

**Of Lawyers Lost and Found:
Searching for legal professionalism in
the People's Republic of China**

by

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“‘I was impressed by the extent to which lawyers had penetrated the process,’ he [Anthony Kronman] said. ‘They are on their way to a very different system of adjudication.’”

From Sara Leitch, “Law Dean Advises Chinese Law Reform,”
Yale Daily News, September 16, 1998, page 1.

American scholars and policy makers concerned with legal development in the People’s Republic of China share a deep faith in the value of China developing a legal profession that operates as we would like to think our own does. Indeed, this idea is so deeply ingrained that it is rarely broken out for critical examination, but instead is treated as an obvious good, the attainment of which is essentially a matter of time. Virtually all such observers seem to assume that lawyers, whether out of idealism or self-interest or some blend thereof, will prove to be a principal force leading the PRC toward the rule of law and a market economy, while some go so far as to treat the development of an indigenous legal profession as crucial to the promotion in China of a more liberal polity.

The hidden assumptions regarding the Chinese legal profession¹ found in both US academic writing and policy papers warrant a scrutiny they have yet to receive here or abroad. Lurking not too far underneath the surface of such portrayals are further assumptions about the inexorability of convergence along a common path, remarkably (surprise) similar to our own. Unexamined, such assumptions run the risk of leaving us with an impoverished understanding not only of the role that the emerging legal profession is playing in China, but also of both the complexity of legal development there more broadly and the limits of the ideology of professionalism in law. This, in turn, may generate unwarranted expectations on our part as to

¹ As will be suggested herein, I use the word “profession” in conjunction with the PRC advisedly -- simply to refer to those Chinese citizens who have been certified by the state to engage in the practice of law.

the manner in which change may come in China while reinforcing the inflated sense that far too many of us in the American legal world have of our own profession's historic importance.

This essay consists of three parts. After a brief discussion of the manner in which the PRC's legal profession has been portrayed, Part One endeavors to depict, in more balanced terms, its growth over the past twenty years and its current situation, drawing in part on a series of interviews I conducted among Chinese practitioners between 1993 and 2000, as well as more conventional research sources. Part Two then seeks to explain why scholars and policy makers, particularly in the United States, have so misunderstood the development of the Chinese legal profession, suggesting that the problem may have as much to do with their appreciation of their own legal profession as with the difficulties of comprehending China's. The final part of the paper offers further thoughts regarding the challenges that we need to confront in thinking about the place of lawyers and legal development in the PRC.

A. THE GROWTH OF THE CHINESE LEGAL PROFESSION

American portrayals of Chinese legal development, whether for scholarly or more policy oriented ends, have tended to take as a given the model of legality generally believed to be in effect in our country today. Only infrequently are its fundamental assumptions questioned or even scrutinized through balanced accounts of its historical development, careful consideration of the interplay of law with other norms and institutions in contemporary American society, or rigorous comparison with the experience of other nations. The result, all too often, is a faith that scrupulous adherence to what is presented as the American model will suffice to bring about major and desirable legal and perhaps political reform in China. These observers also tend to take an approach toward Chinese legal development that sometimes overly exalts modest steps

made in emulation of the model, or more typically, bemoans China's failure better to appreciate and absorb the lessons we provide.²

Nowhere is this cast of mind more evident than in treatment of the legal profession. At its most pronounced, this leads scholars of considerable reputation to make what this paper will argue are extravagant claims about the character and potential (at least in present circumstances) of the profession. Consider, for instance, the following assertion from *Dealing in Virtue*, a celebrated 1996 book by Bryant Garth, President of the American Bar Foundation (the United States' preeminent center for socio-legal research) and Yves Dezalay, the leading disciple of Pierre Bourdieu in legal studies.

“Law may begin to rival Communism — perhaps more precisely, the legal profession may rival the Party — as the leading legitimating authority. Law may provide a kind of neutral ground between competing national elites. As we shall see, there is also evidence that the US version of law and legal practice is of particular importance.”³

Garth and Dezalay's views may be among the more fulsome, but they find echoes in the writings of some of our more astute and otherwise sober analysts of China as well as in the words of leaders of American legal education (such as those of Dean Kronman quoted at the beginning of this essay), pillars of our bar and bench, and shapers of pertinent dimensions of American foreign policy. So it is, for example, that Jonathan Hecht of Yale, the author of an influential study on

² Faith in what can be accomplished through embracing the American model is not, of course, limited to China or to the legal profession. Consider, for example, Steven Calabresi's recent call for emulation of American constitutionalism (“[T]he Federalist Constitution has proved to be a brilliant success, which unitary nation states and parliamentary democracies all over the world would do well to copy.”) or Reinier Kraakman and Henry Hansmann's declaration that, in corporate law, history has culminated in the American model. The latter assertion takes on a special irony in view of the massive problems encountered when Russia's Duma, with Kraakman as a prime advisor, embraced an “American style” corporation law. See, respectively, Steven G. Calabresi, ‘An Agenda for Constitutional Reform’, in William N. Eskridge, Jr. and Sanford Levinson (eds), *Constitutional Stupidities, Constitutional Tragedies* (New York: New York University Press, 1998), p.22 and Henry Hansmann and Reinier Kraakman, ‘The End of History for Corporate Law’, John M. Olin Center for Law, Economics and Business, Discussion Paper # 280 (2000).

criminal justice, assumes that the growing involvement of lawyers will perforce advance the rule of law and human rights.⁴ Or that Pei Minxin, who has taught at Princeton, posits that the legal system could be the “‘backdoor’ through which a gradual process of democratic transition could be introduced” and the party’s power “contested and constrained” with China’s “emerging professional legal community” potentially constituting “an autonomous social group capable of concerted political action” in the attainment of these goals.⁵ Or that Randall Peerenboom of UCLA, among the most accomplished of Americans who has written about lawyers in China, suggests that for whatever problems may now afflict the profession, at a minimum, the desire of competent attorneys to replace *guanxi* (roughly, “connections”) with legal substance will, in time, be a significant factor in promoting the rule of law more broadly within China.⁶ Much the same positive reading of the development of the Chinese profession to date and considerable faith in its future prospects underlie the very considerable funding and energies that multilateral organizations (such as the World Bank and the Asian Development Bank),⁷ foundations (most notably Ford),⁸ and governmental bodies (including the European Communities and the United

³ Yves Dezalay and Bryant G. Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (Chicago: University of Chicago Press, 1996), p.258.

⁴ Jonathan Hecht, *Opening to Reform? An Analysis of China’s Revised Criminal Procedure Law* (New York: Lawyers Committee for Human Rights, 1996).

⁵ Pei Minxin, ‘Political Changes in Post-Mao China: Progress and Challenges’, in Ted Galen Carpenter and James A. Dorn (eds), *China’s Future: Constructive Partner or Emerging Threat?* (Washington, D.C.: Cato Institute, 2000), pp.301-305.

⁶ Lawyers Committee for Human Rights, *Lawyers in China: Obstacles to Independence and the Defense of Rights* (New York: Lawyers Committee for Human Rights, 1998).

⁷ I discuss efforts of multilateral organizations to promote legal development in China in William P. Alford, ‘The More Law, the More...? Taking the Measure of Legal Reform in the People’s Republic of China’, Stanford Center for Research on Economic Development and Policy Reform Working Paper No. 59 (2000).

⁸ See, for example, Aubrey McCutcheon, ‘Contributing to Legal Reform in China’, in Mary McClymont and Stephen Golub (eds), *Many Roads to Justice: the Law Related Work of Ford Foundation Grantees Around the World* (New York: Ford Foundation, 2000).

