

# Inspiring Global Professionalism: Challenges and Opportunities for American Lawyers in China

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## INTRODUCTION

As noise from the busy Beijing streets filters into the law office, the American attorney studies the detailed government form. In the form, the Ministry of Justice of the People's Republic of China demands to know the names of the attorney's clients, the location and nature of the clients' projects, and the amount of investment behind the projects.<sup>1</sup> The attorney, accustomed to greater autonomy from the government and stricter client-confidentiality rules, knows the form complicates her relationship with American business clients.<sup>2</sup> This client questionnaire is only one example of China's efforts to restrict the activities of foreign lawyers. The Chinese Government also bars most foreign law firms from practicing Chinese law, including issuing opinions about the law.<sup>3</sup> This rigorous government regulation of foreign attorneys occurs amid the growth of a legal system in China, a country whose past is filled with philosophical, and at times violent, rejections of the rule of law and the legal profession. As West meets East more frequently, American attorneys are often lost in the deep divide of the cultures' philosophical differences and forced to find creative solutions.

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1. See *Lawyer-Client Privilege Under Challenge*, S. CHINA MORNING POST, Nov. 25, 1996, at 2, available in 1996 WL 14296822 [hereinafter *Lawyer-Client Privilege*].

2. In the United States, ethical canons demand attorneys maintain confidentiality in client dealings, and laws of evidence protect some information entirely from falling into the hands of the government, opposing party, or judge. See STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 21 (4th ed. 1995). Violation of ethical and legal canons may bring the attorney under the judicial system's disciplinary wing or leave attorneys open to lawsuits. See *id.* at 22. "We simply cannot divulge any of this information," an attorney in Beijing lamented soon after the government began its inquiries. *Lawyer-Client Privilege*, *supra* note 1, at 2. "To do so would subject us to disciplinary action—even disbarment—in our home jurisdictions, and litigation from our clients." *Id.*

3. See Matt Forney, *Outside the Law: Reform Reversals Hit Foreign Law Firms in China*, FAR E. ECON. REV., Dec. 26, 1996-Jan. 2, 1997, at 18. Many law firms hire local Chinese attorneys to solve this dilemma, but a recent law threatens to end this practice. See *id.* The Ministry of Justice delayed the implementation of this law, but no one is certain how long this delay will last. See Chris Klein, *China Relents on Its Law Firm Rules*, NAT'L L.J., Dec. 30, 1996-Jan. 6, 1997, at A7. Only about 16 law firms are currently licensed to represent clients in China. See Sean Horgan, *Baker & Daniels Plan Office in China*, INDIANAPOLIS STAR, Feb. 17, 1998, at C7.

Out of this struggle arises an opportunity to redefine the role of the attorney abroad. Globalization, a force that allows ideas to transcend national boundaries and economic markets to integrate, is broadening the legal practice of attorneys. In countries such as China, where concepts of the rule of law and the legal profession are not supported by expansive historical practice or ideological traditions, American attorneys can assist in the development of a professional consciousness and vision. This Note argues that a public service obligation should travel with American attorneys who live and work abroad. Beyond an ambition to tap into the vast foreign consumer markets, these attorneys should help promote the legal profession, and thereby the rule of law, as transnational carriers of legal ethical norms. Professional responsibility should be defined in global rather than domestic terms. Focusing on the Chinese experience, this Note seeks to provide a method for approaching this international involvement. It is a method that requires knowledge of a country's history and a respectful treatment of its traditions.

The Chinese legal profession has continually met with daunting challenges. Just thirty years ago, the Cultural Revolution condemned thousands of Chinese attorneys to labor camps. Today, attorneys play an important role in China's drive to modernize its economic system.<sup>4</sup> Yet, with only about 100,000 attorneys, one for every 12,000 Chinese, the country still faces a shortage of legal personnel. The government stresses a need for 50,000 more attorneys by 2000,<sup>5</sup> but even as the number of attorneys improves, the public remains unsure of them and reports of corruption surround them.<sup>6</sup> Many Chinese attorneys lack university degrees and practical training. The Lawyers' Law, which took effect in January 1997, outlines new professional requirements for Chinese attorneys.<sup>7</sup> It is the

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4. See *The Market Economic System Calls for Building a Contingent of Lawyers*, MINZHU YU FAZHI [DEMOCRACY AND THE LEGAL SYSTEM], Feb. 21, 1996, at 32, translated in F.B.I.S.-CHI-96-134, July 11, 1996, at 11. This report quotes the Vice Chairman of the Standing Committee of the National People's Congress, Wang Guangying, who stated: "The development of a socialist market economy is inseparable from the lawyer service, maintaining political and social stability are inseparable from the lawyer service, and safeguarding national interests and protecting the legitimate rights of citizens and legal persons are inseparable from the lawyer service." *Id.* at 12.

5. See William P. Alford, *Tasselled Loafers for Barefoot Lawyers: Transformation and Tension in the World of Chinese Legal Workers*, 141 CHINA Q. 22, 30 (1995); *Law Leaders Urge Expanded Legal Education*, Zhongguo Xinwen She, Jan. 8, 1996, translated in F.B.I.S.-CHI-96-008, Jan. 11, 1996, at 22, 22-23; Ma Chenguang, *Role of Lawyers to Be Expanded*, CHINA DAILY, June 24, 1996, at 13, available in 1996 WL 8531404.

6. See *China Drafts Rules for Lawyers, Probes Ethics*, Reuters North American Wire, Nov. 28, 1996, available in LEXIS, News Library, Curnws File; Ma, *supra* note 5, at 13 (quoting Deputy Justice Minister Zhang Geng as saying "[a] small number of the lawyers are unskilled, others have bad ethics and even knowingly break the law") (alteration added); Richard Tomlinson, *A Much Criticized Legal System Takes Tentative Steps Toward Reform*, INT'L HERALD TRIB., Nov. 25, 1996, at IV, available in 1996 WL 4094667 (quoting a statement by a Beijing attorney that many Chinese citizens avoid litigation because they distrust the system and worry about the cost).

7. See *Text of Lawyers' Law*, Xinhua, May 15, 1996, translated in F.B.I.S.-CHI-96-109, June 5, 1996, at 41 [hereinafter *Lawyers' Law*]; *China Lawyer System Needs More Flexibility*, CHINA DAILY, Feb. 13, 1997, at 4, available in LEXIS, News Library, Curnws File [hereinafter

most authoritative law to address the regulation of lawyers since 1949,<sup>8</sup> and it is the only law recognizing that lawyers represent clients and not the state.<sup>9</sup> Because neither Chinese attorneys nor the Chinese Government are accustomed to an independent legal profession,<sup>10</sup> realizing the goals of this law will take time. American attorneys can help by educating Chinese attorneys about the importance of both a rule of law and a professional consciousness. Assisting this developing legal profession in China may in turn help ensure the predictability and uniformity in legal enforcement so necessary for continuing Western investment in Asia. And, promotion of a more autonomous, self-regulating Chinese legal profession may also lead to greater flexibility and freedom for all foreign attorneys in China.<sup>11</sup>

Part I of this Note briefly discusses the importance of an autonomous, duty-bound legal profession from a liberal, American perspective and highlights the ethical imperative to promote the development of the law and legal profession. Part II provides a comparative look into China's legal profession through an examination of the country's unique historical and philosophical past. Part III offers ways of tailoring Western systems and values to fit Chinese traditions and reality. With this Part, the author hopes to give American attorneys a theoretical starting point for active involvement with the Chinese legal profession. Finally, Part IV provides practical examples of involvement and argues that American attorneys should act with an understanding of enduring Chinese traditions.

#### I. THE LEGAL PROFESSION UNDER AMERICAN LIBERALISM: AUTONOMOUS AND DUTY BOUND

The American legal profession is itself a vast topic.<sup>12</sup> Certain characteristics help define it, including autonomy through self-regulation, a commitment to public service, and "a sense of professional community."<sup>13</sup> Ethical standards, promulgated and enforced by state bar associations and courts, are vital to the

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*China Lawyer System*].

8. See *China Lawyer System*, *supra* note 7, at 4.

9. See U.S. Dep't of State, *China Country Report on Human Rights Practices for 1997* (visited Apr. 7, 1998) <[http://www.state.gov/www/global/human\\_rights/1997\\_hrp\\_report/china.html](http://www.state.gov/www/global/human_rights/1997_hrp_report/china.html)> [hereinafter *China Country Report*].

10. This is most poignantly shown by a defense attorney's lack of any real ability to assert a client's innocence. See, e.g., Donald C. Clarke & James V. Feinerman, *Antagonistic Contradictions: Criminal Law and Human Rights in China*, 141 CHINA Q. 135, 140 (1995); Timothy A. Gelatt, *Lawyers in China: The Past Decade and Beyond*, 23 N.Y.U. J. INT'L L. & POL. 751, 762, 781-82 (1991).

11. See Alford, *supra* note 5 (arguing that a lack of professional ethics is a serious detriment to Chinese legal development); *infra* Part IV.

12. See Colin Croft, *Reconceptualizing American Legal Professionalism: A Proposal for Deliberative Moral Community*, 67 N.Y.U. L. REV. 1256, 1262-321 (1992) (providing a historical and sociological analysis of the American legal profession).

13. *Id.* at 1267 (addressing the attributes of professionalism). Other attributes include mandatory formal education, an economic monopoly in an area that involves issues of importance to both individuals and society, and interpersonal relationships between the professionals and their clients. See *id.* at 1266-67.

self-regulation and growth of the profession.<sup>14</sup> The preamble to the American Bar Association's Model Rules of Professional Conduct introduces the concept of the legal professional with the words, "[a] lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice."<sup>15</sup> The American legal profession has expressed such a commitment to public service since its early colonial days. English barristers taught the colonial lawyers to serve both the public and the judicial system and to interact with their colleagues in an honest and congenial manner.<sup>16</sup> With the rise of professionalism and the development of capitalism occurring at about the same time in both England and America, the tenets of the legal profession's ideology also became infused with norms of democratic liberalism.<sup>17</sup> This Part explores liberalism's influence on the American legal profession, providing an analytical framework with which to compare the Chinese experience. This Part also offers a normative vision for the legal profession in an expanding global environment.

Liberalism is fundamentally concerned with individual liberty, self-determination, and self-government. This theory "defines an ideal society as one in which each individual is guaranteed an inviolable sphere of freedom in which to pursue her independent self-interests. It assumes that this sphere of freedom can be guaranteed by a neutral, independent judiciary through the protection of constitutional rights."<sup>18</sup> The rule of law is essential to liberalism. This legal principle holds both the individual and her government equally answerable to the law and sets up a system in which everyone is entitled to a trial to decide whether punishment is due.<sup>19</sup> Individual rights are "universal" and "natural," and liberal democracies view their constitutions as supreme laws that protect individuals from government abuses.<sup>20</sup> In the United States, "rights are moral principles" that "impose limits on the interests of others, the good of society, and the will of the majority."<sup>21</sup> In *West Virginia State Board of Education v. Barnette*, the U.S. Supreme Court stated:

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14. Contrast this with the new Lawyers' Law, passed in China by its legislature. See *infra* text accompanying note 112. China is not the only country to have its legislature promulgate ethical guidelines for lawyers. See Malini Majumdar, *Ethics in the International Arena: The Need for Clarification*, 8 GEO. J. LEGAL ETHICS 439, 453 (1995) (arguing for the establishment of a "worldwide code of ethics" to help clarify a foreign lawyer's obligations in the global market) (citing Olga M. Pina, *Systems of Ethical Regulation: An International Comparison*, 1 GEO. J. LEGAL ETHICS 797 (1988)).

