

Don't Stop Thinking About . . . Yesterday

Why There was No Indigenous Counterpart to Intellectual Property Law in Imperial China

WILLIAM P. ALFORD*

"The Master [Confucius] said: I transmit rather than create; I believe in and love the Ancients."

—*The Analects of Confucius*
Book VII, Chapter 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. 617-906),¹ while Western theorists of economic development contend that the inexpensive dissemination of texts necessitated the formal legal

* Henry L. Stimson Professor and Director of East Asian Legal Studies, Harvard Law School.

This essay is dedicated to my teacher and friend Jerome Cohen, for, as any student of Confucian thought knows, our debt to our teachers is inestimable. It is adapted from my monograph entitled *To Steal a Book is an Elegant Offense* (forthcoming Stanford University Press). I would like to acknowledge the firm of O'Melveny & Myers, which in awarding me its Centennial Grant provided the support necessary to conduct the initial research for this essay, and the Chiang Ching-kuo Foundation for International Scholarly Exchange, a grant from which has helped support research on Chinese legal history at Harvard Law School. I would also like to thank my wife Shen Yuanyuan for her many helpful contributions to this article.

1. See, e.g., Zou Shencheng, *Baohu banquan shi yu he shi heguo?* [The Protection of Copyright Started Where and in What Country?], 6 *Faxue Yanjiu* [Research in Legal Studies] 63 (1984); Zheng Chengsi and Michael Pendleton, *Copyright Law in China* (1991); Hek-lam Chan, *Control of Publishing in China, Past and Present*, Address for the G.E. Morrison Lecture Series at Australia National University (1983) (transcript on file with the author).

protection that copyright is intended to provide.² In short, the accepted 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 People’s Republic of China (PRC).³

This essay takes issue with the accepted wisdom, at least as concerns imperial China. After first endeavoring to delineate an appropriate scope for inquiring into imperial Chinese legal history, this essay considers whether there was indigenous formal legal protection for intellectual property in China prior to the twentieth century introduction of Western notions of such law.⁴ It finds evidence of restrictions on the unauthorized reproduction of certain books, symbols and products but determines that it would be erroneous to see these as constituting what we in the United States now typically understand intellectual property to be, for they were little concerned with the protection of property or

2. The point is perhaps most explicitly made in Richard P. Adelstein and Steven I. Peretz, *The Competition of Technologies in Markets for Ideas: Copyright and Fair Use in Evolutionary Perspective*, 5 *Int’l Rev. of Law & Econ.* 209 (1985). Adelstein and Peretz’s 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. Douglass C. North and Robert Paul Thomas, *The Rise of the Western World: A New Economic History* (1973). See also Gary D. Libecap, *Property Rights in Economic History: Implications for Research*, 23 *Explorations in Economic History* 227 (1986); Richard T. Rapp and Richard P. Rozek, *Benefits and Costs of Intellectual Property Protection in Developing Countries*, 24 *J. World Trade* 75 (1990); Edwin Mansfield, *Intellectual Property, Technology, and Economic Growth*, in *Intellectual Property Rights and Capital Formation in the Next Decade* 3-26 (Charles E. Walker & Mark A. Bloomfield eds., 1988).

3. Zheng and Pendleton, *supra* note 1, at 11.

4. For purposes of this study, “intellectual property” is defined principally to encompass copyrights, patents and trademarks. Copyright protects original literary and artistic works, with the notion that the expression of the underlying idea, rather than the idea itself, is protected. The protection provided, which in the West is said to have first been officially introduced in early eighteenth-century England through the Statute of Anne, typically provides the author with the exclusive right to reproduce, prepare derivative works, and distribute, display or perform the work in question. Melville B. Nimmer, *Nimmer on Copyright: A Treatise on the Law and Literary, Musical and Artistic Property, and the Protection of Ideas* (1978 -). “Patent” is a limited term monopoly typically granted by a government to an inventor of a novel, non-obvious, and useful product, manufacturing process, machine, chemical composition, design or plant in exchange for the public disclosure of the pertinent innovation. Patent protection in the West is said first to have been granted in fifteenth-century Venice. Peter D. Rosenberg, *Patent Law Fundamentals* (2d ed. 1980 -). As used herein, a “trademark” is a word or symbol that identifies the source of goods (or services in the case of a servicemark). Trademark emerged as a common law right, though since 1881 it fundamentally has been protected statutorily in the United States. A general treatise in this field is J. Thomas McCarthy, Jr., *Trademarks and Unfair Competition* (2d ed. 1984 -).

other private interests. Their real purpose was the maintenance of imperial legitimacy and power. Accordingly, this essay turns in its final section to a consideration of Chinese political culture and, particularly, its engagement with the past in the effort to illuminate why 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.

Chinese treatment of intellectual property is, of course, an issue of considerable attention in contemporary Sino-American relations. As recently as the early 1990s, the United States government labelled both the PRC and the Republic of China (ROC) as principal culprits in the infringement of billions of dollars of American intellectual property.⁵ In consequence, the United States Trade Representative launched trade actions against both the PRC⁶ and ROC,⁷ resulting, after bitter

5. The United States International Trade Commission [ITC], which is a semi-independent federal agency charged with responsibility, *inter alia*, for preparing a range of reports regarding the international economic activity of the United States, estimates that foreign infringement of American intellectual property annually costs this country more than 133,000 jobs and from US \$23.8 to US \$61 billion in lost profits, and that the PRC and ROC account for a substantial portion of that infringement. The first figure comes from ITC, *The Effect of Foreign Product Counterfeiting on U.S. Industry* (U.S.I.T.C. Pub. No. 1479, 1984) and the second from ITC, *Foreign Protection of Intellectual Property Rights and the Effect on U.S. Industry and Trade*, Report to the U.S. Trade Representative Invest. No. 332-245 (U.S.I.T.C. Pub. No. 2065, 1988); see also Eduardo Lachica, *White House Boosts Campaign to Fight Patent Violations*, *Wall St. J.*, Feb. 29, 1988, at 6. These figures should not be taken at face value. They are based on data supplied by domestic industries hopeful of enlisting government assistance against infringers and typically calculate loss by multiplying estimated instances of infringement by market prices. Even assuming the accuracy of estimates of the numbers of infringers, there is no reason to presume that each infringer would prefer to pay a market price rather than cease using the item in question, were these the only two alternatives available. It seems far more likely, to take but a single example, that law teachers in the PRC, who typically live on less than US \$50 a month, would cease using pirated American texts rather than pay for such books, which typically cost more than US \$50 each. Nonetheless, even taking account of the limitations surrounding American government figures concerning lost intellectual property profits, there is little doubt that infringement of United States intellectual property not only exacts a great cost in terms of lost revenues and jobs, but also has a deleterious impact upon unwitting consumers here and abroad of a range of substandard products from improperly constituted polio vaccine to fake automobile parts to defective contraceptive devices. See, e.g., Jed S. Rakoff and Ira B. Wolff, *Commercial Counterfeiting and the Proposed Trademark Counterfeiting Act*, 20 *Am. Crim. L. Rev.* 145 (1982).

