

9-1-1988

Observations on the Importance of Law in China

Stephen B. Young

Follow this and additional works at: <https://digitalcommons.law.byu.edu/lawreview>



Part of the [Comparative and Foreign Law Commons](#)

Recommended Citation

Stephen B. Young, *Observations on the Importance of Law in China*, 1988 BYU L. Rev. 501 (1988).

Available at: <https://digitalcommons.law.byu.edu/lawreview/vol1988/iss3/3>

This Article is brought to you for free and open access by the Brigham Young University Law Review at BYU Law Digital Commons. It has been accepted for inclusion in BYU Law Review by an authorized editor of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

Observations on the Importance of Law in China

*Stephen B. Young**

I. INTRODUCTION

A pervasive stereotype of China holds that, for Chinese, interpersonal relationships are the preferred mechanism for social interactions. The role of law is denigrated to being inconsistent with China's special cultural orientation. Like most stereotypes, this observation points to a substantial truth about its subject, in this case the Chinese. On the other hand, it misleads more than it enlightens. By overemphasizing the personal, the stereotype distracts a foreigner's attention from the necessity of rule compliance in China. It does so by causing foreigners first to forget that the Chinese developed bureaucracy to a level of high legal sophistication long before Western Europeans did in the nineteenth century of the Common Era, and by causing them second to overlook the fact that among Chinese, much in the way of interpersonal cultivation is expressly prefatory to satisfactory compliance with laws and regulations.

This is not to say that interpersonal relationships do not have their place in Chinese society. Curiously, regulation and the importance of personal ties enjoy a symbiotic relationship. Personal ties take on added consequence when one party is in a position of power, a position given by the legal structure. From this perspective, regulation enhances the social importance of some people by making many others dependent on their decisions. Thus, any system which values ties of personal interdependency would cultivate a network of regulatory control in order to perpetuate the practical necessity of subordination.

Further, the need of many Chinese to avoid offending others and to ingratiate themselves with superiors arises from the formal position of authority with which a superior, or an official, is vested. That position is created by the law. In the People's Republic of China (PRC), little can be accomplished if a permis-

* Adjunct Professor of Law, University of Minnesota Law School; Partner, Winthrop & Weinstine.

sion slip, form, license, or written authorization is not given a red ink "chop" of approval by an official. Getting such a "chop" is the objective of many informal, interpersonal relationships. While "going through the back door" (*hou men*) is an art form necessary to successful navigation of China's bureaucracy, too much focus on the back door easily ignores the fact that the point of the exercise is to get permission to come in by the front door as if with full right and legal privilege.

During the centuries when imperial Confucian norms dictated Chinese social structure, filial piety in a son was not only admired as a mark of moral maturity, it was commanded on pain of death. Lack of filial piety was one of the ten heinous crimes.¹ Today, regulatory power generates the system of bureaucratic control which has strangled China's economic development. By contrast, in a true free market, only the cash nexus prevails; buyers and sellers need no other relationship than the single bargained-for exchange. China has known the effects of bureaucratic regulation for centuries. Getting permission to act has not only been a social custom, it has been a requirement imposed by state authority.²

Four points elucidate my perspective on the Chinese legal experience: first, legal theory developed not long after Confucius taught his moral philosophy of ritual; second, legal theory has been as important as Confucian moral teachings in shaping the Chinese communal experience; third, Chinese display a tendency towards rule conformity as a techniques to restrain selfish motives in individuals; and, fourth, Western scholars have seriously underestimated the importance of law in traditional China.

II. THE THEORY OF LAW

Confucius advocated moral self-restraint and ritual discipline in order to generate the power of personal virtue (*te*), which power could act as a bonding agent for social cohesion. Confucius taught to reinvigorate the teachings of the founders of

1. THE T'ANG CODE 74 (W. Johnson trans. 1979).

2. The linkage between regulations and personal connections can be eloquently made with a brief reference to two recent criminal prosecutions in the United States of America. Two close White House associates of President Ronald Reagan, Michael Deaver and Lyn Nofziger, were prosecuted as a consequence of exploiting financially their personal ties to the senior decision-makers of the Reagan Administration. They offered a "back door" to the corridors of power in Washington so that legal decisions could be made in ways favorable to their clients.

the Chou Dynasty in order to negate political trends at work in his day, when the Chou dynastic house was in serious decline and the aristocratic lords ruling various fiefdoms were becoming increasingly powerful and war-like through efforts at self-aggrandizement. Chou social theory had held that the Chou king could retain the subordination and loyalty of the local feudal lords and their armed retainers through the operation of a charisma known as *te*, or virtue. But as the Chou kings lost their *te*, their polity began to fragment. Confucius thought that the fragmentation could be overcome once individual leaders regained charisma.

