true, or at minimum needs to be qualified in light of recent changes. For example, critiques of the Chinese judiciary often emphasize that judges are poorly trained and, in particular, that many judges are former military officers.¹²³ However, many of the ex-military officers have been transferred to non-adjudication positions and others have retired or are set to retire, particularly in higher level courts, and new judges are required to pass a unified national examination. Further, many former military judges have undergone on-the-job training or obtained law degrees from night schools. While one might question the value of such training or education, it is the same training or education received by many non-military judges. Moreover, the critique rests on the assumption that ex-officers lack adequate education to properly handle cases. Zhu Suli, the Dean of Peking Law School and one of the few scholars to conduct systematic empirical studies of the operation of rural basic level courts, has challenged this assumption.¹²⁴ He argues that given the relatively simple nature of most disputes in basic level courts particularly in rural areas and the expectation of many parties that judges will come up with a solution that fits the circumstances, ex-military personnel familiar with the local area may be better able than college graduates sent down to the countryside to meet expectations. As he notes, in England and other countries, justices of the peace or their equivalent handle lower level disputes, even though they have little, if any, formal legal training.¹²⁵ In urban areas, judges in PRC courts are divided according to level. Judges with the least training are assigned cases considered to be less complicated or where the amount at stake is small.¹²⁶

122. On Several Issues in Relation to the Grasping of Five Principles for the Thorough Implementation of Administrative Approval System Reforms, issued by the State Council's Leading Small Group on Administrative Approval System Reforms, art. 2.1.1.

123. He Weifang, *Fuzhuan Junren Jin Fayuan* [Former Military Personnel Enter the Courts], NANFANG ZHOUMO [SOUTHERN WEEKEND], Jan. 2, 1998.

124. SU LI, SONGFA XIAXIANG [SENDING LAW TO THE COUNTRYSIDE] 369-83 (2000).

125. *Id.*

126. There are, of course, problems with judges lacking adequate legal training and knowledge to decide cases. That is one factor in support of the current system and panels of three judges rather a system in which a single judge decides the case. It is also one reason given to justify the continued existence of adjudicative committees consisting of senior judges who review the decisions of the panel in difficult or contested cases.

Other claims that need to be revised in light of present realities include: the courts are no more authoritative than the post office,¹²⁷ Chinese administrative agencies have the power not only to issue and interpret their own rules (as is true in other systems) but to compel the courts to enforce them,¹²⁸ state-owned enterprises (SOEs) exist outside the law,¹²⁹ and all that matters is *guanxi* (connections), not law.¹³⁰ To be sure, there still may be some truth to such claims. Courts, for example, are weak in China. But they are far from powerless. SOEs are subject to excessive government intervention (even allowing that the State is often the major shareholder). But empirical studies show that economic reforms and a host of regulations have decreased the amount of intervention.¹³¹ In fact, some economists attribute the poor performance of SOEs to insufficient supervision and principal-agency problems.¹³² In any event, SOEs must follow generally applicable laws like everybody else, including environmental laws, consumer protection laws, land use laws, and so on, and at least in that sense, they are not outside the law. It is also true that *guanxi* does matter, more so than in other countries. But *guanxi* alone is

127. For the provocative, somewhat tongue-in-cheek comparison of the courts to the post office, see Donald Clarke *Power and Politics in the Chinese Court System: The Enforcement of Civil Judgments*, 10 COLUM. J. ASIAN L. 1 (1996).

128. LUBMAN, *supra* note 63, at 34. Although Lubman did not specify whether he means that they have the power as a legal matter or simply as a practical matter, he has stated in personal communication that he meant as a practical matter.

129. *Id.* at 144.

130. See, e.g., Scott Seligman, *Guanxi: Grease for the Wheels of China*, CHINA BUS. REV., (Sept.-Oct. 1999), available at 1999 WL 100240512. I have heard similar eternal "truths" repeated time and again at business seminars, often but not always by those who are quick to offer their services for those in need of the right connections for a healthy fee. Some academics, particularly sociologists, emphasize the importance of *guanxi* to the virtual exclusion of law. See, e.g., YI-MIN LIN, BETWEEN POLITICS AND MARKETS (2001). For an exception among sociologists, see Douglas Guthrie, *The Declining Significance of Guanxi in China's Economic Transition*, 154 CHINA Q. 255 (1998). I recently reviewed an article in which the author had conducted interviews of lawyers and their perspective clients. Time and again, the clients complained that the case would be difficult to win because the other side had mobilized *guanxi* or asked the lawyers about the importance of *guanxi*. The lawyers repeatedly stated the obvious, that *guanxi* does matter in some cases. However, they also cautioned the clients that *guanxi* was not everything, and that law and the legal merits of their case did matter. Unwilling to accept the straightforward explanation that the lawyers were simply telling it like it is and that law matters, the author drew the strained conclusion that lawyers were forced to invoke legal symbolism to bolster their claims to professional expertise and get the clients to hire them.

131. The studies also show that SOE managers have more autonomy in some areas (remuneration, production, pricing, technical innovation, choice of inputs and raw materials, marketing and foreign-trade) and less in others, such as labor and major investment decisions. Aimin Chen, *Inertia in Reforming China's State-Owned Enterprises: The Case of Chongqing*, 26 WORLD DEVELOPMENT 479, 484 (1999). See also XIA LI LOLLAR, CHINA'S TRANSITION TOWARD A MARKET ECONOMY, CIVIL SOCIETY AND DEMOCRACY (1997) (reporting the results of a 1994 survey, based on 39 SOEs in Hebei).