15. MODEL RULES OF PROFESSIONAL CONDUCT preamble para. 1 (1995).

16. See Croft, *supra* note 12, at 1281-82.

17. See *id.* at 1270.

18. Peter Lin, *Between Theory and Practice: The Possibility of a Right to Free Speech in the People's Republic of China*, 4 J. CHINESE L. 257, 266 (1990).

19. See Jonas Alsén, *An Introduction to Chinese Property Law*, 20 MD. J. INT'L L. & TRADE 1, 17 (1996).

20. *Id.* at 6-7, 11. Liberal theorist John Locke argued that individuals empower government under a social contract theory, and that the government must stay within the boundaries of the powers provided it by these individuals. See Randall P. Peerenboom, *Rights, Interests, and the Interest in Rights in China*, 31 STAN. J. INT'L L. 359, 375 (1995).

21. Peerenboom, *supra* note 20, at 361.

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.<sup>22</sup>

This view of rights as antimajoritarian supports the separation of the legal profession from the government in terms of regulation. In a society where attorneys hold a monopoly on the rule of law, access to the law becomes critical for the realization of individual goals.<sup>23</sup> To protect the rights of individuals, it also becomes important for the attorneys to work for the individual client and not the government. As further protection, the legal profession in the United States is mostly self-regulating. This self-regulation, together with its accompanying autonomy over the profession's internal affairs, "is widely viewed as a 'hallmark of professional status', and is accomplished through the control of entry into the profession, the promulgation and enforcement of an ethics code or code of conduct, and a professional review mechanism."<sup>24</sup> Codes of ethics, including the Model Rules of Professional Conduct, assert control over the behavior of attorneys.<sup>25</sup> This helps ensure more ethical lawyers without imposing unnecessary government controls and intrusions that might hinder the lawyer's ability to meet the individual client's needs within the limits of the law.

Ethics codes also encourage attorneys to consider the importance and future of their profession, their societies, and the law.<sup>26</sup> In the preamble to the Model Rules, American lawyers are asked to "seek improvement of the law" and "cultivate knowledge of the law beyond its use for clients, [and] employ that knowledge in reform of the law."<sup>27</sup> The preamble emphasizes a need for attorneys to serve the public and not just their own interests.<sup>28</sup> Further, Rule 6.1 states that attorneys "should aspire" to dedicate at least fifty hours a year to pro bono service, and this service may include activities that help improve the law, legal system, or legal profession.<sup>29</sup> U.S. Supreme Court Justice Sandra Day O'Connor noted the importance of a public service obligation:

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22. 319 U.S. 624, 638 (1943).

23. See Stephen L. Pepper, *The Lawyer's Amoral Ethical Rule: A Defense, Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613, 617. Professor Pepper argues that in order to protect the individual autonomy and equality of the client, a lawyer should not be required to counsel clients on morality.

24. Croft, *supra* note 12, at 1267-68.

25. See GILLERS, *supra* note 2, at 2-3.

26. See MODEL RULES OF PROFESSIONAL CONDUCT preamble paras. 1-7 (1995); CODE OF CONDUCT FOR LAWYERS IN THE EUROPEAN COMMUNITY Rule 1.1 (1988).

27. MODEL RULES OF PROFESSIONAL CONDUCT preamble para. 5. Lawyers from the member states of the European Union follow the Code of Conduct for Lawyers in the European Community, a framework of professional conduct rules that applies to all cross-border activities. This code also directs attorneys to serve the public interest, stating that, "[i]n a society founded on respect for the rule of law[,] the lawyer fulfils a special role." CODE OF CONDUCT FOR LAWYERS IN THE EUROPEAN COMMUNITY Rule 1.1.

28. See MODEL RULES OF PROFESSIONAL CONDUCT preamble paras. 5-6.

29. *Id.* Rule 6.1.

One distinguishing feature of any profession, unlike other occupations that may be equally respectable, is that membership entails an ethical obligation to temper one's selfish pursuit of economic success by adhering to standards of conduct that could not be enforced either by legal fiat or through the discipline of the market. There are sound reasons to continue pursuing the goal that is implicit in the traditional view of professional life. Both the special privileges incident to membership in the profession and the advantages those privileges give in the necessary task of earning a living are means to a goal that transcends the accumulation of wealth. That goal is public service, which in the legal profession can take a variety of familiar forms.<sup>30</sup>

As the Western idea of the rule of law closes in on the rest of the world, American attorneys should begin to view their own professional responsibilities from a more global perspective. The "public" should be seen as stretching across borders. This proposed global obligation to serve the public and improve the law should encourage American attorneys to help develop the Chinese legal profession. Given their special relationship to the rule of law, and indeed their need for it, international attorneys should not just pass this role on to international businesspeople or government officials.

In offering this help to the Chinese legal profession, American lawyers are, of course, greatly constrained by the Chinese Government. They can only accomplish small, well-defined goals, such as helping train legal personnel or lobbying the government for less regulation. Attainment of these goals, however, could influence the future of the legal profession and the rule of law in China.<sup>31</sup> Unfortunately, predicting the chances of success is difficult. As a Chinese scholar argues, "[o]ne basic limitation on current development . . . remains the dictates of politics. It is . . . hazardous to predict China's future development."<sup>32</sup> The following Part details China's historical and ideological attitude toward attorneys, showing just how true this warning is.

## II. THE LEGAL PROFESSION IN CHINA: INSIGHT INTO A TROUBLED PAST, VIBRANT PRESENT, AND HOPEFUL FUTURE

The year was 1820 and an elderly Chinese man stood convicted of being a "sung kun," or a "litigation trickster."<sup>33</sup> His crime: preparation of five simple

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30. *Shapiro v. Kentucky Bar Ass'n*, 486 U.S. 466, 488-89 (1988) (O'Connor, J., dissenting) (disagreeing with the Supreme Court's holding that a lawyer's solicitation of potential clients by sending truthful, nondeceptive letters is protected speech under the First and Fourteenth Amendments). This case is also discussed in Croft, *supra* note 12, at 1335.

31. See *infra* Part IV. American attorneys in China must also balance the challenges inherent in the practice of law abroad, not the least of which is building a profitable practice. See Ian Johnson, *Lawyers in China Are Hot Properties as More Companies Do Business There*, WALL ST. J., Apr. 18, 1997, at B7A. Despite this, attorneys should commit themselves to fulfilling these ethical duties as opportunities arise.

32. JINGSHAN WANG, *THE ROLE OF LAW IN CONTEMPORARY CHINA* 352 (1988).

33. Literally, "sung kun" translates into "litigation sticks." DERK BODDE & CLARENCE MORRIS, *LAW IN IMPERIAL CHINA* 413 (1967).

legal documents for people in a rural community. His punishment: three years in prison.<sup>34</sup> Being a lawyer in China was never easy. After more than 2000 years of legal development in China, the Imperial Government viewed legal workers as troublemakers. An 1820 Imperial Edict warned that “[t]hese rascally fellows entrap people for the sake of profit. They fabricate empty words and heap up false charges.”<sup>35</sup> The Chinese people, with only a few daring legal workers to help them assert a private legal claim, came to see law as a government instrument used to maintain order and lawyers as unsavory.<sup>36</sup> This instrumental view of the law largely remains to this day, reinforced by the actions of the Chinese Communist Party (“C.C.P.”).<sup>37</sup> It is under this historical weight that a private legal profession struggles to develop.

China’s enduring philosophies—Confucianism, legalism, and communism—challenge the profession even further. Confucian tradition holds that a society needs only to raise a moral leader in order to bring societal harmony. This moral leader will respect and provide for the members of society without any need for attorneys. In contrast, legalists argue that leaders must promulgate strict laws to hold sway over the illegal motivations of citizens, punishing those who break the laws and deterring others.<sup>38</sup> Attorneys are necessary only as instruments to help carry out the will of the state. Communists, meanwhile, believe the rule of the proletariat, and not the rule of bourgeois laws or lawyers, will bring a new utopian world order and the end of class antagonism.<sup>39</sup> The following sections explore the development of the Chinese legal profession from a historical and philosophical perspective.

#### *A. Out of the Shadows: The Chinese Legal Profession from the Imperial to the Republican Era*

From the third century B.C. to the late twentieth century, Chinese law never assumed the Western role as guarantor of freedoms.<sup>40</sup> Chinese dynastic legal codes focused on maintaining societal order and not providing rights.<sup>41</sup> In traditional China, law operated vertically between a person and the state rather than horizontally between individuals. Very little room was left in between for

34. Because he was not a “habitual litigation trickster[],” he received a lighter punishment. *Id.* at 416. The more dangerous litigation tricksters were exiled. *See id.* at 415-16.

35. *Id.* at 416 (alteration added) (quoting an Imperial Edict received August 17, 1820, by the Department of Chihli of the Board of Punishments).

36. *See id.* at 413.

37. *See* Edward J. Epstein, *Law and Legitimation in Post-Mao China*, in DOMESTIC LAW REFORMS IN POST-MAO CHINA 19, 22-24 (Pitman B. Potter ed., 1994).

38. *See* WANG, *supra* note 32, at 2-3.

39. *See* KARL MARX, COMMUNIST MANIFESTO 75 (Frederic L. Bender ed., W.W. Norton & Co. 1988) (1848). “In place of the old bourgeois society, with its classes and class antagonisms, we shall have an association, in which the free development of each is the condition for the free development of all.” *Id.* There are many communist philosophies of law, but this Note focuses on Marxist and Maoist thought.

40. *See* WANG, *supra* note 32, at 1.

41. *See* LASZLO LADANY, LAW AND LEGALITY IN CHINA 33 (Marie-Luise Näth ed., 1992).

lawyers.<sup>42</sup> The centerpiece of Imperial China's legal system was the code, "a body of law promulgated by a bureaucracy that was primarily interested in regulating the affairs of its own officials. . . . There were no facilities for training jurists and no lawyers to represent parties."<sup>43</sup> The "litigation tricksters" worked within the informal legal system, giving advice to those with private disputes and drawing disfavor from the emperor.<sup>44</sup>

During this dynastic era, China remained uninfluenced by Western ideas.<sup>45</sup> Instead, the legal ideologies of Confucius and legalists emerged during the centuries of feudal and dynastic rule to hold sway over China's people. These ideologies still resonate with the Chinese today. Confucian tradition believes a moral elite can help individuals achieve sociopolitical order by emphasizing "*li*," or social harmony, rather than criminal punishment.<sup>46</sup> Legalists, however, seek "*fa*," or strict criminal legal codes, to achieve order.<sup>47</sup> Over time, these ideas found ways to coexist. Imperial Confucianism accepted a unity between "*li*" and "*fa*," but it gave "*li*" precedence. The *Analects* quote Confucius: "If the people be led by laws, and uniformity sought to be given them by punishments, they will try to avoid the punishment, but have no sense of shame.' 'If they be led by virtue, and uniformity sought to be given them by the rules of propriety [*li*], they will have sense of shame, and moreover will become good.'"<sup>48</sup>

The Confucian ideas of moral governance, flexible enforcement, education and reform of offenders, and preference for mediation in dispute resolution continue to interact with the legalist notion of law as a deterrent. Neither Confucianism nor legalism, though, finds a need to formally establish individual rights or a legal profession acting under a rule of law in order to protect the individual. For both, the government creates and protects societal order and harmony. Rights are conceived as interests in China, with ethical decisions requiring a balancing of the interests of societal members.<sup>49</sup> Both Confucianism and legalism teach the Chinese that a harmony of interests can exist between the state and citizen. Thus, there is no need to separate the attorneys who represent the citizens and the government who protects the citizens.