6. The People's Republic of China's (PRC) formal undertaking to revise its intellectual property laws is contained in a memorandum between the PRC and the United States signed in Washington, D.C. in 1992. *Memorandum of Understanding Between the Government of the People's Republic of China and the Government of the United States on the Protection of Intellectual Property* (Jan. 17, 1992) (available from the office of the United States Trade Representative) (on file with the author). The pressure brought to bear by the United States

negotiations, in the conclusion by each of agreements in 1992 to revise their intellectual property laws to meet American concerns.

The purpose of this essay, in delving into China's imperial legal history regarding such matters, is not to suggest that China ought necessarily to have followed the path of the United States or other nations in developing intellectual property law.⁸ Rather, it is instead to

government on the PRC is treated in William Alford, *Perspective on China: Pressuring the Pirate* — which argues that people who largely lack fundamental rights cannot be expected to embrace complex property rights *L.A. Times*, Jan. 12, 1992, at M5.

7. An insightful overview of the 1992 negotiations is contained in Chiung-hui Shao, *The Internalization of Copyright Protection in Taiwan* (1993) (unpublished L.L.M. thesis, Harvard University). The background of United States-ROC relations regarding intellectual property is portrayed in William Alford, *Intellectual Property, Trade and Taiwan: A GATT-Fly's View*, 1 *Colum. Bus. L. Rev.* 97 (1992). Even with the agreement reached in 1992 between the United States and the ROC, this remains an area of much contention. Susan Yu, *ROC Avoids Trade Sanctions: No Retaliation Now, but Taiwan Returned to Priority Watch List*, *Free China J.*, May 4, 1993, at 1.

8. The United States was notorious through much of the 19th century for its lack of respect for authors' rights. In one of the more celebrated examples, Charles Dickens' 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 copyright law in the U.S., see Aubert J. Clark, *The Movement for International Copyright in Nineteenth Century America*, (1960). Although it took the United States over a century to recognize foreign copyrights, even that step was limited by the "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. The requirements of the clause remained in effect for almost a century. Chinese officials and scholars on both sides of the Taiwan Straits have been quick to note the experience of the United States during the nineteenth century in explaining China's hesitancy in offering protection for foreign copyrighted material. For more on the concern of developing countries regarding 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: China's International Copyright Relations* (1989) (unpublished LL.M. thesis, Harvard University). It should be noted that tough questions as to the extent to which intellectual property law achieves its stated aims anywhere remains the subject of much controversy. George Priest, *What Economists Can Tell Lawyers About Intellectual Property: Comment on Cheung*, 8 *Res. in L. & Econ.* 19 (1986); Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 *Harv. L. Rev.* 281 (1970); William W. Fisher, III, *Reconstructing the Fair Use Doctrine*, 101 *Harv. L. Rev.* 1659 (1988); and Robert P. Merges, *Commercial Success and Patent Standards: Economic Perspectives on Innovation*, 76 *Cal. L. Rev.* 803 (1988). Also worth considering are empirical efforts by economists, including Edwin Mansfield, *Patents and Innovation: An Empirical Study*, 32 *Mgmt. Sci.* 173 (1986); Richard C. Levin et al., *Appropriating the Returns from Industrial Research & Development*, 3 *Brookings Papers on Econ. Activity* 783 (1987); Richard C. Levin, *Appropriability, R & D Spending, and Technological Performance*, 78 *Am. Econ. Rev.* 424 (1988). The question of the effectiveness of intellectual property law in fostering inventiveness and creativity is no more easily resolved with respect to developing nations. A number of commentators, some in the employ of developed world

seek to understand why a civilization, which was for centuries the world's most advanced scientifically and which, by any standard has long been one of the most sophisticated culturally, did not of its own accord generate more comprehensive protection for its rich bounty of scientific and artistic creation.

I. DELINEATING THE SCOPE OF INQUIRY

Sinologists have long characterized the law of imperial China from the first dynasty, the Qin (221-206 B.C.), through the last, the Qing (A.D. 1644-1911), as "overwhelmingly penal in emphasis," in the words of Derk Bodde and Clarence Morris, authors of the most celebrated Western work on Chinese legal history.⁹ Focusing on the imperial codes that were promulgated during each dynasty, such as the *Da Qing lü li* [The Laws of the Great Qing Dynasty],¹⁰ the conventional wisdom holds that positive law, in Joseph Needham's

enterprises that stand to profit through increased protection for intellectual property globally, contend that the benefits for developing nations of embracing greater formal legality far outweigh the costs. See, e.g., *Intellectual Property Rights in Science, Technology, and Economic Performance* (Francis W. Rushing & Carole Ganz Brown eds., 1990); Robert M. Sherwood, *Intellectual Property and Economic Development* (1990); Richard Rapp and Richard Rozek, *Benefits and Costs of Intellectual Property Protection in Developing Nations*, 24 *J. World Trade* 75 (1990). Certain of these writers deploy extensive statistics in making their case, although in many instances, such data rest on questionable assumptions (as, for example, when Rapp & Rozek essentially conflate legislative enactment and enforcement) and fail to prove whether intellectual property law spawned prosperity or prosperity spawned intellectual property law. Other commentators are somewhat more skeptical as to the impact of intellectual property protection on the economic and political situation of developing nations. See, e.g., Susanthan Goonatillake, *Aborted Discovery: Science and Creativity in the Third World*, (1984); A. Samuel Oddi, *The International Patent System and Third World Development: Reality or Myth?*, 1987 *Duke L. J.* 831 (1987); Arman S. Kirim, *Reconsidering Patents and Economic Development: A Case Study of the Turkish Pharmaceutical Industry*, 13 *World Dev.* 219 (1985).

9. Derk Bodde & Clarence Morris, *Law In Imperial China* 3 (1967).

10. These are discussed *id.* at 52-75. See also *Lidai xinafa zhi* [The Penal Law Treatise of the Successive Dynasties] (Chiu Hanping ed., 1986) 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 Guy Boulais into French. See Guy Boulais, *Manuel du Code Chinois* (1966). Professor William Jones of Washington University has recently completed a modern translation. A useful guide to the *Da Qing lü li* [Qing Code] is Xue Yunsheng, *Duli cunyi* [Thoughts About Uncertain Matters Gleaned While Perusing the Statutes], (Huang Chinghua ed., 1970).

words, was confined "to purely penal (criminal) purposes."¹¹ 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.¹²

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 norms by which the society might be administered and social harmony maintained into a hierarchy ranging downward in desirability from heavenly reason (*tianli*), morality (*de*), ritual propriety (*li*), custom (*xixu*) to the community compacts (*xiang yue*), and family rules (*jia xun*).¹³ These public, positive law rules were meant to buttress, rather than supersede, the more desirable means of guiding society and were 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 the 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.¹⁴ The singular emphasis of both Chinese and foreign legal historians on the written law's penalties has obscured the very values that said penalties were designed to promote and, in so doing, prevented us from fully appreciating the

11. Joseph Needham, 2 *Science and Civilization in China* (1954-) 519. Professors Philip Huang and Kathryn Bernhardt of UCLA have launched a major and impressive research project delving into the question whether there was a "civil law" in late imperial and early Republican China.