Other Chinese were less sure of the efficacy of this approach. More pessimistic than Confucius, these thinkers and officials feared that too few individuals were capable of producing charisma in sufficient quantities to create social order on a broad scale. Furthermore, they doubted the capacity of most individuals to foster within themselves adequate amounts of charisma. Thus, they searched for an alternative to *te* as a basis for social order.

For example, Tzu Ch'an, prime minister of the small feudal state of Cheng, drafted rules of behavior to be enforced by the state through negative sanctions of punishment for infractions.³ For this he was soundly criticized by another senior statesman who adhered to the Chou norms of cultivating self-restraint. Tzu Ch'an's laws, the statesman wrote, would encourage people to find loopholes, seek selfish advantage in litigations, and corrupt officials in efforts to subvert the laws. Tzu Ch'an replied simply that as to the profound level of the criticism—its assumption about a perverse tendency in human nature—he had no reply; his only desire in enacting law was to "save the present age."⁴ Tzu Ch'an recognized that reliance on virtue, though laudable, was inadequate.

As the *te* of the Chou dynasty slipped, the position of hegemon, or shogun, was created by the lords. One especially powerful and trustworthy feudal lord was selected by common agreement to be a first among equals and, with his army, to enforce non-aggression covenants agreed to by all the principal lords. Like Tzu Ch'an's reliance on laws, this was a device for obtaining order in lieu of charismatic virtue. Once a hegemon

3. B. SCHWARTZ, *THE WORLD OF THOUGHT IN ANCIENT CHINA* 325-26 (1985).

4. *The Ch'un Ts'ew*, in 5 *CHINESE CLASSICS* 609-10 (J. Legge trans. 1960).

sought to reconvene the other lords to obtain new promises of harmony and peaceful intent. He was advised not to do so on grounds that if his *te* was insufficient to encourage the lords to submit of their own free will, then getting them to promise what they had no desire to perform was pandering with hypocrisy and destructive of his remaining *te*. The counter-argument, which prevailed, was that the self-interests which lead to covenants had an efficacy second only to *te*.⁵ Where charisma was inadequate, substitutes suitable for the age would have to be found and relied upon. It was an ancient example of the bird in hand theory of seeking the relative social good.

An astute politician, Kuan Chung, advised the first Hegemon, Duke Huan, who ruled the large fiefdom of Ch'i. Preceding Confucius by a few decades, Kuan Chung not only advised his lord to invent the position of hegemon, he also drafted economic policies to give the Duke sufficient resources with which to field strong armies. Kuan Chung's theories of the state gave rise to a school of statecraft, the doctrines of which were set down in the text entitled *Kuan Tzu*, or Master Kuan. This text presents an argument that the state should guide the economy directly through regulation and indirectly through manipulation of market prices. By controlling the money supply and amount of grain available for purchase, the state could set grain prices high enough to encourage production but low enough not to strain the resources of urban dwellers. By placing the production of salt and iron under state control, the non-price elasticity of demand for these two basic commodities would make monopoly prices possible and so enrich the state. But, by turning away from free market economic theory, Kuan Chung set in place the foundation for the pervasive bureaucracy that is an immutable part of the Chinese cultural experience.

Accordingly, we read in the *Kuan Tzu* text that "[t]he crucial principle in employing men lies in assigning offices to persons of proper qualifications and in properly distributing salaries and rewards" and that "[t]he shepherd of the people must bring his people under discipline. In order to achieve this, he must enforce the laws, for the laws are the foundation of government."⁶ We also find in the text the following exchange:

Duke Huan: "Please tell me of state regulation."

5. *Id.* at 320-21.

6. L. MAVERICK, *THE KUAN TZU* 38-39 (1954); see also W. RICKETT, *GUANZI* (1985).

Kuan Chung: "There are regulations for farms, for men, for disbursals, for rural areas, for public enterprises, for the currency, for the districts, and for the entire state. It is impossible for a sovereign to hope to administer his state properly, without understanding the methods of regulation."⁷

The careers of Kuan Chung and Tzu Ch'an overlapped the age of Confucius. However, it was these two officials who, more prescient than the philosopher, pointed the way to China's imperial future.