States government via the State Department's rule of law initiative) are expending on it.⁹ A similar sense of the profession informs the strategy of important human rights organizations, such as the Lawyers Committee for Human Rights, which recently lauded the PRC bar and wrote of its potential "to play a vital role in encouraging more far-reaching reforms."¹⁰ It is also echoed in much trumpeted announcements by the American Bar Association and similar actors about their recently discovered PRC brethren.¹¹

So, what is wrong with this picture? How, I have been asked when venturing ideas of the type this paper will discuss (especially in the halls of American legal academe or other such precincts), could one not share the aforementioned enthusiasm? Isn't this the very thing that those of us who have long toiled in the obscurity of Chinese legal studies have been waiting for and have something of an obligation to cultivate?

The answer, at least to the academic dimension of these questions, has three principal components. The first is that, as a simple descriptive matter, the role of the profession, if not of legal development in China more generally, has been significantly overstated to date. The second is that the character of the Chinese legal profession has been badly misunderstood, with considerable consequences for assessment of what it may (or may not) have done to foster a rule of law and liberalism more generally. The third is that while change of the type that many American and other observers desire may be possible over the long run, we lack an empirical foundation or even strong theoretical underpinnings for the tone of assurance that, consciously or otherwise, infuses such sentiments. The remainder of this Part will address these three issues.

⁹ See William P. Alford, 'Exporting the 'Pursuit of Happiness'', *Harvard Law Review*, vol.113 (2000), p.1677 for further discussion of the rule of law initiative and of governmental democracy promotion programs more generally.

¹⁰ See the preface to *supra* note 8.

¹¹ See, for example, Robert A. Stein, 'Two Billion Reasons to Cooperate', *American Bar Association Journal*, vol.85 (February 1999), p.86.

It would certainly be erroneous to ignore either the exponential growth in the size of the Chinese legal profession over the past twenty years, or the accompanying changes in its manner of organization, educational attainments, or relationship to officialdom, let alone the very substantial ways in which the Chinese legal system more generally has developed since the end of the Cultural Revolution in the mid 1970s. In little more than a generation, the Chinese bar has expanded from 3,000 members to more than 175,000, with the state continuing to make noises about its plans for China to have 300,000 lawyers by the end of the current decade.¹² Whereas the operative legal framework in 1981 spoke of state legal workers, the current principal governing national statute describes lawyers as professionals with duties to society as well as to state.¹³ Nor, it is fair to say, are we dealing only with issues of size and nomenclature here, as approximately a third of China's law firms, all of which previously were under direct state ownership, are now organized as partnerships or collectives and there is considerable evidence, at least at the anecdotal level, of lawyers wishing to shield their practice from intensive state scrutiny, if for no other reason than to avoid taxes as well as unlawful exactions.

Even as we recognize such changes in the Chinese profession, however, we would do well not to overstate the impact that they are making. Resort to law and lawyers remains very much the exception in Chinese affairs both large and small. This is so notwithstanding the inordinate publicity accorded such matters, particularly in the western media (where they have a bit of the dancing bear quality that also greets foreigners who manage to utter more than a few garbled phrases in Mandarin). Perhaps most tellingly, the Communist Party, which is not only the nation's leading repository of political power, but which also continues to be its single most consequential actor economically and in many other respects, remains above the state's law, both as a formal and as a practical matter, as has been borne out all too painfully by those who have

¹² William P. Alford, 'Tasselled Loafers for Barefoot Lawyers: Transformation and Tension in the World of Chinese Legal Workers', *The China Quarterly*, vol.141 (1995), pp.22-39. But see *infra* note 33.

¹³ Zhongguo Renmin Gongheguo Lushi Fa [The Lawyers Law of the People's Republic of China] (1997).

sought through the courts to cabin it,¹⁴ even as the Party remains intimately involved in the selection and oversight of judicial personnel.¹⁵ The same insulation from the state's law holds true for individual members, particularly those of consequence, who have been far more likely to be called to task for corruption (whether in their governmental or Party guises) via the Party's internal disciplinary processes than through public positive law, save for those unlucky enough to be singled out for exemplary punishment.¹⁶

It is not only important cadres or others within the Party, however, who have yet to acquire a taste for lawyers. Litigation in the PRC has risen steadily over the past decade to the current level of approximately six million cases per annum,¹⁷ but, even before we scrutinize the content of such actions, their number needs to be set in context. To a far greater extent than most outsiders observers appreciate, China remains fundamentally an administrative state, with administrative recourse (whether for routine civil matters or to address deviance, as through reeducation through labor¹⁸) the norm, rather than exception, and with respect to which lawyers essentially have scant role representing clients. Beyond this, lawyers have had little, if any, part

¹⁴ William P. Alford, 'Double-Edged Swords Cut Both Ways: Law and Legitimacy in the People's Republic of China', *Daedalus*, vol.122 (1993), pp.45-63. For a telling account of the shadowy involvement by the family of one of China's senior most leaders in the management of a major joint venture, see Henny Sender, 'For Morgan Stanley, a Chinese Headache', *Wall Street Journal*, 14 November 2000, p.A21.

¹⁵ Stanley B. Lubman, *Bird in a Cage: Legal Reform in China after Mao* (Stanford: Stanford University Press, 1999).

¹⁶ Luo Bing, 'Mijian Xielu Zhonggong Zuzhi Fulan' [Secret Document Exposes Decay in Communist Party Organization], *Cheng Ming* [Contend], vol.225 (1996), p.6.

¹⁷ Zhongguo Sifa Xingzheng Nianjian Bianji Bu [The Editorial Department of the China Yearbook of Judicial Administration], *Zhongguo Sifa Xingzheng Nianjian* [The China Yearbook of Judicial Administration] (Beijing: Falu Chubanshe, 1999).

¹⁸ China's police are authorized by the provisions on re-education through labor to sentence citizens to periods of up to four years in labor camp for deviant behavior that falls short of warranting criminal prosecution. Such confinement may be extended if the police deem the individual not to have made sufficient progress in redeeming himself. It is now possible for citizens to appeal such determinations to the courts, but there is little evidence of many having done so.

to play in vital avenues through which tens of millions of individuals routinely seek redress, including the letters and visits (*xinfang*) process,¹⁹ extrajudicial mediation,²⁰ resort to rice roots legal workers (*falugongzuozhe*) and other yet more informal processes.²¹ But, of course, we do need to scrutinize litigation; if so, we can see that not more than approximately one out of every ten litigants appears to have been using legal counsel.²² And, if we press our inquiry further, we may do well to question the simple equation that virtually all observers make between litigation and legality,²³ by asking precisely what it is that lawyers are doing even when present, given the near certainty of conviction in criminal cases (the area in which citizens are, by far, most likely to be represented by counsel),²⁴ the fact that the judiciary continues to be characterized by a relatively low level of legal training,²⁵ and the proliferation of accounts of lawyers and judges using litigation as a pretext for bribery.²⁶

¹⁹ This process, which involves petitioning officials for discretionary relief in a manner reminiscent of imperial days and which is a far more active channel for citizen grievances than the much touted Administrative Litigation Law, has barely been studied by foreign (or Chinese) scholars.

²⁰ The PRC has over one million neighborhood mediation committees, with over six million official mediators.

²¹ The role of lawyers in counseling and negotiation is discussed in Alford, *supra* note 15.

²² I discuss in detail the statistics for representation through the mid 1990s in Alford, *supra* note 15.

