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## Professional Responsibility in an Uncertain Profession: Legal Ethics in China

Judith A. McMorrow

Boston College Law School, judith.mcmorrow@bc.edu

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# PROFESSIONAL RESPONSIBILITY IN AN UNCERTAIN PROFESSION: LEGAL ETHICS IN CHINA

#### Judith A. McMorrow\*

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#### I. INTRODUCTION

Over the last thirty years, China has rapidly developed lawyers to implement its growing legal system.<sup>1</sup> The swift expansion of legal education and the legal profession is evident from the numbers. Law schools have grown from eight schools in 1976 to 559 in 2005, with

<sup>\*</sup> Professor of Law, Boston College Law School. Fulbright Professor 2008-2009, Renmin University School of Law, Beijing, China. My thanks to the Fulbright program for providing an opportunity to teach and study in China, to the many Chinese students who spent hours discussing their hopes and dreams, and Prof. Ding Xiangshun, Gerald Clark, Luke Scheuer and the Akron conference participants for their thoughtful comments. As always, I am thankful to the Boston College Law School Fund for its generous support of this research.

<sup>1.</sup> See generally BIN LIANG, THE CHANGING CHINESE LEGAL SYSTEM, 1978-PRESENT: CENTRALIZATION OF POWER AND RATIONALIZATION OF THE LEGAL SYSTEM (2008). This essay will not address the role of judges. For an introduction to this similarly complex subject, see Mo Zhang, International Civil Litigation in China: A Practical Analysis of the Chinese Judicial System, 25 B.C. INT'L & COMP. L. REV. 59 (2002).

450,000 students studying law by the middle of this decade.<sup>2</sup> Today China has over 130,000 lawyers and that cohort is growing.<sup>3</sup>

This emerging legal profession in China is an extraordinary opportunity to test our U.S. assumptions about legal ethics and professionalism.<sup>4</sup> The goal of this essay is to explore the challenges facing Chinese legal education and the Chinese legal profession as it develops norms of legal ethics. This essay starts with two simple questions: Why do law schools in China have so little discussion of legal ethics? Why do students not press or seek more discussion of this topic? The essay then looks at the creation of norms of legal ethics from a top-down perspective and the inadequacy of that approach. Both a bottom-up and top-down examination identify the tremendous challenges facing the Chinese emerging legal culture in building a coherent model of lawyering that can serve as the foundation for a system of legal ethics. This essay is intended as a contribution to the growing English language literature on the Chinese legal profession.<sup>5</sup>

### II. CHALLENGES IN CREATING NORMS OF CONDUCT FOR THE EMERGING CHINESE LEGAL PROFESSION

#### A. The Only Legal Ethics Major in China

China University of Political Science and Law in Beijing has what it describes as the only legal ethics major in China.<sup>6</sup> While this would not seem odd in the United States since we typically do not have majors

<sup>2.</sup> Randall Peerenboom, *Economic Development and the Development of the Legal Profession in China* at 4, http://ssrn.com/abstract=1342287 (last visited Feb. 13, 2009).

Id. For a very good picture of the current state of the Chinese legal profession see Gerald
 Clark, An Introduction to the Legal Profession in China in the Year 2008, 41 SUFFOLK U. L. REV. 833 (2008).

<sup>4.</sup> The model of a market economy in a Communist system has caused many to rethink underlying assumptions in economics, politics, and an array of disciplines. See, e.g., Frank K. Upham, From Demsetz to Deng: Speculations on the Implications of Chinese Growth for Law and Development Theory, 41 N.Y.U. J. INT'L L. & POL. 551 (2009) (rethinking underlying assumptions about relationship between markets and law); Michael William Dowdle, Of Parliaments, Pragmatism, and the Dynamics of Constitutional Development: The Curious Case of China, 35 N.Y.U. J. INT'L L. & POL. 1 (2002) (exploring theories of constitutional development in China's authoritarian regime).

For a bibliography of this growing English language literature on the Chinese legal profession, see Legal Profession in China, http://legalprofessionchina.blogspot.com/ (last visited May 12, 2010).

<sup>6.</sup> Interview with Founder and Current Director of China U. Political Science & Law (CUPL), Legal Ethics major, in Beijing, China (May 18, 2009) (notes on file with author).

within law schools, Chinese graduate legal education is organized around majors. Masters level students select a sub-major such as civil law, international law, or—in one university only—legal ethics. With over 65,000 graduate law students, one might expect more of a legal ethics presence.<sup>8</sup> But this lonely major draws a small number of students, ten or so per year, although a course on professional conduct may be taken by students outside the major. And as with other areas of academic life, there is a chicken-and-egg problem. If the institution does not showcase and promote the major, it is less likely students will select it. 10 Even as an elective in other institutions, legal ethics appears to be a fringe subject in Chinese legal education. Yes, thoughtful U.S. commentators express concern that legal ethics is a fringe subject in U.S. legal education as well. 12 But it is a required course at every U.S. law school and the field has generated an explosion of academic literature and critiques by practitioners in recent years. 13 The field of legal ethics may not be effective in the United States, but it is noisy. Where is the noise in Chinese legal education?

Many factors help explain why legal ethics is simultaneously a quiet, lonely, and inspiring major. This discussion begins from the

<sup>7.</sup> Zeng Xianyi, A Global Odyessy: Legal Education in China, 43 S. Tex. L. Rev. 707, 711 (2002) ("Chinese law schools offer LLM and LLD programs in various specialties").

<sup>8.</sup> Yao Li, John Whalley, Shunming Zhang & Xiliang Zhao, *The Higher Educational Transformation of China and Its Global Implications* 16 (NBER Working Paper Series, 2009), *available at* http://papers.nber.org/papers/w13849.pdf (showing a chart that depicts Chinese graduate students by discipline).

<sup>9.</sup> See Shuzhong Li, On Practical Teaching Modes: Experience from the China University of Political Science and Law, 22 PAC. MCGEORGE GLOBAL BUS & DEV. L.J. 63, 65 (2009) (Provost of CUPL describes research and instruction on legal professional rules of conduct as "one of the most popular subjects among students"). But see Shiwen Zhou, The Reform Strategy of Legal Education in China, 22 PAC. MCGEORGE GLOBAL BUS & DEV. L.J. 69 (2009) ("Traditional legal education [in China] not only ignores students' practical training, but also neglects their professional responsibility training.").

<sup>10.</sup> CUPL interview, supra note 6.

<sup>11.</sup> Zuo Haicong, *Legal Education in China: Present and Future*, 34 OKLA. CITY U.L. REV. 51, 55 (2009) (describing sixteen law courses that make up the basic legal curriculum, which are supposed to embody legal knowledge, including legal ethics, but "[c]urrently Legal Professional Ethics is a weakness in China, and this course is not universally offered in Chinese law schools"); Zeng Xianyi, *supra* note 7.

<sup>12.</sup> See, e.g., Russell G. Pearce, Teaching Ethics Seriously: Legal Ethics as the Most Important Subject in Law School, 29 LOY. U. CHI. L.J. 719 (1998).

<sup>13.</sup> The Association of American Law Schools lists over 1000 professors who teach Professional Responsibility. THE AALS DIRECTORY OF LAW TEACHERS 2009-2010 at 1733-42. The growth of empirical work on the U.S. legal profession and legal ethics is one example of the vibrancy of this academic field. *See, e.g.,* Susan Saab Fortney, *Taking Empirical Research Seriously*, 22 GEO. J. LEGAL ETHICS 1473, 1475 (2009).

perspective of law students and moves outward to examine the social and political forces that may impair a robust discussion of legal ethics both in the classroom and the profession.