132. Chen, *supra* note 131, at 285-86.

not sufficient in all cases. For instance, many companies that have invested heavily in connections find themselves still waiting for approvals while other companies that met the legal requirements obtained approvals.¹³³ Nor does the party with the best connections always win in litigation, even in lower level courts where local protectionism is most pronounced.¹³⁴ And courts may *in some cases* defer to agencies even when not legally required to do so because of their weak stature. However, as a matter of law, agencies *cannot* force their regulations or interpretations on courts in that courts need not follow State Council regulations that are inconsistent with superior law; they may refer to but are not bound by agency rules (*guizhang*); and they can ignore all other agency documents (*guifanxing wenjian*).¹³⁵ Furthermore, courts may follow the agency's rule not out of weakness, but because they find the rule reasonable and worth following. Courts were all the more likely to follow agencies in the early days of reform, when there often was no law or State Council regulation on point.¹³⁶

In general, one can emphasize on either how far the system has come or how far it still has to go. Focusing exclusively or predominantly on the negative obscures the considerable progress China has made in improving

133. One of my clients found out the hard way that relationships are not enough. The chief representative for a U.S. Fortune 500 company thought that her personal relations with the head of the ministry in charge of her sector, who was a long time friend of the family and related through marriage in a distant way, would be sufficient to obtain a special approval for a majority share in a joint venture, even though China's industrial guidelines limited foreign parties to a minority share. After two years of repeated visits to the ministry and countless courting of ministry officials both in China and abroad, the foreign company finally gave up and accepted a minority position.

134. See Randall Peerenboom, *Seek Truth From Facts: An Empirical Study of Enforcement of Arbitral Awards in the PRC*, 49 AM. J. COMP. L. 249 (2001). Broad statements about the importance of *guanxi* are not very helpful. *Guanxi* comes in many varieties, is exercised through a variety of channels, with differing results. *Guanxi* could come in the form of longstanding relationships to specific contacts with judges or government officials who are dealing with a particular case or matter at the time of contact. Parties might rely on the connections of their lawyers, assistance from their embassy or trade representatives or contacts with PRC government officials, judges, and Party members. It can be anything from the simple advantage that comes from the judge being a social acquaintance to the benefits of ex parte communication with a judge to bribery. The results can range from one side gaining the opportunity to present its case more fully in a private meeting with a judge in favorable circumstances, to delaying a final adverse decision and hence the day of reckoning, to reducing the amount of damages owed, to deciding the case incorrectly. We simply do not know how often *guanxi*, and what type of *guanxi*, changes the outcomes in cases in ways inconsistent with law. Nor are we likely to ever know. As Lao Zi noted long ago, those who know don't say, those who say, don't know. At best, we will have anecdotal evidence—a few stories of varying degrees of reliability, usually without means of verification—supplemented by court cases involving judicial corruption.

135. PRC ADMINISTRATIVE LITIGATION LAW (1989) (adopted by the NPC Standing Committee) arts. 52, 53 [hereinafter ALL].

136. Courts may even refuse to follow State Council Administrative Regulations, which are in general binding on the courts, if they believe such regulations are inconsistent with laws.

the legal system and may lead others outside the field to misinterpret the significance of reforms. In many instances, it may come down to a question of emphasis, tone, or "spin." For example, some scholars have attributed the vagueness of many Chinese laws in large part to the Party's desire for flexibility—vague laws give the Party ample wiggle room to issue policies.¹³⁷ Yet there are any number of other plausible reasons, some discussed by the author, that merit equal if not greater emphasis, including: China is modeled on civil law countries where laws tend to be broadly drafted; China is a large country with great diversity and thus it is difficult to draft laws that fit all circumstances; and the pace of economic reforms has resulted in laws being issued before all of the issues were clear and sufficient experience was obtained to come up with more detailed laws.¹³⁸

Similarly, some portrayed the adjudicative committee's role primarily as a vehicle for the exercise of Party discretion.¹³⁹ Yet, an alternative explanation is that it is a reasonable mechanism for enhancing judicial accountability, given the widely recognized problems with judicial competence and corruption.¹⁴⁰ It is possible that in some cases, the adjudicative committee may be used to transmit the Party-line on certain difficult cases. However, many, if not most, cases taken up by adjudicative committees do not involve politically sensitive issues where there is a Party-line, but rather involve differing views among judges within the court over legal issues. One problem is that we lack the empirical foundation about the operation of adjudicative committees to draw conclusions about the extent to which their decisions reflect the influence of the Party and how effective they are in controlling corruption and

137. See CORNE, *supra* note 118. Corne is much too knowledgeable to attribute the vagueness solely to the Party or socialist ideology, and discusses other reasons as well. However, emphasis and tone also matter and it seems to me that there is still too much emphasis on the Party's desire for wiggle room.

138. See PEERENBOOM, *supra* note 1.

139. Margaret Woo, *Adjudicative Supervision in the PRC*, 39 Am. J. Comp. L. 95 (1991). It bears noting that the article was written in the wake of Tiananmen, at a time when concerns about Party dominance of the legal system were at their height.

140. *Su Li*, *supra* note 124. Woo does note that supervision also serves a correcting function and adds in a footnote that this function is undeniably necessary given that judges have a low level of training. However, she argues that:

[I]t serves less as a mechanism to vindicate individual rights or to uphold the mass line justice and more as an institutional check on judicial work. Ultimately, adjudicative supervision is a flexible mechanism by which decisions can be brought into line with the external policies of the central government identified by the CCP.

