Studies in East Asian Law,
Harvard University

To Steal a Book Is an Elegant Offense

Intellectual Property Law in Chinese Civilization

William P. Alford

Stanford University Press,
Stanford, California
1995

intellectual property law and claiming benefits that normally accrue to jurisdictions that comply with the major international intellectual property conventions, all of which are basically derived from the experience of Western nations.[28] And, if further justification is desired, perhaps it may be found in the experience of the purveyors and purchasers of infringing items, whose daily activities remind us that East and West are inextricably linked in matters of intellectual property.[29]

Two

Don't Stop Thinking About . . . Yesterday: Why There Was No Indigenous Counterpart to Intellectual Property Law in Imperial China

> The Master [Confucius] said: I transmit rather than create; I believe in and love the Ancients.
>
> *The Analects of Confucius*, bk. 7, ch. 1

The notion that copyright arose soon after the advent of printing enjoys wide currency in the scholarly world. Chinese historians date copyright from the rise of printing during the Tang Dynasty (A.D. 618–906),[1] while Western theorists of economic development contend that the inexpensive dissemination of texts necessitated the formal legal protection that copyright is intended to provide.[2] In short, the conventional wisdom among "intellectual property scholars . . . [is] that copyright emerged with the invention of printing," as Zheng Chengsi and Michael Pendleton declare in their recent monograph on copyright in the PRC.[3]

This chapter takes issue with the received wisdom, at least as concerns imperial China (221 B.C.–A.D. 1911). After first endeavoring to delineate an appropriate scope for inquiring into imperial Chinese legal history, it explores Chinese efforts to regulate the reproduction of literary and other creation and innovation prior to the twentieth century. Finding neither a formal nor an informal counterpart to copyright or other major forms of intellectual property law, this chapter then considers why imperial China did not respond to the introduction of printing and other major technological advances in

the manner that both Chinese and Western scholars would have us believe.

Sinologists have long characterized Chinese law from the first imperial dynasty, the Qin (221–206 B.C.), through the last dynasty, the Qing (A.D. 1644–1911), as "overwhelmingly penal in emphasis," in the words of Derk Bodde and Clarence Morris, authors of the best-known Western work on Chinese legal history.[4] Focusing on the imperial codes that were promulgated during each dynasty, such as the *Da Qing lü li* (Laws of the Great Qing Dynasty),[5] the conventional wisdom holds that the "positive law," in Joseph Needham's words, was confined to "purely penal (criminal) purposes."[6] As a consequence, the "civil law remained extremely underdeveloped," and the concerns typically addressed through it in the modern West were instead the domain of village and clan elders acting pursuant to custom.[7]

The foregoing image requires serious reconsideration. The emphasis on public, positive law and the dichotomy between civil and criminal law so deeply ingrained in contemporary Western society have led to a mischaracterization of the role and nature of imperial Chinese law. The Chinese neither saw public, positive law as the defining focus of social order nor divided it into distinct categories of civil and criminal. Rather, traditional Chinese thought arrayed the various instruments through which the state might be administered and social harmony maintained into a hierarchy ranging downward in desirability from heavenly reason (*tianli*), the way (*tao*), morality (*de*), ritual propriety (*li*), custom (*xixu*), community compacts (*xiang yue*), and family rules (*jia cheng*) to the formal written law of the state.[8] Public, positive law was meant to buttress, rather than supersede, the more desirable means of guiding society and was to be resorted to only when these other means failed to elicit appropriate behavior.

Far from being indifferent to the concerns we now address through civil law, the imperial Chinese state accorded them great prominence, paying particular attention to the family, which was both a social and economic unit. As befits an agrarian state self-consciously organized along the model of an extended family, the standards embodied in its various norms from heavenly reason down to public, positive law focused to a very substantial degree

on matters encompassed in the "modern West" under the rubric of civil law. The inattention of both Chinese and foreign legal historians to the more ethereal of these precepts and the veritable fixation of such scholars on the written law's penalties has obscured the very concerns those penalties were designed to promote and, in so doing, prevented us from fully appreciating their true significance.[9] We must not lose sight of the fact that more than half of the ten most serious offenses (the Ten Abominations, or *shi e*)[10] under imperial Chinese law consisted of misdeeds involving the family. Impiety toward one's senior relatives, for example, carried far greater repercussions than the murder of a stranger. Indeed, in view of the weight imperial codes gave such matters, one might well argue that the Chinese state had a singular concern with one of the core foci of our civil law.

The idea that the state's reliance on family heads and village elders to enforce local customs expressed an imperial Chinese indifference to what we call civil law also needs revision. The state's reliance on family heads, village elders, and guild leaders to apply local custom—as embodied in family rules [*jia cheng*],[11] guild charters (*hang zhang*),[12] and other less formal expressions of such practices—should instead be seen as akin to a controlled delegation of authority. It was reminiscent of, if far less formal than, tax farming, pursuant to which local private merchants were crucial to the collection of state revenues.[13] As such, it ingeniously allowed the state's influence to reach far further than would otherwise have been the case, given the range of dialects and customs, poor communications infrastructure, and persistent budgetary problems that by the late Qing provided no more than a single local representative of the emperor (known as the district magistrate) for every 200,000 subjects.[14]

The suggestion that the imperial state's reliance on family, village, and guild leaders to administer local custom was a sign of state concern for, rather than indifference to, family and economic matters seems less radical if one appreciates that in making their decisions, such leaders were likely to have been applying basic values consistent with those that the state's official representatives would have employed had they been more directly involved.[15] The delegation of authority "required continuing adherence to the social guidelines set down in the Four Books [which were among the great Chinese Classics],"[16] in the words of the historian Ray Huang.[17] The

emphasis in the family or guild on the acceptance of one's position in the hierarchy (be it as a child or as an apprentice),[18] and on the performance of those obligations that went with each position, had clear parallels vis-à-vis the state. So it was, for example, that local magistrates were known as the *fumu guan*—or "father/mother official"—of the populace.[19] As Confucius observed in the *Analects* when questioned about the fact that he was not then in public service, "be filial, only be filial [towards your parents] and friendly towards your brothers, and you will be contributing to government."[20]

Further evidence that family, village, and guild leaders were acting as responsible, albeit informal, delegates of the state emerges from the consistent patterns of interaction between them and their local magistrates throughout the imperial era. The state charged clan and guild leaders with a range of tax collection and related obligations and also held them responsible for the conduct of their members.[21] Indeed, in some instances, magistrates went so far as to require the certification of guild chiefs and to review the rules that such leaders drafted.[22] The heads of these family and economic units were also able to refer difficult cases to their local magistrates—particularly if they involved challenges to clan or guild rules, or to the authority of their senior members.[23] Conversely, magistrates, who appear to have been confronted with many more legal matters than the conventional wisdom would have us believe, were quick to dispatch appropriate cases back to the leaders of such units—especially as administrative regulations penalized these officials if they had formally to resolve more than a modest number of cases.[24]

In view of the foregoing, study of legal regulation in imperial China should thus not be limited to the penal sanctions in dynastic codes. It must, at a minimum, also address the remainder of imperial China's public, positive law; means other than public, positive law through which the state directly endeavored to maintain social order; the ways in which the populace sought to invoke the state's authority; and the elaborate and varied fabric of indirect ordering through family, village, and guild.

