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The More Law, the More…?
Measuring Legal reform in the People’s Republic of China

by

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The more laws and orders are made prominent
the more thieves and robbers there will be

---- from verse 57 of Laozi, The Dao-de-jing

The challenge of addressing the course of the PRC’s legal reform over the past two decades for an audience comprising persons deeply learned about China and especially its economy, but not necessarily steeped in its law, is an inviting, if daunting, one. It provides an opportunity to step back and consider more fundamental questions than are typically raised in intramural exchanges between legal specialists who, even though their particular positions may differ, share a frame of reference. At the same time, it also requires that one take account of the increasing tendency of leading economists and others outside the law to hinge important elements of their arguments on what are essentially legal concepts (such as property rights, contract, and the rule of law itself). As such, it holds the prospect not only of enriching consideration of Chinese reform within and beyond the law, but also pushing us to think in theoretical terms about possible linkages between law, economic development and society more broadly.

This paper has three sections. The first provides a brief review of the course of state-led legal development during the reform period. The second endeavors to identify and consider questions that one ideally would hope to address in order to reach a full and balanced assessment of the degree of success of Chinese law reform. And the third suggests directions for further research that might enable us to address more thoroughly the questions raised in part two and reflect sensibly on possible priorities for further legal development in China.

As befits a nation possessed of five thousand years of history and almost a quarter of all persons now alive, China thinks big—and the project of post Cultural Revolution legal development is no exception. Whether one looks to the substantive law concerning economic matters, legal institutions and processes, or the personnel needed to staff the foregoing, the Chinese state’s efforts over the past two decades to build a legal structure for an increasingly marketized economy are, at least quantitatively, of historical proportions, irrespective of which nation’s or civilization’s experience one might choose as a measure. Those efforts, to be sure,
have been much chronicled, but warrant at least brief recounting here as a foundation for the more qualitative discussion that follows in part two of this paper.¹

A, if not the, centerpiece of the PRC’s post Cultural Revolution law program of law reform has been the development of a body of substantive law intended to help facilitate the transformation from an economy that was principally planned to one more hospitable to market endeavor. Twenty years ago, the overwhelming cast of the PRC’s relatively modest body of legislation and regulation, at both the national and sub-national levels, was criminal and administrative. China’s scant measures addressing contract were more accurately thought of as providing the means to cement relationships determined by the state, rather than party volition; lawful forms of property were limited to those defined as state or collective; and substantive measures addressing foreign economic activity, such as the Joint Venture Law of 1979, were few in number and open-ended in nature.

Through a concerted program of legal development—supported in important respects both financially and intellectually by a host of external agencies including the World Bank, the Asian Development Bank, the United Nations Development Programme, the European Union, the Ford Foundation, and other actors both public and private—the government of the PRC has promulgated since that time a framework of increasingly market-oriented substantive law at the national level while also allowing sub-national units of government to develop further rules, provided they are consistent with national enactments.² Simple contract provisions aimed principally at recording state-directed transactions gave way in the 1980s to a set of broad principles (articulated as part of an overarching General Principles of the Civil Law), coupled with a series of sector specific rules that still paid considerable homage to state-led endeavor. These, in turn, were supplanted in 1999 with a unified and comprehensive (as in more than 400 articles) law that strives to effect a balance between party autonomy and state imperative. Formal legal protection for a variety of types of property (including real property, securities, and intellectual property) and modes of economic organization (including corporations enjoying

¹For general overviews of the first 50 years of PRC legal development, see Chen (1999), Lubman (1999), Potter 1999, and Alford, 1999a). Wang Liming’s four volume collection of essays touches on most major civil and commercial law developments of the post Cultural Revolution period (Wang, 1998).

²The challenge of developing a clear hierarchy of legal norms is thoughtfully treated in Keller (1994) and (forthcoming).
limited liability and partnerships) have blossomed, leading to constitutional amendments and the recent launching of efforts to produce a national law on property that would set forth broad, cross-cutting principles. Foreign business is now the subject of an increasingly elaborate legal framework, concerning matters ranging from equity joint ventures to technology transfer to taxation, among many others. And the government has laid in place an array of other measures, some directly related to economic affairs (including laws dealing with matters such as accounting, bankruptcy, consumer protection, labor and a national budget) and others of which are viewed as providing needed underpinnings for further marketization (including provisions concerning administrative regularity, corruption, and social security). While volume is hardly a proxy for quality or impact, Chinese authorities report with pride that over 37,000 laws, regulations, and legal measures have been issued over these two decades (Qiushi, 1998).

Attention, of course, has not been confined to the substantive law. Legal institutions were virtually in shambles as the Cultural Revolution came to a close, with, for instance, the Ministry of Justice closed, the procuracy (i.e., Soviet style prosecutor’s office) eliminated, and local governments replaced by revolutionary committees, while even those entities nominally left standing, such as the National People’s Congress, the Bureau of Legislative Affairs of the State Council and the Supreme People’s Court, were relatively modest operations, both formally and practically.

Over the intervening two decades, the PRC government has sought to inject new life into the organs of state charged with making, administering and applying the law. The 1982 Constitution elaborated the powers of the supreme organ of state, the NPC, by authorizing it (either directly or through its Standing Committee) to amend the Constitution, enact national legislation, interpret legislation, and oversee both the administrative arm of national government and sub-national units of government to ensure that their enactments were in conformity with the Constitution and national measures (Xianfa 1982; Cai 1992). Toward that end, the Constitution authorized the NPC to establish specialized committees (now numbering eight) which, _inter alia_, have been a factor in the NPC developing an increasingly professionalized staff.4

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3 For an overview of legal protections for foreign investors, written for prospective investors, see Cohen & Lange (1998).

4 I discuss the role of one such committee (that concerned with Environment and Natural Resources) in Alford & Liebman (forthcoming).
Throughout the same period, the highest organ of national administration, the State Council, has endeavored, pursuant both to its constitutionally derived powers and a 1985 NPC Standing Committee resolution authorizing the making of provisional regulations concerning economic reform, to build its own rule making expertise (both through its Bureau of Legislative Affairs and more generally) while also continuing to oversee the application of those rules (Corne, 1997). And in perhaps the largest institutional departure from the pre-reform era, the PRC’s judiciary has expanded throughout the entire nation via a four-part court system, running from the district level through the Supreme People’s Court in Beijing, which body has since 1981 been authorized to issue judicial interpretations (*sifa jieshi*) of points of law arising in the course of its adjudicative work (Liu, 1997; Finder, 1993).

As it has created these institutions, the PRC has also enacted legislation designed to structure their processes and staff them properly. Beijing is now in its second generation of reform era civil and criminal procedure laws, with each defining a more distinct role for judicial and other actors (i.e., attorneys in the former case and the police, procuracy, and defense bar in the later) than was true previously. The 1989 Administrative Litigation Law and subsequent legislation concerning administrative punishments, state compensation for persons harmed by unlawful administrative acts, administrative review, and administrative procedure more generally suggest at least the possibility of using law to bound administrative discretion (Pei, 1998; Lubman, 1998). And China’s law on legislation (*lifa fa*), recently promulgated after years of debate, aspires to clarify the respective roles and responsibilities of a variety of institutional actors at both the national and sub-national levels (Xinhua, 2000).