In contrast to the Chinese traditions, Western liberalism valued ideas of individual rights and self-determination and saw a need to protect these values from the government. Immanuel Kant, an early liberal philosopher in the West,

42. See WANG, *supra* note 32, at 20.

43. Donald C. Clarke et al., Introduction to the Law of the People's Republic of China ch. I, at 15 (1996) (unpublished manuscript, on file with author).

44. See *id.* ch. 1, at 24 n.22; see also INTRODUCTION TO CHINESE LAW 6-7 (Wang Chenguang & Zhang Xianchu eds., 1997); GEOFFREY MACCORMACK, THE SPIRIT OF TRADITIONAL CHINESE LAW 11 (1996).

45. See Clarke et al., *supra* note 43, ch. 1, at 2.

46. See WANG, *supra* note 32, at 2-3; see also MACCORMACK, *supra* note 44, at 6 (reporting that early Confucians "emphasized teaching and moral guidance rather than penal law as instruments for the government of the people"); *id.* at 6-11.

47. See WANG, *supra* note 32, at 3-7; see also MACCORMACK, *supra* note 44, at 4-6.

48. RONALD C. KEITH, CHINA'S STRUGGLE FOR THE RULE OF LAW 43-44 (1994) (alteration in original) (quoting CONFUCIUS, *Lunyu* [*Analects*], in 2 SISHU [THE FOUR BOOKS] 146 (1962)); see also MACCORMACK, *supra* note 44, at 7, 53.

49. See Peerenboom, *supra* note 20, at 365-66.



believed that people's inherent selfishness would lead to the formation of a state and legal system that would protect individual freedoms and opportunities. These freedoms would be best protected under a republican constitution that valued self-determination and allowed a moral culture to develop. In this way, people would be conditioned to respect each other's liberties and rights.<sup>50</sup> In China, however, the centuries have taught people to respect the liberty of the group to dictate to the individual.

Philosophically, China lacks not only a Kant but the moral machinery that produced Kant. Central to Kant's view and most (but not all) western ethical theory is the view that humans are autonomous moral agents who through a rational faculty are able to make the correct moral choices. Respect for the moral capacity of every individual implies the egalitarianism of democratic liberalism, wherein the legitimate authority of the state is dependent on the consent of the individual members of society. . . . Citizens, through autonomous democratic choice, determine the goals for the society.

This moral psychology is absent in China . . . . Doing what was right was more important than the capacity to choose.<sup>51</sup>

While Kant's liberalism did not find its way to China, Western traders did. The traders brought with them the machinery that ultimately allowed for the development of a legal profession in China. In the late nineteenth century, Europeans emerged victorious from a series of wars fought against the Qing Dynasty and gained access to the Chinese market.<sup>52</sup> Treaties signed after these wars forced China to open its ports to foreign trade and to extend extraterritorial legal protection to foreigners living in China.<sup>53</sup> In this humiliating way, Western law arrived in China. Chinese intellectuals, some of whom saw Western laws as superior to Chinese laws, sought to end this extraterritoriality and to establish a Chinese legal system patterned after the West's.<sup>54</sup> Western-style law schools began to develop and Chinese students traveled to Japan and Europe to study law. Four types of dispute resolution operated in China during this time: mediation, conciliation, arbitration, and court rulings.<sup>55</sup> The use of the court

50. See IMMANUEL KANT, *ETERNAL PEACE* (1795), reprinted in CARL JOACHIM FRIEDRICH, *INEVITABLE PEACE* 245, 259-65 (1948). In his essay, Kant argued that human needs, and not an inherent goodness, would cause people to live in a state with laws.

For it is not the moral perfection of mankind, but merely the mechanism of nature, which this task seeks to know how to use in order to arrange the conflict of unpacific attitudes in a given people in such a way that they impel each other to submit themselves to compulsory laws and thus bring about the state of peace in which such laws are enforced.

*Id.* at 263. Kant believed that a state should also function under a republican constitution that respects individual rights and helps the selfish citizens develop a moral culture. See *id.* at 250-54.

51. Peerenboom, *supra* note 20, at 378-79.

52. See WILLIAM P. ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE* 30, 32-33 (1995); Clarke et al., *supra* note 43, ch. I, at 16.

53. See ALFORD, *supra* note 52, at 32; Clarke et al., *supra* note 43, ch. 1, at 16-17.

54. See Clarke et al., *supra* note 43, ch. 1, at 17.

55. See Alsén, *supra* note 19, at 13.

system remained unpopular, though, especially since Qing Imperial leaders often imposed penalties on those who sued in court.<sup>56</sup>

The Nationalist Revolution of 1911 brought China's Imperial history to an end, but allowed for the continuing development of a legal profession based on European and Japanese models. As leaders of the Republic of China, the Nationalists emphasized the need to learn from foreign legal systems and enacted the first regulations on lawyers in 1912.<sup>57</sup> The regulations, based on a Japanese model, outlined qualifications and requirements for Chinese attorneys.<sup>58</sup> Bar associations issued ethical rules that, among other things, required attorneys to keep their clients' secrets.<sup>59</sup> However, these associations lacked enforcement powers, and the Ministry of Justice did not make legal ethics a required part of the law school curriculum.<sup>60</sup> Growth of the profession came slowly. By 1943, the entire Chinese bar was made up of only 9245 attorneys.<sup>61</sup> Moreover, the foreign-inspired laws they followed did not gain rapid acceptance. Most Chinese either ignored or misunderstood the laws, and, when conflict arose between traditional Chinese beliefs and the foreign codes, the traditions usually won.<sup>62</sup> With the defeat of the Nationalists by the Communists, the fate of the Chinese legal profession took a deadly turn.

*B. Death and Destruction: The Legal Profession on the  
Run in Maoist China*

The People's Republic of China ("P.R.C.") formed in 1949 with the victorious Mao Zedong as its leader. Mao immediately began replacing the ancient traditions and invading European and Japanese legal ideas with his own rendition of Marxism-Leninism.<sup>63</sup> The Communists repealed the Republic of China's laws, rewrote civil laws to give more power to the workers, and put Party members in charge of most of the courts.<sup>64</sup> Mao banned the private-practicing "bourgeoisie" lawyers and staffed the state legal offices with "people's lawyers."<sup>65</sup> Growing distrust of Nationalist-trained professionals led Mao to start a campaign against any legal scholar whose ideas did not match the Party line.<sup>66</sup> During the 1957 Anti-Rightist Movement, the P.R.C. persecuted legal intellectuals who criticized

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56. *See id.* at 14.

57. *See* Alison W. Conner, *Lawyers and the Legal Profession During the Republican Period*, in *CIVIL LAW IN QING AND REPUBLICAN CHINA* 215, 215 (Kathryn Bernhardt & Philip C.C. Huang eds., 1994).

58. *See id.* at 216-17.

59. *See id.* at 222.

60. *See id.* at 224, 227.

61. *See id.* at 230.

62. *See* Walter Gellhorn, *China's Quest for Legal Modernity*, 1 *J. CHINESE L.* 1, 3-4 (1987).

63. *See* WANG, *supra* note 32, at 43-52.

64. *See* Gellhorn, *supra* note 62, at 5-6; *see also* David F. Forte, *Western Law and Communist Dictatorship*, 32 *EMORY L.J.* 135, 193-200 (1983).

65. VICTOR H. LI, *LAW WITHOUT LAWYERS: A COMPARATIVE VIEW OF LAW IN CHINA AND IN THE UNITED STATES* 22-24 (1978).

66. *See* Gellhorn, *supra* note 62, at 7.

Mao and closed several law schools.<sup>67</sup> Finally, in 1966, Mao set out to destroy the entire legal culture. During the next ten years, a period known as the Cultural Revolution, Mao thoroughly rejected the imperialistic law of the Qing Dynasty and the Republic of China. Mao closed all law schools and declared lawyers to be counterrevolutionaries and criminals. He ordered mass trials, allowing judgments to be rendered by people uneducated in the law but willing to follow the Party line. Many Chinese lawyers were executed or sent to labor camps to work in primitive conditions.<sup>68</sup> In the end, the only rules left in China emanated from Party policies and Mao's writings.<sup>69</sup>

Communist ideals fueled Mao's distrust of the legal profession and the law. As argued by German theorist Karl Marx, communism views law as part of the capitalist superstructure burdening the proletariat.<sup>70</sup> Marx placed no special value on the individual, and he saw the state, if ruled by capitalists and not the proletariat, as only serving the purposes of the bourgeois ruling class.<sup>71</sup> During the class struggle toward a communist utopia, there could only be "bourgeois law."<sup>72</sup> Marx saw law as "class-bound" and "conflict-ridden," precluding any notion of a socialist law.<sup>73</sup> He also judged lawyers to be unproductive "servants of the public," writing that: "They live on the produce of *other* people's industry, therefore they must be reduced to the smallest possible number."<sup>74</sup>

Mao embraced many of Marx's views of law and lawyers. Initially, Mao viewed law as an instrument for educating the Chinese about communist ethics, the new "*li*." Law, he hoped, would lose its authority once this ethical system took root.<sup>75</sup> Mao believed the law would actually hinder the progress toward a utopia because it was too inflexible to adjust to "rapidly changing revolutionary conditions."<sup>76</sup> In 1959, Maoist legal scholars emphasized this lack of trust in a stable legal system: "Law cannot be defined precisely . . . . The law of our country is a changing law adapted to the perpetual revolution . . . ." <sup>77</sup> Mao preferred "popular justice," the kind of justice he hoped the Cultural Revolution would carry out.<sup>78</sup> For him, only the class struggle and an uninterrupted revolution could lead China to the utopia. Mao did not see a need for an advanced stage of capitalism or its bourgeois law in China.<sup>79</sup> Years of instability

67. See Clarke et al., *supra* note 43, ch. 2, at 2; see also Gelatt, *supra* note 10, at 753-54.

68. See LADANY, *supra* note 41, at 72-76; see also Gelatt, *supra* note 10, at 754.

69. See INTRODUCTION TO CHINESE LAW, *supra* note 44, at 11-12.

70. See MARX, *supra* note 39, at 71. "Your very ideas are but the outgrowth of the conditions of your bourgeois production and bourgeois property, just as your jurisprudence is but the will of your class made into a law for all . . . ." *Id.*

71. See *id.*

72. CARLOS WING-HUNG LO, CHINA'S LEGAL AWAKENING 4 (1995).

73. *Id.*

74. MAUREEN CAIN & ALAN HUNT, MARX AND ENGELS ON LAW 143-44 (1979) (emphasis in original) (quoting KARL MARX, THEORIES OF SURPLUS VALUE 300-01 (1905)).