²³ Typical of this is the writing of Pei Minxin. See *supra* note 6.

²⁴ Conviction rates run between 98 and 99.5 percent, according to the *Falu Nianjian* [The Law Yearbook]. In weighing this statistic, it helps to be mindful of a comparably high conviction rate in Japan (J. Mark Ramseyer and Eric Rasmussen, 'Why the Japanese Conviction Rate is So High', John M. Olin Center for Law, Economics and Business, Discussion Paper # 240 (1998)) and of the fact that the overwhelming majority of criminal cases in the United States result in plea bargains. In the PRC, approximately 40% of criminal defendants are represented by counsel, although often they have little involvement in the all important pre-trial stage.

²⁵ Many are ex-soldiers, re-assigned in the 1990s when it was determined that the army had too many people and the courts too few and that the requisite skill sets are somewhat comparable. 'He Weifang, Fuzhuan Junren Jin Fayuan' [Retired Soldiers in the Courts], *Nanfang Zhoumo* [Southern Weekend], 2 January 1998. To be sure, the court system has made extensive efforts in recent years to provide on the job training.

²⁶ As the noted social critic He Qinglian recently observed, "Among Chinese lawyers, there is a saying that 'to bring a litigation is to use one's connections' [*da guan si jiu shi da guanxi*]." He Qinglian, 'Dangqian Zhongguo Shehui Jiegou Yanbian de Zongtixing Fenxi' [An Overall Analysis of the Current Change of

One might respond to criticisms regarding the frequency with which citizens use lawyers by suggesting that it does not necessarily diminish the core argument of those who have been relatively sanguine about the building of a legal profession in China and its implications, but instead shows simply that the process is more time consuming than many assumed or perhaps that more resources ought to be devoted to the task than they had initially thought. But as the aforementioned account suggests, rather than presuming that the changes of recent years a fortiori have been a boon for the rule of law, we need more thoroughly to probe what is underway in China. That type of research, in part regarding illicit behavior, some of which may carry severe criminal sanctions (including the death penalty) is not easy to conduct, most especially in a society in which many matters, particularly concerning the administration of justice, remain off limits, especially for foreigners. There are, however, growing numbers of articles to be found in Chinese media regarding widespread corruption in legal processes (which lawyers are inclined to blame on judges and judges on lawyers -- but few, at least in print, on the Party as an institution). My own interviews of scores of Chinese and foreign lawyers, judges, legal academics, and businesspeople working in Beijing, Shanghai, and other major cities suggest that the expansion of the Chinese bar has been accompanied by increasing corruption, with lawyers often a conduit for, if not the instigators of, such behavior.²⁷ Indeed, although the list of questions I developed for these interviews did not specifically address corruption, each lawyer interviewed brought up this topic him- or herself, with some expressing regret at what they described as the need to engage in such behavior in order to stay competitive and others boastful about what they claimed was their capacity to reach virtually any Chinese judge. My sampling, to be sure, makes no pretense of being broadly representative of the nation's bar as a whole. If anything, however, it drew disproportionately on urbanites with elite legal educations (whether obtained in China or

China's Social Structure], *Dangdai Zhongguo Yanjiu* [Modern China Studies], vol.68, no.3 (2000), p.86. See also Frank Ching, 'Rough Justice', *Far Eastern Economic Review*, (August 20, 1998), p.13. Also confirmed in Author's interviews, July 2000, Beijing.

²⁷ Alford, *supra* note 15.

abroad or both) whose predominantly business-oriented law practices and broader life experience generally involve a greater exposure to the sort of international norms typically lauded by those who vest considerable hope in China's developing a domestic counterpart to the bar in this country.

Presumably, without minimizing such problems, some outside analysts may be tempted to view them as likely to abate substantially as increasingly professionalized lawyers (and others) with an interest in the cleaner administration of justice make their presence felt. That may happen, but then again, it may not — for reasons having to do with the degree to which the Chinese legal profession remains interwoven with the party/state. Western, and especially American, observers remain far too quick to read the Communist Party's ebbing enthusiasm for Marxist ideology and economics as encompassing either a concomitant receptivity to competing sources of authority or a naïve ignorance or obliviousness on the part of the Party's leadership to the potential impact of forces set in motion by the policies of the reform era.²⁸ We need to guard against underestimating either the Party's desire to retain power or the self-interest of those who are benefitting from the manner in which power is now held and exercised.²⁹

²⁸ For an example of such smugness about the naïveté of China's leaders (and a disturbing inattentiveness to the possible consequences of pointing this out on the op-ed page of the *New York Times* -- which the PRC Embassy, no doubt, monitors) from an otherwise thoughtful writer, see Anthony Lewis, 'The Engine of Law', *New York Times*, 6 July 1998, p.A11.

²⁹ The pervasiveness of corruption is discussed in Hu Angang (ed), *Zhongguo: Tiaozhan Fubai* [China: Fighting Against Corruption] (Hangzhou: Zhejiang Renmin Chubanshe, 2000). This volume, put together by one of China's most distinguished economists, estimates that some 16-17% of China's GDP (running well over 100 billion dollars) is lost annually to corruption and associated behavior. See also Craig S. Smith, 'Graft in China Flows Freely, Draining the Treasury', *New York Times*, 1 October 2000, p.4; 'China Handling 9,000 Corruption Cases', *Agence France Presse*, 11 December 2000 (indicating from official sources that more than 500,000 cases of corruption have been investigated during the past decade and that at present, some 9,000 regarding banks and other state enterprises are underway); and James Kynge, "'Personal Conduct' Costs Chinese Minister His Job", *Financial Times*, 5 December 2000. The last article concerns the PRC's Minister of Justice, Gao Changli, who was supposedly placed under house arrest for, *inter alia*, misuse of state resources after an investigation said to have been carried out by the party's central disciplinary authorities, rather than by the judiciary or a state administrative organ.

The party/state remains far more involved in the professional lives of lawyers than most foreign observers (perhaps blinded by what I have elsewhere described as the “tasselled loafers” phenomenon³⁰) recognize or than Chinese attorneys, conscious of appearances, would wish to acknowledge.³¹ Through the Ministry of Justice (MOJ) and its sub-national counterparts, it continues directly to have the authority to determine such vital indicia of professional independence, as that term is understood in the west, as the size of the profession, admission, educational requirements, modes of organization, official fee schedules, and disciplinary proceedings, among others. Nor have the MOJ’s much vaunted efforts to assume a posture of macro (*hongguan*) oversight while leaving day-to-day governance to the bar associations done much to promote professional autonomy, given the ways in which, for example, the MOJ has filled the leadership ranks of the All China Lawyers Federation (*Quanguo lushi xiehui*) with its own personnel and has displayed little interest in supporting the (few) calls that have arisen for malpractice measures that might make lawyers more subject to the discipline of the marketplace.³²

The foregoing links have important implications for thinking about the independence of lawyers from the party/state, some such lines having the potential for direct political influence and others constraining the bar in more subtle, but ultimately more consequential, ways. So it is, for example, that notwithstanding the tendency of most foreign observers to view the party/state

³⁰ By this, I mean the tendency of some foreign observers to mistake appearances for substance. Alford, *supra* note 13.

³¹ There is, to be sure, some quite sophisticated writing by PRC scholars about the situation of Chinese lawyers. See, for instance, Du Gangjian and Li Xuan, *Zhongguo Lushi De Dangdai Mingyuan* [The Contemporary Fate of Chinese Lawyers] (Beijing: Gaige Chubanshe, 1997); Zhang Zhimin, ‘Dangdai Zhongguo de Lushi Ye, Yi Minquan Wei Jiben Chidu’ [Lawyers in Contemporary China: A Civil Rights Perspective], *Bijiaofa Yanjiu* [Journal of Comparative Law], vol.9 (1995), p.1.