These efforts have been complemented on the personnel front with both legislation designed to provide further definition for the pertinent professionals and the associated specialized training. In the former regard, the PRC has within the past five years alone promulgated new measures concerning judges, lawyers, civil servants and other personnel, while also bringing to over 300 the number of universities and other institutions offering legal training (which is a larger number than is found in the US). In consequence, China today has close to 300,000 judicial personnel (including 130,000 judges), some 175,00 lawyers (with plans to grow to 300,000 by 2010, which would make it the world’s second largest bar in absolute terms), 160,000 prosecutors, an increasingly professionalized staff of some 2,000 at the NPC, and a periodic mandate that civil servants heed the example of President Jiang Zemin, Premier Zhu
Rongji and other senior national leaders by acquainting themselves with law through lecture or other means (Qiushi, 1998; Luo, 1998; Alford, 1995; Xinhua, 1999a).

II

The PRC leadership’s decision to devote not inconsiderable resources to legal development seems premised on the notion that such development is correlated to overall economic development. To wit, law, legal institutions and legal personnel of the type described in part one are seen as having the potential to foster economic growth and, in particular, foreign involvement in the economy and are to be encouraged for that reason, among others. This is, of course, hardly a new thought. Weber compensated for many a sociological error (as, for example, in his accounts of Chinese life) by explaining how legal rationality spurred the development of capitalist societies by facilitating the predictability he indicates business so prizes (Rheinstein, 1954:29-30). North earned the Nobel Prize by pushing this line of thought further in demonstrating how relative clarity in and security of property rights, spawned in important part through formal legal institutions, had been a prime factor in the rise of major western economies (North, 1990). Shleifer has recently won himself the Bates Prize in part through further refinements of this core notion that suggest why common law regimes are in general more conducive to the accumulation of capital and the ensuing economic development than their civil law counterparts, particularly in the Francophone world (though he and his co-authors seem not to have controlled for the impact on productivity of excessive pate foie, roquefort, and champagne, let alone Jerry Lewis films) (La Porta, et. al., 1998). And the leading multilateral development banks, the G-7 and EU governments, prestigious foundations, the deans (including my own) of the more prominent American law schools, and a bevy of very talented economists (including some at this conference) and other social scientists seem convinced that “the establishment of the rule of law,” as typically exemplified in major measure through the further elaboration of formal legal institutions, is one of, if not, “the biggest challenge for China to complete its market transition” (Qian, 1999: 42).

So, who am I, especially as a law professor who for some two decades been enmeshed in the process of legal development in the PRC, to take issue with such wisdom? Without being flip or nihilistic, it seems that there is a utility in being the skunk at this particular garden party, if for no other reason than to push beyond the “feel good” rhetoric of advocacy of the rule of law
(about which few, other than stray colleagues of mine at the Harvard Law School, have anything
but praise) in order to examine the impact that the legal developments described in part one of
this paper are having in China, ascertain what within the vast black box labeled law might
warrant accentuation, and speculate about the broader societal circumstances that might be
conducive to further, desirable growth in law. If this has a strong normative ring, that is because
assessments of the current course of law reform to date and attempts to set priorities for its
future, even if focused chiefly upon law’s impact on economic performance, are, perforce
grounded ultimately in a normative framework, as will be elaborated below.

A departure point for such an inquiry is to remind ourselves that the link between formal
legal institutions (here broadly defined as North would do) and economic development even in
the advanced economies of the United States and Europe is hardly beyond contention, especially
if one is endeavoring to speak comprehensively (as opposed to seeking to correlate fairly specific
changes in particular laws with comparably specific economic outcomes, as, for example, in
measuring the impact of an extension of the copyright term on the value of a copyright). North’s
claim that a relative clarity and fixity of property rights has been central to economic
development in the west has been construed by many as showing that developing countries (and
foreign donors) desirous of growth should be devoting prime attention and resources to their
formal legal system, yet North himself is quite clear that other factors, such as “informal
constraints” matter, even if we “need to know much more about culturally derived norms of
behavior and how they interact with formal rules to get better answers” (North, 1990:140). At the
broadest of levels, I remain somewhat uneasy in the face of statements that would definitively
attribute overall economic growth to formal legality or even the rule of law, as distinct from
political institutions in general, political culture, a free media, a self-confident and assertive
populace, a vibrant civil society beyond political institutions, religion (did anyone say Protestant
ethic) or other factors, for we lack a controlled experiment that could effectively parse such
variables in an irrefutable manner (Singapore notwithstanding).

Turning to the law, even looking only at economically advanced western nations,
presumably we need to ascertain more precisely what are the motive forces. Is what matters most
particular substantive laws (such as those that limit liability and so make possible the corporate
form, as many would assert)? Or could it be procedural regularity (or perhaps the perception
thereof), as distinct from the content of any given set of laws? Or might it be the presence, self-
interest or ideology of a class of professional judges and lawyers? Or a belief in the system’s legitimacy (Tyler, 1990)? Or is it some combination of all of these? And how in such a calculus would we account for what some economists, social scientists, and others (not to mention a recent Vice-President of the United States) suggest may be the baleful effects of law and lawyers (Magee, 1989; Epstein, 1995; Shleifer & Vishny, 1998:73-80)?

Remaining with the developed west, the inquiry, of course, cannot stop with the formal law itself. In effect demonstrating the soundness of North’s intuition, there is a range of top flight scholars such as Macaulay, Greif, and Ellickson whose work suggests that it is only through careful study of the interplay of formal legal institutions with other more informal norms and processes that we can begin to understand the power, as well as the limits, of legality and to appreciate that some of that very power may manifest itself in ways quite different than was intended by those who drafted or developed said formal legal institutions (Macaulay, 1963; Greif, 1996; Ellickson, 1991). Indeed, in practice these very institutions themselves may be rather distinct from what we had assumed, as suggested, for example, by Herbert Kritzer’s book arguing that in many civil matters, American lawyers are appreciably more akin to “brokers” than professionals (Kritzer, 1990).

Finally, throughout all this, we would not want to lose sight of the impact on our analysis of time. One suspects that writing, especially emanating from Washington, about the centrality of the rule of law to economic development might have presented Chinese reformers with somewhat less of an air of inevitability had it been produced during the double-digit inflation and unemployment of the late Carter/early Reagan years, the savings and loan crisis of the mid 1980s, the stock market crash of 1987, or the recession of 1991 that cost President Bush re-election (all events transpiring during the PRC’s reform era). Or, to take another illustration closer both in time and locale to this inquiry, the World Bank in a celebrated 1993 study suggested that the insulation of high level bureaucrats from politics may have been an important cause of the so-called East Asian economic miracle, which notion would seem potentially in tension with the current emphasis on the rule of law (World Bank, 1993). And there is always the question of just what is the time frame within which one is reasonably to expect legal change to produce economic growth.