12. Needham, *supra* note 11, at 524-530.

13. Chang Wejen, *Chuantong guannian yu xianxing fazhi weishemma yao xue zhongguo fazhi shi* [The Traditional Perspective and the Contemporary Chinese Legal System: Why Study Chinese Legal History?], *Guoli Taiwan Daxue Faxue Luncung* [National Taiwan University Law Review], December 1987 at 1, 6.

14. For more on the prominence of the family, see the text accompanying notes 25-27 *infra*.

role they were intended to play in Chinese life.¹⁵ We must not, after all, lose sight of the fact that more than half of the ten most serious offenses (the so-called ten abominations or *shi e*)¹⁶ 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.

The idea that the state's reliance on unofficial actors, such as family, village and guild leaders connotes Chinese indifference to civil law also needs revision. The state's reliance upon such figures to apply local custom — as embodied in family rules,¹⁷ guild charters (*hang zhang*)¹⁸ 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.¹⁹ As such, it ingeniously allowed the state's influence to reach far further than would have otherwise been the case, given the range of dialects and customs, poor communications infrastructure and persistent budgetary problems²⁰ 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.²¹

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, those leaders were likely to have been applying basic values that were at least broadly consistent with those that the state's official representatives would have

15. This extraordinary emphasis on the imperial codes' penalties seems attributable to a number of factors. These include the Confucian ideological antipathy toward formal legality which discouraged scholars from considering the "civil" side of such law, widespread popular perceptions of the legal system and early reports by foreign observers as to the quality of Chinese justice relative to that of their home jurisdictions.

16. The so-called Ten Abominations are listed in Article 2 of the General Principles Section of the Qing Code. Da Qing lǚli huitong xinsuan [Comprehensive New Edition of The Code of the Great Qing Dynasty] (Yao Yuxiang ed., Taipei reprint, 1964).

17. The classic work on clan rules is Liu Hui-chen, *The Traditional Chinese Clan Rules* (1959).

18. Guild charters are discussed in detail in William T. Rowe, *Hankow: Commerce and Society in a Chinese City, 1796-1889* (1984).

19. Susan Mann, *Local Merchants and the Chinese Bureaucracy, 1750-1950* (1987).

20. Hsiao Kung-ch'uan, *Rural China: Imperial Control in the Nineteenth Century* (1960).

21. John Watt, *The District Magistrate in Late Imperial China* (1972).

employed had they been directly involved.²² The delegation of authority “required continuing adherence to the social guidelines set down in the Four Books [i.e., the great Chinese classics],”²³ in the words of the historian Ray Huang.²⁴ The emphasis in the family or guild on the acceptance of one’s position in the hierarchy (be it as a child or an apprentice)²⁵ 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.²⁶ 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.”²⁷

Further assurance 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. Magistrates charged guild and clan leaders with a range of tax collection and related obligations and, as well, held them responsible for the conduct of their members.²⁸ Indeed, in some instances, magistrates went so far as to require the certification of guild chiefs and to review the rules that they and clan heads drafted.²⁹ The leaders of these family and economic units were also required to refer difficult cases to their local magistrates — particularly if they involved challenges to clan or guild rules, or to the

22. Susan Mann’s study of local merchants suggests that this was the case with respect to tax farming and related fiscal issues. Mann, *supra* note 19.

23. The Four Books are the *Lünyu* [The Analects of Confucius], the *Mengzi* [The Book of Mencius], the *Daxue* [The Great Learning] and the *Zhongyong* [The Doctrine of the Mean]. They are considered among the chief classics of the Chinese tradition.

24. Ray Huang, 1587: A Year of No Significance: The Ming Dynasty in Decline 149 (1981).

25. On the role of hierarchy, see William P. Alford, *The Inscrutable Occidental: Implications of Roberto Unger’s Uses and Abuses of the Chinese Past*, 64 *Tex. L. Rev.* 915 (1985).

26. The Chinese vision of world order also mirrored family structure, with the Chinese at the apex exercising fiducial responsibilities toward less civilized peoples.

27. *The Analects of Confucius* 93 (Arthur Waley trans., 1938) (Bk. II, Ch. 21). For a critique of the manner in which our society has divided public and private, personal and political, see Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 *Harv. L. Rev.* 1497 (1983).

28. Rowe, *supra* note 18, at 292-99; Mann, *supra* note 22, *passim*.

29. Rowe, *supra* note 18, at 292-99; Mann, *supra* note 22, *passim*.

authority of their leaders.³⁰ 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 to reach a formal resolution of more than a modest number of cases.³¹

In view of the foregoing, consideration of topics having to do with legal regulation in imperial China ought not to be limited to the penal sanctions found in dynastic codes. It must, at a minimum, also address the following: the remainder of imperial China's public, positive law; means other than public, positive law through which the state directly sought 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.

II. STATE AND PRIVATE EFFORTS TO CONTROL UNAUTHORIZED COPYING

Considering the full scope of Chinese legal history, it is apparent that the Chinese were not indifferent to issues of the unauthorized reproduction of texts and other items. There is evidence preceding the establishment of the Zhou dynasty in 1122 B.C. of interest in the ways in which commodities were identified,³² concern from the Qin with the distribution of written materials³³ and attention from the Han (206 B.C. - A.D. 220) to barring the unauthorized reproduction of the classics.³⁴ Nonetheless, it is with the advent of printing³⁵ during the Tang that one

30. Liu, *supra* note 17.

31. That the volume of legal matters was far greater than previously assumed is suggested, for example, by the work of Philip Huang & Kathryn Bernhardt. See *Civil Law in Qing and Republican China* (1993).

32. *Shangbiaofa jiaocheng* [A Course of Study in Trademark Law] 17-18 (Zhang Xujiu ed., 1985).

33. Derk Bodde, *China's First Unifier: A Study of the Ch'in Dynasty as Seen in the Life of Li Ssu. 280?-208 B.C.*, in 3 *Sinica Leidensia* (1938).

34. Chang Wejen and William Alford, *Major Issues in Chinese Legal History* (1992) (unpublished course materials, on file with the author).