Woo, *supra* note 139, at 107. She also argues that "the emphasis on ensuring judicial decisions comply with central policy is consistent with the socialist view that 'law is a policy instrument. Law is politics.'" *Id.* at 118.

ensuring just decisions. In any event, my point is not that scholars should not call attention to the possible use of adjudicative committees as a channel for Party influence. Rather, it is that we should not let such concerns obscure the other reasons for such committees.

Although some issues turn on how one interprets and presents the facts, other claims are simply factually incorrect. For instance, one often hears that arbitral awards are all but impossible to enforce. As one lawyer melodramatically declared, China “might as well have not bothered signing” the New York Convention.¹⁴¹ In fact, foreign arbitral awards are enforced about 50% of the time—hardly perfect, but hardly the dire situation suggested by the alarmist accounts in the press. Moreover, the main reason for lack of enforcement is that the party against which enforcement is sought lacks assets. System failure in the form of local protectionism, judicial incompetence, or corruption and the like account for between 10% and 29% of non-enforcement cases.¹⁴²

Likewise, one reporter claimed that “only a tiny minority of judges have any legal training and therefore are unable to decide cases on their merits.”¹⁴³ Actually, by the end of 1995, 80% of judges had at least *dazhuan* qualifications, which requires a minimum of two years of college level legal training.¹⁴⁴ Most judges have also undergone on-the-job training. Granted, a two-year *dazhuan* degree may not provide a solid foundation in law, and in some cases judges who obtain a *dazhuan* through night school or other means may learn very little about law. On-the-job training may also be inadequate in some cases. Nevertheless, it is a gross misrepresentation to state that only a tiny minority of judges have any legal training whatsoever. Nor should we rush to conclude that only a tiny minority are able to decide cases on the merits. As noted previously, many disputes encountered by judges in basic level courts do not involve complex legal issues and in some countries would be handled by lay judges with no or minimal legal training.

Complex social phenomena allow for many different interpretations and may result from a variety of causes. Nor is one necessarily required to

141. See *Swedish Arbitral Award Enforced in Beijing*, INT'L COM. LITIG., June 1, 1998, at 31. See also Charles Kenworthy Harer, *Arbitration Fails to Reduce Foreign Investors' Risk in China*, 8 PAC. RIM L. & POL'Y J. 393, 414, 419 (1999) (claiming Chinese courts “do as they please” when it comes to enforcement of arbitral awards); Greg Rushford, *Chinese Arbitration: Can It Be Trusted?*, ASIAN WALL ST. J., Nov. 29, 1999, available at 1999 WL-WSJA 30191114.

142. Peerenboom, *supra* note 134, at 263.

143. James Kynge, *Survey—China & The World Trade Organisation: Reform, but in a Communist State*, FIN. TIMES, Mar. 15, 2002, available at 2002 WL 16942332.

144. PEERENBOOM, *supra* note 99, at 61-62.

rehearse every argument and counter-argument every time one wants to comment on some aspect of the legal system. Nevertheless, it seems to me preferable to at least attempt to present an impartial and even-handed account of reforms rather than simply seizing whatever explanation would put the legal system and the ruling regime in the worst light. For instance, China has taken on many obligations as part of its accession to the WTO that are more onerous than those assumed by other countries.¹⁴⁵ These include legal system commitments such as agreeing to publish all trade related legislation in a single journal and providing an enquiry point that will provide Member States an authoritative explanation of trade laws within a maximum of forty-five days, as well as economic commitments that limit its ability to subsidize agricultural inputs such as fertilizer.¹⁴⁶ At one meeting attended by foreign and domestic legal scholars, many of the Chinese academics were upset that the government had conceded so much, comparing it to various infamous unequal treaties in China's past. However, when the question was raised as to why China would take on such burdensome obligations, one foreign commentator suggested that it was because China had no intention of abiding by its commitments. But surely there are many other possible explanations. It could be that Chinese leaders were simply eager to be in the WTO. Jiang Zemin might have seen accession as a way to solidify his legacy. Zhu Rongji might see it as a way to push through SOE reforms in light of persistent political opposition. Chinese leaders may have wanted to have an impact on the next round of WTO negotiations, which required that China have entered by the end of 2001. Some Chinese scholars in attendance suggested that the process was to blame. The terms of accession were not widely circulated within Chinese government circles. Key industries did not realize what the terms were until too late. In some cases, negotiators may not have had sufficient expertise in some areas and did not receive timely input from those within the relevant sectors.

At any rate, there is little reason to rush to the conclusion that China intends to renege on its obligations. While there is some room for debate, China's record with respect to honoring its treaty commitments is generally considered pretty good, or at least not materially worse than

145. The list of commitments in China's tailor-made accession agreement included 82 different points. In contrast, Ecuador made 21 special commitments, Bulgaria 26, Jordan 29, and Taiwan 63. See Leila Choukroune, *Rule of Law Through Internationalisation: The Objective of Reforms?*, 40 CHINA PERSP. 7, 12 (2002).

146. Nicholas Lardy, *Survey—China and the World Trade Organisation: Problems on the Road to Liberalisation*, FIN. TIMES, Mar. 15, 2002, available at 2002 WL 16942328.

other states.¹⁴⁷ Furthermore, violating “hard law” trade agreements such as WTO is considerably different than violating “soft law” human rights treaties. The worst that can happen in the latter case is public censure (although even that has proven difficult as China has managed to defeat every attempt to censure it in Geneva).¹⁴⁸ In the case of the WTO, however, Member States are subject to binding arbitration that could result in other Member States imposing economic sanctions on China.