Considering the full scope of their legal history, the Chinese were not indifferent to the unauthorized reproduction of texts and other items. There is evidence from before the establishment of the Zhou dynasty in 1122 B.C. of interest in the ways in which commodities were identified,[25] concern from the Qin era with the distribution of

written materials,[26] and attention from the Han dynasty (206 B.C.–A.D. 220) to barring the unauthorized reproduction of the Classics.[27] Nonetheless, it is with the advent of printing during the Tang period that one first finds substantial, sustained efforts to regulate publication and republication.[28] What appears to have been one of the earliest such measures was issued in A.D. 835 by the Wenzong Emperor in the form of an edict, which, as was routine, became a part of the Tang code.[29] The decree prohibited the unauthorized reproduction by persons of calendars, almanacs, and related items that might be used for prognostication, which, it observed, were being copied in great quantity in the Southwest and distributed throughout China. Far from being arcane, questions of time and astronomy were central to the emperor's assertion that he was the link between human and natural events—and so were to be tightly controlled by court astronomers, while works regarding prognostication were of concern because they might be used to predict the dynasty's downfall. This initial ban on the pirating of officially promulgated works soon expanded. Before its collapse, the Tang dynasty also prohibited the unauthorized copying and distribution of state legal pronouncements[30] and official histories, and the reproduction, distribution, or possession of "devilish books and talks" (*yaoshu yaoyan*) and most works on Buddhism and Daoism.[31] Unfortunately, evidence as to the effectiveness of these various provisions is scant.

Spurred by advances in printing technology and a relative rise in literacy, the early years of the Song dynasty (A.D. 960–1279) saw a marked increase in the production of printed materials by both the Imperial College (or Directorate of Education, as *guozijian* has variously been translated) and "private" persons, many of whom, in fact, were government officers carrying on sideline activities.[32] Concerned about the proliferation of undesirable printed materials, in 1009, the Zhenzong Emperor ordered private printers to submit works they would publish to local officials for prepublication review and registration.[33]

The principal goal of prepublication review was to halt the private reproduction of materials that were either subject to exclusive state control or heterodox. By the Song, the former category included both those items covered in Tang Wenzong's edict of 835 and authorized versions of the Classics (which were only to be reproduced under the auspices of the Imperial College), model answers to

imperial civil service examinations, maps, and materials concerning the inner workings of government, politics, and military affairs.[34] Pornography, broadly defined, and writings using the names of members or ancestors of the imperial family in "inappropriate" literary styles or that were "not beneficial to scholars" were also deemed heterodox.[35]

The penalties crafted by the state to enforce the prepublication review system underscored its objectives. Persons failing to obtain official approval prior to printing works that were neither subject to exclusive state control nor banned altogether might suffer one hundred blows with a heavy bamboo cane and the destruction of their printing blocks. Those who reproduced controlled or prohibited items risked far greater punishment.[36] The unauthorized reproduction of astronomical charts, for example, called for a 3,000-li (i.e., approximately 500-mile) exile. This was a severe penalty, indeed, given that one would not only be sent off to a desolate border region but largely be cut off from one's family, ancestral burial grounds, and linguistic and cultural home base.

One interesting by-product of the Song's prepublication review system was that persons who obtained its approval appear at times to have included in works they printed notices of such state action in an effort to combat unauthorized reproduction. Typical of these was a notice contained in a twelfth-century Sichuan work of history stating, "This book has been printed by the family of Secretary Cheng of Meishan[,] who have registered it with the government. No one is permitted to reprint it."[37] Unfortunately for the Cheng family and others similarly situated, the same laws that so carefully and stringently penalized unauthorized reproduction of the Classics and banned the heterodox neither explicitly forbade the pirating of more mundane works nor set forth sanctions for so doing. There is some evidence of printers of the innocuous seeking the assistance of local officials to combat unauthorized use of their works and even of signs being posted to that effect—but these efforts appear scattered,[38] ad hoc, and may well have been attributable to the fact that, as with Secretary Cheng, private printers and local officials were often one and the same. Indeed, by the late Song era, the dynasty appears to have had difficulty in securing enforcement of the ban on unauthorized reprinting of works intended to be under exclusive state control.[39]

The Song's imperial successors, and especially the Ming

(A.D. 1368–1644), endeavored to strengthen state control of publication, although relatively few changes were made to the formal structure of regulation until the Qing.[40] Each post-Song dynastic code specifically forbade the unauthorized republication of governmental works on astronomy, the civil service examinations, and other materials long considered sensitive. Additionally, each contained provisions banning "devilish books." These provisions were supplemented periodically by special decrees—as may be seen, for example, in the Hongwu Emperor's (1368–92) orders that all works disparaging the newly founded Ming dynasty even indirectly through the use of homophonic puns be eliminated,[41] and in the Qianlong Emperor's (1736–96) famous decree of 1774 requiring that all literature be reviewed so that any books containing heterodox ideas could be destroyed.[42]

Notwithstanding the Ming dynasty's goal of exercising more control over publication, the formal prepublication review system developed by the Song appears to have lost much of its vitality. Efforts were made during the mid and late Ming to revitalize official control, principally at the local level, but seem not to have been particularly successful, judging from extensive accounts of the unauthorized reproduction and alteration of texts for commercial reasons.[43] As a consequence, Qing rulers moved to strengthen this function of local officials, going so far in 1778 as to direct the reinstitution of a strict system of local prepublication review.[44]

This high degree of state interest in the control of publication was not mirrored with respect to the unauthorized reproduction of that which we now protect through trademark or patent. Although prior to the twentieth century, the Chinese state oversaw matters of commerce and industry more closely than has typically been recognized,[45] it did not develop comprehensive, centrally promulgated, formal legal protection for either proprietary symbols or inventions.

The dynastic codes did, through elaborate sumptuary laws, restrict the use of certain symbols associated with either the imperial family (such as the five-clawed dragon) or officialdom.[46] They also barred the imitation of marks used by the ceramists of Jingdezhen and others making goods for exclusive imperial use,[47] and made it illegal for certain craftspersons to send information about their work out of China.[48] These prohibitions did not, however, presage a broader pattern of centralized legal regulation.

The absence of direct imperial legal regulation of trademarks

and inventions did not wholly bar the development of concern for its protection against unauthorized use. Northern Song (960–1127) records reveal that a family named Liu of Jinan, Shandong, used a mark containing both a drawing of a white rabbit and an accompanying legend to extol the virtues of its sewing needles.[49] Nor were the Lius and their white rabbit alone. Guild regulations, clan rules, and other sources indicate that producers of tea, silk, cloth, paper, and medicines, among other products, from at least the Song period onward, sought to maintain the brand names and symbols they had developed by marking their goods, by declaring that others could not use the marks involved, and by registering them with guilds and at times, local officials.[50] Additionally, some—such as the producers of the celebrated Tongren Temple line of medicines—sought to maintain the confidentiality of their manufacturing process by employing only family members or eunuchs, or by keeping vital parts of the process secret from nonfamily employees.[51]

The same documents that yield data regarding efforts to protect proprietary marks and processes also, however, indicate the great difficulty of doing so.[52] There appears to have been massive counterfeiting of well-known brand names and marks, as well as extensive attempts to imitate secret manufacturing processes—often with questionable results. Merchants and producers endeavored to deal with these problems both directly and through guild and comparable organizations, but when all else failed—as appears often to have been the case—they turned to local officialdom. Help was sought from local officials, not on the basis of any code provision specifically outlawing such imitating, but instead by imploring these "father-mother" figures to prevent unfairness and deception.[53] Thus, for example, sericulturists whose "trade-marked" silk in the Shanghai area had been improperly copied were able in 1856 to seek the assistance of their district magistrates, who ordered the infringers to stop.[54] Such appeals, however, do not appear to have been large in number, even taking account of the anecdotal nature of the evidence available. Nor do they appear often to have been successful in bringing the objectionable activity to an end.

Although the characterization of imperial Chinese law as wholly penal obscures the degree to which such law addressed civil matters, it does not follow that intellectual property law existed in China centuries before it arose in the West. Virtually all known examples

of efforts by the state to provide protection for what we now term intellectual property in China prior to the twentieth century seem to have been directed overwhelmingly toward sustaining imperial power. These official efforts were only tangentially, if at all, concerned either with the creation or maintenance of property interests of persons or entities other than the state or with the promotion of authorship or inventiveness. This is perhaps most obvious with respect to provisions of the dynastic codes barring ordinary people from reproducing symbols, such as the five-clawed dragon, associated with the throne or officialdom. It is also evident in the fact that although the Tang and later dynasties went to considerable lengths to restrict the unauthorized reproduction of government materials and to ensure the accuracy of those it licensed, they seem to have been unconcerned about the pirating or improper editing of other works. Indeed, it is more accurate to think of prepublication review and the other restrictions on reprinting described above, together with the absolute ban on heterodox materials, as part of a larger framework for controlling the dissemination of ideas, rather than as the building blocks of a system of intellectual property rights, whether for printers, booksellers, authors, or anyone else.