After Confucius' death, his prescriptions were harshly rejected by the social activist Mo Tzu. Mo Tzu not only taught, he organized a band of armed followers who rushed to the assistance of lords under aggressive attack.⁸ As an antidote to the selfishness of his time, Mo Tzu advocated that each person bring into his or her mind a mental state of compassion for all. For this, he was castigated by Mencius as going contrary to human nature. Less noted, but no less important, has been Mo Tzu's prescription for the use of regulation in achieving social order for China.

Mo Tzu had no faith in the capacity of people to acquire *te*; if left to their own cunning, Mo Tzu believed, people would fall at each other's throats in divisive argument over what was good, and the world would be as "chaotic as though it were inhabited by birds and beasts alone."⁹ Mo Tzu argued that, to escape from chaos, rulership was created as the basis for the human community. This is the same argument given by Hobbes centuries later in England. Thus, the formula for community advocated by Mo Tzu was totalitarian: What the superior considers right, all shall consider right.¹⁰ Obedience to the views of superiors was to be exacted, recommended Mo Tzu, through the meting out of rewards and punishments. People could not be trusted to be loyal and obedient of their own accord.

Illustrative of Mo Tzu's philosophy is his statement about the five punishments. Mo Tzu said:

In ancient times the sage kings devised the five punishments so as to bring order to the people. These were like the main thread binding a skein of silk or the main cord controlling a

7. L. MAVERICK, *supra* note 6, at 123.

8. Y. MEI, MOTSE, *THE NEGLECTED RIVAL OF CONFUCIUS* (1973).

9. *Identifying with One Superior* in *BASIC WRITINGS OF MO TZU, HSUN TZU AND HAN FEI TZU* 34 (B. Watson trans. 1967).

10. *Id.* at 35.

net, by which the sage kings bound and hauled in those among the people of the world who failed to identify themselves with their superiors.¹¹

The paradigm of social order presented by Mo Tzu—Heaven above, a single son of Heaven to rule the people in accordance with Heaven's norms, regional lords completely faithful to the Son of Heaven, local lords completely faithful to the regional lords, village heads completely obedient to regional lords, family heads completely obedient to village heads, and individuals completely faithful to family heads—would become the ideal of the imperial Chinese state. It was a paradigm for exacting conformity to the expectations set forth by superiors and was a philosophical premise for the regulatory state.

After Mo Tzu, two thinkers advocated the advantages of setting forth such expectations for subordinates in written form as laws and regulations. Both these men, Shang Yang and Han Fei Tzu, built on the foundations of state theory previously set forth by Tzu Ch'an and Kuan Chung. Shang Yang, known primarily in Chinese history for his emphasis on war and farm production as the supreme goals of state power, devised for the fiefdom of Ch'in a rigid, harsh bureaucracy which accumulated military might. In time, the ruler of Ch'in conquered all other feudal lords and thereafter used Shang Yang's centralized, autocratic structure as the basis for the Chinese Empire. Law, not Confucian morality, built the empire. Accordingly, Legalism, as Shang Yang's theory is called, was of some consequence for China.

The Shang Yang text contains the following advice: "The way to administer a country well is for the law for officials to be clear; therefore one does not rely on intelligent and thoughtful men. The ruler makes the people singleminded and therefore they will not scheme for selfish profit."¹² We also read, "[t]he right standard is fixed by the prince alone. If a ruler of men fails to observe it, there is danger; if prince and ministers neglect the

11. *Id.* at 38. The nature of the five punishments varied over the centuries of Chinese civilization. In Mo Tzu's day, the punishments were various forms of mutilations such as the cutting off of a foot. In late Imperial China the five punishments consisted of 1) beating with a light rod; 2) beating with a heavy rod; 3) penal servitude; 4) life exile to a far province; and 5) death. See also D. BODDE & C. MORRIS, *LAW IN IMPERIAL CHINA* 77-78 (1967).

12. *THE BOOK OF LORD SHANG* 188 (J. Duyvendak trans. 1928).

law and act according to their own self-interest, disorder is the inevitable result."¹³ The text continues by saying:

Now if laws and mandates are not clear nor legal titles definite, the men of the empire have opportunities for discussion; in their discussions they will differ and there will be no definiteness. If above the rule of men makes laws, but below the inferior people discuss them, the laws will not be definite and inferiors will become superiors.¹⁴

Han Fei Tzu, living after Shang Yang when his adherents in Ch'in were in the process of consolidating their supremacy over other Chinese leaders and territories, also advocated the use of clear, non-discretionary rules and regulations as the basis for social order. He noted that "the law is codified in books, kept in governmental offices, and promulgated among the hundred surnames."¹⁵ He admonished, "[i]ndeed, the purpose of enacting laws and decrees is to abolish selfishness. Once laws and decrees prevail, the way of selfishness collapses. Selfishness disturbs the law."¹⁶ He also said, "[t]he laws of the intelligent ruler always penetrate the minute details of fact."¹⁷