The above are only a few of the many possible examples that could be cited where it seems China’s legal system has been subject to unduly harsh or at least one-sided criticism.¹⁴⁹ No doubt more could be said about these examples and the larger context in which the arguments occurred. In some cases, the basic point made by the author may be accurate, requiring only minor qualifications. The specific claims to which I object may not always be central to the author’s main argument or undermine the general thrust of the argument. Nor do I mean to suggest that all of the authors from whose works these examples are drawn focused only on the negative and failed overall to present a more balanced account of China’s legal reforms

147. See, e.g., Margaret Pearson, *China’s Track Record in the Global Economy*, CHINA BUS. REV., Jan.-Feb. (2000), at 48 (arguing that China takes its treaty obligations seriously). Cf. Michael Yahuda, *China’s Foreign Relations: The Long March, Future Uncertain*, 159 CHINA Q. 650 (1999) (suggesting somewhat more cautiously that China’s depth of commitment to various international treaties remains unclear).

148. KENT, *supra* note 97. Kent’s impressively detailed study of China’s interactions with U.N. human rights organs shows how China learned over time the rules and how to manipulate them to achieve its ends, and how it used its political and economic power to defeat attempts to censure it. Kent argues that China improved with respect to procedural compliance but showed less progress with respect to substantive compliance. She often treats this as a problem of cognitive learning or lack of internalization of norms. See, e.g., *id.* at 8. However, in many cases there may be a legitimate difference of opinion over the substantive norms and how they are to be interpreted and implemented. In other cases, it may not be cognitive deficiencies as much as a hard-headed calculation of what is in China’s interests. Overall, the picture that emerges is of China complying when it can and it is in its interest to do so and resisting otherwise. When not in its interest, China uses whatever techniques are at its disposal to resist, including procedural ploys, political pressure, economic pressure, and normative arguments. Whether China is significantly different in that regard from other countries is doubtful. In my view, one weakness in this otherwise wonderful study is its failure to question the substantive norms contained in international human rights documents. The various international rights are simply taken as an unqualified good. There is also a tendency to favor without serious scrutiny a universalist position over more particularistic, context-specific, or relativist interpretations and arguments. Yet human rights documents are notoriously vague and open to vastly different interpretations that call into question the coherence and internal consistency of the various documents. As a result, what is substantively required may not be as obvious as it first appears. For a discussion of the various ways allegedly universal human rights are localized, see Peerenboom, *Beyond Universalism and Relativism: The Evolving Debates About “Values in Asia”* (forthcoming 2003).

149. For further examples, see PEERENBOOM, *supra* note 1, where I also discuss some possible reasons for what seems to be a tendency to present China’s legal system in harsh terms, including the tendency to judge China according to liberal values and standards.

or that they are hostile to China.¹⁵⁰ In fact, I have deliberately chosen claims mainly from leading China law scholars and reporters who regularly write on China for major publications. I want to avoid the impression that I am simply attacking the claims of fringe elements out to demonize China or the views of those who know little about China. Despite room for argument over specific examples, when considered as a whole, the examples do show in my view a tendency to be unduly skeptical about the motives behind, and the possibilities for, reform, and to create an impression particularly among those who are not familiar with China that the legal system is much less effective and more alien than it actually is.

It is equally problematic, of course, to be overly optimistic, to be naïve about the various ways in which political power continues to trump law, or to downplay the significant institutional obstacles China faces in implementing even a thin rule of law. But an excessively negative view is likely to lead to despair and paralysis. If China does not intend to honor its WTO obligations, there is little point in the United States and others investing so much time and energy in working with China to establish the various mechanisms for implementing its obligations that China agreed to in its Protocol of Accession. If the reason for vague laws is that the Party wishes to continue to rule by policy, there is little point in trying to improve the quality of legal drafting. An excessively negative portrayal of China's legal system is also likely to lead to a misallocation of scarce energy and resources pursuing the wrong issues or the wrong solutions to problems because the source of the problem has been misidentified. For instance, focusing too much on the Party or ideology as an obstacle to the implementation of legal reforms shifts attention away from pressing institutional issues that are often the more immediate cause of problems in practice.

150. Lubman, for instance, acknowledges significant improvement with respect to the creation of rights via legislation, the establishment of a judicial hierarchy and a more professional judiciary, a reconstituted bar, better legal education, and an increasingly assertive legislature, all of which are steps away from Maoism. He even acknowledges certain "fragile harbingers" of a possible rule of law future for China. Nevertheless, he describes himself as cautiously pessimistic about the future of legality in China. While he and I both see progress and problems, he sees in China's much strengthened legal institutions at best the tender sprouts of rule of law, whereas I see sturdy young saplings in their prime growth years. See LUBMAN, *supra* note 63.

III. CONCLUSIONS: SOME REFLECTIONS ON CHINESE LEGAL EDUCATION AND RESEARCH

China is like the proverbial elephant. Too big for any one person to grasp in its entirety, how we see it depends on what part we happen to grab on to. The result is a diversity of views, including sometimes diametrically opposed views. But surely a diversity of views is healthy and to be expected. In the past, there were few significant disagreements about the legal system because there was not much to say about it. Everyone agreed the legal system was heavily politicized, best characterized as rule by law and only of marginal importance in understanding politics, economics, or daily life in China. As a result, many scholars focused their attention on historical issues rather than studying the contemporary legal system. Nowadays, the legal system commands attention. Yet, given the scope of legal reforms and the complexity of the legal system, it is highly unlikely that there will be the same level of consensus among scholars as to where the legal system is heading or what shape it will take. Meanwhile, differences in social-political philosophies and fundamental values will inevitably lead to heated debates about where the legal system *should* be heading and what shape it *should* take. We can expect then a similar range of divergent views and opinions as in other countries with more well-developed legal systems.