Only the efforts of printers, booksellers, and other guilds or merchants to establish their particular monopolies seem to presage the notion that persons or entities other than the state might enjoy an interest in intangible property akin to the protection provided for tangible personal property or real property throughout much of imperial Chinese history.[55] Even this limited interest appears to have been tolerated by the state and its local representatives chiefly because it advanced other objectives. It is no coincidence that official expressions of concern about unauthorized copying often focused either on the textual distortions and errors contained in pirated editions of the classics, dynastic histories, and other orthodox works or on the fact that persons responsible for such editions were disrupting local peace by violating monopolies granted to local officials or influential gentry in their districts. Similarly, it is not unduly cynical to view the state's implicit and occasionally explicit support for guild efforts to protect trade names and marks as aimed at the preservation of social harmony by maintaining commercial order and reducing instances of deception of the populace.

The Chinese were obviously not alone in linking state interest

with the protection of what we term intellectual property. In both the common and civil law worlds, the idea of limiting the unauthorized copying of books was originally prompted not by a belief that writings were the property of their authors, but by a desire to give printers an incentive not to publish heterodox materials.[56] Similarly, the early history of patent law in the West owes far more to the state's desire to strengthen itself than to an acknowledgment of any inherent property interest of the inventor.[57] Thus, for example, the English throne awarded patents to foreigners who introduced new products or processes to the British isles, even if those persons were not themselves responsible for the innovation in question.[58]

But the seventeenth and eighteenth centuries witnessed the development of an approach toward intellectual property in Europe that had no counterpart in imperial Chinese history. Simply stated, there developed in England and on the Continent the notion that authors and inventors had a property interest in their creations that could be defended against the state.[59] Society, growing numbers of Europeans came to believe, would benefit by providing incentives to engage in such work and disseminate the results. China, by contrast, continued to regulate this area predominantly in terms of how best to maintain the state's authority.

To take heed of this distinction is not to suggest that the Chinese ought to have followed the same course as the West.[60] Rather, it is to ponder why a civilization that for centuries paid particular attention to the regulation of publication, that for long was a world leader in science and technology, and that celebrated at least certain types of innovation,[61] did not provide more comprehensive protection for its rich bounty of creation.

Neither Chinese nor foreign scholars of intellectual property law contribute much to such an inquiry. The former, for example, typically treat imperial efforts to control the dissemination of ideas as constituting copyright, and so end the inquiry there.[62] They see little need to consider why—if China had copyright from the Tang dynasty—enforcement appears to have been negligible, subsequent foreign efforts to foster such laws were unavailing, and other forms of intellectual property law were not forthcoming in a sustained fashion. Foreign scholars also provide scant assistance. Surprisingly few of the Western scholars who write about intellectual property have endeavored to analyze the development of such law in the West,

let alone elsewhere. Instead, most recent scholarly writing touching on such development either consists chiefly of historical narrative[63] or portrays intellectual property law solely in terms of economic development—as a concomitant of industrialization in general or as a response to particular technological breakthroughs.[64]

Clearly, economic and technological factors should not be ignored in the effort to understand why the imperial Chinese state did not provide systematic protection for the fruits of innovation and creation. China may well have been as generally prosperous and as technologically advanced as any area in the world from the seventh through the twelfth centuries.[65] Nonetheless, being preindustrial, China had little in the way of the inexpensive mass production that some scholars see as an impetus to establish intellectual property law.[66] So it was, for example, that although in China printing had been invented by the Tang and movable type by the Song,[67] "methods suitable for the mass printing of [materials such as] newspapers" were to originate in the West, and then centuries later.[68] Moreover, the fact that no more than 20 percent of Chinese were literate even by the early twentieth century[69] and the possibility that the absence of the corporate form may have impeded the type of capital formation needed for large-scale commercial innovation[70] may also help us understand why few actors, other than persons such as the Chengs and Lius, seem to have been concerned with protecting intellectual property.

These economic and technological considerations notwithstanding, it is to political culture that we must turn for the principal explanation as to why there were no indigenous counterparts to contemporary ideas of intellectual property law throughout imperial Chinese history.[71] Lying at the core of traditional Chinese society's treatment of intellectual property was the dominant Confucian vision of the nature of civilization and of the constitutive role played therein by a shared and still vital past.[72] That vision saw civilization as defined by a paradigmatic set of relationships, each bearing reciprocal, although not necessarily equal, responsibilities and expectations, which the parties were morally bound to fulfill. Typically, individuals found themselves in a number of such relationships—the most important of which were those between ruler and subject, father and son, and husband and wife.[73] Only through encountering the past—

which provided unique insight into the essence of one's own character, relationships with other human beings, and interaction with nature—could individuals, guided by nurturing leaders, understand how properly to adhere to those relationships of which they were a part.[74]

The dual functions of the past—as the instrument through which individual moral development was to be attained and the yardstick against which the content of the relationships constituting society was to be measured—posed a dilemma. The indispensability of the past for personal moral growth dictated that there be broad access to the common heritage of all Chinese. Nonetheless, the responsibility of senior members of relationships for the nurturing of their juniors[75]—together with the fact that reference to the past, far more than public, positive law or religion, defined the limits of proper behavior in what were, after all, unequal relationships—demanded more controlled access. Both functions, however, militated against thinking of the fruits of intellectual endeavor as private property.

The relationship of ruler and ruled exemplified the power of the past, while also illustrating the rationale for providing measured access to it. The notion of the Chinese people as a family, with the ruler as parent, is one that has had great and enduring currency since preimperial times.[76] In that capacity, the ruler had a fiducial obligation to provide for both the spiritual and physical well-being of the populace, who, in turn, were expected to be loyal and productive. Although the Chinese early on had a far more sophisticated formal legal system than has typically been recognized at home or abroad, the very nature of this relationship was such that public, positive law could serve neither as the primary instrument for ensuring that the people genuinely understood what was expected of them nor as a means for encouraging rulers to discharge their responsibilities in a suitable fashion. As Confucius indicated in the *Analects*, "Lead the people with governmental measures and regulate them by law and punishments, and they will avoid wrong-doing, but will have no sense of honor and shame. Lead them by virtue and regulate them by the rules of propriety [*li*] and they will have a sense of shame and, moreover, set themselves right."[77]

The standards meant to govern the ruler-subject relationship—virtue and the rules of propriety—derived their content and legitimacy chiefly from the common heritage of the Chinese people,

rather than from any action, whether political, legal, or otherwise, of contemporaneous figures, including the ruler himself. Indeed, much the same point might be made with respect to the entire moral ethos that underlay Chinese civilization.[78] Nowhere is this more apparent than with the *li*—the "rites" that defined morality and propriety. Having evolved from a set of rituals into a code of conduct well before the time of Confucius, the *li* at once embodied and expressed the most profound insights and experience of the so-called Ancients who had established society and compiled the Classics.[79] As such, the *li* fostered a mutually reinforcing personal and social ordering that linked the present simultaneously with that which came before and that which was to follow.

This sense of the power of the past was also manifested in the concept of the rectification of names (*zhengming*), which Confucius indicated would be the "first measure" he would advise a ruler to institute on assuming power.[80] In essence, it involved the expectation that current rulers would carry out their responsibilities in a manner consistent with the moral standards set by their most worthy predecessors. The idea of the Mandate of Heaven (*tianming*) embodied a similar expectation. It, in effect, provided that rulers failing to discharge their responsibilities in keeping with such standards—which had their genesis in preimperial days[81] and, presumably, were known in general form to all[82]—might lose the Mandate and, with it, their claim to rule.[83] In short, a shared past defined the limits of legitimate power in the present.