³² To be sure, the Lawyers Law acknowledges the possibility of malpractice actions (without providing a mechanism for them). The All China Lawyers’ Federation recently prepared a report denouncing corruption and incompetence on the part of lawyers and called for a reduction in the number of persons admitted annually to the bar.

as largely having written off direct ideological control, there are scores of regulatory measures governing law practice in Beijing that, inter alia, require that law firms form Communist Party cells and senior lawyers to provide junior colleagues with ideological, as well as practical, training. And so it is that the lawyers bureau of the Beijing municipal government, which oversees annual renewal of lawyers' licenses, in 1999 instructed attorneys not to represent persons detained during the crack-down on the Falungong movement.

To heed the state's on-going presence in the affairs of Chinese lawyers is not to suggest that the nature of its involvement is unchanged from the days when socialism was more than an adjective used to justify whatever economic measures the Party might wish to promote. Senior partners interested in maximizing revenues may be none too keen to spend time in empty ideological exercises, while warnings against representing the Falungong and other activists are, as one of the more outspoken members of Beijing's legal community put it, utterly superfluous. But before we break out the *maotai* and celebrate the ways in which the profit motive may be sapping the ideological content of the party/state's efforts at political control, we need soberly to consider the possibility that it may be reinforcing the Party's hold on power and impeding, rather than facilitating, movement toward the rule of law specifically and liberalism more generally.

There are undoubtedly exceptions, but it could be argued that at least some in the Chinese bar, and perhaps most especially elite business practitioners in the capital, have struck a Faustian bargain with the party/state, willingly accepting a good life materially and in terms of prestige and security in return for foregoing certain of the attributes (most notably, a considerable measure of independence from the state) generally associated with legal professionalism in liberal democratic states and for acquiescing in the role the Party has accorded itself in Chinese political and legal life. This is perhaps most readily apparent in the array of corporatist alliances formed between the party/state and lawyers.³³ At their most extreme, this may include links

³³ A comparable point has been made with respect to the emerging business community in the PRC. See, for example, Margaret Pearson, *China's New Business Elite: the Political Consequences of Economic*

between officialdom and law firms in which work is directed, foreign study opportunities granted, licenses for specialized tasks awarded, and permits clients need doled out in return for pecuniary gain. We ought not, for instance, to be any more mesmerized by the proliferating forms of ownership of PRC law firms than we would be by those of industrial enterprises, for as is the case in the latter, so, too, in the former, placards suggesting that a firm is non-state may still mask close financial and other ties to pertinent officials while an on-going designation as state-owned does not necessarily mean that we can rest assured that all proceeds are, at the end of the day, finding their way into state coffers.

But even if such practices are not as widespread as my interviewing would seem to suggest, there is the arguably more vexing dilemma presented by the ways in which lawyers benefit from the current distribution of power. This is neither to paint all PRC lawyers with a single brush³⁴ nor to ignore challenges that legal professionals may face worldwide, but rather to demand that those of us who consciously target China's lawyers as likely to be a major force in promoting greater liberality, confront such institutional factors and associated collective action problems (e.g., the strong disincentive to eschew bribery if one wishes to retain clients noted by many lawyers I interviewed). These factors surely present a daunting and very concrete set of

Reform (Berkeley: University of California Press, 1997); David L. Wank, 'The Institutional Process of Market Clientelism: Guanxi and Private Business in a South China City', *The China Quarterly*, vol.147 (1996), p.820. He Qinglian has expressed a good deal of disappointment with the ways in which businesspersons, lawyers, accountants, and the middle class more generally have exacerbated China's endemic problems. See He, *supra* note 27, p.85-87 and generally. As Robert Bianchi's work of the 1980s on Egypt and Turkey suggests, we may want to guard against the pervasive assumption that the middle class will always be a force for liberalization. See Robert Bianchi, *Unruly Corporatism: Associational Life in Twentieth Century Egypt* (New York: Oxford University Press, 1989).

³⁴ There are, to be sure, isolated figures such as Zhang Sizi and Guo Jianmei, who on behalf of political dissidents and abused women, respectively, have posed noteworthy challenges to the authorities. And, as previously indicated, my interviews have focused predominantly on business practitioners in Beijing for whom the stakes may be higher than for their provincial brethren engaged in more mundane areas of practice. I would also note, as discussed *infra* note 51, that we ought not to allow our focus on the legal profession to overshadow the ways in which ordinary citizens may seek to avail themselves of the protections to which the law suggests they are entitled.

challenges that noble visions of the place of legal professionals in other societies alone cannot will away.

B. WHY OBSERVERS MISUNDERSTAND THE DEVELOPMENT OF THE CHINESE LEGAL PROFESSION

Why is, then, that we are so inclined to see lawyers in the PRC as, in effect, junior colleagues -- cut from the same cloth as their American brethren, but needing a bit more tailoring before their professional attire fits them as smartly as we like to think ours fits us (or at least once did)? The answer is in some respects quite obvious, in others appreciably less so. Ironically, the more obvious respects are those concerning the supposedly exotic orient, the less apparent those much closer to home, linked to the ways in which we American lawyers and legal academics think of the very profession we seek to propagate.

There is no particular mystery to or instructive novelty about many of the difficulties that impede the conduct of research into topics such as the place of the legal profession in China. In this, as in many other areas, it is rarely, easy to examine facets of Chinese life that might be politically sensitive because they touch directly on either the Party's power or abuses thereof (as with corruption at high levels). Notwithstanding a movement toward greater transparency made in conjunction with various bilateral trade agreements or with accession to the World Trade Organization (WTO), Chinese authorities continue to limit access to potentially pertinent materials. Normative documents that may override positive laws are often limited to *neibu* or "internal circulation" (i.e., no foreigners, and in some instances, few Chinese, need apply). An example is the Beijing rules on the formation of party cells in law firms (e.g., all cells must have at least three Party members).³⁵ On top of this, there are the endemic problems of working with

³⁵ Compliance with Article X of the General Agreement on Tariffs and Trade (concerning transparency) would seem to require far more extensive adjustment in Chinese rule making and application processes than appears generally to be appreciated. For a thoughtful essay on the challenges posed by China's

official Chinese statistics — which in this area purport to tell us precisely how many times lawyers negotiated contracts (down to the last *renminbi*), drafted opinion letters, and provided other forms of legal guidance, but which differ between their public and internal versions and provide no information as to how many citizens were executed or sent to re-education through labor, with (or, more typically, without) the benefit of counsel.³⁶ There is little new or intriguing about such impediments to scholarly understanding. More interesting are the ways in which prominent figures in the scholarly and policy community in this country have read, or misread, the Chinese landscape. The point here is not that one expects that all who would venture to work with or write about China must possess the equivalent of an area studies background. So steep an entry price would deter many who may have contributions of value while privileging others whose vision may suffer constraints of their own, including insufficient disciplinary depth or comparative breadth. Rather, it is to decry the ignorance or arrogance of those who would deign to prescribe for another society without first taking the trouble to consider basic issues of historical experience, institutional structure, political power and the like -- to wit, the type of due diligence that we would demand of any foreign observer deigning to suggest ways in which our society might better itself. In some instances, this may be a product of what Bruce Ackerman of Yale recently bemoaned in the *Harvard Law Review* as the stunning lack of knowledge of the world beyond our borders demonstrated by American legal academics, even relative to our brethren in political science.³⁷ In other situations, it may result from the soothing sound of one's Chinese interlocutors invoking language that we, not always listening closely, may associate with

integration into the WTO, see Robert Herzstein, 'Fitting China into the WTO: Can China Function in a Law Governed Trading System?', *Harvard China Review*, vol.2 (2000), p.63.