As we turn our attention outward, even if only to the economically advanced nations of East Asia, the concerns expressed above arguably become yet more daunting. To begin with, if
our goal is to assess the impact of legal institutions on economic development, what are the germane institutions? Does Japan have a very modest number of lawyers relative to other industrialized societies (which would seem to be the case if we confine our consideration to bengoshi or individuals authorized by the state to represent clients in court), are the proportions somewhat more comparable, at least as concerns the civil law jurisdictions of western Europe (which would seem to be the case if we include tax and patent specialists, judicial scriveners and others licensed by the state to perform functions akin to those performed by counsel elsewhere), or does it, to be perverse for the moment, enjoy/suffer from a greater proportion of legally trained persons in the work place than even the US (which would be the case if one focused upon graduates of law departments)? But even if we take the seemingly easiest alternative and focus only on bengoshi (as the closest equivalent to lawyers as we in the US know them) is the equivalence necessarily close enough to capture the very features for which we may be testing, as bengoshi, for example, have until quite recently had only an extremely modest role in business planning and an almost negligible role in government service and within corporate hierarchies, as compared with their North American counterparts.

To take another issue that at least some scholars would need to resolve at a fairly early stage in the inquiry, how are we to classify the legal systems of jurisdictions such as Japan, Korea, and Taiwan. The recent work of Shleifer and company on the relationship of law and finance turns on the very question of the relative efficacy of common law and what they term French, German, and Scandinavian civil law systems in promoting capital markets. Japan, Korea, and Taiwan, we are informed, are “German civil law...countries” for purposes of this study (La Porta, et. al., 1998). Yet in each of these jurisdictions, much of the very substantive law of corporate governance upon which they are focused is derived quite explicitly and with little alteration from American models. In addition, before pigeon-holing Japan as a German civil law country, one might want to take account of such further legal data potentially relevant to an assessment of Japanese law enforcement as 2,000 years of Japanese legal history and the presence of a constitution and other legal enactments beyond the corporate governance area bearing a distinct American imprint.⁵ And, of course, it may well be that what Shleifer would

⁵To be sure, Shleifer and company note in a single line that “after World War II, the American occupying army ‘Americanized’ some Japanese laws, particularly in the company law area, although their basic German-civil-law structure remained”(La Porta, et.al. 1998:1119).
describe as the Germanness of Japan’s capital markets and associated legal infrastructure may have a good deal less to do with the power of the German example than with more fundamental decisions of an economic and political nature. Facetiousness aside, the point here is to illustrate the need for caution as we consider what even much acclaimed work presents as the link between law and development.

Shleifer’s study also suggests other respects in which caution may be warranted even in thinking about societies such as Japan, Korea and Taiwan that have already attained a high level of economic development (and in which, therefore, it would be easier to track the impact of law than on a society at a far earlier stage of development such as the PRC—whose scholars, incidentally, typically describe it as being a civil law state). Is it prudent, for example, to rely so heavily on assessments generated by international business consultants (such as Business International Corp.) about such crucial matters as “efficiency of the judicial system,” the “rule of law,” and “corruption”? Are international consultants (even if they use domestic sources to gather some of their data) an accurate proxy for domestic economic actors, be they state, corporate or other? Would international business have access to or be as willing as domestic actors (given the constraints of the US Foreign Corrupt Practices Act and comparable legislation in a growing number of other OECD countries) to use extra-legal methods to address certain matters (one thinks, for instance, of rumored alliances of yakuza and certain Japanese businesses or of the massive underground economy existing on the small island of Taiwan about which Jane Kaufman Winn has written so well) (Winn, 1994)? Might not the excessive confidence that foreign business has displayed at earlier times about, inter alia, the robustness of the Japanese and Korean economies suggest that we would wish now to approach such assessments with a good deal of humility? 6 (Vogel, 1979).

The very question of timing suggests yet another caveat as we ponder what the examples of Japan, Korea, and Taiwan may have to tell us about the link between law and economic development. Each of these societies became a developed economy far more rapidly than the US, Britain, France, Germany, the Scandanavian nations, or other prime actors in Shleifer’s sampling and managed to do so with formal legal institutions, by virtually all accounts, playing

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6 Robert Barro suggests that “although these data are subjective...the willingness of customers to pay substantial fees for this information is perhaps some testament to their validity” (Barro, 1997:27). Presumably, at a minimum, one would want to see how such vendors performed were valued in the market over a sustained period of time, including downturns, and as well ascertain who their customers were.
an appreciably smaller role than was the case in North America or Europe. And growth in each, arguably, has slowed appreciably with the introduction and increasing reliance on certain types of formal legality. Obviously, there are a great many factors that could be cited in explanation of both the rapid rise of East Asian economies (including borrowings of technologies and institutional forms generated in the west) and the troubles that they have encountered in the 1990s (including an insufficient embrace of more arms-length, rule-oriented ways of doing business) but the point is that it is not necessarily waggish to think that large questions remain unresolved, even among China’s developed neighbors, as to the link between law and development.

So what, then, about China? As with so much else, the sheer size, diversity, and complexity of China, together with the relative lack of transparency about many matters pertinent to an assessment of the law there as well as the uncertainty that continues to shroud at least some available statistics, suggests that we will face the type of challenges encountered elsewhere, and more, in abundance as we turn our attention to the PRC.

For starters, the effort to measure the impact of law on economic development in China should endeavor to take a comprehensive view. Far too much of the writing concerned with current or prospective links between law and economic development in China has focused on presumed positive outcomes (such as increases in rates of foreign investment or overall growth in the economy) but would it not be equally relevant to include in the equation baleful consequences of the same? At the most obvious level, in the case of China, it would seem, for example, that one ought to offset against the figures for foreign direct investment those monies unlawfully sent overseas and perhaps also those funds diverted into the underground economy—for, in their own way, they speak to the effectiveness of the new legal system. In August of 1999, for instance, PRC Auditor-General Li Jinhua announced that public funds totaling more than 117 billion renminbi (more than US $14 billion) had been misused in the first six months of 1999 alone—a sum greater than the amount of that year’s special government spending package designed to stimulate the economy while some have suggested that money held in illegal offshore public accounts may total as much as US $6 billion and that tens of billions of renminbi in customs revenue have been lost by virtue of illegal imports said to run as high as US $30 billion a year (Becker 1999a). Moreover, the possibility exists that these figures may understate
the case, given, for instance, the considerable gap between World Bank and Chinese government estimates of lawful net capital outflow (72 vs. 16 billion for 1998) (Becker 1999b).