35. Historians locate the invention of woodblock printing between 590 and 650 and the development of movable type by Bi Sheng at around the year 1000. Zheng and Pendleton assert that whereas in the West "the adoption of woodblock printing was not sufficient to dramatically speed up the publication of books, [i]n China the situation was different," due to the use of Chinese characters rather than a phonetic alphabet. Zheng and Pendleton, *supra* note 1, at 11-12. The history of printing in China is discussed in T.H. Tsien, *5 Paper and Printing — Part I* (1936);

first finds substantial, sustained efforts to regulate publication and republication. What appears to have been the first such measure 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.³⁶ The decree prohibited the unauthorized reproduction by persons of calendars, almanacs, and related items, which, it observed, were being reproduced in great quantity in the Southwest and distributed throughout China. Far from being arcane, matters 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. This initial ban on the pirating of officially promulgated works soon expanded. Before its collapse, the Tang also banned the unauthorized copying and distribution of state legal pronouncements³⁷ and official histories, and the reproduction, distribution or possession of “devilish books and talks” (*cao yaoshu yaoyan*) and most works on Buddhism and Daoism.³⁸ 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 and “private” persons, many of whom, in fact, were government officers carrying on sideline activities.³⁹ Concerned about

Thomas F. Carter, *The Invention of Printing in China and Its Spread Westward* (L. Carrington Goodrich ed., 2d ed. 1955); Paul Pelliot, *Les Debuts de l'imprimerie en Chine*, in 4 *Oeuvres Posthumes de Paul Pelliot* (Robert des Rotours ed., 1953); and Denis Twitchett, *Printing and Publishing in Medieval China* (1983).

36. Chan, *supra* note 1, at 2. See also Qi Shaofu, *Zhongguo gudai de chuban he danxing de chuban faling* [Ancient Chinese Publishing and Pertinent Laws of that Time], *Shanghai chuban gongzuo* [Publishing Work in Shanghai], Aug. 1980. Wallace Johnson has published a translation of the General Principles section of the Tang Code and has recently completed translations of other major portions of the Code. Wallace Johnson, *The T'ang Code: Volume 1: General Principles* (1979).

37. Printed versions of state laws were rarely disseminated widely in pre-imperial and imperial China. Although the populace's limited literacy was obviously a factor, the notion that law ought not to be widely distributed may have been attributable more to a sense that the populace had no need for the law, as those persons who had properly cultivated their virtue would know how to behave without resort to legal rules, while those of lesser character would simply study the written law in order to find ways around its strictures. Interestingly, the PRC government continues to restrict access by both Chinese nationals and foreigners to laws to which they are potentially subject.

38. Chan, *supra* note 1.

39. The Imperial College, which housed China's “first officially-run publishing house” is discussed in Zheng and Pendleton, *supra* note 1, at 12.

the proliferation of undesirable printed materials, in 1009 the Zhencong Emperor ordered private printers to submit works they would publish to local officials for pre-publication review and registration.⁴⁰

The principal goal of pre-publication 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.⁴¹ That deemed heterodox expanded as well to include the pornographic broadly defined, and materials that used the names of members or ancestors of the imperial family, that were written in "inappropriate" literary styles, or that were "not beneficial to scholars."⁴²

The penalties crafted by the state to enforce the pre-publication review system underscored its objectives. Persons failing to obtain official approval prior to printing works that were neither subject to exclusive state control or banned altogether might suffer one hundred blows of the heavy bamboo and the destruction of their printing blocks. Those who reproduced such controlled or prohibited items risked far greater punishment.⁴³ The unauthorized reproduction of astronomical charts, for example, called for a 3,000 *li* exile. This was a severe penalty, indeed, given that one would not only be sent off to a desolate border region, but would also 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 pre-publication 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 that "This book has been printed by the family of Secretary Cheng of Meishan which has registered it with the government. No one is

40. Ye Dehui, *Shulin Qinghua* [Quiet Words in a Forest of Books] 145 (1957).

41. Twitchett, *supra* note 35. Ye Dehui, *supra* note 40, at 143-45. The penalties contained in Song's publication laws are discussed in detail in Niida Noboru, *Chugoku hoseishi kenkyu* [The Legal History of China] (Tokyo: Tokyo University Press, 1964).

42. Lu Guang and Pan Xianmou, *Zhongguo xinwen falü gailun*, A General Survey of Press Law in China] 4 (1965).

43. Niida, *supra* note 41.

permitted to reprint it."⁴⁴ 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,⁴⁵ 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, the dynasty appears to have had difficulty in securing enforcement of the bans on unauthorized reprinting of works intended to be under exclusive state control.⁴⁶

The Song's imperial successors and especially the Ming (1368-1644) endeavored to strengthen state control of publication, although relatively few changes were made to the formal structure of regulation until the Qing.⁴⁷ Each post-Song dynastic code specifically forbade the unauthorized republication of governmental works on astronomy, the civil service examinations, and other subjects that had long been 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 (1368-1392) orders that all works disparaging the newly founded Ming dynasty even indirectly through the use of homophonic puns be eliminated,⁴⁸ and in the Qianlong Emperor's (1732-1799) famous decree of 1774 requiring that all literature be reviewed so that any containing heterodox ideas could be destroyed.⁴⁹

44. The original colophon is reproduced in Poon Ming-sun, *The Printer's Colophon in Sung China*, A.D. 960-1279, 43 *Libr. Q.* 39 (1973). Ye Dehui discusses local efforts to bar unauthorized reproduction at *supra* note 40, at 37-41, 143-45. See also Twitchett, *supra* note 35, at 65.

45. Ye, *supra* note 40, at 143-45.

46. Yuan Yi, *Zhongguo gudai banquan shi kaolue* [A Consideration of the History of Copyright in Classical China], 3 *Faxue zazhi* [The Journal of Legal Studies] 40 (1985).

47. Ye Dehui, *supra* note 40. See also Ku Chieh-kang, *A Study of Literary Persecution During the Ming*, 3 *Harv. J. Asiatic Stud.* 254 (L. Carrington Goodrich trans., 1938). For a thorough treatment of mid-Qing efforts to control publication, see L. Carrington Goodrich, *The Literary Inquisition of Ch'ien-lung* (rev. ed. 1966).

48. Charles Hucker, *The Ming Dynasty: Its Origins and Evolving Institutions* 70 (1978). Wu Kuang-ch'ing, *Ming Printing and Printers*, 7 *Harv. J. Asiatic Stud.* 230 (1942-43).