#### B. Constraints on Legal Ethics Discussions in Chinese Law Schools

#### 1. The Expansion of Higher Education and Pressure for Jobs

In an effort to build its human capital, the entire system of higher education in China has vastly expanded in the last thirty years. <sup>14</sup> By 2005 China had more than 1700 institutions of higher education offered a variety of majors. <sup>15</sup> By 2006, 620 of these institutions offered a law major. <sup>16</sup>

These figures cannot fully portray the sheer numbers involved. Every year China graduates over 150,000 students who have studied law into a system that cannot absorb college graduates generally, much less provide law-related positions. As with the United States, university graduates in all disciplines face this uncertainty. In China, unemployment for college graduates of all disciplines has steadily risen. As with the United States, there are vast unmet legal needs in China, but there is not yet a strong economic model for service delivery that allows lawyers to make a living while providing legal services to the

<sup>14.</sup> James J. Heckman, *China's Human Capital Investment*, 16 CHINA ECONOMIC REV. 50-70 (2005); Weifang Min, *Chinese Higher Education: The Legacy of the Past and the Context of the Future*, in ASIAN UNIVERSITIES: HISTORICAL PERSPECTIVES AND CONTEMPORARY CHALLENGES 53, 63 (Philip G. Altbach & Toru Umakoshi eds., 2004) ("Education was considered the strategic foundation for economic success given the growing recognition of the need for well-educated manpower, especially high-level specialized personnel."); Yao Li, *supra* note 8.

<sup>15.</sup> Yao Li et al, supra note 8, at 18.

<sup>16.</sup> Miyazawa, intra note 37, at 334.

<sup>17.</sup> Yao Li, supra note 8, at 3-4.

<sup>[</sup>Expansion of higher education] is seemingly not driven by the demand side of labor markets defining potential requirements of labor of different types. One result so far has been a sharp increase in the number of individuals with high educational attainment in various areas independently of the size of respective job markets, and this has created significant short term problems of absorption and unemployment for labor associated with these activities.

Id. See also id. at 15 (showing Table 4, which lists 163,529 graduates in law in 2005).

<sup>18.</sup> Weifang Min, *supra* note 14, at 80 (describing increasing problem of unemployment of university graduates).

<sup>19.</sup> Limin Bai, Graduate Unemployment: Dilemmas and Challenges in China's Move to Mass Higher Education, 185 The CHINA QUARTERLY 128 (2006).

poor. 20 Legal aid exists, but as in the United States, it cannot begin to meet the needs. 21

In a country of high unemployment, even among the relatively elite college graduates, students are searching for majors that increase their chance of getting a job.<sup>22</sup> There are some jobs that intersect with legal ethics and the legal profession, but they are few and far between. Instead, like in the United States, students focus on subjects that are reported to offer the highest chance of getting a job, often related to the private sector, or areas promoted by the government such as environmental law. The lure of high-paying positions with foreign law firms also draws students from the elite institutions to foreign LL.M. degrees. But students face a legal job market, at least for firm positions, in which "most Chinese lawyers are struggling for survival."<sup>23</sup>

This brief overview does not portray the very real social pressure on young college students to get a decent job. Those from the cities and Han majority are likely to be the only child in their family. Although social norms may be changing, there is still a strong social expectation that parents will invest heavily in their children, <sup>24</sup> and the children in

<sup>20.</sup> See Samuel J. Levine & Russell G. Pearce, Rethinking the Legal Reform Agenda: Will Raising the Standards for Bar Admission Promote or Undermine Democracy, Human Rights, and the Rule of Law?, 77 FORDHAM L. REV. 1635, 1662 (2009).

<sup>21.</sup> The particular challenges to a functional legal aid system in China are also, alas, beyond the scope of this essay. See generally Aaron Halegua, Getting Paid: Processing the Labor Disputes of China's Migrant Workers, 26 BERKELEY J. INT'L L. 254, 280-84 (2008); Titi M. Liu, Transmission of Public Interest Law: A Chinese Case Study, 13 UCLA J. INT'L L. & FOR. AFF. 263, 275-83 (2008) (describing government, non-government and clinical education legal aid); Benjamin L. Liebman, Legal Aid and Public Interest Law in China, 34 Tex. INT'L L.J. 211 (1999) (describing early efforts to develop legal aid).

<sup>22.</sup> Limin Bai, supra note 19, at 142 (56 percent of surveyed students enrolled in graduate school for better job opportunities). It appears that law itself is an attractive major because of the career potential. See James V. Feinerman, China's Human Rights Lawyers: Current Challenges and Prospects, Roundtable Before the Congressional-Executive Commission on China, 111th Congress, 1st Sess (July 10, 2009), at 3, available at http://www.cecc.gov/pages/roundtables/ 2009/20090710/Feinerman\_remarks\_20090710.pdf?PHPSESSID=4c9b0c9012ed627fefc9c0dfe1de 0397 ("Law is seen as a lucrative career path for those who pursue certain avenues, as it is in many developed countries."). As with the United States, it is difficult to capture an accurate snapshot of unemployment among college and university graduates. Yu Nanping, Fresh Graduates Face Unemployment, CHINA PERSPECTIVES (JAN.-FEB. 2004) available http://chinaperspectives.revues.org/document786.html.

<sup>23.</sup> Ethan Michelson, The Practice of Law as an Obstacle to Justice: Chinese Lawyers at Work, 40 LAW & Soc'Y REV. 1, 10 (2006).

<sup>24.</sup> Yao Li *et al.*, *supra* note 8, at 13-14 (Chinese Academy of Social Sciences survey "shows that education expenditures for children ranks No.1 in consumption categories for Chinese households, and overwhelms pension and house expenditures.").

turn will help support their parents in old age.<sup>25</sup> To state the obvious, in one-child families this financial interconnection through family ties is no longer shared by a group of siblings, but borne by a single child.<sup>26</sup> The pressure to plan for a long-term and financially successful career is significant.<sup>27</sup>

#### 2. The Continental Model for Legal Education

Second, Chinese students are educated in the continental model, where law is largely an undergraduate major rather than *professional* education.<sup>28</sup> Legal education serves as a general background for many students. Like history or political science majors in the United States, the students graduating from undergraduate law programs in China may go to work for a business or different ministries within the central or local government units where the law connection is not central to the new job. Since many students, at least on the undergraduate level, will not seek a license to practice law, they are unlikely to discuss challenges to legal practice. This also results in fewer institutional incentives to build a professional responsibility model into the law school curriculum.

The focus on academic rather than professional education significantly impacts curriculum perspectives on legal ethics. A professional education purports to educate students to take on a professional role within society. It requires some meaningful consideration of the practice world in developing the curriculum. A purely academic approach does not require the legal programs to consider the daily life of legal practice. As a result, the Chinese legal education is dominated by lectures, taught by professors with little or no

<sup>25.</sup> See generally Zuan Chen & Merrill Silverstein, Intergenerational Social Support and the Psychological Well-Being of Older Parents in China, 22 RESEARCH ON AGING 43 (2000) (noting that in China "filial responsibility of elder care is taken for granted and the majority of older parents are supported by their adult children"). See also Zachary Zimmer & Julia Kwong, Family Size and Support of Older Adults in Urban and Rural China: Current Effects and Future Implications, 40 DEMOGRAPHY 23, 30 (2003) (providing an empirical study indicating that children continue to be the traditional source of support for elderly, with support more likely in rural areas).

<sup>26.</sup> See generally Zimmer & Kwong, supra note 25 at 39-42.

<sup>27.</sup> Consequently, students have an incentive to select the major that provides them maximum flexibility in the labor market. *See generally* Weifang Min, *supra* note 14, at 67.

<sup>28.</sup> See id. at 54.