³⁶ See Alford, *supra* note 15. The law yearbooks do indicate that approximately 200,000 people resided in such camps during the mid 1990s, but neither they nor other official sources I have found indicate how many citizens are annually committed or re-committed. Nor is this system a relic of the past, as some are inclined to suggest. Human rights groups believe that as many as 10,000 followers of the Falungong may have been consigned to reeducation through labor camps in the past two years.

³⁷ Bruce Ackerman, 'The New Separation of Powers', *Harvard Law Review*, vol.113 (2000), p.633.

liberal legality, as figures ranging from Jiang Zemin through members of the dissident community, speak of ruling the country through law (*yi fa zhi guo*).³⁸ In yet others, it may have to do with the desire on the foreign side to disseminate values deeply cherished here or to use China as a staging ground to re-fight our own ideological battles or otherwise vindicate signature theoretical positions in the manner Richard Madsen so artfully describes in more general terms in *China and the American Dream*.³⁹ And in yet others, it may be driven by a need to undertake “legal exportation projects” designed as much with an eye toward satisfying domestic American political concerns or economic interests as with the recipient country in mind, as arguably has been the case with the Clinton Administration’s rule of law initiative for China.⁴⁰

However interesting such concerns may be, ultimately they sound very much in the familiar comparativist’s key of non (area) specialists not knowing as much as they need to about something that is removed from their principal line of endeavor. There is, however, a more novel and engaging focus, whether from the vantage point of those wishing to probe more deeply into the reasons that the transplantation of foreign institutions into China is so problematic, or from the vantage point of those who are far more concerned with American legal thought than with anything Chinese. It is that the Chinese case can help us to see limitations of a fundamental nature in the non China- related work of those who are seeking to foster the growth of an American style legal profession in China. The remainder of this Part supports this point with a consideration of the understanding of the legal profession portrayed in Dean Kronman’s landmark book, *The Lost Lawyer*.⁴¹ Kronman, to be sure, has not written about China

³⁸ See, for example, ‘President Tells Legal Profession to Help Promote Reform’, *Xinhua*, 27 January 1997.

³⁹ Richard Madsen, *China and the American Dream: a Moral Inquiry* (Berkeley: University of California Press, 1995).

⁴⁰ I discuss the US rule of law initiative in Alford, *supra* note 10.

⁴¹ Anthony T. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (Cambridge: Belknap Press of Harvard University Press, 1993).

specifically, but as the quote introducing this essay illustrates, he has, in his role as dean of the Yale Law School and as US chair of a bilateral conference on legal education launched under the auspices of the State Department in conjunction with President Clinton's 1998 trip to the PRC, played a role both in disseminating American norms to China and in portraying China here.⁴² Perhaps even more importantly, whatever Kronman's direct involvement in things regarding China, the conception of the lawyer set forth in his book — which one commentator termed “a major document in the history of American law” and which has generally been treated as one of the most important books of its generation regarding the legal profession⁴³ — not only surely has made its influence felt in efforts to propagate American models of lawyering in China, but also exemplifies a central current in thinking in this country about what the legal profession should be.⁴⁴

At first blush, a book entitled *The Lost Lawyer: The Failing Ideals of the Legal Profession* might seem an odd source in a discussion of efforts to foster American notions of lawyering. But then again, Kronman clearly did not write his nearly 400 page book simply to mark the imminent passing of a golden age. Rather, very much in the manner of Confucian argumentation (even if not recognized as such), *The Lost Lawyer* is better understood as invoking the past in order both to make points about the deficiencies of the present and to suggest what a better future might be.

A complex book, to be sure, *The Lost Lawyer*'s central proposition is that over the course of the second half of the twentieth century, the legal profession in the United States has

⁴² See Sara Leitch, ‘Law Dean Advises Chinese Law Reform’, *Yale Daily News*, 16 September 1998, p.1.

⁴³ The words are those of David Kornstein of the *New York Law Journal*, reproduced on the back cover of the paper edition of Kronman's book, along with lavish praise from Charles Fried, Robert Gordon and other noted scholars of the legal profession. Even the book's critics treat it as a major work.

⁴⁴ For instance, see Gordon's comments, *supra* note 44 or the insightful critique by David Wilkins, ‘Practical Wisdom for Practicing Lawyers: Separating Ideals from Ideology in Legal Ethics’, *Harvard Law Review*, vol.108 (1994), p.458.

experienced a falling away from the ideal of the lawyer-statesman, with serious ramifications for our polity and society in general. To understand why this is, we need briefly to consider Kronman's vision of politics. For him, politics ought not to be construed only as the battling out of previously defined sets of interests, but instead as a potential act of fraternity in the course of which, through reasoned deliberation, interests can be developed, refined and either reconciled for the larger good or, if truly incommensurate, accommodated in as an intelligent and fair a manner as reason permits.

The lawyer-statesman, Kronman argues, has a singular role to play in this all important enterprise, so central to a sense of community, because the lawyer-statesman, by definition, "excels at the art of deliberation...[and] is a paragon of judgement."⁴⁵ That means that even as he represents private interests vigorously, the lawyer-statesman is able to discern their impact on the public interest and to work with his clientele to define the former in a manner consistent with the latter, to the longer term benefit of both interests. So, too, when in public life the lawyer-statesman is able to assist members of the polity to transcend parochialism and to realize their deeper interests as part of a larger community.

The attributes that make one a lawyer-statesman, contends Kronman, are "trait[s] of character" further cultivated through appropriate study to produce a prudence or "practical wisdom." In effect, says Kronman in words that unwittingly echo the Confucian *Analects*, we should "look to him for leadership...[and] praise him for his virtue and not just his expertise."⁴⁶ That course of study, continues Kronman, in words that do not echo of the *Analects*, is rooted in the case method classically employed in American law schools, in which students, by virtue of being forced to imagine themselves as judges in exceptionally close appellate cases, learn not only to see issues from many sides, but, in so doing, also learn to cultivate the art of being

⁴⁵ Id. p.15.

⁴⁶ Id. p.16.

simultaneously sympathetic and rigorous, and to understand that politics, and, indeed life generally, prize the art of blending that which is ideal with that which is practical.

Alas, bemoans Kronman, forces in both the world of ideas and that of affairs, have over the past half century increasingly militated against realization of the lawyer-statesmen ideal. In the former regard, the legal academy has increasingly abandoned the very thing that set law apart from other disciplines — namely, the common law case method — in favor of what he describes as a belief in “scientific law reform” that may have begun at the end of the nineteenth century with Harvard Law School Dean Christopher Columbus Langdell and that may have grown further through the legal realists. Today this belief finds expression in schools of thought as seemingly varied as law and economics and critical legal studies. Whatever the virtues of economics or philosophy (or social science in general), they are, to his way of thinking, inferior to the law for the nurturing of the “practical wisdom” Kronman so prizes. This is because they stress an abstract and, in his mind, excessively ideological approach toward the resolution of problems that need to be understood in a more nuanced manner if one is to strike a prudential balance between the desirable and the attainable or between the general rule and individual circumstance. In effect, the growing reliance on these disciplines beyond the law has “encouraged lawyers to view themselves as ‘social engineers’ engaged in the structural design of institutions...focused on more-abstract concerns...in contrast to the common lawyer of the past, who built by indirection and without a conscious plan in view.”⁴⁷ Compounding this trend in the world of ideas has been a transformation in the nature of law jobs, whether at the bar or on the bench (or in the academy), which in an atmosphere of increasing commercialization and complexity have become almost too specific -- as exemplified by their growing concern with technique and specialized knowledge that have dulled, rather than sharpened, the traits of character that when properly honed may yield the qualities of deliberation he so prizes.