For Han Fei Tzu, legal norms had a power greater than personal virtue to achieve social harmony:

Men make no fuss about balance and weight. This is not because they are upright and honest and would ward off profits, but because the weight can not change the quantities of things according to human wants nor can the balance make things lighter or heavier according to human wishes. Acquiescing in the inability to get what they want, people make no fuss. In the state of the intelligent sovereign, officials dare not bend the law, magistrates dare not practice selfishness, and bribery does not prevail.¹⁸

He also said, "Therefore, in the state of the enlightened sovereign there is no literature written on bamboo slips, but the law is the only teaching; there are no quoted sayings of early kings, but the magistrates are the only instructors."¹⁹ Later, under the empire, China's rulers enforced an orthodox code of learning, reli-

13. *Id.* at 260.

14. *Id.* at 332.

15. 2 HAN FEI TZU 188 (W. Liao trans. 1959).

16. *Id.* at 235.

17. *Id.* at 256.

18. *Id.* at 254.

19. *Id.* at 291.

gious beliefs, and social norms to put these recommendations of Han Fei Tzu substantially into practice.

The vision of the state as a structure of rules set down by the sovereign shaped the Chinese empire for 2,000 years, but not without some modification. The Ch'in political effort, which successfully created an imperial hegemony for a ruler acting as the exclusive Son of Heaven, could not maintain such autocratic rule in its Dynastic house. The son of the founder lost the throne. Subsequently, the Liu clan prevailed in a bloody struggle for supreme rule. They modified the norms and practices of Ch'in legalism and sustained a dynasty under the name of Han for two centuries. On establishing his power, the Han founder made only a few changes to Ch'in legal institutions. The most harsh and unfeeling aspects of Ch'in punishments were abandoned, but the corpus of Ch'in law was apparently taken over almost in toto.²⁰ After a brief usurpation, the Liu's again secured the imperial throne and ruled for two more centuries as the Later, or Eastern, Han Dynasty. All subsequent Chinese dynasties followed the Han model of imperial organization.

A century into their rule the Han added a formalism of Confucian ritual and conformist filial piety to the legal expectations that the state held out for its subjects to meet.²¹ This supplementation of legalism with ritual obligations did not replace law with morality as the paramount principle of rule. The tension between the Confucian preference for personal virtue as fundamental and the alternate Legalist preference for regulation and punishment was overcome under the Han by invocation of the five phase, *yin/yang*, theory of cosmic influence. The *yin/yang* theory held that events were determined by the waxing or waning influences of supernatural *yin* or *yang* energies. The theory posited a mechanistic determinism with variation and fluctuation brought about by various admixtures of *yin* and *yang*. Every circumstance or happening contained some of each energy; the combined and offsetting vectors of the forces produced movement in the phenomenal world experienced by people. Thus, success in any venture such as government required use of both *yin* and *yang* forces. For the dynamic act of rule, legal norms and punishments constituted the necessary *yin* energy and Confucian social propriety constituted the complementary

20. A. HULSEWE, REMNANTS OF HAN LAW 329 (1955).

21. CH'U, LAW AND SOCIETY IN POLITICAL CHINA 267-79 (1961).

yang energy. Both were part of a single effort to sustain order. From this perspective, both virtue and law were necessary for complete success in rule. Neither could be dispensed with. The introduction to the law section of the Han history made this point explicit.²²

The imperial order, if it were to replicate Heaven's norms on earth, which was its legitimating purpose, had to use both *yin* and *yang* forces in proper degrees and at proper times. For those who had virtue, legal restraint was unnecessary; but for those unable to surmount their selfishness, legal regulation of their activities was imperative. The ratio of law to virtue tilted towards law. Since most people lacked the requisite amounts of virtue, law provided the more reliable guarantee of social order.

But the Confucian ritual through which individual virtue was to be cultivated and in which a person's moral perfection could be displayed for all to see, was given more public deference by the Han rulers than was law. As the Han dynasty evolved, court routine turned increasingly to the rites, pomp, and punctilio of Confucian propriety. The relationship between law and ritual was expressed as "*nei yin, wei yang*" or "yin on the inside, yang on the outside." The activities which embodied *yin* were regulation and punishment; by contrast, ritual expressed the *yang* force. The Han placed moral rectitude and correct interpersonal behavior on the surface of social conduct, but hid underneath the pretense of moral righteousness cold coercion as the power of last resort. Subsequent dynasties—Sui, T'ang, Sung, Yuan, Ming and Ch'ing—adopted this bimodal form of rule.