<sup>29.</sup> Recent critiques of U.S. legal education point out many ways in which the U.S. system could improve its professional education. *See generally* WILLIAM M. SULLIVAN, ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (The Carnegie Foundation for the Advancement of Teaching 2006); ROY STUCKEY *ET AL.*, BEST PRACTICES FOR LEGAL EDUCATION (2007).

legal experience, and offers quite limited clinical and skills education.<sup>30</sup> One observer has described Chinese legal education as "a hidebound curriculum controlled at the national level by the Ministries of Education and Justice."31 The law is more often studied as a body of rules, not an organic and living organism as we understand it in the United States. As Prof. Eli Wald describes in his comparison of Chinese and U.S. law students, "Chinese law students are much more interested in black-letter law than their American counterparts, their interpretation is more committed to the text, and their construction is more consciously limited by it."<sup>32</sup> As he notes, this may reflect an understanding of the limited role of lawyers.<sup>33</sup> "Once they as lawyers concede black-letter law runs out, their work is done and the legislature takes over."<sup>34</sup> This presents another chicken-and-egg problem. Because the Chinese legal system does not have a common law process of judge-made rules, which involves a lawyer's active role in the development of law, the organic nature of law is less transparent.<sup>35</sup> Law may change and grow, but under the rubric of Chinese Communist Party ("CCP" or "Party") interpretation.<sup>36</sup>

The absence of professional education is an often-stated concern familiar to observers of Chinese legal education. There are concerted efforts to improve legal education.<sup>37</sup> The introduction of the Juris Masters (JM) program in 1995 opened up the possibility of a more professional education focus. These programs have grown rapidly since they were introduced and enrolled more than 50,000 students by 2009.<sup>38</sup> But the pedagogy remained closely tied to traditional education.<sup>39</sup>

<sup>30.</sup> Qingjiang Kong, *Practice in Legal Education: International Experience and Chinese Response*, 22 PAC. MCGEORGE GLOBAL BUS & DEV. L.J. 35, 41 (2009) (describing lecture approach).

<sup>31.</sup> Feinerman, *supra* note 22, at 3 ("[L]aw schools are usually not too adventurous in training their graduates to consider what might be characterized as 'public interest' law.").

<sup>32.</sup> Eli Wald, Notes From Tsinghua: Law and Legal Ethics in Contemporary China, 23 CONN. J. INT'L LAW 369, 371 (2008).

<sup>33.</sup> Id.

<sup>34.</sup> Id.

<sup>35.</sup> See infra Section I.B.3.

<sup>36.</sup> See William P. Alford, Of Lawyers Lost and Found: Searching for Legal Professionalism in the People's Republic of China, in RAISING THE BAR: THE EMERGING LEGAL PROFESSION IN EAST ASIA 287 (William P. Alford ed., 2007).

<sup>37.</sup> See generally Setsuo Miyazawa, Kay-Wah Chan & Ilhyung Lee, The Reform of Legal Education in East Asia, 4 ANN. REV. LAW. SOC. SCI. 333 (2008).

<sup>38.</sup> See supra Section I.A.

<sup>39.</sup> Zuo Haicong, supra note 11, at 55-56.

Clinical and skills education is expanding in Chinese law schools. Impressive efforts by the Ford Foundation and many collaborative initiatives between Chinese and U.S. law schools are offering Chinese law professors an opportunity to explore how to increase skills education. The growth of Lexis and Westlaw in China gives these private enterprises an incentive to increase skills education, at least as to English language materials. But expansion of clinical education in China faces the same challenges as U.S. law schools—"resources, academic politics, a preference for theoretical and doctrinal teaching rather than experiential education, the lack of a large body of scholarship on the theory of experiential learning, the large number of required courses in the curriculum, and acceptance of the status quo by the legal profession and judiciary." Pedagogical reforms in higher education are inevitably slowed by the sheer number of law schools.

The disconnect between legal education and legal practice is evident in the requirements to take the bar. Recent reforms generally require a college degree of some sort to sit for the bar exam, but the degree need not be in legal studies. The low bar passage rate of 10 percent would likely encourage applicants to undertake law studies before embarking on the bar exam, but a legal education is not required.

These features—lecture style (even with pedagogical reforms) and the disconnect between legal education and practice—again help explain the sparse role of legal ethics in Chinese legal education. Many issues of legal ethics occur from the lawyer's professional role in the daily practice of law. But when legal education does not examine law through the lawyer's role in practice, there is little need to focus on ethics. The

<sup>40.</sup> Brian K. Landsberg, Strategies to Increase the Availability of Skills Education in China, 22 PAC. McGeorge Global Bus & Dev. L.J. 45, 49-53 (2009) (part of a collection of eight articles in a Symposium on Experiential Education in China: Curricular Reform, The Role of the Lawyer and the Rule of Law, 22 PAC. McGeorge Global Bus & Dev. L.J. 1-91 (2009)); Robert Lancaster & Ding Xiangshun, Addressing the Emergence of Advocacy in the Chinese Criminal Justice System: A Collaboration between a U.S. and a Chinese Law School, 30 Fordham Int'l. L.J. 356, 369 (2007).

<sup>41.</sup> For example, Lexis offered a two-day training program to Chinese law professors on "Skills Education in China" on July 14-15, 2009 (program on file with author).

<sup>42.</sup> Landsberg, *supra* note 40, at 45; Zuo Haicong, *supra* note 11, at 57 (describing challenge of limited funds for clinics and publication pressures that discourage time-consuming clinical education).

<sup>43.</sup> The Law of the People's Republic of China on Lawyers, revised and adopted at the 30th Meeting of the Standing Committee of the Tenth National People's Congress of the People's Republic of China, Oct. 28, 2007 (effective date June 1, 2008), art. 8 (hereafter "Lawyer's Law").

<sup>44.</sup> Liang, *supra* note 1, at 65-66 (describing history of bar exam and bar passage rates).

curriculum has the luxury of focusing on broad legal principles and can avoid the messiness of legal practice.

#### 3. Different Understanding of "Lawyer"

In addition to the utilitarian role of education (to get a job) and the constraints of a legal education system that continues to focus on the content of rules far more than professional practice, the Chinese legal system has a different understanding of the definition and role of the lawyer. To understand the role of lawyers it is necessary to offer a brief, and consequently superficial, explanation of the Chinese legal system. In sharp contrast to our U.S. experience, the legal system in China does not have an independent judiciary. 45 Instead, the judiciary, like the procurator (prosecutor's office), is under the control of the governmental unit to which the court corresponds. 46 Consequently, both judges and prosecutors are often seen more as government workers, subordinate to the local party.<sup>47</sup> Recent changes unified the examination for prosecutors, judges, and lawyers, but there is still a sharp distinction between government workers (judges and prosecutors) and lawyers. This inhibits the development of unifying themes in professional identity that percolate down to the law students. The absence of an independent judiciary, and the alignment of judges and prosecutors, is a subject beyond the scope of this essay, but this structural aspect of the Chinese legal system obviously is a significant factor in determining the role of lawyers in China.<sup>48</sup>

In addition to a group of lawyers who look quite like our U.S. lawyers offering legal services to clients, China has "basic level legal workers" who are licensed at the provincial level and offer legal services in civil matters.<sup>49</sup> These basic level legal workers have some legal training and tend to provide legal services in under-served populations. In addition, there are a group of "barefoot lawyers" who, while not formally trained in law, have offered assistance to the rural poor.<sup>50</sup> As

<sup>45.</sup> Zhang, *supra* note 1, at 92-95.

<sup>46.</sup> Id. at 93-94.

<sup>47.</sup> Stanley Lubman, Bird in a Cage: Chinese Law Reform after Twenty Years, 20 NW. J. INT'L L. & BUS. 383, 398 (2000); Ann D. Jordan, Lost in the Translation: Two Legal Cultures, the Common Law Judiciary and the Basic Law of the Hong Kong Special Administrative Region, 30 CORNELL INT'L L.J. 335, 341 (1997).