Given the potential validating—and invalidating[84]—force of the past, those with or aspiring to power sought to cloak themselves in the past while also tailoring it to suit their particular needs. The desire to draw on the legitimating capacity of the past is evident in the degree to which the basic structure, forms, and images of imperial governance persisted, even as their content may have changed throughout two millennia of growth, upheaval, and violent transitions of power. Indeed, even rebels seeking to dislodge those in power consistently structured the alternatives they proposed so as to gain legitimacy from the past.[85]

The power of the past was also to be seen in the reliance of Chinese rulers from the Sui (A.D. 581–618) onward for thirteen centuries on the world's first civil service.[86] At least in theory, from its earliest days, officials were to be identified through an examination system

that viewed knowledge of the past—both in terms of the questions asked and the manner in which they were to be answered—as evidencing the attributes needed to resolve the problems of the present.[87] This, in turn, greatly influenced the character of education. After all, a thorough immersion in the Classics would surely do more for the development of character, and, with it, the ability to serve in government effectively, than would more technical training. The latter, by its very nature, had little to say about morality and therefore, could be left to those whose virtue had not developed to the point at which they could benefit fully from a classical education.[88]

The legal system displayed this same concern with deriving legitimacy through association with the past. Thus, the basic conceptual and classificatory framework for the imperial code continued largely unchanged from its preimperial precursors through the Sui dynasty, during which it was modified only in part.[89] This revision, in turn, set the basic format for imperial codes through to the end of the imperial era, with the result that "30 to 40 percent of the statutes in the Ch'ing Code [operative until the twentieth century] go back unchanged to the T'ang Code of 653."[90] Once again, as was the case with the structure of government and, as we shall see, with literature and the arts, this unswerving employment of the past ought not to mask the fact of enormous change, but should instead highlight the context within which that change occurred. After all, the remaining 60 to 70 percent of the statutes in the Ch'ing (i.e., Qing) Code did change, while even the 30 to 40 percent that remained unchanged on the face of it were in fact transformed through an extensive additional body of law, including an ever-evolving array of substatutes.[91]

Contrary to what one might initially expect, the imperial Chinese legal system did not adhere to a formal system of binding precedent, although, in fact, magistrates and other officials involved with the law did draw on compilations of prior cases as they reached and sought to justify their decisions.[92] But on reflection, the absence of binding precedent may actually have connoted an even greater embracing of the past—as the Confucian morality and wisdom of the ages that officials were assumed to have cultivated in preparing for and taking the imperial examinations were surely seen as a truer and more historically valid guide for making decisions than any set of rules formulated or cases resolved by one's predecessors in office.[93]

Use of the past to mold the present also took a darker form. Early on, the Chinese came to recognize that those who controlled the compilation of history, the interpretation of its lessons, and the characterization of the current dynasty for historical purposes wielded great influence. This led to the establishment by the Han and emulation by subsequent dynasties of elaborate state historiographic offices that engaged in the world's most systematic continuous gathering of historical data prior to the twentieth century.[94] But, less positively, it also lay behind repeated attempts throughout imperial history to shape the content of the historical record. Small wonder, then, that, in an ominous foreshadowing of future efforts at such control, the Han subjected the epochal historian Pan Gu (A.D. 32–92) to an extended imprisonment for engaging in unsanctioned historical work.[95] Nor ought it to be surprising that rulers from Qin Shihuang in the earliest years of the first imperial dynasty[96] to Qianlong[97] in the ebbing years of the last should endeavor to eradicate all they deemed heterodox. As Li Si, China's first prime minister and advisor to Qin Shihuang, is reported to have said, "Anyone referring to the past to criticize the present should, together with all members of his family, be put to death."[98]

As important as the acquisition and maintenance of imperial power may have been, there was more to efforts to regulate intellectual endeavors than the desire to buttress such claims. Coinciding with and obviously reinforcing these secular concerns was the idea of the ruler as fiduciary. In that capacity, the ruler had not only the authority but also a responsibility to ascertain how best to nurture the populace. Central to that responsibility was the need to determine which knowledge warranted dissemination and which ought to be circumscribed in the best interests of the commonwealth. The ruler's parentlike position enhanced the legitimacy of imperial efforts to control the flow of ideas and suggests that there was a greater coherence to such regulation than scholars have typically assumed.[99]

"Lacking," as Thomas Metzger has put it "John Stuart Mill's optimistic view that good doctrines would emerge victorious out of a free marketplace of ideas, Chinese political philosophers since Mencius and Xunzi have instead emphasized the human tendency to become deluded through the interplay of 'false' and 'correct' doctrine."[100] In his role as fiduciary, the ruler had an affirmative obligation to filter out and destroy harmful knowledge—such as that

found in "devilish books and talks," which might contain pornographic as well as politically and religiously suspect materials—rather than permit it to delude his charges. By the same token, there were certain types of information, such as that contained in maps, calendars, and astronomical texts, for which the emperor and his officials alone had legitimate use in their fiduciary capacity. Conversely, the spread of other knowledge, such as that embodied in the Classics, might benefit society (and, not coincidentally, enhance the imperial position), justifying assistance to persons having the Imperial College's permission to reprint approved versions of such works, especially in order to stem the production of "butchered summaries" and otherwise inaccurate copies. And, finally, there was further knowledge—neither orthodox, heterodox, nor official—that the imperial government did not endeavor directly to protect, bar, or otherwise regulate, with the result that its treatment varied widely according to local circumstance.

The throne's efforts to define and supervise the realm of acceptable ideas were not as avowedly totalitarian as they might initially seem, given that the shared past that placed a premium on such control perforce harbored a collective memory of the outer limits of power.[101] Nonetheless, the state's emphasis clearly was focused far more on political order and stability than on issues of ownership and private interests. This did not preclude state support for persons seeking to prevent others from infringing on their monopoly over the reproduction of certain materials and symbols. Through its prepublication review procedures, the state protected the monopoly of printers to whom it had entrusted reproduction of authorized versions of certain materials, such as the Classics. So, too, as has been discussed above, the state, both directly through local magistrates and indirectly through its tacit delegation to specified local groups of considerable responsibility in the commercial area, supported guilds, families, and others in their efforts to maintain the integrity of their trade names and marks. But in each instance, this protection emerged from, and was ultimately to be defined by, the state's interest in preserving imperial power and fostering social harmony.

The rationale for imperial Chinese protection of intellectual property dictated the character of that protection. Neither formal nor informal bodies of law vested guilds, families, and others seeking

to preserve their monopoly over particular items with "rights" that might be invoked to vindicate their claims against the state or against others throughout China. Nor was the provision of state assistance, whether direct or indirect, merely a matter of privilege. In keeping with the tenor of the fiducial bond underlying the relationship between ruler and ruled, there existed among civilized persons expectations as to what was appropriate and fair, as well as a sense that an appeal to one's magistrate or other representatives of the state might be warranted in the event those expectations went unfulfilled. So it was that printers charged with responsibility for printing certain texts or guilds that had developed particular medicines might seek official assistance against persons appropriating what fairness and custom dictated was theirs, and that officials on occasion responded in the interests of fairness and the maintenance of harmony.[102]

The content of expectations concerning the appropriateness of individuals and groups exercising control over the expression of particular ideas derived, in turn, from the critical role that the shared past played in the Confucian understanding of both individual moral and collective social development. Simply stated, the need to interact with the past sharply curtailed the extent to which it was proper for anyone other than persons acting in a fiducial capacity to restrict access to its expressions.