Virtue and ritual won primacy in Han public rhetoric for an important reason. They, rather than law, reflected the highest purpose of the regime; in reflecting the ways of Heaven, they legitimated any regime which respected them as a government in accord with Heaven. By contrast, law did not rise above the morality of instrumental calculation; it did not reflect Heaven's purposes but only the crafty manipulations authored by human minds seeking to maintain order for the moment. Human devices of punishment and material incentives were of lesser legitimacy than Heaven-emulating virtue.

Han dynastic practice reflected the teachings of Hsun Tzu. He had blended Confucian concern for virtue with the more cyn-

22. HULSEWE, *supra* note 20, at 329.

ical and nihilistic recommendations of Mo Tzu and Shang Yang. Hsun Tzu was the teacher of Han Fei Tzu and Li Ssu, who helped the Lord of Ch'in transcend his birthright to become China's first emperor. Hsun Tzu accepted the necessity of hierarchical rule: "If there were no prince to rule the subjects, if there were no superior to rule the inferiors, the country would be injured and people would give rein to their desires."²³

Hsun Tzu saw law and ritual as similar social constructs; for example, both should be infused with compassion for inferiors.²⁴ Ritual, he taught, was the best response to the invidious actions of desire in human affairs. "Man by birth had desire. When desire is not satisfied, then he cannot be without a seeking for satisfaction. When this seeking for satisfaction is without measure or limit, then there cannot but be contention. When there is contention, there will be disorder."²⁵ Rituals were created to give the seeking of satisfaction a course to follow which is not destructive to social order. Ritual is therefore a conformist activity akin to any other form of regulated activity. Ritual also educates persons towards social maturity by providing opportunities for increasing a capacity for self-restraint. Hsun Tzu believed that "[t]he original nature of man is to seek for gain, so to give rein to man's original nature, to let men follow their feelings, leads to strife."²⁶ He also said, "[a]lthough desires cannot be removed, their pursuit can be temperate."²⁷ He added, "[s]o the rules of proper conduct and social relationships laws and regulations came from acquired knowledge, not from man's original nature."²⁸

Hsun Tzu concluded:

Now suppose we try to remove the authority of the prince, and be without the reforming influence of the rules of proper conduct and justice; suppose we try to remove the beneficent control of the laws and the government, and be without the restraining influence of punishments. . . . If this were the situation, then the strong would injure the weak and rob him; the many would treat cruelly the few and rend them. The

23. HSUN TSE 151 (H. Dubbs trans. 1928).

24. *Id.* at 155.

25. *Id.* at 213.

26. *Id.* at 302.

27. *Id.* at 295.

28. *Id.* at 305.

whole country would be in a state of rebellion and disorder. It would not take an instant to get into this condition.²⁹

Ritual was regulatory—law-like—in its coercive demands. Further, norms of social ritual were explicitly legalized by the state's penal code, which punished deviations from prescribed interpersonal behaviors such as filial piety or mourning for parents.

Filial piety has been widely accepted as the most apt metaphor for the personalistic, non-legal quality of Chinese society. However, there is another perspective on the subject. The *Filial Piety Classic*,³⁰ along with the *Classic on Ritual*,³¹ was promoted as the basis of an orthodox social code by the Han Dynasty. Appropriately, the *Filial Piety Classic* draws explicit attention to the law-like implications for Dynastic tranquility of mass conformity to moral rectitude. We read in verse 5, “[l]ikewise, to serve one’s elders reverently paves the way for civic obedience”;³² in verse 9, “[t]he relationship between father and son is rooted in nature and develops into the proper relations between prince and ministers”;³³ in verse 10, “[h]e who really loves his parents will not be proud in high stations; he will not be in-subordinate in an inferior position; among equals he will not be contentious”;³⁴ in verse 12, “[t]here is nothing better than propriety for giving security to the rulers and keeping the people well governed.”³⁵

As the early Chinese developed an increasingly complex structure, the initial optimism of Confucius that virtue could be principally relied upon to engender social order was replaced by a more cynical calculation that law and regulatory supervision were preferable supports for public undertakings.

III. LAW AND SELF

As intimated in the above discussion of Chinese preferences for law, self-seeking proclivities in people was a concern for ancient Chinese thinkers and officials. The same aversion to selfishness can be found in contemporary China. In 1986, when the

29. *Id.* at 308.