<sup>48.</sup> Alford, supra note 36, at 294.

<sup>49.</sup> Levine & Pearce, supra note 20, at 1643.

<sup>50.</sup> William P. Alford, Tasselled Loafers for Barefoot Lawyers: Transformation and Tension in the World of Chinese Legal Workers, 141 CHINA Q. 22 (1995).

Profs. Russell Pierce and Samuel Levine have observed, disparate forms of lawyers increase access to justice, which is a desperately needed goal.<sup>51</sup> But these various forms of lawyers also demonstrate that the conditions of legal practice are so varied in China that it is difficult to discuss common, unifying themes of professional conduct.

#### 4. The Formation of Legal Consciousness

Yet another variable that might affect why legal ethics is not a significant subject in Chinese law schools flows from the emerging legal consciousness of the Chinese people and the lawyer's role in that consciousness. Like U.S. students, law students in China enter law studies with some understanding of the theoretical role of law in society. Very able and sophisticated scholars of the Chinese legal system have observed the concerted effort of the CCP to increase legal consciousness among Chinese, but in a controlled manner.<sup>52</sup> As political scientist Mary Gallagher notes, "[t]he legal consciousness of Chinese citizens is profoundly shaped by the heavy hand of the CCP in the creation of new legal institutions that are at least partially intended to buttress the CCP's legitimacy."<sup>53</sup>

Legal consciousness in a rapidly changing environment is inevitably both contradictory and contingent on experience.<sup>54</sup> As with their U.S. counterparts, it is not clear how much actual exposure or experience Chinese law students have with the legal system before they begin law studies.<sup>55</sup> The campaigns and slogans used to build a legal consciousness do not focus on lawyers, but rather on some abstract notion of the "law" given by the CCP.<sup>56</sup> This emphasis on the abstract

<sup>51.</sup> Levine & Pearce, supra note 20, at 1644.

<sup>52.</sup> Ethan Michelson, Dear Lawyer Bao: Everyday Problems, Legal Advice, and State Power in China, 55 SOCIAL PROBLEMS 43 (2008); Randall Peerenboom, Globalization, Path Dependency and the Limits of Law: Administrative Law Reform and Rule of Law in the People's Republic of China, 19 BERKELEY J. INT'L L. 161, 191 (2001); Mary E. Gallagher, Mobilizing the Law in China: "Informed Disenchantment" and the Development of Legal Consciousness, 40 LAW & SOC'Y REV. 783, 792 (2006).

<sup>53.</sup> Gallagher, supra note 52, at 792.

<sup>54.</sup> Laura Beth Nielsen, Situating Legal Consciousness: Experiences and Attitudes of Ordinary Citizens about Law and Street Harassment, 34 LAW & SOC'Y REV. 1055, 1061 (2000) (discussing contingent nature of legal consciousness); Gallagher, supra note 52, at 786 (discussing contradictory nature of legal consciousness).

<sup>55.</sup> See generally Lingyun Gao, Comment, What Makes a Lawyer in China? The Chinese Legal Education System After China's Entry into the WTO, 10 WILLAMETTE J. INT'L L. & DISPUTE RES. 197, 230 (2002) (describing limited life experience of Chinese law students).

<sup>56.</sup> Id. at 793.

benefits of law can result in sharp disappointment when the reality cannot live up to the ideals.<sup>57</sup> And disappointed clients can blame their lawyer if the reality does not live up to the public ideal.<sup>58</sup>

Despite the strong central control, mobilization of public opinion is a critical aspect to change in China. For lawyers who work in the area of public interest law, a media campaign is often essential to success (or partial success) in the legal arena. On the ground there appears to be a need to mobilize a sense of wrongdoing to justify legal intervention. But for citizens (and presumably entry-level law students), legal consciousness appears to consist of abstract generalities: Look to law to settle disputes. The rise in legal consciousness does not appear to include a strong role for lawyers.

#### 5. Relative Dearth of Widely Presented Legal Heroes

While legal consciousness may be on the rise, it is not clear that there are widely presented and modern models of legal heroes in China that can serve as inspiration for students.<sup>61</sup> U.S. pop culture has a plethora of legal portrayals, including heroes, anti-heroes, and sometimes villains.<sup>62</sup> U.S. students understand that the lawyer's role is often exaggerated or made more exciting for entertainment reasons. But the portrayals still give an image, often positive, of the lawyer as an agent of change. Chinese students who have English language skills can access this U.S. model of lawyering through the Internet, but that model does not translate into the daily life of lawyering in China.

Plaintiffs respond to the highly constrained nature of the Chinese courts by focusing on shaping legal consciousness as the objective of their litigation; hence, media involvement is critical. Building relationships with the media is both an important tactic in and of itself, and it influences other tactics such as case selection. Plaintiffs choose cases that illustrate a compelling harm to the public interest, but are not too politically sensitive to be reported in the Chinese media.

<sup>57.</sup> Id. at 813 (quoting one plaintiff in a lawsuit, ""[o]ur hopes are higher so our disappointment is all the deeper."").

<sup>58.</sup> Michelson, supra note 23, at 19.

<sup>59.</sup> Benjamin L. Liebman, Watchdog or Demagogue? The Media in the Chinese Legal System, 105 COLUM, L. REV. 1 (2005).

<sup>60.</sup> Liu, supra note 21, at 288-89.

Id.

<sup>61.</sup> This point is dangerous to make since one quickly must delve into disparate presentations. There have been widely presented righteous heroes, such as Judge Bao, a recurring figure in Chinese literature who exemplifies the thoughtful and just judge.

<sup>62.</sup> Judith A. McMorrow, *Law and Lawyers in the U.S.: The Hero-Villain Dichotomy, in* READER IN AMERICAN LAW FOR CHINESE LAW STUDENTS (John Nagel & Glenn Shive eds., anticipated 2010) (copy on file with author).

Observers of China popular culture in TV and movies note that these cultural forms occasionally portray lawyers, but not often as the central figure. Anti-corruption literature that is increasingly popular in China may present the lawyers as petty actors, or holding a job from which they escape the corrupting pressures of bureaucratic positions, or as an ally to combat corruption. Perhaps this dearth of legal heroes arises because the nascent legal system is simply not free enough to support consistent, credible, and interesting stories of positive, government-sanctioned social change through law. The anticorruption fiction that has become popular in recent years "is a moral literature focusing on sin, with few signs of legal reasoning." This is unlike the U.S. culture, where lawyers are essential actors in our rule-of-law system (warts and all).

Public presentation of lawyers is, of course, heavily shaped by governmental constraints. The taboo topics are lengthy:

Fundamental concerns of Chinese readers that cannot be directly addressed include their desire for democracy (or at least greater consultation), political and civil rights, freedom to form groups to solve current problems inside and outside the workplace, and freedom to become well informed or sometimes just to work safely for a living wage. One may not suggest that the [Communist Party] should share power with other parties or depict constitutional change, much less describe nationally organized resistance to [Party] policies. Excessive discussion of big losers in society, such as AIDS victims and drug addicts, is taboo, and so too, perhaps, is excessive focus on the sins of China's capitalists, professionals, and foreign investors, except those in collusion with corrupt cadres.<sup>66</sup>

<sup>63.</sup> As a non-Mandarin speaker, I relied initially on the observation of Chinese friends for this factual assessment. Some scholarly work has studied the role of Chinese lawyers in the popular culture and confirms this assessment. See generally Alison W. Conner, Chinese Lawyers on the Silver Screen, in CINEMA, LAW, AND THE STATE IN ASIA 195, 207 (Corey K. Creekmur & Mark Sidel. eds., 2007) (describing pre-1949 depiction of lawyers, in which lawyers appear typically as a small part of a larger story; describing in detail the film Bright Day in which the lawyer is a central figure who "is portrayed as an admirable character in every respect, though he might also be seen as self-righteous."); See generally Jeffrey C. Kinkley, CHINESE JUSTICE, THE FICTION: LAW AND LITERATURE IN MODERN CHINA, 3 (2000).

