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PIRACY, PREJUDICE, AND PERSPECTIVES: AN ATTEMPT TO USE SHAKESPEARE TO RECONFIGURE THE U.S.-CHINA INTELLECTUAL PROPERTY DEBATE

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I. INTRODUCTION	2
II. THE UNITED STATES'S FAILED CONVERSION ATTEMPTS ...	3
III. DIFFERENCES BETWEEN CHINA AND THE WEST	16
A. <i>Confucianism and Cultural Practices</i>	16
B. <i>Socialist Economic System</i>	21
C. <i>Self-strengthening Worldview</i>	22
D. <i>Skepticism, Xenophobia, and Nationalism</i>	24
E. <i>Censorship and Information Control Policy</i>	28
F. <i>Laws with Chinese Characteristics</i>	32
IV. THE MERCHANT OF VENICE	38
A. <i>The Story</i>	38
B. <i>The Lessons</i>	43
1. Who Chooseth Me, Must Give and Hazard All He Hath	44
2. May the Outward Shows Be Least Themselves	50
3. Let the Sounds of Music Creep in Our Ears.....	53
V. AMERICAN INTELLECTUAL PROPERTY POLICY TOWARD CHINA	55
A. <i>The Two Countries Must Give and Hazard All They Have</i>	55
B. <i>The U.S.-China Intellectual Property Debate Is Deceived with Ornament</i>	67
C. <i>The Two Countries Should Strive for Harmony</i>	77
VI. CONCLUSION	87

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*All of us are to an extent prisoners of our environments, trapped in one or another set of parochial concerns. And the truth we retrieve is inevitably qualified by the intellectual and emotional preoccupations each of us, through our vocabulary and concepts, brings to bear on the study of the past.*¹

I. INTRODUCTION

Every once in a while, the mass media report stories about intellectual property piracy in China. These stories usually go as follows. For a long time, the evil Chinese pirates have been freeriding on the creative genius of Western authors and inventors. Engaging in unfair competition, these pirates have brought about the greatest trade deficit in the United States in years. Every year, the United States loses more than \$2 billion of revenues due to intellectual property piracy in China. Tired of this enormous trade deficit and the millions of pirated copies of Microsoft Windows and counterfeit Mickey Mouse T-shirts, the United States has finally decided to mount a noble crusade against these lowly pirates. This crusade has not only protected the United States's intellectual property interests, but also brought to China the needed ethical values, technological development, and global economic integration.

This story contains some truths, in particular the extent of the Chinese piracy problem and the problem's adverse impact on the U.S. economy. However, it omits several important aspects of the existing U.S.-China intellectual property conflict. First, even though the crusade did not receive much media coverage before the 1980s, this crusade has been an ongoing effort since the turn of the twentieth century. So far, it has not produced any effective results, apart from putting intellectual property laws on statute books. Second, unfair competition is not the only reason behind the piracy problem. China and the West harbor significant political, social, economic, and cultural differences, which militate against intellectual property law reforms in China. Without reforms that are sensitive to these differences, the piracy problem will continue. Indeed, the problem will exacerbate as the Chinese economy grows. Third, the crusade has failed to convince the Chinese, in particular their leaders, of the importance and benefits of intellectual property rights. Even worse, it backfires on the United States's foreign trade and human rights policies. In light of these significant omissions, the current U.S.-China intellectual property debate "obscure[s] far more than . . . illuminate[s]."² It baffles American scholars, policymakers, the mass media, and the general public

¹ PAUL A. COHEN, *DISCOVERING HISTORY IN CHINA* 198 (1984).

² William P. Alford, *Making the World Safe for What? Intellectual Property Rights, Human Rights and Foreign Economic Policy in the Post-European Cold War World*, 29 N.Y.U. J. INT'L L. & POL. 135, 135 (1997).

and prevents them from understanding the roots of the Chinese piracy problem.

To reconfigure the U.S.-China intellectual property debate, this Article articulates the various differences between China and the West and explains how these differences have contributed to the failure of the United States's repeated conversion attempts. It also highlights the undesirability for and ineffectiveness of forced conversion by juxtaposing the piracy problem with one of Shakespeare's legal masterpieces, *The Merchant of Venice*³ ("*The Merchant*"). By comparing China's experience in the international intellectual property community to Shylock's predicament in the play, this Article seeks to challenge the readers' cultural presumptions and invites readers to step outside their own world to rethink the U.S.-China intellectual property conflict.

Part II of this Article describes the failure of the United States's repeated attempts to convert China into a Western intellectual property regime. This Part argues that the American intellectual property policy toward China in the last two decades failed in the same way as it had failed at the turn of the twentieth century. Part III examines the political, social, economic, and cultural differences between China and the West. This Part explains how these differences have primarily accounted for the United States's failed conversion attempts. Part IV recounts the story of Shylock's forced conversion in *The Merchant* and compares China's conversion experience in the international intellectual property community to Shylock's predicament in the Venetian court. This Part also examines in depth the three major lessons the audience can learn from the play and how these lessons can help avoid Shylock's painful experience. Using *The Merchant* as a legal text, Part V applies Shakespeare's teachings to the U.S.-China intellectual property conflict. This Part concludes that Shakespeare's lessons in *The Merchant* provide valuable lessons for people to understand the conflict and for policymakers to reshape their foreign intellectual property policy.

II. THE UNITED STATES'S FAILED CONVERSION ATTEMPTS

To understand why China has to be converted, one must realize that China had not developed any intellectual property notion throughout its millennia-long imperial history. The earliest effort to regulate publication and reproduction was through an edict issued by Emperor Wenzong of the Tang dynasty in A.D. 835.⁴ This edict "prohibited the unauthorized reproduction by persons of calendars, almanacs, and related items

³ WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* (John Russell Brown ed., Arden Shakespeare 1955). All the quotes from *The Merchant of Venice* in this Article are taken from this edition of the play.

⁴ WILLIAM P. ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION* 13 (1995).

that might be used for prognostication.”⁵ Because the Chinese considered the emperor to be the link between human and natural events, this prohibition was needed to protect the emperor against findings that would have undermined the dynasty or predicted its downfall.⁶ By the end of the Tang dynasty, the edict was further expanded to “prohibit[] the unauthorized copying and distribution of state legal pronouncements and official histories, and the reproduction, distribution, or possession of ‘devilish books and talks’ (*yaoshu yaoyan*) and most works on Buddhism and Daoism.”⁷ Rather than fostering creation and promoting authorship, this edict was designed to sustain imperial power.

The Song dynasty expanded this portion of the Tang Code⁸ to include prepublication review and registration by “order[ing] private printers to submit works they would publish to local officials.”⁹ The principal goal of this institution was “to halt the private reproduction of materials that were either subject to exclusive state control or heterodox.”¹⁰ In addition to works covered by the Tang edict, prohibited materials included authorized versions of the classics, model answers to imperial service examinations, maps, materials concerning the inner workings of government, politics, and military affairs, pornography, and writings using the names of members or ancestors of the imperial family in “inappropriate” literary styles or in writings that were “not beneficial to scholars.”¹¹ Like the British Stationers’ Company,¹² this review and registration system was mainly instituted to control the dissemination of ideas.

⁵ *Id.*; see also TANG CODE art. 110 (“All cases of possession of astronomical instruments, maps of the heavens, esoteric books, military books, books on the seven days, the *Methods of the Great Monad*, or the *Methods of the God of Thunder* by private persons punish violators by two years of penal servitude.”), translated in 2 THE TANG CODE 78 (Wallace Johnson trans., Princeton Univ. Press 1997).

⁶ ALFORD, *supra* note 4, at 13.

⁷ *Id.* (footnote omitted).

⁸ See generally 1-2 THE TANG CODE, *supra* note 5, for a collection and analysis of the Tang Code. The Tang Code was significant for two reasons. First, it was the oldest surviving code in China today. Although comprehensive legal codes were enacted in the Qin and Han dynasties, most of these codes have been lost except through scattered quotations found in other works. ALBERT H.Y. CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE’S REPUBLIC OF CHINA 12 (1998). Second, the Tang Code was the basis on which the later codes of the Song, Yuan, Ming, and Qing dynasties were developed. *Id.*

⁹ ALFORD, *supra* note 4, at 13.

¹⁰ *Id.*

¹¹ *Id.* at 13-14.

¹² For comprehensive discussions of the British Star Chamber and the Stationers’ Company, see generally AUGUSTINE BIRRELL, SEVEN LECTURES ON THE LAW AND HISTORY OF COPYRIGHT IN BOOKS (1899); CYPRIAN BLAGDEN, THE STATIONERS’ COMPANY: A HISTORY, 1403-1959 (1960); MARCI A. HAMILTON, THE HISTORICAL AND PHILOSOPHICAL UNDERPINNINGS OF THE COPYRIGHT CLAUSE 4-8 (Benjamin N. Cardozo School of Law Occasional Papers in Intellectual Property No. 5, 1999).

In the trademark context, the dynastic codes “restrict[ed] the use of certain symbols associated with either the imperial family (such as the five-clawed dragon) or officialdom.”¹³ They also “barred the imitation of marks used by the ceramists of Jingdezhen and others making goods for exclusive imperial use” and forbid certain craftspersons from exporting their works.¹⁴ In addition, guild regulations, clan rules, and local laws protected producers of tea, silk, cloth, paper, and medicines by registering their brand names and symbols they had developed.¹⁵ Tight family control and screening of employees were also used to protect the confidentiality of vital manufacturing processes.¹⁶ Nonetheless, the dynastic codes and the various regulations and control efforts did not result in any formal, centralized intellectual property protection.¹⁷

Indeed, China did not attempt to introduce substantive intellectual property protection until the early twentieth century. Such protection arrived “with such inventions and novel ideas as the gunboat, opium, ‘most favoured nation’ trading status, and extraterritoriality.”¹⁸ When China first opened its coastal ports to Western trade in the 1840s, “there was little foreign investment in China, and trade was confined to items such as opium, tea, and raw silk, sold as bulk commodities, rather than under brand names.”¹⁹ While “there were periodic allegations of inferior grades of tea being passed off as their more costly counterparts,”²⁰ substantial problems of intellectual property piracy did not arise until decades later. By the turn of the twentieth century, foreign imports and investment had increased substantially, and intellectual property piracy had become a serious problem.²¹

To protect the intellectual property rights of its nationals, the United States, which had recently acceded to the Paris Convention for the Pro-

¹³ ALFORD, *supra* note 4, at 15.

¹⁴ *Id.*

¹⁵ *Id.* at 16. One commentator noted the limitation of clan rules:

The clan rules, as guidance toward ideal conduct, could not be very effective beyond a certain point, depending upon how well a given clan was organized and operated. It seems that even the clans which were sufficiently well organized and wealthy enough to have their genealogies printed did not have the necessary organizational strength and appeal to make the clan rules rigidly binding upon their members. The clan rules nonetheless had an impressive normative influence, even upon members with little education.

Hu-chen Wang Liu, *An Analysis of Chinese Clan Rules: Confucian Theories in Action*, in *CONFUCIANISM AND CHINESE CIVILIZATION* 16, 17 (Arthur F. Wright ed., 1964).

¹⁶ ALFORD, *supra* note 4, at 16.

¹⁷ *Id.* at 15.

¹⁸ PETER FENG, *INTELLECTUAL PROPERTY IN CHINA* 3 (1997).

¹⁹ ALFORD, *supra* note 4, at 33-34.

²⁰ *Id.* at 34.

²¹ *Id.*

tection of Industrial Property²² and had enacted the Chace Act²³ to provide formal intellectual property protection to foreigners, used its military and economic strength to induce China to sign a commercial treaty in 1903.²⁴ This treaty represented the United States's first attempt to convert China into a Western intellectual property regime.²⁵ It granted copyright, trademark, and patent protection to Americans in return for reciprocal protection to the Chinese.²⁶

Despite the 1903 treaty and similar commercial treaties with Britain and Japan,²⁷ China did not introduce a substantive copyright law until 1910, a substantive patent law until 1912, and a substantive trademark law until 1923.²⁸ Though these laws existed on paper, they offered foreigners very limited intellectual property protection.²⁹ In fact, due to increasing industrialization, the growth of the urban elite, and the spread of literacy, the piracy problem exacerbated despite successful negotiation of the treaty and the introduction of new intellectual property laws.³⁰

The failure of the United States's first conversion attempt can be attributed to several factors. First, the United States failed to consider the relevance of its intellectual property model to China and premised the new regime on a registration system.³¹ Hampered by problems that were uniquely Chinese, such as geographical difficulties, high corruption, and strong regional protectionism, the registration system turned out to be substantially ineffective, rendering the new intellectual property laws virtually unenforceable. Second, the United States was unable to convince the Chinese government why intellectual property laws could benefit China.³² Indeed, most Chinese officials, including the very powerful Empress Dowager, were skeptical of the need for legal reforms. To these officials, law reforms were merely "an unfortunate short-term expedient

²² Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, *as last revised in Stockholm*, July 14, 1967, 21 U.S.T. 1538, 828 U.N.T.S. 305.

²³ Act of Mar. 3, 1891, ch. 565, 26 Stat. 1106. Under the Chace Act, foreign, nonresident authors could attain copyright protection in the United States if their countries offered Americans similar protection.

²⁴ Treaty for Extension of the Commercial Relations Between [China and the United States], *reprinted in* TREATIES AND AGREEMENTS WITH AND CONCERNING CHINA 1894-1919 (J.V.A. MacMurray ed., 1921).

²⁵ See Alford, *Making the World Safe for What?*, *supra* note 2, at 138 ("[The 1903 treaty represents] one of the first efforts by the United States anywhere to use its strength bilaterally to bring about greater intellectual property protection.").

²⁶ ALFORD, *supra* note 4, at 37-38.

²⁷ Interestingly, out of these three commercial treaties, the 1903 treaty with the United States was the only agreement that included patent protection. *Id.* at 37.

²⁸ *Id.* at 41-42.

²⁹ *Id.* at 42.

³⁰ *Id.* at 43.

³¹ *Id.* at 2.

³² *Id.* at 49.

needed to calm the restive masses and appease the treaty powers before Qing power could be reasserted in its proper form.”³³ Finally, the United States did not rally the support of Chinese holders of intellectual property rights behind the new intellectual property regime.³⁴ The United States also failed to train Chinese officials with responsibilities in the field and to educate the Chinese populace about the importance of, and rationales behind, intellectual property rights.³⁵

Instead, the United States “presumed that foreign pressure would suffice to induce ready adoption and widespread adhesion to [the intellectual property] laws.”³⁶ In the beginning, China was willing to comply with the treaty because it naïvely assumed that introducing intellectual property laws would put an end to the unequal treaties signed in the latter half of the nineteenth century, in particular the extraterritoriality provisions,³⁷ which allowed foreigners accused of crimes against Chinese subjects to be tried in China according to their own laws by the representatives of their home government.³⁸ Once the Chinese government realized that legal reforms would not affect China’s semi-colonial status, it lost interest in pursuing those reforms. In fact, the Chinese government took advantage of the Western position and used legal reforms to provide leverage against the treaty powers.³⁹

During the Republican era, which immediately followed the fall of the Qing dynasty, intellectual property rights managed to receive some legislative attention. Shortly after Guomindang took power in 1928, they promulgated a new copyright law, affording protection to books, music, photographs, designs, sculpture, and other technical, literary and artistic works.⁴⁰ The Nationalist government also issued a new trademark law⁴¹ and promulgated the Measures to Encourage Industrial Arts, which afforded protection to indigenous inventions.⁴² Notwithstanding these efforts, “the decades of wars, famines and revolutions scarcely gave them

³³ *Id.* at 47; see also IMMANUEL C.Y. HSÜ, *THE RISE OF MODERN CHINA* 411 (6th ed. 2000) (“[The late Qing reforms were] a shrewd effort on the part of the dowager to disguise her shame over her role in the Boxer catastrophe.”).

³⁴ ALFORD, *supra* note 4, at 49.

³⁵ *Id.*

³⁶ *Id.* at 2.

³⁷ While China was negotiating the commercial treaties with Britain, Japan, and the United States, the treaty powers hinted that they might relinquish extraterritoriality if they were satisfied with the state of the Chinese law and the arrangement for its administration. *Id.* at 36.

³⁸ *Id.* at 32. For a comprehensive discussion of the development of extraterritoriality in China, see generally 1-2 GEORGE W. KEETON, *THE DEVELOPMENT OF EXTRATERRITORIALITY IN CHINA* (1969).

³⁹ ALFORD, *supra* note 4, at 49.

⁴⁰ *Id.* at 50.

⁴¹ *Id.* at 51.

⁴² *Id.* at 52.

a chance to take root in China.”⁴³ Moreover, the fact that the laws were transplanted from abroad with scant alteration and that they presumed a legal structure and legal consciousness that did not exist in China at that time made implementation very difficult.⁴⁴

After the Second World War, the prospects of intellectual property protection became even gloomier. In 1949, the Chinese Communist Party established the People’s Republic of China. By the early 1950s, the government had “nationalized industry and commerce, collectivized agricultural production and embarked on a socialist command economy.”⁴⁵ In such a politico-juridical environment in which formal law and administrative bureaucracy were denounced,⁴⁶ “the very notion of privately owned monopolies or exclusive rights in the use of expressions, ideas and names became meaningless.”⁴⁷ Even though China reopened its markets in 1979 and allowed people to own limited private property, the Chinese had yet to develop a respect for intellectual property rights.

Immediately after the reopening, China and the United States signed the Agreement on Trade Relations Between the United States of America and the People’s Republic of China⁴⁸ (“1978 Agreement”), marking the beginning of Western intellectual property protection in post-Mao China. This Agreement provided that “each Party shall seek, under its laws and with due regard to international practice, to ensure to legal or natural persons of the other Party protection of patents and trademarks equivalent to the patent and trademark protection correspondingly accorded by the other Party.”⁴⁹ The Agreement also provided that “each Party shall take appropriate measures, under its laws

⁴³ FENG, *supra* note 18, at 3.

⁴⁴ As Professor Alford explained:

Structurally, each of these laws granted rights only to those persons who had registered their intellectual property with the appropriate governmental agencies and further specified that such rights were to be enforced through recourse to the nation’s court system. Such a registration requirement may have made sense in the foreign context from which it was borrowed. It was, however, far less appropriate for China in the early twentieth century, given that, in the words of Chiang Kai-shek himself, “when something arrives at a government office it is *yamenized*—all reform projects are handled lackadaisically, negligently, and inefficiently,” and given the virtual absence of personnel trained to administer such a registration system.

ALFORD, *supra* note 4, at 53 (footnote omitted).

⁴⁵ FENG, *supra* note 18, at 3; *see also* Hsü, *supra* note 33, at 652-55 (describing the economic policies, land revolution, and agricultural reforms in China in the early 1950s).

⁴⁶ *See infra* text accompanying notes 215-17 (discussing the lack of rule of law in Maoist China).

⁴⁷ FENG, *supra* note 18, at 3.

⁴⁸ Agreement on Trade Relations Between the United States of America and the People’s Republic of China, July 7, 1979, P.R.C.-U.S., 31 U.S.T. 4652.

⁴⁹ *Id.* art. VI (3), 31 U.S.T. at 4658.

and regulations and with due regard to international practice, to ensure to legal or natural persons of the other Party protection of copyrights equivalent to the copyright protection correspondingly accorded by the other Party.”⁵⁰ Pursuant to this Agreement, China became a member of the World Intellectual Property Organization (“WIPO”) in 1980 and the Paris Convention for the Protection of Industrial Property⁵¹ in 1984. China also promulgated a new trademark law⁵² in 1982 and a new patent statute⁵³ in 1984. Despite these new laws and multilateral agreements, China afforded authors and inventors very limited protection.⁵⁴

Initially, the United States was willing to compromise its intellectual property rights because the country was eager to lure China into the family of nations.⁵⁵ By the mid-1980s, however, American businesses became impatient with the lack of improvement in intellectual property protection in China.⁵⁶ Urged by American business executives,⁵⁷ the United States Trade Representative (“USTR”) placed China on the “Priority Watch List” in 1989.⁵⁸ In response to this designation, China passed a

⁵⁰ *Id.* art. VI (5).

⁵¹ Paris Convention, *supra* note 22.

⁵² Trademark Law of the People’s Republic of China, *translated in* THE LAW OF THE PEOPLE’S REPUBLIC OF CHINA 1979-1982, at 305 (1987).

⁵³ Patent Law of the People’s Republic of China, *translated in* THE LAWS OF THE PEOPLE’S REPUBLIC OF CHINA 1983-1986, at 65 (1987).

⁵⁴ Although the new trademark and patent laws granted individuals rights over their creations and inventions, these laws were designed mainly to promote “socialist legality with Chinese characteristics.” ALFORD, *supra* note 4, at 70. Uneasy about the introduction of private property and the potential conflict between intellectual property rights and the national interest, the Chinese government placed substantial limits on the rights granted under the new statutes. *Id.*

⁵⁵ ALFORD, *supra* note 4, at 152-53 nn. 67-68.

⁵⁶ “At a 1985 meeting to the U.S.-China Joint Committee on Commerce and Trade (JCCT), the U.S. for the first time expressed concerns about weak Chinese [intellectual property rights] standards. In 1987, the U.S. put [intellectual property rights] protection on the agenda for U.S.-China market access talks.” Warren H. Maruyama, *U.S.-China IPR Negotiations: Trade, Intellectual Property, and the Rule of Law in a Global Economy*, in CHINESE INTELLECTUAL PROPERTY LAW AND PRACTICE 165, 186 (Mark A. Cohen et al. eds., 1999).

⁵⁷ See Daniel Southerland, *U.S. Businesses Urge Trade Sanctions to Stop Piracy of Software in China*, WASH. POST, Apr. 11, 1989, at E7.

⁵⁸ The *Priority Watch List* includes “countries whose actions, policies, and practices meet some, but not all, of the criteria for priority foreign country identification. These actions, policies, or practices warrant active work for resolution and close monitoring to determine whether further Special 301 action is necessary.” Paul C.B. Liu, *U.S. Industry’s Influence on Intellectual Property Negotiations and Special 301 Actions*, 13 UCLA PAC. BASIN L.J. 87, 95 (1994). By doing so, the United States gained leverage in negotiations with China while it did not need to initiate a section 301 investigation.

new copyright law⁵⁹ and enacted new implementing regulations⁶⁰ in 1990. A separate set of computer software regulations⁶¹ followed in 1991.

Notwithstanding these legislative efforts, the United States found intellectual property protection in China unsatisfactory. In April 1991, the United States upgraded China to a "Priority Foreign Country."⁶² A month later, the Bush administration initiated an investigation under Section 301 of the Trade Act of 1974⁶³ ("section 301"). To increase its leverage, the U.S. government also threatened to impose retaliatory tariffs of \$1.5 billion on Chinese textiles, shoes, electronic instruments, and pharmaceuticals.⁶⁴

Although China quickly responded with countersanctions of a similar amount on American commodities, such as aircraft, cotton, corn, steel, and chemicals,⁶⁵ China succumbed to American pressure and signed the Memorandum of Understanding Between China (PRC) and the United States on the Protection of Intellectual Property⁶⁶ ("1992 MOU") hours before the deadline for imposing sanctions. Pursuant to the 1992 MOU,

⁵⁹ Copyright Law of the People's Republic of China [hereinafter Copyright Law], translated in INTELLECTUAL PROPERTY PROTECTION IN CHINA: THE LAW 128-42 (1996).

⁶⁰ Implementing Regulations of the Copyright Law of the People's Republic of China, translated in INTELLECTUAL PROPERTY PROTECTION IN CHINA: THE LAW, *supra* note 59, at 146-56.

⁶¹ Computer Software Protection Regulations of the People's Republic of China, translated in INTELLECTUAL PROPERTY PROTECTION IN CHINA: THE LAW, *supra* note 59, at 188-97.

⁶² OFFICE OF USTR, 1995 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 54 (1995) [hereinafter 1995 NTE REPORT].

⁶³ 19 U.S.C. §§ 2411-2420 (1994). Section 301 permits the President to investigate and impose sanctions on countries engaging in unfair trade practices that threaten the United States's economic interests. The goals of the provision are to eliminate unfair trade practices and to open foreign markets. See Jagdish Bhagwati, *Aggressive Unilateralism: An Overview*, in AGGRESSIVE UNILATERALISM: AMERICA'S 301 TRADE POLICY AND THE WORLD TRADING SYSTEM 1, 4 (Jagdish Bhagwati & Hugh T. Patrick eds., 1990) [hereinafter AGGRESSIVE UNILATERALISM].

⁶⁴ Sheryl WuDunn, *Nonstate Plants in China at Risk in U.S. Talks*, N.Y. TIMES, Jan. 14, 1992, at A9.

⁶⁵ David Holley, *China Warns of Trade War with U.S. over Patents, Copyrights; Economic Ties: 'Excessive' Demands May Lead to Higher Tariffs on American Commodities Worth \$1.2 Billion*, BEIJING WARNS, L.A. TIMES, Jan. 8, 1992, at A6.

⁶⁶ Memorandum of Understanding Between China (PRC) and the United States on the Protection of Intellectual Property, Jan. 17, 1992, P.R.C.-U.S., 34 I.L.M. 677 (1995) [hereinafter 1992 MOU]; see also Stuart Auerbach, *China, U.S. Reach Trade Accord; Beijing Agrees to Curb Piracy of Products, Safeguarded Material*, WASH. POST, Jan. 17, 1992, at A24; Keith Bradsher, *U.S. and China Reach Accord on Copying*, N.Y. TIMES, Jan. 17, 1992, at D1.

China amended the 1984 Patent Law,⁶⁷ promulgated new patent regulations,⁶⁸ and acceded to the Patent Cooperation Treaty.⁶⁹ China also acceded to the Berne Convention for the Protection of Literary and Artistic Works⁷⁰ and ratified the Geneva Convention for Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms.⁷¹ In addition, it amended the 1990 Copyright Law,⁷² updated its trademark law, and adopted a new unfair competition law that affords protection to trade secrets.⁷³

By 1994, American businesses again complained about the lack of intellectual property protection in China and the substantial losses incurred as a result. According to then-USTR Mickey Kantor, enforcement of intellectual property laws in China was "sporadic at best and virtually non-existent for copyrighted works."⁷⁴ In June, the USTR once again initiated a Special 301 investigation.⁷⁵ Six months later, the Clinton

⁶⁷ The new patent law extends the duration of patent protection from 15 to 20 years, affords protection to all chemical inventions, including pharmaceuticals and agrichemical products, and sharply restricts the availability of compulsory licenses. Patent Law of the People's Republic of China, *translated in* INTELLECTUAL PROPERTY PROTECTION IN CHINA: THE LAW, *supra* note 59, at 66-79; *see also* 1992 MOU, *supra* note 66, art. 1(1), 34 I.L.M. at 677 (stating that China will exert its best efforts to implement amendments to the Patent Law by January 1, 1993).

⁶⁸ Implementing Regulations of the Patent Law of the People's Republic of China, *translated in* INTELLECTUAL PROPERTY PROTECTION IN CHINA: THE LAW, *supra* note 59, at 83-116.

⁶⁹ Patent Cooperation Treaty, June 19, 1970, 28 U.S.T. 7645, 1160 U.N.T.S. 231.

⁷⁰ Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, *as last revised in Paris*, July 24, 1971, 828 U.N.T.S. 221; *see also* 1992 MOU, *supra* note 66, art. 3(1), 34 I.L.M. at 680-81 (stipulating that China will adhere to the Berne Convention and will enact legislation authorizing such accession).

⁷¹ Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, Oct. 28, 1971, 25 U.S.T. 309; *see also* 1992 MOU, *supra* note 66, art. 3(2), 34 I.L.M. at 681 (stipulating that China will accede to and ratify the Geneva Convention).

⁷² The amended statute protects computer software programs as literary works for 50 years, removes formalities on copyright protection, and extends protection to all works originating in a Berne country, including sound recordings that have fallen into the public domain. *See* 1992 MOU, *supra* note 66, art. 3(4), 34 I.L.M. at 681.

⁷³ *Id.* art. 4, 34 I.L.M. at 683.

⁷⁴ Gregory S. Feder, Note, *Enforcement of Intellectual Property Rights in China: You Can Lead a Horse to Water, But You Can't Make It Drink*, 37 VA. J. INT'L L. 223, 242 (1996).

⁷⁵ 1995 NTE REPORT, *supra* note 62, at 54. Special 301 was enacted as part of the Omnibus Trade and Competitiveness Act of 1988, 19 U.S.C. §§ 2101-2495 (1994), which amended section 301 of the Trade Act of 1974. *Id.* §§ 2411-2420. Special 301 requires the USTR to identify foreign countries that provide inadequate intellectual property protection or that deny American intellectual property goods fair or equitable market access. *Id.* § 2242(a)(1)(A). Upon identification, the USTR must

administration threatened to impose 100 percent tariffs on more than \$1 billion worth of Chinese imports. In response to the United States's threat, China retaliated with a counterthreat of 100 percent tariffs on U.S.-made compact discs, cigarettes, alcoholic beverages, and other products.⁷⁶ China also threatened to suspend negotiations with American automakers over the establishment of joint ventures in China for manufacturing mini-vans and passenger cars. Such establishment was one of the top trade priorities of the Clinton administration.⁷⁷ Hours before the deadline, however, both countries reached a compromise by exchanging a set of correspondence, which later constituted the Agreement Regarding Intellectual Property Rights⁷⁸ ("1995 Agreement").

The 1995 Agreement summarized the enforcement measures China had undertaken in the past few months and those it would undertake in the near future. It included a pledge to improve market access for American products and to promote transparency by publishing all laws, rules, and regulations concerning limitation on imports, joint ventures, and other economic activities.⁷⁹ The Agreement also delineated the mutual responsibilities that would be undertaken by both countries, such as training customs officers and bureaucrats, exchanging information and statistics, and undertaking future consultations.

In addition, the Agreement provided a series of short-term and long-term remedial measures, which included the establishment of the State

initiate within 30 days an investigation into the act, policy, or practice of the identified country, *id.* § 2412(b)(2)(A), and request a consultation with the country regarding its offending practices. *Id.* § 2413(a)(1). If the issues remain unresolved after six months, *id.* § 2414(a)(3)(A), which may be extended to nine months under certain statutory conditions, *id.* § 2414(a)(3)(B), the USTR may suspend or withdraw trade benefits, impose duties or other restrictions, or enter into binding agreements that require the offending nation to eliminate or phase out its offending practice or to compensate the United States. *Id.* § 2411(c)(1).

⁷⁶ Martha M. Hamilton, *U.S. to Hit China with Stiff Tariffs; Sanctions Are Largest Ever Imposed*, WASH. POST, Feb. 5, 1995, at A1.

⁷⁷ David E. Sanger, *President Imposes Trade Sanctions on Chinese Goods*, N.Y. TIMES, Feb. 5, 1995, at A1.

⁷⁸ Agreement Regarding Intellectual Property Rights, Feb. 26, 1995, P.R.C.-U.S., 34 I.L.M. 881 (1995) [hereinafter 1995 Agreement]. The 1995 Agreement comprised a letter from Chinese Minister of Foreign Trade and Economic Cooperation Wu Yi to USTR Mickey Kantor, Letter from Wu Yi, Minister of Foreign Trade and Economic Cooperation, People's Republic of China, to Mickey Kantor, United States Trade Representative (Feb. 26, 1995), in 1995 Agreement, *supra*, 34 I.L.M. at 882 [hereinafter Agreement Letter], and the Action Plan for Effective Protection and Enforcement of Intellectual Property Rights. Action Plan for Effective Protection and Enforcement of Intellectual Property Rights, in 1995 Agreement, *supra*, 34 I.L.M. at 887 [hereinafter Action Plan].

⁷⁹ Agreement Letter, *supra* note 78, 34 I.L.M. at 884-86.

Council Working Conference on Intellectual Property Rights;⁸⁰ the creation of Enforcement Task Forces;⁸¹ the adoption of a copyright verification system that protects compact discs, laser discs, and CD-ROMs;⁸² the requirement for title registration of foreign audiovisual products and computer software in CD-ROM format;⁸³ and the intensification of border control by customs officers.⁸⁴ It also provided for a six-month "special enforcement period," during which intensive efforts would be undertaken to crack down on the major infringers of intellectual property rights and to target regions in which infringing activity was particularly rampant at the time of the Agreement.⁸⁵

Although the United States found early implementation of the Agreement promising,⁸⁶ the Agreement had become apparently inadequate by

⁸⁰ The Working Conference was responsible for the central organization and coordination of protection and enforcement of all intellectual property laws throughout the country. Action Plan, *supra* note 78, § I[A], 34 I.L.M. at 887-89. It was specially designed to target local protectionism and the vulnerability of the Chinese judicial system to such a problem. See Jeffrey W. Berkman, *Intellectual Property Rights in the P.R.C.: Impediments to Protection and the Need for the Rule of Law*, 15 UCLA PAC. BASIN L.J. 1, 18 (1996) ("In drafting the 1995 MOU, it appears that China and the U.S. understood that the weaknesses of China's judicial system made it especially susceptible to localism."). In April 1998, the Chinese government established the State Intellectual Property Office, a ministry-level branch of the State Council. This Office took over the responsibility of the Working Conference. HONG XUE AND CHENGSI ZHENG, *SOFTWARE PROTECTION IN CHINA: A COMPLETE GUIDE* 21-22 (1999).