75. See LO, *supra* note 72, at 9-10; see also Forte, *supra* note 64, at 190.

76. LO, *supra* note 72, at 9.

77. LADANY, *supra* note 41, at 69 (first omission added; second omission in original) (quoting from the April 1959 issue of *Research in Politics and Law*).

78. LO, *supra* note 72, at 9.

79. See *id.* at 28-29.

and chaos, however, led a new Chinese leadership to see that the class struggle also destroyed any sense of social order.<sup>80</sup> They would decide in 1978 that a legal profession and a rule of law could serve the state and the citizenry by providing stability and aiding economic modernization.

*C. A Season for Order: The Legal Profession of Today's  
P.R.C.*

The Cultural Revolution brought chaos, even to the Communist leadership. When the Revolution ended with Mao's death in 1976, the country's people and leaders ached for order and stability.<sup>81</sup> In 1978, under Deng Xiaoping's leadership, China began the struggle to reestablish legal institutions by opening law schools, restructuring the judicial and procuracy systems, and restoring the Ministry of Justice.<sup>82</sup> Taking a stance opposite that of Mao, Deng said: "To ensure people's democracy, we must strengthen our legal system. Democracy has to be institutionalized and written into law, so as to make sure that institutions and laws do not change whenever the leadership changes, or whenever the leaders change their views or shift the focus of their attention."<sup>83</sup> Deng appeared to realize that a modern economy, necessary for China's growth and ultimate social stability, required an orderly legal system as well as the support of Western investors and Chinese intellectuals.<sup>84</sup> He reestablished the legal system to give foreign investors a degree of security in the P.R.C. and to provide for rapid domestic development. Used this way, law was still just a tool for the building of a higher Party goal: the modernization of the P.R.C.<sup>85</sup> "Beginning from the Marxist principle that law is the embodiment of the will of the ruling class, the Chinese Communist Party leadership since 1949 has consistently stressed the point that law must serve the tasks of rebuilding Chinese society."<sup>86</sup> Law is only an instrument, a mechanism, for implementing Party policy.<sup>87</sup>

In implementing his policies, Deng took a nondogmatic approach to Marxism. He vowed that his country would "build[] socialism with Chinese characteristics," adjusting Marxism-Leninism to fit within the Chinese reality.<sup>88</sup>

80. *See id.* at 28.

81. *See* Gellhorn, *supra* note 62, at 8. "Probably because they themselves had experienced the consequences of lawlessness and mob hysteria, the new leadership sought vigorously not merely to recapture the past, but to push forward to a higher level of legality than had previously been attained." *Id.*

82. *See* WANG, *supra* note 32, at 128; *see also* *Communique of the Third Plenary Session of the 11th Central Committee of the Communist Party of China*, HSINHUA, Dec. 23, 1978, translated in F.B.I.S.-CHI-78-248, Dec. 26, 1978, at E4, E10 (discussing the link between economic modernization and development of a legal system).

83. WANG, *supra* note 32, at 67 (quoting [no vol. no. provided] DENG XIAOPING, *SELECTED WORKS OF DENG XIAOPING* 157-58 (1984)).

84. *See id.* at 75-79.

85. *See* Yu Xingzhong, *Legal Pragmatism in the People's Republic of China*, 3 J. CHINESE L. 29, 41 (1989).

86. Clarke et al., *supra* note 43, ch. 3, at 2.

87. *See* Yu, *supra* note 85, at 40.

88. LO, *supra* note 72, at 18.

He established four "Cardinal Principles" to guide the Chinese regime. First, the "socialist road" principle describes China's economy as predominately planned and only supplemented by a limited market economy.<sup>89</sup> Secondly, the "dictatorship of the masses" announces a comprehensive legal system that allows for a degree of socialist democracy.<sup>90</sup> Thirdly, the "Party leadership" principle reminds the people and the party that China's centralism should be tempered by public supervision and condemnation of corruption.<sup>91</sup> Finally, the Marxism-Leninism-Maoism principle reflects the idea of adopting theories to fit China's reality.<sup>92</sup> A socialist law becomes possible because China is a socialist society. The people, and not the bourgeoisie, own the means of production. And the law that emanates from this socialist state is therefore a socialist law.<sup>93</sup>

The Chinese continue to view their constitutions as policy documents containing rights that are subordinate to state, society, and Party interests. For instance, the 1982 Constitution states that an important citizen duty is to avoid infringing the "interests of the state, of society or of the collective, or on the rights of other citizens" when exercising freedoms and rights granted in the Constitution.<sup>94</sup> Rights, then, are seen to flow from the state and may be subjected to conditions or negated by unilateral decisions of the state.<sup>95</sup> Therefore, unlike the Western view of rights as antimajoritarian, the Chinese system sees the state as "the guardian of rights and the punisher of transgressors."<sup>96</sup> If no need exists to protect the individual from the government or rule of the majority, then it is also unnecessary to separate the lawyers from the state. Under this view, a citizenry would best be served by lawyers intimately involved with the people's main protector, the state.

By the time the Ministry of Justice was reestablished in 1979 to serve as the legal profession's connection to the state, only about 9000 qualified attorneys had survived the Cultural Revolution, and most had not practiced in at least ten years.<sup>97</sup> Undaunted, Deng set a goal for China to have two million legal workers by the year 2000.<sup>98</sup> In 1981, the first students graduated from rejuvenated law schools.<sup>99</sup> In 1988, a Chinese attorney opened the country's first private law firm since 1949.<sup>100</sup> Today, an estimated 100,000 Chinese lawyers with varying degrees of experience practice in China, and about 8200 Chinese law firms operate in

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89. *Id.* at 20.

90. *Id.*

91. *Id.*

92. *See id.*

93. *See id.* at 59.

94. Alsén, *supra* note 19, at 6-7, 13; *see also* XIANFA [Constitution], art. 51 (1982).

95. *See* R. Randle Edwards, *Civil and Social Rights: Theory and Practice in Chinese Law Today*, in HUMAN RIGHTS IN CONTEMPORARY CHINA 41, 44-45 (1986).

96. LADANY, *supra* note 41, at 33.

97. *See* Tomlinson, *supra* note 6, at IV.

98. *See* LAW IN THE PEOPLE'S REPUBLIC OF CHINA 5 (Ralph H. Folsom & John H. Minan eds., 1989). This number included attorneys, notaries, and grass-roots legal workers. The current goal of the Ministry of Justice is 150,000 lawyers, 30,000 notaries, and 40,000 grass-roots legal service centers by 2000. *See China Country Report*, *supra* note 9.

99. *See* Alsén, *supra* note 19, at 16.

100. *See* LAW IN THE PEOPLE'S REPUBLIC OF CHINA, *supra* note 98, at 204.

cities across China.<sup>101</sup> More than fifty university law departments and specialized legal institutes graduate about 4000 lawyers a year.<sup>102</sup> The Ministry of Justice still maintains a level of supervision over attorneys, most of whom are paid as civil servants. The Communist Party wields ideological control, making sure that law in China serves Party policies.<sup>103</sup> The goal of legal training is to teach students how to “become people who possess basic knowledge of the Marxist-Leninist theory of law; are familiar with the Party’s political and legal work, policies and guiding principles; are endowed with socialist political consciousness; have mastered the professional knowledge of law; and are capable of undertaking research, teaching and practical legal work.”<sup>104</sup> This permeation of C.C.P. doctrine into the legal education system slows the growth of an independent legal profession.<sup>105</sup>

Nonetheless, hopeful signs that China is committing itself to the development of a rule of law and a more independent legal profession do exist. First, the role of the Supreme People’s Court, the highest judicial body, may be expanding. In 1983, the Court began to issue collections of decided cases to lower courts.<sup>106</sup> If these decisions gain precedential value, it may become more difficult for the Party to change the interpretations of statutes based on the current policy needs of the C.C.P. Secondly, current laws, including civil and economic laws, allow people more room to guide their own actions.<sup>107</sup> This body of legislation challenges, “for the first time in Chinese history, the theses that ‘Chinese law is punitive in nature’ and [that] ‘the Chinese law is vertical rather than horizontal.’”<sup>108</sup> Thirdly, civil and economic litigation is on the rise now that

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101. See *Legislation Boosts China's Legal Profession*, Xinhua News Agency, May 15, 1997, available in LEXIS, World Library, Txtwns File; see also *China's Justice Ministry Warns Lawyers' Standards Lagging*, Agence France-Presse, Jan. 6, 1997, available in 1997 WL 2035239 (releasing figures that China has about 100,000 law professionals, 1.2 million legal workers, and only 2.2% of university students majoring in law, all for a population of more than 1 billion). Unfortunately, officials also complain that many of these Chinese lawyers are inexperienced and greedy for money. See *id.*

102. See Clarke et al., *supra* note 43, ch. 3, at 21.

103. See WANG, *supra* note 32, at 136, 142.

104. Han Depei & Stephen Kanter, *Legal Education in China*, 32 AM. J. COMP. L. 543, 563 (1984); see also Gelatt, *supra* note 10, at 795-97; Yu, *supra* note 85, at 38.

105. See Clarke et al., *supra* note 43, ch. 3, at 23-24.

106. See Nanping Liu, “*Legal Precedents with Chinese Characteristics: Published Cases in the Gazette of the Supreme People’s Court*,” 5 J. CHINESE L. 107, 107-08 (1991) (arguing that these reported decisions carry some precedential weight).

107. See WANG, *supra* note 32, at 119. Property, family, and contract laws have been passed since the legal reforms began, and, in 1996, the National People’s Congress passed laws giving suspects the right to consult an attorney and limiting the period a suspect may be detained. Of course, few Chinese people know of the laws and the Chinese Government is known to ignore the laws in practice. See *China’s Legal Reforms May Provide Greater Rights*, DALLAS MORNING NEWS, Dec. 31, 1996, at 20A, available in 1996 WL 15026461; Tomlinson, *supra* note 6, at IV.

108. WANG, *supra* note 32, at 125; see also INTRODUCTION TO CHINESE LAW, *supra* note 44, at 12-13 (“The awareness of the importance of law by the populace and the government represents a watershed in China’s legal development. The ideological change has to a great extent changed the popular view towards law.”); Dorinda Elliott, *A Land with Lawyers—But*

people are more informed about the legal system, despite the fact that the Chinese have always preferred to resolve private disputes with mediation.<sup>109</sup> In a speech before House subcommittees, U.S. professor Minxin Pei reported that he believes the economic modernization and political liberalization of China provide more civil liberties as well as greater access to national and international information.<sup>110</sup> Pei reported that more people are taking advantage of the Administrative Litigation Law. Under this law, citizens may take the government to court for abuse of power; about 27,000 of these lawsuits were brought in 1993 and citizens won about twenty percent of them.<sup>111</sup>

One of the most important developments for the legal profession is the Lawyers' Law, passed during the Eighth National People's Congress in 1996 and implemented in January 1997.<sup>112</sup> The law is designed to "standardize lawyers' behavior, protect the legitimate rights and interests of litigants, safeguard the correct enforcement of laws, and bring into full play the positive role of lawyers in establishing a socialist legal system."<sup>113</sup> It emphasizes the need for Chinese lawyers to ethically represent clients, requiring them to keep the clients' secrets and avoid any conflicts of interest.<sup>114</sup> Entrance into the legal profession is now gained with higher-education degrees and passing scores from a national examination.<sup>115</sup> The law also codifies a concept of private practice by allowing the formation of cooperative- or partnership-based law firms, signifying perhaps that the P.R.C. is beginning to accept the idea of "private" lawyers. Today, only about thirty percent of Chinese law firms are cooperatives or partnerships; the rest are state owned.<sup>116</sup> The Lawyers' Law requires lawyers to join local bar associations, but it does not go as far as granting the All China Lawyers' Association, a national organization, the power to discipline its members. This power remains with the Ministry of Justice.<sup>117</sup>

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*Not Enough Law*, NEWSWEEK, Apr. 1, 1996, at 50, 50 ("The Chinese are learning how to use the law to protect their interests.").