<sup>64.</sup> Jeffrey C. Kinkley, Corruption and Realism in Late Socialist China: The Return of the Political Novel 80, 119, 128-31 (2007).

<sup>65.</sup> *Id.* at 179. Prof. Kinkley notes that "[t]he major anticorruption novels analyzed in this book . . . are not so concerned with law and legal institutions." *Id.* at 176. By implication, the novels also tend not to focus on the lawyer's role.

<sup>66.</sup> Id. at 7.

These are all topics that would be ripe for popular culture presentations in the United States, but are not widely available for public discussion in China. Popular presentations of law are one way to enhance public consciousness and build a popular model of lawyering. By portrayals that rely more on moral perspectives than political or legal questions, the focus is not on law as a method of social correction. As discussed below, since law is subordinate to the Communist Party, this is not a surprising state of affairs.

Many Chinese legal heroes do exist for students, but the decision to attach the label "hero" is itself a political perspective. For example, from a Western perspective, I would identify as heroes Chinese lawyers such as Mo Xiaoping, who has developed the art of maneuvering just below the point of sanction within the Chinese legal system. Mo Xiaoping has represented many controversial clients within China. He attributes his ability to continue to represent controversial clients to his decision to focus on legal technicalities and avoid political statements. In non-public forums, Mr. Mo is quite open about his concerns with the Chinese legal system, but he carefully and politely notes that his views are not the government's position on these issues. But making models such as Mr. Mo available to students is very difficult because professors and university leaders often shy away from any potentially controversial presentations.

Western commentators have rightly identified as heroes lawyers who have challenged state actions and suffered significant legal consequences. For example, Beijing lawyer Xu Zhiyong, founder of the legal aid organization Open Constitution Initiative, was arrested in August 2009 on tax evasion charges, which are highly suspicious given his public actions for change leading up to his arrest. The 2008 Human

<sup>67.</sup> Verna Yu, Arguing Cases Whose Verdicts Are Already Written, N.Y. TIMES, Dec. 26, 2009, at A6.

<sup>68.</sup> See Panel Presentation on Journalism and Law: A Fact-Finding Session, U.S. Embassy in Beijing, China (May 21, 2009) (translation of transcript on file with author).

<sup>69.</sup> The U.S. Embassy program, *id.*, included two prominent Chinese lawyers who represent reporters, including Mo Xiaoping. The afternoon before the program, after the identity of the two Chinese speakers was provided, Tsinghua University School of Journalism withdrew permission for a busload of their students to attend the program. With one bureaucratic decision, thirty students were unable to hear the speakers.

<sup>70.</sup> Al Young, Note, *The Continuing Lack of Independence of Chinese Lawyers*, 18 GEO. J. LEGAL ETHICS 1133, 1134-35 (2005).

<sup>71.</sup> Sarah Sharples, *Deregistration of Lawyers Human Rights Concern for China*, Aug 13, 2009, http://www.lawyersweekly.com.au/blogs/top\_stories/archive/2009/08/13/deregistration-of-lawyers-concerning-for-china-human-rights.aspx.

Rights Watch report, "Walking on Thin Ice": Control, Intimidation and Harassment of Lawyers in China, collects many more examples, presenting a painful picture of the risks to lawyers who chose to use legal skills for social change.<sup>72</sup>

Unfortunately, high-profile examples of lawyers harassed, arrested, intimidated, sanctioned criminally, or whose licenses to practice have been suspended, vie for attention in the media.<sup>73</sup> background, students are understandably cautious, looking for signals about what behavior will be tolerated. With messages of state sanction for aggressive lawyering or taking on cases that are deemed threatening to social order, it is little wonder that students do not rush to embrace a discussion of legal ethics. In the United States, we often portray legal ethics as questions of dilemmas—what to do with competing duties pushing us in different directions. We engage in an analytical process in which we might look for a hierarchy of duties, or use virtue ethics, utilitarianism, casuistry, or any number of other analytical paths to identify the best and proper behavior.<sup>74</sup> But if the hierarchy of duties is supposedly clear, there is danger in suggesting that duties to the state do not ultimately trump. It is easy to see why legal ethics is a very, very delicate subject if it intersects with state interests and is best avoided if one wishes to stay out of trouble.

This rather bleak description of the political climate, however, is not the dominant feeling when you speak with young Chinese law students and law professors. They note the challenges facing a changing China, but evince a high degree of hope about the future.<sup>75</sup> In addition, because so many seek positions either in the private sector or areas that

<sup>72.</sup> Human Rights Watch, "Walking on Thin Ice": Control, Intimidation and Harassment of Lawyers in China (2008), http://www.hrw.org/reports/2008/china0408/.

<sup>73.</sup> See, e.g., Ian Johnson, WILD GRASS: THREE STORIES OF CHANGE IN MODERN CHINA (2004). Several groups monitor sanctions against lawyers. See, e.g., Human Rights in China, Beijing Lawyers Beaten for Representing Falun Gong Case, http://www.hrichina.org/public/contents/press?revision\_id=164835&item\_id=164831 (last visited Mar. 5, 2009) (describing May 13, 2009 arrest and beating of two lawyers who were meeting with family of a man who had died while serving a prison sentence for being a Fulan Gong practitioner); Human Rights Watch, China: Human Rights Lawyer in Arbitrary Detention, http://www.hrw.org/en/news/2009/02/02/china-human-rights-lawyer-arbitrary-detention (calling for information concerning missing human rights lawyer Gao Zhizheng).

<sup>74.</sup> See generally Daniel R. Coquillete, R. Michael Cassidy & Judith A. McMorrow, Lawyers and Fundamental Moral Responsibility (2d ed. 2010).

<sup>75.</sup> See also Carlos Wing-Hung Lo & Ed Snape, Lawyers in the People's Republic of China: A Study of Commitment and Professionalization, 53 AM. J. COMP. L. 433, 452 (2005) (noting optimistic and confident views of lawyers interviewed about the future for the Chinese legal profession).

do not directly intersect with the CCP, there is a sense that it will be quite easy to avoid these political problems by simply avoiding these controversial subjects. While an outsider cannot question the wisdom of this approach, as Prof. William Alford has noted, it is unlikely that the growing Chinese legal profession is going to carry the banner of democracy.<sup>76</sup>

#### 6. Role of Relationships—"Guanxi"

A system of professional ethics assumes that the external ethical norms have some meaningful constraining force. In addition to the challenge of creating ethical norms without drawing state sanctions, there is a strong cultural emphasis in China on building relationships." The informal network of relationships—known as "guanxi"—is an integral part of legal practice. 78 Lawyers create relationships with judges, with local government officials who can provide access to approvals needed for clients, and with local officials who regulate lawyers.<sup>79</sup> Local justice bureau officials may use the shadow of regulatory power to obtain jobs for relatives, encourage donations, and the like.80 Sociologist Ethan Michelson's empirical study of 1000 Chinese lawyers in twenty-five cities verified the importance of ties to state actors both to build bridges of access and to protect lawyers from predatory behavior.<sup>81</sup> Not surprisingly, Chinese firms emphasize their

<sup>76.</sup> Alford, *supra* note 36, at 306 (we should stay attentive "to the subtle and not always self-conscious ways in which lawyers and law may channel energies for political change into legal avenues, often to the fundamental preservation of the status quo and, not coincidentally, the enrichment of lawyers themselves").

<sup>77.</sup> This dynamic is a social and cultural element of living and working in China. *See generally* Seung Ho Park & Yadong Luo, *Guanxi and Organizational Dynamics: Organizational Networking in Chinese Firms*, 22 STRATEGIC MANAGEMENT J. 455, 456 (2001) ("Guanxi reflects delicate fibers woven into every person's social life and every aspect of Chinese Society.").