An argument might be made that one may also wish to add onto the scale externalities, both positive and negative, that can be credibly linked to such economic gains as enhanced foreign investment or a more open, market oriented economy. For example, a World Bank report entitled *Clean Water, Blue Skies* suggests that urban air pollution results in some 178,000 premature deaths annually, which, when taken with other “hospital and emergency room visits, lost work days and the debilitating effects of chronic bronchitis are estimated at more than $20 billion a year” in the cities alone (World Bank, 1997:19-23). Arguably, if one is to “credit” China’s emerging legal regime for drawing in foreign direct investment and spurring growth, one might also wish to “debit” that regime for that part of the aforementioned damage that could reasonably be attributed to the inability of China’s growing body of environmental law to curb such problems, particularly if generated by foreign invested plants.7 And a similar point might even be made regarding the sharp increase in crime (criminal cases were, according to the Supreme People’s Court’s Work Report up more than nine percent in 1998 -- Xiao, 1999b:180) and particularly, the rapid proliferation of economic crimes of a type largely unknown during the decade that preceded the reform period, with, for instance, the courts dealing with 17,612 cases involving alleged violations of the law by its own personnel (principally concerning corruption and other economic crimes -- Xiao 1999a:12) in 1998 and many more (running into the hundreds of thousand) such matters having been dealt with through Party disciplinary mechanisms (Luo, 1996).

Another, more subtle “externality” of China’s growing legalization may be its impact on at least some of the “informal constraints” that may in the past have been vehicles for the resolution of disputes (whether themselves directly related to the economy or not) and the building of trust of the type that helps foster the social stability and legitimacy upon which sound economies rest. In making this point, we need, of course, to be careful neither to fall victim to the tendency to romanticize such practices nor to assume that, even absent the rapid development of the formal legal system, the more “traditional” of these ways would necessarily be able to retain

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7Arguably, the UNDP’s impressive *China Human Development Report*, produced under the leadership of Prof. Wu Jinglian, represents an important step toward generating a metric that would capture both the benefits and costs of development (United Nations, 1999).
their vitality in an increasingly urbanized, industrialized, and internationalized China. Nonetheless, a fair ledger sheet on current law reform ought to try to take account of the ways in which the elaboration of the formal legal system is, both by design and unwittingly, eroding less formal institutions and customs. This may be most apparent with respect to the falling off of mediation that has accompanied the rise in litigation (to the point that in 1997 the number of disputes litigated was roughly equivalent to the number mediated -- for perhaps the first time in the history of the Chinese mainland), (Zhongguo Sifa, 1998) but it is also having an impact on the letters and visit [xinfang] process of citizen complaint (which has long historical antecedents). Some might contend that this shift simply reflects a voluntary movement by people with problems toward a more effective mode of dispute resolution. There is, however, more to it, with the state diverting resources from informal toward formal processes and advancing the position of attorneys relative to that of “legal workers” (falü gōngzuòzhē) who like the barefoot doctors of the 1960s provided crude but readily available services in the countryside—raising the as yet unexplored question of whether there has been a constricting of the access of poorer peoples (especially rural) to dispute resolution even as options become more abundant for the more affluent (Liebman, 1999).

Corrections to the way in which the link between law and development is typically considered also need to be made at the in-put as well as the out-put stage. Much has been made of the fact that China has of late been the world’s largest recipient of foreign direct investment (other than the US) while some attention has also been focused on estimates that approximately 60 percent of such investment comes from overseas Chinese (including PRC Chinese routing money through Hong Kong and other overseas Chinese communities in an effort to enjoy various tax holidays reserved for foreign investment) (Wei, 1997:24). Relatively little consideration, however, has been given in the developmental community as to the ways in which this datum regarding the provenance of incoming FDI may require a scaling down of the assumption that a stronger legal regime will perforce enhance the PRC’s capacity to attract foreign capital. For one, research on such investment suggests that overseas Chinese investors are appreciably less interested in formal legal protections than major corporate investors from the G-7 nations, in part because of the greater availability to them of informal networks and in part because of a considerable skepticism on their part about the effectiveness of the PRC legal system (Wei, 1997:24; Huang 1998). Indeed, my own research has unearthed
anecdotal data suggesting that some overseas Chinese endeavored to conduct business in the PRC precisely because they believed that it had a weaker legal regime with respect to intellectual property, labor law, and many other matters than surrounding jurisdictions (such as Taiwan and Hong Kong) and that this has evoked resentment among some PRC nationals both for the condescension it is seen as representing and for its impact upon the already difficult task of building respect for legality in China. 

In fairness, we ought not necessarily to take at full face value the assertions of other foreign investors, many of whom may not be overseas Chinese, about how dearly they desire the rule of law in China. Consider, the data gleaned by Daniel Rosen from extensive interviews which suggests that some foreign managers, for all their rhetoric about the need for more law, are not above resort to extra-legal measures. Or think about the late 1990s multi-billion dollar collapse of the Guangdong International Trust and Investment Corporation (GITIC). When Chinese authorities refused to bail out investors on the grounds that GITIC was a distinct corporate entity for which the state was not financially responsible, a number of western and Japanese investors conveniently urged China to overlook such niceties, arguing that had they thought China might invoke GITIC’s limited liability, they would have invested less or sought a higher return). And secondly, to the extent that investment figures may include sizable PRC funds unlawfully laundered abroad to take advantage of incentives for foreign money, one would want to think twice before utilizing it as evidence of the formal legal system performing its stated functions (The Economist, 2000).

The issue of the strength of PRC legal processes raises yet another delicate question that presumably needs to be addressed as we weigh the impact of law reform on economic development. As indicated earlier, the sociologist Herbert Kritzer has argued that in many instances, it may be more accurate to think of American lawyers as brokers than as professionals—which suggests to me the possibility that at least in some instances we may want to consider their contribution to economic development as rooted in relationships, influence-

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8 This is based on interviews with PRC lawyers and businesspersons conducted in Hangzhou and Cambridge, MA. in 1996.

9 This argument has a disingenuous quality to it, as some sophisticated foreign lenders had acted on the basis of non-binding “comfort letters” rather than formal bank guarantees. Similarly, we ought not to read concerns currently expressed in OECD states about corruption too far back into history as, after all, bribes paid to foreign officials to secure business abroad were tax deductible in Germany until quite recently.)
peddling, common sense, business acumen and the like as much as in anything peculiar to the law (though the quasi monopolistic power their licensed identity as lawyers provides also should not be ignored) (Kritzer, 1990). Without wishing to demean the Chinese bar, my own research on elite PRC business lawyers suggests that the phenomenon Kritzer discusses may even be appreciably more the case in China, given the novelty of so much of the legal system, the lower levels of training (relative to the American system) of most people working in it, historically rooted notions of *guanxi*, and the difficulty of enforcing ethical and other constraints on wayward attorneys (Alford, 1995; id., 1999b). If true, viewed benignly, this suggests that we might need to attribute some of the economic gains typically associated with growing legalization more to brokering (perhaps even of a very “traditional” *guanxi* peddling type, albeit in a new venue) rather than to the law or legal analysis. But in the spirit of Laozi, there is also a less benign reading, emerging from my interviewing of elite lawyers, to the effect that the proliferation of laws and lawyers may actually in some instances be degrading the quality of state administration by providing a plethora of opportunities for corruption (or, if one subscribes more to Richard Epstein than Laozi, by generating a good deal of unnecessary and economically unproductive work) (Epstein, 1995:1-16). A comparable point with respect to institutional design more generally is nicely made by Melanie Manion (Manion, 1996).