49. Goodrich, *supra* note 47.

Notwithstanding the Ming's goal of exercising more control over publication, the formal pre-publication 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.⁵⁰ As a consequence, the Qing moved to strengthen this function of local officials, going so far in 1778 as to direct the reinstitution of a strict system of local pre- publication review.⁵¹

The high degree of state interest in the control of publication was not mirrored with regard to the unauthorized reproduction of that which we now protect through trademark or patent. Although prior to the 20th century, the Chinese state oversaw matters of commerce and industry more closely than has typically been recognized,⁵² it did not develop comprehensive, centrally promulgated, formal legal protection either for 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.⁵³ They also barred the imitation of marks used by the ceramists of Jingdezhen and others making goods for exclusive imperial use,⁵⁴ and made it illegal for certain craftspersons to send information about their work out of China.⁵⁵ 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 foreclose the development of concern for their protection against unauthorized use. Northern Song (960-1127) records reveal that a family named Liu of Jinan, Shandong, used a mark

50. Wu, *supra* note 48, at 229.

51. Chan, *supra* note 1, at 23-24.

52. Paolo Santangelo, *The Imperial Factories of Suzhou: Limits and Characteristics of State Intervention during the Ming and Qing Dynasties*, in *The Scope of State Power* (Stuart Schram ed., 1985). See also Mann, *supra* note 19.

53. These are described in detail in Ch'u T'ung-tsu, *Law and Society in Traditional China* (1961).

54. Gary Hamilton & Lai Zhigong, *Jinshi zhongguo shangbiao yu guanguo dushi shichang* [Trademark and national urban market in late imperial China], in *Proceedings of the Conference on Regional Studies of Modern China* (1986).

55. R. Randle Edwards, *Imperial China's Border Control Law*, 1 *J. Chinese L.* 33, 57-58 (1987).

containing both a drawing of a white rabbit and an accompanying legend to extol the virtues of its sewing needles.⁵⁶ 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 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.⁵⁷ Additionally, some — such as the producers of the celebrated Tongren Temple line of medicines — sought to maintain the confidentiality of their manufacturing process by only employing family members or eunuchs, or by keeping vital parts of the process secret from non-family employees.⁵⁸

The same documents that yield data regarding efforts to protect proprietary marks and processes also, however, indicate the great difficulty of accomplishing that end.⁵⁹ There appears to have been massive counterfeiting of famous 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 their “father-mother” figures to prevent unfairness and deception.⁶⁰ 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.⁶¹ 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 seem to have been consistently successful.

Although the characterization of imperial Chinese law as wholly penal obscures the degree to which such law addressed civil matters, it

56. The original mark is reproduced in Zhang Xujiu, *supra* note 31, at 19.

57. Hamilton and Lai, *supra* note 53, at 4-15. See also *Zhongguo jindai chuban shiliao* [Historical Materials on Chinese Publishing in Recent Times] (Zhang Jinglu ed., 1954-57).

58. Hamilton and Lai, *supra* note 53.

59. Zheng Chengsi, *Chinese Intellectual Property and Technology Transfer Law* 21 (1987).

60. Hamilton and Lai, *supra* note 53, at 4-15.

61. *Id.*

does not follow that intellectual property law existed in China centuries before it arose in the West. Virtually all extant examples of efforts by the state to provide protection for 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 with either 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 pre-publication review and the other restrictions on reprinting described above, together with the absolute bans 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 that persons or entities other than the state might enjoy an interest in what we now term intellectual property akin to the protection enjoyed throughout much of imperial Chinese history with respect to tangible personal property or real property.⁶² Even this limited interest in intellectual property 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 pirates were violating monopolies granted to local officials or to influential gentry in their districts, and so were disrupting local peace. Similarly, one need not be unduly cynical

62. The best source for evidence of these efforts is Ye, *supra* note 40. For more on the history of real property in China, see Niida, *supra* note 41. Also Professor James Feinerman of the Georgetown University Law Center is now doing research on the mortgage-like transaction known as the *dian*.

to view the motivation behind the state's implicit and occasionally explicit support for guild efforts to maintain the exclusive use of trade names and marks as the preservation of social harmony by keeping order among business persons and reducing instances of deception of the populace.

III. THE POWER OF THE PAST

The Chinese, obviously, were not alone in linking the assertion of state interest and 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 first arose not from a belief that the contents of such works were the property of their authors, but from the crown's desire to provide printers with an incentive not to publish heterodox materials.⁶³ So, too, the early history of patent law in the West illustrates the crown's desire to consolidate its position through a strengthening of the state, rather than acknowledgment of any inherent property interest of the inventor.⁶⁴ Thus, for example, the English throne awarded patents to foreigners who introduced new products, processes, or inventions to England even if those persons were not the inventors of the innovation in question.⁶⁵

But the seventeenth and eighteenth centuries witnessed the development in Europe of approaches toward intellectual property that had no counterpart in imperial China. Simply stated, there developed in England and on the Continent the notion that authors, inventors and other innovators had a property interest in their creations that could be defended against the state.⁶⁶ Society, growing numbers of people came to believe, would benefit by providing such persons with the incentive

63. With respect to England, see Lyman Patterson, *Copyright in Historical Perspective* 36-41 (1968). See also Elizabeth Eisenstein, *The Printing Press as an Agent of Change* (1979). With regard to France, see Robert Darnton, *The Literary Underground of the Old Regime* (1982). Others would link copyright far more to the rise of the romantic construct of "authorship." See Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the "Author,"* 17 *Eighteenth-Century Studies* 425 (1984).

64. Fritz Machlup, *Patents*, in 11 *The International Encyclopedia of the Social Sciences* 461, 462-63 (David Sills ed., 1968).

65. W. R. Cornish, *Intellectual Property: Patents, Copyright, Trademarks and Allied Rights* (2d ed. 1989).

66. See Patterson, *supra* note 63; Machlup, *supra* note 64, at 462-467; Nathan Rosenberg and L.E. Birdzell, Jr., *How the West Grew Rich: The Economic Transformation of the Industrial World* (1986); North and Thomas, *supra* note 2.

to engage in such work and disseminate their results. This stood in stark contrast to China, which continued to regulate this area predominantly with respect to how it might best 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.⁶⁷ Instead, 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 innovation⁶⁸ 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 limited to copyright, and so end the inquiry there.⁶⁹ 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 law 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 analytically to trace 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 narrative⁷⁰ or portrays intellectual property law solely in terms of economic development — be it as a concomitant of industrialization in general or as a response to particular technological breakthroughs.⁷¹

Clearly, economic development cannot be excluded from the list of important factors as one ponders why imperial China did not provide systematic protection for the fruits of innovation and creation. In terms of overall levels of development, China may well have been as technologically advanced and as generally prosperous throughout much

67. Alford, *supra* note 25; William Alford, *On the Limits of "Grand Theory" in Comparative Law*, 61 Wash. L. Rev. 975 (1986).

68. Robert Temple, *The Genius of China: 3,000 Years of Science, Discovery and Invention* 9-12 (1986); Frank Ross, Jr., *Oracle Bones, Stars and Wheelbarrows: Ancient Chinese Science and Technology* (1982); Needham, *supra* note 11.