While diverse perspectives are welcome, they must be supported by law and facts. A certain amount of balance is required. There is a role for advocacy and critical theory, particularly given China's abuses in the human rights area and the tendency of legal scholars to assume liberal democratic rule of law as the only model for development. However, there is enough to criticize about the current system without having to exaggerate the problems.

The need for balance raises important methodological issues. In the past, and even to a large extent today, much scholarship on Chinese law has focused on doctrinal analysis of laws without any consideration of social context or how the laws are implemented. Bookstores are filled with book after book, often rushed out after a new law has been promulgated, offering "authoritative," line by line interpretations of the law. In many cases, the length of the book, generally tied to the amount of compensation paid the author, is inversely proportional to the level of insight or scholarly merit. There is, of course, still a need for doctrinal analysis. However, there is an even greater need at this stage for studies of how law is implemented.

Fortunately, many scholars are increasingly drawing on their own experiences and greater access to legal actors in China to examine law in practice. This often leads to insightful observations that help us better understand the state of legal developments in China and make concrete what at times may seem like excessively abstract and detached theorizing about rule of law.¹⁵¹ On the other hand, there is a danger of excessive reliance on personal anecdotes. In some cases, a single picture is worth more than a thousand words. But in other cases, it can give us a very inaccurate and incomplete perspective. Legal systems are inevitably imperfect. It is always possible to find examples of grave miscarriages of justice in any system. Surely Americans would not want their legal system judged solely on the basis of muckraking articles in the *New York Times*.

In many cases, systematic empirical studies are needed to clarify the picture. Chinese scholars have increasingly turned to empirical work, conducting a number of important studies on the judiciary, administrative law system, the implementation of the criminal procedure law, rights consciousness, and the role of law in the countryside as seen from the perspective of rural basic level courts.¹⁵² Although some empirical studies suffer from serious methodological flaws, many scholars are now becoming more aware of methodological issues.

Foreign legal scholars on the whole have not been inclined to conduct empirical studies, even though foreign sociologists, economists, and political scientists have done empirical work in China for years.¹⁵³ In part, this is because some of the more interesting topics, such as the role of Party organs in the daily operation of the legal system, are too politically sensitive (though to some extent, this problem can be overcome by

151. See, e.g., HE WEIFANG, JUTI FAZHI [CONCRETE RULE OF LAW] (2001).

152. See, e.g., FAZHI DE LIXIANG YU XIANSHI [THE IDEAL AND REALITY OF THE RULE OF LAW] 33 (Gong Xiangrui ed., 1993) (empirical study of the courts); ZHONGGUO XINGZHENG FAZHI FAZHAN JINCHENG DIAOCHA BAOGAO [SURVEY REPORT ON THE DEVELOPMENT AND PROGRESS OF CHINA'S ADMINISTRATIVE RULE OF LAW] 449 (Jiang Mingan ed., 1998) (empirical study of administrative law); CHEN WEIDONG, XINGSHI SUSONGFA SHISHI WENTI DIAOYAN BAOGAO [Survey Report on the Problems in Implementation of Criminal Procedure Law] (2001); Xia Yong, *Xiangmin Gongfa Quanli de Shengcheng* [The Formation of Chinese Rural Citizen's Rights in Public Law], in ZOUXIANG QUANLI DE SHIDAI [TOWARD AN AGE OF RIGHTS] (Xia Yong ed. 1995); SU LI, *supra* note 124 (showing an empirical study of rural basic level courts).

153. Again, there are exceptions. See Pitman Potter, *Riding the Tiger: Legitimacy and Legal Culture in Post-Mao China*, 138 CHINA Q. 325 (1994) (writing based on survey work of émigré attitudes toward the legal system); Isabelle Thireau & Linshan Hua, *Legal Disputes and the Debate about Legitimate Norms*, in CHINA REVIEW (Kuan Hsin-chi & Maurice Brosseau eds., 1997) (examining practice of lawyers in civil disputes). More recently, Margaret Woo has conducted an survey of divorce litigants that has led to many interesting insights. See Margaret Woo, *Shaping Citizenship: Chinese Family Law and Women* (unpublished paper, on file with author).

working with Chinese collaborators). It may also be because leading law schools at least in the United States have historically placed more emphasis on theory and doctrinal studies rather than empirical studies. Or it may be because of the lack of readily available funding or that such work is very demanding and time-consuming.