⁴⁷ Id. p.22.

But the seeming bleakness of parts of *The Lost Lawyer* notwithstanding, all is not despair, for why, otherwise, would Kronman have taken the trouble to write so substantial a book? We can indeed, he argues, recapture the ideal of the lawyer-statesman if we reshape our institutions accordingly (which presumably is how he would justify accepting the deanship of a law school known more for its commitment to social scientific and philosophical inquiry than to traditional doctrinal analysis).⁴⁸ And perhaps in China, which, as fortune would have it, has embarked in our lifetime on an epic effort of singular magnitude wholly to reconstruct itself legally, we have a critical role to play in helping to implement this ideal — which may also provide us with the opportunity, perhaps not easily available in our own society, to acquit ourselves as lawyer-statesmen of historic note.

Kronman's devotion to the ideal of the lawyer-statesman may in some respects seem excessive, but the general sentiment it expresses informs a good deal of both academic work and policy efforts concerning the development of a legal profession in China. We advocate the profession's further growth in China not so much to produce technicians (though there is, no doubt, some element of that desired by business and others who regularly need to deal with the PRC), but more so because we see lawyers as especially well equipped to advance concerns that we value — such as the rule of law, devotion to a market economy, and even democratic government — be it through active propagation or simply the power of the example of their daily professional lives.

Ironically, however, some of the very same qualities that Kronman extols for the part they play in the nurturing of the lawyer-statesman bear a measure of responsibility for the misunderstanding of the Chinese profession reflected in Kronman's own observations and in both scholarly and policy circles more broadly. We can see this in Kronman's (repeated)

⁴⁸ See, for example, Richard Falk, 'Casting The Spell: The New Haven School of International Law: Jurisprudence for a Free Society', *Yale Law Journal*, vol.104 (1995), p.1991. Of course, some have expressed skepticism about the depth of Yale Law School's commitment to social science inquiry. Mark Tushnet, 'Critical Legal Studies: A Political History', *Yale Law Journal*, vol.100 (1991), p.1515.

statements, upon which he places great weight, of the nature and genesis of the habits of mind and traits of character that warrant our vesting leadership in the lawyer-statesman. The quality of practical wisdom and political fraternity that we (should) so cherish, Kronman tells us, are not primarily about “the structural design of institutions” of the type fostered through immersion in economics or philosophy and the capacity they promote to see things in broad, abstract, and perhaps ideological terms. Rather, they involve a more solomonic interstitial, incremental, balancing of potentially incommensurate ends that is imparted by the type of analysis and way of thinking that the case method fosters.

Structure, however, does matter. Kronman and virtually all others who would share what they take to be the ideals of liberal legal professionalism in the US with China seem to be assuming that these ideas are so powerful they will not only blossom in the PRC, but will also play a critical role in the liberalization of distinctly illiberal institutions there. As Dezalay and Garth put it at one point in a prognosis that, one suspects, echoes of the thinking of many Americans engaged in legal transplantation, soon “the legal profession may rival” the Communist Party. As recounted in Part I of this paper, the record so far suggests the opposite — namely, that it is the Communist Party, and China more generally, that are doing the far larger part of the shaping, judging from the ways in which the PRC profession has assisted the party/state in legitimating its position⁴⁹ and, perhaps even more tellingly, from the role that

⁴⁹ Many persons concerned with China policy take considerable comfort in the fact that the PRC now often responds to criticisms of its rights record in the language of the law. While I, too, think it significant that the Chinese government has taken up this discourse (and happily acknowledge that there are serious Chinese scholars working on rights issues), we need also to take account of the ways in which the state (and some scholars) have used such rhetoric in a highly instrumental fashion to defend acts that would seem deeply problematic from the vantage point either of Chinese law or of international human rights, and to fend off foreign criticism. Consider, for example, the uses of law to justify the state’s harsh crackdown on the Falungong movement. In that regard, see materials in Danny Schechter, *Falun Gong’s Challenge to China: Spiritual Practice or “Evil Cult”?* (New York: Akashic Books, 2000).

lawyers appear to be having in exacerbating the corruption that so afflicts judicial and administrative life in China.⁵⁰

That this is so ought not necessarily to be surprising if one were to realize that the qualities Kronman prizes would be better served were they to be informed by a greater appreciation of structure, not to mention a healthy dose of humility. The history in China of Buddhism, Christianity, Marxism and many another idea possessed of a longer history, more innate power and more effective proselytizing than legal professionalism has underscores the fact that we do not need to see context as static in order to appreciate the ways in which it shapes that which would shape it.⁵¹ And to take a more contemporaneous illustration that would seem obvious, but that has largely been ignored in considerations of the value of external cultivation of the legal profession, lawyers in the PRC function in an institutional setting quite different from that of our own society.⁵² The Chinese bench has, at least in theory, been cast in a civil law frame (albeit quite different from that of liberal democratic states with a continental system), while we promote a distinctly common law model of the profession, typically with utter obliviousness to how things function in civil law jurisdictions.⁵³ To put it mildly, PRC

⁵⁰ To note this is not to ignore the ways in which citizens have sought to hold the state to its own law — the “double-edged” phenomenon about which I first wrote in 1993. See Alford, *supra* note 15. To the contrary, it is in part to point out the ways in which lawyers may be blunting, as well as facilitating this phenomenon.

⁵¹ Jonathan D. Spence, *To Change China: Western Advisors in China 1620-1960* (New York: Penguin Books, 1980).

⁵² Kronman, to be sure, does acknowledge in passing that in some societies “there is no room...for civic friendship or the statesmen’s art...because they [the statesmen] stand at the boundaries of political life and, if they lead anywhere at all, it can only be to revolution.” *Supra* note 42, p.107. Judging from the nature of his involvement in and comments about the PRC, it would not seem that Kronman could fairly include the PRC in this category.

⁵³ He Weifang, ‘Tongguo Sifa Shixian Shehui Zhengyi: Dui Zhongguo Faguan Xianzhuang de Yige Toushi’ [The Realization of Social Justice Through Judicature: A Look at the Current Situation of Chinese Judges], in Xia Yong (ed), *Zou Xiang Quanli De Shidai: Zhongguo Gongmin Fazhan Yanjiu* [Toward a Time of Rights: a Perspective on the Development of Civil Rights in China] (Beijing: Zhongguo Zhengfa Daxue Chubanshe, 1995).

authorities have not yet come to prize independence in any major dimension of public life.⁵⁴ In addition there are massive and immediate incentives for lawyers, among others, to accept a system arrested between plan and market, with many a bottleneck (and concomitant opportunities for rent-seeking), rather than to push for more thorough-going reform and accompanying competition.⁵⁵

But the failure of Kronman and others like him to engage in the type of inquiry that might elicit such an understanding raises broader questions, reaching beyond the PRC to our own society. For example, as a normative matter, how do we know that the values Kronman so strongly advocates are worthy of broader adoption or even of retention here if, as our own society and bar have become more democratic, pluralistic and prosperous, each, along with the bench and the legal academy, has, by Kronman's own account, largely rejected them? More practically, how do we know that the ideal Kronman sketches, centered around a call for a small legal-aristocratic leadership, is not so linked to the conditions (including a far more homogeneous elite) of the period within which Kronman suggests it flourished (i.e., this nation's first century) that even if desirable, it is unsustainable, given the current structure of American life, economically, politically and socially? And, to take but one more illustration, if we are so uncertain about the links between this ideal and the society from which it has emerged, how are we (or those whose lives it would shape) to determine its feasibility in another society that presumably differs in important respects from our own?