69. See, e.g., Zou, *supra* note 1 or any of the writings of Zheng Chengsi.

70. A fine example of such work is Patterson, *supra* note 63.

71. See, e.g., Adelstein and Peretz, *supra* note 2.

of the Tang and Northern Song as any area in the world.⁷² Nonetheless, it was still pre-industrial and so had little of the inexpensive mass production that industrialization facilitates and that is typically viewed as a precursor to the creation of intellectual property law.⁷³

The same point might be made even with respect to those fields — such as printing — in which China was for long far ahead of the West technologically.⁷⁴ To be sure, contrary to what general theorists of the growth of intellectual property would posit, the Tang invention of printing and the Song development of movable type did not generate law designed to restore the “exclusionary barriers to the inexpensive appropriation of intellectual goods” made possible by this technological breakthrough.⁷⁵ This does not mean, however, that economic factors are of no use in illuminating the history of intellectual property law in China. As the Cheng family’s twelfth-century notice about book registration or the Liu family’s crude white rabbit drawing imply, at least some people whose livelihood emanated from “intellectual goods” were concerned with securing protection for them. Moreover, other factors of an economic nature may have some explanatory force. These the size of the market for books in a society with no more than approximately twenty percent literacy by the twentieth century⁷⁶ and the absence of corporate bodies capable of generating capital needed for large-scale commercial innovation.⁷⁷

If economic considerations are not wholly irrelevant to understanding imperial Chinese attitudes towards intellectual property, nor do they fully explain them. What might be described as political culture clearly has much to tell us about the inquiry at hand. Lying at the core of traditional Chinese society’s treatment of intellectual property

72. Joseph Needham, *Science and Society in East and West*, in *The Grand Titration* (Joseph Needham ed., 1969).

73. Adelstein and Peretz, *supra* note 2.

74. Tsien, *supra* note 35.

75. Adelstein and Peretz, *supra* note 2. Similar views are voiced by Zheng and 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.” Zheng and Pendleton, *supra* note 1, at 14.

76. Richard J. Smith, *China’s Cultural Heritage 201* (1983). The wide variety of vernacular works circulated in the Ch’ing Dynasty contributed to the growth of basic literacy in China — estimated by some to be as high as 30-45% for males and 2-10% for females.

77. Lloyd Eastman, *Family, Field and Ancestors: Constancy and Change in China’s Social and Economic History 1550-1949* (1988).

was the dominant Confucian vision of the nature of civilization and of the constitutive role played therein by a shared and still vital past.⁷⁸

The dominant Confucian vision saw civilization as defined by a paradigmatic set of relationships, each bearing reciprocal, though not necessarily equal, responsibilities and expectations that the parties thereto were morally bound to fulfill.⁷⁹ 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.⁸⁰ 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 — might individuals, guided by nurturing leaders, understand how properly to adhere to those relationships of which they were a part.⁸¹

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 comprising 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. Yet the responsibility of senior members of relationships for the nurturing of their juniors⁸² — 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 was a series of unequal relationships — militated toward more controlled access. As will be explained in detail below, however, both functions fostered concerns that not only had little to do with thinking of the fruits of intellectual endeavor as private property, but, indeed, worked against such an idea.

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 people as a family, with the ruler as parent, is one that has had great and enduring currency from pre-imperial days.⁸³ In that capacity, the ruler had a fiducial obligation to provide for both

78. For a compelling discussion of the importance of the idea of the past in Chinese civilization, see Stephen Owen, *Remembrances: The Experience of the Past in Chinese Literature* (1986).

79. The importance of these relationships is discussed in Alford, *supra* note 25.

80. Donald J. Munro, *The Concept of Man in Early China* 24 (1969).

81. Hsiao Kung-ch'uan, *A History of Chinese Political Thought* 89-92 (F. W. Mote trans., 1979), at 90-94.

82. Tu Wei-ming, *Centrality and Commonality: An Essay on Confucian Religiousness* (1989).

83. Alford, *supra* note 25.

the spiritual and physical well-being of the populace, who, in turn, were to be loyal and productive. Although the Chinese early on had a far more sophisticated 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*, "Govern the people by regulation, keep order among them by chastisements, and they will flee from you, and lose all self-respect. Govern them by moral force, keep order among them by ritual, and they will keep their self-respect and come to you of their own accord."⁸⁴

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, be it 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.⁸⁵ Nowhere is this more apparent than with the *li* — the "rites" that defined morality and propriety. Having evolved from a set of rituals to a code of conduct well before the time of Confucius,⁸⁶ the *li* at once embodied and expressed the most profound insights and experience of the so-called Ancients who established society and compiled the Classics.⁸⁷ As such, the *li* fostered a mutually reinforcing personal and social ordering that simultaneously joined the present 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 upon assuming power.⁸⁸ 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

84. The Analects, *supra* note 27, at 88 (Bk. II, Ch. 3).

85. David L. Hall & Roger T. Ames, *Thinking Through Confucius* (1987).

86. Alford, *supra* note 25.

87. *Id.*

88. The Analects, *supra* note 27, at 171-72 (Bk. XIII, Ch. 3). The idea of a "rectification of names" has had enduring currency with 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.

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 pre-imperial days⁸⁹ and, presumably, were known in general form to all⁹⁰ — might lose the Mandate and, with it, their claim to rule.⁹¹ In short, a shared past defined the limits of legitimate power in the present.

Given the potential validating — and invalidating⁹² — 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 upon 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.⁹³

89. David N. Keightley, *The Religious Commitment: Shang Theology and the Genesis of Chinese Political Culture*, 17 *History of Religions* 211, 220 (1978).

90. Hok-lam Chan, *Legitimation in Imperial China: Discussions under the Jurchen-Chin Dynasty, 1115-1234* (1984).

91. In the words of the *Shu Jing* (The 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.” *The Announcement About Drunkenness*, translated in Bernhard Karlgren, *Book of Documents*, *Museum of Far Eastern Antiquities Bulletin*, at 1.

92. The invalidating power of the past, was evidenced, for example, by Kang Youwei (1858-1927), the controversial late Qing scholar and reformer. Believing that the state orthodoxy of his day impaired 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 upon 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 wide-spread 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.” Immanuel Hsu, *The Rise of Modern China* 382 (3d ed. 1970).

93. Philip Kuhn, *The Taiping Rebellion*, in 10:1 *Cambridge History of China: Late Ch’ing 1800-1911* 264 (John King Fairbank & Denis Twitchett eds., 1978).

The power of the past was also to be found in the reliance of Chinese rulers from the Sui (A.D. 581-618) onward for thirteen centuries on the world's first civil service.⁹⁴ 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 requisite to resolving the problems of the present.⁹⁵ 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 where they could benefit fully from a classical education.⁹⁶

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 pre-imperial precursors through the Sui, during which it was modified only in part.⁹⁷ 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.”⁹⁸ 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 Code” did change, while even the 30 to 40 percent that remained unchanged on their face were in fact transformed through

94. Teng Ssu-yü, *Chinese Influence on the Western Examination System*, 7 *Harv. J. Asiatic Stud.* 267 (1943). In this article, Professor Teng traces the impact of the Chinese method for selecting imperial officials upon the British civil service system.