<sup>78.</sup> This was one of the first words I learned when living in China.

<sup>79.</sup> Lo & Snape, *supra* note 75, at 450 (in interviews with Chinese lawyers, there was "a strong consensus on the worst part of the lawyers' work, that is, cultivating guanxi (personal relations) with judges and legal officials").

<sup>80.</sup> Randall Peerenboom, *Law Enforcement and the Legal Profession in China*, in IMPLEMENTATION OF LAW IN THE PEOPLE'S REPUBLIC OF CHINA 125, 134-36 (Jianfa Chen et al. eds., 2002).

<sup>81.</sup> Ethan Michelson, Lawyers, Political Embeddedness, and Institutional Continuity in China's Transition from Socialism, 113 AM. J. OF SOCIOLOGY 352-414 (2007).

network of connections as an important part of the services offered to clients.<sup>82</sup>

The importance of relationships in legal practice raises additional challenges to building up a system of legal ethics. If the network of relationships with government officials and regulators is an important aspect of what you offer to clients, then legal skill and analysis play a correspondingly less significant role. The legal skill and analysis play a correspondingly less significant role. The legal skill and analysis play a correspondingly less significant role. The legal skill and analysis play a correspondingly less significant role. The legal skill and analysis play a correspondingly less significant role. The legal skill and analysis play a correspondingly less significant role. The legal skill and analysis play a correspondingly less significant role. The legal skill and analysis play a correspondingly less significant role. The legal skill and analysis play a correspondingly less significant role. The legal skill and analysis play a correspondingly less influence, rather than skill, is seen in U.S. legal ethics analysis as an ethically problematic activity, at least for lawyers engaged in the traditional practice of law. For example, taking advantage of relationships and access is forbidden under professional conduct rules such as limiting ex parte contact. The legal skill and analysis play a correspondingly less significant role. The network of legal skill and regulators is an important aspect of what you defined skill and regulators is an important aspect of what you defined the network of legal skill and regulators is an important aspect of what you defined the network of the network of legal skill and regulators is an important aspect of what you defined the network of the network of legal skill and regulators is an important aspect of what you defined the network of the netw

#### 7. Corruption and Incompetence

Relationships are good, corruption is bad. Corruption is a widely discussed topic in China. For purposes of this essay, I will limit the definition of corruption to instances in which individuals abuse state power for private gain. Judicial corruption exists in many forms, from outright bribery to more soft influence, and there is evidence that judicial corruption has increased with the size of the legal profession. Without belaboring the obvious, students undoubtedly are aware of concerns about corruption, presumably hoping they can avoid the problem, or that it will improve before they enter into the practice world. This big

<sup>82.</sup> See, e.g., Chenggong Jinmeng Law firm website, http://www.cjlawfirm.com/decc/jj.asp (last visited Oct. 4, 2009) ("Chenggong Jinmeng has extensive past dealings and close working relationships with various government agencies, at both the central and local levels.").

<sup>83.</sup> Peerenboom, supra note 80, at 138.

<sup>84.</sup> MODEL RULES OF PROF'L CONDUCT R.3.5(b) (2009) (prohibiting ex parte communication during a proceeding).

<sup>85.</sup> MODEL CODE OF JUDICIAL CONDUCT, Canon 2 (2007).

<sup>86.</sup> Kinkley, *supra* note 64, at 119. *See also* Benjamin van Rooij, *China's War on Graft: Politico-Legal Campaigns Against Corruption in China and Their Similarities to the Legal Reactions to Crisis in the U.S.*, 14 PAC. RIM L. & POL'Y 289 (2005).

<sup>87.</sup> See generally Nanping Liu, Trick or Treat: Legal Reasoning in the Shadow of Corruption in the People's Republic of China, 34 N.C.J. INT'L L. & COM. REG. 179 (2008); Alford, supra note 36, at 293 (interviews with Chinese legal professionals "suggest that the expansion of the Chinese bar has been accompanied by increasing corruption").

unknown sits on the horizon for students who intend to practice law. In the United States, we assume corruption is caused typically by rogue actors, and can envision a place to go (at least in theory), such as the Department of Justice or the FBI. Corruption embedded more widely into the legal culture obviously raises significant problems for Chinese lawyers who seek to build a model of professional ethics. <sup>88</sup>

Corruption is not the only concern. Chinese courts continue to be plagued by a reputation for being weak institutions, often staffed by judges of questionable competence.<sup>89</sup> There have been significant efforts to increase the competence of judges, but Chinese law students will be entering a field with this institutional issue on the horizon for the foreseeable future.

We can see again why legal ethics are not a priority in Chinese legal education if the actual daily practice may involve significant ethical compromises. Talking openly about the flaws presents a negative view of the legal system. Teaching students how to function within the flawed system requires an interdisciplinary perspective that draws on ideas from management and government. The pedagogy would require an active and engaging style. Even students inclined toward practice, such as the Juris Masters students, are likely to focus their immediate attention on mastering the body of rules that will be tested on the bar examination and building a resume that will look attractive in the intensely competitive job market. Neither professors nor students are equipped to take on the challenge of how to function in flawed systems.

#### 8. A Pre-Rule-of-Law Legal System

The discussion above takes us to a topic that is often a beginning step for discussion of the Chinese legal system and the fragile and uncertain state of the rule of law. We begin, in typically Chinese fashion, with an important acknowledgment of how far China has come in building a rule of law and implementing economic reforms that have brought hundreds of millions of people out of abject poverty. 90

<sup>88.</sup> Alford, supra note 36, at 293.

<sup>89.</sup> Liebman, *supra* note 59, at 6 ("China's courts have long been weak institutions, subject to extensive external influence and lacking in both authority and competence.").

<sup>90.</sup> See Randall Peerenboom, Assessing Human Rights in China: Why the Double Standard?, 38 CORNELL INT'L L.J. 71, 72 (2005).

With these vast improvements, there is a long way to go. Law students are likely to absorb not only a concern about corruption in the courts but also the well-known gap between the theory of law in China and its practice. As Prof. Randall Peerenboom has described, the enforcement problem that pervades the Chinese legal system is in fact a series of problems, including the challenge of weak central government agencies, a strong preference for economic growth over compliance with law, turf struggles between the prosecutor's office and the judiciary, cultural traditions of hierarchy and paternalism, and a population often unaware of its rights despite the rise in legal consciousness.<sup>91</sup> Prof. Peerenboom aptly notes the "systemic and institutional obstacles to enforcement," including tension between the central and local governments, local protectionism, inconsistencies in the regulatory framework, rapidly antiquated laws that are often ignored, and the omnipresent problem of corruption. 22 Lawyers who work with the courts are fully aware that the local protectionism is a reality and that "judges and courts are beholden for job security and funding to local government institutions."93 Academic education can talk about the theory of law without confronting the gap between theory and practice. Students can happily live in the world of theory in preparation for theoretical exams, yet know that the legal world in practice will require many compromises. Even more than compromises, the legal realm involves competing ideologies that students understandably are very reluctant to address in class.<sup>94</sup>

In sum, Chinese law students seeking to enter legal practice face a fragile and tentative legal system (for which we often use the phrase "rule of law") that is steadily improving in areas of economic issues, but remains highly uncertain when seen through a rights model.<sup>95</sup>

#### 9. Summary of Impediments to Legal Ethics in China

This essay began with the question of why there is only one legal ethics major in China. The students who seek legal practice, which includes many of the more than 60,000 Masters students, will be

<sup>91.</sup> See Peerenboom, supra note 80, at 125.

<sup>92.</sup> Id. at 126.