The point of raising such matters has been to begin to sketch what might go into a comprehensive metric for evaluating the relationship between Chinese legal and economic reform and not to denigrate the Chinese project of post Cultural Revolution legal development, for that effort poses a number of excruciatingly difficult dilemmas. The remainder of Part II of this article examines two of the most important of these dilemmas.

The first concerns the viability of top-down, as opposed to societally generated, legal reform. In some senses, this is obviously a false dichotomy. Any type of formal or positivist legal change, by definition, involves action by legislatures, the executive, judicial or other state actors and, even in highly democratic states, may well reflect a disproportionate influence of elites beyond the state structure. Furthermore, change of the magnitude pursued in China over the past two decades (in terms of economic and social liberalization) could not have commenced without the leadership’s endorsement, may well entail a fairly strong, on-going steadying state hand during a period of enormous and wrenching transition, and, as a practical matter, is unlikely to proceed much further if the powers that be feel threatened by it. And those of us whose
experience lies chiefly in the United States need to be mindful that in most civil law states (and, indeed, some other common law jurisdictions), citizens enjoy somewhat less capacity to initiate formal legal change than is, at least in theory, the case here. These caveats notwithstanding, however, if our assessment is to be responsible, we need to inquire as to the extent to which one reasonably can expect that heavily top-down development will generate a legal framework sufficiently reflective of and responsive to the needs of merchants and the citizenry more generally. For some years now, multilateral financial institutions, multinational corporations, and developmental economists have tended to urge states with appreciably more liberal economies than China’s to temper their inclinations to rely on a centralized direction of development in order that they might better accommodate the interests and initiative of merchants and others in civil society. (See, for instance, Shleifer & Vishny, 1998) And yet, when it comes to China, whose leaders, however savvy, have had no direct experience working in a market economy and whose civil society continues to have very considerable difficulty either in influencing the direction of public policy or asserting its own independence from the state, the international development community seems to have a pervasive faith in the willingness and capacity of Chinese political and bureaucratic authorities to act in a more disinterested manner to advance the values of the market than economic analysis typically assumes is the case for their counterparts in more liberal societies.

Experience from the first two decades of Chinese law reform suggests some of the costs of this mode of legal development. First, the single most important actor in the nation in terms of its capacity to shape the economy, the Communist Party, has seen fit to exempt itself, as both a formal and informal matter, from the constraints of the legal system, as exemplified by the fact that it is not covered by the Administrative Litigation Law (which, though not insignificant, has received a good deal more credit than it deserves as a means of citizen empowerment) and the

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10 We ought, for instance, to remain mindful of the argument of Marc Galanter, among others, as to how judge-made law may come to favor repeat players -- which typically are corporations or wealthy individuals (Galanter, 1974).

11 Actions can only be brought under the Administrative Litigation Law (ALL) against governmental entities (Xingzheng Susong Fa, 1990). Attempts to ground actions against the Party on this law have been rejected by the courts as lacking a legal basis. (Alford, 1993) The number of cases brought under the ALL since its promulgation in 1990 through the end of 1998 was less than 300,000, with well over half of them having come during the last two of these years. Early research suggests that citizens prevail in approximately 20 percent of the cases that proceed to judgment. While this clearly represents an advance from earlier days in which citizens lacked such a legal remedy, before according the ALL the rather lavish praise it has received, one would want to know a
further fact that individuals (particularly of consequence) forming and carrying out economic policy are far more likely to be subject to Party than legal discipline and, when subject to law, are far more likely to receive substantially lighter punishment than ordinary citizens for comparable offenses (Luo, 1996; Manion, 1998). At a minimum, this can not help but send a message to the general public that is in tension with the bountiful official rhetoric about relying on law to govern the nation and so, complicate the task of building support for and faith in China’s emerging legal system, not to mention trust more generally in the new institutions of a market economy at this formative stage in their development. More problematically, in undercutting the transparency, predictability and accountability that are believed to be among the principal benefits to be derived from legal development, this would seem to exacerbate the temptation of cadres (local as well as national) and businesspeople (foreign as well as domestic) to resort to extra-legal or even illegal means to advance their economic and other interests.

Given that the Party has exempted itself from the formal legal system, it is somewhat ironic that it continues to dominate the apparatus of that system. Knowledgeable observers suggest that virtually all significant legal personnel are Party members or have been closely vetted by the Party prior to assuming office. This is particularly the case with regard to the judiciary. At the very highest levels, the previous President of the Supreme People’s Court served simultaneously for many years as head of the Party’s committee on legal and disciplinary affairs. At more mundane strata, loyalty to the Party remains a crucial, if not the most important, criterion in the selection of new judges12, while sitting judges are extolled as models for their devotion to the Party (He, 1995).

The indelible link between the Party and the judiciary would seem to raise serious questions about the latter’s independence in matters having implications for the former, including those concerning concern economic affairs, even as we remember that under the

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12 Claims about the Party’s role in the judiciary are, by their nature, difficult to prove. I base these statements on discussions conducted between 1993 and 1999 with several noted Chinese legal experts, many with substantial experience working in government or with the judiciary.
Constitution, it is the individual court (e.g., the Haidian district court) rather than the individual judge which is said to be independent (Xianfa, 1982, art. 126). (Nor, incidentally, should we forget that the institutional, rather than individual, nature of judicial independence is itself another consequence of Party design.) Scholars such as Donald Clarke of the University of Washington and Anthony Dicks of the School of Oriental and African Studies of the University of London suggest quite interestingly that the judiciary’s lack of independence may be a prime reason that the courts have experienced such difficulty in securing enforcement of their judgements in civil and commercial matters, particularly vis-a-vis other government actors who, it is said, do not tend to see the courts as imbued with any special qualities or aura, but rather as one among many bureaucratic actors and not an especially noteworthy one at that (Clarke, 1997; Dicks, 1995). And anecdotal data I have gleaned suggests a considerable degree of unease among lawyers, both Chinese and foreign, about the prospect of litigation involving state-owned enterprises or other actors with powerful links to the Party (Alford, 1999b).

On the other hand, as the situation of the judiciary illustrates, there are no easy answers. A judiciary composed to a significant degree of people not affiliated with the Party might be more irrelevant in the contemporary Chinese context than is now the case. Apart from issues of links to the Party, the endowing of individual judges with independence in a manner akin to that of their common law counterparts assumes a higher level of training and experience than is generally the norm among lower level PRC judges and also a willingness of the center to see power further and less predictably dispersed. Given problems of local courts favoring local actors, such a move is not without potentially troubling consequences of its own. Indeed, in yet another irony, some serious observers suggest that the Chinese judiciary will not improve substantially until the central government takes a far more active role vis-a-vis the judiciary (which, though national in name, follows sub-national geographic units in its organization and source of finance) (O’Neill, 1999).