95. *Id.*

96. Thomas H. C. Lee, *Government Education and Examinations in Sung China* (1985).

97. Bodde and Morris, *supra* note 9.

98. *Id.* at 63. Bodde and Morris rely on the *Duli cunyi* in reaching this estimate.

an extensive additional body of law, including an ever-evolving array of sub-statutes.⁹⁹

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 upon compilations of prior cases as they reached and sought to justify their decisions.¹⁰⁰ But upon 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.¹⁰¹

99. The use of sub-statutes is discussed at Bodde and Morris, *supra* note 9, at 63-63. 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, the Chinese state displayed a keen appreciation that a symbolic infliction of punishment might carry an even greater force than its actual counterpart. Michel Foucault, *Discipline and Punish: The Birth of the Prison* (1977). 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 often were sentenced to death after the assizes (or following 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 but a small fraction of the blows of the bamboo (be it heavy or light) to which criminals might be punished. 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 this essay more generally illustrates, many of the ideological and psychological devices that Jurgen Habermas suggests result from the efforts of modern states to legitimate themselves appear to have had clear antecedents in imperial China. Jurgen Habermas, *Legitimation Crisis* (Thomas McCarthy trans., 1975).

100. One such compilation was the Xing'an huilan. It was comprised of cases in possession of the Board of Punishments compiled on an unofficial basis by officials of the Board for the benefit of magistrates.

101. Much has been made of what Ch'u T'ung-tsu three decades ago termed the "Confucianization" of the law, by which he meant the absorption during the Han of Confucian values into the law. This process led, for example, to the law's mandating of 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

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.¹⁰² 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 historians Sima Qian and Pan Ku to castration and imprisonment, respectively, for engaging in unsanctioned historical work.¹⁰³ Nor ought it to be surprising that rulers from Qin Shihuang in the earliest years of the first dynasty¹⁰⁴ to Qianlong¹⁰⁵ in the ebbing years of the last should endeavor to eradicate all they deemed heterodox. As Li Ssü, 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."¹⁰⁶

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

them, consciously or otherwise. For a brief further discussion of this, see William Alford, *Law, Law, What Law? Why Historians and Social Scientists Have So Little to Say About the Law of China*, in *Justice and Discretion in Chinese Law* (Karen Turner et al. eds., forthcoming). Extremely interesting work on related concerns is being done by Professor Karen Turner (focused on notions of legality in early China) and by Adam Alfert and Mary Buck (each of whom is exploring the interaction between formal legality and Confucian ideals in magisterial decision-making).

102. *Historians of China and Japan* (W.G. Beasley and E.G. Pulleyblank eds., 1961).

103. Burton Watson, *Records of the Grand Historian of China: Translated from the Shih-chi of Ssu-ma Ch'ien* (1961); Edward G. Pulleyblank, *The Historiographical Tradition*, in *The Legacy of China* 143, 152-53 (Raymond Dawson ed., 1964).

104. Bodde, *supra* note 33. In a fascinating example of the vitality of the past for contemporary discourse, articles published about the Qin 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, at 5.

105. Goodrich, *The Literacy Inquisition*, *supra* note 47.

106. Shi ji 87, 66-67a, quoted in Watson, *supra* note 103.

fiduciary. In that capacity, the ruler not only had the authority, but also the 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 strength of this vision of the ruler's parental-like posture vested imperial efforts at controlling the flow of ideas with a legitimacy beyond that of a desire to retain power, while suggesting that there was a greater coherence to such regulation than scholars have typically assumed.¹⁰⁷

"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."¹⁰⁸ In his role as fiduciary, the ruler, consequently, 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 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. This, in turn, justified assistance to persons having the Imperial College's permission to reprint approved versions of such works, especially in their attempts 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 even more widely according to local circumstance.

The throne's ongoing efforts to define and supervise the realm of acceptable ideas was not as avowedly totalitarian as they might initially have seemed, given that the shared past that placed a premium on such

107. Goodrich, *The Literary Inquisition*, *supra* note 47.

108. Thomas Metzger, *Foreword to Moral Behavior in Chinese Society* xiv (Richard Wilson et al. eds., 1981).

This same mentality may be evident in the principal PRC translation of United States Supreme Court cases that excludes all dissenting opinions on the ground that they represent incorrect views and so do not warrant study.

control perforce harbored a collective memory of the outer limits of power.¹⁰⁹ 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, to be sure, preclude state support for persons seeking to prevent others from infringing on their monopoly over the reproduction of certain materials and symbols. Through its pre-publication 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 families, guilds 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 fostering overall social harmony.

The rationale for imperial Chinese protection of intellectual property dictated the character of that protection. Neither formal nor informal bodies of law provided families, guilds 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, and, with that, a sense that efforts could be made to invoke the assistance of magistrates and other representatives of the state in the event those expectations went unfulfilled. So it was that printers charged with responsibility for printing certain texts, or guilds which had developed particular medicines might seek to invoke magisterial discretion with respect to persons appropriating what fairness and custom dictated was theirs. And so it was that magistrates might choose to exercise their discretion to redress such grievances and to

109. 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 quanji* [Collected Works and Essays from the Ice-drinkers' Studio] (Beijing reprint, 1989).

maintain harmony both by vindicating the aggrieved and preventing abusers from injuring the public through the dissemination of improper products.¹¹⁰

The content of expectations as to the appropriateness of individuals and groups exercising control over the expression of particular ideas derived, in turn, from the critical role that a shared past played in the Confucian understanding of both individual moral and collective social development. Simply stated, the need to interact with the past curtailed sharply 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 that "The Master [i.e., Confucius himself] said 'I have transmitted what was taught to me without making up anything of my own. I have been faithful to and loved the Ancients.'"¹¹¹ The essence of human understanding had long since been discerned by those who came before and, in particular, by sage rulers collectively referred to as the Ancients who resided in a distant and, no doubt, idealized "golden age."¹¹² Subsequent generations could avail themselves of it and employ it as an exemplar for their own behavior only through interacting with the past in a sufficiently thorough fashion so as to be able to transmit it.¹¹³ Yet, as Confucius himself demonstrated in undertaking to edit the Classics and to comment on them in *The Analects*, the very act of 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.¹¹⁴

110. The evaluation of magistrates was based, in part, on the extent to which they maintained "harmony" within their districts — thereby providing them with a strong incentive to discourage litigation and other actions that would be seen as disharmonious by their superiors. Bodde and Morris, *supra* note 9.

111. *The Analects*, *supra* note 27, at 123 (Bk. VII, Ch. 1).