⁸¹ These Task Forces consisted of administrative and other authorities responsible for intellectual property protection, such as the National Copyright Administration, the State Administration for Industry and Commerce, the Patent Office, police at various levels, and customs officials. They were authorized to enter and search any premises that allegedly infringed on intellectual property rights, review books and records for evidence of infringement and damages, seal suspected goods, and confiscate materials and implements directly and predominantly used to make infringing goods. When infringement was found, the Task Forces had authority to impose fines, to order a stoppage of production, reproduction, and sale of infringing goods, to revoke production permits, to confiscate and destroy without compensation the infringing goods and the materials and implements used to manufacture the counterfeit products. Action Plan, *supra* note 78, § I[B][1], 34 I.L.M. at 890.

⁸² *Id.* § I[H], 34 I.L.M. at 903.

⁸³ *Id.* § I[H][2][a], 34 I.L.M. at 903.

⁸⁴ *Id.* § I[G], 34 I.L.M. at 900-03.

⁸⁵ *Id.* pmbl., § I[C], 34 I.L.M. at 887, 892.

⁸⁶ See Feder, *supra* note 74, at 245 ("In the first few months of the enforcement period, U.S. government officials remarked that implementation of the Agreement was 'very promising,' with Chinese government officials conducting 'massive raids' against [intellectual property rights] infringers throughout the country."); see also Helen Cooper & Kathy Chen, *China Averts Trade War with the U.S., Promising a Campaign Against Piracy*, WALL ST. J., Feb. 27, 1995, at A3 (reporting that many considered the 1995 Agreement "the single most comprehensive and detailed

November 1995.⁸⁷ In May 1996, the Clinton administration again designated China as a Priority Foreign Country and threatened to initiate a Special 301 investigation.⁸⁸ A couple of weeks later, the administration announced its intention to impose about \$2 billion worth of trade sanctions on Chinese textiles, garments, consumer electronics, sporting goods, and bicycles. Within thirty minutes of the announcement, China responded with retaliatory sanctions of a similar amount on American agricultural products, cars and car parts, telecommunications equipment, and compact discs.⁸⁹

Even though China and the United States eventually averted a potential trade war by reaching a new accord in the eleventh hour, such an accord merely reaffirmed China's commitment to protect intellectual property rights made under the 1995 Agreement.⁹⁰ It neither included any new terms nor increased market access for American products.⁹¹ Even worse, as I have argued elsewhere, the 1996 Accord has demonstrated the ineffectiveness of the American intellectual property policy

[intellectual property] enforcement agreement the U.S. had ever concluded"); Martha M. Hamilton & Steven Mufson, *Clinton Hails Accord with China on Trade: Piracy Enforcement Provision Called Tough*, WASH. POST, Feb. 27, 1995, at A1 ("This is a strong agreement for American companies and American workers." (statement of William Clinton, President of the United States)).

⁸⁷ Paul Blustein, *U.S. Warns China to Step Up Efforts Against 'Piracy'*, WASH. POST, Nov. 30, 1995, at B13. Testifying before the Senate Subcommittee on East Asian and Pacific Affairs, then-deputy USTR Charlene Barshefsky stated that, despite the raids on retailers of pirated goods and the efforts to establish intellectual property courts, "China's overall implementation of the agreement falls far short of the requirements of the agreement." *Id.*; see also OFFICE OF USTR, 1996 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 54 (1996) ("U.S. and other foreign industry representatives reported that pirated and counterfeit goods exported from China to third markets continued at the same or even higher levels than before conclusion of the 1995 [intellectual property rights] enforcement agreement . . .").

⁸⁸ Richard W. Stevenson, *U.S. Cites China for Failing to Curb Piracy in Trade*, N.Y. TIMES, May 1, 1996, at D4.

⁸⁹ Helene Cooper & Kathy Chen, *U.S. and China Announce Tariff Targets as Both Nations Step Up Trade Rhetoric*, WALL ST. J., May 16, 1996, at A3 [hereinafter Cooper & Chen, *U.S. and China Announce Tariff Targets*].

⁹⁰ See China Implementation of the 1995 Intellectual Property Rights Agreement, June 17, 1996, P.R.C.-U.S., at <http://www.mac.doc.gov/TCC/DATA/index.html> (last visited Mar. 6, 2001). The terms of the Accord included the closing of pirate plants, criminal prosecution for those who violate intellectual property regulations, a special enforcement period where police assume responsibility for the investigation of piracy, improved border surveillance by customs officers, and a registration system for compact disc manufacturers. See *id.*

⁹¹ Cf. CHENGSI ZHENG, *INTELLECTUAL PROPERTY ENFORCEMENT IN CHINA: LEADING CASES AND COMMENTARY* xxvi (1997) ("In the 1996 Sino-U.S. negotiations, what the USTR really wanted was not the impossible short term elimination of pirate copies, but access to the Chinese markets for its cultural products.").

toward China⁹² and the increasing reluctance of the Chinese government to bow down to foreign pressure in the intellectual property arena.⁹³

Since the 1996 Accord, the Chinese government has made substantial efforts to improve intellectual property protection in the country, in the hope that China will be able to join the World Trade Organization ("WTO") in the very near future.⁹⁴ In light of these increased efforts, the U.S. government has shelved its coercive policy and has not imposed any new section 301 sanctions. However, intellectual property piracy is still rampant in China today. Every year, the United States loses more than \$2 billion of revenues due to intellectual property piracy in China alone.⁹⁵

⁹² The following pattern of events illustrates well the ineffectiveness of the American intellectual property policy toward China. The United States begins by threatening China with trade sanctions. In response, China retaliates with countersanctions of a similar amount. After several months of bickering and posturing, both countries come to a last minute compromise by signing a new intellectual property agreement. While intellectual property protection improves during the first few months immediately after the signing of the agreement, the piracy problem revives once international attention is diverted and the foreign push dissipates. Within a short period of time, American businesses again complain to the United States government, and the cycle repeats itself. See Peter K. Yu, *From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-first Century*, 50 AM. U. L. REV. (forthcoming 2001), for a discussion of this pattern of events.

⁹³ *Id.*

⁹⁴ These measures included the issuance of the Regulations on Certification and Protection of Famous Trademarks and the Regulations on the Protection of New Plant Varieties, the inclusion of a section on intellectual property crimes within the Criminal Law, the reorganization of the State Patent Bureau into the State Intellectual Property Office, and the establishment of intellectual property research and training centers. See *id.* (describing the various measures the Chinese government had undertaken to improve intellectual property protection in the country).

⁹⁵ Seth Faison, *China Turns Blind Eye to Pirated Disks*, N.Y. TIMES, Mar. 28, 1998, at D1 [hereinafter Faison, *China Turns Blind Eye*]; see also OFFICE OF USTR, 2000 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 50 (2000) (reporting that significant problems exist with the enforcement of intellectual property laws at the grassroots level in China); Daniel C.K. Chow, *Counterfeiting in the People's Republic of China*, 78 WASH. U. L.Q. 1, 11 (2000) ("Although the level of copyright piracy seems to have decreased recently in China due to aggressive campaigning by copyright owners, trademark counterfeiting continues to increase." (footnote omitted)); Tom Korski, *AV Piracy Still "Rampant" Despite Crackdowns, Chinese Authorities Say*, Pat. Trademark & Copyright L. Daily (BNA), at D3 (Jan. 21, 1998) ("[P]iracy of audio-visual products in China remains 'rampant' despite expanded police raids on black marketeers . . ."); Steven Mufson, *Piracy Still Runs Rampant in China; Yet Industries Oppose Asking for Sanctions*, WASH. POST, Mar. 27, 1998, at E3 ("Despite the 1996 accord, the value of pirated goods in China grew to an estimated \$ 2.8 billion in 1997 from about \$ 2.3 billion in 1996, according to the International Intellectual Property Alliance.").

As the Chinese economy grows, these losses may continue to increase even if the piracy problem does not worsen.

III. DIFFERENCES BETWEEN CHINA AND THE WEST

Since the mid-1980s, the U.S.-China intellectual property conflict has entered into the public debate. This conflict has also been frequently discussed and debated in Congress, in particular during those times when the renewal of China's most-favored-nation status was in question. Despite the importance of this issue, the public debate thus far has been one-sided, focusing primarily on the unfair competition aspect.

Undeniably, there are some greedy Chinese who are eager to free ride on the creative efforts of Western authors and inventors. However, greed alone cannot explain this century-old intellectual property conflict. To understand the roots of the conflict, one must focus on the significant political, social, economic, and cultural differences between China and the West, which continue to frustrate the United States's conversion efforts and the intellectual property law reforms in China. Unless the Chinese government introduces reforms that are sensitive to these differences, the piracy problem will continue.

A. *Confucianism and Cultural Practices*

For more than 2000 years, the Chinese had been heavily influenced by Confucianism,⁹⁶ which provided "the blueprint of an ideal life"⁹⁷ and the yardstick against which human relationships were to be measured.⁹⁸ To the Chinese, the past was not only a reflection of contemporary society, but also the embodiment of cultural and social values.⁹⁹ By encountering

⁹⁶ "Although Taoism and Buddhism were also influential in some periods and in some aspects of life, Confucianism had never been displaced as the basic philosophy of the Chinese state and society—until the beginning of the twentieth century." CHEN, *supra* note 8, at 9. As Professor Yao pointed out insightfully:

On many occasions Confucianism gained strength and positive influence from [the general changes in political, social, economic, religious, and cultural life], yet on other occasions it suffered from the breakdown of the social fabric and responded by becoming either more flexible or more dogmatic. Throughout the history of the Chinese dynasties, Confucianism changed and adapted itself to new political and social demands, and these changes and adaptations are as important as the teachings of the early Confucian masters.

XINZHONG YAO, AN INTRODUCTION TO CONFUCIANISM 4 (2000). For excellent discussions of Confucianism, see generally CONFUCIANISM AND CHINESE CIVILIZATION, *supra* note 15; YAO, *supra*. For excellent collections of essays discussing Chinese philosophy and the Chinese mind, see generally THE PSYCHOLOGY OF THE CHINESE PEOPLE (Michael Harris Bond ed., 1986); UNDERSTANDING THE CHINESE MIND: THE PHILOSOPHICAL ROOTS (Robert E. Allinson ed., 1991).

⁹⁷ YAO, *supra* note 96, at 50.

⁹⁸ ALFORD, *supra* note 4, at 20.

⁹⁹ *Id.* at 26.

the past, one could understand the Way of Heaven,¹⁰⁰ obtain guidance to future behavior,¹⁰¹ and find out the ultimate meaning of human existence.¹⁰² One could also transform oneself and build his or her moral character through self-cultivation.¹⁰³ Thus, materials and information about the past had to be put in the public domain for people to borrow or to transmit to younger generations.¹⁰⁴ Because intellectual property rights allow a significant few to monopolize these needed materials, they prevent the vast majority from understanding their life, culture, and society. Intellectual property rights therefore "contradict[] traditional Chinese moral standards."¹⁰⁵

Unlike Westerners today, the Chinese in the imperial past did not consider copying or imitation a moral offense. Rather, they considered it "a noble art,"¹⁰⁶ a "time-honored learning process"¹⁰⁷ through which people

¹⁰⁰ YAO, *supra* note 96, at 50 ("Confucians believe that in the classics, heavenly principles are revealed to them and that by studying these classics and books they will be able to understand the Way of Heaven and by applying it to human life they can establish the Way of humanity.").

¹⁰¹ ALFORD, *supra* note 4, at 26; *see* YAO, *supra* note 96, at 50 ("The customs and events of the past are believed to serve as a mirror of the present and the guide to the future.").

¹⁰² ALFORD, *supra* note 4, at 25 ("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.'"); YAO, *supra* note 96, at 139 ("The Way (*dao*) is fundamental to the Confucian view of the world, concerning the question of the ultimate meaning of human existence."); *see also* STEPHEN OWEN, REMEMBRANCES: THE EXPERIENCE OF THE PAST IN CHINESE LITERATURE 15 (1986) ("[T]he experience of the past roughly corresponds to and carries the same force as the attention to meaning or truth in the Western tradition.").

¹⁰³ *See* ALFORD, *supra* note 4, at 20 (noting that the past served as "the instrument through which individual moral development was to be attained"); THE ANALECTS OF CONFUCIUS bk. XVII, ¶ 4 (Arthur Waley trans., Vintage 1989) [hereinafter ANALECTS] ("A gentleman who has studied the Way will be all the tenderer towards his fellow-men; a commoner who has studied the Way will be all the easier to employ." (internal quotations omitted)); YAO, *supra* note 96, at 30 ("Confucian Learning is the study of the Way of Heaven both in the inner self and in external practices. The only purpose of learning is the promotion of virtuous action and the cultivation of a moral character . . .").

¹⁰⁴ *See* ALFORD, *supra* note 4, at 20 ("The indispensability of the past for personal moral growth dictated that there be broad access to the common heritage of all Chinese.").

¹⁰⁵ Patrick H. Hu, "Mickey Mouse" in China: Legal and Cultural Implications in Protecting U.S. Copyrights, 14 B.U. INT'L L.J. 81, 104 (1996).

¹⁰⁶ Marci A. Hamilton, *The TRIPS Agreement: Imperialistic, Outdated, and Overprotective*, 29 VAND. J. TRANSNAT'L L. 613, 619 (1996) [hereinafter Hamilton, *TRIPS Agreement*]. A case in point is the art of *linmo*, a technique of hand-copying a master's work. As Professor Feng described:

manifested respect for their ancestors.¹⁰⁸ At a very young age, Chinese children were taught to memorize and copy the classics and histories.¹⁰⁹ On the one hand, such undertaking would instill in the youngsters familial values, filial piety, and respect for their cultural legacy. On the other hand, copying was practically needed to ensure success in the imperial civil service examinations,¹¹⁰ which emphasized the knowledge of the Confucian Four Books and the Five Classics.¹¹¹ Success in those examinations would not only bring power and glory to the candidates, but would also bring honor to their families, districts, and provinces.

When the Chinese grew up, they were by training compilers, as compared to composers.¹¹² "Having memorized vast sequences of the classics

Hand-copying (*linmo*) of a master's work is a pedagogical regimen in traditional Chinese painting and calligraphy. As practised, *linmo* is usually done with the same tools and materials (brush, ink, pigments, paper, etc.) as the original. It differs from tracing, in that it involves not only demanding skills and discipline, but vigorous mental process and effort to absorb and express the master's technique, style and spirit. Hence good *linmo* is considered an art on its own right.

FENG, *supra* note 18, at 62. Because of the importance of this art, the Copyright Law includes a special *linmo* exception. Copyright Law, *supra* note 59, art. 22(10).

¹⁰⁷ Hu, *supra* note 105, at 104.

¹⁰⁸ See J. DAVID MURPHY, *PLUNDER AND PRESERVATION: CULTURAL PROPERTY LAW AND PRACTICE IN THE PEOPLE'S REPUBLIC OF CHINA* 30 (1995); see *id.* ("Chinese writers, artists, and creators in all areas of knowledge had significant reverence and attachment for the past which resulted in legitimized copying."); *id.* at 31 ("[F]orgeries were not always stigmatized; emulation was regarded as a form of appreciation."); see also ALEXANDER LINDEY, *PLAGIARISM AND ORIGINALITY* 254 (1952) ("Admiration induces imitation; the closer the imitation, the narrower the dividing line between it and outright copying.").

¹⁰⁹ See JOHN KING FAIRBANK, *THE GREAT CHINESE REVOLUTION 1800-1985*, at 28 (1987) ("To prepare for the [civil] examinations a boy began at age seven or so and in about six years memorized the *Four Books* and *Five Classics*, which totaled 431,000 characters."); see also YAO, *supra* note 96, at 50 (noting that Confucian followers were required to learn the texts by heart).

¹¹⁰ FAIRBANK, *supra* note 109, at 28. For an overview of the civil service examination in imperial China, see generally HSÜ, *supra* note 33, at 75-80. For a comprehensive discussion of the civil service examination systems in the Tang, Song, Ming, and Qing dynasties, see MU CH'EN, *TRADITIONAL GOVERNMENT IN IMPERIAL CHINA: A CRITICAL ANALYSIS* 48-53, 77-80, 109-13, 134-37 (Chü-tu Hsüeh & George O. Totten trans., 1982).

¹¹¹ This emphasis was mainly due to the Chinese belief that knowledge of the past demonstrated one's ability to resolve problems of the present. ALFORD, *supra* note 4, at 21-22. The Confucian Four Books include *The Analects*, *The Book of the Mean*, *The Book of Mencius*, and *The Great Learning*. The Five Classics refer to *The Book of Odes*, *The Book of History*, *The Book of Changes*, *The Book of Rites*, and *The Spring and Autumn Annals*.

¹¹² JOHN KING FAIRBANK & MERLE GOLDMAN, *CHINA: A NEW HISTORY* 100-01 (1998).

and histories, they constructed their own works by extensive cut-and-paste replication of phrases and passages from those sources."¹¹³ To the Chinese, the classics and histories constituted the universal language¹¹⁴ through which they communicated.¹¹⁵ Although their unacknowledged quotation may be considered plagiarism today, the Chinese in the imperial past regarded such a practice as an acceptable, legitimate, or even necessary, component of the creative process. Indeed, Chinese writers from early times saw themselves more as preservers of historical record and cultural heritage than as creators.¹¹⁶ Even Confucius, one of the greatest philosophers of all time, proudly acknowledged that he had "transmitted what was taught to [him] *without making up anything of [his] own.*"¹¹⁷

To a very great extent, this compiling tradition was similar to that held by Westerners before the emergence of the contemporary notion of authorship in the eighteenth century.¹¹⁸ Unlike contemporary writers, "[m]edieval church writers actively disapproved of the elements of originality and creativeness which we think of as essential component of authorship. 'They valued extant old books more highly than any recent elucubrations and *they put the work of the scribe and the copyist above that of the authors.*'"¹¹⁹ Although writers in later periods changed their attitudes toward originality and creativeness, they did not espouse modern attitudes toward plagiarism. Rather, like the Chinese people, they regarded imitation as the sincerest form of flattery and a necessary com-

¹¹³ *Id.* at 101.

¹¹⁴ See ALFORD, *supra* note 4, at 26 (noting that allusion and reference to the classics and histories constituted "a sophisticated cultural shorthand" that was potentially accessible throughout the Sinicized world); JOSEPH LEVENSON, *CONFUCIAN CHINA AND ITS MODERN FATE: A TRILOGY* xvii (1968) (noting that citation to the classics was "the very method of universal speech").

¹¹⁵ See ALFORD, *supra* note 4, at 26.

¹¹⁶ FAIRBANK & GOLDMAN, *supra* note 112, at 101; see also YAO, *supra* note 96, at 53 (noting that the Old Text School of Confucianism considered Confucius a preserver of early writings who transmitted those writings to later generations).

¹¹⁷ ANALECTS, *supra* note 103, bk. VII, ¶ 1 (emphasis added and internal quotations omitted).

¹¹⁸ See MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* (1993); Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author,'* 17 EIGHTEENTH-CENTURY STUDS. 425 (1984). For an excellent collection of essays examining the concept of authorship, see generally *THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE* (Martha Woodmansee & Peter Jaszi eds., 1994).

¹¹⁹ JAMES BOYLE, *SHAMANS, SOFTWARE & SPLEENS: LAW AND THE CONSTRUCTION OF INFORMATION SOCIETY* 53 (1996) (quoting ERNST P. GOLDSCHMIDT, *MEDIEVAL TEXTS AND THEIR FIRST APPEARANCE IN PRINT* 112 (1943)).

ponent of the creative process.¹²⁰ For example, in *The Defence of Poesy*, Sir Philip Sidney maintained that poetry "is an art of imitation . . . [and] counterfeiting."¹²¹ Likewise, "Shakespeare engaged regularly in activity that we would call plagiarism but that Elizabethan playwrights saw as perfectly harmless, perhaps even complimentary."¹²²

Finally, the Chinese subscribed to the Confucian vision of civilization. Under this vision, the family constituted the basic unit of human community, and the world was an outgrowth of this basic unit.¹²³ Emphasizing familial values and collective rights,¹²⁴ the Chinese did not develop a concept of individual rights. They also did not regard creativity as individual property. Instead, they considered creativity as a collective benefit to their community and the posterity.¹²⁵ Having a strong disdain for com-

¹²⁰ See *id.* at 54.

¹²¹ SIR PHILIP SIDNEY, *THE DEFENSE OF POESY* (1595), in *THE NORTON ANTHOLOGY OF ENGLISH LITERATURE* 479, 483 (M.H. Abrams ed., 6th ed. 1993) (footnote omitted); see also ROSE, *supra* note 118, at 13.

¹²² BOYLE, *supra* note 119, at 230 n.12; RICHARD A. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* 382 & n.3 (1988) ("Shakespeare was by modern standards a plagiarist, but by the standards of his time not. . . . A competing playwright, Robert Greene, called Shakespeare 'an upstart Crow, beautified with our feathers.'"); see also LINDEY, *supra* note 108, at 72 ("Borrowing flourished in sixteenth-century England. It was often flagrant enough to constitute plagiarism. The Elizabethans did not bother to devise plots, incidents and characters; they lifted them from their predecessors and from each other."). As Professor Boyle pointed out, Shakespeare's "plagiarism" is the main reason why critics doubt the authorship of what we attribute to Shakespeare. See BOYLE, *supra* note 119, at 230 n.12; see also JOHN MICELL, *WHO WROTE SHAKESPEARE?* (1999) (examining questions concerning the authorship of Shakespeare's plays and sonnets); James Boyle, *The Search for an Author: Shakespeare and the Framers*, 37 AM. U. L. REV. 625 (1988) (examining the similarities between textual indeterminacy and the notion of romantic authorship).

¹²³ See YAO, *supra* note 96, at 33 ("[Confucian ethics] takes virtues as the cornerstone of social order and world peace. Its logic is that the family is the basic unit of the human community and that harmonious family relationships will inevitably lead to a harmonious society and a peaceful state.").

¹²⁴ For discussions of the Chinese communitarian perspective, see generally DANIEL A. BELL, *EAST MEETS WEST: HUMAN RIGHTS AND DEMOCRACY IN EAST ASIA* (2000); *CONFUCIANISM AND HUMAN RIGHTS* (Wm. Theodore de Bary & Tu Weiming eds., 1998); WM. THEODORE DE BARY, *ASIAN VALUES AND HUMAN RIGHTS: A CONFUCIAN COMMUNITARIAN PERSPECTIVE* (1998); *HUMAN RIGHTS AND CHINESE VALUES: LEGAL, PHILOSOPHICAL, AND POLITICAL PERSPECTIVES* (Michael C. Davis ed., 1995); *THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS* (Joanne R. Bauer & Daniel A. Bell eds., 1999).

¹²⁵ Hu, *supra* note 105, at 104; Jianyang Yu, *Protection of Intellectual Property in the P.R.C.: Progress Problems, and Proposals*, 13 UCLA PAC. BASIN L.J. 140, 160 (1994) [hereinafter Yu, *Progress, Problems, and Proposals*]; see ALFORD, *supra* note 4, at 29 ("[T]rue scholars wrote for edification and moral renewal, rather than profit.").

merce,¹²⁶ they greatly despised those who created works for sheer profit.¹²⁷

B. *Socialist Economic System*

While the Communist government did not emphasize Confucianism until very recently,¹²⁸ its view on the function of creative works is similar to that of the Confucianists.¹²⁹ Under the socialist economic system, property belongs to the State and the people, rather than private owners. Authors thus create literary and artistic works for the welfare of the State, rather than for the purpose of generating economic benefits for themselves.¹³⁰ Indeed, in a socialist society, "owning property is tantamount to a sin. Thus, stealing an object that is owned by someone else is less corrupt than owning it outright yourself."¹³¹

This aversion of private property was particularly strengthened by the numerous mass campaigns and endless class struggles that took place during the Mao era. Among the various mass campaigns, the Great Proletariat Cultural Revolution was the most severe and devastating.¹³² During the Cultural Revolution, the government heavily criticized scientists,

¹²⁶ Merchants were considered the lowest among the four social classes in a traditional Chinese society. These four classes were, in descending order, scholar-official (*shih*), farmer (*nung*), artisan (*kung*), and merchant (*shang*).

¹²⁷ ALFORD, *supra* note 4, at 29 ("[T]he Confucian disdain for commerce fostered an ideal . . . that true scholars wrote for edification and moral renewal rather than profit."); see also Liwei Wang, *The Chinese Traditions Inimical to the Patent Law*, 14 NW. J. INT'L L. & BUS. 15, 36-56 (1993) (discussing how Confucianism smothered the impulse to commercial profit).

¹²⁸ See Wm. Theodore de Bary, *Preface to CONFUCIANISM AND HUMAN RIGHTS*, *supra* note 124, at xvi-xvii (discussing the recent revival of Confucianism by the Chinese leaders); see also YAO, *supra* note 96, at 274-79 (describing the recent revival of Confucian values).

¹²⁹ See ALFORD, *supra* note 4, at 56 (arguing that the Soviet model "reflected traditional Chinese attitudes toward intellectual property"); see also PETER HOWARD CORNE, *FOREIGN INVESTMENT IN CHINA: THE ADMINISTRATIVE LEGAL SYSTEM* 25 (1997) ("Mao had no wish to rid society of the many useful Confucian 'virtues'. Rather, he intended to retain them whilst removing their association with Confucianism.").

¹³⁰ Hu, *supra* note 105, at 104; see also Susan Tiefenbrun, *Piracy of Intellectual Property in China and the Former Soviet Union and Its Effects upon International Trade: A Comparison*, 46 BUFF. L. REV. 1, 11 (1998) ("The Soviet model reflected traditional Chinese attitudes toward intellectual property and expounded the socialist belief that by inventing or creating, individuals were engaging in social activities based on knowledge that belonged to all members of society.").

¹³¹ Tiefenbrun, *supra* note 130, at 37-38.

¹³² See CHEN, *supra* note 8, at 30-33, for a discussion of the impact of the Cultural Revolution on the Chinese legal system and profession. See generally JUNG CHANG, *WILD SWANS: THREE DAUGHTERS OF CHINA* 273-443 (1991), for an insightful personal account of the Cultural Revolution.

writers, artists, lawyers, and intellectuals and routinely condemned them to harsh prison terms.¹³³ Fearing political repercussions, many Chinese became "unwilling to acknowledge their personal role in [creative and] inventive activity."¹³⁴ Instead, they used pseudonyms and put pure and non-identifying labels, such as "Red Flag," "East Wind," and "Worker-Peasant-Soldier," on their products.¹³⁵

Even worse, many Chinese developed contempt for authorship and remuneration from creative efforts. As one comrade would argue during the Cultural Revolution, "[i]s it necessary for a steel worker to put his name on a steel ingot that he produces in the course of his duty? If not, why should a member of the intelligentsia enjoy the privilege of putting his name on what he produces?"¹³⁶ Even though Deng Xiaoping and other Chinese leaders tried to rehabilitate the intelligentsia after the Cultural Revolution by enhancing their positions and facilitating their endeavors,¹³⁷ these reforms have yet to cultivate respect for intellectual property rights.

C. *Self-strengthening Worldview*

During the nineteenth and twentieth centuries, China was constantly attacked by Western powers. Under the Treaty of Nanjing of 1842, which was signed after China's defeat in the Opium War, China ceded Hong Kong Island to Britain and was forced to open five coastal ports to Western trade.¹³⁸ Since the Opium War, China had experienced repeated attacks by Western imperialist powers and was forced to sign unequal treaties giving out significant economic and territorial concessions. Such submission eventually led to the "Scramble for Concessions" in 1898, in which foreign imperialist powers carved the country "into leased territories and spheres of interest, within which they constructed railways, opened mines, established factories, operated banks, and ran all kinds of exploitive organizations."¹³⁹

Desperate to save the country, the Chinese adopted a self-strengthening worldview, under which attaining independence and liberating the

¹³³ ALFORD, *supra* note 4, at 63-64.

¹³⁴ *Id.* at 64.

¹³⁵ Mark Sidel, *Copyright, Trademark and Patent Law in the People's Republic of China*, 21 TEX. INT'L L.J. 259, 272 (1986).

¹³⁶ ALFORD, *supra* note 4, at 65.

¹³⁷ *Id.*

¹³⁸ Treaty Between China and Great Britain, Signed at Nanking, Aug. 29, 1842, China-Gr. Brit., reprinted in YASH GHAI, HONG KONG'S NEW CONSTITUTIONAL ORDER: THE RESUMPTION OF CHINESE SOVEREIGNTY AND THE BASIC LAW 504-07 (1997).

¹³⁹ HSÜ, *supra* note 33, at 344.

nation became the country's first priority.¹⁴⁰ In the beginning, self-strengthening was mainly limited to diplomatic, military, and industrial reforms.¹⁴¹ After China's defeats in the Sino-French War in 1885 and the Sino-Japanese War in 1895, Chinese reformers realized the inadequacy of limited modernization and the need for drastic institutional changes. Inspired by successful reforms introduced by Peter the Great and Emperor Meiji, these reformers advocated radical reforms of the civil service examinations, education, and political institutions.¹⁴² Unfortunately, due to the reformers' inexperience and the strong conservative opposition in the imperial court, these reforms remained largely futile.¹⁴³

The 1911 Revolution led to the abdication of the Manchu Emperor, ending 268 years of Qing rule and more than 2000 years of imperial dynasties.¹⁴⁴ Notwithstanding the founding of the new republic, China had yet to experience peace, order, or unity. In fact, "the early republican years were characterized by moral degradation, monarchist movements, warlordism, and intensified foreign imperialism."¹⁴⁵ Frustrated by China's backwardness and its semi-colonial status, the new intelligentsia, many of whom were trained in the West or were influenced by Western philosophy, advocated "a radical change in the philosophical foundations of national life." In particular, they "called for a critical re-evaluation of China's cultural heritage in the light of modern Western standards, a willingness to part with those elements that had made China weak, and a determination to accept Western science, democracy, and culture as the foundation of a new order."¹⁴⁶

In 1949, the Chinese Communist Party established the People's Republic of China. Despite the change in government, the self-strengthening worldview persists. Subscribing to this worldview, many Chinese believed it was *right* to freely reproduce or to tolerate the unauthorized reproduction of foreign works that would help strengthen the country.¹⁴⁷ Some of them also believed that copying was needed, or even necessary, for China to catch up with Western developed countries. Thus, one could

¹⁴⁰ Xiang Rui Gong, *Constitutional Protection of Human Rights: The Chinese View Under the Notion of One Country, Two Systems*, in THE HONG KONG BILL OF RIGHTS: A COMPARATIVE APPROACH 492 (Johannes Chan & Yash Ghai eds., 1993).

¹⁴¹ The Self-strengthening Movement lasted from 1861 to 1895. See Hsü, *supra* note 33, at 261-312, for a discussion of the Self-strengthening Movement.

¹⁴² See *id.* at 355-86, 408-18, for a discussion of political reforms in the late Qing period.

¹⁴³ See *id.* at 380-84 for a discussion of the failure of the Reform Movement of 1898.

¹⁴⁴ *Id.* at 474.

¹⁴⁵ *Id.* at 493.

¹⁴⁶ *Id.*

¹⁴⁷ See Sidel, *supra* note 135, at 271 (noting the use and application by the Chinese of technology, techniques, and products developed in more advanced countries without paying any royalties).

easily find bookstores containing "special" rooms selling pirated works from Western publishers.¹⁴⁸ One could also find *Reference News* (*Cankao Xiaoxi*) providing translated excerpts from foreign news materials published abroad.¹⁴⁹ Even today, the Chinese sometimes refer to pirated computer programs "as 'patriotic software,' out of a belief that it speeds the nation's modernization at little or no cost."¹⁵⁰

D. *Skepticism, Xenophobia, and Nationalism*

Before the Opium War, the Chinese regarded foreigners as "outer barbarians" and believed the country had no need for foreign objects, manufactures, and ideas.¹⁵¹ Ignorant and complacent, Emperor Qianlong of the Qing dynasty told King George III of England: "We possess all things. I set no value on objects strange or ingenious, and have no use for your country's manufactures."¹⁵² A couple of centuries later, the scientific progress and military prowess of Western powers had proven Qianlong wrong. In fact, they brought China two centuries of tremendous pain and humiliation. It was not until the resumption of sovereignty in Hong Kong in 1997 that China was able to recover from all the unequal treaties signed in the nineteenth and twentieth centuries.