In one sense, Kronman's relative slighting of what he terms the structural in favor of practical wisdom seems odd, given that he earlier produced a book length study of Weber's

⁵⁴ As Ken Lieberthal put it in 1995, "all nonofficial organizations exist only at the sufferance of the party." Kenneth Lieberthal, *Governing China: From Revolution Through Reform* (New York: W.W. Norton, 1995). This is not to denigrate the serious efforts, nicely documented by Tony Saich, of a growing number of citizens' groups to carve out space for themselves in the interstices. Tony Saich, 'Negotiating the State: The Development of Social Organizations in China', *The China Quarterly*, vol.161 (2000), p.125.

⁵⁵ Author's interviews, Beijing, September 1997; August 1999; July 2000.

approach to law⁵⁶ and given that *The Lost Lawyer* describes itself as a work of philosophy and sociology that states quite explicitly that philosophical argument is the only remaining hope for recapturing the ideals embodied by the lawyer-statesman.⁵⁷ Yet, in another sense, it is very much of a piece with the great majority of American writing about the sociology of the legal profession which, whether by lawyers, sociologists, or others, tends to present its theoretical findings as having universal validity, even if they emerge from work principally concerned with the United States.⁵⁸ This approach is taken in discussions of schools as seemingly different as the functionalism of Talcott Parsons,⁵⁹ the professionalization project of Magali Sarfatti Larson,⁶⁰ the market driven focus of scholars running the political gamut from Richard Abel⁶¹ to Richard Posner, and the knowledge centered inquiry of Andrew Abbott,⁶² David Trubek,⁶³ Bryant Garth⁶⁴ and others. It has produced a sociology of the profession that assumes the US-specific backdrop

⁵⁶ Anthony T. Kronman, *Max Weber* (Stanford: Stanford University Press, 1983).

⁵⁷ Kronman, *supra* note 42, p.14.

⁵⁸ This may be most obvious in the writing of Richard Posner. Although his writing on the legal profession is principally concerned with the experience of the United States, he treats the lessons he draws from this as having far broader application. Richard Posner, 'Professions', *Arizona Law Review*, vol.40 (1998), p.1. See also, Richard Posner, 'Creating a Legal Framework for Economic Development', *World Bank Research Observer*, vol.13 (1998), p.1. I discuss Posner in Alford, *supra* note 10.

⁵⁹ See, for example, Talcott Parsons, 'The Legal Profession', in William Evans (ed), *Law and Sociology* (New York: Free Press of Glencoe, 1962).

⁶⁰ Margali Sarfatti Larson, *The Rise of Professionalism: A Sociological Analysis* (Berkeley: University of California Press, 1977).

⁶¹ See, for example, Richard Abel, 'Comparative Sociology of the Legal Profession', in Richard Abel and Philip Lewis (eds), *Lawyers in Society: Comparative Theories* (Berkeley: University of California Press, 1988).

⁶² Andrew Abbott, *The System of Professions: An Essay on the Division of Expert Labor* (Chicago: University of Chicago Press, 1988).

⁶³ David Trubek, Yves Dezalay, Ruth Buchanan, and John Davis, 'The Future of the Legal Profession: Global Restructuring and the Law: Studies in the Internationalization of Legal Fields and the Creation of Transnational Arenas', *Case Western Reserve Law Review*, vol.44 (1995), p.407.

⁶⁴ See Dezalay and Garth, *supra* note 4.

of a weak executive, a highly independent bench, a strong profession largely distinct from the state but less so from commerce. It also assumes a vibrant civil society to such a degree that the theoretical guideposts emerging from it do not map comfortably even onto liberal democratic states with a civil law heritage, let alone societies such as the PRC.⁶⁵ Perhaps even more crucially because it takes our institutions so much as a given, such work, in the end, does not probe as thoroughly as it might into the relationship, even here, between the particular institutions of our society and the nature and role of our legal profession. As such, it is far less illuminating academically and far less empowering for those engaged in legal development than is work that is of a more nuanced historical or richly comparative bent.⁶⁶

C. THE CHALLENGE OF THINKING ABOUT LAWYERS IN THE PRC

Appearances to the contrary, the principal purpose of this paper has not been to follow in the Harvard tradition of faulting legal scholarship emanating from Yale. Instead, it has been to utilize the phenomenon of Dean Kronman's hope of finding (or implanting) in China the ideals of legal professionalism that he believes we are losing here as a focal point for reflecting on what is, assuredly, the most concerted effort in world history to spawn a legal profession. For, as this brief concluding part will endeavor to suggest, the Chinese experience raises difficult, but

⁶⁵ Interestingly, scholarly writing about the legal profession in Europe tends to be more self-conscious about the significance of institutional context, perhaps a reflection of the vicissitudes of the German legal profession over the past century or of the likelihood that those who write about societies other than the US cannot help but be mindful of the American experience and the ways in which it differs from what they discern to be the case elsewhere (in a manner that does not have a direct counterpart for those whose principal focus is the American profession). See, for example, Dietrich Rueschemeyer, 'Comparing Legal Professions: A State-Centered Approach', in Richard Abel and Philip Lewis (eds), *Lawyers in Society: Comparative Theories* (Berkeley: University of California Press, 1988); Kenneth F. Ledford, *From General Estate to Special Interest: German Lawyers 1878-1933* (New York: Cambridge University Press, 1996); Terence C. Halliday and Lucien Karpik (eds), *Lawyers and the Rise of Western Political Liberalism* (New York: Oxford University Press, 1997).

⁶⁶ See *supra* note 10.

essential, questions not only about China, but about legal professionalism, legal academe, and law more generally.

For all its use of the tools of sociology and philosophy, Kronman's book does not yield as much insight as at least this observer wishes it had into the broad implications of professionalism from the vantage point of either discipline as we turn to the Chinese case. From a sociological perspective, we need to know far more than we can glean from *The Lost Lawyer* (and most other writing regarding the legal profession) about the interplay between ideas of professionalism and broader institutions and norms. If, for example, Robert Gordon is correct in his provocative hypothesis that the patterns of American liberalism made themselves felt not only in tangible form, such as the manner in which the late nineteenth century elite New York bar organized itself for the practice of law, but also in the very ways in which those lawyers thought through legal problems, what does this suggest for our consideration of lawyers in the as yet decidedly illiberal PRC setting?⁶⁷ Or, to use Kronman's frame of analysis, what does it mean to speak of the lawyer-statesman as possessing a singular capacity to formulate and articulate a society's interests through politics in a setting in which the range of views that might be given voice remains sharply constrained and in which behind the state and its law lurks the Party? Or if what Kronman describes as the qualities that distinguish lawyers from other intellectuals in our society can only be cultivated through the common law case method, what does that suggest about the prospects for the bar in civil law jurisdictions, even in liberal democratic civil law states, let alone China? And what are the implications of promotion of a legal profession for the access of citizens, particularly among society's more vulnerable groups, to dispute resolution, especially if historically grounded alternatives to formal legal processes (such as mediation) are cut back as the bar and the state's law grow?