30. THE HSIAO CHING (M. Makra trans. 1961).

31. *The Li Ki*, in 27 & 28 SACRED BOOKS OF THE EAST (F. Muller ed. 1885, 1976).

32. THE HSIAO CHING 11 (M. Makra trans. 1961).

33. *Id.* at 21.

34. *Id.* at 23.

35. *Id.* at 27.

China Economic System Reform Institute surveyed 2,500 people in thirty-eight Chinese cities, the complaint most frequently recorded was the use of power to seek private gain. In fact, the moral appeal of socialism as a legitimating ideology for the PRC lies in its rejection of self-aggrandizement as the norm of social relations. Capitalism, assumed to rest on the self-assertion of unimpeded individualism, is believed to have no similar moral basis. Thus, compliance with rules, social norms, and orders in a non-self-regarding fashion has great appeal for all Chinese. Deep seated revulsion against the Cultural Revolution arose because such restraints were abandoned and people were exposed to lawlessness of tyranny everywhere as anyone could denounce anyone else with deleterious consequences.

From this perspective, strong affinities between the social function of law and central features of Confucius' moral teachings are noticeable. As set forth in the *Analects*, Confucius' social theory gave prominence to role conformity. Individualism was denigrated because personal virtue was found in self-control, not in self-indulgence. People were to find meaning for their lives in the duties of station and in living out the fixed expectations associated with interactions between stations such as fathers and sons. Such conduct was subsumed in the concept of propriety (*Li*); the network of stations and their mutual interdependencies was the structure of justice or righteousness (*i*). Confucius defined government as that state which prevailed when "lords lord, ministers minister, fathers father and sons son."³⁶

Role responsibility was designed to minimize abuse of power by individuals. Mencius said that a ruler who did not act as king should did not deserve the position of king and could be deposed.³⁷

In his study of Chinese in Hong Kong, Richard Solomon discovered that the people had high levels of anxiety regarding the possibility that others would take advantage of position for selfish reasons.³⁸ Solomon concluded:

[W]hen father or elder brother failed to perform as Father or Elder Brother should, when the dependent's minimal needs were not met, then "rebellion" had a certain legitimacy. In the

36. *Analects*, in 1 CHINESE CLASSICS 256 (J. Legge trans. 1960).

37. *Mencius*, in 2 CHINESE CLASSICS 167 (J. Legge trans. 1960).

38. R. SOLOMON, MAO'S REVOLUTION AND THE CHINESE POLITICAL CULTURE (1971).

sense of injustice which dependents saw in authorities who failed to fulfill the obligations of their social role lies the psychological root of the 'right of rebellion' expressed in the philosophy of Mencius.³⁹

The Legalist thinkers had designed bureaucratic laws and regulations to replace Confucian virtue as the mechanism to obtain conformity of individuals to duty. The technique was different, but the goal was similar. Han Fei Tzu, for example, wrote that "legal standard and personal inclination are in conflict."⁴⁰

Meeting the Confucian obligations of station or the legalist conformity to law and taking one's norm from a code of social behavior transformed life into a never-ending ritual of wearisome conformity. Escape for individuals could be found through the naturalism of Taoism and, later, the transcendent consciousness of Buddhism.

The limitation inherent in role conformity as a technique for constraint of selfish tendencies consists of the human potential for hypocrisy; the ability of people to assume an outward compliance which does not reflect inner sincerity of mind and heart. Confucius had discussed the implications of external compliance with role far more than any inner purity of intention. He thus left his scheme with a loophole, for, if individuals deceitfully played their appointed roles, their selfishness would slip out from time to time so that even their conforming behavior provided no assurance of social harmony. The presence of hypocrisy, real or suspected, kept others mistrustful, anxious, and always prone to assert their own selfish needs defensively. An important school of Chinese thought emerged under the Sung and Ming Dynasties to grapple with this defect in the original Confucian prescription for effective social control.

Wang Yang Ming, a scholar living under the Ming Dynasty, wrote:

[P]eople have used their selfishness and cunning to compete with and rival one another. Consequently each one has his own opinion, and one-sided, trivial, perverse, and narrow views as well as dishonest crafty, underhanded and evil tricks have become innumerable. Outwardly people make pretenses in the

39. *Id.* at 56.