109. See WANG, *supra* note 32, at 171.

110. See *U.S.-China Relations: Next Steps: Joint Hearing Before the Subcomms. on Int'l Econ. Policy and Trade and Asia and the Pac. of the House Comm. on Int'l Relations*, 104th Cong. 53-55 (1997) (statement of Minxin Pei, assistant professor of politics, Princeton University).

111. See *id.* at 55.

112. See *Lawyers' Law*, *supra* note 7, at 41; *id.* at 46 (ch. 8, art. 53); see also Kevin Ying Yue Song, *China's New Law on Lawyers Will Move System Closer to International Standards*, E. ASIAN EXECUTIVE REP., Aug. 15, 1996, at 9, 9-14 (discussing the new law and arguing that the law gives Chinese lawyers a more positive role in the Chinese legal system).

113. *Lawyers' Law*, *supra* note 7, at 41 (ch. 1, art. 1).

114. See *id.* at 43 (ch. 3, arts. 1-36).

115. See *id.* at 41-42 (ch. 2, arts. 5-14). Only one-fifth of Chinese lawyers have earned university law degrees, and several of these lawyers studied law designed for a centrally planned economy. Remedial training programs help ease this educational problem. See Alford, *supra* note 5, at 31.

116. See Daniel Kwan, *Lawyers' Law Takes Step Back on Reform*, S. CHINA MORNING POST, May 15, 1996, at 8, available in 1996 WL 3757860 (reporting that the legislature dropped provisions of the law that would have allowed lawyers to set up solo practices).

117. See *id.*; see also *Lawyers' Law*, *supra* note 7, at 44 (ch. 5, art. 39, ch. 7, art. 44).

The Ministry of Justice also exercises "supervision and guidance" over the All China Lawyers' Association, preventing it from becoming truly self-regulatory and autonomous.<sup>118</sup> However, this organization is able to hold legal seminars, develop contacts with Western legal organizations, and sponsor TV and radio programs to advise citizens about their rights. In recent years, cooperation between professional organizations of China and Western democracies has exposed several Chinese lawyers to Western ideas.<sup>119</sup> This exposure has also led the Chinese to question how much Western influence they should accept. An article written after the violence on Tiananmen Square expressed this concern, saying "if we indiscriminately accept all the Western-style democracy, freedom, and legal system, we would certainly turn to blindly worship all foreign things regardless of our national conditions, which would definitely harm our national interests."<sup>120</sup> As suggested in the following Part of this Note, teachings by American attorneys should be tempered by this concern as well as a recognition of China's traditions and current Communist reality.

But despite the seemingly ironclad grip communism has on China today, the Chinese traditions handed down from Confucius and legalists may bind the society at a deeper level. In the 1950s, the Soviet Union helped China establish a judicial system. The Chinese, however, insisted on a system that also fostered conciliation and repentance, displaying once again the continuing importance of traditional Chinese concerns.<sup>121</sup> As a scholar noted, "[t]he Chineseness of China's communism is not to be under-estimated; Marx is more remote in his foreignness than Confucius across the gap of [the] millennia."<sup>122</sup> Even if the Chinese Communists falter like the Soviets, liberalism's emphasis on the individual and self-determination would face staunch competition from these enduring traditions. The challenge for the American lawyer is to find a theoretical—and respectful—way of approaching the competing traditions in China.

### III. WESTERN MODERNIZATION AND COMPREHENSIVE COLLECTIVISM: WAYS TO BRIDGE THE PHILOSOPHICAL GAPS

The competing tenets of liberalism, communism, Confucianism, and legalism create tensions not only for heads of states, but also for lawyers operating in a multinational world. In its dealings with the West, China struggles with whether to accept a Western idea of a rule of law that goes against centuries of Chinese tradition.<sup>123</sup> Western lawyers, too, may disagree as to whether Western ideas represent greedy imperialism or, in contrast, vital modernization. Despite these

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118. Tomlinson, *supra* note 6, at IV.

119. See Gelatt, *supra* note 10, at 758-59.

120. Guo Zu, *Why Those Who Study Law Act Against the Law—Mediation by Teachers and Students of China Politics and Law University*, RENMIN RIBAO, Oct. 23, 1989, at 4, translated in F.B.I.S.-CHI-89-219, Nov. 15, 1989, at 26, 30.

121. See LAW IN THE PEOPLE'S REPUBLIC OF CHINA, *supra* note 98, at 7-8.

122. *Id.* at 10.

123. See Zu, *supra* note 120; see also *infra* text accompanying notes 193-95.



tensions, and in this time of globalization, respect for a rule of law is vital to the operations of international organizations such as the World Trade Organization or the World Health Organization.<sup>124</sup> These organizations depend on sovereign states and their citizens to follow rules designed to create a more profitable market and safer world. This Part, therefore, discusses ways to theoretically ease the tensions between the Eastern and Western ideas and shows that all may not be lost in the wide gap between the ideas.

### *A. Imperialism or Modernization*

Rarely can one know a culture better than one's own, and this makes the study of cultures and their ideas a hazardous venture. The idea of cultural relativism holds that cultures are equal and that the understanding of cultures is limited by the cultural upbringing of the observer.<sup>125</sup> Liberalism, however, ignores relativism and demands that liberals adopt a more global perspective. It claims that "[o]ne fallacy of the doctrine of cultural relativism is its oversimplification of the unity of traditions, assuming they each have closed, concrete boundaries and are internally free of conflicts."<sup>126</sup>

Liberal theorists believe that a priori rights, such as self-determination, exist and belong to every culture. To them, cultures are not static or totally exclusive from each other, and continuing contact will help them share values and reduce the occurrence of war.<sup>127</sup> They believe profound political changes require dialogue between the cultures, and some liberal scholars today argue that the number of universally accepted values are increasing.<sup>128</sup> These scholars also point to similarities between Confucianism and liberalism to find a way to argue that the modern concept of human rights is not "alien to Chinese soil."<sup>129</sup> For instance, the Confucian theory of benevolence, or "jen," teaches that citizens have a right to express dissatisfaction if the elite rulers are immoral, intolerant, and disrespectful of the citizens.<sup>130</sup> Individual liberty is "'alien' to the Chinese

124. See *infra* text accompanying note 195.

125. See Nancy Kim, *Toward a Feminist Theory of Human Rights: Straddling the Fence Between Western Imperialism and Uncritical Absolutism*, 25 COLUM. HUM. RTS. L. REV. 49, 56 (1993).

126. Eliza Lee, *Human Rights and Non-Western Values*, in HUMAN RIGHTS AND CHINESE VALUES 72, 77 (Michael C. Davis ed., 1995).

127. See KANT, *supra* note 50, at 264. Kant believed that international trade would draw nations closer together. "It is the spirit of commerce which cannot coexist with war, and which sooner or later takes hold of every nation." *Id.* (emphasis omitted); see also Michael C. Davis, *Chinese Perspectives on Human Rights*, in HUMAN RIGHTS AND CHINESE VALUES, *supra* note 126, at 3, 7.

128. See Lee, *supra* note 126, at 73, 80.

129. Du Gangjian & Song Gang, *Relating Human Rights to Chinese Culture: The Four Paths of the Confucian Analects and the Four Principles of a New Theory of Benevolence*, in HUMAN RIGHTS AND CHINESE VALUES, *supra* note 126, at 35, 36; see also KEITH, *supra* note 48, at 60-69.

130. See Gangjian & Gang, *supra* note 129, at 35-43. Only rulers who carried out their responsibilities "in a manner consistent with the moral standards set by their most worthy predecessors" could be assured an enduring "Mandate of Heaven" and "claim to rule."

tradition in its past and present state. But this does not make out the case that rights are alien to Chinese society by nature."<sup>131</sup> This theory emphasizes that, although modern human rights ideas originate in the West, these ideas are not necessarily "Western" values that are only suitable for or applicable to the West.

Resolving this controversy about whether classic or developing human rights are Western and, thus, "alien" to the cultures of Asia, will be important to liberals. Both the liberal tradition and the philosophy of basic rights originated with philosophers such as Kant and John Locke as well as the French and American revolutions.<sup>132</sup> Some scholars point out, though, that this "Western label" creates more resistance in nationalistic leaders. These leaders stubbornly decide to retain old traditions, which are devastating to their subjects, rather than succumb to the Western propaganda. In fact, "[t]he idea that 'rights' are specifically Western is often a convenient excuse for Eastern and other autocracies to justify oppressive measures."<sup>133</sup> This is certainly true for China.

Amnesty International and the U.S. State Department report that torture, forced confessions, arbitrary arrest, and lengthy incommunicado detentions continue in China.<sup>134</sup> Thousands are held as political prisoners. In 1997, Chinese prison officials beat labor activist Liu Nianchun with an electric baton to punish him for refusing to eat. China released prominent dissident Wei Jingsheng on medical leave, but not until after fellow inmates beat him and prison officials held him behind a glass-walled cell. Officials also arrested many of those who demanded a government apology for violent suppression of Tiananmen Square demonstrators.<sup>135</sup> The onslaught of criticism from the West concerning China's human rights practices led the country to adopt a defensive, relativist view of human rights. Chinese officials argued that foreigners should not criticize the internal affairs of a nation and that China, as a sovereign, socialist nation, is free to choose which rights it emphasizes.<sup>136</sup> Deng said, "'People support human rights, but they should not forget that state sovereignty exists.' 'Actually, state sovereignty is much more important than human rights.'"<sup>137</sup> Furthermore, China maintains that its definitions and protections of human rights are superior to those in the West.<sup>138</sup> In a document released in response to the U.S. State

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ALFORD, *supra* note 52, at 21; *see also* MACCORMACK, *supra* note 44, at 9 (asserting that "jen" "dictates humane treatment for the subjects of the emperor").

131. Margaret Ng, *Are Rights Culture-Bound?*, in HUMAN RIGHTS AND CHINESE VALUES, *supra* note 126, at 59, 67 (emphasis omitted).

132. *See* Lawrence M. Friedman, *Borders: On the Emerging Sociology of Transnational Law*, 32 STAN. J. INT'L L. 65, 83 (1996).

133. *Id.* at 84.