⁶⁷ Robert W. Gordon, 'Legal Thought and Legal Practice in the Age of American Enterprise', in Gerald L. Geison (ed), *Professions and Professional Ideology in America* (Chapel Hill: University of North Carolina Press, 1983).

Nor are the questions we need explore from a philosophical viewpoint any easier. If we believe that the high ideals undergirding our profession are failing here, what is the moral basis for our seeking to persuade the Chinese or anyone else to adopt them? If we believe that the ideals of legal professionalism are linked to or dependent upon the institutions and values of liberalism, does that obligate us to push first or simultaneously for broader political change and, if so, on what moral foundation? And if so sweeping a course is either inappropriate or impractical, what are the implications of our placing so great an emphasis on legal professionals, if not legal reform more generally, in the absence of broader political change?

Lurking beneath many of these questions, both sociological and philosophical, are fundamental tensions in the nature of lawyering and law (and, for that matter, legal academe), at least in this society, that Kronman slights in his hope of promoting the ideal of the lawyer-statesman and of which most American observers seem essentially oblivious as they seek to foster legal development in the PRC. Kronman, reflecting, one imagines, the pride that a great many Americans who would export our legal institutions have had in at least the ideals of our legal profession, clearly is taken with the sentiment expressed in de Tocqueville's statement that "it is at the bar or the bench that the American aristocracy is found" — which he both quotes on the first page of his book and affirms with the observation that "judging by the wealth and influence of lawyers in contemporary America, one might conclude that his famous dictum is as true today as when he uttered it a hundred and fifty years ago."⁶⁸ Kronman, however, does not quote de Tocqueville's accompanying admonition — that although lawyers "value liberty, they generally rate legality as far more precious; they are less afraid of tyranny than of arbitrariness, and provided that it is the lawgiver himself who is responsible for taking away men's liberty, they are more or less content."⁶⁹ This important dimension of de Tocqueville's thinking is instead captured, if at all, in a fleeting acknowledgment well into *The Lost Lawyer* that "the

⁶⁸ Kronman, *supra* note 42, p.1.

⁶⁹ Alexis de Tocqueville, *Democracy in America* (New York: Vintage Books, 1990) (1848), p.266.

observation that American lawyers tend to be conservative...[has] been made before most famously by Tocqueville” and Kronman’s statement that our bar has tended to be “closely connected to the propertied class” and to have a disdain, coming from “above all, the discipline of legal reasoning...for the unruly proceedings of democratic assemblies.”⁷⁰ American lawyers as a whole may (or may not) be conservative in the sense Kronman suggests, but that proposition, I would argue, fails adequately to convey the grave danger — regarding lawyers’ potential proclivity to sacrifice liberty and embrace tyranny — against which de Tocqueville sounded his warning both in the above cited passage and in his further observation that a ruler “faced by an encroaching democracy” would do well to bring lawyers into his government, for “having entrusted to them a despotism taking its shape from violence, perhaps he might receive it back from their hands with features of justice and law.”⁷¹

My point here is not to deny the good that lawyers can do. Our history and that of other nations contains many an admirable example of lawyers deeply dedicated to the promotion of liberty through law.⁷² Rather, it is to urge that we not lose sight of de Tocqueville’s prescient observation regarding the profession’s double-edged capacity, borne out in our history and with analogs elsewhere, to facilitate very different ends. One need not lapse into a relativism that would equate the US and PRC to observe that even as we take note of a 98-99.5% conviction rate in China in our discussion of the role of counsel there, we might also want to remain mindful as we consider the profession here of the fact that some 90% of criminal cases in this country are resolved through plea bargaining (on which formal constitutionally oriented procedural

⁷⁰ Kronman, *supra* note 42, p.155.

⁷¹ De Tocqueville, *supra* note 70.

⁷² With respect to the United States, the work of the legal team in *Brown v. Board of Education*, the famed 1954 school desegregation case, comes readily to mind. See Richard Kluger, *Simple Justice: the History of Brown V. Board of Education and Black America’s Struggle for Equality* (New York: Knopf, 1975). Examples of heroic lawyering abroad are discussed in a number of the essays in Austin Sarat and Stuart Scheingold (eds), *Cause Lawyering: Political Commitments and Professional Responsibilities* (New York: Oxford University Press, 1998).

protections cast at best a distant shadow). An awareness of the complex picture de Tocqueville actually paints would seem to require that those who speak only of the profession's promise in China explain both why we would have reason to expect more of it there⁷³ and why the Chinese leadership, which is quite committed to maintaining its distinctly non-democratic hold on power, seems so intent on promoting the growth of the legal profession⁷⁴. The recognition that law may be dual-edged should, in turn, prompt us to stay attentive (as de Tocqueville also observed regarding the American experience) 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. That may be one thing in a state that is essentially liberal democratic and quite another in a nation that remains highly authoritarian.⁷⁵

⁷³ It might also require that we take note of the observation of many Chinese lawyers I interviewed to the effect that American business lawyers in China present a more variegated picture than we might imagine. Even as they acknowledge that the expatriate bar there may be introducing new norms of professionalism, there is considerable resentment among my sampling of PRC lawyers that many foreign lawyers routinely provide advice about local law in contravention of PRC legal and ethical requirements. For an account of one American lawyer's unwitting efforts to circumvent PRC requirements in order to work as a legal professional see Peter Wonacott, 'As China Opens the Door, Foreign Lawyers are Poised to Rush In', *Wall Street Journal*, 15 November 2000, p.A23.

⁷⁴ As indicated earlier (see *supra* note 29 and accompanying text), we should be wary of suggestions that authorities in the PRC are too naïve to understand the implications of their actions. This is not to deny that China's top leadership has relatively little direct experience with the institutions of liberal democracy. Nor is it to ignore the possibility that the Party's top echelon may in desperation be tolerating changes that it appreciates present some risk to its tight grip on power or that there may even be some persons of rank who would welcome a modest degree of liberalization, whether for reasons of philosophy or factionalism. Instead, it is to urge that persons who portray foreign legal assistance as a Trojan Horse demonstrate why they think they have a better understanding than China's ruling elite of how particular institutions may play out on Chinese soil, given the arduous political gauntlet through which those leaders have passed to reach and retain their present positions, their greater access to information about current Chinese circumstances, and the earnestness with which Beijing has dissected the experience of Eastern Europe and Taiwan over the past decade.

⁷⁵ For a recent account of the potential of how foreign assistance in legal development may legitimate problematic activity such as Beijing's crackdown on the Falungong see Ian Johnson, 'U.N. Helps Sponsor China Conference on 'Evil Cults'', *Wall Street Journal*, 22 November 2000, p.A19.

The foregoing presents a stiff challenge to lawyers and others concerned with the legal profession and legal development in the PRC, particularly if we also seek to remain cognizant of the ways in which legalization may privilege some members of society and the impact it may have on less formal modes of dispute resolution and citizen redress. Dedicated to the good that lawyers and law can do, we need to understand their pitfalls, even as we extol their potentialities. And, at least for those of us primarily situated in professional schools, we must not allow the allure presented by the opportunity to promote our ideals (or ourselves) to divert us from striving fairly to critique such endeavor. That may, in the end, pose a conundrum comparable in its complexity to the riddles posed by Laozi, Zhuangzi and other great ancient Daoist figures, but it would seem we owe no less to the Chinese and to ourselves.