The power of the past and its consequences for possession of the fruits of intellectual endeavor are well captured in the passage in the *Analects* in which Confucius indicates, "The Master [i.e., Confucius himself] said: 'I transmit rather than create; I believe in and love the Ancients.' "[103] The essence of human understanding had long since been discerned by those who had gone before and, in particular, by the sage rulers collectively referred to as the Ancients, who lived in a distant, idealized "golden age."[104] To avail themselves of that understanding in order to guide their own behavior, subsequent generations had to interact with the past in a sufficiently thorough manner so as to be able to transmit it.[105] Yet, as Confucius demonstrated in undertaking to edit the Classics and to comment on them in the *Analects*, transmission, far from being a passive endeavor, entailed selection and adaptation if it was to be meaningful to oneself, one's contemporaries, and one's successors.[106]

This sense of the past's compelling pertinence, and of intellectual endeavor as the medium through which interaction with and

transmission of it was possible, permeated virtually all facets of Chinese civilization. As the noted scholar of Chinese literature Stephen Owen has observed, in the Chinese literary tradition "the experience of the past roughly corresponds to and carries the same force as the attention to meaning or truth in the Western tradition."[107] Thus, in classical Chinese literature, the past survives and warrants consideration, not merely as an obvious foil for contemporary activity,[108] but, more important, because "the Confucian imperative insists that in encountering the ancients, we ourselves must be changed [for] we discover in the ancients not mere means but the embodiment of values."[109]

The process of transformative engagement with the past was, in turn, made possible through reliance in Chinese literature, and especially classical Chinese poetry, on a common body of allusion and reference, commencing with the classics and built up over time. To be sure, as T. S. Eliot has observed, all poetry[110]—and, one might add, all literature—draws on and therefore owes an obligation to the past. And yet this use of shared imagery in Chinese literature is distinguishable from its seeming counterparts elsewhere. In Joseph Levenson's words, "to cite the Classics was the very method of universal speech,"[111] to a further-reaching and more enduring degree than even the Bible in the Judeo-Christian world or the Koran in Islam. As the "very method of universal speech," such allusion and reference, in effect, constituted a sophisticated cultural shorthand that was potentially accessible, at least in theory, throughout the civilized (i.e., sinicized) world, facilitating access from the present to the past or, for that matter, the future.

To speak of the relative omnipresence of the past and the existence of a unique, shared intellectual vocabulary is not to suggest that classical Chinese poetry was lacking in originality, any more than it is to dismiss transmission as only a mechanical process. Rather it is to underscore the context within which originality arose and was expressed and, in so doing, to heed what the fourteenth-century poet Gao Bing (1350–1423) termed "innovation within the bounds of orthodoxy."[112] Indeed, over time, Chinese poets and literary theorists have expressed a myriad of views as to the very question of what constituted appropriate interaction with the past. Some, such as the influential late Ming advocate of a return to antiquity (*fu gu*) Li Mengyang (1472–1529), argued for a fairly literal following of the

past, saying that "prose (*wen*) must be like that of the Qin or the Han, and poetry (*shi*) must be like that of the High Tang."[113] "This," they contended, "was justified because the rules used by the ancients were not invented by them, but really created by Nature . . . [so that] when we imitate the ancients, we are not imitating them but really imitating the natural law of things."[114] Others, such as Yuan Zhongdao (1570–1624) of the *gongan* school, took a very different view, suggesting that in their desire to "imitate words and lines" of earlier literature, Li Mengyang and his colleagues missed the more essential "meaning and flavor" (*yiwei*) animating the great poetry of the Tang.[115] But what united such disparate views—and indeed, classical literature more broadly—was the need to address in so central a fashion the past and approaches to it.

Poetry, of course, was but one literary form in which this concern was evidenced. In the much-prized discipline of history, the model, not only for the standard dynastic histories (*zheng shi*), compiled for almost two millennia, but for "history writing of all kinds," was, in the words of the historiographer Edward Pulleyblank, "a patchwork of excerpts, often abridged but otherwise unaltered, from [the historian's] . . . sources, with any personal comment or judgement kept clearly separate." This structure, suggests Pulleyblank, grew out of the belief that "the work of the historian was to compile a set of documents which would speak for themselves rather than to make an imaginative reconstruction of past events." As was the case with the transmission of the Ancients by Confucius himself, or the heavy employment of allusion and references to the classics in poetry and other literary forms, this manner of historical inquiry should not be construed as connoting a lack of originality. As Pulleyblank observes, "the selection and arrangement of [the historian's] . . . material called for the exercise of critical judgement, and conclusions about the causes of events or the characters of historical persons could be expressed separately in the appropriate place."[116]

The concern with the past evidenced in classical poetry and literature was mirrored in Chinese painting and calligraphy. As with poetry, "engagement with the past validated the present"[117] by posing "the resource of [the] past to renew . . . life repeatedly in the recurrent present."[118] For many, the artistic process itself, accordingly, was understood as a type of spiritual exercise through which one's moral sense might be both expressed and enhanced.[119]

This was particularly true for the literati (*wenren*), who in theory, if not always in practice, subscribed to the famed Song artist Mi Fu's (1051–1107) belief that "in matters of calligraphy and painting, one is not to discuss price. The gentleman is hard to capture by money."[120]

Although later in its genesis and less catholic in its force, a common vocabulary emerged in painting and calligraphy that facilitated communication across time and space.[121] As was the case with literature, there was much debate among both artists and theorists[122] as to the most appropriate way in which to relate to the past. Some, such as the "orthodox school" of the early Qing, saw a "lineage" in painting, parallel to "the succession of Confucian philosophers from Confucius himself down to Wang Yang-ming in the Ming dynasty," to which they advocated fairly literal adherence, at least as a departure point.[123] As Wu Li (1632–1718) put it, "to paint without taking the Sung and Yuan masters as one's basis is like playing chess on an empty chessboard, without pieces."[124] Others took a far more expansive view, contending that latter-day painting should be less literal and should, instead, strive to capture the ideas that animated earlier work.[125] Still others felt a need to address the past as a precondition to expressing their own vision. As the Qing artist Dao-ji, or Shi-tao, (1642–1708) wrote:

> Painters of recent times have all appropriated the styles of the old masters . . .
>
> In the broadest sense, there is only a single method [of painting], and when one has attained that method, one no longer pursues false methods. Seizing on it, one can call it one's own method.[126]

Again, as with poetry, however much artists and scholars may have been divided as to the best stance toward and use of the past, they were at one in their focus on it.

Given the extent to which "interaction with the past is one of the distinctive modes of intellectual and imaginative endeavor in traditional Chinese culture,"[127] the replication of particular concrete manifestations of such an endeavor by persons other than those who first gave them form never carried, in the words of the distinguished art historian and curator Wen Fong, the "dark connotations . . . it does in the West."[128] Nor, as was often the case in the West, was such use accepted grudgingly and then only because it served as a vehicle through which apprentices and students developed their

technical expertise, demonstrated erudition, or even endorsed particular values, although each of these phenomena also existed in imperial China.[129] On the contrary, in the Chinese context, such use was at once both more affirmative and more essential. It evidenced the user's comprehension of and devotion to the core of civilization itself, while offering individuals the possibility of demonstrating originality within the context of those forms and so distinguishing their present from the past.

In view of the foregoing, there was what Wen Fong has termed a "general attitude of tolerance, or indeed receptivity, shown on the part of the great Chinese painters towards the forging of their own works."[130] Such copying, in effect, bore witness to the quality of the work copied and to its creator's degree of understanding and civility. Thus, Shen Zhou (1427–1509) is reported to have responded to the suggestions that he put a stop to the forging of his work by remarking, in comments that were not considered exceptional, "if my poems and paintings, which are only small efforts to me, should prove to be of some aid to the forgers, what is there for me to grudge about?"[131] Much the same might be said of literature, where the Confucian disdain for commerce fostered an ideal, even if not always realized in practice, that true scholars wrote for edification and moral renewal rather than profit. Or, as it was expressed so compactly in a famed Chinese aphorism, "Genuine scholars let the later world discover their work [rather than promulgate and profit from it themselves]." If, after all, even the characters constituting the Chinese language itself, as the famed Song statesman Wang Anshi (1021–86) observed, "actually came from nature . . . and were not created by human beings, but merely imitated by them . . . from configurations of nature,"[132] on what basis could anyone exclude others from the common heritage of all civilized persons?

feiting." The various forms of infringing activity and the damage they cause are discussed in General Accounting Office, *International Trade*.