The aforementioned top-down quality is also mirrored in the substance of Chinese law itself. This is perhaps most significantly borne out by the Constitution of the PRC which is limited to a statement of the state’s structure and aspirations (among which are the rights it

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13Indeed, problems with enforcing judgments reached such proportions—with close to a million unenforced through the middle of 1999—that Chinese authorities recently launched a massive nationwide campaign directed at this, with particular attention to governmental agencies which have ignored judgements (Ni, 1999).
wishes to bestow on the populace), and does not itself provide any basis or means by which citizens might, through law, vindicate such rights or otherwise protect economic or other interests vis-a-vis the state (Liu, 1997:94-106). Stated differently, citizens are unable directly to invoke the Constitution to protect the interests in property that that document acknowledges or otherwise shield themselves against unwarranted state or Party action, but must instead premise any relief they might seek on further, specific legislation, assuming it is available. Beyond the Constitution, many of the central legal pillars of China’s move toward market—such as its new unified contract law, its intellectual property laws, and its laws concerning the internet—strike that balance in a manner tilted appreciably more toward state interest relative to the autonomy of non-state economic actors than is the norm in most major market economies. (On intellectual property law, see Alford, 1995b) Again, however, there are here no easy answers. Even among the G-7 nations, the way in which this balance is struck differs considerably. And in case of the PRC, the aforementioned tilt could be said, *inter alia*, to reflect such goals as establishing a reasonable pace for economic transition, fostering a market intended ultimately to be national in scope, and protecting consumers and other citizens who might have difficulty in doing so themselves.

As challenging as the foregoing may be, China’s post Cultural Revolution project of legal development raises a second and, in some respects, even more daunting set of challenges that go beyond issues of the power of the Party or center to the very character of law itself anywhere. How is China to balance stability with flexibility, uniformity with difference, and a recognition of the need for law to transcend instrumentalism with a very real need to deploy it instrumentally? And what is the relation of whatever type of law may be needed to underlying values and institutions?

There is, to be sure, no single definition of the rule of law (which is, in fact, part of its attraction as a rallying cry for some politicians worldwide) but there seems a fairly broad consensus that at its heart is the belief that the law must transcend any particular politics, policies, and personnel and apply in a predictable and even-handed way to all.14 That ideal, however, is somewhat in tension with the dictates of any society, especially, it might be argued, during times of considerable transition. It seems naive, as some scholars have done, to call on

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14 For an enormously thoughtful article on competing definitions of the idea of the rule of law, see Ohnesorge, forthcoming.
China to refrain from using law “instrumentally” when the nation’s needs are great and perhaps the chief rationale and source of on-going support for law lies in its perceived capacity to help transform the nation economically and otherwise, but where ought the line to be drawn and how? Predictability is to be prized, but does that require that China eschew its practice of experimenting with a variety of solutions to particular problems through what are termed provisional or temporary (zanxing) legal measures that draw on different foreign models or have application during particular phases of economic development? Is this phenomenon a major impediment to developing the rule of law, as most foreign scholars suggest, or an ingeniously Chinese innovation, as Ji Weidong and others have argued, that in the longer run may facilitate a more stable legal order by enabling China to customize its legal regime, rather than take foreign generated models lock, stock and barrel (Keller, forthcoming; Ji, 1992)? ¹⁵ And an analogous point might be made regarding uniformity. The PRC is, by its own statement, a unitary national state rather than a federal entity and yet even leaving aside the situation of Hong Kong and the other special administrative regions, there has been an explosion of law-making sub-nationally. Ought we to understand this as a clever and necessary functional equivalent to federalism (which can not be addressed directly for political reasons) or an indication of a chaotic legal regime, lacking the clear hierarchy of legal norms so essential to a fair and ordered society?

Lurking behind all of these questions is a no less difficult conundrum posed by China’s utilization of foreign models as a relative late-comer to market oriented legal development. To what degree will China’s reliance on such models either require or result in its embracing the values and institutions with which they are associated in their originating societies? ¹⁶ To pose this question is not to exaggerate China’s choices in a falsely dichotomous fashion by assuming that it will either wish or be able fully to emulate or to reject such values and institutions. Nor is it to ignore the long history of adoption and adaptation of foreign legal forms both in the west and throughout Sino-centric East Asia (Watson, 1977; Bodde & Morris, 1967). Rather, the point is that if one believes that law and society are linked (or, as North would put it, that the operation

¹⁵ In a sense, this position is similar to Qian Yingyi’s call with respect to economics for the development of “adaptive institutions” that would enable China to adapt, rather than simply adopt, international “best practices” (although neither Ji nor other advocates of it reference Qian) (Qian 1999). I discuss this position with respect to law below and in (Alford 2000).

¹⁶ William C. Jones has explored a number of these questions with great insight in Jones, 1999.
of formal constraints is shaped by that of informal constraints and vice versa), both those endeavoring to shape Chinese legal development and those who would write about it need to confront the implications of a program marked by considerable usage of foreign models as they weigh its performance and ponder its future direction. Can we reasonably expect that legal measures taken with little change from G-7 states will perform in China as they have in the very different institutional and cultural milieu from which they came (Pistor & Wellons, 1999)? If, on the other hand, such forms are substantially modified to suit Chinese circumstances, in a manner analogous to Qian Yingyi’s argument with respect to international “best practices” in economics, is there a danger that crucial features will be lost (Qian 1999)? And given China’s practice of drawing elements from many different settings (as, for example, in its reliance on a Soviet-civil law model for its judiciary but an increasingly American model for its bar), how well will the different pieces mesh? My own research, for instance, suggests that the divergent conceptions of the relative roles of judge and lawyer emanating from these different models is a significant cause of the very high level of tension one finds between the PRC bench and bar (Alford, 1999b; Xia, 1995).

Discussion of foreign models for Chinese law reform surfaces the question of the position of foreign donors and advisors, even if we are mindful of avoiding the common pitfall of exaggerating our impact upon Chinese processes. Particularly of late, foreign sources have provided considerable financial support for legal development in the PRC (although it totals far less than one percent of all developmental assistance provided China). Among the most noteworthy such efforts have been those of the European Union (with some US$20 million to be dispensed), the World Bank (which has devoted well over US $8 million to such programs), the United Nations Development Programme (which has spent millions on legislative drafting, Seidman, Seidman & Payne, 1997), the Asian Development Bank (which has been providing legal assistance in a variety of forms), assorted national governments (led by the Scandanavians, Germans and Canadians), various major foundations (Ford having spent close to US$10 million since 1982), and other actors. Nor is money all. Many of the aforementioned organizations have imparted ideas as well both through the provision of technical legal assistance and through the
examples they set via their own work in and with China. And they have been joined in that regard by universities, think tanks, businesses, law firms, and a host of others.17

Assessing this foreign contribution is virtually as complex as evaluating Chinese law reform itself (in part because it is so closely intertwined with the question of how the PRC has sought to generate and utilize foreign support). We need at the outset to recognize that the vast bulk of such assistance emanating from international organizations, multilateral developmental entities, and even foreign governments and foundations has tended to flow through and be directed toward actors that are either a part of the state or closely affiliated therewith. Certainly, there are many reasons why this is quite understandable. To some degree, law, by definition, involves the building of public institutions. Developmental agencies are bound by agreements, formal or otherwise, to work through particular official Chinese intermediaries (as, after all, their assistance often comes in the form of loans to the PRC government) while their charters typically preclude intervention in political affairs. And, in any event, there is surely a far greater need among official or officially blessed PRC actors than there are foreign assistance funds available. Nonetheless, as scholars, we ought not to take this approach as given, but should instead be probing its implications.