Although China's defeats in the Opium War and the subsequent Arrow War had awakened the Chinese and made them aware of their country's backwardness, many Chinese, in particular those in the imperial court, were still skeptical of Western technology, ideas, and institutions.¹⁵³ Indeed, "[t]he great majority of the scholar-official class regarded foreign affairs and Western-style enterprises as 'dirty' and 'vulgar,' beneath their

¹⁴⁸ See Glenn R. Butters, *Pirates, Dragons and U.S. Intellectual Property Rights in China: Problems and Prospects of Chinese Enforcement*, 38 ARIZ. L. REV. 1081, 1082 (1996) (describing "special" rooms in bookstores that sell pirated works to local Chinese people).

¹⁴⁹ See DANIEL C. LYNCH, *AFTER THE PROPAGANDA STATE: MEDIA, POLITICS, AND "THOUGHT WORK" IN REFORMED CHINA* 133 (1999).

¹⁵⁰ James Cox, *U.S. Firms: Piracy Thrives in China*, USA TODAY, Aug. 23, 1995, at 2B.

¹⁵¹ See ALFORD, *supra* note 4, at 30-31; see also Hsü, *supra* note 33, at 142 ("The Chinese attitude toward foreign trade was an outgrowth of their tributary mentality. It postulated that the bountiful Middle Kingdom had no need for things foreign, but that the benevolent emperor allowed trade as a mark of favor to foreigners and as a means of restraining their gratitude."). See *id.* at 130-34 for a discussion of the Chinese tributary mentality.

¹⁵² Letter from the Qianlong Emperor to King George III of England, Oct. 3, 1793, *quoted in* Hsü, *supra* note 33, at 161.

¹⁵³ See Hsü, *supra* note 33, at 289 ("Western machines and industrial management were alien to the traditional Chinese mentality."); see also *id.* 281-82 (discussing the conservative opposition within the imperial court).

dignity.”¹⁵⁴ As a result, China’s early modernization efforts were limited to firearms, ships, machines, communications, mining, and light industries, and “[n]o attempts were made to assimilate Western institutions, philosophy, arts, and culture.”¹⁵⁵ Indeed, the skepticism of the conservative Qing court was one of the main reasons for the failure of these modernization efforts.¹⁵⁶

While skepticism toward Western objects and ideas made the Qing court reluctant to introduce modernization reforms, the xenophobic and nationalist sentiments among the Chinese populace¹⁵⁷ made implementation of those reforms difficult. To a very great extent, the Chinese nationalist and xenophobic sentiments were “a reaction to the humiliation that China suffered under the hands of Western imperialism.”¹⁵⁸ These sentiments began to grow after China’s defeat in the Opium War, which led to rapid inflation and an influx of foreign goods.¹⁵⁹ Subsequent foreign attacks and signings of unequal treaties also resulted in the unpopular invasion of Christianity and unwanted presence of foreign troops, ministers, consuls, missionaries and traders in China.¹⁶⁰

By the turn of the twentieth century, foreign industries and investments had dominated almost all modern industries and enterprises in China.¹⁶¹ Such domination disrupted the self-sufficient agrarian economy, displaced the native handicraft industries,¹⁶² and shattered traditional family

¹⁵⁴ *Id.* at 289-90; *see also id.* at 289 (“[M]en of talent and integrity usually steered clear of foreign matters and enterprises; only the lesser characters were willing to associate with the modernization projects . . .”).

¹⁵⁵ *See id.* at 287.

¹⁵⁶ *See id.* at 289-90 (discussing the social and psychological inertia that hampered the Self-strengthening Movement).

¹⁵⁷ For discussions of nationalist sentiments in China, *see generally* CHINESE NATIONALISM (Jonathan Unger ed., 1996); YONGNIAN ZHENG, DISCOVERING CHINESE NATIONALISM IN CHINA: MODERNIZATION, IDENTITY AND INTERNATIONAL RELATIONS 154 (1999) [hereinafter ZHENG, DISCOVERING CHINESE NATIONALISM].

¹⁵⁸ ZHENG, DISCOVERING CHINESE NATIONALISM, *supra* note 157, at 154.

¹⁵⁹ *See* HSÜ, *supra* note 33, at 223-24 (describing the socio-economic impact of the Opium War on the Chinese people).

¹⁶⁰ *Id.* at 388. The Treaties of Tianjin in 1858 allowed for the free propagation of Christianity in the interior. The Conventions of Beijing in 1860 further granted missionaries the right to rent and buy land to build churches. Protected by the flag and the treaties, the missionaries moved about freely in China.

¹⁶¹ *See id.* at 432-35 (describing the foreigners’ dominating role in modern Chinese industries and enterprises). “84 percent of shipping, 34 percent of cotton-yarn spinning, and 100 percent of iron production were under foreign control in 1907, while 93 percent of railways were foreign-dominated in 1911.” *Id.* at 436.

¹⁶² Professor Hsü described how the impact of foreign goods and investments on the Chinese economy:

The influx of foreign commodities under preferential customs and the right of foreigners after 1895 to engage in local manufacturing disastrously affected the native handicraft industries and agrarian economy. Foreigners dominated

relationships.¹⁶³ Added to these hardships were floods in Shandong, Sichuan, Jiangxi, Jiangsu, and Anhui and a severe draught in northern China.¹⁶⁴ Fueled by socio-economic distress and nationalist sentiments, the Chinese vented their frustration on foreigners and foreign enterprises.¹⁶⁵ Notable outbursts of anti-foreign sentiments in the late Qing and Republican period included the Tianjin Massacre of 1870,¹⁶⁶

Chinese public utilities, communications, mining, banking, and other modern enterprises. Their factories, by virtue of vast capital and mass production, outsold Chinese rivals even in distant villages. As common an agricultural product as cotton was marketed by foreigners more cheaply than the Chinese could produce it. Farm women who traditionally weaved as a secondary vocation were thrown out of work, and farmers had increasing difficulty eking out a living.

Id. at 427-28.

¹⁶³ Professor Hsü described the adverse impact of foreign goods and investment on familial relationships:

The clan and family could no longer provide help and comfort to those members who became unemployed, sick, and destitute. The displaced handicraft worker or the peasant left for the city, where he slipped from family and clan control; if lucky enough to find a new life, his meager income hardly sufficed to support his own dependents, let alone the clansmen. The ties between such a man and his clan became attenuated. Very often the wife and children of such a man were forced to work in a different city just to scabble out a living, thereby scattering further not only clansmen but even immediate family members. Little wonder that old familial relationships broke down under the impact of the foreign economic invasion.

Id. at 428.

¹⁶⁴ *Id.* at 390.

¹⁶⁵ As Professor Hsü described:

By the end of the 19th century, the country was beset by bankruptcy of village industries, decline of domestic commerce, rising unemployment, and a general hardship of livelihood. Many [Chinese] attributed this sorry state of affairs to evil foreign influence and domination of the Chinese economy. . . . Victims of natural calamities as well as superstitious scholars and officials blamed the misfortune on the foreigners, who, they insisted had offended the spirits by propagating a heterodox religion and prohibiting the worship of Confucius, idols, and ancestors. Foreigners were accused of damaging the "dragon's vein" (*lung-mai*) in the land when they constructed railways, and of letting out the "precious breath" (*pao-ch'i*) of the mountains when they opened mines. The gentry held foreigners responsible for destroying the tranquility of the land and interfering with the natural functioning of the "wind and water" (*feng shui, geomancy*), thus adversely affecting the harmony between men and nature.

Id. at 389-90.

¹⁶⁶ The Tianjin Massacre arose out of rumors that French missionaries bewitched Chinese children, mutilated their bodies, and extracted their organs to make medicine. In response to those charges, a Qing official inspected the orphanage. After the official had found no truth to the wild charges, the French consul, armed with a pistol, confronted the Chinese, demanding justice for the priests and sisters. The mob soon went out of control, killed the French consul and his assistant, and burned the church and the orphanage. Ten sisters, two priests, and two French officials were killed. Three Russian traders lost their lives by mistake. And four British and American churches were destroyed. See *id.* at 299-302 for a description of

the Boxer Uprising in 1900,¹⁶⁷ and the May Fourth Movement in 1919.¹⁶⁸

During the Mao era, xenophobia and nationalism were primarily used “to mobilize domestic resources to catch up with advanced Western powers and prevent China’s further victimization.”¹⁶⁹ Keenly aware of China’s misfortunes in the nineteenth and twentieth centuries, Mao and his followers were “national Communists at heart.”¹⁷⁰ Like the reformers in the Qing period, they had “a burning desire to restore China’s rightful position under the sun, to achieve the big power status denied it since the Opium War, and to revive the national confidence and self-respect that had lost during a century of foreign humiliation.”¹⁷¹ Nonetheless, the repeated power struggles within the Chinese leadership made Mao’s dreams unfulfilled.

When Deng Xiaoping returned to power in the late 1970s, he adopted a different and more pragmatic approach. Instead of putting “politics in command,” Deng saw economic wealth as the foundation of China’s power.¹⁷² “According to Deng, whether China could have a rightful place in the world of nations depended on China’s domestic economic development.”¹⁷³ Although his predecessors emphasized national unity, Deng believed that “national unity depended on whether China could catch up with the developed countries.”¹⁷⁴ Thus, he vigorously pushed for the Four Modernizations,¹⁷⁵ the renewal of diplomatic and commer-

the anti-Christian feelings among the Chinese that led to the Tianjin Massacre of 1870.

¹⁶⁷ During the Boxer Uprising, members of a fin-de-siècle secret society, backed by Empress Dowager, brutally murdered missionary families, foreign ministers and diplomats, and Chinese converts. They also besieged embassies and burned churches and shops that sold foreign merchandise and books. See *id.* at 386-418 for an overview of the Boxer Uprising in 1900.

¹⁶⁸ The May Fourth Movement began as a mass demonstration by students in Beijing protesting the verdict of the Versailles Peace Conference, which allowed Japan to retain Shandong, a territory leased to Germany in 1898 and occupied by Japan during the First World War. The demonstration was so powerful and far-reaching that it evoked an immediate national response. In addition to pressuring the Chinese delegation to reject the treaty, the Chinese boycotted Japanese products and stopped taking Japanese streamers. Dockhands in China also refused to upload Japanese goods. See *id.* at 501-05 for an overview of the May Fourth Movement in 1919.

¹⁶⁹ ZHENG, *DISCOVERING CHINESE NATIONALISM*, *supra* note 157, at 17.

¹⁷⁰ HSÜ, *supra* note 33, at 660.

¹⁷¹ *Id.* at 660-61.

¹⁷² ZHENG, *DISCOVERING CHINESE NATIONALISM*, *supra* note 157, at 17.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ The Four Modernizations aimed to develop China’s world-class strength in agriculture, industry, science and technology, and national defense by 2000. See HSÜ, *supra* note 33, at 803-14 for a comprehensive overview of the Four Modernizations.

cial ties with the United States, Japan, and other Western developed countries,¹⁷⁶ and the establishment of Special Economic Zones.¹⁷⁷

With the death of Deng Xiaoping in 1997, many commentators suggested that there might be a resurgence of xenophobic and nationalist sentiments. According to these commentators, "a new ideology is necessary as faith in Marxism or Maoism declines[,] and nationalism, if handled properly, can justify the political legitimacy of leadership."¹⁷⁸ These commentators cited as evidence the two recent bestsellers, *China Can Say No*¹⁷⁹ and *Behind a Demonized China*,¹⁸⁰ the Chinese reaction to the United States's bombing of their embassy in Belgrade,¹⁸¹ and China's recent standoff with the United States over the collision between its jet fighter and a U.S. reconnaissance plane.¹⁸²

E. Censorship and Information Control Policy

Since the establishment of the People's Republic of China in 1949, the Communist government has exercised very strict control over the dissem-

¹⁷⁶ See *id.* at 858-69 for a discussion of the Open Door Policy adopted by the Chinese Communist Party in December 1978.

¹⁷⁷ The special economic zones seek to experiment with new economic forms within the framework of "socialist modernization." These zones allow for a substantial role for foreign investment in the private economy. Peter K. Yu, *Succession by Estoppel: Hong Kong's Succession to the ICCPR*, 27 PEPP. L. REV. 53, 104 n.293 (1999) [hereinafter Yu, *Succession by Estoppel*]; see also George T. Crane, 'Special Things in Special Ways': *National Economic Identity and China's Special Economic Zones*, in CHINESE NATIONALISM, *supra* note 157, at 148 (exploring China's economic identity as revealed in debates surrounding the establishment and expansion of special economic zones).

¹⁷⁸ ZHENG, *DISCOVERING CHINESE NATIONALISM*, *supra* note 157, at 2; see also *id.* at 17 (arguing that the rise of nationalism in post-Mao China is "a response to the 'Chinese problems' that post-Mao China has encountered").

¹⁷⁹ QIANG SONG ET AL., *ZHONGGUO KEYI SHUO BU* [CHINA CAN SAY NO] (1996).

¹⁸⁰ XIGUANG LI ET AL., *YAOMOHUA ZHONGGUO DE BEIHOU* [BEHIND A DEMONIZED CHINA] (1997).

¹⁸¹ Although the United States insisted that the bombing was accidental and apologized for the incident, many Chinese considered the bombing a deliberate attack to slow down China's rise in world affairs and to warn China against challenging American hegemony. STEVEN M. MOSHER, *HEGEMON: CHINA'S PLAN TO DOMINATE ASIA AND THE WORLD* 81 (2000); see also John Pomfret & Michael Laris, *China Suspends Some U.S. Ties; Protesters Trap Ambassador in Embassy*, WASH. POST, May 10, 1999, at A1 (reporting on the anti-American protests outside the U.S. embassy after the bombing of the Chinese embassy in Belgrade).

¹⁸² See John Pomfret, *New Nationalism Drives Beijing; Hard Line Reflects Public Mood*, WASH. POST, Apr. 4, 2001, at A1 (attributing the recent standoff with Washington to the growing nationalist sentiments among the Chinese people); Elisabeth Rosenthal, *Many Voices for Beijing*, N.Y. TIMES, Apr. 10, 2001, at A1 (noting that anti-American feelings are running high in China).

ination of information and the distribution of media products.¹⁸³ The logic behind such control is that, as an instrument of political indoctrination and mass mobilization,¹⁸⁴ media not only has the ability to create an atmosphere conducive to political development, but can also help mobilize the masses and foster political struggle.¹⁸⁵ Thus, information control and content regulations are needed to ward off those politically sensitive materials that would destabilize the country and the Communist regime.¹⁸⁶ Today, “[t]he media business and the publishing industry are among the most heavily regulated industries in [China].”¹⁸⁷

Consider imported films for example. As the Motion Picture Exhibitors Association of America alleged, “China has an unofficial, unwritten, ‘shadowy’ system of quotas for films, video, and television.”¹⁸⁸ Initially,

¹⁸³ See YUEZHI ZHAO, *MEDIA, MARKET, AND DEMOCRACY IN CHINA: BETWEEN THE PARTY LINE AND THE BOTTOM LINE* 19 (1998) [hereinafter ZHAO, *MEDIA, MARKET, AND DEMOCRACY*] (noting that the Chinese Communist Party “exercised strict control over its publications from the very beginning”); Shaozhi Su, *Chinese Communist Ideology and Media Control*, in *CHINA’S MEDIA, MEDIA’S CHINA* 75, 77 (1994) (noting that the Chinese Communist Party “pays utmost attention to ideology”). But see LYNCH, *supra* note 149 (describing how a combination of property rights reforms, administrative fragmentation, and technological advance has caused the Chinese authorities to lose some of its control over propagandistic communication).

¹⁸⁴ ZHAO, *MEDIA, MARKET, AND DEMOCRACY*, *supra* note 183, at 2.

¹⁸⁵ Su, *supra* note 183, at 77.

¹⁸⁶ Among the most politically sensitive materials at the moment are articles inciting the independence of Taiwan and Tibet, stories about political dissidents, materials promoting Falun Gong, and *The Tiananmen Papers*. *THE TIANANMEN PAPERS: THE CHINESE LEADERSHIP’S DECISION TO USE FORCE AGAINST THEIR OWN PEOPLE—IN THEIR OWN WORDS* (Andrew J. Nathan & Perry Link eds., 2001).

¹⁸⁷ Anna S.F. Lee, *The Censorship and Approval Process for Media Products in China*, in *PROTECTING INTELLECTUAL PROPERTY RIGHTS IN CHINA* 127, 127 (Mary L. Riley ed., 1997); Mary L. Riley, *The Regulation of the Media in China*, in *CHINESE INTELLECTUAL PROPERTY LAW AND PRACTICE*, *supra* note 56, at 355 (“Media and all media products, are heavily regulated in China.”); see also Peter K. Yu, *Barriers to Foreign Investment in the Chinese Internet Industry*, GIGALAW.COM, Mar. 2001, at <http://www.gigalaw.com/articles/2001/yu-2001-03-p1.html> (discussing content regulations in the Chinese Internet Industry).

¹⁸⁸ Butterson, *supra* note 148, at 1105-06. As one commentator explained:

Government monopolies have essentially controlled all aspects of the Chinese film industry, from production to distribution and exhibition, by way of the Ministry of Culture and related agencies. The China Film Distribution and Exhibition Bureau and its subsidiaries, in collaboration with the central government, have determined times, places, dates and terms under which films are shown in Chinese cinemas, and censorship has been performed by the Ministries of Culture, Information and Film, Television and Radio. Contrary to standard industry practice in most of the world, China until very recently refused to permit the licensing of foreign motion pictures in exchange for a percentage of gross receipts; instead, it imposed a flat sales scheme, demanding that it be

the Chinese authorities imposed a sales scheme in which all imported films would be licensed at a low, flat rate.¹⁸⁹ In 1994, they replaced this scheme by allowing ten recent blockbusters to be distributed on a revenue-sharing basis.¹⁹⁰ During the U.S.-China intellectual property talks in 1996, the Chinese authorities further eliminated this ten-imports-per-year quota.¹⁹¹ They also ended the monopoly of China Film Distribution and Exhibition Company over film distribution and allowed Chinese film studios to sign cooperative agreements with U.S. film producers to distribute foreign motion pictures.¹⁹² Although the government soon backpedaled on its new policy,¹⁹³ the film industry is opening up as China prepares to enter the WTO. On November 15, 1999, China and the United States signed the U.S.-China Bilateral Market Access Agreement.¹⁹⁴ Under the agreement, China promised to "allow[] at least 20 films annually into

allowed to pay US\$ 3000 for rights in each film, a figure that is astonishingly modest by world standards. Moreover, all prints of films so licensed have had to be made in Chinese film laboratories according to the regulations of the China Film Bureau. Nor have the Chinese observed the conventional distinction between authorization for home as opposed to commercial use, which has led to the widespread Chinese practice of showing home-licensed videos in public displays.

Id. at 1106 (footnotes omitted); Lee, *supra* note 187, at 137 ("Only work units with import authorization are allowed to engage in the import of foreign films."); Riley, *supra* note 187, at 358 ("Only a publishing unit with the authorized capacity to import audio-visual products may import such products."). See generally Mary Lynne Calkins, *Censorship in Chinese Cinema*, 21 HASTINGS COMM. & ENT. L.J. 239, 291-96 (1999), for a discussion of the importation and censorship of non-Chinese films in China.

¹⁸⁹ Butterson, *supra* note 148, at 1106.

¹⁹⁰ OFFICE OF USTR, 2001 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 42 (2001) [hereinafter 2001 NTE REPORT]; Calkins, *supra* note 188, at 291; see also Seth Faison, *A Chinese Wall Shows Cracks; Hollywood Scrambles as Film Barriers Start to Fall*, N.Y. TIMES, Nov. 21, 1995, at D1 (reporting on the liberalization of the Chinese film industry). "Among the movies imported under this new system were *The Lion King*, *The Fugitive*, and *True Lies*." Calkins, *supra* note 188, at 291 (footnotes omitted).

¹⁹¹ Lisa Atkinson, *What's Entertainment?* CHINA BUS. REV., Mar.-Apr. 1997, at 38.

¹⁹² *Id.*; Riley, *supra* note 187, at 365. As a result of this new policy, "the Changchun Film Studio won the rights to distribute *Waterworld*, and the Shanghai Film Studio signed a deal to distribute *Toy Story*. Movies such as *The Piano*, *Schindler's List*, *Forrest Gump*, and *True Lies* earned high revenues at Chinese box offices." Calkins, *supra* note 188, at 293 (footnotes omitted).

¹⁹³ Shortly after the announcement of the new policy, the Central Propaganda Department issued an order demanding self-criticism of the policy of importing large quantities of U.S. movies. Bian He, *Why Prohibit the Importation of Foreign Movies*, CHINA FOCUS, Aug. 1, 1996, available at 1997 WL 11751443.

¹⁹⁴ 2001 NTE REPORT, *supra* note 190, at 42.

China on a revenue-sharing basis. China also agreed to open theaters and distribution to foreign investment."¹⁹⁵

Apart from imported films, the Chinese authorities place heavy restriction on imported books and audiovisual products. Under the Chinese regulations, wholly foreign-owned enterprises are forbidden to sell books, for "[s]uch activities might expose foreigners to 'internal' publications and other sensitive materials which foreigners are not permitted to see."¹⁹⁶ In addition, they "are not allowed to engage in the publication or reproduction sector."¹⁹⁷ Instead, they must form a joint venture with a state-approved Chinese publishing or reproduction unit.¹⁹⁸ As with other local Chinese publishing or reproduction units, these joint ventures are subject to re-registration every two years.¹⁹⁹ They must also abide by the various censorship laws and regulations, which list in details the type of contents prohibited by the government.²⁰⁰

Due to this stringent information control policy, many media products are not available even if there is great demand in the Chinese market.²⁰¹ Unable to purchase these products in the open markets, some consumers may settle for black market products or pirated goods.²⁰² Although these infringing substitutes are often inferior to the genuine products, many consumers do not have counterparts to compare with or to select from.²⁰³

¹⁹⁵ *Id.* at 62.

¹⁹⁶ Lee, *supra* note 187, at 148; Riley, *supra* note 187, at 377.

¹⁹⁷ Lee, *supra* note 187, at 132; Riley, *supra* note 187, at 373.

¹⁹⁸ Lee, *supra* note 187, at 132; Riley, *supra* note 187, at 373.

¹⁹⁹ Lee, *supra* note 187, at 132; Riley, *supra* note 187, at 361.

²⁰⁰ Lee, *supra* note 187, at 129-30 (discussing the censorship procedures practiced by Chinese authorities); Riley, *supra* note 187, at 357-59 (same).

²⁰¹ See Robert B. Frost, Jr., Comment, *Intellectual Property Rights Disputes in the 1990s Between the People's Republic of China and the United States*, 4 TUL. J. INT'L & COMP. L. 119, 132 (1995) ("[W]hen China stalled the import of the film, 'True Lies,' because of the looming trade war, a cinema in Shenzhen had already begun showing a pirated copy." (footnote omitted)); Erik Eckholm, *Spider-Man Springs into China with More Than Comics*, N.Y. TIMES, Aug. 31, 2000, at E2 (reporting that pirated video compact discs of *X-Men* were available in China even though the film itself was not approved for commercial screening); see also 2001 NTE REPORT, *supra* note 190, at 55 ("Pirates find ways to get VCDs and DVDs of blockbuster films into the Chinese market almost immediately after the films are released theatrically in the United States.").

²⁰² See Butterson, *supra* note 148, at 1105-06 (noting that the film import quota has "been a fertile ground for pirate practices"); Derek Dessler, Comment, *China's Intellectual Property Protection: Prospects for Achieving International Standards*, 19 FORDHAM INT'L L.J. 181, 232 (1995) ("Commentators argue that . . . market access barriers facilitate intellectual property piracy and impede enforcement."); Frost, *supra* note 201, at 132 ("The United States claims that this limitation produces a vacuum effect which creates a large demand for pirated films.").

²⁰³ See 2001 NTE REPORT, *supra* note 190, at 55 (noting that "consumers are often unaware that they are purchasing [intellectual property right]-infringing goods");

As time passes, the Chinese market would become saturated with infringing substitutes. Even if the market barriers are finally removed, foreign manufacturers may have great difficulty in entering the market.²⁰⁴

F. *Laws with Chinese Characteristics*

Finally, the Chinese have an entrenched tradition of regarding laws as an inefficient, arbitrary, and cumbersome instrument for governance.²⁰⁵ As Confucius explained in the *Analects*: "Govern the people by regulations, 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."²⁰⁶ Although many considered this tradition a

Alford, *Making the World Safe for What?*, *supra* note 2, at 137 (noting that the piracy problem in Shanghai "has reached such proportions that officials in Shanghai have found it necessary to take to the airwaves to inform citizens of where they can shop without fear of purchasing fakes").

²⁰⁴ As one commentator explained:

If the Chinese more fully relaxed or lifted barriers to market participation by foreign [intellectual property rights] owners, those foreign owners could sell their own goods in China and thereby displace, at least to some extent, pirate products that now have Chinese markets to themselves. Moreover, absent such barriers, some U.S. producers could both sell their "authentic" products in the Chinese market, and also monitor, if not police, infringement themselves on an in-country basis. Such market access adjustments would have application in a number of areas.

Butterton, *supra* note 148, at 1105.

²⁰⁵ See, e.g., CHEN, *supra* note 8, at 93 ("[T]he concept and doctrines of legality, unlike the precepts of Confucianism, had never occupied a central role in traditional imperial China. There has not existed a legal culture with elements like officials' fidelity to law or citizens' consciousness of their legal rights . . ."); *id.* at 128 (pointing out that the legal profession was despised, stigmatized, or sometimes even outlawed in imperial China); FENG, *supra* note 18, at 10 ("[T]here is . . . an entrenched Confucian-strategist tradition which regards formal law as an inefficient and cumbersome instrument for governance."); Berkman, *supra* note 80, at 39 (noting the Chinese "preference for death rather than bringing a lawsuit"). But see PHILIP C.C. HUANG, *CIVIL JUSTICE IN CHINA: REPRESENTATION AND PRACTICE IN THE QING* (1996) (pointing out that state law and Qing courts played a very important role on community mediation and noting that parties would resort to courts when community or kin mediation failed); William P. Alford, *Law, Law, What Law? Why Western Scholars of China Have Not Had More to Say About Its Law*, in *THE LIMITS OF THE RULE OF LAW IN CHINA* 45 (Karen G. Turner et al. eds., 2000) [hereinafter *LIMITS OF THE RULE OF LAW*] (exploring why Western scholars of Chinese history and society have neglected or mischaracterized the effect of law upon Chinese life).

²⁰⁶ ANALECTS, *supra* note 103, bk. II, ¶ 3 (footnote omitted). "The Confucianists criticized the hedonistic pleasure-pain psychology relied on by the Legalists, which, the Confucianists argued, would lead people to think only in terms of their self-interest and make them litigious, trying to manipulate the laws to suit their own interests." CHEN, *supra* note 8, at 9.

Confucian legacy, such an aversion to law can be actually traced back to the Western Zhou period (1122-771 B.C.), during which rituals were emphasized.²⁰⁷

Under this tradition, the Chinese lived by the concept of *li* (rites), rather than the concept of *fa* (law). Broadly defined, *li* extended beyond one's proper conduct or etiquette and covered the whole range of political, social, and familial relationships that encompass a harmonious Confucian society.²⁰⁸ People who were guided by this concept always understood their normative roles, responsibilities, and obligations to others. They were also ready to adjust their views and demands in order to accommodate other people's needs and desires, to avoid confrontation and conflict, and to preserve harmony.²⁰⁹ As a result, litigation and promotion of individual rights became unnecessary in a Confucian society.

²⁰⁷ William P. Alford, *The Inscrutable Occidental? Implications of Roberto Unger's Uses and Abuses of the Chinese Past*, 64 TEX. L. REV. 915, 930 (1986) (tracing the Chinese aversion to litigation to the Western Zhou period); Berkman, *supra* note 80, at 39 n.177 ("The normative aversion to litigation stretches back to pre-unified China, as indicated in the Book of Changes, dated approximately 1000 B.C." (citing I CHING, OR BOOK OF CHANGES 28-30 (Richard Wilhelm trans., Princeton Univ. Press, 3d ed. 1967))); Butterton, *supra* note 148, at 1108 ("The concept, though it is widely identified with the teachings of Confucius (551-479 B.C.), antedated him and appears to have been established in Chinese bureaucratic thought and the larger culture during the Western Zhou Period (1122-771 B.C.), if not before."); see also GRAY L. DORSEY, JURISCULTURE: CHINA 87 (1993) (discussing the need for new philosophy created by the disintegration of feudal society in the Western Zhou period).

²⁰⁸ As one commentator explained:

The "relationships" of Confucian society consist of connections between various types of political, social and familial roles. The roles are also normative, embodying prescriptions that tell those who play the roles how they ought to act when playing them. Thus, the role of father embodies a norm of proper fatherly behavior; the role of friend embodies a norm of friendship; and similarly, other norms are expressed for the other fundamental roles of wife, child, ruler, subject, elder brother and younger brother. Eventually, Confucianism reduced all relationships to a finite set of fundamental relationships that were presumed to be exhaustive, the so-called Five Relations which obtained between father and child, husband and wife, elder and younger brother, ruler and subject, and friend and friend. The *li* expressed the rules of conduct involved in all of these basic relationships, and, at bottom, the *li* were about the obligations between parties to relationships.

Butterton, *supra* note 148, at 1109-10.

²⁰⁹ *Id.* at 1109; see also Benjamin Schwartz, *On Attitudes Toward Law in China*, in GOVERNMENT UNDER LAW AND THE INDIVIDUAL (Milton Katz ed., 1957) ("The proper disposition with regard to one's interests is the predisposition to yield rather than the predisposition to insist."), quoted in JEROME A. COHEN, THE CRIMINAL PROCESS IN THE PEOPLE'S REPUBLIC OF CHINA, 1949-1963: AN INTRODUCTION 62, 65 (1968); Alice Tay, *The Struggle for Law in China*, 21 U. BRIT. COLUM. L. REV. 561, 562 (1987) ("Chinese tradition personalizes all claims, seeing them in the context of social human relationships."); Margaret Y.K. Woo, *Law and Discretion in Contemporary Chinese Courts*, in LIMITS OF THE RULE OF LAW, *supra* note 205, at

In contrast to *li*, “*fa* is a penal concept; it is associated with punishment, serving to maintain public order through the threat of force and physical violence.”²¹⁰ Unlike the Confucianists, the Legalists believed that it was impossible to teach people to be good. Thus, *fa* is needed to tell people what to do and to induce them to do what they should do. Except in the Qin dynasty in the third century B.C., *fa jia* (legalism) has never been the dominant Chinese ideology.²¹¹ In fact, the Chinese always viewed *fa* unfavorably and associated it with the harsh and despotic Qin rule, which unified China and centralized its bureaucracy.²¹² They assumed that “when government leans heavily on *fa* to reinforce its authority, it does so because it has no effective ability to rule by *li*.”²¹³ To the Chinese, *fa* should always be employed as the last resort.²¹⁴

During the Mao era, formal laws were denounced as “inherently bureaucratic, hampered by legislative formalities and fed on professional

163, 168 (“Today, litigation in the public courts is still viewed with disfavor in China, for it represents a breakdown in relationships that should be avoided. Ideally, broken relationships should be restored, but litigation makes restoration difficult.”).

²¹⁰ Butterson, *supra* note 148, at 1110.

²¹¹ Nevertheless, the adoption of Confucianism as the orthodoxy and the rejection of Legalism did not mean the abolition of laws. “All the dynastic empires subsequent to the Qin dynasty continued to develop codes of law and legal institutions. There was thus a coexistence of both *li* and *fa* in traditional China . . .” CHEN, *supra* note 8, at 11.