<sup>93.</sup> *Id*. at 128

<sup>94.</sup> Wald, *supra* note 32, at 373 (describing "students' reluctance to recognize or publicly acknowledge the possibility of, and the role of, competing ideologies when exercising their discretion")

<sup>95.</sup> Feinerman, supra note 22.

maneuvering in this complex and tentative legal system. Legal ethics require us to have some consensus about the role of lawyers in implementing a rule of law. With the Chinese legal system still maintaining strong central control, and the role of lawyers so highly uncertain, particularly outside private contract disputes, the lawyer's role is still evolving. It is difficult for students to study legal ethics when the lawyer's role is so uncertain.

So the professors and students who have devoted themselves to legal ethics should be seen as unsung heroes of the Chinese legal profession. They strive to identify themes of ethics and professional responsibility in the midst of a rapidly changing and often contradictory system. In typical Chinese fashion, they toss out seeds hoping for the time that the seeds will take root. They forge ahead in the face of tremendous uncertainty.

Those who study legal ethics do have legal norms with which to work. The next section sets out some of the legal sources for attorney conduct and identify why these legal rules do not make a system of legal ethics clearer or easier.

#### III. BUILDING A TOP-DOWN MODEL OF LEGAL ETHICS

For the reasons described above, law schools in China are currently limited in the role they can play in creating norms of attorney conduct. This section changes the focus and describes briefly the efforts to create legal professionals and norms of legal ethics "from the top down." As China crafted legislation to build a legal system, the 1996 Lawyer's Law moved the lawyer's role from a worker of the state to a private practitioner model. The Lawyer's Law sets out both a system of licensing and some professional values. Both the 1996 version and recent amendments, effective in 2008, create a "dual management structure," in which both the judicial administration department of the city or district in which the lawyer practices (sometimes referred to as the Justice Bureau or more globally as the Ministry of Justice) and the local mandatory bar associations have regulatory power. Set

<sup>96.</sup> Benjamin L. Liebman, Legal Aid and Public Interest Law in China, 34 Tex. INT'L L.J. 211, 277 (1999).

<sup>97.</sup> Peerenboom, supra note 80, at 131.

<sup>98.</sup> Lawyer's Law, *supra* note 43, at ch. 5, art. 46(6) (setting out Lawyers Association duties of "giving reward or punishment to a lawyer or a law firm"); *id.* at ch. VI, art. 47-52 (setting out power of judicial administration departments to suspend, fine and investigate for criminal conduct); Peerenboom, *supra* note 80, at 132.

matter, lawyers are more likely to be challenged by the local judicial administration department, which controls the lawyer's license to practice. For example, in spring 2009, a flurry of reports emerged of lawyers who represented disfavored clients having their licenses suspended, or not renewed. Lawyers have routinely been challenged for representing Falun Gong practitioners and other disfavored clients. Even if the local bar associations can, in theory, also regulate lawyers, the control of these bar associations is maintained by the Party, so there is little indication of independent self-regulation. This structure assures that the Party maintains control over the legal profession.

Party control of lawyers comes through the substantive portions of the Lawyer's Law. <sup>103</sup> Consider Article two of the Lawyer's Law, which sets out the duties of a lawyer:

For the purposes of this Law, a lawyer means a professional who has acquired a lawyer's practice certificate pursuant to law, and is authorized or designated to provide the parties with legal services.

A lawyer shall protect the lawful rights and interests of the parties, ensure the correct implementation of law, and safeguard fairness and justice of the society. 104

Article 3 contains similar broad directions, including a statement that "[i]n legal practice, a lawyer shall subject himself to supervision of the State, society and the parties concerned." In this trinity of supervision—state, society and the parties—it is clear that the state is the dominant actor.

On paper the Lawyer's Law contains the foundation for what we identify as professional ideals from a U.S. perspective, but with broad

<sup>99.</sup> *Id.* at ch. II, art. 6 ("A person who intends to practice as a lawyer shall submit an application to the judicial administration department of the people's government of a city divided into districts or of a district of a municipality directly under the Central Government and submit the following documents . . . ").

<sup>100.</sup> Austin Ramzy, Why the Case for China's Lawyers Doesn't Look Good, TIME, June 17, 2009, available at http://www.time.com/time/world/article/0,8599,1905130,00.html (last visited Dec. 19, 2009).

<sup>101.</sup> Peerenboom, supra note 80, at 134; Human Rights Watch, supra note 72.

<sup>102.</sup> Peerenboom, *supra* note 80, at 136 ("[B]ar associations themselves are dominated by former and present MOJ and bureau officials."); Alford, *supra* note 36, at 294.

<sup>103.</sup> Jing "Brad" Luo, *Chinese Law on Lawyers Amended: Progress Made and to Be Made*, CHINESE LAW AND PRACTICE, Feb. 2008, *available at* http://www.chinalawandpractice.com/Article/1865844/Issue/66194/Chinese-Law-on-Lawyers-Amended-Progress-Made-and-to-Be-Made.html.

<sup>104.</sup> Lawyer's Law, supra note 43, at ch.1, art. 2.

<sup>105.</sup> Id. at ch. I, art. 3.

exceptions that again are controlled by the CCP. For example, Article 38 requires that a "lawyer shall keep confidential the secrets of the State and commercial secrets that he comes to know during his legal practice and shall not divulge the private affairs of the parties concerns." The Lawyer's Law reflects the U.S. notion that lawyers are not legally liable for the opinions made "as an agent ad litem or defender in court, with the exception of the views he presents to endanger State security, maliciously slander another person, or seriously disrupt the court order."107 Both the confidentiality and the no-liability provisions exemplify the challenge. As long as the meanings of "State secrets" and "State security" are defined solely by CCP actors, this exception trumps any other fine-sounding protection. As Prof. Ethan Michelson has noted, "China's socialist legality, by demanding that the law serve the interests of the state above all else . . ., produces a fundamental conflict of interest between lawyers' loyalty to the state and their loyalty to their clients."108

The Lawyer's Law also has the same enforcement gap described above for law generally. Provisions on the ability to meet with clients in criminal cases, to investigate a case, and other important protections are embodied in the Lawyer's Law. But on the ground, lawyers report that these provisions offer little persuasive force in controversial cases. 110

The Lawyer's Law gives the All-China Lawyers Association the responsibility to formulate professional regulations and rules of punishment, organize education in lawyers' professional ethics, and practice discipline. We see again a system fine in theory, but weak in practice. Both the Ministry of Justice and the All-China Lawyers Association have developed codes of ethics. But it is difficult to find any indication, at least in the English-language literature, that the codes

<sup>106.</sup> Id. at art. 38.

<sup>107.</sup> Id. at art. 37.

<sup>108.</sup> Michelson, supra note 23, at 30.

<sup>109.</sup> Lawyer's Law, *supra* note 43, at art. 33 (meet with clients in criminal cases); *id.* at art. 35 (investigate).

<sup>110.</sup> This enforcement gap is a chronic subject of criticism. *See* Human Rights Watch Report, *supra* note 72, at 4 (quoting Shanghai Academy of Social Sciences Press Report: "Lawyers should independently carry out their professional duties and not be subjected to interference from state organs, groups or individuals.").

<sup>111.</sup> Lawyer's Law, *supra* note 43, at ch. V, art. 46(3) and (4).

<sup>112.</sup> Xu Xi, A Comparative Study of Lawyers' Ethics in the US and PRC: Attorney-Client Privilege and Duty of Confidentiality, 1 TSINGHUA CHINA L. REV. 46, 51-52 (2009), available at http://www.tsinghua.edu.cn/docsn/fxy/tclr/issue/PDF%20Files/XU%20Xi.pdf.

of ethics have had much influence. And when either the Lawyer's Law, or other ethical provisions with the force of law, conflict with other substantive provisions, such as the procedural code, the latter usually trumps. Lawyers have little incentive to press for implementation of provisions of the Lawyer's Law because "PRC courts and procuratorates have the tendency to arrest 'obstructive' lawyers." When local officials have as a dominant obligation the need to maintain social order, so even if the central government gives lip service to the lawyer's role the local officials have strong incentives to control troublesome lawyers.