14. Intellectual property rights have largely been territorial in scope. That is, they essentially provide protection only with respect to infringement occurring within the territory of the nation granting the right in question. Commencing with the International Union for the Protection of Industrial Property of 1883 (the Paris Convention), which deals with patent and trademark, and the Berne Convention, which addresses copyright, efforts have been made to enable nationals of one nation to secure counterpart rights within the territory of other nations.

The development of a Benelux patent, work toward a European patent, and attempts to promote a "world" patent suggest the possibility of further extending intellectual property rights beyond their current territorial status. Nonetheless, given the difficulties that have marked such efforts to harmonize the law, as well as the problems that would ensue from subsequent divergent national interpretations, meaningful harmonization of intellectual property law remains only a distant possibility. In its absence, the United States and other nations frustrated with the problem of infringement were able in the recently concluded Uruguay Round of the General Agreement on Tariffs and Trade (GATT) to link access to their markets for foreign goods to respect for their intellectual property rights. The international treaty structure for intellectual property protection and proposals to strengthen it are described in General Accounting Office, *International Trade*. Efforts at addressing such issues through the GATT are considered in Alford, "Intellectual Property."

15. The United States was notorious through much of the nineteenth century for its lack of respect for authors' rights. In one of the more celebrated examples, Charles Dickens's work was sold in the United States in numerous pirated editions. *A Christmas Carol*, for instance, was offered for as little as six cents in the United States (as opposed to the equivalent of $2.50 in Great Britain) and altered in different parts of the United States to suit local tastes. For more on the early history of U.S. copyright law, see Aubert Clark, *Movement for International Copyright*.

Although it took the United States over a century to recognize foreign copyrights, even that step was limited by the introduction in 1891 of the so-called "manufacturing clause." In an effort to boost the American publishing industry, the manufacturing clause specifically limited protection to those foreign copyrighted works actually produced within the United States, and these requirements remained in effect until 1986. Chinese officials and scholars have been quick to point to this history in seeking to justify China's record of protection for foreign copyrighted material. For more on developing countries's concern about the expenditure of limited foreign exchange holdings for royalty payments in order to obtain access to needed foreign intellectual property, see Shen Yuanyuan, "To Copy or Copyright."

16. See, e.g., Rakoff and Wolff, "Commercial Counterfeiting."

17. The complexity and impracticality of fair use doctrine is nicely illustrated in UCLA Policy No. 1160—Reproduction of Copyrighted Materials for Teaching and Research (Nov. 25, 1986), which devotes some fifteen largely impenetrable pages to endeavoring to explain to faculty the limits of the fair use doctrine. An overview of fair use is provided in Nimmer, *Nimmer on Copyright*. The fair use doctrine is insightfully discussed in Fisher, "Reconstructing the Fair Use Doctrine," and Weinreb, "Fair's Fair."

18. The Eurocentric quality of Marx's thinking is demonstrated in Karl Marx, "Revolution in China and Europe," *New York Daily Tribune*, June 14, 1853, reprinted in Alford, "Role of Law in Chinese Society."

19. See Vogel, *Four Little Dragons*. See also Alford, "When Is China Paraguay?"

20. For more on this problem, see Alford, "On the Limits of 'Grand Theory.' "

21. Thus, for example, in the otherwise stimulating debate regarding patent between Edmund Kitch and his critics, certain basic questions—such as why the United States limits patent protection to seventeen years (or any specified period) irrespective of the value of the invention involved—are essentially taken for granted and so not probed. The article that initiated this debate was Kitch, "Nature and Function of the Patent System." The debate is continued, inter alia, in Smith and McFetridge, "Patents, Prospects and Economic Surplus" and Kitch, "Patents, Prospects and Economic Surplus: A Reply."

Similar concerns might be voiced with respect to important scholarship concerning copyright. For example, Richard Epstein's recent foray into copyright uses the celebrated case of *International News Service v. Associated Press*, 248 U.S. 215 (1918), as a vehicle for contending that we ought to pay greater heed to "custom and industry practice" and less to the "positive law" of judges and legislators in considering such property rights. Ironically, however, notwithstanding the increased role he advocates for custom relative to law, Epstein's central discussion of custom in the news-gathering business at the time of World War I is drawn from fewer than a half-dozen judicial opinions and from fragmentary anecdotal data from two sources about journalistic behavior in the period since World War II. Epstein seems unconcerned with how journalists in the early twentieth century (or, for that matter, anyone other than judges, whose "techniques of rational analysis" he questions elsewhere in the same article) conceived of "custom and industry practice" in news-gathering. Nor does he evidence

any appreciation at a more general or theoretical level of the difficulties inherent in ascertaining what constitutes custom, particularly some seven or more decades after the fact. See Richard Epstein, "*International News Service v. Associated Press*."

Scholars with a very different political orientation than Kitch and Epstein have recently turned their attention to copyright law. Among the most important pieces are Martha Woodmansee, "Genius and the Copyright"; Jaszi, "Towards a Theory of Copyright"; and Boyle, "Theory of Law and Information." Although they take a fresh, imaginative, and stimulating view of copyright, these scholars seem torn between their desire on the one hand to take apart what they term the societal constructs of authorship and copyright and on the other to preserve the economic, moral, and psychological prerogatives that such constructs provide. For example, at a conference organized by Woodmansee and Jaszi in 1991 entitled "Intellectual Property and the Construction of Authorship," participants paused in the midst of three days of strenuous attacks on the idea of authorship and the notion of copyright to pepper the Registrar of Copyrights of the United States with a stream of questions concerned, in large measure, with how they might secure fuller protection for their work under current copyright law.

22. Arguments for and against treating intellectual property differently from other forms of property are set forth in Gordon, "Inquiry into the Merits of Copyright."

23. See Yankelovich et al., "Public Perceptions of the Intellectual Property Rights Issue"; Shattuck, "Public Attitudes and the Enforceability of Law." It should be noted that the leading software producers trade association, the Business Software Alliance, believes software piracy is far worse throughout Asia than in the United States.

24. Both the PRC and the ROC are pressing to secure GATT Contracting Party status. The array of issues involved are discussed in Feinerman, "Taiwan and the GATT."

25. See, e.g., Alford, " 'Seek Truth from Facts.' " On the disruptions of the Great Proletarian Cultural Revolution, which is described in the PRC as having lasted from 1966 to 1976, see Thurston, *Enemies of the People*.

26. The role of the PRC government in the unauthorized production and distribution of foreign intellectual property, as well as its censorship activities, are discussed in chapter 4.

27. The role of internal circulation (*neibu*) laws and legal materials in the PRC is thoughtfully discussed in Jones, "Some Questions." See also Nicholas Kristof, "What's the Law in China? It's No Secret (Finally)," *New York Times*, Nov. 20, 1988, pt. 1, 21. In response to a U.S. threat to impose substantial trade sanctions, the PRC agreed in principle, on October 10, 1992, to eliminate *neibu* laws concerning foreign trade by issuing "regulations . . . that state only laws and regulations published and readily available to foreign governments and travelers are enforceable [after October 10, 1993]," according to the principal U.S. negotiator involved (Massey, "301: The Successful Conclusion," 9). Even taking account of exceptions found elsewhere in the October 10, 1992, "Memorandum of Understanding . . . on Market Access" (such as that permitting the exclusion of undefined "information contrary to the public interest," it strains credulity to believe that this will transform fundamental long-standing Chinese practices any more effectively than the U.S. undertaking—as part of the so-called Structural Impediments Initiative with Japan—to reform our elementary and secondary education will, indeed, result in a drastic improvement in the overall quality of our public schools. Motivated largely by the presidential election, the U.S. drive in 1992 to secure the PRC's agreement to open its markets to foreign goods or face massive retaliatory tariffs, all the while paying scant attention either to how such promises were to be met or to the implications of using U.S. leverage for such purposes, exemplifies the type of problem in trade policy discussed in chapter 6 of this book with reference to intellectual property. Succinctly stated, flexing one's muscles is no substitute for thinking through how respect for particular types of legality grows.