40. 2 HAN FEI TZU, *supra* note 15, at 285.

name of humanity and righteousness. At heart their real aim is to act for their own benefit.⁴¹

To address this flaw in the orthodox scheme as enforced by the imperial order, the school of neo-Confucian philosophers such as Wang Yang Ming emphasized a morality of pure mind divorced from any consideration of materialism or sensuous interest. In this, they adopted from Buddhism and Taoism the power of consciousness to transcend empirical reality. For example, in the *Chin ssu lu* collection of neo-Confucian writings, we read "[a]lthough one may be public-spirited in all things, if he does a thing according to his personal wishes, that is selfishness."⁴²

That collection records this comment as well:

K'ung Ming [the famous Chu Ko Liang of the *Romance of the Three Kingdoms*] had the intention of being an assistant of a true king, but he was not completely identified with the Way. A true king, like Heaven and Earth, has no selfish ideas. He would not commit an act of unrighteousness even if he could acquire an empire by so doing. K'ung Ming was determined to achieve success and to capture Liu Chang. A sage would rather not succeed. K'ung Ming should not have done it.⁴³

Similarly we read that "[t]o have an iota of selfishness is not to act like a true king."⁴⁴

Neo-Confucians believed passionately that the mind, which was subject to a person's will, could control the feelings. Thus, enlightened persons were expected to control their feelings by clearing their minds of turbulence, desire, and selfishness. "To have no selfish subjectivity is to be like the universe."⁴⁵ In such a state, the person was described by the neo-Confucians as being empty and completely sincere. Such a person had vanquished selfishness and moved beyond any need of legal restraint.

The person without selfishness was the epitome of human quality:

Essentially speaking, the way of humanity may be expressed in one word, namely, impartiality. However, impartiality is but

41. W. YANG-MING, INSTRUCTIONS FOR PRACTICAL LIVING AND OTHER NEO-CONFUCIAN WRITINGS 168 (W. Chan trans. 1963) [hereinafter INSTRUCTIONS].

42. REFLECTIONS ON THINGS AT HAND 275 (W. Chan trans. 1967) [hereinafter REFLECTIONS].

43. *Id.* at 295.

44. *Id.* at 54.

45. *Id.* at 45.

the principle of humanity; it should not be equated with humanity itself. When one makes impartiality the substance of his person, that is humanity. Because of his impartiality, there will be no distinction between himself and others.⁴⁶

Such a person poses no threat to social harmony, and furthermore, can be trusted not to abuse power. A social order filled with such people would not need law.

The neo-Confucians were disparaging of law, regulation and manipulation of selfish desires to maintain order. Such techniques, they believed, only encouraged distressing appetites among people when real harmony could only arrive after the appetites had been transcended. "Ancient kings governed the world with moral principles, whereas later generations have merely controlled the world with laws and orders."⁴⁷ "From the Han dynasty . . . down, however, there was no attempt to do anything after chaos was removed but merely an effort to maintain the status quo. As a result, good government was not accomplished."⁴⁸ The neo-Confucian master Chang Tsai said of the corrupting potential of government service that "seeking an official position is incompatible with moral principles."⁴⁹ The Ming neo-Confucian, Wang Yang Ming, wrote that "to exercise government with the motive of success and profit is the enterprise of despots."⁵⁰ The oft-cited Chinese rhetoric expressing a repugnance to law has these neo-Confucian roots.

Strangely, the neo-Confucian distaste for law and government as a source of discontent did not lead those scholars to subvert the imperial order. Their opposition to legalism as a cynical theory of human nature was offset by their commitment to selflessness. In making self-restraint the primary virtue, the neo-Confucians precluded themselves from active opposition to the Legalist foundation of the state. Rather, they withdrew to their libraries and mountain study halls to discuss the meaning of life with their associates and students. We find this injunction in the *Chin ssu-lu*:

It is not right to live in the present and yet not be contented with the laws and orders of the present. As to government, either one should do nothing or, if he does anything, he should

46. *Id.* at 62.

47. *Id.* at 211.

48. *Id.* at 209.

49. *Id.* at 200.

50. INSTRUCTIONS, *supra* note 41.

handle matters in the proper way within the present laws and regulations; only then can he be right.⁵¹

This persuasion on the necessity for self-restraint also disposed the neo-Confucians to live by the code of filial piety, which, I have suggested, subordinates moral pluralism to the dictates of the existing legal order.