In any event, empirical studies require a sound methodology. Researchers need to be clear about what the goal of empirical research is and what assumptions underlie the project. Thus, as Clarke rightfully cautions, researchers must take care not to assume that courts must function in the way they do in liberal democratic rule of law systems lest they predetermine the results.¹⁵⁴ Another issue facing researchers is how to achieve a representative sample. In part, the problem is due to the size and diversity of China. In addition, however, researchers often select locations based on their connections to key individuals. The reason for this is straightforward. By relying on people they know, they are more likely to get a true and complete account than if they interviewed strangers. While understandable, this practice, for better or worse, results in selection bias and calls into question the representativeness of the sample.¹⁵⁵

Although the lack of a firm empirical foundation is frequently an issue, an equally pressing issue is how to analyze, interpret, and evaluate the tremendous amount of information that is now available to legal scholars. Foreign Chinese legal scholars, foreign lawyers working in China, and many Chinese legal scholars and citizens are sometimes understandably impatient with ongoing shortcomings in the legal system. The lack of a sufficiently broad comparative and historical context may cause observers to fail to appreciate both how much progress China has made in a relatively short time and how difficult the process of implementing rule of law is for all countries. As Mattei rightly notes, Chinese law has become a field unto itself, with specialists tending to discuss among themselves rather than to participate in the general enterprise of comparative law. By pointing out several common characteristics of many legal systems in transition, Mattei provides sometimes overly specialized China scholars a broader comparative perspective to view China's legal reforms. Once one overcomes the traditional bias of Mattei's approach and views China as a legal system in transition, it becomes possible to compare China to other

154. See Clarke, *supra* notes 87-88 and accompanying text.

155. In some cases, an empirical study may not be necessary. We may already have enough information about some issues to understand the problem and identify possible solutions. Legislative inconsistency is an example. The basic reasons for legislative inconsistency are clear enough, as is the fact that it is serious problem.

countries that have undergone or are undergoing transitions and thus, ironically, to achieve Mattei's goal of bringing China into the mainstream of comparative law.

It is especially important that China specialists adopt a broader comparative perspective because China has borrowed freely from other countries. China's legal system is a prime example of a mixed system, with elements of civil law, common law, socialist law, and to a limited extent, traditional law. What may strike a common law lawyer as perverse may be a common feature in civil law systems. Without a broader comparative perspective, there is a tendency to portray features of China's legal system as odd or alien, and to judge them wanting.¹⁵⁶ Given that many foreign China specialists are more familiar with China's legal system than their own, there is also a tendency to compare the detailed reality of China to an idealized version of their own system, with the predictable result that China's system seems vastly inferior and deficient.

In reflecting on the implementation of rule of law in China, scholars should not only focus on comparisons to contemporary legal systems but also turn to history for lessons. Rule of law was not achieved overnight in Europe or America. The process took centuries and involved many of the kinds of institutional conflicts and battles for turf that are now occurring in China. At the same time, scholars should not limit themselves to Western countries. The experiences of China's Asian neighbors may prove more relevant and instructive. Despite their many differences, some of these countries may share more similar traditions. Perhaps more importantly, many of them are, like China, developing states trying to cope with a historical context very different from that in which Western legal systems developed. China and its neighbors must now contend with the forces of globalization, increased economic interaction and foreign trade, the importance of multinational companies and foreign direct investment to domestic economic growth, the role of international organizations such as the IMF and the WTO, and the normative pressure of the human rights movement. The tremendous diversity within Asian legal systems may provide China with a valuable menu of options on which to base its own reforms.

Closer attention to the experiences of Asian countries may also help China specialists avoid Euro-American centricism in conceptualizing the

156. This was especially evident when foreign lawyers were asked to comment on the contract law. Those from a civil law country frequently objected to features modelled on a common law system while lawyers from common law countries found odd features that are typical in civil law systems. Comments on Draft of Unified Contract Law (on file with author).

role of law in China. PRC scholars frequently point out the dangers of trying to import “Western” rule of law, and call for theories of rule of law that build on China’s native resources and are consistent with China’s traditions and current circumstances. But few scholars specify which native resources are relevant today. Nor has there been enough work done on developing in a systematic way a comprehensive alternative political philosophy to liberal democracy to serve as the foundation for alternative thick conceptions of rule of law. While PRC political scientists such as Liu Junning and Pan Wei have crossed disciplinary borders to discuss rule of law, PRC legal scholars seem less inclined to branch out into political philosophy other than to familiarize themselves with the thoughts of major Western philosophers and legal theorists, most of whom fall within the liberal camp. Few seem interested in the philosophical debates about communitarianism, much less New Confucianism or New Conservatism.

Whether communitarianism, New Confucianism, or Neo-authoritarianism will be able to provide the basis for a normatively attractive alternative political philosophy to liberalism remains to be seen. As a threshold matter, it would seem that any such theory must be compatible with modernity, including some form of a market economy, democracy, rule of law and human rights. In that sense, Neo-authoritarianism seems more like a bridge to some form of democratic polity than a stable end point.

To date, New Confucianism has attracted the most attention from scholars, not only in China but in other Asian countries and even in the West.¹⁵⁷ New Confucians suggest that Confucianism can be adapted to

157. See TU WEIMING, *CONFUCIAN THOUGHT: SELFHOOD AS CREATIVE TRANSFORMATION* (1985); DAVID HALL & ROGER T. AMES, *DEMOCRACY OF THE DEAD* (1998) (arguing that despite serious defects to traditional Confucianism illustrated by the isolation of minorities, gender inequities and an overall disinterest in rule of law, there are resources within the Confucian tradition for constructing a coherent model of a viable and humane democracy that remains true to the communitarian sensibilities of traditional China while avoiding many of the defects of rights-based liberalism, and suggesting that a post-socialist China is more likely to resemble a Deweyan version of Confucian communitarianism than a liberal rights-based democracy); WM. THEODORE DE BARY & TU WEIMING, *CONFUCIANISM AND HUMAN RIGHTS* 234-60 (1998) (containing several essays exploring the compatibility of Confucianism and human rights); WM. THEODORE DE BARY, *ASIAN VALUES AND HUMAN RIGHTS: A CONFUCIAN COMMUNITARIAN PERSPECTIVE* (1998). A number of scholars from Yonsei University in Seoul, universities in Hong Kong as well as from the United States and China have held a series of conferences aimed at exploring the contemporary relevance of Confucianism. See DANIEL BELL & HAHM CHAIBONG, *CONFUCIANISM FOR THE MODERN WORLD* (forthcoming). One of the strengths of the book is that the purpose was to move beyond the oftentimes frustratingly abstract assertions about the compatibility or incompatibility of Confucianism with capitalism, democracy, rule of law and human rights to develop coherent Confucian variants of these four general institutions. Several chapters in the book identify and make at least a prima facie case for one or more key Confucian values, institutions or practices and then try to demonstrate their value for contemporary