²¹² Butterson, *supra* note 148, at 1108; *see also* DORSEY, *supra* note 207, at 125-30 (discussing legalism in the State of Qin). As one commentator explained:

The intellectual roots of *fa* are in the Legalist movement—a group of political philosophers primarily active in the China of the fourth and third century B.C., who held that social order could only be maintained by the use of law as a tool for manipulating society. The Qin dynasty adopted the Legalist philosophy and effectively integrated and centralized the whole of the Chinese Empire in the third century B.C. (221-209 B.C.). The Qin ruled with the aid of a harsh penal law and brutal tactics, and developed a vast administrative law bureaucracy to manage the empire they had created. They thus shaped an image of the “rule of law” as brutal and rigid, and that image endured throughout the greatest period of Confucian influence from the first century A.D. to the development of civil-law criminal codes during the late nineteenth-century portion of the Qing dynasty (1644-1912 A.D.) and the beginning of the Republican period following the 1912 [sic] revolution, when the last incarnation of those codes was enacted.

Butterson, *supra* note 148, at 1110 (footnote omitted).

²¹³ Butterson, *supra* note 148, at 1110.

²¹⁴ *See* ALFORD, *supra* note 4, at 10 (“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.”); CHEN, *supra* note 8, at 11 (“[*Fa*] is to be employed as a last resort to maintain social order when *li* has failed to do so.”); Berkman, *supra* note 80, at 32 n. 144 (“The Confucian ideology . . . saw law as an instrument of last resort necessary to punish those who could not follow the normative ideal of social harmony arising from the many social relationships within society.”).

interests, slow to come, rigid in procedure, prone to ramifying into technical details and yet unable to cover all the circumstances of the ever-changing social relationships.”²¹⁵ To replace this “defective” legacy, Mao instituted socialist laws that “operate within the boundaries of policy directives, under the guidance of policy principles and supplemented by various policy tools (such as a Party or government circular or notice).”²¹⁶ “Throughout the Cultural Revolution and until Mao’s death in 1976, law was simply a mechanism for implementing Party policy, interpreted and reinterpreted to reflect the direction of the prevailing political winds.”²¹⁷

Even today, laws are still considered a “concrete formulation of the Party’s policy.”²¹⁸ As “a summary of practical administrative and judicial experience,”²¹⁹ laws do not “necessarily constitute a detailed, comprehensive and self-containing rule system, justifiable on ideological as well as jurisprudential grounds, with coherent principles and well-defined con-

²¹⁵ FENG, *supra* note 18, at 10; *see also* CHEN, *supra* note 8, at 93 (“[T]he ideology of Marxism-Leninism, not even to mention Mao Zedong Thought, is ambivalent about the positive contributions of law, particularly outside the realm of the struggle against counter-revolutionaries, class enemies and criminals.”).

²¹⁶ FENG, *supra* note 18, at 10.

²¹⁷ Berkman, *supra* note 80, at 35; *see also* Perry Keller, *Sources of Order in Chinese Law*, 42 AM. J. COMP. L. 711, 713 (1994). As one commentator explained:

Law became an instrument of Mao and the CCP and was used to suppress “counterrevolutionaries” and protect Mao’s power. The seemingly daily fluctuations in Mao’s political, economic, and social policies destroyed any sense of predictability in law. On the eve of Deng Xiaoping’s reform movement, China was a nation of rule by men—or more specifically by one man, Mao—rather than law. Equally important, the Cultural Revolution had instilled in the masses the cynical view that law was a concern of the government, not the people, and a tool to create social stability and advance political agendas rather than a mechanism to protect rights.

Berkman, *supra* note 80, at 35; *see also* RONALD C. KEITH, CHINA’S STRUGGLE FOR THE RULE OF LAW 1 (1994); Jerome Alan Cohen, *The Criminal Process in the People’s Republic of China: An Introduction*, 79 HARV. L. REV. 469, 470-71 (1966); Shao-Chuan Leng, *The Role of Law in the People’s Republic of China as Reflecting Mao-Tse Tung’s Influence*, 68 J. CRIM. L. & CRIMINOLOGY 356 (1977).

²¹⁸ FENG, *supra* note 18, at 10. As Professor Feng explained:

The CCP policy . . . is more than a political guideline. It is a strategy of social control maintained by a set of long-standing propaganda, training, experiment, inspection and enforcement procedures, with its own formality, etiquette, pedigree and convention. Its objective is that all operators or decision-makers (administrators and judges included) can “unify thinking” and act pursuant to the policy “spirit” where concrete rules are inadequate, in conflict or lacking. As a result, new analyses, interpretations, applications and initiatives are formed, giving rise to new concrete rules. Some of the rules eventually mature into statutory provisions. That is why “policy and strategies are”, in Mao’s words, “the Party life”.

Id.

²¹⁹ *Id.* at 11.

cepts.”²²⁰ They can also be “incomplete, incoherent, ideologically compromising, as well as broadly and vaguely termed pending further administrative and judicial experience in its implementation.”²²¹

Furthermore, laws are intended to be flexible²²² and can be formulated “on an interim or trial use basis.”²²³ Given the rapid social and economic changes, laws will likely fall behind policies.²²⁴ Statutory provisions that are effective in one year may therefore be outdated in the following year had a new policy or a new law been implemented in the relevant or related areas. To determine the applicability and effectiveness of a provision, one must examine *all* the laws and supplementary documents, including administrative rules and judicial interpretations, in *all* the relevant and related areas.²²⁵ In most cases, the more specific and updated provisions prevail.

Chinese laws “are generally broadly drafted, leaving the detailed rules to be provided by the relevant administrations under the State Council.”²²⁶ Thus, “it is often the detailed administrative implementing rules that provide the concrete information about the definition, limits, and practical implication of legal rights established in the laws.”²²⁷ Contrary

²²⁰ *Id.*

²²¹ *Id.*; see also CHEN, *supra* note 8, at 90 (“[N]o effective system has yet been evolved to deal with the problem of inconsistencies between legal norms derived from different sources.”); CORNE, *supra* note 129, at 55 (“[I]n the PRC there is no concept, as exists in Western legal systems, that law or delegated legislation can be struck down on the basis of uncertainty.”); Claudio Ross & Lester Ross, *Language and Law: Sources of Systemic Vagueness and Ambiguous Authority in Chinese Statutory Language*, in LIMITS OF THE RULE OF LAW, *supra* note 205, at 221 (regarding vagueness as a structural characteristic of Chinese law).

²²² See CORNE, *supra* note 129, at 93-145 (discussing flexibility as a characteristic of Chinese laws); Woo, *supra* note 209 (examining how the historic Chinese preference for discretion and informality in the distribution of justice has been retained and reflected in the judicial decisionmaking process and in the procedural rules); see also Butters, *supra* note 148, at 1113 (“To many, the shifting sands of ‘flexibility’ and ad hoc adjustments are synonymous with a host of corrupt business practices.”).

²²³ FENG, *supra* note 18, at 11. “[A]mong the 713 pieces of laws and administrative regulations enacted in the period 1979-1985, 25% were of . . . provisional nature.” CHEN, *supra* note 8, at 89.

²²⁴ FENG, *supra* note 18, at 11; see also CORNE, *supra* note 129, at 189 (“[L]aw in China tends to take on the colour of policy in the course of its implementation. Those who implement law are the same as those who were responsible for the implementation of policy under the pre-legal order.”).

²²⁵ FENG, *supra* note 18, at 11.

²²⁶ *Id.* at 12; see also CORNE, *supra* note 129, at 54 (“The laws [in China] are expressed in terms of general standards which fail to deal with obvious problems of implementation. Real clarity exists only at the level of administrative rules and circulars.”).

²²⁷ FENG, *supra* note 18, at 12; see also CORNE, *supra* note 129, at 239 (“The existence of discretion allows administrative bodies to apply laws in a way that is

to Western beliefs and expectations, these rules sometimes exceed the explicit provisions of the laws they are supposed to explain. They may also add rights and rules that were not previously conceived by the legislature when it adopted the laws.²²⁸ Nevertheless, the Chinese lacked a concept of separation of powers²²⁹ and found these expansions and modifications acceptable.

consistent with underlying normative expectations held by the regulators. The manner of implementation is completely different from what Westerners would expect from the ostensibly familiar principles that are embodied in the law.”).

²²⁸ FENG, *supra* note 18, at 13; *see also* CORNE, *supra* note 129, at 147 (“The general principle of legislative consistency emphasizes consistency with the ‘spirit’ rather than with the ‘letter’ of the relevant higher law or laws. This is also true with respect to consistency with the PRC Constitution.”). As one commentator explained:

[I]n the Chinese legal system a rule or regulation is not considered to conflict with the Constitution *per se* or with rules or regulations enacted by other administrative or legislative bodies at the same or higher level, even if it appears to do so on its face, as long as it fulfills the primary condition of being within the enacting organ’s entrusted or inherent power. It is this principle that defines the approach that judicial, administrative and legislative institutions have taken in respect of this issue.

Id. at 148.

²²⁹ *See* XIANFA art. 128 (1982) (amended Mar. 29, 1993) (“The Supreme People’s Court is responsible to the National People’s Congress and its Standing Committee. Local People’s courts at various levels are responsible to the organs of state power which created them.”); RONALD C. BROWN, UNDERSTANDING CHINESE COURT AND LEGAL PROCESS: LAW WITH CHINESE CHARACTERISTICS 8 (1997) (“[T]he governmental congresses and standing committees are comprised of members primarily selected by Party members through a separate Party congress mechanism. Party committees, such as the Political-Legal Committee, ‘supervise’ the public security (police), procuratorates, and the courts.”); *id.* at 35 (arguing that the constitutional basis of the judicial system in China “is not separation of powers, but on the contrary it is a ‘division of functions and responsibilities’ under the unified guidance of the organs of state power, i.e., the people’s congresses, as guided by the Chinese Communist Party, ‘in accordance with the law’”); CHEN, *supra* note 8, at 48 (“The orthodox view expressed in textbooks is that . . . the Chinese socialist political system manifests the principle of the unity of deliberation and execution (*yixing heyi*) which Marx used in discussing the Paris Commune Movement of 1871.”); CORNE, *supra* note 129, at 141 (“Administrative interpretation is not only the most important mode of legal interpretation in the PRC, it is in effect an authoritative supplement and accretion to legislation.”); *id.* at 253 (“The trial judge is very susceptible to [outside] pressures, both internal and external to the court, as his decision is only preliminary and may at any time be overridden by an adjudication committee within the local people’s court under the principle of democratic centralism.”); Berkman, *supra* note 80, at 23 (“When Chinese officials speak of judicial independence they may be using a lexicon familiar to westerners, but they certainly do not intend to connote the separation of powers usually equated with the democratic definition.”); *see also* CORNE, *supra* note 129, at 287 (“China’s lack of an independent legal tradition and the current low status of the courts will make it very difficult to extricate

IV. THE MERCHANT OF VENICE

*Through the imagination, art evinces what purely didactic speech cannot—the “sensation” of an experience never had, a world never seen. Conjuring up that which has not been experienced, it poses a challenge to the participant’s preconceived and preordained world view. At a level similar to sympathy . . . the imagination takes one beyond one’s preexisting conceptions and intuitions about life, power, and reality.*²³⁰

Since the turn of the twentieth century, the United States has made repeated attempts to convert China into a Western intellectual property regime. So far, these conversion attempts have failed. To highlight the undesirability for and ineffectiveness of forced conversion, this Article juxtaposes the Chinese piracy problem with one of Shakespeare’s legal masterpieces, *The Merchant of Venice*. By comparing China’s experience in the international intellectual property community to Shylock’s predicament in the Venetian court, the Article seeks to challenge the readers’ cultural presumptions and invites readers to step outside their own world to rethink the U.S.-China intellectual property conflict. This Article hopes that readers can draw on Shakespeare’s teachings and use his valuable lessons to resolve, or at least minimize, this century-old conflict. This Part first recounts the story of Shylock’s forced conversion in *The Merchant*. It then examines in depth the three major lessons within the play and how these lessons can help avoid Shylock’s painful experience.

A. *The Story*

The Merchant begins when Bassanio needs to finance his trip to Belmont to court a young heiress named Portia. Although Antonio is willing

the courts from the webs of party and governmental influence which permeate their decision making processes and undermine their value as a supervisory institution.”).

One commentator explained the operation of the adjudication committee and the intertwining relationship between the Party and the judiciary:

An institutional aspect clearly foreign to students of American constitutional law are China’s Adjudication Committees. Minor, non-politically sensitive cases can be handled by individual judges, or a collegiate bench of judges and lay persons, generally free from interference by other court officials. However, cases deemed to be of importance, perhaps those involving difficult legal issues, significant economic disputes, sensitive political matters, or highly charged public issues, are handled by individual judges on advice of the particular court’s Adjudication Committee. While the individual judge will hear the case, following consultation the Committee may direct the judge to enter a particular verdict, invite the judge to seek more information from the parties, or report the case to a higher level court for guidance. The Committee consists of the president of the court, the vice-president, the head and deputy head of the various specialized chambers, and some ordinary judges. Members of the Committee are also likely to be Party members, and thus the influence of the CCP should be assumed in all decisions.

Berkman, *supra* note 80, at 22-23.

²³⁰ Marci A. Hamilton, *Art Speech*, 49 VAND. L. REV. 73, 88 (1996).

to help his friend, his wealth has been locked up in various business ventures. On Bassanio's behalf, he borrows money from his business rival, Shylock. Taking advantage of Antonio's needs, Shylock sets up a scheme whereby he will lend Antonio money without interest. However, if Antonio cannot repay him within three month's time, he will cut from Antonio a pound of flesh in any part of the body that pleases him. Confident about his ability to repay Shylock in two months' time, Antonio agrees to the bond immediately.

During the intervening months, all of Antonio's ships sink in the ocean. Bankrupt by the loss, Antonio cannot repay Shylock upon the due date. Meanwhile, Shylock's daughter, Jessica, elopes with a Christian named Lorenzo, taking with her Shylock's money and jewels. Aggrieved by the loss of his daughter and the ducats, Shylock is determined to "have [his] bond" (3:3:5). He takes Antonio to the court and asks for the forfeit.

At trial, Portia, now Bassanio's wife, appears in disguise in the learned Judge Balthazar, who has been sent to help the Duke adjudicate the case. Portia assures Shylock that the bond is valid and earns respect and praise from him. Portia then extols the celestial quality of mercy and begs Shylock to show mercy upon Antonio. After failing to convince Shylock, she appeals to his monetary interests and allows Bassanio to offer him three times, and then nine times, the principal. Believing that he has Antonio "on the hip" (1:3:41) and the law on his side, Shylock refuses both and asks the court for the fatal penalty.

When Portia realizes that she cannot change Shylock's mind and that he is determined to kill Antonio for revenge, she turns the tables on him. Holding the law to its literal meaning, à la Shylock, Portia makes one of the most ridiculous interpretations ever in contract law.²³¹ Shylock can have his pound of flesh,²³² but no more, no less.²³³ Furthermore, if Shy-

²³¹ See DANIEL J. KORNSTEIN, *KILL ALL THE LAWYERS?: SHAKESPEARE'S LEGAL APPEAL* 70 (1994) ("[T]he bond must have implicitly authorized what was necessary for Shylock to get his pound of flesh, that is, the shedding of Antonio's blood. Portia's interpretation is like granting an easement on land without the right to leave footprints."); Peter J. Alscher, *Staging Directors for a Balanced Resolution to "The Merchant of Venice" Trial Scene*, 5 CARDOZO STUDS. L. & LITERATURE 1, 12 (1993) (regarding Portia's interpretation as "legalistic hair-splitting [that] renders injustice to the original bond language"). As Peter Alscher pointed out: "Both Antonio and Bassanio understand the plain meaning of the moneylender's intentions. Bassanio was spontaneously fearful while Antonio was overly confident that his ships would come home a month before the bond was due. . . . [Antonio] even accepted the bond language in the spirit of a merry bond and says that the Hebrew grows kind." Alscher, *supra*, at 12.

²³² Professor Shapiro argues that Shylock intends circumcision as the forfeit of the bond. See JAMES SHAPIRO, *SHAKESPEARE AND THE JEWS* 121-26 (1996). According to Shapiro, it was the Christians, who believe in the Pauline concept of circumcision of the heart, that misread Shylock's intentions. See *id.* at 126-28.

lock sheds a drop of Antonio's blood, the State will confiscate Shylock's lands and goods.

Unable to revenge, Shylock decides to cut his losses by asking for three times the principal, the bargain Bassanio has previously offered him. Insisting that Shylock "shalt have justice more than thou desir'st" (4:1:311-12), Portia denies Shylock's request. Reluctantly, Shylock demands the principal and asks the court to grant him leave. Again, Portia insists on strict justice and rejects his demand: "He hath refus'd it in the open court, / He shall have merely justice and his bond" (4:1:334-35). As a result, Shylock loses his money, his bargain, and his opportunity to get rid of his business rival.

Unfortunately, due to Shylock's alien status, "[t]he law hath yet another hold on [him]" (4:1:343). The Alien Statute provides:

If it be proved against an alien, / That by direct, or indirect attempts / He seek the life of any citizen, / The party 'gainst the which he doth contrive / Shall seize one half his goods, the other half / Comes to the privy coffer of the state, / And the offender's life lies in the mercy / Of the duke only, 'gainst all other voice (4:1:344-52).

Because of his attempt to kill Antonio, Shylock has to forfeit half of his wealth to the State and the other half to Antonio.

Once again, Portia interposes and begs the Duke to show mercy upon the poor Jew. Without any hesitation, the Duke pardons Shylock's life and reduces half of his penalty to a mere fine. Expecting a similar response,²³⁴ Portia asks Antonio if he will show the Jew any mercy. Surprising many, Antonio not only takes away the Duke's earlier concessions, but also increases Shylock's penalty. Under the new verdict, which the Duke concurs, Shylock has to give half of his wealth to Lorenzo and to leave the other half for Antonio's use, thus giving Antonio a "lifelong interest-free loan" that competes directly against Shylock's usury practice.²³⁵ In addition, Shylock has to bequeath *all* his present and future wealth to Lorenzo and Jessica after his death.²³⁶ Even worse, he has to

²³³ A nineteenth century jurist pointed out that "unless the contract specifically excluded blood, the strictest definition of 'a pound of flesh' would have allowed for any blood, sinews, tissue, and bone that might have come with it, 'nearest the heart.'" Alscher, *supra* note 231, at 12; see also Jay L. Halio, *Portia: Shakespeare's Matlock*, 5 CARDOZO STUDS. L. & LITERATURE 57, 59 (1993) ("Legally, one naturally assures that Shylock is entitled to take his forfeiture along with everything else necessary (implied though not specified) to exact it.").

²³⁴ *Contra* Harold C. Goddard, *The Three Caskets*, in SHAKESPEARE: *The Merchant of Venice* 142, 159 (John Wilders ed., 1969) [hereinafter CASEBOOK] ("Portia quickly interposes, as if afraid that the Duke is going to be too merciful, going to let her victim off too leniently.").

²³⁵ MARTIN D. YAFFE, *SHYLOCK AND THE JEWISH QUESTION* 78 (1997).

²³⁶ Richard Weisberg, *Antonio's Legalistic Cruelty: Interdisciplinarity and "The Merchant of Venice,"* 25 COLLEGE LITERATURE 12 (1998).

convert to Christianity, a faith he has rejected and always despises. Losing his wealth, daughter, and religion, Shylock is completely defeated and leaves the stage a broken man.

Undeniably, bad acts and guilty minds deserve punishment.²³⁷ No matter how much a person hates his or her business rival, attempted murder is not justified. Nonetheless, the final verdict far exceeds the punishment Shylock deserves.²³⁸ Indeed, had it not been for the Alien Statute and

²³⁷ As Daniel Kornstein pointed out in his imaginary appeal, Shylock's punishment can be, for example, a voided bond. The court can void the bond under the following theories: (1) The bond is against public policy. KORNSTEIN, *supra* note 231, at 70-71. (2) The bond violates existing usury laws. *Id.* at 71. (3) The bond is a fraud. *See id.* at 72 ("Shylock proposed the penalty clause to Antonio as a jest."). (4) The bond lacks mutual intent of contracting parties. *See id.* ("Shylock himself told Antonio that the bond was 'in a merry sport' and not meant seriously . . ." (citation omitted)). (5) The bond is a gambling contract. *See id.* at 72 ("Shylock's refusal to accept generous repayment is evidence that the bond is not an ordinary commercial guarantee at all, but truly a gamble of Antonio's life."). Moreover, in light of Bassanio's offer of three times the principal of debt, Portia may refuse the equitable remedy of specific performance on the ground that Shylock has an adequate remedy at law for damages. *Id.* at 71.

²³⁸ Whether Shylock deserves his punishment depends on how one perceives the character. For four centuries, critics have intensely debated Shakespeare's original intentions with respect to the character. However, "the author, whatever his or her intentions, cannot control any more than critic can the play of language," because words spill over and reach beyond their immediate point and place. Martin Coyle, *Introduction to THE MERCHANT OF VENICE* 1, 5 (Martin Coyle ed., 1998) [hereinafter *NEW CASEBOOK*]. "Each reader reads not only a text but himself or herself, his or her particular set of cultural assumptions." BILL OVERTON, *THE MERCHANT OF VENICE: TEXT & PERFORMANCE* 13 (1987). After learning about the atrocities during the Holocaust, the audience can hardly watch or read the play the same way as the Elizabethans did. JOAN OZARK HOLMER, *THE MERCHANT OF VENICE: CHOICE, HAZARD AND CONSEQUENCE* 220 (1995); *see also* LAWRENCE DANSON, *THE HARMONIES OF The Merchant of Venice* 129 (1978) ("Now it was almost inevitable that the Shylock of the modern stage, being conceived at once as 'the type of a persecuted race' and as an individual, should have become a 'gentleman' and not a villain."). One commentator even suggested that a reader of the late twentieth century had to focus exclusively on the alternative world of Belmont to avoid any potential suggestions of injustice. Graham Holderness, *Comedy and The Merchant of Venice*, in *NEW CASEBOOK*, *supra*, at 23, 27.

Regardless of how one perceives Shylock, one should be careful not to define the play in terms of which party deserves the blame and which the absolution. As Professor Ryan explained:

To define the play in terms of which party deserves the blame and which the absolution, with readings and productions swinging now to Shylock and now to the Christians, is to miss the point. What is at stake is the deeper recognition that, through the revenge plot and the trial, through the ironies and contradictions they lay bare, an apparently civilised society is unmasked as premised on barbarity, on the ruthless priority of money values over human values, of the rights of property over the elementary rights of men and women.

Shylock's alien status,²³⁹ he would not have received such a heavy punishment. Thus, the trial scene and the final verdict have disturbed many theatergoers, readers, and critics.²⁴⁰ The trial becomes even more disturbing when it is held in Venice, which many have considered "a model for an ideal economic coexistence between subjects and aliens" in the Elizabethan Age.²⁴¹ While some directors cut out the final act to emphasize the inequity of the trial,²⁴² others wrote sequels²⁴³ and offered interpretations that reconciled Shylock to the Christian community.²⁴⁴ Several years ago, lawyers, academics, and students gathered at Hofstra

The point lies not in the vindication of the Jew at the expense of the Christians, or the Christians at the expense of the Jew, but in the critique of the structural social forces which have made them both what they are, for better or for worse.

Kiernan Ryan, *Re-reading The Merchant of Venice*, in *NEW CASEBOOK*, *supra*, at 36, 39-40.

²³⁹ See JOHN GROSS, *SHYLOCK: A LEGEND & ITS LEGACY* 37 (1992) ("Until the end of the eighteenth century no Jew, however long his ancestors had lived in the city, could become a Venetian citizen.").

²⁴⁰ See *id.* ("Despite its otherwise happy ending or perhaps because of it, Shakespeare's Venetian comedy leaves us unsettled and perplexed over the place of the Jew in the modern city."); RICHARD WEISBERG, *POETHICS AND OTHER STRATEGIES OF LAW AND LITERATURE* 104 (1992) [hereinafter WEISBERG, *POETHICS*] ("I would be willing to wager—my soul upon the forfeit—that most of these theatergoers avoided comedy for at least a few nights thereafter.").

²⁴¹ GROSS, *supra* note 239, at 183.

²⁴² See Alscher, *supra* note 231, at 3 ("[C]utting out the entire post-trial Christian cast was the director's literary justice for the gross legal trickery they saw in Portia's calculatedly defeating the Jew.") Critics have generally attributed this notorious cut to Henry Irving. However, unlike what critics argued, Irving did not drop the fifth act for literary reasons, but for pragmatic reasons—to make room for a sentimental one-act trifle called *Iolanthe*. Except for the brief two-month period, when he substituted the final act with *Iolanthe*, Irving presented *The Merchant* intact with five acts. GROSS, *supra* note 239, at 153-54. Today, critics generally regard such a cut as a "serious mistake." KORNSTEIN, *supra* note 231, at 82; see also WEISBERG, *POETHICS*, *supra* note 240, at 94-104 (emphasizing the significance of Act V).

²⁴³ For example, in St. John Ervine's play, *The Lady of Belmont*, Shylock becomes a different man and has benefited from his new Christian faith. When asked by Portia if he can forgive what they have done to him, Shylock responds, "I must forgive. We must all forgive, because we have so much to be forgiven." GROSS, *supra* note 239, at 228-29. In Louis Untermeyer's cynical epilogue, *The Merchant of Venice Act VI*, Shylock and Antonio become business partners. *Id.* at 271. In Ludwig Lewisohn's *The Last Days of Shylock*, Shylock reconciles with Jessica, whom Lorenzo has deserted. *Id.* at 271-72.

²⁴⁴ See Alscher, *supra* note 231 (offering an alternate staging that brings about a credible reconciliation between Shylock and Antonio); Susan Oldrieve, *Marginalized Voices in "The Merchant of Venice,"* 5 CARDOZO STUDS. L. & LITERATURE 87, 99 (1993) (suggesting that Shylock may be the "holy hermit" who accompanies Portia and Nerissa back to Belmont).

University to appeal Shylock's case after the case was first tried 400 years ago.²⁴⁵

To many of these sympathizers, Shylock is a social victim, a "noble and dignified martyr to popular prejudice."²⁴⁶ Like King Lear, he is "[m]ore sinn'd against than sinning."²⁴⁷ "Shylock is not only a Jew; he is a symbol for any group that feels itself oppressed."²⁴⁸ His actions are mainly the result of the suffering, humiliation, injustice, and prejudice he and his tribe have received.²⁴⁹ The real culprit behind such actions is not hate or revenge, but the Alien Statute, which "protects the Christian Antonio from the punitive consequences of anything he said or did against Shylock, while it incriminates Shylock for any self-defensive action he took to maintain his human dignity."²⁵⁰ Encouraging prejudice against the Jews, the Alien Statute is akin to Jim Crow, Nuremburg,²⁵¹ or Vichy laws.²⁵²

B. *The Lessons*

Shylock's conversion is painful but hardly inevitable. Even though Shakespeare did not tell the audience whether Shylock could avoid his painful conversion, *The Merchant* provides valuable lessons as to how one can lead a noble life and what type of world one should seek to attain.

²⁴⁵ See LAW AND THE ARTS 149-235 (Susan Tiefenbrun ed., 1999) (collecting the briefs of, and analysis on, Shylock's appeal staged at the Hofstra University School of Law); see also KORNSTEIN, *supra* note 231, at 83-85 (outlining Shylock's imaginary appeal).

²⁴⁶ LINDA ROZMOVITS, SHAKESPEARE AND THE POLITICS OF CULTURE IN LATE VICTORIAN ENGLAND 79 (1998); see also ROBERT SCHNEIDER, SHYLOCK, THE ROMAN: UNMASKING SHAKESPEARE'S *The Merchant of Venice* (1999) (comparing Shylock to "a noble Roman in comic mask" *Id.* at 188).

²⁴⁷ KORNSTEIN, *supra* note 231, at 66 (quoting WILLIAM SHAKESPEARE, KING LEAR act 3, sc. 2); see also *id.* at 79 (arguing that Shylock is "not a cardboard figure of evil, but a complex and somewhat sympathetic man who has suffered much"); ROZMOVITS, *supra* note 246, at 7 (arguing that Shylock is "an outsider by choice as much as by compulsion").

²⁴⁸ KORNSTEIN, *supra* note 231, at 81.

²⁴⁹ *Id.* at 79; see also Alscher, *supra* note 231, at 10 ("Antonio's hostility is the only quality of mercy Shylock experiences in the Rialto").

²⁵⁰ Alscher, *supra* note 231, at 16. Under a textual analysis, the Alien Statute can even be applied for mere intentions to act. See KORNSTEIN, *supra* note 231, at 80. Since property is the foundation of life, Shylock's seeking repayment of Antonio's debt may already constitute a contrivance against a citizen's life, even if Shylock does not ask for interest. *Id.* Thus, the Alien Statute gives Christians a "license to take whatever they will, by request or force, from contriving aliens" and perpetuates vengeance by dehumanizing the Jew and exonerating the Christians. See *id.*

²⁵¹ KORNSTEIN, *supra* note 231, at 81.

²⁵² Richard H. Weisberg, *Confiscated Jewish Property in Vichy, France: An Attempt to Understand Through Shakespeare*, 20 CARDOZO L. REV. 591 (1998); see also RICHARD H. WEISBERG, VICHY LAW AND THE HOLOCAUST IN FRANCE (1996).

Had Shylock and the Christians followed these teachings, the play might have a different, and possibly less problematic, ending.

1. Who Chooseth Me, Must Give and Hazard All He Hath

“Who chooseth me, must give and hazard all he hath” (2:7:16) is one of the most important lessons in the play. This lesson is embodied in the lottery of caskets, which Portia’s father has devised to test the inner character of his daughter’s suitors. In this lottery, there are three metal caskets, each symbolizing a different set of living values. The suitor who picks the right casket will marry Portia; the one who picks the wrong casket will have to leave Belmont immediately and to remain unmarried for the rest of his life. While the prize is rich, the sacrifice is great. Thus, six coward suitors have decided to leave Belmont without even trying the caskets.

The first suitor who is bold enough to try the lottery is the Prince of Morocco. Despite his courage and noble birth, he fails to understand the give-and-take nature of a marital relationship. He mistakes Portia as a treasured object that many men desire, rather than as a partner for whom he is willing to give and hazard. He also compares her to his previous courageous exploits and emphasizes how he “would o’erstare the sternest eyes that look: / Outbrave the heart most daring on earth: / Pluck the young sucking cubs from the she-bear, / [and] mock the lion when a roars for prey / To win the[] lady” (2:1:27-30). Dismissing the lottery as a “blind Fortune” (2:1:36), he interprets the metals literally and selects the casket based on the worth of his conquest. He picks the golden casket and loses his suit.

Unlike Morocco, the Prince of Arragon fails because he is so preoccupied with himself that he could not possibly love.²⁵³ To him, Portia is not a conquest, but a prize he deserves. While Morocco is willing to conquer the lottery, Arragon believes he deserves Portia as of right. Without even reading the inscriptions, he rejects the leaden casket. “[B]ase lead” (2:9:20) is too incomparable to his self-worth. Once again, Arragon fails to understand the give-and-take nature of a marital relationship. Thus, he selects the wrong casket and loses his suit.

By contrast, Bassanio understands the true nature of a marital relationship. Instead of seeing marriage as a take-taken conquest in which he acquires his wife as a treasured object or a well-deserved prize, he is prepared to “give and hazard all he hath” (2:7:16) for the sake of a successful relationship. Being able to see the meaning Portia’s father has intended, Bassanio becomes the Jason who wins the “golden fleece” (1:1:170).

Critics have argued that Bassanio may have selected the right casket because of Portia’s song, which suspiciously rhymes with “lead.” Some of these critics even regarded Bassanio as an opportunist, who plans to use

²⁵³ HOLMER, *supra* note 238, at 105.

Portia's wealth to repay his debt. Pointing to Bassanio's speech about "a lady richly left" (1:1:161), his plea to Antonio for "the means / To hold a rival place with" (1:1:174) other suitors, and his extravagance over Launcelot's elaborate livery,²⁵⁴ these critics questioned Bassanio's internal values.

However, "a clue is but a clue. [It] is not an answer. The success of the communication of the clue depends on the nature of the recipient."²⁵⁵ Despite similar clues—"led" (2:1:13), "hazard" (2:1:44), and "hazard" (2:9:18)—both Morocco and Arragon fail to select the right casket.²⁵⁶ In fact, as John Russell Brown pointed out, "dowry was frankly discussed in planning any Elizabethan marriage."²⁵⁷ Though a popular dramatist, Shakespeare could not ignore this established tradition without sacrificing the genuineness of his characters. Moreover, the accelerating rhythm toward the end of the scene seems to suggest the dramatist's intention to push the scene from Venice to Belmont.²⁵⁸ Thus, the rhetorical structure of Bassanio's speech strongly suggests that Portia's qualities are listed in ascending, rather than descending, order of importance.²⁵⁹

To understand Bassanio's inner values, one must therefore focus on the latter half of Bassanio's speech, where he notes that Portia is "[o]f wondrous virtues" (1:1:163) and is comparable to "Cato's daughter, Brutus' Portia" (1:1:166). Portia's virtues, rather than her wealth, are what Bassanio treasures. His sense of values is even more evident when Bassanio "refuses to claim his prize until Portia herself chooses to ratify his tri-

²⁵⁴ OVERTON, *supra* note 238, at 22.