We need to be mindful that the foregoing approach may as a practical matter reinforce bureaucratic actors and formal constraints, relative to the private economy and civil society more generally, when the stated purpose of the endeavor, at least judging from the rhetoric of both the PRC government and the multilateral development agencies, is to facilitate movement toward a more liberal economy. Accustomed, as state and Party authorities have been, to permeating economy and society, it seems somewhat hopeful to structure developmental initiatives on the assumption that such authorities will refrain from seeking to use the ensuing infusions of cash and technical assistance to buttress their position, rather than cultivate forces in society that may eventually compete for resources and power. Some state agencies have seized upon legal reform as a means to justify their continuation at a time of transition and have accordingly been busy churning out a plethora of legal enactments that may not have been in the broad interest of the economy or society (Manion 1996; Keller, forthcoming). Indeed, at its worst, there are indications that some regulatory authorities and courts have developed regulations or encouraged

17US foreign legal assistance is thoroughly and thoughtfully treated in deLisle, 1999.
litigation as a means of generating their own institutional (or even personal) revenues, legitimately or otherwise—as the central government has recognized in various anti-corruption campaigns that have led to tens of thousands of Party disciplinary matters and thousands of criminal actions concerning corruption in 1998 alone (Luo, 1996; Xiao, 1999a; Xinhua, 1999b).

Alternatives to the overwhelmingly statist orientation of developmental assistance for law in China are obviously not without potential problems of their own (concerning, inter alia, issues of possible or perceived encroachment upon state sovereignty and those of the legitimacy of unofficial organizations). Nonetheless, one can not help but wonder whether espoused goals of legal development such as economic development or the cultivation of greater trust—and perhaps even legal development itself—might not be further advanced were law thought of more in its social context, and resources and attention allocated accordingly. Dasgupta and Wheeler have shown, for example, that holding constant for other variables, a one percent increase in literacy in China is likely to yield a two percent increase in utilization of the letters and visits [xinfang] process to register complaints concerning the environment. (Dasgupta & Wheeler, 1996), while Shi Tianjian has documented the continuing interest even of Beijing residents in this traditionally rooted mode of seeking redress for injustice (Shi, 1997). And Amartya Sen has made a powerful case based principally on the Indian state of Kerala for the proposition that increased literacy and workplace opportunity for women are more effective in lowering birthrates than laws or policies of a coercive nature. One could well imagine that increased support for education (be it primary, secondary or tertiary and general or focused on civics), non-governmental organizations, and unofficial media, to take but a few illustrations, might yield very substantial benefits with regard to law and the ends that law is supposed to achieve.

This general point about indirection has more specific analogues with respect both to substantive legal questions and issues of legal institutions. On the substantive side, the predominant attention of foreign donors, especially among the developmental agencies, has been on what is loosely called economic law. It could well be, however, that the goal of promoting greater confidence in the legal and economic institutions of a marketizing economy might be advanced less by another complex provision on securities or copyright and more by anti-corruption measures that were understood to cover everyone, rather than stopping at mid level officials or persons of higher position (such as former Beijing mayor Chen Xitong) who,
anecdotal data suggests, may be viewed as having been selected for punishment (deserving, to be sure) chiefly for having lost the latest power struggle (Bezlori, 1998).18

On the institutional front, the argument might be made that foreign donors have been too inclined to focus resources and attention on such avowedly legal apparatus as the courts and offices doing the technical drafting of laws. This is not to deny their obvious importance, but rather to urge that we remember, for example, that courts occupy a somewhat different role in China than the US. Their decisions in civil matters lack precedential value (and so, do not bind subsequent courts), their decisions in administrative matters have until the recent passage of the Administrative Reconsideration Law (on which “the jury is still out”) have only had the potential to declare unlawful specific administrative actions (rather than a pattern of behavior or the underlying regulation itself), and their decisions in criminal matters rarely result in determinations of innocence (with conviction rates typically running between 98 and 99.5 percent). It might well be that concentrating on providing citizens with more meaningful opportunities for substantive input into the law-making process (for which improvements in technical legal drafting are not a substitute) and with greater access to principled and transparent administrative decision making might be of appreciably greater consequence in the promotion of the rule of law in China.19

Implicit in the approach advanced by the vast majority of foreign donors is the notion that law can be detached from politics and perhaps even society more broadly. While this posture is understandable given the difficulties that might ensue from acknowledging any such linkage and China’s unfortunate recent history in which politics played all too prominent a role in legal and

18 Some foreign observers, such as the eminent law and economics scholar Richard Posner, have suggested that developing nations such as China would be better advised at least in the immediate future to concentrate their efforts in law on developing a few clear substantive rules regarding property and contract and a relatively simple, judicial, arbitral or other enforcement apparatus. The establishment of “an extensive system of civil liberties” and a more elaborate judiciary, suggests Posner, absorb human and other resources that a developing society can ill afford to lose from more productive economic activity (Posner, 1998). As I suggest elsewhere, even if one were to accord economic development the centrality that Posner does, this is a flawed argument. It is questionable whether a few clear rules regarding property and contract are sufficient to undergird the type of transformation that nations such as China are undertaking and to satisfy the international business community (which is likely, in their absence, to require a higher risk premium). Moreover, Posner and others of similar mind seem to neglect the ways in which an independent media and autonomous non-governmental organizations may facilitate economic growth (by, inter alia, ensuring that unfavorable economic news is generally available and exposing corruption and mismanagement) (Alford, 2000).

19 Hearings, it should be noted, have been held in some instances at both the national level (as with regard to the Water Pollution Prevention and Control Act) and the provincial level (in Guangdong).
other affairs, it carries considerable risks. Perhaps the most significant is that it may serve to shroud the difficult choices inherent in any serious program of law reform. Although they often are presented in neutral and/or technical terms, matters such as the independence of the judiciary or the content of laws concerning property involve the allocation of power within the government and between state and society (as we should know from our own experience), as well, of course, as the Party. Undue obliqueness about what is involved in such decisions, however well-intended, may serve to reinforce instrumentalist conceptions of law among Chinese leaders and thereby divert their attention from concerns that will need to be addressed for even the more technical of measures to flourish. By definition, this would seem to work against greater engagement of the Chinese citizenry on issues of consequence at a time when popular support seems critical to the success of the law reform effort. And it has the potential to place donors in the awkward position of advocating particular legal reforms without fully disclosing to aid recipients what they believe may be important implications of the assistance being provided, including its potentially transformative impact on the polity.