modern times and that to claim otherwise is to essentialize Confucianism in an inappropriate way.¹⁵⁸ This project seems worth pursuing, though there are a number of serious questions to be answered and obstacles to overcome.

First, there is no accepted definition of Confucianism. Now, it is understandable why there is not. Confucianism is a vague term that covers two millennia of diverse ideas and practices. Thus, identifying the key or core values or elements of Confucianism is problematic to say the least. Yet, in the absence of any attempt to state the key elements or parameters of Confucianism, advocates of New Confucianism are left to their own devices. One typical approach is to scan the tradition for values or practices that seem at least on their surface similar to values and practices associated with modernity, while ignoring the context in which these ideas were embedded and all of the related values and practices that are inimical to modernity. When undesirable features are noted, they are quickly dismissed. Confucianism is a living tradition, and traditions change. But that does not mean that one is free to attribute anything one wants to Confucianism. It may be possible to simply reject some ideas—such as the subjugation of women—in favor of other ideas. But can one reject the notion of a paternalistic government or the inegalitarianism inherent in the *li*/rites (assuming one would want to)? And can one simply substitute democracy and elections as the basis for legitimacy rather than the traditional moral cultivation of the leaders and the mandate of heaven? Advocates must address these thorny methodological issues that arise in rendering Confucianism compatible with modernity.

The empirical basis for the claim that Confucianism is still important in contemporary societies also seems rather weak.¹⁵⁹ One might point to countries such as South Korea, Taiwan, and even Singapore as examples of modern states influenced by Confucianism. Yet are these countries really Confucian in any meaningful sense? It is often difficult to

society by considering specific institutions or practices.

158. For an extreme statement of this position that would seemingly allow Confucianism to transform itself into Rawlsian liberalism, see Roger Ames, *New Confucianism: A Native Response to Western Philosophy*, in CHINESE POLITICAL CULTURE, 1989-2000 70, 71, 80 (Shiping Hua ed., 2001) (claiming that to ask the question "what is Confucianism?" essentializes Confucianism by "treating it as a specific ideology that can be denoted with varying degrees and accuracy," and that "this assumption is likely to add confusion", and arguing that "any particular doctrinal commitment or set of values that we might associate with Confucianism needs to be qualified by its resolutely porous nature, absorbing into itself, especially in periods of disunity, whatever it needs to thrive within its particular historical moment").

159. Jeremy T. Paltiel, *Confucianism Contested: Human Rights and the Chinese Tradition in Contemporary Chinese Political Discourse*, in DE BARY & TU, *supra* note 157, at 270-96.

empirically verify the link between Confucianism and contemporary institutions or practices. Frequently, Confucianism is simply assumed to be what is doing the explanatory work, when other alternatives seem just as likely. What remains of Confucianism seems less like a coherent system and more like isolated values, often hardly unique to Confucianism, that serve as a communitarian corrective on liberal extremism.

Perhaps greater attention should be focused on developing communitarian or collective alternatives to liberalism without worrying so much about the link to Confucianism. There may not be much gained by hanging on to the label of Confucianism at this point. But even if there is some explanatory power in Confucian communitarianism, Confucian democracy, Confucian rule of law, Confucian human rights, or even a Confucian liberalism, much more work needs to be done to develop these ideas into coherent theoretical concepts and to spell out in sufficient detail the implications of these alternative forms of modernity in terms of institutions, norms, legal rules, social practices, and outcomes.

In the United States, much of this kind of theoretical legal scholarship grows out of constitutional law jurisprudence and reflection on leading cases. However, it is unlikely that constitutional law will become a source for jurisprudential debates in China. The Constitution may play a greater role in the future, as suggested by a recent Supreme People's Court reply holding the Constitution directly justiciable.¹⁶⁰ But there is, as of yet, no constitutional court or effective body for constitutional review, and Chinese judges in ordinary courts have little authority to break new ground. China's leading legal theorists are therefore not likely to be drawn from the ranks of constitutional law scholars.¹⁶¹ Rather, the more

160. The Supreme Court stated that the plaintiff's basic right to an education as provided in the constitution should be protected even though there was no implementing law regarding the right to education. While a number of questions remain as to the Court's interpretation, it would appear that the decision opens the door to parties to directly invoke the constitution when at least their basic (*jiben*) constitutional rights have been violated, even in the absence of implementing legislation, thus making the constitution directly justiciable. See the Supreme Court's Reply, No. 25, issued on August 13, 2001.