The Lawyer's Law requires that all lawyers join their local lawyer's association, which in turn makes the lawyer simultaneously a member of the All China Lawyer's Association. 114 The lawyer's association is "a public organization with the status of a legal person and the selfdisciplining organization of lawyers". This language would provide the foundation for a potential counterweight to the state interests. If lawyers did identify a need to have a stronger lawyer's role, they could collectively advocate through the local lawyer's association. It recently became clear that self-disciplining is not the same as self-governing. A seemingly simple step toward self-regulation recently drew a sharp governmental response. In 2008, thirty-five lawyers from the Beijing Lawyer's Association (BLA), the body charged with regulating attorneys in Beijing, urged that members of the BLA have direct elections of their representatives. The lawyers who supported direct elections were denounced as seeking "total repudiation of China's current lawyers' administrative system, judicial system, and even political system." <sup>116</sup> According to English-language reports, authorities have successfully pressured law firms to dismiss lawyers who supported the direct election movement. 117

What we learn from this familiar litany is that efforts to identify norms of attorney conduct are embedded in state/CCP interests. The top-down model of legal ethics guarantees that the lawyer's function will be confined to a much narrower role than the U.S. model of lawyering.

<sup>113.</sup> Id. at 57.

<sup>114.</sup> Lawyer's Law, supra note 43, at ch. V, art. 45.

<sup>115.</sup> Id. at art. 43.

<sup>116.</sup> China Forum, CCP Afraid of China's Lawyers, http://www.topix.com/forum/world/china/TF3QBM3LPMLSDI8CD (last visited Mar. 23, 2009).

<sup>117.</sup> Human Rights in China, *Beijing Law Firm Faces Six-Month Shutdown for Attorneys' Support of Direct Bar Election*, Feb. 19, 2009, http://iso.hrichina.org/public/contents/press?revision\_id=149342&item\_id=132331.

And there are indications that many Chinese lawyers support this system because it is the path to financial success. 118

## IV. WHAT THE U.S. LEGAL PROFESSION CAN LEARN FROM THE CHINESE EXPERIENCE

We return to that lonely legal ethics major at China University of Political Science and Law. Given the still tentative nature of the Chinese legal system, the absence of a strong legal culture that creates some consensus about the lawyer's role, and the continuing gap between the theory of law and its practice, it is not surprising that lawyers have not developed a strong professional identity independent of the desire to get good work and stay out of trouble. In this regard, Chinese lawyers mirror most of their U.S. counterparts.

I conclude with four lessons that those of us who work on legal ethics in the United States can learn from the Chinese experience. The first lesson is political and obvious: Our constitutional political structure that encourages an independent judiciary in the spirit of the common law plays a critical part in supporting our lawyer's role and our system of legal ethics. The constitutional right to counsel and the United States Supreme Court pronouncements that provide substance to the right, the adversarial system, duties of confidentiality that are supported (albeit with significant exceptions) in the attorney-client privilege, and candor duties owed to courts all shape our lawyer's role and the ethical obligations that flow from it. Studying the Chinese legal system reminds us of the need to separate out the political values that lie behind some aspects of our system of legal ethics and more traditional ethical values, such as a duty of allegiance, keeping one's word, and fiduciary relationships. This helps us identify those aspects of legal ethics that are not easily transferred to different systems because of our differing political structures and those aspects that have a credible claim for international application.

A second lesson is pedagogical. We have what is often called a crisis in professionalism among lawyers in the United States. As we look at the emerging cohort of lawyers in China, we can see how much Chinese lawyers reflect the social and cultural values around them. <sup>119</sup> In

<sup>118.</sup> Alford, supra note 36.

<sup>119.</sup> Peerenboom, *supra* note 80, at 138 ("The legal professional has been tainted by a rampant disregard of professional ethics resulting from the low level of training and professionalism of lawyers as well as more general social trends").

a fragile legal culture where legal norms in general are unstable, it is not surprising that lawyers have not coalesced and embraced a professional ethos. It seems painfully obvious that U.S. lawyers, like our Chinese counterparts, are profoundly shaped by the systems and structures in which they practice.

Our Chinese colleagues face significant obstacles to discussing structural pressures and the legal, factual, and moral uncertainty that surrounds many aspects of the practice of law in China. What is our excuse? We fail to prepare our students adequately to function in our flawed system. Observing the Chinese experience is a strong reminder to U.S. ethics professors that we should address more openly the structural flaws that impair access to justice in the United States. We should address directly the "politics of ethics" and how to function better within flawed systems. We should focus on helping our students learn the art of conversation to maneuver better in the face of conflicting pressures, rather than offer simple hypotheticals that often ask them to fall on their swords.

A third lesson is regulatory. Through a hierarchy of legal norms, our system of legal regulation has tolerated multiple regulators without creating major areas of conflict or struggle. States provide the license to practice and have the sole power to strip a lawyer completely of his or her license. We have seen a rise in the federal regulation of attorneys through context-specific areas, such as norms for federal court practice lawyers appearing before the Securities and Exchange Commission. 121 However much U.S. lawyers might complain about multiple regulators in their area of practice, we have sufficient social and political understanding of our roles that there can be a dynamic conversation between the groups. While the SEC may have the power to trump state rules through the Supremacy Clause, it actually listened to state and ABA commentators and backed off an aggressive proposal to change lawyer confidentiality obligations in SEC regulated activities. 122 The experience of our Chinese counterparts reminds us to appreciate the ability to have this dynamic conversation.

<sup>120.</sup> This phrase comes from a wonderful book by Richard Nielsen, THE POLITICS OF ETHICS: METHODS FOR ACTING, LEARNING, AND SOMETIMES FIGHTING WITH OTHERS IN ADDRESSING ETHICS PROBLEMS IN ORGANIZATIONAL LIFE (1996).

<sup>121.</sup> See generally Judith A. McMorrow & Daniel R. Coquillette, The Federal Law of Attorney Conduct, *Moore's Federal Practice*, (Matthew Bender 3d ed. 2009).

<sup>122.</sup> Susan P. Koniak, When the Hurlyburly's Done: The Bar's Struggle with the SEC, 103 COLUM. L. REV. 1236 (2003) (arguing that SEC backs down too quickly).

Fourth, we have much in common in terms of the daily life of lawyering. While we in the United States spend inordinate amounts of time exploring examples of excess zeal or intentional wrongdoing, data shows that the single biggest reason for complaints to the regulatory apparatus about U.S. lawyers is neglect. Too many lawyers do not attend properly to their cases. Similarly, in China the need for stronger professional skills and habits is arguably one of the bigger concerns facing Chinese lawyers. As such, perhaps we can benefit from shared conversations about how both countries can improve the competence of lawyers.

There are more lessons to learn as bilingual commentators open up the Chinese experience to non-Mandarin speakers. The international press is playing a role by bringing out stories of some of the lawyers who maneuver in this challenging Chinese legal system. U.S. lawyers can certainly admire the legal heroes who are emerging in China. Perhaps they can inspire us to be more heroic in our own professional lives.

<sup>123.</sup> See, e.g., Massachusetts Bar Counsel's Report to the Supreme Judicial Court [Annual Report] 5 (2009) ("Approximately 25% of all inquiries concern lawyers' neglect, lack of diligence, or failure to return client calls."), available at http://www.mass.gov/obcbbo/fy2009.pdf; State of Michigan Attorney Discipline Annual Report 12 (2008) (neglect constituted forty-three of the 140 cases for which sanctions were imposed).