28. See, e.g., Ren Wei, "World-Wide Symposium."

29. See U.S. Congress, House, *Unfair Foreign Trade Practices*.

Two. Don't Stop Thinking About . . . Yesterday

1. See, e.g., Zou, "Baohu banquan . . . ?"; Zheng and Pendleton, *Copyright Law in China*; and Chan, "Control of Publishing."

2. The point is perhaps most explicitly made in Adelstein and Peretz, "Competition of Technologies and Markets," whose views may be seen as a specific application of the broader contention of economic historians such as Douglass North and Robert Paul Thomas that innovation spurs the need for well-defined private property rights, which in turn provide the incentive needed to foster further innovation (see, e.g., North and Thomas, *Rise of the Western World*). See also Libecap, "Property Rights"; Rapp and Rozek, "Benefits and Costs"; and Mansfield, "Intellectual Property."

3. Zheng and Pendleton, *Copyright Law in China*, 11.

4. Bodde and Morris, *Law In Imperial China*, 3.

5. Imperial law codes are discussed in ibid. See also Chiu Hanping, ed., *Lidai xingfa zhi*, which reproduces the section on law of the official dynastic histories from the Han to the Ming. Portions of the Qing code have been translated by George Staunton into English and by Guy Boulais into

publication laws are discussed in detail in Niida, *Chūgoku hōseishi kenkyū*, 4: 445–91.

37. The original colophon is reproduced in Poon, "Printer's Colophon," 39. Ye Dehui discusses local efforts to bar unauthorized reproduction in *Shulin qinghua*, 37–41 and 143–45. See also Twitchett, *Printing and Publishing*, 65.

38. Even the late Qing study *Shulin qinghua*, which deals more extensively with Song prohibitions on printing than any other, consists of little more than isolated anecdotes.

39. See Yuan, "Zhongguo gudai banquan shi kaolüe."

40. Ye Dehui, *Shulin qinghua*; see also Ku, "Study of the Literary Persecution," 254. For a thorough treatment of mid-Qing efforts to control publication, see Goodrich, *Literary Inquisition*.

41. Hucker, *Ming Dynasty*, 70; Wu Kuang-ch'ing, "Ming Printers and Printing," 230.

42. Goodrich, *Literary Inquisition*.

43. Wu Kuang-ch'ing, "Ming Printers and Printing," 229.

44. Chan, "Control of Publishing," 23–24.

45. Mann, *Local Merchants*; Santangelo, "Imperial Factories of Suzhou."

46. See, e.g., the *Da Qing lü li*, Art. 429. The sumptuary laws are described in detail in Ch'ü, *Law and Society*.

47. Hamilton and Lai, "Jinshi zhongguo shangbiao."

48. Edwards, "Imperial China's Border Control Law," 57–58.

49. The original mark is reproduced at Zhang Xujiu, *Shangbiaofa jiaocheng*, 18.

50. Examples are discussed in Hamilton and Lai, "Jinshi zhongguo shangbiao." See also Rowe, *Hankow*.

51. Hamilton and Lai, "Jinshi zhongguo shangbiao," 4–15.

52. Ibid.

53. Zheng Chengsi, *Chinese Intellectual Property*, 21; Hamilton and Lai, "Jinshi zhongguo shangbiao," 4–15.

54. See Hamilton and Lai, "Jinshi zhongguo shangbiao."

55. The best source for evidence of these efforts is Ye Dehui, *Shulin qinghua*. For more on the history of real property in China, see vol. 4 of Niida, *Chūgoku hōseishi kenkyū*. James Feinerman of the Georgetown University Law Center is now working on the mortgage-like transaction known as the *dian*.

56. With respect to England, see Patterson, *Copyright in Historical Perspective*, 36–41. See also Eisenstein, *Printing Press*. With regard to France, see Darnton, *Literary Underground*. Others would link copyright far more to the rise of the Romantic construct of "authorship." See Woodmansee, "Genius and the Copyright," 425.

57. Machlup, "Patents," 461.

58. Klemm, *History of Western Technology*, 171–73.

59. See Patterson, *Copyright in Historical Perspective*; Machlup, "Patents," 462; Nathan Rosenberg and L. E. Birdzell, Jr., *How the West Grew Rich*; North and Thomas, *Rise of the Western World*.

60. Alford, "Inscrutable Occidental"; Alford, "On the Limits of 'Grand Theory,'" 975.

61. See, e.g., Temple, *Genius of China*, 9–12; Ross, *Oracle Bones*; Needham, *Science and Civilization*.

62. See, e.g., Zou, "Baohu banquan," or any of the writings of Zheng Chengsi.

63. Martha Woodmansee and those who have adopted her thesis that copyright is an outgrowth of the Romantic conception of the author as an inspired genius whose creativity should be seen as individual rather than societal, are noteworthy exceptions. See Woodmansee, "Genius and the Copyright."

64. See, e.g., Adelstein and Peretz, "Competition of Technologies and Markets for Ideas."

65. Needham, *Science and Civilization*; Elvin, *Pattern of the Chinese Past*.

66. Adelstein and Peretz, "Competition of Technologies and Markets for Ideas." Similar views are voiced by Zheng Chengsi and Michael Pendleton, who assert that the "fact that the concept of copyright was formed after such a leap [to movable type] shows that the development of law always follows the development of technology" (*Copyright Law in China*, 14).

67. Ch'ien, *Paper and Printing*.

68. Berman, *Words Like Colored Glass*, 105.

69. Richard Smith, *China's Cultural Heritage*, 201.

70. Eastman, *Family, Field and Ancestors*.

71. In using the term political culture, it is not my intention to invoke the work of Lucian Pye. As I endeavor to demonstrate below, I seek to bring both a broader and a more nuanced content to this admittedly elastic concept.

72. For a compelling discussion of the importance of the idea of the past in Chinese civilization, see Owen, *Remembrances*.

73. The importance of these relationships is discussed in Alford, "Inscrutable Occidental."

74. Hsiao, *History of Chinese Political Thought*, 1: 90–94.

75. Tu, *Centrality and Commonality*.

76. Alford, "Inscrutable Occidental."

77. Confucius, *Analects*, bk. 2, ch. 3 (Waley translation modified by this author).

78. See Hall and Ames, *Thinking Through Confucius*.

79. Alford, "Inscrutable Occidental."

80. Waley, trans., *Analects of Confucius*, bk. 13, ch. 3. The idea of a "rectification of names" has had enduring currency in China, as evidenced, for example, by the use of that term by the leadership of the Chinese Communist party to describe efforts in the early 1980's to encourage the retirement of certain cadres resistant to Deng Xiaoping's policies.

81. Keightley, "Religious Commitment," 220.

82. Chan, *Legitimation in Imperial China*.

83. In the words of the *Shu jing* (Book of Documents), one of the great classics of the Chinese tradition, the last Shang (1700–1122 B.C.) ruler had "no clear understanding of the respect due the people; he maintained and spread far and wide resentment and did not change. Therefore, Heaven sent down destruction on Yin . . . [and replaced it with the next dynasty, the Chou]. . . . It was due to [such] excesses. Heaven is not tyrannical" ("Announcement About Drunkenness," trans. Karlgren, 1).

84. The invalidating power of the past, was evidenced, for example, by the controversial late Qing scholar and reformer Kang Youwei (1858–1927), who believed that the state orthodoxy of his day was impairing China's modernization. In his book *Xinxue weijing kao* (A Study of the Forged Classics of the Xin Period), Kang sought to expose as inauthentic certain of the key Confucian classics relied on heavily by conservatives surrounding the Guangxu Emperor. In turn, he argued that an accurate reading of authentic Confucian texts provided unmistakable support from the Master himself (who Kang claimed had written, rather than edited, the texts in question) for a host of reforms. These included a curtailing of imperial power, the introduction of elections, and the abolition of the family in favor of voluntary cohabitation arrangements that could be altered annually. Kang's efforts to appropriate and recast the past earned him widespread denunciation and an imperial ban (later briefly lifted) on much of his writing. Among his critics was the conservative scholar Ye Dehui, whose book on Song publication practices is relied on elsewhere in this study. "K'ang Yu-wei's face," wrote Ye, "is Confucian . . . but his heart is barbarian." Quoted in Hsü, *Rise of Modern China*, 456.