134. *See* Amnesty Int'l, *People's Republic of China: Law Reform and Human Rights* (visited Apr. 7, 1998) <<http://www.amnesty.org/ailib/aipub/1997/ASA/31701497.htm>>; *China Country Report*, *supra* note 9.

135. *See* *China Country Report*, *supra* note 9.

136. *See* Zhu Muzhi on *Human Rights*, Xinhua Domestic Service, Dec. 28, 1993, translated in F.B.I.S.-CHI-93-248, Dec. 29, 1993, at 10.

137. *Id.* at 11 (quoting 3 DENG, *supra* note 83, at 331, 345).

138. *See* Ren Yanshi, *A Comparison of Human Rights in China with Those in the United States*, BEIJING REV., Apr. 1-7, 1996, at 10 (claiming that the Chinese Constitution guarantees more specific and extensive rights than the U.S. Constitution and that the Chinese Government

Department's human rights report on China, Chinese officials criticized America for its racism, gender inequality, and money-dominated politics.<sup>139</sup>

To avoid this nationalistic response to the Western-label issue, scholars argue that "most so-called 'Western' concepts are not really Western at all, at least not in the sense that they are part of ancient traditions. They are, rather, distinctively modern."<sup>140</sup> Over time, the ideas of human rights developed in countries, including England, that were also once home to feudal landowners. Modern legal culture is "Western" only because "the West modernized first."<sup>141</sup> As the global economy develops with the leadership of the West, liberals hope these modern ideas will also become truly transnational. This modernization theory encourages the development of a liberal legal culture in China to help protect life and property.<sup>142</sup>

### B. Voicing a Collective Consciousness

Another developing approach to perceived cultural differences between the East and West is the "pragmatic rights theory," which "redefines 'rights' as freedoms which the state provides to its citizens by way of political practices that are sensitive to the interests of all segments of the society, and justifiable in accordance with the standard of rationality generally accepted in the society."<sup>143</sup> For this theory to work, citizens must have freedom of speech, and the government must be willing to listen to this marketplace of ideas. The goal of this free speech is the development of a "common democratic consciousness," and, ultimately, a "comprehensive collectivism."<sup>144</sup> This will ensure rights are enjoyed in practice as well as in theory since the government and its citizens will be on the same page of a societal script.<sup>145</sup>

The pragmatic rights theory also seeks to solve the controversy between Western liberalism's idea of "naturally endowed" fundamental rights and China's view that rights are only privileges created by and subject to state policies.<sup>146</sup> It narrows the gap between the West's view that a neutral judiciary protects individual rights and China's view that laws serve social policies by arguing that the natural rights theory of liberalism obscures the reality of even the Western system of government and rule of law.<sup>147</sup> The pragmatic rights theory argues that "legal concepts and principles" are "humanly constituted artifacts of social and

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assumes a larger role in advancing and protecting these rights).

139. See Seth Faison, *China Turns the Tables, Faulting U.S. on Rights*, N.Y. TIMES, Mar. 5, 1997, at A8 ("The U.S. Government, posing as the human rights judge of the world, turned a blind eye again to the serious human rights problems in its own country.") (quoting an official New China News Agency Report).

140. Friedman, *supra* note 132, at 84 (emphasis omitted).

141. *Id.* at 85.

142. *See id.* at 78-85.

143. Lin, *supra* note 18, at 258.

144. *Id.*

145. *See id.*

146. *Id.* at 260.

147. *See id.* at 262-63.

legal practices"—even in the West.<sup>148</sup> Whenever a judge is confronted with the need to interpret common law or sentence a defendant, the judge must be "sensitive to the interests of all segments of the community."<sup>149</sup> Therefore, rights are not necessarily metaphysical or natural. Rather, they are freedoms that society gives its citizens through a political process that is sensitive to the expressed and evolving values and goals of both minority and majority voices. In addition, the judge will use values expressed by a community to define an individual right. Rights, then, cannot be "purely individualistic and apolitical" even in a liberal democracy.<sup>150</sup>

The question for China then becomes whether the leaders are willing to sacrifice some control over their subjects in order to foster free speech and create the "democratic consciousness."<sup>151</sup> Article 35 of the 1982 Constitution guarantees freedom of speech, but this freedom must be exercised so as not to violate Article 52's obligation to safeguard the country's unity, Article 53's duty to observe public order, and Article 54's demand to uphold the interests of the motherland.<sup>152</sup> China's leadership today seems far too insecure to allow a truly unfettered freedom of speech.<sup>153</sup> According to the State Department, Chinese officials routinely monitor telephone conversations, faxes, and electronic mail, restrict Internet content, and warn dissidents against speaking to the foreign press.<sup>154</sup> Because of these free speech restrictions, increased participation by the public in a legal system becomes even more important. Under the developing rule of law, more people are learning how to express their interests in a court, and the government is being exposed—whether it likes it or not—to the interests of the people it governs. Notably, in the last few years, the Chinese Government has started training a legal profession and helping its citizens understand the law to a degree not found in China's traditional past.<sup>155</sup>

A new law—Resolution on Promoting Legal Propaganda, Education—requires legal professionals to help educate the Chinese about the country's legal

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148. *Id.* at 264.

149. *Id.*

150. *Id.* at 267.

151. *Id.* at 268. "The impediment to the realization of rights and democracy in the P.R.C. is neither its collectivism nor its legal instrumentalism. Instead, it is the schism of values and interests between the governing elites and the people which precludes a comprehensive collectivism necessary for producing rights." *Id.* at 276.

152. See XIANFA [Constitution] arts. 35, 52-54 (1982); Clarke et al., *supra* note 43, ch. 4, at 15.

153. Compare XIANFA [Constitution] art. 35, with Michael Laris, *The Price of the Deal: Doing Business in China Sometimes Means Complying with the Authorities' Demands for Control*, NEWSWEEK, Dec. 9, 1996, at 44, 44. American telecommunications firm Globalstar won a contract to put China on its global satellite telephone network after it promised China a system that will enable the country's security forces to tap phone lines and pinpoint individual cellular phone users. "[The Chinese] can monitor; they can intercept," said a Globalstar executive. *Id.* (alteration in original) (quoting an unidentified Globalstar executive). "That's the key point, the real reason they picked us." *Id.* (quoting an unidentified Globalstar executive).

154. See *China Country Report*, *supra* note 9.

155. See Gellhorn, *supra* note 62, at 9.

system.<sup>156</sup> Legal periodicals are circulated in smaller villages, and a hotline, staffed by practicing lawyers, provides callers with legal definitions of terms such as inheritance.<sup>157</sup> Besides serving as a communication link between the government and its citizens, this training may help ease the Chinese people's traditional indifference and distrust of the law by helping to move Chinese society toward a "true legal consciousness."<sup>158</sup> Recent governmental reforms have given more power to local governing bodies, decentralizing decisionmaking and creating what some hope to be the beginnings of democracy. These events may provide a reason to hope that, "[g]iven China's long-established humanistic values and deeply held expectations of fair government, . . . individual rights will grow as the economy develops and the country's leaders become increasingly committed to the rule of law at home and in the international arena."<sup>159</sup>

Unfortunately, most of these government-sponsored acts actually seem more oriented toward building a national economy.<sup>160</sup> The government wants to dispel uncertainty about how business obligations can be enforced so that the road to a strong socialist economy can continue.<sup>161</sup> The lessons of Tiananmen Square, Tibet, and the secret trial of dissident Wang Dan must temper the West's enthusiasm for what it judges to be advances toward a rule of law, the acceptance of human rights, and other democratic ideals.<sup>162</sup> Closing the door to China is not the answer, but neither is a rose-colored view of the future. The West must understand China's past while tenaciously supporting China's developing rule of law and legal profession. In promoting these concerns, American attorneys should offer a perspective of Western values that the Chinese can accept. Either of the aforementioned theories—or both in combination—may be helpful. The

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156. See *The Resolution of the National People's Congress [NPC] Standing Committee of Continuing to Launch Propaganda on and Education in the Legal System*, Xinhua Domestic Service, May 15, 1996, translated in F.B.I.S.-CHI-96-104, May 29, 1996, at 17.

157. See Yu Wong, *Beijing-Speak*, FAR E. ECON. REV., Dec. 26, 1996-Jan. 2, 1997, at 106, 107.

158. Yu, *supra* note 85, at 50; see also ALFORD, *supra* note 52, at 112-23 (arguing that adoption of laws by the government must be coupled with an understanding and acceptance of the laws by society in order to truly protect intellectual property rights).

159. Edwards, *supra* note 95, at 75.

160. See Gellhorn, *supra* note 62, at 10.

161. See *id.*; see also Chen Yanni, *Eager Clients Mob Legal Eagles*, CHINA DAILY, Oct. 17, 1996, at 22, available in 1996 WL 8532385. Sending more than 110,000 grass-roots legal workers across China may be helping to dispel the uncertainty about wills, property, marriage, and family affairs as well. These workers answer legal questions, write documents, represent people in arbitration and court, and teach about laws, state policies, and ethics. According to the Ministry of Justice, these workers handled 36 million legal matters throughout China during the last four years and they recouped or avoided more than \$4.8 billion in economic losses for their clients. Only about 21% of these legal workers have professional legal educations. See *id.*

162. See *PM Takes Low-Key Approach with Jiang*, CALGARY HERALD, Nov. 24, 1996, at A12, available in 1996 WL 5108493 (discussing critics of China's legal reforms who cite Tiananmen Square dissident Wang Dan's 11-year prison sentence after a secret trial as proof the rule of law in China has no practical effect); see also Li Tzu-ching, *300,000 Arrested in the First 30 Days of Strike Hard Campaign*, CHENG MING, June 1, 1996, at 15, translated in F.B.I.S.-CHI-96-121, June 21, 1996, at 19 (reporting on a recent shoot-to-kill order for criminals found to fit within nine categories, including drug and pornography sales).

following Part discusses the ways in which the promotion of the legal profession can be accomplished.

#### IV. ENCOURAGING THE LEGAL PROFESSION: A ROLE FOR THE AMERICAN BAR TO PLAY

American lawyers are in a position to support liberal institutions or a collective consciousness in China. Practicing lawyers can be carriers of transnational norms.<sup>163</sup> According to Lawrence Friedman, transnational norms are valid in and apply to more than one country, and they are often subtly "spread by human agents."<sup>164</sup> This scholar considers several norms, including those concerning the growing global economy and human rights, to be developing transnational norms.<sup>165</sup> Unlike attorneys, the multinational corporations fueling world trade lack an ethical imperative to serve the public. Instead, the pursuit of profit motivates them.<sup>166</sup> Therefore, attorneys should not rely on the idea of their clients being carriers of these transnational values. American attorneys who view ideas concerning "Western" rights as modern or transnational norms could, first, help train Chinese legal personnel about the value of ethics codes, self-regulation, and interaction with colleagues, and, secondly, support a dialogue about the importance of a transnational legal practice. If Chinese attorneys can begin to see themselves as independent from the government and the Party, they may begin to see law as also independent of government policy.<sup>167</sup> These attorneys may be able to better resist another Cultural Revolution given their growing ability to understand and articulate to the people a need for a rule of law and the legal profession.<sup>168</sup>

##### *A. Involvement in the Professional Realm: Instilling a Professional Consciousness Through Education*

The importance of education should not be underestimated, especially considering the shortage of legally trained personnel in China and the tendency of Chinese legal personnel to violate laws themselves because of their poor

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163. See Friedman, *supra* note 132, at 75.