Foreign involvement in Chinese legal development is not, of course, limited to multilateral institutions and foundations and, therefore, we ought also to be mindful of the impact of other actors, including governments, business, legal practitioners, and academe. Many among these latter actors have, for example, in recent years had a great deal to say about the promotion of the rule of law in China. Without being unduly cynical, assessment in this area would need to move beyond the rhetorical to an examination of behavior. It may be, for instance, that the American government’s much touted (but as yet largely unfunded) rule of law initiative is better understood as having as much to do with domestic American politics as Chinese reform (in the sense of finding common ground for the business and human rights communities that have been divided over China policy) (Alford, 2000). As Daniel Rosen’s fine study of foreign enterprises in China suggests, notwithstanding what may be quite sincere expressions of concern about the need for greater legality, many expatriate managers indicate that they are not adverse to employing extra-legal measures (Rosen, 1999). And one might ask whether foreign business’s

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20This proposition is borne out, at least in a preliminary fashion, by research that I have been conducting with colleagues, American and Chinese, from a variety of disciplines on popular understanding of and behavior toward the environment (Alford, Hall, Polenske, Shen, Wang, Weller, Xu and Zweig, forthcoming). Notwithstanding considerable state effort, the populace we studied seems only in a limited way to have understood and embraced official messages (conveyed through campaigns, law, education, and politics) about the environment.
enormous enthusiasm for arbitration in China, though quite understandable in view of the quality of Chinese courts, represents an embrace of what is, in effect, a system of private justice for wealthy enterprises and a concomitant lack of commitment to public institutions that presumably have a critical role to play if the rule of law is to be achieved in and for Chinese society.

III

As we turn our attention to possible research that might be of interest to those who may be involved in the future of Chinese law reform, the good news is that there is a vast array of topics worthy of the attention of serious scholars. That, unfortunately, also happens to be the bad news. Stated differently, notwithstanding noteworthy work by the teams led by the late Gong Xiangrui and Xia Yong in China and such individual scholars as Fang Liufang, He Weifang, Liang Zhiping, Donald Clarke, and Pitman Potter, there is far too little writing that examines the type of questions posed throughout part two of this article (Gong, 1993; Xia, 1995; Fang, 1999; He, 1998; Liang, 1997; Clarke, 1997, Potter, 1994). And there are very substantial reasons for this, including the sheer complexity of separating different explanatory elements sufficiently to construct verifiable hypotheses, the uncertain reliability of at least some major categories of officially promulgated data, the practical difficulties of gathering alternative data (Xinhua, 1999c), the sensitivity of parts of the exercise, and the need to be cross-disciplinary not only in a formal methodological sense but as well in one’s appreciation of the biases of one’s own discipline, and the multiple readings that might be given to the course of legal development in the societies against which China is inevitably, if implicitly, being measured.

The prime area in which research needs to be focused is that of the interplay between formal and informal norms. As suggested in Part II of this paper, Chinese authorities, foreign

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21 Official statistics, at least regarding law, warrant intense scrutiny. For example, the pertinent official yearbooks not only indicate court appearances by lawyers, but also specify such additional data as the number of contracts negotiated by lawyers, the amounts at stake in such negotiations, and the number of times lawyers provided legal advice to clients—even as the Chinese government indicates that it does not know how many of its citizens are undergoing “reeducation through labor.” Nor do such official sources regarding lawyers indicate how they have dealt with the challenges to the accurate gathering of such data posed by lawyers’ (and clients’) incentive to underreport in order to avoid legal (and extralegal) exactions (Alford 1999b).

22 The Chinese government has of late indicated that it wishes to exercise a high degree of oversight regarding survey research, especially when foreigners are involved. There are indications that some surveys need to be vetted by state authorities prior to being administered (Xinhua, 1999c). In this context, it is questionable whether one could (or would be well-advised to) poll merchants or citizens more generally as to their views on the Communist Party’s willingness to observe the law or similar topics.
donors and most scholars seem to be proceeding on the assumption that the growth of formal legal institutions, formal rules, and formal legal personnel is synonymous with the promotion of greater respect for legality, which, in turn, will foster further economic development (and perhaps other desirable goals such as a more just society). We need to move beyond such assumptions to consider the impact that this burgeoning of the formal is having on both existing and emerging norms of a less formal sort. For example, it is virtually universally assumed, at least among persons working on Chinese legal development, that the rapid expansion of the Chinese bar has been a boon for legality. But is this necessarily so? As suggested earlier, my research on elite, internationally oriented business practitioners in Beijing (who typically have a higher level of legal education and more exposure to international norms than the vast majority of Chinese lawyers) is not necessarily encouraging. It suggests that at least some such lawyers may be exacerbating problems of corruption among the judiciary and officialdom (Alford, 1999b), while there is evidence that in its drive to build a legal profession, the Chinese state may be displacing China’s paraprofessional “barefoot lawyers” and weakening more traditional, less formal methods of dispute resolution such as mediation (Liebman, 1999). Moreover, my research further suggests that in exploring such issues, we need to examine what it is that lawyers actually are doing (as distinct from assuming that actors bearing the same name in different settings are carrying out the same set of activities in the same manner) and who, in addition to lawyers, benefits from such endeavor. We ought not, for example, simply take the increase in cases filed as incontrovertible proof of a popular commitment to the legal system and evidence of justice being done, as there are suggestions that some judges have been soliciting cases so that their courts, which do not receive adequate government funding, might secure the not inconsiderable court filing fees (Fang, 1999). The point here is to surface questions that will undoubtedly be difficult to answer, and to suggest that at a minimum we examine them with care prior to concluding that increasing the number of lawyers is a warranted expenditure or that the present prevalent conception of what lawyers are, how they should be trained, and how they should be regulated is sound and will promote further reform, be it in the law or for society more broadly.

Optimally, if circumstances permit, such research ought to go still further, utilizing the rich example that China provides to delve seriously into the more general question of why law matters to economic growth in a manner akin to that Jean Oi and Andrew Walder have successfully deployed in their just published volume that weighs broad theory concerning the
centrality of property rights in light of the Chinese experience (Oi & Walder, 1999). For all the difficulties in conducting research discussed earlier in this paper, China does present a highly attractive opportunity to test the received wisdom concerning the interplay of legal and economic development, given that although it has a long history of informal (and some formal) institutions that appear to have been facilitative of a market oriented economy, the sharp break engendered by the early years of the PRC culminating in the Cultural Revolution enables us to trace from a fairly precise starting point both its contemporary move toward marketization and its program of legal development. Moreover, the fact that we have a fairly comprehensive chronicle of the particular foreign provenance of much of China’s program of law reform and broad agreement as to its largely top-down character suggests the possibility of undertaking research designed to test out assumptions regarding the relationship of law to underlying values and institutions, and the significance of popular involvement that, explicitly or otherwise, inform theoretical writing about legal development. And if we were sufficiently adventuresome, we might even think about bringing the Chinese case together with work in social psychology that suggests that the elaboration of formal, external constraints may result in a weakening of individual moral resolve (Deci & Ryan, 1985; Eisenberger & Cameron, 1996; Jolls, Sunstein & Thaler, 1998). Perhaps, from such inquiries, we might in time reach a fuller understanding of what it was Laozi was endeavoring to convey in his cautionary adage concerning the law.
REFERENCES


------, 1999c, “Zhongguo Jiang Dui Shewai Shehui Diaocha Huodong Jinxing Shenpi” [China’s Movement Toward an Approval Process Regarding Foreign Social Science Surveys.]