²⁵⁵ HOLMER, *supra* note 238, at 99.

²⁵⁶ Cf. HOLMER, *supra* note 238, at 100. Professor Holmer argues that the clues for the golden and silver caskets should be differentiated from those of the leaden casket, which Shakespeare intentionally created. As she explained, "[t]he subliminal bias for the language of the leaden casket in [Portia's] speech reveals how central that choice is to her own life, not just because the choice is momentous but because the values inherent in that choice are her values—humility, hazard, and self-sacrifice." *Id.*

²⁵⁷ John Russell Brown, *Introduction* to SHAKESPEARE, *supra* note 3, at xlvii; see also HOLMER, *supra* note 238, at 107 (arguing that there is a wide acceptance in Elizabethan England that "marriage among members of the higher classes should uphold economic and social considerations, the equitable or advantageous joining in matrimony of persons who are reasonably alike in nobility of family and estate").

²⁵⁸ As Lawrence Danson pointed out:

Portia's wealth is mentioned first but quickly and almost by the way; her beauty is mentioned next, with heavier stress; and finally her virtue—fairer than the word "fair" itself. The accelerating rhythm of the progression seems to push the scene forward, striving to reach beyond the boundaries of this scene into the next, into that Belmont we as audience are privileged to reach even before the new Jason.

DANSON, *supra* note 238, at 43.

²⁵⁹ Daniel H. Lowenstein, Book Review, *The Failure of the Act: Conceptions of Law in The Merchant of Venice, Bleak House, Les Misérables, and Richard Weisberg's Poethics*, 15 CARDOZO L. REV. 1139, 1159 n.91 (1994).

umph.”²⁶⁰ Practicing what the casket says, “Bassanio hazards it all for Portia’s confirmation.”²⁶¹ Careful readers may even notice that Bassanio is the first person in the play to utter the word “hazard” (1:1:151) and “the only Venetian who does not instinctively hate Shylock.”²⁶² Structurally, Shakespeare emphasized Bassanio’s wise choice by foiling it against Morocco’s and Arragon’s ill-advised selections.²⁶³

When the scene returns to Venice, similar values are tested in the form of a trial. In this controversial trial, which many commentators have criticized as implausible²⁶⁴ and illogical,²⁶⁵ both Shylock and Antonio are tested for their ability to show mercy. As Portia explains, the “quality of mercy is . . . [the] mightiest in the mightiest” (4:1:180-84). “It blesseth him that gives, and him that takes” (4:1:183). “When mercy seasons justice” (4:1:193), salvation is at hand. Thus, one should always show mercy. Shylock fails to understand the need for mercy,²⁶⁶ so he loses the legal battle, his money, his daughter, and his religion.

²⁶⁰ HOLMER, *supra* note 238, at 107. Professor Holmer pointed out that Bassanio “has . . . been forthright with Portia about how financially poor a gentleman he is because he has no wealth except his bloodline.” *Id.* However, her observation is problematic, because Bassanio does not reveal his financial troubles until he receives Antonio’s letter, which announces Antonio’s impending death.

²⁶¹ *Id.* at 114.

²⁶² ALLAN BLOOM & HARRY V. JAFFA, *SHAKESPEARE’S POLITICS* 26 (1964). As Professor Bloom pointed out, Bassanio “always treats [Shylock] like a man, indifferent to the doctrines which separate them. He is surprised and shocked at Shylock’s conduct; he does not expect it, and even encourage it, as does Antonio.” *Id.* Notwithstanding his insightful observation, one have to wonder whether Bassanio treats Shylock well because he needs to borrow money from Shylock.

²⁶³ HOLMER, *supra* note 238, at 102.

²⁶⁴ As W.H. Auden pointed out:

Even in the rush of a stage performance, the audience cannot help reflecting that a man as interested in legal subtleties as Shylock, would, surely, have been aware of the existence of this law and that, if by any chance he had overlooked it, the Doge surely would very soon have drawn his attention to it. Shakespeare, it seems to me, was willing to introduce what is an absurd implausibility for the sake of an effect which he could not secure without it

W.H. Auden, *Brothers and Others*, in *CASEBOOK*, *supra* note 234, at 224, 234; see also Harley Granville-Barker, *The Merchant of Venice*, in *THE MERCHANT OF VENICE: Critical Essays* 3, 3 (Thomas Wheeler ed., 1991) [hereinafter *CRITICAL ESSAYS*] (“*The Merchant of Venice* is a fairy tale. There is no more reality in Shylock’s bond and the Lord of Belmont’s will than in Jack and the Beanstalk.”); John Middleton Murry, *Shakespeare’s Method: The Merchant of Venice*, in *CRITICAL ESSAYS*, *supra*, at 37, 38 (characterizing *The Merchant of Venice* as “a true folk story”).

²⁶⁵ See POSNER, *supra* note 122, at 94 (“The lack of realism in the play’s treatment of law extends to the procedures as well as the substance of law.”).

²⁶⁶ See HOLMER, *supra* note 238, at 68 (“One reason Shylock does not see the wisdom of mercy when Portia advises him to ‘consider this’ is his blindness to his own need of it.” (citation omitted)).

Shakespeare reinforced his losses by coupling it, subtly, with the defeat of Morocco and Arragon.²⁶⁷ As Professor Holmer pointed out:

The gold and silver choices of Morocco and Arragon serve as dramatic analogues for Shylock's own choices of what he desires and thinks he deserves: his gold and silver gain of usury and his assumption of deserving fleshly revenge according to the rigour of the law. Like Morocco and Arragon, who literally reject the leaden chest, Shylock symbolically rejects it because he considers the true wisdom of giving and hazarding mere foolishness, insisting rather on personal gain, whether of earthly treasure or flesh. Both Morocco and Arragon ironically err exactly where they think they excel, just as Shylock does when he is undone by the letter and strict justice. Like Morocco and Arragon, self-preoccupation blinds Shylock to his own presumptive egotism. These mis-choosers defeat themselves.²⁶⁸

In addition, the play provides remarkable similarities between the princely suitors' literal interpretation of the caskets and Shylock's literal faith and rigid interpretation of the law,²⁶⁹ Morocco's discovery of "[a] carrion Death" (2:7:63) reminds the audience of Shylock's epithet as "the old carrion" (3:1:32),²⁷⁰ and Arragon's emphasis on his deserts parallels Shylock's emphasis on his self-righteousness ("What judgment shall I dread, doing no wrong?" 4:1:89). Indeed, Shylock's ultimate fate vividly demonstrates the threatening inscriptions on the caskets: "Shylock does not get what he desires, the pound of flesh or thrice his loan; he does not get what he deserves, the bare principal; he is put in the position of giving and hazarding all he hath."²⁷¹

While most critics and audiences focused on Shylock's inability to give and hazard, they tended to overlook Antonio's similar weakness, which is evident in his behavior toward Shylock in the Rialto and his failure to show mercy during the trial. In the Rialto, Antonio curses Shylock, treats him like a dog, and spits upon his Jewish gabardine. Even after Shylock has promised to lend him three thousand ducats, Antonio insists that he will continue to treat Shylock badly. Likewise, when Portia asks him to show mercy on Shylock at the end of the trial, he refuses.²⁷² In fact, he

²⁶⁷ *Id.* at 106.

²⁶⁸ *Id.* But see POSNER, *supra* note 122, at 97 (defending Shylock's insistence on strict justice); KORNSTEIN, *supra* note 231, at 74 (same).

²⁶⁹ HOLMER, *supra* note 238, at 146.

²⁷⁰ *Id.* at 104.

²⁷¹ *Id.* at 244.

²⁷² See, e.g., Alscher, *supra* note 231, at 17 (arguing that Antonio has several chances to show mercy to Shylock or to intercede against the Alien Statute, but he refuses); Marci A. Hamilton, *The End of Law*, 5 CARDOZO STUDS. L. & LITERATURE 125, 125 (1993) ("Antonio, the play's putative Christ, . . . utterly fails to fulfill his promise of redemption."); Oldrieve, *supra* note 244, at 94-95 (arguing that Antonio has shown no mercy to Shylock); Charles Spinosa, *Shylock and Debt and Contract in*

aggravates the penalty and takes away the concessions the Duke has made earlier. While the Duke gives Shylock almost half of his present and future wealth to use and bequeath as he pleases, Antonio takes all and requires him to bequeath all the profits for the rest of his lifetime to the daughter and son-in-law he has completely disowned.²⁷³ Antonio also requests that Shylock be immediately converted to Christianity. Instead of showing mercy, Antonio takes away his money, his practice of usury, and his religion. To emphasize Antonio's weakness, one director addressed Portia's "quality of mercy" speech to both Antonio and Shylock.²⁷⁴

Some critics have defended Antonio by citing as evidence his generosity to Bassanio and his fellow Christians. To these critics, "[a] kinder gentleman treads not the earth" (2:8:35). However, they overlooked the Christian teaching that one should not only love one's friends, but should also love one's enemies.²⁷⁵ Indeed, Shakespeare used Antonio and Shylock as foils to each other so that they could be compared in terms of

"*The Merchant of Venice*," 5 CARDOZO STUDS. L. & LITERATURE 65, 77 (1993) (arguing that Antonio "cannot live up to his own words"); see also YAFFE, *supra* note 235, at 77 ("Antonio's rendering of mercy to Shylock is . . . neither unconstrained nor unconstraining. . . . In the name of mercy, Antonio stipulates a series of contractlike conditions, each one a quid pro quo.").

Many commentators disagreed and argued that Antonio has shown mercy, at least in Elizabethan terms. See, e.g., Halio, *supra* note 233, at 61. As Professor Richard Knowles pointed out to the Author, there were plenty of religious martyrs in Elizabethan England who chose to be executed rather than to convert from Catholicism to Anglicanism. Thus, Shylock has been offered a reasonable alternative, even if this alternative is only merciful in contrast to the death penalty with which Shylock is threatened. Despite the forcefulness of these arguments and the fact that they are well supported by historical facts in Elizabethan England, Antonio's "mercy" is still problematic because it is based on his own values and his wrongful and arrogant assumption that his values are universal for everybody, including Shylock. Cf. OVERTON, *supra* note 238, at 33 ("[B]oth the 'justice' and 'mercy' are strictly Venetian. Shylock's treatment only appears merciful in contrast to the dire penalties with which he is threatened and in accordance with a Christian perspective."); Lowenstein, *supra* note 259, at 1170 ("If the sentence is assumed to be cruel, Antonio and the Duke may fairly be charged with insensitivity . . .").

²⁷³ *Contra* HOLMER, *supra* note 238, at 229 ("Despite his present situation of lamented poverty, Antonio selflessly creates a trust that will stead Shylock during his lifetime and his offspring after his death. . . . Antonio assumes a generous fatherly role in providing for the offspring of his would-be murderer . . .").

²⁷⁴ See Alscher, *supra* note 231, at 11 ("If the pivotal Quality of Mercy speech is not addressed both to Antonio and Shylock simultaneously in Court, there is no hope of any credible justice or redemption there.").

²⁷⁵ See Matthew 5:43-44 (King James) ("Ye have heard that it hath been said, thou shalt love thy neighbor, and hate thine enemy. But I say unto you, Love your enemies; bless them that curse you; do good to them that hate you; and pray for them which despitefully use you, and persecute you.").

their situations, motives, words, and deeds.²⁷⁶ Compared to Portia and Bassanio, who acknowledge their own weaknesses, both Antonio and Shylock are “unenlightened about themselves as well as others, and both err in the direction of proud self-righteousness.”²⁷⁷ While “Shylock believes he is right to practise usury as he does and to hate Antonio for his opposition[,] Antonio just as strongly believes he is right to hate and ridicule Shylock for the same practice.”²⁷⁸ Small wonder Shakespeare presented him as an odd man out in the final act,²⁷⁹ who imports legalistic jargons from Venice to Belmont and promises to serve as a surety for Bassanio’s unconditional love for Portia. With such a portrait, Shakespeare invited the audience to compare Antonio to the lonely Shylock who creeps from the stage in the earlier act.²⁸⁰ Among all the fourteen Shakespearean comedies, Antonio is “the only major character . . . who is not wed by play’s end.”²⁸¹

Up to this point, all the major characters except Portia have been tested. To demonstrate her values and to test whether Portia can practice what she preaches, Shakespeare staged a mock trial in Belmont, which immediately follows the main trial in Venice. At the end of the Venetian trial, Bassanio and Gratiano are caught between their promises to keep their rings and their need to reward the lawyer and the clerk for the great deeds they have done to their best friend. Promises are important, but so is friendship. Upon Antonio’s instigation, they break their oaths and give away the rings that epitomize their marriages.

When they return to Belmont, their wives, who are no longer disguised, feign their discovery and start a quarrel. Portia’s dissatisfaction with her

²⁷⁶ HOLMER, *supra* note 238, at 143; *see also* POSNER, *supra* note 122, at 109 (“[I]n his joylessness, wifelessness, melancholy anti-Semitism, and essential solitariness, [Antonio] is almost the Christian mirror of Shylock.”); SCHNEIDER, *supra* note 246, at 95 (“Shylock and Antonio are complementary antitheses, opposite sides to a single coin—inverse reflections of a common ideal that can be inferred from the play, but which the play does not reveal directly.”).

²⁷⁷ HOLMER, *supra* note 238, at 143.

²⁷⁸ *Id.* at 144.

²⁷⁹ “Antonio has no future in Belmont, despite Portia’s polite but somewhat cursory welcomes. As the inner circle’s only confirmed bachelor, he simply does not fit in any longer. . . .” Alscher, *supra* note 231, at 29. What Antonio misses is underscored by Gratiano’s last word in the play, the “ring.” *Id.*

²⁸⁰ Auden, *supra* note 264, at 240; Graham Midgley, *The Merchant of Venice: A Reconsideration*, in CASEBOOK, *supra* note 234, at 193, 207. *Contra* R.F. Hill, ‘*The Merchant of Venice*’ and the Pattern of Romantic Comedy, in CRITICAL ESSAYS, *supra* note 264, at 139, 158 (arguing that the action of the play seems to deny that Antonio is an isolated figure).

²⁸¹ Alscher, *supra* note 231, at 6. *But see* HOLMER, *supra* note 238, at 253 (“By not giving Antonio a wife, Shakespeare continues to dramatise the claims of love in friendship as well as romance, even until the final moments of his festive conclusion.”).

husband is understandable. During the trial, Bassanio repeatedly offers Portia's money to Shylock to redeem Antonio. He also tells Antonio that he would sacrifice his own life, his wife's, and the entire world just to save the royal merchant. Even after Antonio has regained his freedom, Bassanio forgets the promise he has made to his wife and gives the lawyer his ring.

Nonetheless, Portia understands the celestial quality of mercy and forgives her husband once she has taught him a lesson. Leading by example, Portia not only teaches the audience the need to forgive, but also suggests to them how the tension in the earlier act can be avoided had Shylock and Antonio learned to forgive. By emphasizing the importance of mutual trust and forgiveness, the ring episode provides "an admirable tonal modulation between Act IV and Act V"²⁸² and "bring[s] the play full circle."²⁸³

2. May the Outward Shows Be Least Themselves

Throughout *The Merchant*, things are not what they seem. For example, Shylock is repeatedly referred to as "the Jew" and insists on his religious differences ("I will buy with you, sell with you, talk with you, walk with you, and so following: but I will not eat with you, drink with you, nor pray with you," 1:3:30-33). Yet, he dines with the Christians and has knowledge of the New Testament. Bassanio holds the key to the deceptive caskets and earns the virtuous Portia. Yet, his behavior and extravagance suggest his inadequacy. Antonio, the noble merchant, is referred to as the "kinde[st] gentleman [who] treads . . . the earth" (2:8:35). Yet, he fails to forgive Shylock or to show Shylock any mercy when he has the opportunity to do so. Indeed, there are many other places where Shakespeare explored and emphasized the difference between appearance and reality. To narrow its focus, this section discusses the caskets, the trial, and the ring episode, each of which poses a difficult trap for the audience.

In the casket test, both the metals and the mottos are deceiving. While gold is what most people want and desire, Portia's portrait is found in the leaden casket. The first two suitors fail to understand the distinction between appearance and reality. Thus, they fail to appreciate this "obscure grave" (2:7:51). Although Morocco asks Portia not to misjudge him by his skin color, he ironically emphasizes that his blood is as red as that of any fair-skinned creature. Focusing on the literal significance of the metal, rather than its substance, he picks the golden casket and loses his suit. Likewise, Arragon deceives himself by focusing on the motto of the casket, rather than its underlying meaning. Though recognizing that a fool chooses by "the fond eye" (2:9:27), he rejects the leaden casket with-

²⁸² HOLMER, *supra* note 238, at 272.

²⁸³ *Id.* *Contra* WEISBERG, POETHICS, *supra* note 240, at 104 (arguing that Act V has reversed the metaphysics of the play, leaving the audience wondering whether Shylock's values are somehow better, more direct, and more forceful).

out even considering the meaning of the metal or the motto. In the end, he who tries to distinguish himself from "the fool multitude" (2:9:26) ends up being one of them. The silver casket rightly rewards him with a blinking idiot's head. By contrast, Bassanio understands the distinction between appearance and reality. Putting the metal and the motto together, he shows the audience the real meaning behind the caskets. Even after he is awarded Portia's portrait, he reminds the audience of the difference between the real person and the "counterfeit" (3:2:105): "Yet look how far / The substance of my praise doth wrong this shadow / In underprizing it, so far this shadow / Doth limp behind the substance" (3:2:126-29). Thus, he deserves to select the right casket.

While the deceptiveness of the casket test is obvious to most audience, the trial is more difficult and has confused many. In this trial, the plaintiff and the defendant are indistinguishable. The judge even has to ask, "Which is the merchant, and which the Jew?" (4:1:170). At the end, the plaintiff and the defendant reverse their roles, and what starts as a civil trial ends up being a criminal one. Moreover, the two figures that are most qualified to give justice are biased. Although Portia appears to be a "Daniel" (4:1:219) and a "[m]ost rightful judge" (4:1:297), she is in fact corrupt, racist,²⁸⁴ and self-serving.²⁸⁵ She hardens Shylock's resolve to

²⁸⁴ David D. Saxe, *Shylock, Portia and a Case of Literary Oppression*, 5 CARDOZO STUDS. L. & LITERATURE 115, 118 (1993). But see BLOOM & JAFFA, *supra* note 262, at 42 (arguing that Portia's reaction to Morocco's complexion demonstrates to the Elizabethan audience her "healthy tastes"); HOLMER, *supra* note 238, at 103 ("Judged by today's standards [Portia's] remark would seem as arguably racist. Yet Portia's remark is obviously not intended to be intellectually demeaning but rather physically preferential. If beauty is in the eye of the beholder, Portia is letting us know that she finds the less familiar less attractive."); E.E. Stoll, *Shylock*, in CASEBOOK, *supra* note 234, at 47, 48 ("Now a popular dramatist, even more than other artists, cannot play a lone hand, but must regard the established traditions of his art, the rooted sentiments and prejudices of the public.").

²⁸⁵ Portia is interested in settling Bassanio's debt to Antonio and to finish the trial so that both she and Bassanio can return to Belmont to consummate their marriage. She also has a monetary interest in the outcome of the trial. It is her money that Bassanio is using to repay Shylock. KORNSTEIN, *supra* note 231, at 77; *see id.* ("Portia herself is not what she seems. As the wife of Antonio's best friend, for whom the loan was made, she is anything but a disinterested judge."); OVERTON, *supra* note 238, at 37 ("The reason for [Portia's] insistence [on the moral law] is not only to save Antonio but to safeguard her marriage."); *see also* MODEL CODE OF JUDICIAL CONDUCT Canon 3(E)(1)(a) (1990) ("A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where: the judge has a personal bias or prejudice concerning a party . . ."); *In re Sims*, 462 N.E.2d 370, 375 (1984) ("When a Judge acts in such a way that she appears to have used the prestige and authority of judicial office to enhance personal relationships, or for purely selfish reasons, or to bestow favors, that conduct is to be condemned whether or not the Judge acted deliberately and overtly.").

enforce the bond (4:1:200-02), “entraps [him] by allowing him to believe he has the same petition rights as a citizen,”²⁸⁶ and brings up the Alien Statute even after Shylock has withdrawn his demand for a pound of flesh.²⁸⁷ The Duke is equally prejudiced.²⁸⁸ Although he says that he cannot deny Shylock the bond because of its negative implications for Venice, he possesses the power to delay the trial, to grant pardon, and to apply the Alien Statute to prevent Shylock from hurting Antonio. In fact, when the Duke refuses to “do a great right a little wrong” (4:1:212) lest he damages Venice’s reputation, he sets a notorious precedent by allowing Christians to persecute the Jews by using the Alien Statute.

The ring episode is the most deceptive of all, baffling even the most sensitive audience and critics. As Professor Weisberg pointed out, in the final act, the characters “ha[ve] become just as legalistic as the Jew whose legalism they had sought to banish.”²⁸⁹ Instead of talking about love and music, they emphasize commitments, oaths, and promises. Thus, one cannot discount Shylock’s residual effect.²⁹⁰ Spooking in the background as if he is “an unappeased ghost,”²⁹¹ Shylock reminds the audience about the harsh reality confronting those who only focus on law and commitments. Through Shylock the ghost, Shakespeare invited the audience to think deeply about their living values. Should one live by law, commitment, and promises? Or should one live by love, music, and harmony?

Unsurprisingly, the key to these important questions are found in the character who is the most unlikely to have the answer. Gratiano, who “speaks an infinite deal of nothing” (1:1:114), gives the audience the answer in the last two lines of the play: “Well, while I live, I’ll fear no other thing / So sore, as keeping safe Nerissa’s ring” (5:1:306-07). The most important thing in life is mutual trust and forgiveness, which the ring signifies. These two qualities are the *sine qua non* of a successful human relationship. All the legalistic jargons, oaths, promises, and commitments are just deceptive appearances that misguide people. To amplify this message, Shakespeare not only concluded the play with the

²⁸⁶ Alscher, *supra* note 231, at 15-16.

²⁸⁷ Kornstein, *supra* note 231, at 81.

²⁸⁸ Halio, *supra* note 233, at 58.

²⁸⁹ Weisberg, Poethics, *supra* note 240, at 104.

²⁹⁰ See *id.* at 102 (“Shylock may be gone, but his mediated approach to commitment lingers on.”).

²⁹¹ Sigurd Burckhardt, *The Merchant of Venice: The Gentle Bond*, in CASEBOOK, *supra* note 234, at 208, 209; Norman Rabkin, *Meaning and Shakespeare*, in CRITICAL ESSAYS, *supra* note 264, at 103, 110 (arguing that Shylock “haunt[s] our memories during the suddenly etherialized and equally suddenly trivialized final episodes as we try to reach a simple position on the fairness of his treatment, or even on the truth of his response to it”); see also Weisberg, Poethics, *supra* note 240, at 104 (“Shylock is gone but not forgotten.”). *Contra* Midgley, *supra* note 280, at 193-94 (“Shylock is forgotten completely by the lovers beneath the stars . . .”).

word "ring," but also reinforced it by a couplet, a double entendre, and two bawdy puns.

3. Let the Sounds of Music Creep in Our Ears

While the first two teachings concern human virtues and proper aspiration of life, the final teaching concerns Shakespeare's platonic worldview. Under this worldview, "[t]he ideal society . . . is one in which each citizen does the task allotted to them within the natural community, and in terms of their natural disposition of soul."²⁹² As Shakespeare explained through Antonio, we all live in one cosmos, "[a] stage, where every man must play a part" (1:1:78). In order to function in this cosmos and to appreciate our position within the community, we must strive for harmony and "let the sounds of music / Creep in our ears" (5:1:55-56). Otherwise, the "muddy vesture of decay" (5:1:64) would engulf us and would disconnect us from the higher immortal world.²⁹³ Throughout the play, this need for harmony is demonstrated through the interdependence between Venice and Belmont and between all the major characters and through the characters' appreciation of music.

The contrasts between Venice and Belmont are striking. "Venice is . . . most closely associated with the sea, even interwoven with it; and Belmont suggests a more airy height, a finer element."²⁹⁴ "Venice is the scene of tragedy; Belmont is . . . a land of music, love, and 'holy crosses.'"²⁹⁵ The Venetians believe in hate, prejudice, and revenge; the Belmontians and their guests desire love, music, and harmony. The Venetians have troubles with money and speak in legal jargons and commercial terms; the Belmontians have boundless wealth and allude to the Classics and Greek mythologies. In sum, "Belmont . . . is a utopia. What is not possible in Venice is possible here."²⁹⁶

Although commentators have analyzed the play in terms of these polar contrasts,²⁹⁷ these contrasts "do not solely oppose but also temper each other."²⁹⁸ For example, the play begins in Venice but ends in Belmont. It

²⁹² IAN WARD, *SHAKESPEARE AND THE LEGAL IMAGINATION* 142 (1999).

²⁹³ BLOOM & JAFFA, *supra* note 262, at 30.

²⁹⁴ G. Wilson Knight, *Tempest and Music*, in *CASEBOOK*, *supra* note 234, at 81, 82-83.

²⁹⁵ *Id.* at 83.

²⁹⁶ BLOOM & JAFFA, *supra* note 262, at 30.

²⁹⁷ See, e.g., *id.*; Knight, *supra* note 294, at 82-83; Kenji Yoshino, *The Lawyer of Belmont*, 9 *YALE J.L. & HUMAN.* 183, 185 (1997) ("[T]he play presents itself as a parade of binaries . . . that may be seen as a sequence of paired and conflicting spheres of activity.").

²⁹⁸ HOLMER, *supra* note 238, at 5; see *id.* at 44 (arguing that Venice and Belmont are "purposefully interrelated"). As Professor Holmer explained:

There is . . . no real thematic dichotomy between Belmont and Venice because the theme of appearance and reality in Belmont also occurs in Venice (as in Shylock's feigning good will toward Antonio in his 'merry' bond, and Lancelot's

is the Venetian gentleman who liberates the Belmontian heiress from her father's will. Without the Venetian bond and moneylender, this heiress would still be trapped within the casket scheme. By contrast, it is the Belmontian heiress who rescues the Venetian merchant from his predicament. It is also she who saves Venice "from the deadly logic of its own constitution."²⁹⁹ Moreover, the deceiving Venetian bond doubles the Belmontian caskets. The controversial trial in Venice paves the way for a reenactment in Belmont. The melancholic merchant in Venice parallels the unhappy heiress in Belmont. The alien Jew at the end of the trial mirrors the lonely bachelor at the end of the play. And Venetian justice provides the context for Belmontian mercy.³⁰⁰ Without the interactions between the two places, there will be no marriage, no trial, and, the most important of all, no play.

Like Venice and Belmont, the characters are dependent on each other.³⁰¹ Portia depends on her father's will, Bassanio's life, and her maid's cheerfulness. Bassanio depends on Antonio's generosity, Portia's love, and Shylock's loan. Antonio depends on Bassanio's friendship and Portia's dramatic rescue. Lorenzo depends on Jessica's love and Portia's "manna" (5:1:294). Gratiano depends on Bassanio's support and Nerissa's affection. Old Gobbo depends on Launcelot's care and support. Venice's reputation depends on the learned Balthazar. Shylock's fate depends on the Duke and Antonio. Indeed, as Professor Weisberg aptly pointed out, most of the characters in the play are unable to "conclude their affairs without the mediation of a third character."³⁰²

Because of this interdependence, attaining harmony is very important. While harmony is present in all immortal souls, it only exists in those mortal beings that have music in their souls. Those who do not attain this immortal virtue have "spirit . . . dark at night" (5:1:86) and "affections dark as Erebus" (5:1:87). They are "fit for treasons, stratagems and spoils" (5:1:85) and are not to be trusted. Among these people are Antonio and Shylock. While Antonio dislikes masques, Shylock orders Jessica to lock up the doors and windows of his house lest "the sound of shallow foppery enter / [his] sober house" (2:5:35-36). To highlight

and Jessica's adoption of disguise), and the themes of justice and mercy in Venice also occur in Belmont (for example, strict justice governs the penalties for loss in the casket test, with no mitigation, but mercy tempers the penalties for loss of the betrothal rings at the play's end).

Id.

²⁹⁹ Burckhardt, *supra* note 291, at 212.

³⁰⁰ See Halio, *supra* note 233, at 60 ("For without that context—without justice—mercy is empty, meaningless. It turns into sentimentality and becomes counterproductive, resulting in injustice. Fully to understand and value mercy, we need first of all to understand and grasp justice in all its rigor.").

³⁰¹ Max Plowman, *Money and the Merchant*, in CASEBOOK, *supra* note 234, at 77, 80.

³⁰² WEISBERG, POETHICS, *supra* note 240, at 95.

Antonio's and Shylock's weaknesses, Shakespeare left the two characters alone when he harmonized the discordant elements at the end of the play.³⁰³ Shylock is excluded from beautiful Belmont, and Antonio has an awkward presence on the island.

V. AMERICAN INTELLECTUAL PROPERTY POLICY TOWARD CHINA

In the past, people looked to canons of books when they confronted problems in their lives or when they thought about their personal goals.³⁰⁴ Among one of these canons is the works of William Shakespeare. Being "an eminently political author,"³⁰⁵ Shakespeare not only helped people understand their world, but also gave them insights into how a good regime and a good ruler should be.³⁰⁶ His works also "provide the necessary lessons concerning human virtue and the proper aspirations of a noble life."³⁰⁷

In light of the close resemblance between Shylock's painful experience in *The Merchant* and China's forced conversion in the international intellectual property community, *The Merchant* may provide valuable insights into how China and the United States can resolve, or at least minimize, their intellectual property conflict. Using *The Merchant* as a legal text, this Part applies Shakespeare's teachings to the U.S.-China intellectual property conflict. It concludes that Shakespeare's lessons in *The Merchant* provide valuable lessons for people to understand the conflict and for policymakers to reshape their foreign intellectual property policy.

A. *The Two Countries Must Give and Hazard All They Have*

Since China began its contact with the West in the mid-nineteenth century, the United States has made repeated attempts to convert China into a Western intellectual property regime. These attempts have ranged from commercial treaties to threats of trade sanctions and from threats of non-renewal of most-favored-nation status to opposition to entry into the WTO. So far, all attempts have failed. Despite the increased efforts by the Chinese government to combat piracy and the public's heightened awareness of intellectual property rights, piracy remains rampant in China. Every year, the United States loses more than \$2 billion of revenues due to intellectual property piracy in China.³⁰⁸ Thus, scholars,

³⁰³ Graham Holderness, *Shakespeare on Marx*, in *THE MERCHANT OF VENICE* 57, 95 (Nigel Wood ed., 1996).

³⁰⁴ See BLOOM & JAFFA, *supra* note 262, at 1.

³⁰⁵ *Id.* at 4; see also POLITICAL SHAKESPEARE: ESSAYS IN CULTURAL MATERIALISM (Jonathan Dollimore & Alan Sinfield eds., 2d ed. 1994) (collecting essays that explored the meaning of Shakespeare's plays within different social contexts).

³⁰⁶ BLOOM & JAFFA, *supra* note 262, at 5.

³⁰⁷ *Id.* at 2.

³⁰⁸ Faison, *China Turns Blind Eye*, *supra* note 95.

policymakers, and commentators have called for a critical assessment and reformulation of the existing American intellectual property policy toward China.

As Shylock has demonstrated in *The Merchant*, forced conversion is always painful, uneasy, and problematic—and, most of the time, ineffective. Even though Shylock is converted at the end of the trial, there is no indication that he will “presently become a Christian” (4:1:383). In fact, the cultural history of his tribesmen suggests otherwise. Consider, for example, the expulsion of the Jews from England by King Edward I in 1290. Right after the expulsion, the Jews immediately returned to the country.³⁰⁹ Similarly, the conversion and persecution attempts of the Jews during the Spanish Inquisition were futile. Even though the surviving Jews became outwardly Christians, they retained their Jewish affiliations and covertly practiced their religious ceremonies.³¹⁰ Instead of destroying their faith and practices, the conversion experience had actually increased the awareness of their cultural identities,³¹¹ thus making later conversion attempts even more difficult.