164. *Id.*

165. See *id.* at 81-82.

166. See Laris, *supra* note 153, at 44; see also BENJAMIN R. BARBER, *JIHAD VS. MCWORLD* (1995) (revealing the pragmatic nature of multinational corporations and arguing that the unfettered spread of capitalism undermines democracy unless consumerism is matched by shared conceptions of the common good and some form of civic society).

167. See William C. Jones, *The Constitution of the People's Republic of China*, 63 WASH. U. L.Q. 707, 733-34 (1985).

168. See *id.* The Ministry of Justice recently honored 10 lawyers as models of the ideal legal professional, hoping such an honors program will help improve the ethics of lawyers overall. Minister of Justice Xiao Yang said the model lawyers had a "strong sense of political awareness, professional qualifications and ethics, a pioneering spirit and a hardworking style." *Model Lawyers Deliver Speeches on Merits*, Xinhua English Newswire, Nov. 27, 1996, available in 1996 WL 13774537.

training.<sup>169</sup> As long as Chinese citizens remain skeptical toward the law and the legal profession, progress toward a rule of law will be painstakingly slow.<sup>170</sup> One key to a successful education program is reaching out to the lawyers themselves. Using training techniques that intermingle the Confucian virtues of benevolence with Western values may give Chinese attorneys the basis they need to confront corruption in the legal profession. Another Confucian virtue—self-cultivation—may help form the foundation of a more autonomous profession by encouraging Chinese attorneys to reflect more individually on ethical issues.<sup>171</sup>

According to William Alford, the new Lawyers' Law "stresses the need for lawyers to be independent, act autonomously, and exercise a high degree of professional and personal ethics."<sup>172</sup> At the same time, the Ministry of Justice now encourages Chinese attorneys to work directly for state-owned companies and it is nominally reducing its supervisory role over the All China Lawyers' Association. While all of this gives Chinese attorneys a chance to experience the autonomy and independence so lauded by the West, it also exacerbates their professional problems. These problems involve competency—only one-fifth of Chinese attorneys have university degrees—and ethics. Ethical issues range from bribing judges to ignoring conflicts of interest.<sup>173</sup> Many Chinese attorneys lack both experience and core professional ideals at a time when the C.C.P.'s ability to fill in these gaps is waning. Alford writes:

[I]f . . . the function of legal professionals is to reconcile public and private interests, the absence of clear, broadly shared understandings of what these interests are at a time when the contents of the Party's core ideology and of morality itself are increasingly open to contestation and manipulation leaves lawyers without more than a highly personalized basis for framing such reconciliations.<sup>174</sup>

American attorneys can help by providing training, not only in technical legal matters, but also in professional ethics. The American attorneys cannot offer an ethical model that works all the time in any culture. They can, however, focus on the challenges that the Chinese attorneys will face in following an ethical code of conduct and offer examples of how they would resolve the issues. They can provide important reasons for following a code, including the need for clients to be able to depend on a stable and honest legal profession.<sup>175</sup> Li Qiu Hong, the Deputy Director of the Shandong Provincial Justice Bureau, led a delegation of Chinese attorneys to the United States in 1996 and commented that Americans can offer the Chinese insight into issues such as legal ethics, firm management,

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169. See WANG, *supra* note 32, at 348-49; Alford, *supra* note 5, at 31-33; Ma, *supra* note 5, at 13.

170. See WANG, *supra* note 32, at 350.

171. See MACCORMACK, *supra* note 44, at 9 (arguing that the virtue of self-cultivation encourages individuals to reflect on their conduct, discuss it, repent, and reform).

172. Alford, *supra* note 5, at 23.

173. See *id.* at 31-33.

174. *Id.* at 36.

175. See *id.* at 35-37.

and professional training.<sup>176</sup> In addition to delegations, more than 100 graduate students from China pursue advanced degrees in the U.S., Japan, and Western Europe every year. These students return to China, carrying with them a knowledge of the Western legal education and profession, and they often assume influential positions as teachers in major universities' law departments or workers in governmental ministries.<sup>177</sup>

Educational programs are popular topics in the speeches of leaders from both the West and East. Canadian Prime Minister Jean Chretien supports Canadian funding of programs to help China modernize its legal system and provide training for lawyers and judges.<sup>178</sup> Both the Ministry of Justice and the All China Lawyers' Association also encourage broad contacts with foreign attorneys, with Vice-Minister of Justice Zhang Geng claiming that the cooperation plays a "vital role in China's legal development and improving China's investment environment, and has helped Chinese lawyers learn directly from their overseas counterparts."<sup>179</sup> U.S. Representative Ed Royce emphasized the need for legal exchanges, citing the ability of Japan, Hong Kong, and Taiwan to embrace basic human rights values and the rule of law:

The rule of law, which is key to Hong Kong's miracle, is a foreign concept in China. Ask the American companies that are finding this out the hard way. We need to encourage the exchange of judges and attorneys. Chinese legal professionals should come here, and American lawyers should go there. However we make contact with the Chinese, we must demonstrate our faith in democracy and human rights. I am troubled that some influential Americans seem to be buying into the Asian-values thesis that democracy, human rights and the rule of law are really Western notions, and if Asians embrace them it is really only a minority of Asians. . . . [W]hat about Japan, South Korea and now even Hong Kong?<sup>180</sup>

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176. See Li Qiu Hong, *Chinese Delegation Studies Law the American Way*, IND. LAW., Aug. 7, 1996, at 4.

177. See Clarke et al., *supra* note 43, ch. 3, at 21. Even more significant is the fact that about 50,000 Chinese, including the children of Chinese leaders, study at U.S. colleges and universities. They, too, are taking home American ideas. See, e.g., Dexter Roberts et al., *Big Bird Heads for Shanghai: U.S. Television, Education, and Business Are Changing China*, BUS. WK., Nov. 10, 1997, at 66E2, available in 1997 WL 14814213; George F. Will, *Lost a Battle on China Trade, Won the War*, WASH. POST, July 3, 1997, at A19.

178. See *PM Takes Low-Key Approach with Jiang*, *supra* note 162 ("We have no illusions this policy will bring about immediate results. But it is a concrete approach.") (quoting an unidentified Canadian official); see also Jonathan Manthorpe, *Canada's Aid Didn't Help Wang Dan: Chinese Judicial System Remains a Political Tool*, MONTREAL GAZETTE, Nov. 2, 1996, at B6, available in 1996 WL 4211431 (noting that the Canadian International Development Agency together with other Canadian organizations has spent "\$159,000 to [help] modernize China's criminal code and train prosecutors; \$284,000 to support research in good governance and human rights; \$500,000 to provide training sessions for Chinese lawyers; and \$2.5 million to assist in the establishment of the Chinese Institute of Judges").

179. *China's Co-operation Overseas in the Law Increasing*, Xinhua English Newswire, Oct. 4, 1996, available in 1996 WL 11987183.

180. Ed Royce, *U.S. Needs a Clearer Policy Toward China*, ORANGE COUNTY REG., Dec. 27, 1996, at B6, available in 1996 WL 13272979.



Agreeing that American involvement in foreign legal systems is important, the American Bar Association ("A.B.A.") seeks ways to promote its "Rule of Law Projects" in China. These public service projects offer the American legal experience as one approach the Chinese may study as it reforms its legal system.<sup>181</sup> Timothy Gelatt, an American attorney who worked in China, encouraged these types of programs in the years following Tiananmen Square. He wrote, "[h]aving contributed . . . to the creation of a legal system in China that neither tanks nor ideological forces seem able to destroy, we owe it to the people in China who have derived benefit and hope from our efforts not to abandon them now."<sup>182</sup> Expressing this kind of advice in respectful rather than arrogant or chauvinistic terms may lead Chinese attorneys and officials to be more accepting and responsive to the involvement of foreigners in the evolution of their legal system.<sup>183</sup>

*B. Involvement in the Public Realm: Encouraging a Dialogue and a Transnational Perspective*

Lawyers play an important role in the deals that bring the world's nation-states closer together. By educating themselves about their clients, the deals, and the places the deals affect, lawyers ideally help ensure a productive and smooth-operating global market. As part of their public service obligation, American lawyers in China should emphasize this important role in open dialogues with Chinese attorneys and Chinese officials. American lawyers should show how domestic regulations of the legal profession, such as the client questionnaires and practice restrictions on foreign attorneys, handicap this role. In addition, American lawyers should emphasize that the more China follows a rule of law and reduces its protectionist laws, the closer the country will be to gaining the privileges of organizations and treaties such as the World Trade Organization ("WTO"), and the General Agreement on Tariffs and Trade ("GATT"). China should fit the practice of law, as it has its overall economy, into a transnational perspective.

American attorneys should encourage an open dialogue about the transnational nature of the legal practice with Chinese attorneys and officials, emphasizing a common belief in the importance of a global market. Engaging in such dialogue brings America's policy of "constructive engagement" to a deeper societal level within China. This policy, in which trade with China continues despite America's frustration with China's human rights policies, allows America to retain an

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181. See *Foreign Operations Export Financing and Related Programs Appropriations for 1998: Hearing Before the Subcomm. on Foreign Operations, Export Financing, and Related Programs of the House Comm. on Appropriations*, 105th Cong. 252-67 (1997) (statement of Lucinda A. Low, chairperson of the A.B.A.'s Section on International Law and Practice).

182. Timothy A. Gelatt, *Law Reform in the PRC After June 4*, 3 J. CHINESE L. 317, 324 (1989).

183. Cf. James J. White, *Advising the Neocapitalists*, U. MICH. L. QUADRANGLE NOTES, Summer 1995, at 52 (discussing the problems inherent in offering advice to countries with emerging free-market economies).

influential presence in China.<sup>184</sup> Critics claim the policy fails to balance America's trade deficit with China or improve China's human rights policies.<sup>185</sup> However, U.S. President Bill Clinton defends the policy of engagement, saying he hopes that, in a "spirit of liberty over time," communism will eventually run its course in the P.R.C.<sup>186</sup> Despite this optimism, Clinton warns the engagement could become more contentious if China quashes Hong Kong's rule of law or sells arms to the Middle East,<sup>187</sup> and Secretary of State Madeleine Albright maintains that "[e]ngagement is not the same as endorsement."<sup>188</sup> Nonetheless, some foreign policy scholars argue that a nonconfrontational dialogue should continue with China. Henry Kissinger, for instance, believes the U.S. Government must plan and maintain a strategic dialogue with China. He cautions that "China's foreign policy is not so much driven by communist ideology as by growing nationalism, which can be inflamed only by a confrontational American policy."<sup>189</sup>

New trade deals indicate that America's dialogue with China may be becoming more constructive.<sup>190</sup> However, Chinese officials may also be learning how to appeal to America's conscience in getting what they want. In October 1997, China signed the International Covenant on Economic, Social, and Cultural Rights ("ICESCR"), and in March 1998, Foreign Minister Qian Qichen announced that China planned to sign the International Covenant on Civil and Political Rights ("ICCPR") as well.<sup>191</sup> Most notably, China agreed to release several prominent political prisoners, including Wang Dan, if the U.S. did not

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184. See Mimi Hall, *Clinton Warns China on Hong Kong Crackdown*, USA TODAY, Jan. 29, 1997, at 8A; *How America Sees China: Friend or Foe?*, ECONOMIST, Oct. 25, 1997, at 21.