85. See Kuhn, "Taiping Rebellion," 264.

86. See Teng Ssu-yü, "Chinese Influence on the Western Examination System," 267, which traces the impact of the Chinese method for selecting imperial officials on the British civil service system.

87. Centuries before the Sui—during the third century B.C.—would-be Confucian advisors were already being attacked for their emphasis on knowledge of the past. "They [the Confucianists], neither study affairs pertaining to the law and government nor observe the realities of vice and wickedness but all exalt the reputed glories of remote antiquity and the achievements of Ancient Kings." Han Fei Tzu, "On the Dominant Systems of Learning," quoted in De Bary et al., trans., *Sources of Chinese Tradition*, 1: 142.

88. Thomas Lee, *Government Education*.

89. Bodde and Morris, *Law in Imperial China*.

90. Ibid., 63. In reaching this estimate, Bodde and Morris rely on the *Duli cunyi*, in which Xue Yunsheng lays out in meticulous detail the origins and subsequent history of revision for the various provisions of the Qing code.

91. The use of substatutes is discussed in ibid., 63–68. Evocation of the past was, of course, not the only way in which the Chinese state used its legal system to evidence its majesty. Centuries before Foucault wrote *Discipline and Punish*, the Chinese state displayed a keen appreciation of the fact that symbolic infliction of punishment might have an even greater impact than its actual counterpart. At least from the Han dynasty (206 B.C.–A.D. 220) onward (and some would suggest long before the formation of imperial China in 221 B.C.), the death penalty was divided so that execution of all but the most egregious offenders was to be delayed until "after the autumn assizes." Although this procedure may have had its genesis in the effort to align human and natural affairs by deferring executions until the time of greatest death in the natural world, the Chinese soon took to using it simultaneously to display the state's awesome power and its great benevolence. Individuals were often sentenced to death "after the assizes" (*jianhou*), which typically entailed waiting two years, only to be spared by a state wishing to appear magnanimous once the requisite time had elapsed.

A comparable appreciation of the value of symbolic punishment is also evident in the Qing code directive that officials only inflict a fraction of the blows with a bamboo cane (either heavy or light) to which criminals might be sentenced. Again, it was presumed that those so sentenced would both understand the severity of the punishment due them and appreciate the state's decision to accord them leniency.

As these examples and much of this chapter illustrates, many of the ideological and psychological devices that Jürgen Habermas suggests (in *Legitimation Crisis*) result from the efforts of modern states to legitimate themselves appear to have had clear antecedents in imperial China.

92. One such compilation was the *Xing'an huilan*, comprising cases recorded by the Board of Punishments, compiled on an unofficial basis by officials of the board for the benefit of magistrates.

93. Much has been made of what Ch'ü T'ung-tsü three decades ago termed the "Confucianization" of the law, by which he meant the absorption during the Han dynasty of Confucian values into the law. This process led, for example, to the law's mandating far harsher penalties when juniors struck their seniors than vice versa. Work remains to be done, however,

on what might be termed the "legalization" of the Confucians—by which I mean the impact that use of the law had on the thinking of Confucian-oriented scholar-officials, for whom formal legality was said to be an inferior social norm. It is hard to imagine that such officials could have used the law as extensively and adroitly as many in fact did without its ways of looking at the world influencing them, consciously or otherwise. For a brief further discussion of this, see Alford, "Law, Law, What Law?" Extremely interesting work on related concerns is being done by Karen Turner (focusing on notions of legality in early China) and by Mary Buck and Adam Alfert (each of whom is exploring the interaction between formal legality and Confucian ideals in magisterial decision making).

94. Pulleyblank, "Chinese Historical Criticism," 135.

95. Watson, *Ssu-ma Ch'ien*; Pulleyblank, "Historiographical Tradition," 143, 152–53.

96. Bodde, *China's First Unifier*. In a fascinating example of the vitality of the past for contemporary discourse, articles published about the Qin dynasty in the PRC in the wake of the June 1989 suppression of the pro-democracy movement attempt to play down the number of persons executed 2,200 years ago and suggest that they were unworthy individuals. See, e.g., Wang Ningjun, "Tale of Qin Scholars Being Buried Alive Is Challenged," *China Daily*, Aug. 1, 1989, 5.

97. Goodrich, *Literacy Inquisition*.

98. Sima Qian, *Shi ji*, quoted in De Bary et al., trans., *Sources of Chinese Tradition*.

99. Goodrich, *Literary Inquisition*.

100. Metzger, "Foreword," xiv. This same mentality may be evident in a principal PRC translation of U.S. Supreme Court cases, which essentially excludes all dissenting opinions on the grounds that they represent incorrect views and so do not warrant study.

101. Attempts to stretch that collective memory included not only the denunciation of texts as unauthentic (as Kang Youwei did) but also the "discovery" of what were said to be long-lost versions of classics. Indeed, by the late Qing, there were so many key texts being "rediscovered" that Liang Qichao (who commenced his public career as an ally of Kang's) later deplored what he saw as efforts retroactively to add passages to ancient texts and then claim their discovery. Liang Qichao, *Yinbingshe heji*.

102. The evaluation of magistrates was based, in part, on the extent to which they maintained "harmony" within their districts, giving them a strong incentive to discourage litigation and other actions that would be seen as disharmonious by their superiors. See Bodde and Morris, *Law in Imperial China*.

103. Waley, trans., *Analects of Confucius*, bk. 7, ch. 1.

104. Schwartz, *World of Thought in Ancient China*.

105. Owen, *Remembrances*, 18.

106. As Zhu Xi (1130–1200), the progenitor of Neo-Confucianism, observed "at that time [i.e., when Confucius lived], the work of creation was fairly complete; the Master [i.e., Confucius] therefore made a Great Synthesis [*dacheng*] of the various Sages and struck a Mean. Although this was 'transmission,' his merit was twice that of 'making.' One must understand this also" (quoted in Murck, *Artists and Traditions*, xii). See also Ju-hsi Chou, "Through the Disciples' Eyes," 11–22.

107. Owen, *Remembrances*, 22.

108. Ibid., 14–15. See also Alford, "Inscrutable Occidental."

109. Owen, *Remembrances*, 15.

110. Eliot, *Notes Toward a Definition of Culture*, 118.

111. Levenson, *Confucian China*, xvii.

112. Lynn, "Alternative Routes to Self-Realization," 322.

113. Quoted in ibid., 317.

114. Quoted in Chaves, "Panoply of Images," 357.

115. Ibid., 343.

116. Pulleyblank, "Historiographic Tradition," 150.

117. Cahill, *Compelling Image*, 57.

118. Mote, "The Arts and the 'Theorizing Mode' of Chinese Civilization," 7.

119. Bush, *Chinese Literati on Painting*, 50–66.

120. Quoted in Levenson, *Confucian China*, 1: 21.

121. Murck, *Artists and Traditions*.

122. Bush, *Chinese Literati on Painting*.

123. Cahill, "Orthodox Movement," 180.

124. Quoted in Cahill, *Compelling Image*, 57.

125. See Ho, *Eight Dynasties of Chinese Painting*.

126. Quoted in Cahill, *Compelling Image*, 155.

127. Murck, *Artists and Traditions*, xi.

128. Wen Fong, "Problem of Forgeries," 100.

129. Ibid., 100.

130. Ibid.

131. Wen Fong, "Problem of Forgeries," 100. These suggestions, of course, indicate that some were concerned about unauthorized copying.

132. Quoted in Lin Shuen-fu, "Chiang K'uei's Treatises," 307.

Three. Learning the Law at Gunpoint

1. See Richard Smith, *China's Cultural Heritage*.

2. Hao and Wang, "Changing Chinese Views," 156–72.