Because forced conversion is both undesirable and ineffective, the United States must abandon its coercive intellectual property policy toward China.³¹² Instead, it needs to “give and hazard” some of its short-term profits and economic advantage to induce China toward a new intellectual property regime. For example, American manufacturers and publishers can price their products lower in China than in other Western developed countries.³¹³ They can also provide better products or post-

³⁰⁹ GROSS, *supra* note 239, at 62.

³¹⁰ *Id.* at 32. As John Gross pointed out, a handful of Marranos had made their way from Spain or Portugal to England during the reign of Henry VIII. *Id.*

³¹¹ ROZMOVITS, *supra* note 246, at 86.

³¹² Yu, *From Pirates to Partners*, *supra* note 92.

³¹³ See *id.*; see also MICHAEL P. RYAN, KNOWLEDGE DIPLOMACY: GLOBAL COMPETITION AND THE POLITICS OF INTELLECTUAL PROPERTY 81 (1998); John Donaldson & Rebecca Weiner, *Swashbuckling the Pirates: A Communications-Based Approach to IPR Protection in China*, in CHINESE INTELLECTUAL PROPERTY LAW AND PRACTICE, *supra* note 56, at 409, 433 (“Today, various multinationals have started discovering that one way to stop pirates from their activities is to offer them an *honest* alternative.” (emphasis added)); Don Goves, *Warner Bros., MGM Dips into China Vid Market*, DAILY VARIETY, Feb. 21, 1997, at 1 (stating that Warner Bros. and MGM have entered into a licensing deal with a Chinese government-owned conglomerate to release low-priced video products dubbed in Mandarin). Such bargain pricing is particularly important for educational products, where access to those products is crucial to the country’s development and for raising the living standards of its people. Considering that the Chinese can only afford lower priced products, bargain pricing would also be economically sound as long as these bargain products do not enter the United States as grey market goods. In fact, American businesses can lower their business costs by manufacturing their products in China, thus taking advantage of the lower labor, production, and distribution costs.

sale benefits that are not available to purchasers of counterfeit goods, such as warranty service, replacement part guarantees, free upgrades, and contests or giveaways.³¹⁴

In addition, the United States needs to be patient while China is undergoing transition to a new intellectual property regime.³¹⁵ The effort to foster serious, widespread, and long-term adherence to a new regime “entails significant transformations in people’s attitudes toward intellectual creation, toward property, toward rights, toward the vindication of such rights through formal legal action, toward government and so forth.”³¹⁶ The new intellectual property laws were not enacted in China until the mid-1980s. Even if one ignores the inertia of China’s longstanding compiling tradition,³¹⁷ the public’s general understanding of intellectual property is still vague and weak.³¹⁸ Thus, one cannot expect drastic and immediate changes in Chinese attitudes toward intellectual property rights or the sudden emergence of institutions needed to nurture and support those attitudes.³¹⁹

Moreover, a lower price and thus a lower profit margin would eventually take away the counterfeiters’ incentives to make pirated goods. The smaller price difference between legitimate and illicit products would also discourage the local Chinese people from buying counterfeit products, provided the consumers can distinguish between the two.

³¹⁴ Providing these post-sale benefits “would, in the mind of [the] consumers, warrant the higher prices paid for such legally manufactured goods.” Doris Estelle Long, *China’s IP Reforms Show Little Success: IP Enforcement Remains Problematic, but Clever Owners Can Beat the Odds*, IP WORLDWIDE, Nov.-Dec. 1998; see also Donaldson & Weiner, *supra* note 313, at 432 (citing the success of a comic book publisher in competing directly against pirates by upgrading the quality of its graphics and paper and by including prizes with each issue); see also Yu, *From Pirates to Partners*, *supra* note 92 (emphasizing the importance of providing post-sale benefits).

³¹⁵ See Yu, *From Pirates to Partners*, *supra* note 92.

³¹⁶ William P. Alford, *How Theory Does—and Does Not—Matter: American Approaches to Intellectual Property Law in East Asia*, 13 UCLA PAC. BASIN L.J. 8, 21 (1994) [hereinafter Alford, *How Theory Does—and Does Not—Matter*]; see also ROBERT SHERWOOD, INTELLECTUAL PROPERTY AND ECONOMIC DEVELOPMENT 193-96 (1990) (discussing the difficulty of changing the mindset of the people in less developed countries concerning how they perceive intellectual property rights).

³¹⁷ See *supra* text accompanying notes 106-22 (discussing China’s compiling tradition).

³¹⁸ See Hu, *supra* note 105, at 110.

³¹⁹ Alford, *How Theory Does—and Does Not—Matter*, *supra* note 316, at 21; see Carole Ganz Brown & Francis W. Rushing, *Intellectual Property Rights in 1990s*, in INTELLECTUAL PROPERTY RIGHTS IN SCIENCE, TECHNOLOGY, AND ECONOMIC PERFORMANCE: INTERNATIONAL COMPARISONS 1, 14 (Francis W. Rushing & Carole Ganz Brown eds., 1990) [hereinafter INTERNATIONAL COMPARISONS] (“[I]ncreased protection is not to be expected tomorrow, and the movement will be evolutionary rather than revolutionary. Strategies to advance protection should take long-range approaches, say, a five to ten year time frame.”); Marcus W. Brauchli & Joseph Kahn,

The United States can also give and hazard by helping China integrate into the global economy. To accelerate such integration, the United States can convince the Chinese leaders why economic integration will benefit China and improve its standing in the international community.³²⁰ It can also treat China with the status appropriate to a major power by supporting China's participation at the G-7 and G-8 meetings,³²¹ by encouraging Chinese membership and active participation in international organizations, and by accelerating China's entry into the WTO.³²²

Intellectual Property: China Moves Against Piracy as U.S. Trade Battle Looms, ASIAN WALL ST. J., Jan. 6, 1995, at 1 ("[Building a functional intellectual property regime is] like building a house. . . . You can have the house structure all set up, very beautiful. But then, you need electricity and water pipes. That takes more time." (quoting Li Changxu, head of China United Intellectual Property Investigation Center)); *see also* Marrakesh Agreement Establishing the World Trade Organization, Annex IC, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31, (providing a 5-year transitional period for less developed countries and a 11-year transitional period for least developed countries).

³²⁰ *See* Yu, *From Pirates to Partners*, *supra* note 92.

³²¹ *See Final Report of the Eighty-ninth American Assembly*, in *LIVING WITH CHINA: U.S.-CHINA RELATIONS IN THE TWENTIETH-FIRST CENTURY* 295, 301 (Ezra F. Vogel ed., 1997) [hereinafter *LIVING WITH CHINA*]. The G-7 is an informal forum of seven major industrialized countries—Canada, France, Germany, Italy, Japan, the United States, and the United Kingdom. Since 1998, the G-7 and the Russian Federation have met as the G-8 to discuss global economic issues.

³²² *See* Jerome A. Cohen & Matthew D. Bersani, *Leveling the Playing Field for U.S. Firms in China*, in *BEYOND MFN: TRADE WITH CHINA AND AMERICAN INTERESTS* 107, 110 (James R. Lilley & Wendell L. Willkie II eds., 1994) [hereinafter *BEYOND MFN*]; David M. Lampton, *A Growing China in a Shrinking World: Beijing and the Global Order*, in *LIVING WITH CHINA*, *supra* note 321, at 120, 137; Yu, *From Pirates to Partners*, *supra* note 92; *see also* Joint United States-China Statement, 33 WEEKLY COMP. PRES. DOC. 1680 (Oct. 29, 1997) [hereinafter *Joint Statement*] ("The United States and China agree that China's full participation in the multilateral trading system is in their mutual interest."); *id.* (agreeing "to intensify negotiations on market access, including tariffs, non-tariff measures, services, standards and agriculture and on implementation of WTO principles so that China can accede to the WTO on a commercially meaningful basis at the earliest possible date"); China's WTO Accession: American Interests, Values and Strategies: Hearings Before the House Comm. on Ways and Means, 106th Cong. 1 (2000), available at http://www.ustr.gov/speech-test/barshefsky/barshefsky_t34.pdf (statement of USTR Charlene Barshefsky) ("China's WTO accession is a clear economic win for the United States."); Laura D'Andrea Tyson, *China Policy: Means and Ends*, N.Y. TIMES, Mar. 9, 1997, at A15 ("China's admission to the World Trade Organization—on commercially acceptable conditions—is probably our single most effective means of shaping a more open, market-oriented China."). *But see* RICHARD BERNSTEIN & ROSS H. MUNRO, *THE COMING CONFLICT WITH CHINA* 211 (Vintage Books 1998) (arguing against WTO membership for China); James V. Feinerman, *Free Trade, Up to a Point*, N.Y. TIMES, Nov. 27, 1999, at A15 (discarding myths concerning China's accession to the WTO); James Mann, *Our China Illusions*, AM. PROSPECT, June 5,

Given the very specialized nature of intellectual property laws, it is also important that the United States give and hazard its legal expertise with respect to drafting, implementing, and enforcing intellectual property laws.³²³ In providing such assistance, the United States needs to be careful about the laws and legal ideas they will bring into China, because laws and ideas usually "bring their specific motivating values with them."³²⁴

2000, at 22 (arguing that China's entry into the WTO would likely disappoint the American business community); Tara Kalagher Giunta & Lily H. Shang, *Ownership of Information in a Global Economy*, 27 GEO. WASH. J. INT'L L. & ECON. 327, 339 (1993) ("Bilateral agreements provide the most workable vehicle for addressing the contentious issues surrounding intellectual property protection."); Ashoka Mody, *New International Environment for Intellectual Property Rights*, in INTERNATIONAL COMPARISONS, *supra* note 319, at 203, 255 ("In the short-run, bilateralism is proving more effective than multilateral efforts in furthering U.S. interests. Bilateralism is quicker and allows more focused and tailored responses."). See generally CHINA IN THE WORLD TRADING SYSTEM: DEFINING THE PRINCIPLES OF ENGAGEMENT (Frederick M. Abbott ed., 1998) for a collection of essays discussing China's accession to the WTO.

"Involving China in the WTO and obtaining deadlines for compliance (even if allowing for longer transition times than one would want) is preferable to having China outside the WTO, with no deadlines for compliance whatsoever." Lampton, *supra*, at 137; see MARK A. GROOMBRIDGE & CLAUDE E. BARFIELD, *TIGER BY THE TAIL: CHINA AND THE WORLD TRADE ORGANIZATION* 41 (1999) ("WTO is by no means a panacea to China's economic problems, but both China and the world trading community will be better served if China is a member."); Margaret M. Pearson, *China's Integration into the International Trade and Investment Regime*, in CHINA JOINS THE WORLD: PROGRESS AND PROSPECTS 161, 195 (Elizabeth Economy & Michel Oksenberg eds., 1999) [hereinafter CHINA JOINS THE WORLD] ("[W]ithout China in the WTO the United States loses a key forum for seeing that China adheres to the rules of the regime."). Being an emerging world power, China "will more likely to adhere to international norms that it has helped to shape." Sam Nunn, *Address to the American Assembly*, in LIVING WITH CHINA, *supra* note 321, at 277, 285. Indeed, "[g]lobal commerce can ill afford to have a major player like China not playing by market rules and conventions. If China is allowed to pirate whatever products and technology it chooses, the international system could well break down." Julia Chang Bloch, *Commercial Diplomacy*, in LIVING WITH CHINA, *supra* note 321, at 185, 200; see also Julia Cheng, Note, *China's Copyright System: Rising to the Spirit of TRIPS Requires an Internal Focus and WTO Membership*, 21 FORDHAM INT'L L.J. 1941, 2005 (1998) ("Admitting China into the WTO will encourage China to enforce its [intellectual property] protection and enhance the international community's position to contain China's piracy problem.").

³²³ See Yu, *From Pirates to Partners*, *supra* note 92.

³²⁴ Paul Edward Geller, *Legal Transplants in International Copyright: Some Problems of Method*, 13 UCLA PAC. BASIN L.J. 199, 205 (1994); see ROBERT B. SEIDMAN, *THE STATE, LAW AND DEVELOPMENT* 34 (1978) ("Legal transplants practically never work."); Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1, 27 (1974) ("[A]ny attempt to use a pattern of law outside the environment of its origin . . . requires a knowledge not only of the foreign law, but

For example, the United States copyright law—in particular the 1976 Copyright Act—is filled with compromises struck among American interest groups that participated in the drafting process.³²⁵ A verbatim transplant of this statute into China would not only be inefficient, but could be indeed harmful, if China were not facing similar interest group pressure or had similar needs or concerns. In fact, a verbatim transplant would ignore those important problems that continue to hamper intellectual property law reforms in China.³²⁶

Moreover, as its assistance efforts to the former Soviet Union and Eastern and Central Europe have demonstrated, the United States needs to pay special attention to how it gives and hazards. “[D]epending on how donors design and deliver assistance, and the relationships they develop with recipients, aid can either help to bridge the gap or serve to widen it.”³²⁷ In fact, assistance can be competitive³²⁸ and may dominate power

also of its social, and above all its political, context.”); Herbert H.P. Ma, *The Chinese Concept of the Individual and the Reception of Foreign Law*, 9 J. CHINESE L. 207 (1995) (discussing the cultural barrier to the reception of Western laws in China); Julie Mertus, *Mapping Civil Society Transplants: A Preliminary Comparison of Eastern Europe and Latin America*, 53 U. MIAMI L. REV. 921 (1999) (arguing that foreign legal experts bring with them their own cultural, social, and political misconceptions); Neil Winstock Netanel, *Asserting Copyright's Democratic Principles in the Global Arena*, 51 VAND. L. REV. 217, 274 (1998) (“[A] legal rule or doctrine often operates quite differently, or carries very different symbolic content, when transplanted from the source to the host jurisdiction. Even if a rule is transplanted word-for-word, it may effectively be modified in substance or simply rendered irrelevant in the host country.”).

³²⁵ Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 859 (1987); see also Jessica Litman, *The Exclusive Right to Read*, 13 CARDOZO ARTS & ENT. L.J. 29, 53 (1994) (“The only way that copyright laws get passed in this country is for all the lawyers who represent the current stakeholders to get together. . . . This process has produced laws that are unworkable from the vantage point of people who were not among the negotiating parties.” (footnote omitted)); Netanel, *supra* note 324, at 225-26 (arguing that copyright law represents an uneasy accommodation of competing interests and theoretical premises, which makes direct transplant difficult and uncomfortable); Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197 (1996) (arguing that American copyright protection expands as a result of interest group politics and the need for the nation's elite to protect the status quo).

³²⁶ These problems include the difficulty in monitoring a large territory, in collecting evidence of infringement, and in collecting judgments; widespread corruption; abuse by government officials; different values placed on intellectual property infringement; the indistinguishability between public and private entities; local protectionism; and the decentralization of government. See Yu, *From Pirates to Partners*, *supra* note 92.

³²⁷ JAINE R. WEDEL, COLLISION AND COLLUSION: THE STRANGE CASE OF WESTERN AID TO EASTERN EUROPE 1989-1998, at 6 (1998); *id.* at 7 (“In some

relations.³²⁹ As feminist commentators pointed out, by giving a gift that Antonio cannot reciprocate, Portia settles once and for all Antonio's ambiguous relationship with Bassanio,³³⁰ thus "ensur[ing] that her marriage to Bassanio will be conducted upon hers and not Antonio's terms or the terms of the patriarchal system under which she was wed."³³¹

Even though Shakespeare encouraged people to give and hazard without expecting any return, his ideal world would not be attainable if everybody just took without giving. Thus, China, like the United States, must give and hazard. While China has neither economic profits nor legal expertise to give and hazard, it can adjust its self-strengthening worldview, tone down its xenophobic skepticism toward Western institutions and intellectual property rights, and modify its concept of absolute national sovereignty.

So far, many Chinese, including their leaders, considered intellectual property rights as "goodly apple[s] rotten at the heart" (1:3:96). According to these people, the West has specifically designed intellectual property rights to protect its hegemony,³³² to drain the Chinese purse,³³³ and to slow down China's economic progress and its rise in world affairs.³³⁴

instances, unwitting donors sustained and even reinforced those legacies through their sheer misunderstanding of them.").

³²⁸ See Karen Newman, *Portia's Ring: Unruly Women and Structures of Exchange in The Merchant of Venice*, in *NEW CASEBOOK*, *supra* note 238, at 117, 118 ("[G]ift giving can be competitive . . .").

³²⁹ *Id.* at 122; see also Nicholas D. Kristof, *Asians Worry That U.S. Aid Is a New Colonialism*, N.Y. TIMES, Feb. 17, 1998, at A4 (reporting the concerns of the Asian countries that the American assistance efforts may create a new form of colonialism).

³³⁰ Newman, *supra* note 328, at 124-25.

³³¹ Oldrieve, *supra* note 244, at 99.

³³² Lampton, *supra* note 322, at 121; see Yue Ren, *China's Perceived Image of the United States: Its Sources and Impact*, in *THE OUTLOOK FOR U.S.-CHINA RELATIONS FOLLOWING THE 1997-1998 SUMMITS: CHINESE AND AMERICAN PERSPECTIVES ON SECURITY, TRADE AND CULTURAL EXCHANGE* 247, 262 (Peter Koehn & Joseph Y.S. Cheng eds., 1999) ("From the Chinese point of view, Washington is sensitive to any power that might pose a challenge to its hegemonic position.").

³³³ Tara Kalagher Giunta & Lily H. Shang, *Ownership of Information in a Global Economy*, 27 GEO. WASH. J. INT'L L. & ECON. 327, 331 (1993) (stating that the less developed countries consider intellectual property rights as a means of draining their scarce government resources).

³³⁴ See Elizabeth C. Economy, *China's Environmental Diplomacy*, in *CHINA AND THE WORLD: CHINESE FOREIGN POLICY FACES THE NEW MILLENNIUM* 264, 281 (Samuel S. Kim ed., 4th ed., 1998) [hereinafter *CHINA AND THE WORLD*] ("[T]here was increasing discussion in the Chinese media suggesting that sustainable development was part of a master plan by the advanced industrialized countries (and especially the United States) to contain China by forcing it to slow the pace of economic growth in order to protect the environment."); Paul H.B. Godwin, *Force and Diplomacy: China Prepares for the Twenty-first Century*, in *CHINA AND THE WORLD*, *supra*, at 171, 178 ("Beijing is convinced that at the heart of U.S. strategy is

Like "devil[s who] cite scriptures for [their] purpose" (1:3:93), the West seeks to import these "Trojan horses" to divide China, to erode its cultural identity,³³⁵ and to ensure that the nation "follow the path of the former Soviet Union and Eastern Europe—toward economic decay, social unrest, and political instability."³³⁶

However, this perspective is not only misguided, but overlooks the merits of Western institutions, which are important to the country's strategy of economic development, foreign investment, and interstate relations.³³⁷ In fact, adopting an intellectual property regime that harmonizes with Western notions will provide the needed incentives for Chinese authors and inventors to invent, commercialize, and market their

the intent to delay, if not prevent, China's emergence as great power in the twenty-first century; that the United States views China as the principal contender for the predominant position of the United States in Asia."); Michel Oksenberg, *Taiwan, Tibet and Hong Kong in Sino-American Relations*, in *LIVING WITH CHINA*, *supra* note 321, at 53, 56 ("[The Chinese leaders] believe that foreign leaders tend to be reluctant to welcome China's rise in world affairs and would prefer to delay or obstruct its progress."). *But see* BERNSTEIN & MUNRO, *supra* note 322, at 204 ("The goal of the United States is not a weak and poor China; it is a China that is stable and democratic, that does not upset the balance of power in Asia, and that plays within the rules on such matters as trade and arms proliferation."); Lee H. Hamilton, *Introduction* to *BEYOND MFN*, *supra* note 322, at 1, 5 ("The U.S. interest is served by China's continuing economic development, for the sake of both improving the material welfare of the Chinese people and fostering political liberalization.").

³³⁵ See SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* 223 (1996) ("By 1995, a broad consensus reportedly existed among the Chinese leaders and scholars that the United States was trying to divide China territorially, subvert it politically, contain it strategically and frustrate it economically." (internal quotations omitted)); Hamilton, *Introduction*, *supra* note 334, at 7 ("[T]he United States must avoid creating the impression within China's elite that it intends to bring down the current system or divide the country. That, of course, is not the U.S. objective.").

³³⁶ Harry Harding, *Breaking the Impasse over Human Rights*, in *LIVING WITH CHINA*, *supra* note 321, at 165, 172. *But see* Hamilton, *Introduction*, *supra* note 334, at 4 ("China's stability is in the U.S. interest.").

³³⁷ Yu, *From Pirates to Partners*, *supra* note 92; Yu, *Succession by Estoppel*, *supra* note 177, at 100; *see* Robert Sherwood, *Why a Uniform Intellectual Property System Makes Sense for the World* [hereinafter Sherwood, *Why a Uniform Intellectual Property System Makes Sense*], in *GLOBAL DIMENSIONS OF INTELLECTUAL PROPERTY RIGHTS IN SCIENCE AND TECHNOLOGY* 68, 83 (Michael B. Wallerstein et al. eds., 1993) [hereinafter *GLOBAL DIMENSIONS OF INTELLECTUAL PROPERTY RIGHTS*] ("Strong intellectual property safeguards seem likely to speed rather than retard progress toward world-class achievement."); *see also* CORNE, *supra* note 129, at 1 ("[F]or continued economic development, [China] needs to further amplify economic linkages with West and Japan."); *id.* at 284 ("Law's overt purpose is to assist China's modernization by replacing policy decree and customary practices with a stable universal framework of normative behaviour.").

products.³³⁸ It will increase foreign investment,³³⁹ thus creating new jobs³⁴⁰ and facilitating technology transfer.³⁴¹ It will also promote indigenous industries and technologies³⁴² and will generate considerable tax

³³⁸ Yu, *From Pirates to Partners*, *supra* note 92.

³³⁹ EDWIN MANSFIELD, *INTELLECTUAL PROPERTY PROTECTION, FOREIGN DIRECT INVESTMENT AND TECHNOLOGY TRANSFER* (1994); Thomas Lagerqvist & Mary L. Riley, *How to Protect Intellectual Property Rights in China*, in *PROTECTING INTELLECTUAL PROPERTY RIGHTS IN CHINA*, *supra* note 187, at 7, 8 (listing the loss of foreign investment and know-how as a cost of counterfeiting); Antonio Medina Mora Icaza, *The Mexican Software Industry*, in *GLOBAL DIMENSIONS OF INTELLECTUAL PROPERTY RIGHTS*, *supra* note 337, at 232, 236 ("Intellectual property rights protection in a country is a way to seek the trust of foreign investors in the country that will allow its economy to grow."); Josh Martin, *Copyright Law Reforms Mean Better Business Climate*, J. COM., Mar. 7, 1996, at 1C, 1C (reporting on a World Bank survey that demonstrates the correlation between intellectual property rights and foreign investment); A.R.C. Westwood, *Preface* to *GLOBAL DIMENSIONS OF INTELLECTUAL PROPERTY RIGHTS*, *supra* note 337, at v, vi ("Clearly, a company will not be enthusiastic about doing business in a country unwilling to provide protection for the intellectual content of its products—a concern now facing U.S. businesses as they evaluate opportunities in the former Soviet Union."); *see also* Robert M. Sherwood, *Intellectual Property Systems and Investment Stimulation: The Rating of Systems in Eighteen Developing Countries*, 37 IDEA 261 (1997) (using foreign investment as one of the variables in measuring intellectual property protection in a less developed country); *Mickey Mouse in China*, N.Y. TIMES, June 3, 1993, at D4 (reporting that Disney bought Mickey Mouse back to China after a self-imposed four-year absence due to copyright infringements). *But see* A. Samuel Oddi, *The International Patent System and Third World Development: Reality or Myth?*, 1987 DUKE L.J. 831, 849 ("In the complex decisionmaking process of whether to invest in a foreign country, the availability of patent protection seems unlikely to be a determinative factor.").

³⁴⁰ Lagerqvist & Riley, *supra* note 339, at 9; *see* PRICEWATERHOUSECOOPERS, *CONTRIBUTION OF THE SOFTWARE INDUSTRY TO THE CHINESE ECONOMY* 4 (1998) (estimating that a 60% decrease in piracy would translate into more than 79,000 jobs).

³⁴¹ MANSFIELD, *supra* note 339, at 20 ("[T]he strength or weakness of a country's system of intellectual property protection seems to have a substantial effect, particularly in high-technology industries, on the kinds of technology transferred by many U.S. firms to that country."); SUSAN K. SELL, *POWER AND IDEAS: NORTH-SOUTH POLITICS OF INTELLECTUAL PROPERTY AND ANTITRUST* 214 (1998) (arguing that an operational intellectual property regime will promote foreign investment); Edmund W. Kitch, *The Patent Policy of Developing Countries*, 13 UCLA PAC. BASIN L.J. 166, 175-76 (1994) (same).

³⁴² *See* Robert P. Merges, *Battle of the Lateralisms: Intellectual Property and Trade*, 8 B.U. INT'L L.J. 239, 246 (1990) ("A recording industry flourished in Hong Kong for the first time after passage of a copyright act protecting sound recordings; the Indian software industry saw a growth surge after a copyright was extended to software . . ."); Sherwood, *Why a Uniform Intellectual Property System Makes Sense*, *supra* note 337, at 72 ("There are reports that immediately after Mexico reformed its patent law in June 1991, large numbers of patent applications were filed by Mexican

revenues for the country.³⁴³ It may even help prevent the large variety of domestic problems that would arise due to inadequate intellectual property protection.³⁴⁴

In addition, China needs to give and hazard its protectionist trade barriers, such as quotas, import licensing, import substitution and local content policies, unnecessarily restrictive certification and quarantine standards, and export performance requirements.³⁴⁵ It also needs to eliminate the restrictions on foreign investment and trade contained in its industrial policies and to provide full trading rights to foreign companies.³⁴⁶ Given the significant difference between Chinese and Western legal systems,³⁴⁷ it is also essential that China promote transparency by publishing laws, regulations, and related measures and procedures and by making available the informal administrative "guidance" or "approval" used in its rulemaking.³⁴⁸

nationals."); *id.* ("A small but striking example of before-and-after shift comes from Columbia where copyright protection for software took effect in 1989. More than 100 Columbian nationals have since produced application software packages that have been registered with the copyright office, with hundreds more written but not registered.").

³⁴³ Lagerqvist & Riley, *supra* note 339, at 9; see PRICEWATERHOUSECOOPERS, *supra* note 340, at 4 (estimating that a 60% decrease in piracy would translate into more than \$466 million in government revenues).

³⁴⁴ These problems include, among others, illnesses and deaths caused by adulterated drugs and counterfeit products, higher prices businesses and educational centers have to pay for to make up for the potential infringement by their fellow citizens and organizations, the consumers' reluctance to purchase in the open market, and brain drain. See Yu, *From Pirates to Partners*, *supra* note 92.

³⁴⁵ See *id.*; see also WILLIAM H. OVERHOLT, *THE RISE OF CHINA: HOW ECONOMIC REFORM IS CREATING A NEW SUPER POWER* 381 (1993) (discussing China's protectionist trade barriers); see also *id.* ("China is trying to export like a capitalist and import like a communist." (quoting statement of Ambassador Arthur W. Hummel, Jr.)).

³⁴⁶ Bloch, *supra* note 322, at 214; Yu, *From Pirates to Partners*, *supra* note 92.

³⁴⁷ See discussion *supra* Part II.F (discussing the difference between Chinese and Western legal systems).

³⁴⁸ See Bloch, *supra* note 322, at 215; Yu, *From Pirates to Partners*, *supra* note 92; see also CHEN, *supra* note 8, at 85 ("There is no legal requirement for all *guizhang* to be published, and some of it is in fact regarded as internal or not published."); CORNE, *supra* note 129, at 72 ("Many *banfa*, *guiding* and *guize* are never promulgated or issued to the public and are only intended for the eyes of government officials. They are merely designated a serial number and then appear in the internal document series of a certain department."); Sylvia Ostry, *China and the WTO: The Transparency Issue*, 3 UCLA J. INT'L L. & FOREIGN AFF. 1 (1998) (arguing that the lack of transparency in China will obstruct its accession to the WTO); Pearson, *supra* note 322, at 170 ("[T]he trading system remained far from transparent, a problem exacerbated by the still less-than-reliable accounting system and statistical reporting.").

China also needs to give and hazard its concept of absolute national sovereignty.³⁴⁹ Although China has repeatedly emphasized the importance of this concept, the need for global cooperation has drastically weakened the foundation of this principle.³⁵⁰ To resolve domestic

³⁴⁹ China considers state sovereignty as the most fundamental principle of international law and society. Yu, *Succession by Estoppel*, *supra* note 177, at 88 & n.207; see also CHINA RISING: NATIONALISM AND INTERDEPENDENCE 181 (David S.G. Goodman & Gerald Segal eds., 1997) ("China is the rearguard great power when it comes to the erosion of state sovereignty."); see also U.N. CHARTER art. 2, ¶ 7 ("Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state . . .").

Indeed, some commentators argued that "the trend toward international agreements and the formation of international institutions are consistent with the basic desire of government to maintain their sovereignty." Enrico Colombatto & Jonathan R. Macey, *A Public Choice Model of International Economic Cooperation and the Decline of the Nation State*, 18 CARDOZO L. REV. 925, 926 (1996). As Professors Colombatto and Macey explained:

All else equal, regulators would prefer not to cede or to share authority with their counterparts from other countries. Thus, regulators in a particular country generally will not sacrifice autonomy by coordinating their activities with regulators from other countries. . . . [H]owever, . . . technological change, market processes, and other exogenous variables may deprive the regulators in a particular country of the power to act unilaterally. Such change can cause regulators acting alone to become irrelevant. When this happens, the regulators in a particular country will have strong incentives to engage in activities such as international coordination in order to survive.

Id.

³⁵⁰ See David de Pury, *Drawing National Democracies Towards Global Governance*, in THE URUGUAY ROUND AND BEYOND: ESSAYS IN HONOR OF ARTHUR DUNKEL 171, 171 (Jagdish Bhagwati & Mathias Hirsch eds., 1998) [hereinafter URUGUAY ROUND AND BEYOND] ("Global governance is what is needed to make an increasingly global world economy function better and ensure sustainable world-wide growth and development."); Harding, *supra* note 336, at 177 (stating that the need for global cooperation has weakened the principle of national sovereignty); John O. McGinnis, *The Decline of the Western Nation State and the Rise of the Regime of International Federalism*, 18 CARDOZO L. REV. 903 (1996) (arguing that a new regime of "international federalism" has replaced the regime of nation states); see also ABRAM CHAYES & ANOTNIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS 27 (1995) ("[F]or all but a few self-isolated nations, sovereignty no longer consists in the freedom of states to act independently, in their perceived self-interest, but in membership in reasonably good standing in the regimes that make up the substance of international life."); *id.* ("Sovereignty, in the end, is status—the vindication of the state's existence as a member of the international system. In today's setting, the only way most states can realize and express their sovereignty is through participation in the various regimes that regulate and order the international system."); STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY (1999) (contending that states have never been as sovereign as scholars have argued); DENNIS ROY, CHINA'S FOREIGN

problems that have ramifications beyond national frontiers, states often have to cooperate with each other.³⁵¹ Even the United States, which has been known to favor unilateral actions, has had to and "is [still] going through difficult adaptations to the demands of global institutions, international law, multinational companies, and transnational financial networks and the loss of exclusive national decision-making power associated with them."³⁵²

Finally, China needs to give and hazard its focus on internal development as it makes transition to a world power.³⁵³ World power status is glamorous, but it does come with a price. This price may entail the sacrifice of a country's own internal development, its sovereignty, and its decisionmaking power. In the joint statement issued after the 1997 U.S.-China Summit, the Presidents of China and the United States acknowledged the two countries' "common responsibility to work for peace and prosperity in the 21st century."³⁵⁴ Given this significant responsibility, China, like the United States, has to assume the role to maintain international peace and order and has to set examples for other countries.³⁵⁵

RELATIONS 231 (1998) ("[S]tates are not the only important actors in international relations, but must share the stage with non-government organizations, international institutions, and multinational corporations."); ARNOLD WOLFERS, DISCORD AND COLLABORATION 27 (1962) ("Co-operation means sacrificing some degree of national independence with a view to co-ordinating, synchronizing, and rendering mutually profitable some of the political, military, or economic policies the co-operating nations intend to pursue."); John H. Jackson, *The Uruguay Round Results and National Sovereignty*, in URUGUAY ROUND AND BEYOND, *supra*, at 293, 294 ("No sensible persons today would agree that [absolute] sovereignty legitimately exists anywhere in the world."). For a collection of essays discussing the decline of the nation state and the implications of such a decline, see Symposium, *The Decline of Nations State and Its Effects on Constitutional and International Economic Law*, 18 CARDOZO L. REV. 903 (1996).