185. See Susan Page, *Gore Sees U.S.-China Deals Signed*, USA TODAY, Mar. 25, 1997, at 1A (discussing the signing of two U.S.-China business contracts worth about \$2 billion and stating that American officials hope these deals will quiet criticism).

186. Hall, *supra* note 184, at 8A (quoting President Clinton).

187. See, e.g., John M. Broder, *Clinton Defends Engagement with China*, N.Y. TIMES, Oct. 25, 1997, at A6 (declaring that isolating China would be "unworkable, counterproductive and potentially dangerous") (quoting President Clinton); Hall, *supra* note 184; Robert A. Rankin, *Clinton: U.S. Can Gain Much from Relations with China*, ARIZ. REPUBLIC, Oct. 25, 1997, at A31, available in 1997 WL 8402466.

188. Brigid Schulte & Peter Slevin, *Behind Visit's Pomp, U.S., China Differ*, MILWAUKEE J. SENTINEL, Oct. 29, 1997, at 6, available in 1997 WL 12752739 (alteration added) (quoting Madeleine Albright).

189. Henry A. Kissinger, *A World We Have Not Known*, NEWSWEEK, Jan. 27, 1997, at 74, 77.

190. See, e.g., John M. Broder, *U.S. and China Reach Trade Pacts but Clash on Rights: Beijing to Halt Nuclear Deals with Iran*, N.Y. TIMES, Oct. 30, 1997, at A1 (reporting that "contentious talks" between President Clinton and President Zemin produced billion-dollar deals but failed to ease America's worries about political and religious rights in China); Page, *supra* note 185.

191. See, e.g., *China's Intention to Sign UN Rights Covenant a "Cheap Gesture"*, Agence France Presse, Mar. 12, 1998, available in LEXIS, News Library, Curnws File [hereinafter "Cheap Gesture"]; *On Eve of Geneva Rights Talks, China Agrees to Sign U.N. Pact*, N.Y. TIMES, Mar. 13, 1998, at A6; Philip Shenon, *Annual U.N. Ritual Condemning China Loses U.S. Support*, N.Y. TIMES, Mar. 14, 1998, at A1.

sponsor an annual U.N. resolution condemning China's human rights policies. America did not sponsor the resolution.<sup>192</sup>

Using a similar quid pro quo approach, American lawyers could appeal to China's pragmatic economic goals. Currently the eleventh-largest trading nation, China maintains a policy of export-led growth.<sup>193</sup> In pursuit of GATT and WTO privileges, China is in the process of aligning its foreign trade and economic policies more closely with international norms.<sup>194</sup> This realignment creates tensions within China for the country must now begin to consider whether to follow the rule of law as it is understood in the West. Beyond these considerations, China must also struggle with the fact that GATT and the WTO are unlikely to condone laws that disadvantage foreign lawyers in China.<sup>195</sup> The client questionnaires and other practice restrictions on foreign lawyers impede the world economy in the interest of protecting China's own lawyers. The questionnaires show that the Chinese view the practice of law primarily from a domestic perspective. The Chinese fail to see that these restrictions unfavorably impact the global business community. Therefore, American lawyers should encourage China to view the practice of law from a more global, transnational perspective. China's legal profession is growing, but not fast enough to satisfy the needs of international business transactions or to placate the worries of foreign investors.

Other countries realize that a need for foreign legal services exists within their national borders. In America, for example, foreign attorneys may be licensed as foreign legal consultants in sixteen states and the District of Columbia, and a

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192. See Shenon, *supra* note 191, at A1; see also Michael Hirsh, *The Red Star Is Rising*, NEWSWEEK, Mar. 23, 1998, at 50. Human rights organizations denounced the United States' decision to forego the resolution, pointing out that China has yet to ratify the ICESCR and has not yet established a date for signing the ICCPR. See, e.g., Peter Capella, *Heart of the Matter*, TIMES (London), Mar. 13, 1998, at 17; "Cheap Gesture", *supra* note 191. The Chinese freed Wang Dan on medical parole April 19, 1998. See, e.g., John M. Broder, *Release Just a Small Step*, U.S. AIDES SAY, N.Y. TIMES, Apr. 20, 1998, at A6; Erik Eckholm, *As Top President Lands in U.S., China Is Hoping to Score Points*, N.Y. TIMES, Apr. 20, 1998, at A1.

193. See *For Richer or for Poorer . . .*, NEWSWEEK, May 19, 1997, at 40, 41 (providing economic statistics about China on the eve of the Hong Kong takeover); see also Sean D. Murphy, *The Security Council, Legitimacy, and the Concept of Collective Security After the Cold War*, 32 COLUM. J. TRANSNAT'L. 201, 285-86 (1994) (stating that the U.N. Security Council should emphasize to its nondemocratic member states the importance of maintaining a world economy based on liberal, democratic, and free-market concepts, and that developed countries should offer economic incentives for developing countries to adhere to a rule of law).

194. China's membership in GATT and WTO would encourage foreign investment and WTO membership in particular would prevent countries such as the U.S. from taking unilateral action against China. See, e.g., GREG MASTEL, *CHINA AND THE WTO: ECONOMY AT THE CROSSROAD* (1994); Monica Hsiao, *China and the GATT: Two Theories of Political Economy Explaining China's Desire for Membership in the GATT*, 12 UCLA PAC. BASIN L.J. 431, 436 (1994); Thomas Yunlong Man, *National Legal Restructuring in Accordance with International Norms: GATT/WTO and China's Foreign Trade Reform*, 4 IND. J. GLOBAL LEGAL STUD. 471 (1997).

195. See Kathy Chen, *China to Enact Strict Rules that Curb Who Can Be Hired at Foreign Law Firms*, WALL ST. J., Dec. 13, 1996, at A10.

Model Rule for the Licensing of Legal Consultants exists for states to follow.<sup>196</sup> China, too, must establish a less protectionist and less arbitrary way of regulating foreign attorneys.<sup>197</sup> American attorneys should lobby for the promulgation of fair licensing regulations. Lobbying is a proven method of gaining ground with the Chinese. It has already affected the foreign practice of law in China and should continue. However, attorneys who lobby the Chinese Government should heed dissident Wei Jingsheng's warning to American officials. Wei cautions that Chinese leaders still approach promises differently than Americans:

"In the West, you go by credibility, by the rule of law" . . . "That is never the case with the Chinese communists. They can make any promises and they can go back on any promises. So in a way, it is like a sports competition. One side must obey all the rules, while the other side doesn't have to. So it's not a very fair game."<sup>198</sup>

Nonetheless, foreign businesses, embassies, and law firms occasionally score at least tentative wins. They successfully lobbied China's Ministry of Justice to indefinitely delay the implementation of new laws that would forbid employment of Chinese attorneys and legal assistants at foreign law offices. The foreign lawyers offered the Chinese compromises, including a suggestion that employment be limited to a period of three to four years so that the best licensed lawyers in China would not be able to make a lifetime career out of working for the West.<sup>199</sup> In addition to the ability to hire Chinese nationals, individual lobbying efforts also earned about sixteen foreign law firms licenses to represent both Chinese and foreign clients in issues such as labor, immigration, and land use.<sup>200</sup> Arguing for a phaseout of the client questionnaires may be more difficult, even if the P.R.C. noted a need for client confidentiality in its Lawyers' Law.<sup>201</sup> Foreign law firms resist the questionnaires by arguing that the information is privileged and confidential, but the Ministry of Justice may not accept this reasoning indefinitely.<sup>202</sup> In this area, just as in many others, American attorneys

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196. See Orlando Flores, *Prospects for Liberalizing the Regulation of Foreign Lawyers Under GATS and NAFTA*, 5 MINN. J. GLOBAL TRADE 159, 174 n.121 (1996) (reporting that these 16 states represent more than 75% of the U.S. legal market). See generally *id.* at 174-76.

197. Observers report that Chinese officials sometimes overlook violations of the regulations, primarily using the regulations as sources of authority to expel foreign firms. See Edward A. Adams, *Firms Join Legal 'Gold Rush' in China*, N.Y. L.J., July 1, 1996, at 1.

198. Robert Burns, *Dissident Urges Clinton to Be Wary of Chinese Promises*, Associated Press, Dec. 9, 1997, available in 1997 WL 2567649 (quoting Wei Jingsheng).

199. See Klein, *supra* note 3, at A7.

200. See Horgan, *supra* note 3, at C7; John Pletz, *Baker & Daniels Gets OK in China; Firm Worked Years to Win Permission*, INDIANAPOLIS BUS. J., Feb. 16, 1998, at 1.

201. See *supra* text accompanying note 114.

202. See Caryl Ben Basat & Julian D. Nihill, *Corporate Counsel*, 31 INT'L LAW. 245, 257-58 (1997) (discussing the attorney-client privilege in China). In the meantime, American attorneys should protect themselves and their clients. Model Rule 1.6 allows attorneys to disclose information if the client consents, if "impliedly authorized in order to carry out the representation," or if the statement is required by law. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(a) (1995). In this case, the Chinese Government requires the completion of the questionnaires. The best way to protect the client's autonomy would be to, first, attempt to persuade Chinese officials of the protected nature of this information, and, second, to

and their clients must patiently wade through China's uncharted legal territory. This, however, does not mean the attorneys must be passive actors.

#### CONCLUSION

Creating a working relationship with China that does not sacrifice important American values will take time. Americans will have to be sensitive to China's history and enduring traditions, and they will have to frame their enthusiasm for individual rights and free-market values within these traditions. Otherwise, the Chinese may view the rhetoric as cultural imperialism and recoil into nationalism. China will forge her own path, and it may not lead to a Western-style liberal democracy. However, this does not mean the world should abandon its strong interest in a stable and freer China that respects a rule of law. Inspiring the Chinese legal profession may bring us one step closer to this vision of China.

This can be also true of many of the other foreign countries in which American attorneys now work, from the new democracies to the more pragmatic Communist countries throughout the world that are struggling to understand and operate under a rule of law. American attorneys, already under an ethical obligation to improve the law, the legal profession, and society, should accept a global challenge to help developing legal professions around the world understand the responsibilities they bear under a rule of law. These lessons should emphasize the value of legal ethics, a professional consciousness, and a stable legal system. In addition, the lessons should encourage a transnational view of the legal profession, one that explains the need for good lawyering in this global age. As argued in this Note, this guidance should be offered in ways that acknowledge the guiding traditions of each country. As agents of transnational norms, lawyers can and should ensure the progress and promise of globalization.

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carefully inform clients of any necessary disclosures. *See also* Lee A. Pizzimenti, *The Lawyer's Duty to Warn Clients About Limits on Confidentiality*, 39 CATH. U. L. REV. 441, 449-51 (1990). "Attorneys may deprive those clients of information critical to intelligent decisionmaking if they fail to apprise clients of those exceptions [to confidentiality], thereby limiting client's [sic] ability to choose rationally whether to confide in counsel." *Id.* at 450.