112. Benjamin I. Schwartz, *The World of Thought in Ancient China* 63-64 (1985).

113. Owen, *supra* note 79, at 18.

114. 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 Christian F. Murck, *Introduction to Artists and Traditions* xii (Christian F. Murck ed., 1976). See also Ju-hsi Chou, *Through The Disciples' Eyes: Transmission of Art and Group Interactions in the Ming and Qing Periods*, in *Heritage of the Brush: The Roy and Marilyn Papp Collection of Chinese Painting*, 11-21 (1989).

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 "[i]n this [i.e., 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."¹¹⁵ Thus, in classical Chinese literature, the past survives and warrants consideration not merely as an obvious foil for contemporary activity,¹¹⁶ but more importantly, 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."¹¹⁷

The process of transformative engagement with the past was, in turn, made possible through reliance in Chinese literature and especially classical Chinese poetry upon 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 poetry¹¹⁸ — and, one might add, all literature — draws upon 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"¹¹⁹ to a further reaching and more enduring degree than even the Bible in the Judeo-Christian world or the Quran 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 but 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 Kao Ping (1350-1423)

115. Owen, *supra* note 79, at 2.

116. *Id.* at 14-15. See also Alford, *supra* note 26.

117. Owen, *supra* note 79, at 15.

118. T.S. Eliot, *Notes Toward the Definition of Culture* 117-18 (1949).

119. Joseph Levenson, *1 Confucian China and Its Modern Fate* xvii (1958).

termed “innovation within the bounds of orthodoxy” (*chengzhong zhi bian*).¹²⁰ 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 (*fugu*) Li Mengyang (1472-1529), argued for a fairly literal following of the past, saying that “prose (*wen*) must be like that of the Ch’in (221-207 B.C.) or the Han (206 B.C.-220 A.D.), and poetry (*shih*) must be like that of the High T’ang.”¹²¹ 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.”¹²² Others, such as Yuan Zhongdao (1570-1624) of the Gong’an 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” (*yíwēi*) animating the great poetry of the Tang.¹²³ 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 judgment kept clearly separate.”¹²⁴ 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.”¹²⁵ As was the case with the transmission of the Ancients by Confucius himself, or the heavy

120. Richard J. Lynn, *Alternate Routes to Self-Realization in Ming Theories*, in *Theories of the Arts in China* 317, 322 (Susan Bush & Christian F. Murck eds., 1983).

121. *Id.* at 317.

122. Jonathan Chaves, *The Panoply of Images: A Reconsideration of the Literary Theory of the Kung-an School*, in *Theories of the Arts in China*, *supra* note 120, at 341, 357.

123. *Id.* at 343.

124. Edward Pulleyblank, *The Historiographic Tradition in The Legacy of China* 134 (Raymond Dawson ed., 1964).

125. *Id.*

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 observed, "the selection and arrangement of [the historian's] . . . material called for the exercise of critical judgment, and conclusions about the causes of events or the characters of historical persons could be expressed separately in the appropriate place."¹²⁶

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 present¹²⁷ by posing "the resource of [the] past to renew . . . life repeatedly in the recurrent present."¹²⁸ For many, the artistic process itself, accordingly, was understood as a "spiritual exercise" through which one's moral sense might be both expressed and enhanced.¹²⁹ This was particularly true for the literati (*wenren*) who, at least in theory, subscribed to the notion of the famed Song artist Mi Fu (1051-1107) when he wrote that "[i]n matters of calligraphy and painting, one is not to discuss price. The gentleman is hard to capture by money."¹³⁰

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.¹³¹ As was the case with literature, there was much debate among both artists and theorists¹³² 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"¹³³ and to which they advocated fairly literal adherence, at least as a departure point.¹³⁴ As Wu Li (1632-1718) put it, "paint without taking the Sung and Yuan masters as one's basis is like playing chess on an

126. *Id.*

127. Frederick W. Mote, *The Arts and the "Theorizing Mode" of Chinese Civilization*, in *Artists and Traditions*, *supra* note 114, at 7.

128. Susan Bush, *The Chinese Literati on Painting: Su Shih (1037-1101) to Tung Ch'ich'ang (1971)*.

129. Levenson, *supra* note 119, at 21.

130. *Artists and Traditions*, *supra* note 127.

131. Bush, *supra* note 128.

132. *Id.*

133. James Cahill, *The Orthodox Movement in Early Ch'ing Painting in Mucrcck*, *supra* note 114, at 180.

134. *Id.*

empty chessboard, without pieces."¹³⁵ Others took a far more expansive view, arguing that painting should be less literal and should instead strive to capture the ideas that animated earlier work.¹³⁶ As Shen Gua (1030-1094) wrote:

The excellence of painting and calligraphy should be sought through sympathetic identification [with the essence of any given work of art] (*shenhui*) and not through formal elements. . . .

When the Ancients studied calligraphy, they did not copy exactly. They spread out the writing of a predecessor on the wall and looked at it in complete absorption. Then, when they put brush to paper, it was in accordance with the writer's idea.¹³⁷

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 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,"¹³⁸ the replication of particular concrete manifestations of such 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."¹³⁹ 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.¹⁴⁰ To the contrary, in the Chinese context, such use was at once both more affirmative and more essential. It evidenced the user's comprehension

135. James Cahill, *The Compelling Image: Nature and Style in Seventeenth Century Chinese Painting* 57 (1982).

136. Wai-kam Ho, *Aspects of Chinese Painting from 1100 to 1350*, in *Eight Dynasties of Chinese Painting: The Collections of the Nelson Gallery-Atkins Museum, Kansas City, and the Cleveland Museum of Art* xxv, xxix (Sally W. Goodfellow ed., 1980).

137. Bush, *supra* note 128, at 50.

138. *Artists and Traditions*, *supra* note 114, at xi.

139. Wen Fong, *The Problem of Forgeries in Chinese Painting*, 25 *Artibus Asiae* 95, 99 (1962).

140. *Id.* at 100.

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 willingness, shown on the part of the great Chinese painters towards the forging of their own works."¹⁴¹ 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 work¹⁴² by remarking, in comments that were not considered exceptional, that "[i]f 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?"¹⁴³ Much the same might be said for literature, where the Confucian disdain for commerce fostered an ideal, even if not always realized in practice, that the 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 comprising the Chinese language itself, as the famed Song statesman Wang Anshi (1021-1086) observed, "actually come from nature . . . [and] were not created by man; man merely imitated them,"¹⁴⁴ on what basis could anyone exclude others from the common heritage of all civilized persons?

141. *Id.*

142. These suggestions, of course, indicate that some persons were concerned about unauthorized copying.

143. Wen Fong, *supra* note 139, at 100.

144. Shuen-fu Lin, Chiang K'uei's Treatises on Poetry and Calligraphy, in *Theories of the Arts in China*, *supra* note 120, at 293, 307