³⁵¹ These problems include, to name a few, illicit drug trafficking, refugees, illegal immigration, environmental degradation, illegal arms sales, nuclear proliferation, terrorism, bribery, and corruption. See Judith H. Bello, *National Sovereignty and Transnational Problem Solving*, 18 CARDOZO L. REV. 1027, 1027 (1996) ("Many of the most difficult problems that challenge nation states in the increasingly interdependent world do not respect borders. . . . Nation states acting alone are helpless to resolve or most effectively alleviate these problems.").

³⁵² Lampton, *supra* note 322, at 123; see Johan D. van der Vyver, *Universality and Relativity of Human Rights: American Relativism*, 4 BUFF. HUM. RTS. L. REV. 43, 66 (1998) (criticizing the United States's reluctance in ratifying international human rights instruments).

³⁵³ See Yu, *From Pirates to Partners*, *supra* note 92.

³⁵⁴ Joint Statement, *supra* note 322, at 1681.

³⁵⁵ See Yu, *From Pirates to Partners*, *supra* note 92.

B. *The U.S.-China Intellectual Property Debate Is Deceived with Ornament*

Shakespeare's teaching on deceptive appearance is particularly relevant to the U.S.-China intellectual property conflict. To understand the failure of the current intellectual property law reforms and ineffectiveness of existing American intellectual property policy toward China, one must be able to distinguish between appearance and reality. One must also be vigilant, and sometimes even skeptical, when assessing the extent of the Chinese piracy problem or its impact on the U.S. economy.³⁵⁶ After all, "[a]ll that glisters is not gold" (2:7:65).

On appearance, China's piracy problem is attributable to its lack of intellectual property laws. In reality, thanks to the United States's coercive efforts in the past two decades, China has on its books one of the most comprehensive intellectual property laws around the world. At a breakneck rate, China has acceded to virtually all the major multilateral intellectual property conventions available and has become a member of WIPO. Indeed, Chinese copyright laws grant rights that are not available under the U.S. counterpart, such as the right of integrity in one's work regardless of the work's medium.³⁵⁷

On appearance, the United States's coercive foreign intellectual property policy has been effective in facilitating immediate compliance and inducing short-term concessions,³⁵⁸ such as those improvements made during the first few months immediately after the signing of a new intellectual property agreement. Such a policy has also successfully induced China to introduce new laws and institutions along the Western model. In reality, the coercive policy has very little success in eradicating the Chinese piracy problem. In 1995, the United States lost only \$1 billion of annual revenues due to intellectual property piracy in China.³⁵⁹ By 1998, this figure had doubled to \$2 billion,³⁶⁰ despite the Chinese government's

³⁵⁶ See *id.*

³⁵⁷ Compare Copyright Law, *supra* note 59, art. 10(vi) (protecting the right of integrity of all works), with Visual Artists Rights Act, 17 U.S.C. § 106A(a)(3) (1994) (protecting the right of integrity of only works of visual art). See also FENG, *supra* note 18, at 94-101 (discussing moral rights under Chinese copyright law).

³⁵⁸ ALFORD, *supra* note 4, at 118; see also CHAYES & CHAYES, *supra* note 350, at 89 ("On the record, it cannot be said that unilateral economic sanctions imposed by the United States have been uniformly ineffective in inducing other countries to fulfill treaty obligations. In some issue areas they have worked at least moderately well in a fair proportion of cases."); Alan O. Sykes, *Constructive Unilateral Threats in International Commercial Relations: The Limited Case for Section 301*, 23 LAW & POL'Y INT'L BUS 263, 313 (1992) ("Section 301 is fairly successful at inducing foreign governments to modify their practices when they are accused of violating U.S. legal rights. . . . [S]uccess is more likely with a GSP beneficiary . . .").

³⁵⁹ Tony Munroe, *Action Aside, Chinese Intellectual Property Hasn't Slowed*, WASH. TIMES, Aug. 31, 1995, at B7.

³⁶⁰ Faison, *China Turns Blind Eye*, *supra* note 95.

increased efforts to combat piracy and the public's heightened awareness of intellectual property rights.

The U.S. foreign intellectual property policy fails for several reasons. First, it "fail[s] to generate[] the type of domestic rationale and conditions needed to produce enduring change."³⁶¹ It also fails to promote the underlying values that support voluntary compliance with the law.³⁶² As Portia cautions us, "to do good [were not as easy as] to know what were good to do [One] can easier teach twenty what / were good to be done, than one of the twenty to / follow [one's] own teaching" (2:2:12-17). Laws alone are insufficient, no matter how well they are enforced. They must be accompanied by a legal culture that fosters voluntary compliance.³⁶³ In light of the entrenched antipathy toward laws and legal process in China, such a legal culture is particularly needed.

³⁶¹ ALFORD, *supra* note 4, at 118; *see also* CHAYES & CHAYES, *supra* note 350, at 32 ("[T]he experience in the international arena is that unilateral sanctions in the more coercive form of military or economic penalties are but infrequently and sporadically deployed to redress violations of treaty obligations, and are not very effective when they are."); SELL, *supra* note 341, at 177 ("If targeted countries do not accept the value orientation preferred by the powerful state, and no politically influential domestic constituency favors the new policies, one can expect nonimplementation and robust domestic resistance."); *id.* at 212 ("The fact that developing countries have not vigorously enforced these new policies suggests that domestic opposition is still robust."); Geller, *supra* note 324, at 203 ("A full-scale copyright law, backed by widespread values supporting its enforcement, would seem more effective [than police measures]."); Marshall A. Leaffer, *Protecting United States Intellectual Property Abroad: Toward a New Multilateralism*, 76 IOWA L. REV. 273, 278 (1991) ("A durable agreement must be based on mutual gain and cannot be imposed by the information-producing countries on the developing world.").

³⁶² *See* YU, *From Pirates to Partners*, *supra* note 92. These values include legitimacy and morality. To provide legitimacy, the United States must abandon its coercive policy, which drastically undercuts the legitimacy of intellectual property rights. Such a policy makes the Chinese people suspicious of the willingness of their government to adhere to and enforce the new legal regime forced upon their country. To provide morality, the United States can educate the Chinese populace about the rationales behind intellectual property protection and the wrongful nature of appropriating other's intellectual property. The United States can also make the Chinese aware of the benefits of intellectual property rights and the damages inadequate intellectual property protection can inflict upon the growing Chinese economy. Furthermore, it can alert the Chinese to the harmful effects of using counterfeit products and make them aware that what looks like a bargain may end up costing more in the long run.

³⁶³ Tom R. Tyler, *Compliance with Intellectual Property Laws: A Psychological Perspective*, 29 N.Y.U. J. INT'L L. & POL. 219, 234 (1997); *see* CORNE, *supra* note 129, at 8 ("Law's effectiveness depends on shared social values. Law is apparently an autonomous agency which depends on and mirrors particular social and cultural conditions."); Hamilton, *TRIPS Agreement*, *supra* note 106, at 616 ("Intellectual property is nothing more than a socially-recognized, but imaginary, set of fences and

Second, the U.S. policy ignores the sensitive and significant political, social, economic, and cultural differences between China and the West.³⁶⁴ It also ignores the various problems within the Chinese legal system, not to mention the distinctive differences between Chinese and Western laws.³⁶⁵ Among the current problems are the lack of rule of law,³⁶⁶ lack

gates. People must believe in it for it to be effective.”); Jessica Litman, *Copyright Noncompliance (Or Why We Can't "Just Say Yes" to Licensing)*, 29 N.Y.U. J. INT'L L. & POL. 237, 239 (1997) (“People don’t obey laws that they don’t believe in. It isn’t necessarily that they behave lawlessly, or that they’ll steal whatever they can steal if they think they can get away with it.”); see also Jessica Litman, *Copyright as Myth*, 53 U. PRR. L. REV. 235 (1991) (examining the difference between the prevailing public myth of copyright and existing copyright statute and case law); Faison, *China Turns Blind Eye*, *supra* note 95 (“We take copyright violations very seriously, . . . but when it comes to copying a disk, most Chinese people don’t see what’s wrong.” (quoting Xu Guojie, senior official in Shanghai’s Industrial and Commercial Administration)).

³⁶⁴ See discussion *supra* Part II.A-E (discussing the political, social, economic, and cultural differences between China and the West).

³⁶⁵ See discussion *supra* Part II.F (discussing the distinctive differences between Chinese and Western laws).

³⁶⁶ As one commentator explained:

Law’s overt purpose is to assist China’s modernization by replacing policy decree and customary practices with a stable universal framework of normative behaviour. However, in practice the reverse is occurring—law in its application to society is being readjusted in accordance with extra-legal norms in the course of implementation. There has been little inclination on the part of regulators and the regulated to internalize the norms and ideals underlying the legal regime. Enforcement patterns reflect whether or not one can attract the patronage of the ‘right official’ for the personalized ‘quick fix’ rather than codified substantive or procedural norms.

CORNE, *supra* note 129, at 284-85. While the Chinese government has instituted a series of reforms to promote the rule of law and professionalism in judges, lawyers, procurators, and law enforcement officers, the courts are still marred by the limited independence of the judicial branch, intertwining relationship between courts and the Chinese Communist Party, the court’s vulnerability to outside influence, the judges’ susceptibility to bribery and corruption, underfunding, abuse of government officials, and local protectionism. See Yu, *From Pirates to Partners*, *supra* note 92; see also ALFORD, *supra* note 4, at 118 (“[W]ithout a concomitant nurturing of the institutions, personnel, interests, and values capable of sustaining a liberal, rights-based legality[,] . . . freestanding foreign-derived rules on rarified private property rights, held in significant measure by foreign parties, are, ultimately, of limited utility.”); Berkman, *supra* note 80 (arguing that promotion of the rule of law is needed to eradicate the piracy problem). For comprehensive discussions of rule of law in China, see generally CHINA’S LEGAL REFORMS (Stanley Lubman ed., 1996); DOMESTIC LAW REFORMS IN POST-MAO CHINA (Pitman B. Potter ed., 1994); KEITH, *supra* note 217; LIMITS OF THE RULE OF LAW, *supra* note 205; STANLEY B. LUBMAN, BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO (1999); MURRAY SCOTT TANNER, THE POLITICS OF LAWMAKING IN POST-MAO CHINA: INSTITUTIONS, PROCESSES AND DEMOCRATIC PROSPECTS (1999); Stanley B. Lubman, *Studying Contemporary Chinese Law: Limits,*

of transparency within the court system,³⁶⁷ confusion caused by conflicting laws and regulations,³⁶⁸ confusion and rivalry within the enforcement apparatus,³⁶⁹ and corruption.³⁷⁰ Without reforms that are sensitive to these problems, the piracy problem will likely continue.

Possibilities, and Strategy, 39 AM. J. COMP. L. 293 (1991) (discussing how Chinese laws are regarded as an instrument to enforce policy).

³⁶⁷ See CORNE, *supra* note 129, at 54 ("Issued by the implementing authority itself, [administrative rules and circulars] are not necessarily published and are inherently changeable, subject as they are to the whims of agency officials."); SHIZHONG DONG ET AL., *TRADE AND INVESTMENT OPPORTUNITIES IN CHINA: THE CURRENT COMMERCIAL AND LEGAL FRAMEWORK* 5 (1992) ("[T]here are unpublished guidelines promulgated by the Supreme People's Court of the PRC or by the higher People's Courts that are usually followed by the lower courts when deciding cases.").

³⁶⁸ See Yu, *Progress, Problems, and Proposals*, *supra* note 125, at 153 (citing as example the lack of coordination between the trademark law and the Regulations on the Administration of the Registration of Enterprise Names); Gregory S. Kolton, Comment, *Copyright Law and the People's Courts in the People's Republic of China: A Review and Critique of China's Intellectual Property Courts*, 17 U. PA. J. INT'L ECON. L. 415, 450 (1996) ("Chinese law is a confusing array of laws and regulations; there may be no law on point or the laws that do exist may contradict one another.").

³⁶⁹ See MILTON MUELLER & ZIXIANG TAN, *CHINA IN THE INFORMATION AGE: TELECOMMUNICATIONS AND THE DILEMMAS OF REFORM* 47 (1997) ("China's administrative structure fostered self-reliance within each ministry. Department heads had every incentive to expand their own empires and little incentive to contract out for services that could be provided by others."); Chow, *supra* note 95, at 31-33 (describing the rivalries among the various parallel government entities charged with public enforcement against counterfeiting); Yu, *Progress, Problems, and Proposals*, *supra* note 125, at 154 (pointing out the difficulty in coordinating between requests, actions, and decisions when a case involves more than one intellectual property claim); *id.* ("If the intellectual property owner wants to appeal the administrative decisions to a court, he may have to appeal to different divisions. And it is also not entirely clear which procedures he should follow. He may very well end up in a civil procedure for one claim and an administrative litigation procedure for the other claim.").

³⁷⁰ See BROWN, *supra* note 229, at 130 ("[J]udges in China, like many civil servants in the world do not receive high compensation which renders the 'wayward,' at least susceptible to bribery and corruption."); Chow, *supra* note 95, at 30-31 ("Some local enforcement officials ask for payments, case fees, or gifts such as mobile phones from trademark owners in exchange for conducting enforcement actions."); *see also id.* at 37 ("Issues over whether there has been adequate funding of the courts has raised concerns that effective judicial administration is hampered and more subject to corruption where 'outside' economic support may induce court officials to seek political and economic support, exposing them to political influence."). In the last few years, China has made a significant effort to combat corruption. *See China Issues New Codes on Prosecution of Corruption*, CHINA BUS. INFO. NETWORK, Sept. 17, 1999, available at 1999 WL 17731146; Anthony Kuhn, *China Executes Ex-Official for Corruption*, L.A. TIMES, Sept. 15, 2000, at A1 (reporting on the execution of a former vice chairman of the National People's Congress who was convicted of receiving five

Third, the United States fails to educate government officials, judges, and the general populace about the benefits of and rationales behind intellectual property rights.³⁷¹ At present, many Chinese officials, especially those at the local level, do not understand the necessity and urgency of protecting individual intellectual property interests.³⁷² To many of these people, intellectual property laws were, more or less, unjustly forced upon the country by the United States, rather than legitimately introduced by their leaders. Once international attention is diverted and the pressure from their leaders dissipates, these officers will loosen their enforcement of these "unjust" laws.³⁷³ Moreover, most Chinese judges lack experience and expertise in intellectual property cases.³⁷⁴ The acute shortage of lawyers, in particular intellectual property lawyers, has also made it difficult for businesses to obtain advice and services that would help them protect and enforce their intellectual property rights.³⁷⁵

Finally, the United States fails to rally the support of Chinese intellectual property holders. It also fails to develop a lobby that aims to protect their own interests.³⁷⁶ As the American foreign antitrust policy has

million dollars in bribes); Tom Korski, *China Premier Pledges Drive Against Corruption, Economic and Copyright Crimes*, Pat. Trademark & Copyright L. Daily (BNA), at D2 (Mar. 5, 1997) ("More than 400 senior Communist officials have been imprisoned or executed for corruption in the past six months, by official estimate, while 2,522 state employees have been fired for 'disciplinary reasons.' . . . Chinese prosecutors initiated probes into more than 78,000 corruption cases last year, according to state agencies."). Unfortunately, like the intellectual property piracy problem, the Chinese government has yet to succeed in this area.

³⁷¹ See Yu, *From Pirates to Partners*, *supra* note 92.

³⁷² Hu, *supra* note 105, at 105; see also Tiefenbrun, *supra* note 130, at 37 ("The failure to reduce or eradicate piracy of intellectual property in China is also due to the serious misconceptions of the very notion of ownership by the Chinese people and by their government leaders.").

³⁷³ Yu, *From Pirates to Partners*, *supra* note 92.

³⁷⁴ This lack of experience and expertise becomes even more devastating in light of China's inquisitorial judicial system. Under the inquisitorial system, judges must gather facts on their own. They must also search a confusing array of laws and regulations to determine which law to apply. A judge who has inadequate training or experience will likely be incompetent to perform these difficult tasks. See Kolton, *supra* note 368, at 450; Yu, *From Pirates to Partners*, *supra* note 92.

³⁷⁵ See Yu, *From Pirates to Partners*, *supra* note 92.

³⁷⁶ As commentators explained:

[U]ltimately, the strongest voices in China are always Chinese, and the most convincing arguments for development and enforcement of strict [intellectual property rights] protocols in China have come from those Chinese organizations which are starting to discover that they have intellectual property worth protecting. More and more MNCs are finding that one of the best ways to fight Chinese pirates is to seek out or help create Chinese organizations which share the same interest.

Donaldson & Weiner, *supra* note 313, at 417; see HELEN V. MILNER, INTERESTS, INSTITUTIONS AND INFORMATION: DOMESTIC POLITICS AND INTERNATIONAL RELA-

demonstrated, "the sustainability of the new direction in developing countries will depend on both the emergence of politically powerful domestic constituencies committed to the new direction, and the ability of interested private parties to mobilize these constituents to uphold and enforce these policies."³⁷⁷ Without a well-organized intellectual property lobby, China lacks the essential domestic constituencies that are needed to push for and to sustain continuous intellectual property law reforms and enforcement efforts.³⁷⁸

On appearance, the coercive intellectual property policy is promoting the United States's economic interests. In reality, unilateral sanctions tend to hurt American businesses without any guarantee of change.³⁷⁹ Today, goods produced in the United States are also produced in Europe

TIONS 239 (1997) (arguing that the legislature would likely to adopt a proposal that it does not fully understand when it can depend on one or more informed domestic groups to signal it about the proposal); *see also* Giunta & Shang, *supra* note 333, at 331 ("[U]nlike Western countries, developing countries have few strong lobbies of inventors, authors or companies that would benefit from strict intellectual property laws or the enforcement thereof."); Eric M. Griffin, Note, *Stop Relying on Uncle Sam!—A Proactive Approach to Copyright Protection in the People's Republic of China*, 6 TEX. INTELL. PROP. L.J. 169, 191 (1998) ("Intellectual property is simply too new a concept within China to have any strong lobbies of inventors, authors, or companies.").

³⁷⁷ SELL, *supra* note 341, at 216; *see also* Gary M. Hoffman & George T. Marcou, *Combating the Pirates of America's Ideas*, 7 COMPUTER LAW. 8, 12 (1990) ("The local recording industry in Indonesia, for example, helped significantly in convincing the Indonesian government to pass an effective copyright law."). The difference between the foreign intellectual property and antitrust policies clearly demonstrates the sharp distinction between overt coercion and persuasion. *See* SELL, *supra* note 341, at 13.

³⁷⁸ *See* Yu, *From Pirates to Partners*, *supra* note 92.

³⁷⁹ Bloch, *supra* note 322, at 206; Yu, *From Pirates to Partners*, *supra* note 92; *see also* CHAYES & CHAYES, *supra* note 350, at 22 ("[I]f we are correct that the principal source of noncompliance is not wilful disobedience but the lack of capability or clarity or priority, then coercive enforcement is as misguided as it is costly."); Mark A. Groombridge, *China's Accession to the World Trade Organization: Costs and Benefits*, in CHINA'S FUTURE: CONSTRUCTIVE PARTNER OR EMERGING THREAT 165, 178 (Ted Galen Carpenter & James A. Dorn eds., 2000) [hereinafter CHINA'S FUTURE] ("If one looks at the history of using economic sanctions as a weapon . . . , there is a clear and consistent trend: multilateral sanctions sometimes work; unilateral sanctions almost never do."); W. Bowman Cutter et al., *New World, New Deal; A Democratic Approach to Globalization*, FOREIGN AFF., Mar./Apr. 2000, at 80, 92 (arguing that unilateral economic sanctions not only failed to achieve their goals but have cost the United States about \$20 billion in lost exports, 200,000 jobs, and the goodwill and trust of its allies abroad). *But see* Richard W. Parker, *The Problem with Scorecards: How (and How Not) to Measure the Cost-effectiveness of Economic Sanctions*, 21 MICH. J. INT'L L. 235 (2000) (pointing out the difficulty in measuring the effectiveness of economic sanctions and the methodological challenges confronting empirical studies regarding economic sanctions); *see also* Jagdish Bhagwati, *Trade Linkage and Human Rights*, in URUGUAY ROUND AND BEYOND, *supra* note 350, at 241, 243

and Japan. As "the growth prospects for the U.S. economy . . . have become increasingly dependent on exports,"³⁸⁰ a confrontational policy will hurt American businesses significantly. On the one hand, the uncertain trade relations will induce risk-averse American businesses to limit their business in China to avoid risks. On the other hand, due to their unreliability as long-term suppliers as a result of turbulent U.S.-China relations, many American businesses will be replaced by their foreign competitors.³⁸¹ Even worse, the trade threats, repeated conversion attempts, and constant bullying have sparked a new resurgence of nationalism and xenophobia in China that may result in "day-to-day bureaucratic actions that hold back, divert, or delay action on U.S. companies' permits, applications, and bids."³⁸² If these sentiments continue to grow, they may even lead to boycotts of American products or harassment of American businesses.³⁸³

At the global level, a coercive policy will threaten the integrity of the international trading system and may even lead to its collapse.³⁸⁴ It would also lead to criticism from other countries, thus alienating the United States from its trading partners.³⁸⁵ Moreover, such a policy may

(arguing that moral absolutists are willing to suffer economic harm even though the sanctions may not result in any policy changes).

³⁸⁰ Bloch, *supra* note 322, at 205; see also Jeffrey E. Garten, *Business and Foreign Policy*, FOREIGN AFF., May/June 1997, at 67, 69-70 ("[T]he health of the American economy is more closely linked to foreign markets than ever before. The country can no longer generate enough growth, jobs, profits, and savings from domestic sources.").

³⁸¹ See OVERHOLT, *supra* note 345, at 381.

³⁸² Bloch, *supra* note 322, at 209.

³⁸³ To highlight these possibilities, one commentator entitled a chapter of his book "To Screw Foreigners Is Patriotic." GEREMIE R. BARMÉ, IN THE RED: ON CONTEMPORARY CHINESE CULTURE 255-80 (1999).

³⁸⁴ Makoto Kuroda, *Super 301 and Japan*, in AGGRESSIVE UNILATERALISM, *supra* note 63, at 219, 220-21; Yu, *From Pirates to Partners*, *supra* note 92; see Helen Milner, *The Political Economy of U.S. Trade Policy: A Study of the Super 301 Provision*, in AGGRESSIVE UNILATERALISM, *supra* note 63, at 163, 176-77 ("Aggressive, bilateral reciprocity violates central tenets of the postwar international trading system."); see also CHAYES & CHAYES, *supra* note 350, at 100 ("The central lesson the drafters [of GATT] took from interwar history was that unilateral action on trade questions and disputes led ultimately to the collapse of the international trading system."); Leaffer, *supra* note 361, at 297 (arguing that unilateral action "tend[s] to fragment the world trading system . . . [by creating] resentment, particularly among Third World countries who view imposed bilateral agreements as a species of colonialism"); *id.* (arguing that the United States's unilateral sanctions "run counter to U.S. long-term interests for a healthy, stable trade environment"). But see William Safire, *Smoot-Hawley Lives*, N.Y. TIMES, Mar. 17, 1983, at A23 (arguing that protectionism may be the only solution to unfair competition from foreign countries).

³⁸⁵ Cheng, *supra* note 322, at 1979; Yu, *From Pirates to Partners*, *supra* note 92; see also GATT Bill Brings Major Reforms to Domestic Intellectual Property Law, 11 Int'l

lead to unrevised adoption by emerging democracies which are constantly looking to the policies of Western democracies, in particular the United States, for guidance in their economic transition.³⁸⁶ The United States has taken a tremendous effort to create the TRIPs Agreement and to build an international intellectual property system. Ironically, its foreign intellectual property policy is attempting to destroy what it has worked so hard to achieve.³⁸⁷

In fact, the repercussions of the existing coercive policy are not only limited to the trade arena. By demonstrating that a country should rely heavily on pressure and ultimata to protect its economic interests, the existing coercive policy backfires and jeopardizes the United States's longstanding interests in promoting human rights and civil liberties in China. It also discredits the very important message that one should respect rights and the legal process.³⁸⁸ Even worse, it provides China with "a convenient legitimization for repressive measures [the Chinese

Trade Rep. (BNA) 50 (Dec. 21, 1994) (noting the dissatisfaction of the less developed countries over the United States's ability to impose Special 301 sanctions despite their compliance with TRIPs); David Hartridge & Arvind Subramanian, *Intellectual Property Rights: The Issues in GATT*, 22 VAND. J. TRANSNAT'L L. 893, 909 (1989) ("It is indeed hard to see why many states should accept new multilateral commitments in [the intellectual property] area if they remain vulnerable to unilateral actions.").

³⁸⁶ ROBERT W. MCGEE, A TRADE POLICY FOR FREE SOCIETIES: THE CASE AGAINST PROTECTIONISM 160 (1994) (footnotes omitted); Yu, *From Pirates to Partners*, *supra* note 92; see also Whitmore Gray, *The Challenge of Asian Law*, 19 FORDHAM INT'L L.J. 1, 5-6 (1995) ("After the Second World War, however, a new era of global interaction of legal systems developed. U.S. economic dominance reinforced the idea that U.S. legal institutions and, particularly, recent U.S. substantive law, should be considered as normal models for modernization.").

³⁸⁷ Assafa Endeshaw, *Commentary: A Critical Assessment of the U.S.-China Conflict on Intellectual Property*, 6 ALB. L.J. SCI. & TECH. 295, 337-38 (1996); Yu, *From Pirates to Partners*, *supra* note 92; see also Oddi, *supra* note 339, at 874 (arguing that the American unilateral actions and its existing approach toward the protection of patents and mask works "ha[ve] raised a significant question of its continued commitment to the principle of national treatment").

³⁸⁸ Alford, *Making the World Safe for What?*, *supra* note 2, at 143; Yu, *From Pirates to Partners*, *supra* note 92; see Berkman, *supra* note 80, at 42 ("If the system requires action by the powerful elite within the government, the Party, or both to ensure enforcement, rule of law is replaced by rule of men."); Robert Burrell, *A Case Study in Cultural Imperialism: The Imposition of Copyright on China by the West*, in INTELLECTUAL PROPERTY AND ETHICS 195, 198 (Lionel Bently & Spyros M. Maniatis eds., 1998) ("[The Western approach toward China] suggests that the western governments are more concerned with property rights than with the more fundamental rights of China's population."); see also J.H. Reichman & David Lange, *Bargaining Around the TRIPS Agreement: The Case for Ongoing Public-Private Initiatives to Facilitate Worldwide Intellectual Property Transactions*, 9 DUKE J. COMP. & INT'L L. 11, 48 (1998) ("Coercion is . . . a delicate, risky, and possibly

authorities] intended to take in any event while simultaneously constraining America's capacity to complain about such actions."³⁸⁹

Apart from the Americans, the Chinese also need to distinguish between appearance and reality. Blinded by its skepticism toward Western institutions, China fails to understand the merits of intellectual property rights or to take advantage of the intellectual property law reforms that are currently introduced. Although the Chinese economy has not reached the stage where information goods and services will become a major sector, a well functioning intellectual property regime will allow China to trade effectively with other Western countries, thus gaining their acceptance in the international community. In addition, such a regime will allow China to take advantage of the new globalization trends and e-commerce opportunities. It will also provide the substantial capital needed for the modernization process.

In fact, while China is undergoing modernization, the harmonization process will provide China with a full grasp of the Western intellectual property regime. This grasp will help the Chinese leaders understand the principles behind Western economic systems and anticipate the problems that may occur during the critical transitional period. It will also allow the leaders to assess the strengths and weaknesses of a market economy and to design an economic development strategy that matches China's present conditions.³⁹⁰

Unlike what many Chinese have believed, intellectual property rights are not only reserved for countries that have advanced technology.³⁹¹ Western technology is undeniably far more advanced than what is currently produced in China. However, different countries have different technological needs.³⁹² A product or technology that is suitable to a

counterproductive strategy, one that could easily backfire on those governments that succumb to this temptation.").

³⁸⁹ Alford, *Making the World Safe for What?*, *supra* note 2, at 144-45. For example, to comply with the Western demands to curtail piracy, the Chinese authorities have enlisted the help of some of their toughest law enforcers, including those who are notorious for gross human rights violations, to clean up the pirate factories. *See id.* at 143. In addition, to create a deterrent effect and to demonstrate to the West their eagerness in eradicating the piracy problem, these authorities have enforced the death penalty and life imprisonment on infringers in severe cases. *See* ALFORD, *supra* note 4, at 91 (stating that China has imposed death penalty on at least four individuals, life sentences on no fewer than five others, and imprisonment on some 500 people for trademark violations); Tom Korski, *China Sentences Three to Life in Prison for CD Piracy in Harshes Sanction So Far*, Pat. Trademark & Copyright L. Daily (BNA), at D2 (Dec. 11, 1997). Even though the piracy figure may have dropped, the number of human rights violations has risen. *See* Yu, *From Pirates to Partners*, *supra* note 92.

³⁹⁰ *See* Yu, *From Pirates to Partners*, *supra* note 92.

³⁹¹ *Id.*

³⁹² *See* Kitch, *supra* note 341, at 172 ("The developing countries have their own, unique needs.").

Western developed country may not be suitable to China. Thus, China still has to provide adequate intellectual property protection in order to create incentives for domestic authors and inventors to invent, commercialize, and market their products. In fact, such protection will allow consumers to identify their favorite local products and may even help China "open up market opportunities in export markets."³⁹³

Furthermore, the Chinese culture is not completely incompatible with Western intellectual property notions.³⁹⁴ Consider, for example, the Confucian tradition of interaction with the past.³⁹⁵ Even though the Chinese civilization emphasizes this tradition, Chinese poets and literary theorists have disagreed as to the extent of reproduction.³⁹⁶ Indeed, "as Confucius demonstrated in undertaking to edit the Classics and to comment on them in the *Analects*, transmission . . . entailed selection and adaptation if it was to be meaningful to oneself, one's contemporaries, and one's successors."³⁹⁷ Thus, traditional Chinese culture does not call for *verbatim* reproduction. Rather, it calls for transformative use of preexisting works that is tailored to the user's needs and conditions. Such use, and the ability to do so, will demonstrate the user's comprehension of and devotion to the core of the Chinese civilization and his or her ability to distinguish the present from the past through original thoughts.³⁹⁸

³⁹³ Janet H. MacLaughlin et al., *The Economic Significance of Piracy*, in INTELLECTUAL PROPERTY RIGHTS: GLOBAL CONSENSUS, GLOBAL CONFLICT? 89, 104 (R. Michael Gadbaw & Timothy J. Richards eds., 1988); Yu, *From Pirates to Partners*, *supra* note 92; see also Kitch, *supra* note 341, at 168 (arguing that inadequate trademark protection encourages competition policies that reduce the competitiveness of local products in export markets); *China: Famous Beijing Roast Duck Restaurant Secures Trademark*, CHINA BUS. INFO. NETWORK, Jan. 20, 1999, available at 1999 WL 5617961 (describing the importance of trademark protection to Beijing Quanjude Roast Duck Restaurant, which is world renowned for its roast ducks).

³⁹⁴ Yu, *From Pirates to Partners*, *supra* note 92. Compare XIANFA art. 20 (1982) (amended Mar. 29, 1993) ("The state promotes the development of natural and social sciences, disseminates knowledge of science and technology, and commends and rewards achievements in scientific research as well as technological innovations and inventions."), and *id.* art. 47 ("The state encourages and assists creative endeavors conducive to the interests of the people that are made by citizens engaged in education, science, technology, literature, art and other cultural work."), with U.S. CONST. art. I, § 8, cl. 8 ("The Congress shall have Power . . . to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.").

³⁹⁵ See *supra* text accompanying notes 96-105.

³⁹⁶ See ALFORD, *supra* note 4, at 26-29 ("[O]ver 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." *Id.* at 26).

³⁹⁷ *Id.* at 25; see YAO, *supra* note 96, at 50 (noting that Confucius's editing and commentaries have added value to the classics).

³⁹⁸ Cf. ALFORD, *supra* note 4, at 29.