161. That said, it may be time to reconsider the value of case studies. In the past, scholars have shied away from studies of cases for various reasons. Few cases were available, except in official collections where the case had been edited for instructional purposes, and even then the opinions were often short on legal analysis. Moreover, as a civil law rather than a common law system, cases lacked precedential value (though lower level courts were obliged to follow the model cases published by the Supreme Court). Today, many more cases are widely available from all levels of courts without editing. While opinions generally still are short on legal analysis, the Supreme Court has called for longer, better reasoned opinions. With changes in technology, courts are more likely to be aware of leading cases from other courts. Although such cases are not binding, courts may find them persuasive and thus follow them. In any event, even if the cases lack precedential value, an analysis of cases may be informative with respect to many issues (including how law is interpreted and applied in practice,

theoretically oriented scholars generally teach jurisprudence (*faxue*).¹⁶²

A primary research focus in the near future is likely to continue to be legal reform issues, including theories of reforms, institutional analyses, and studies of the relationship between norms and institutions. This presents challenges, particularly for Chinese legal scholars who want to actively participate in the reform process.¹⁶³ These days those on the frontline of legal reforms (judges, prosecutors, legislators, lawyers, and officials in government agencies—collectively, practitioners) frequently complain that legal scholars have failed to provide an adequate theoretical basis for reforms. Practitioners claim that reforms are chaotic and out of control—there is no guiding plan. The failure to think through larger issues such as what the purpose of law in China is—or rather, what the purposes of law in China are—results in haphazard, inconsistent, and ill-conceived reforms that often do as much harm as good. Practitioners also argue that academics are out of touch, too idealistic, and unrealistic about the possibilities for reform. In addition, they claim that academics rely too heavily on the U.S. and common law systems, or that academic reformers latch onto one aspect of a foreign legal system without understanding how all of the parts relate. For example, trial reforms in civil cases led to a more adversarial process as in common law states. Yet the reforms were not accompanied by changes in the process for pre-trial discovery. Nor did the reformers give adequate consideration to the role and capacity of Chinese lawyers and their ability to effectively present their client's case.

Practitioners have therefore called on academics to devise new theories and an overall plan for reforms that fit China's current circumstances. Recently, many academics and practitioners have advocated the establishment of a legal reform committee whose tasks would include coordinating reforms across departments and different branches of government; gathering and disseminating information; mediating conflicts

whether there are regional differences in the interpretation of state laws, whether ideological or political conflicts are evident in case decisions, reflecting different political factions despite the general single party socialist framework, etc.). For one illuminating study of cases, see Frances Foster, *Linking Support and Inheritance: A New Model From China*, 1999 WIS. L. REV. 1199 (arguing that the U.S. model could benefit from adopting certain doctrines and practices of PRC inheritance law).

162. Constitutional law scholarship in the sense of reflection on the development of constitutional norms and practices may become significant, though in most cases such scholarship is not likely to be done by constitutional law professors, who tend to focus on doctrinal analysis. Rather, it is likely to be done by legal sociologists, legal theorists and academic-minded practitioners in such entities as the NPC.

163. Other scholars see their role as critics and thus wish to distance themselves from government-centered reform efforts to maintain their independence and a critical perspective. See HE, *supra* note 151, at 100-02.

among different interest groups and governmental departments and organs; ensuring that reforms work together as a package rather than undermining each other; sequencing reforms so that the powers granted an entity are consistent with its level of development and institutional capacity; and devising a long term, comprehensive reform agenda. Such a committee could no doubt play a positive role. But, it is no panacea, and indeed it raises a number of important issues.¹⁶⁴

Although one can appreciate the desire for an overall, coherent plan for reforms, no country has ever successfully implemented rule of law in accordance with some preordained theoretical blueprint. Legal reforms are necessarily evolutionary, context-specific and path-dependent. Moreover, China is increasingly pluralistic. As noted, there are important differences in the conceptions of rule of law and the different emphases in the purposes of law among central leaders, local officials, academics, and Chinese citizens, and within these broad categories as well. Urban and rural residents are likely to experience law in different ways; business people and workers are likely to have different demands from the legal system; and surely not all central leaders think alike. Thus, no single view of law or single theory can capture the diversity of perspectives.

The diversity of perspectives may undermine or at least complicate the committee's efforts to mediate conflicts of interest and develop a unified agenda for legal reforms. Nevertheless, there is some value in clarifying different theoretical positions and considering their potential impact on legal reforms, in part to facilitate an informed debate about the merits of the various conceptions. Further, it is possible and indeed likely that some reforms will receive broad-based, if not unanimous support, notwithstanding the differences in theoretical perspectives. Thus, one of the tasks for the committee is to identify common ground and opportunities for engagement, cooperation, and progress. But that requires that members of the committee, and academics who are interested in reforms more generally, be intimately aware of what is happening on the ground and of the day-to-day problems and constraints facing the various institutional actors.

Even assuming that it is possible to achieve consensus on the rough outline of some long term reform agenda, the agenda would necessarily be

164. An initial issue is what type of committee it should be and who should be on it. The committee could be a non-government organization, a special committee under the NPC or even a committee affiliated with the Party. I have discussed briefly the relative merits of these structures in a report prepared by the Ford Foundation available upon request from author.

fairly abstract and subject to revisions as the situation evolved. While there is no shortage of technical issues requiring attention, identification of issues and possible solutions is largely something that must come from those on the frontlines. Academics who want to contribute to reforms in a meaningful way need to work with practitioners, to combine theory with practice, and to base theories on a firm empirical foundation derived from survey work and case studies. What is needed is creative, constructive, empirically-based theory from academics personally engaged in legal reforms, working in close collaboration with practitioners who, in many cases, will take the lead in identifying specific issues and solutions.