IV. WESTERN MISINTERPRETATIONS

Western scholars have long underestimated the role of rule conformity in the Chinese social scheme. For example, B. Schwartz repeated the preferences of late imperial Confucian intellectuals for moral purity over legal regulation in his article on the dichotomy between morality (*li*) and law (*fa*) and what he saw was the Chinese preference for *li*.⁵² Chu presented the Han Dynasty blending of legalist structures with family ritual as the triumph of Confucianism over Ch'in legalism.⁵³

The sequence of Western images portraying the Chinese as preferring morality over law began with Jesuit missionaries frequenting the Court of the Ming Dynasty. The images of the Chinese related by the Jesuits have had a long shelf-life, acting as unquestioned—almost unconscious—suppositions, resisting correction and shaping the research of succeeding scholars. Fascination with the neo-Confucians began with the Jesuits. They sought in such Chinese beliefs in heaven and morality analogies to their belief in the Christian God and the Golden Rule of Christian ethics.⁵⁴ They hoped to use such analogies to more easily persuade the Chinese elite to adopt Christianity.

Accordingly, the principle focus of Western studies of China has been on the high theory of Confucian thought as reformulated by neo-Confucian scholars in the Sung and Ming Dynasties and on the gentry class which took that body of social thought as its ego ideal. That class overlapped with the structure of the imperial order for the state recruited its bureaucrats from the gentry and the gentry gained power, money, and status from

51. REFLECTIONS, *supra* note 42, at 250.

52. Schwartz, *On Attitudes Towards Law in China* in GOVERNMENT UNDER LAW AND THE INDIVIDUAL 27-47 (M. Katz ed. 1957).

53. Ch'u, *supra* note 21.

54. CHINA IN THE SIXTEENTH CENTURY: THE JOURNALS OF MATTHEW RICCI (L. Gallagher trans. 1942); See, e.g., G. LEIBNIZ, DISCOURSE ON THE NATURAL THEOLOGY OF THE CHINESE (H. Rosemont & D. Cook trans. 1977); D. MUNGELLO, LEIBNIZ AND CONFUCIANISM: THE SEARCH FOR ACCORD (1977).

supportive affiliation with each imperial clan. In short, Western attention has focused on the external ritual and rhetoric of legitimacy, the *yang*, to the exclusion of understanding the inner workings of the imperial system, the *yin* elements hidden behind the throne. Similarly, the role of women and of unorthodox religious thought has been under-emphasized in Western studies of China.

During the nineteenth century, Western governments had little interest in building respect for China's legal institutions and judicial procedures. The weaker and less sovereign the Ch'ing state could be made to appear, the more justified the assertion of western power and influence over China became. The Western demand for rights of extra-territorial law enforcement within China rested on a judgment that Chinese law was barbarous and inhumane, unfit for application to foreigners. In addition, Western officials also sought law reform to condition China for receipt of economic and political institutions more compatible with the needs of the industrial revolution. For these reasons, there was little incentive to study traditional Chinese law with respect.

Simultaneously, Christian pastors and missionaries continued the Jesuits' fixation on neo-Confucian philosophy. These anxious Westerners sought analogies or cognates to familiar Christian symbols and beliefs. Was the Chinese Heaven just another word for the Judeo-Christian God? Was the Chinese Son of Heaven in some way analogous to Jesus Christ as the Son of God? The concern of neo-Confucian literati for transcendent, selfless persons was not dissimilar to the morality advocated by Jesus. Thus one strain of Chinese social thought, albeit a very important one, was allowed to shine for Western observers with a brilliance that eclipsed other perspectives.

Thoughtful study of law in China did not begin in the West until Professor Jerome Cohen established the East Asian Legal Studies Center at the Harvard Law School in the late 1960s. Prior to that, translations of Chinese legal works or consideration of Chinese legal problems occurred in an ad hoc, unsystematic fashion. Little attention was paid to context and tradition of law in China. No attempt was made by scholars until recently to translate the great law codes of imperial China into Western languages so that a wider range of commentators could assess the role law played under the various dynasties. Thus, many Western commentators are still poorly prepared to com-

prehend the role of law and regulations in the Chinese cultural setting.

V. CONCLUSION

The influences of both law and virtue remain in the PRC today. Legalist theory remains in the structure of laws and regulations, compliance with which is a pre-condition for any business venture in China. The contrary emphasis on personal character, formality of inter-personal relationships, and cultivation of acquaintances remains as a vital part of the art of successful negotiations with contemporary Chinese. In attending to personal networking it is important that foreign businessmen not overlook the underlying structure of law which provides coherence to China's economic and social development.

Foreigners who interact with Chinese without awareness of China's legal environment may press their hosts or business associates into uncomfortable positions of threatened non-compliance, and so, into displaying excessive individualism smacking of forbidden selfishness. One can predict either evaporation of working relationships or opposition from other Chinese to the contemplated venture under such circumstances. Actions of Chinese need to be authorized before they can legitimately take place. Manipulation of personal networks may produce the authorization, but they do not supplant the requirement of compliance with policies and regulations.