This emphasis of transformative use is similar to what the United States Supreme Court pronounced in *Campbell v. Acuff-Rose Music, Inc.*³⁹⁹ In *Campbell*, a music publisher brought a copyright infringement action against the rap band, 2 Live Crew, for its salacious rap parody of the song "Oh, Pretty Woman." Emphasizing that transformative works are important to promote the constitutional goal of copyright, the Court held that the rap band's rendition of the song constituted fair use and did not infringe upon the publisher's copyright.⁴⁰⁰

Finally, abiding by a law-based intellectual property regime would protect China against further bullying by the United States and other Western developed countries. At the moment, because China is not a member of the WTO, the West has a lot of discretion over what policies and actions they can take when they trade with China. Unfortunately, "discretion . . . can become arbitrariness, and worse than injustice is arbitrariness, the negation of law."⁴⁰¹ As Judge Richard Posner pointed out insightfully, an unpopular alien like Shylock would naturally "mistrust a jurisprudence that gave judges a broad discretion to mitigate the rigors of legal rules, for he could expect any discretion to be exercised against him."⁴⁰² The majority may not need the law to protect its rights because it has numbers to prevail in the political realm; the minority, however, has to rely on the law, for the law may be its only protection.⁴⁰³ If China abides by a law-based regime, the regime may deter foreign governments from undertaking arbitrary actions that are mainly designed to alleviate domestic political pressure.⁴⁰⁴

C. *The Two Countries Should Strive for Harmony*

Shakespeare's teaching on interdependence and his platonic worldview are important to the development of Sino-American relations,⁴⁰⁵ in par-

³⁹⁹ 510 U.S. 569 (1994).

⁴⁰⁰ See *id.* at 579 ("[T]he goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright" (citation and footnote omitted)).

⁴⁰¹ KORNSTEIN, *supra* note 231, at 74.

⁴⁰² POSNER, *supra* note 122, at 97; see also KORNSTEIN, *supra* note 231, at 74 ("[F]or such a victim of discrimination [like Shylock], it is entirely logical and reasonable [for him] . . . to trust in the apparent severity of a rigid but certain interpretation of law than in the discretion of a system that has already shown its bias.").

⁴⁰³ POSNER, *supra* note 122, at 97.

⁴⁰⁴ See *Editorial Surprise! A Deal with China*, WALL ST. J., June 18, 1996, at A22 (arguing that the eleventh-hour compromise during the negotiation of the 1995 Agreement had helped the Clinton administration gain its "domestic political mileage").

⁴⁰⁵ For recent discussions of China's foreign policy, see generally BERNSTEIN & MUNRO, *supra* note 322; CHINA AND THE WORLD, *supra* note 334; CHINA'S FUTURE,

ticular how the two countries conduct their foreign intellectual property policies. While harmony promotes cooperation and maximizes the utility of scarce natural resources, discordance alienates nations and creates tensions and confrontations. Thus, both countries should embrace the platonic worldview in developing their bilateral relations.

Needless to say, being the only remaining superpower after the disintegration of the Soviet Union, the United States is a very important player in both the global economy and world politics.⁴⁰⁶ The United States is also a very important trading partner to China, absorbing a third of China's exports.⁴⁰⁷ A healthy and harmonious relationship with the United States is therefore very important and beneficial to China. If bilateral relations deteriorated and trade wars took place, the confrontation would disrupt China's modernization process and would very likely put an end to its continuous economic growth. This economic downturn would alienate the diasporic Chinese communities⁴⁰⁸ and would force China to "retreat into a new kind of isolationism."⁴⁰⁹ Not only would

supra note 379; CHINA JOINS THE WORLD, *supra* note 322; CHINESE FOREIGN POLICY: THEORY AND PRACTICE (Thomas W. Robinson & David Shambaugh eds., 1998); WARREN I. COHEN, AMERICA'S RESPONSE TO CHINA: A HISTORY OF SINO-AMERICAN RELATIONS (4th ed., 2000); HARRY HARDING, A FRAGILE RELATIONSHIP: THE UNITED STATES AND CHINA SINCE 1972 (1992); MICHAEL H. HUNT, THE GENESIS OF CHINESE COMMUNIST FOREIGN POLICY (1996); ANDREW J. NATHAN & ROBERT S. ROSS, THE GREAT WALL AND THE EMPTY FORTRESS: CHINA'S SEARCH FOR SECURITY (1997); ROY, *supra* note 350; OUTLOOK FOR U.S.-CHINA RELATIONS, *supra* note 332.

⁴⁰⁶ HENRY R. NAU, THE MYTH OF AMERICA'S DECLINE: LEADING THE WORLD ECONOMY INTO THE 1990's (1990); Samuel P. Huntington, *The U.S.—Decline or Renewal?*, FOREIGN AFF., Winter 1988/1989, at 76; Jacek Kugler & A.F.K. Organski, *The End of Hegemony?*, 15 INT'L INTERACTIONS 113 (1989); Yu, *From Pirates to Partners*, *supra* note 92. *But see* HSÜ, *supra* note 33, at 959-60 ("Although the United States was generally considered the only remaining superpower, its strength was compromised by its large national debt, debilitating budgetary deficit, and serious domestic problems."); PAUL KENNEDY, THE RISE AND FALL OF THE GREAT POWERS: ECONOMIC CHANGE AND MILITARY CONFLICT FROM 1500 TO 2000 (1987) (discussing the relative decline of the American economic and military power).

⁴⁰⁷ Bloch, *supra* note 322, at 198.

⁴⁰⁸ Yu, *From Pirates to Partners*, *supra* note 92; *see also* HUNTINGTON, *supra* note 335, at 170-71 (describing the importance of diasporic Chinese communities).

⁴⁰⁹ MICHAEL YAHUDA, HONG KONG: CHINA'S CHALLENGE 4 (1996).

China fail to regain its past glory,⁴¹⁰ but it might remain dominated by the West in the rest of the twenty-first century.⁴¹¹

By the same token, China is an important trading partner to the United States,⁴¹² providing an attractive market that contains one-fifth of the world population.⁴¹³ If China's current economic development continues, China will become one of the three largest economies in the world by the early twenty-first century.⁴¹⁴ China thus will be more important to the United States than Japan, Mexico, Canada, or Russia.⁴¹⁵ Indeed, in the years to come, China may even join the United States as a super-

⁴¹⁰ See BERNSTEIN & MUNRO, *supra* note 322, at 4 (arguing that China considers its legacy to take up the great power role); *id.* at 56 ("The last half century in short saw China acquiring the conditions for renewed historic greatness."); Hsü, *supra* note 33, at 991 ("There is a new confidence in the Chinese psyche, and many believe that the country's destiny is on the ascent and that it is time for China to assert its own 'Manifest Destiny.'").

⁴¹¹ See Michael B. McElroy & Chris P. Nielsen, *Energy, Agriculture, and the Environment: Prospects for Sino-American Cooperation*, in LIVING WITH CHINA, *supra* note 321, at 217, 248 ("China's rise to superpower status will mark the end of an era, the centuries-long monopoly of world economic and political power by nations of the West.").

⁴¹² Yu, *From Pirates to Partners*, *supra* note 92; see OVERHOLT, *supra* note 345, at 365 ("China presents the United States with the greatest opportunities of the coming generation, for instance, the largest market in the 1990s for aircraft, power plants, and telecommunications . . .").

⁴¹³ See NATHAN & ROSS, *supra* note 405, at 17 (explaining the importance of China's demographic size); see also ADAM SMITH, *THE WEALTH OF NATIONS* bk. I, ch. 8 (Penguin Books 1986) (1776) ("The most decisive mark of the prosperity of any country is the increase of the number of its inhabitants."). But see Endeshaw, *supra* note 387, at 333 ("[E]ven if China enforces United States intellectual property rights according to the recent agreement and establishes a level playing field, the demand for United States movies and software will not emerge from the general populace.").

⁴¹⁴ Daniel A. Sharp, *Preface* to LIVING WITH CHINA, *supra* note 321, at 9. But see Samuel S. Kim, *Chinese Foreign Policy in Theory and Practice*, in CHINA AND THE WORLD, *supra* note 334, at 3, 7 ("[B]ecause of the localizing pressures from below and new risks and challenges (e.g., rising unemployment, expanding floating population, growing income inequality, mounting environmental pressures, incomplete market reforms, trade frictions), China will not so easily become the economic superpower that many have predicted."); Mann, *supra* note 322 (arguing that China's economic explosion has created a remarkable buildup of inventories of low-quality goods that were produced but will never be sold).

⁴¹⁵ Sharp, *supra* note 414, at 9. But see Gerald Segal, *Does China Matter*, FOREIGN AFF., Sept./Oct. 1999, at 24 (arguing that China's importance in the global economy and world politics is overexaggerated); NATHAN & ROSS, *supra* note 405 (arguing that China is a vulnerable power whose most pressing security problems are powerful rivals at its own borders).

power in the world.⁴¹⁶ As President Clinton pointed out, "the role China chooses to play will powerfully shape the [twenty-first] century."⁴¹⁷

In military terms, China is also very important to the United States. Despite criticism of the backwardness of Chinese military forces,⁴¹⁸ "[a]ny long-term peaceful solution to the conflicting territorial claims in the South China Sea will require China's active cooperation."⁴¹⁹ Because China holds a permanent seat in the United Nations Security Council, the United States needs China's support, through either an affirmative vote or an abstention, in order to gain U.N. support of its peacekeeping initiatives.⁴²⁰ Past initiatives included forcing Iraq to withdraw from Kuwait and maintaining peace in Cambodia and the former Yugoslavia. Furthermore, China has the ability to produce weapons of mass destruction, such as missiles, nuclear technology, and chemical weapons.⁴²¹ Its ability to export these deadly weapons overseas therefore makes China strategically important to the United States.⁴²²

To promote harmony with this emerging power, the United States must abandon its confrontational policy. "[D]iplomacy, by its very nature, requires tact; it cannot succeed if the other party is discountenanced and

⁴¹⁶ Ezra F. Vogel, *Introduction* to *LIVING WITH CHINA*, *supra* note 321, at 17, 18.

⁴¹⁷ Peter Koehn & Joseph Y.S. Cheng, *Introduction* to *OUTLOOK FOR U.S.-CHINA RELATIONS*, *supra* note 332, at 1 (quoting President Clinton's *Remarks on U.S.-China Relations in the 21st Century*).

⁴¹⁸ See NATHAN & ROSS, *supra* note 405, at 137-57 (discussing the backwardness of China's military forces); Segal, *supra* note 415 (same). But see BERNSTEIN & MUNRO, *supra* note 322, at 64-65 ("[T]he essential measure of any country's military strength is not its absolute power, but its power relative to others, and in this sense China is already by far the most powerful country in Asia, and it is rapidly becoming even more powerful."); see also Richard D. Fisher, Jr., *The Accelerating Modernization of China's Military*, in *BETWEEN DIPLOMACY AND DETERRENCE: STRATEGIES FOR U.S. RELATIONS WITH CHINA* 97 (Kim R. Holmes & James J. Przystup eds., 1997) [hereinafter *BETWEEN DIPLOMACY AND DETERRENCE*] (noting the impressive growth of military capabilities of the People's Liberation Army). See generally *CHINA'S MILITARY FACES THE FUTURE* (James R. Lilley & David Shambaugh eds., 1999) for a collection of essays examining China's military power and its implications for security in East Asia.

⁴¹⁹ James Lilley, *Trade and the Waking Giant—China, Asia, and American Engagement*, in *BEYOND MFN*, *supra* note 322, at 36, 55; Yu, *From Pirates to Partners*, *supra* note 92.

⁴²⁰ Lilley, *supra* note 419, at 54-55; Yu, *From Pirates to Partners*, *supra* note 92.

⁴²¹ JAMES MANN, *ABOUT FACE: A HISTORY OF AMERICA'S CURIOUS RELATIONSHIP WITH CHINA, FROM NIXON TO CLINTON* 228 (2000).

⁴²² See *id.* ("China could succeed in demonstrating its strategic importance to the United States by threatening to sell dangerous weapons overseas."); see also *id.* ("China was now important to the United States not because of the help it could provide (against the Soviet Union), but because of the potential harm it might do (by exporting missiles and nuclear technology).").

left humiliated.”⁴²³ The existing policy and on-and-off relations not only humiliate and alienate China, but also impair the success of American businesses in competing against their Japanese and European counterparts for the Chinese market.⁴²⁴ Thus, the United States should assess China’s emerging world power status, reexamine the basic assumptions of the existing international order, and work together with China to forge a new order that would “bring about productive cooperation with the least cost and disruption to the [existing] global system.”⁴²⁵

The “constructive strategic partnership” model, which the Chinese and American leaders pronounced after the U.S.-China Summit in 1997, provides the model environment for nurturing such a new international order.⁴²⁶ Instead of challenging the other’s “core values” or competing

⁴²³ DE BARY, *supra* note 124, at 9.

⁴²⁴ See Bloch, *supra* note 322, at 206 (“[T]he Chinese government will react to sanctions by becoming even more hostile to the United States and by switching from U.S. products to European and Japanese ones.”); *China and France Will Study Developing a 100-Seat Jet*, N.Y. TIMES, Apr. 12, 1996, at D2 (reporting that China gave a European consortium the rights to develop a new hundred-seat airliner in response to the United States’s trade threats); Tony Walker et al., *Li Peng Backs Trade with “More Lenient” Europeans*, FIN. TIMES, June 11, 1996, at 1, (“If the Europeans adopt more co-operation with China in all areas, not just in economic areas but also in political and other areas, then I believe the Europeans can get more orders from China.” (statement of Chinese Premier Li Peng)); Craig R. Whitney, *China Awards Huge Jet Order to Europeans*, N.Y. TIMES, Apr. 11, 1996, at A1 (reporting that Chinese Premier Li Peng went to France to sign a \$1.5-billion order for thirty short-haul Airbus planes, instead of Boeing planes); see also Bloch, *supra* note 322, at 209 (“Among the biggest beneficiaries of America’s crackdown on copyright piracy in China . . . are Bertelsmann of Germany and Sony of Japan.”); Garten, *supra* note 380, at 71 (“If Boeing does not play by China’s rules, Airbus will. If AT&T does not meet Brazilian requirements, Alcatel would be happy to help.”); *id.* (“Unilateral sanctions only put U.S. firms at a major disadvantage vis-à-vis their rivals.”); Lampton, *supra* note 322, at 137 (arguing that the Japanese and European competitors seek to “promote their own commercial advantages by portraying Washington as the sole factor preventing China’s entry” into the WTO); Haiying Zhao, *Sino-U.S. Economic Relations Across Time and Space*, in OUTLOOK FOR U.S.-CHINA RELATIONS, *supra* note 332, at 207, 216 (“Given the current world economic landscape, the United States has to compete with Europe and Japan in the emerging Chinese market, and China has to compete with other developing countries in the U.S. market.”); Cheng, *supra* note 322, at 1978 (“Repetitive threats of trade sanctions might cause China to lose patience with the United States and switch to Europe, Japan, and Russia for trade and technology transfers.”); David E. Sanger, *U.S. Blames Allies for Undercutting Its China Policy*, N.Y. TIMES, June 12, 1996, at A1 (reporting that the Clinton administration accused Europe and Japan of exploiting the United States’s efforts to force China to respect trade accords).

⁴²⁵ Lampton, *supra* note 322, at 122.

⁴²⁶ See Yu, *From Pirates to Partners*, *supra* note 92. Since the announcement of the partnership, commentators and policymakers have downplayed the significance of the new model. While some regarded the partnership as “more symbolic than

against the other under a zero-sum game,⁴²⁷ the model recognizes the other's sensitive differences and calls for a resolution of those differences in a nonconfrontational manner.⁴²⁸ The new model also allows for an efficient dialogue between the two countries, thus helping the other understand its present and future strategic intentions and national objectives. This dialogue will also help reduce the mutual suspicion between the two countries.⁴²⁹

To establish this dialogue, both China and the United States must understand each other better⁴³⁰ and "deal with [the other] as it exists and is becoming, not as some imagine it or hope it to be."⁴³¹ To this end, the

substantive," some refused to speculate and contended that the partnership "lacks a clear definition." Nevertheless, by creating a "principled" position, the partnership model has significant implications when viewed within the context of Chinese negotiating behavior. See generally OUTLOOK FOR U.S.-CHINA RELATIONS, *supra* note 332, for an excellent collection of essays discussing the 1997-1998 U.S.-China Summits and the constructive strategic partnership model.

⁴²⁷ See Yebai Zhang, *Can a "Constructive Strategic partnership" Be Built Up Between China and the United States*, in OUTLOOK FOR U.S.-CHINA RELATIONS, *supra* note 332, at 142, 144 ("[A] partnership is quite different from the big-power relations of the past; it is a new pattern of relations among major powers who possess different histories, cultures, social systems, and levels of economic development together with broad common interests and deep differences.").

⁴²⁸ Xinbo Wu, *China and the United States: Toward an Understanding on East Asian Security*, in OUTLOOK FOR U.S.-CHINA RELATIONS, *supra* note 332, at 69, 83.

⁴²⁹ Xinghao Ding, *Basis for a Constructive Strategic Partnership Between China and the United States*, in OUTLOOK FOR U.S.-CHINA RELATIONS, *supra* note 332, at 157, 164.

⁴³⁰ Ding, *supra* note 429, at 161; Yu, *From Pirates to Partners*, *supra* note 92; see also MILNER, *supra* note 376, at 20 ("[T]he uncertainty created by incomplete or asymmetric information leads to outcomes that prevent optimal levels of exchange or that foster conflict. In other words, incomplete information leads to inefficient outcomes."); *id.* at 259 ("[W]hen assessing other countries' behavior, policy makers should make sure they understand the domestic situation their foreign counterparts face."); ARTHUR STEIN, *WHY NATIONS COOPERATE: CIRCUMSTANCE AND CHOICE IN INTERNATIONAL RELATIONS* 58 (1990) ("[I]t is universally suggested that the result of misconception is conflict that would have been otherwise avoidable. Although international conflicts are often attributed to misperception, international cooperation never is.").

⁴³¹ Hamilton, *Introduction*, *supra* note 334, at 4. As Professor Ren explained: An image is a perception of a reality. In this sense, there is no "real image." Under normal conditions, how an individual acts toward an object is determined by his or her image, or perception, of that object. Such images are rooted in personal beliefs and attitudes and shaped by experience. This property of image makes it difficult for changes to take place. Furthermore, an image "may cause people to make self-serving attributions and permit them to believe what they want to believe because they want to believe it."

Ren, *supra* note 332, at 247, 248 (quoting Ziva Kunda, *The Case for Motivational Reasoning*, 108 PSYCHOL. BULL. 487 (1990)).

two countries need to foster more exchanges (in particular educational and cultural ones) between academics, professionals, and government officials.⁴³² They also have to organize joint conferences, seminars, and research projects that help identify the common interests of and differences between the two countries.⁴³³ Given the significant differences between the two countries, these exchanges and joint projects will help the other understand its position, intention, and national objectives. They will also help reduce the mutual suspicion between the two countries and be conducive to maintaining a stable, healthy, and harmonious bilateral relationship.

In addition to joint projects, the U.S. government needs to encourage and sponsor research related to China. So far, American scholars, policy-makers, the mass media, and the general public have very limited understanding of China, in particular its political institutions and decisionmaking processes⁴³⁴ and how it conducts its foreign affairs.⁴³⁵

⁴³² Yu, *From Pirates to Partners*, *supra* note 92; see Ding, *supra* note 429, at 167 (arguing that both China and the United States should encourage more exchanges at every level of government and society, especially educational and cultural exchanges, to help understand the other better); Gregory P. Fairbrother & Gerard A. Postiglione, *Teaching About China in America: Shaping the Perspectives of a Generation*, in *OUTLOOK FOR U.S.-CHINA RELATIONS*, *supra* note 332, at 267 (arguing for the incorporation of China-related content in the U.S. social-studies curriculum); Yu, *From Pirates to Partners*, *supra* note 92; see also Fairbrother & Postiglione, *supra*, at 432 ("Schools have the potential to influence the formation of public opinion about China and improve relations at the citizens' level by teaching specific information about issues important in present-day China and U.S.-China relations and by enhancing students' abilities to assess reports in the popular media objectively."); *China: Sino-US Seminar on Intellectual Property Rights Closes*, CHINA BUS. INFO. NETWORK, Sept. 21, 1998, available at 1998 WL 13494566 (reporting on a joint seminar between Chinese and U.S. experts in Chongqing that explored the relations between intellectual property protection and economic development).

⁴³³ See Ding, *supra* note 429, at 167; Yu, *From Pirates to Partners*, *supra* note 92; *China Fair of Inventions, New Technologies Opens in US*, CHINA BUS. INFO. NETWORK, Sept. 2, 1999, available at 1999 WL 17730900 (reporting on the China Fair of Inventions and New Technologies, an event co-sponsored by the State Intellectual Property Office of China and the US-China Council for International Exchange, Inc. to promote better understanding and cooperation between the United States and China in the intellectual property area); see also YVES L. DOZ & GARY HAMEL, *ALLIANCE ADVANTAGE: THE ART OF CREATING VALUE THROUGH PARTNERING* 80 (1998) (emphasizing the importance of creating an interface so that the partners can learn from each other).

⁴³⁴ See David Bachman, *Domestic Sources of Chinese Foreign Policy*, in *CHINA AND THE WORLD: NEW DIRECTIONS IN CHINESE FOREIGN RELATIONS* 31 (Samuel Kim ed., 1989) ("[Domestic factors] have had a greater impact than international factors in shaping Chinese foreign policy."); Kenneth Lieberthal, *Domestic Forces and Sino-U.S. Relations*, in *LIVING WITH CHINA*, *supra* note 321, at 254, 274-75 ("[T]he inability of each nation's leaders . . . to understand and empathize with the domestic

Increased funding for research in this area would provide the United States with the information needed to overcome the obstacles in negotiating with and transacting business in China. It would also provide the American government with the capacity to make a more accurate assessment of the conditions in China. To help create incentives for research in these areas, the American government can "cultivate and reward its foreign service officers, commercial counselors, military officers, and intelligence analysts who have expertise on China."⁴³⁶

Finally, China and the United States can join together to develop a new international intellectual property regime. One should, however, not confuse this new regime with a universalized Western intellectual property regime. The American government "sometimes confuses its natural policy preferences with 'international norms'"⁴³⁷ and ignores the interests of other countries, in particular the less developed countries.⁴³⁸ Due to variations in level of wealth, economic structure, technological capability, political system, and cultural tradition, states' interests and goals differ widely,⁴³⁹ and "[n]o two countries have the same pressures and goals."⁴⁴⁰

political constraints confronting the other side . . . limited both the ability and the desire of each leadership to accommodate the other."); Kenneth Lieberthal, *Domestic Politics and Foreign Policy, in CHINA'S FOREIGN RELATIONS IN THE 1980s* 43 (Harry Harding ed., 1984) ("[Each of China's domestic political campaigns] has had clear and direct implications for its posture toward the rest of the world."); see also BERNSTEIN & MUNRO, *supra* note 322, at 105-29 (describing China's progress in mastering American domestic politics).

⁴³⁵ Michel Oksenberg & Elizabeth Economy, *Introduction to CHINA JOINS THE WORLD*, *supra* note 322, at 1, 39; see QUANSHENG ZHAO, *INTERPRETING CHINESE FOREIGN POLICY* 9 (1996) ("[T]he study of Chinese diplomatic history has become fairly well developed, the study of Chinese foreign policy decisionmaking remains very underdeveloped, and the study of China's foreign relations is barely on the radar scope." (quoting Kenneth Lieberthal)); see also RICHARD H. SOLOMON, *CHINESE NEGOTIATING BEHAVIOR: PURSUING INTERESTS THROUGH 'OLD FRIENDS'* (1999) (noting the peculiarities of Chinese negotiating behavior); Lucian W. Pye, *Understanding Chinese Negotiating Behavior: The Roles of Nationalism and Pragmatism, in BETWEEN DIPLOMACY AND DETERRENCE*, *supra* note 418, at 211 (noting the difference between American and Chinese negotiating behavior).

⁴³⁶ Oksenberg & Economy, *supra* note 435, at 39; Yu, *From Pirates to Partners*, *supra* note 92.

⁴³⁷ Lampton, *supra* note 322, at 133; see also ASSAFA ENDESHAW, *INTELLECTUAL PROPERTY POLICY FOR NON-INDUSTRIAL COUNTRIES* 80 (1996) ("[T]he US drive for stronger protection of IP is more in the direction of devising a new legal regime that answers to its needs than to accommodate within the present conventions upcoming global trends in technology creation and use.").

⁴³⁸ See Burrell, *supra* note 388, at 198 (arguing that the Western approach toward China "fails to respect other voices and other traditions and instead posits the moral superiority of a value system which is far more recent than the tradition it seeks to condemn").

⁴³⁹ RYAN, *supra* note 313, at 191.

Thus, the new regime should take into consideration the political, social, economic, and cultural differences between China and the West.⁴⁴¹ In particular, it should "address the difficulties of reconciling legal values, institutions, and forms generated in the West with the legacy of China's past and the constraints imposed by its present circumstances."⁴⁴²

In constructing this regime, the legal specialists of the two countries need to pay special attention to the structural and ideological assump-

⁴⁴⁰ *Id.* at 201; see also Giunta & Shang, *supra* note 333, at 333 ("Fundamental differences in concepts of ownership and legal regimes provide at least some explanation as to why it has been so difficult to draft a multilateral intellectual property agreement. A favorable agreement for one country could be unfavorable for another country.").

⁴⁴¹ Yu, *From Pirates to Partners*, *supra* note 92; see ENDESHAW, *supra* note 437, at 47 (arguing that less developed countries may be able to modernize if "they manage to grasp the internal dynamic that operates in each of them and devise appropriate economic and technological policies, without neglecting social and political aspects"); *id.* at 98-142 (outlining a proposal for an intellectual property system in non-industrial countries); Vincent Chiappetta, *The Desirability of Agreeing to Disagree: The WTO, TRIPs, International IPR Exhaustion and a Few Other Things*, 21 MICH. J. INT'L L. 333 (2000) (arguing that countries must "agree to disagree" during their negotiation of a multilateral intellectual property regime); Carlos M. Correa, *Harmonization of Intellectual Property Rights in Latin America: Is There Still Room for Differentiation?*, 29 N.Y.U. J. INT'L L. & POL. 109, 129 (1997) ("Differentiation . . . looks desirable in that it permits countries in the Latin tradition to retain a system that responds to their own cultural perceptions of creation and protects the moral and economic rights of all interested parties."); Claudio R. Frischtak, *Harmonization Versus Differentiation in Intellectual Property Rights Regime*, in GLOBAL DIMENSIONS OF INTELLECTUAL PROPERTY RIGHTS, *supra* note 337, at 89 (arguing that countries should tailor their intellectual property system by taking in to account their economic needs, productive and research capabilities, and institutional and budgetary constraints); Oddi, *supra* note 339, at 866-74 (outlining a proposal for a patent system in less developed countries); Robert M. Sherwood et al., *Promotion of Inventiveness in Developing Countries Through a More Advanced Patent Administration*, 39 IDEA 473 (1999) (explaining how to restructure the patent administration in ways that can maximize the contribution of inventors to economic growth and sustained development); Sherwood, *Why a Uniform Intellectual Property System Makes Sense*, *supra* note 337, at 68 ("The first characteristic of the uniform system being proposed is that the specific intellectual property systems being proposed is that the specific intellectual property systems of individual countries need not be identical."); David Silverstein, *Intellectual Property Rights, Trading Patterns and Practices, Wealth Distribution, Development and Standards of Living: A North-South Perspective on Patent Law Harmonization*, in INTERNATIONAL TRADE AND INTELLECTUAL PROPERTY: THE SEARCH FOR A BALANCED SYSTEM 156 (George R. Stewart et al. eds., 1994) ("[A] truly successful IP system must be culturally-specific and responsive to the different economic and social realities of each country."); *id.* at 171 ("[I]t cannot be taken for granted that a Western IP system will be either beneficial to or successful in other countries with different cultures.").

⁴⁴² ALFORD, *supra* note 4, at 2.

tions built within the Western intellectual property regime. The existing Western regime tends to "value the raw materials for the production of intellectual property at zero,"⁴⁴³ ignoring rare and irreplaceable raw materials like folkloric works, works of cultural heritage, and biological and ecological know-how of traditional peoples.⁴⁴⁴ The Chinese civilization has over 4000 years of history and is made up of the majority Han Chinese and a great variety of minority cultures,⁴⁴⁵ bringing with them rich tradition, indigenous art, and native medical knowledge.⁴⁴⁶ The loss of these cultures and cultural knowledge is not only a loss to the Chinese civilization, but to all humanity.⁴⁴⁷

⁴⁴³ BOYLE, *supra* note 119, at 126 (emphasis omitted).

⁴⁴⁴ See Bellagio Declaration, in BOYLE, *supra* note 119, at 192-95. Most recently, some countries and policymakers have emphasized the need for a "cultural exception" in multilateral agreements. See, e.g., Council Directive 89/552 on Television Without Frontiers art. 4, 1989 O.J. (L 298) 26 (requiring that 50% of audiovisual products broadcast over European television to be of European origin); North American Free Trade Agreement, Can.-Mex.-U.S., Dec. 17, 1992, art. 2106, 32 I.L.M. 289, 703 (1992) (providing the cultural industries exemption); William Drozdiak, *With Deadline Looming Before Trade Talks, U.S., France Trade Blame*, WASH. POST, Oct. 16, 1993, at A14 (reporting that the French Cultural Minister argued that culture could not be included in any global trade deal lest it leads to "the mental colonization of Europe and the progressive destruction of its imagination"); Thomas Bishop, *France and the Need for Cultural Exception*, 29 N.Y.U. J. INT'L L. & POL. 187 (1997) (justifying the need for the cultural exception in an international trade agreement).

⁴⁴⁵ "The largest of the fifty-six minority groups are the Zhuangs (15.4 million), Hui or Chinese Muslims (8.6 million), Uyghur (7.2 million), Yi (6.5 million), Tibetans (4.5 million), Miao (7.3 million), Manchus (9.8 million), Mongols (4.8 million). Bouyei (2.1 million), and Koreans (1.9 million)." JAMES C.F. WANG, *CONTEMPORARY CHINESE POLITICS: AN INTRODUCTION* 176 (6th ed. 1999).

⁴⁴⁶ See generally VALUING LOCAL KNOWLEDGE: INDIGENOUS PEOPLE AND INTELLECTUAL PROPERTY RIGHTS (Stephen B. Brush & Doreen Stabinsky eds., 1996) for a collection of essays examining the protection of indigenous knowledge.

⁴⁴⁷ See, e.g., Convention for the Protection of Cultural Property in the Event of Armed Conflict of May 14, 1954, 249 U.N.T.S. 240 (stating that cultural artifacts are the "cultural heritage of all mankind"); Bishop, *supra* note 444, at 187 ("Each country, although it needs to be open to the cultures of other lands, has a right—even a duty—to protect and develop its own culture. This disappearance of one country's culture cannot be made up by another's gain; the result would be an irretrievable loss for all humanity."); Sarah Harding, *Justifying Repatriation of Native American Cultural Property*, 73 IND. L.J. 723, 769 (1997) ("[Cultural property] helps us to understand other cultures and creates a sense of connection, a world-wide culture or common heritage."); J.H. Merryman, *The Public Interest in Cultural Property*, 77 CAL. L. REV. 339, 349 (1989) (arguing that cultural property promote "participation in a common human enterprise"); Yu, *From Pirates to Partners*, *supra* note 92 (arguing that the loss of minority cultures and their cultural knowledge is not only a loss to the Chinese civilization, but to all humanity).

VI. CONCLUSION

The Merchant of Venice is a very rich play. Different people come up with different interpretations and responses. While some may agree that China is the Shylock in the international intellectual property community, some may find this analogy far-fetched. Nevertheless, all of us would tend to agree that those problems facing Shakespeare in his time are still prevalent today in the twenty-first century. “[A]s long as anxieties about racial, national, sexual, and religious difference continue to haunt the way we imagine ourselves and respond to others, Shakespeare’s words will remain ‘not of an age, but for all time.’”⁴⁴⁸ Borrowing ideas from *The Merchant of Venice*, this Article hopes to challenge readers to rethink the U.S.-China intellectual property conflict. The Chinese piracy problem has been troubling the West for more than a century. Perhaps it may be a good idea to look outside the law for insights and solution.

⁴⁴⁸ GROSS, *supra* note 239, at 229; *see also* WARD, *supra* note 292, at 2 (“The debates which engage legal and political theorists today are the same as those which troubled Shakespearean England.”).