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When Old Meets New: Some Perspectives on Recent Chinese Legal Developments and Their Relevance to the United States (The Importance of Labor Law)

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WHEN OLD MEETS NEW: SOME PERSPECTIVES ON RECENT CHINESE LEGAL DEVELOPMENTS AND THEIR RELEVANCE TO THE UNITED STATES (THE IMPORTANCE OF LABOR LAW)

*Dr. Louise Willans Floyd**

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“Is there one single maxim that could ruin a country?”

*Confucius replied: “Mere words could not achieve this. There is this saying, however: ‘The only pleasure of being a prince is never having to suffer contradiction.’ If you are right and no one contradicts you, that’s fine; but if you are wrong and no one contradicts you—is this not almost a case of ‘one single maxim that could ruin a country?’”¹ –Confucius, in *The Analects of Confucius**

“[O]ur lead has slipped. . . . We have to do better. . . . [The] world has changed. . . . [T]he change has been painful. I’ve seen it in the shuttered windows of once booming factories, and the vacant storefronts on once busy Main Streets.”² –President Barack Obama outlining the “Sputnik moment” and the need to “win the future” in his 2011 State of the Union Address.³

1. THE ANALECTS OF CONFUCIUS 62–63 (Simon Leys trans. 1997) (as cited in CHRISTOPHER PATTEN, EAST AND WEST: CHINA, POWER, AND THE FUTURE OF ASIA 116 (1998)).

2. President Barack Obama, State of the Union Address (Jan. 25, 2011) (transcript available at <http://www.whitehouse.gov/the-press-office/2011/01/25/remarks-president-state-union-address>).

3. *Id.*

I. INTRODUCTION

THE connection between the United States' twenty-first century President Obama and China's ancient philosopher, Confucius, may not immediately be apparent. But the relevance of China to the West, especially to the United States, as well as the significance of a growing Chinese economy and political presence, is a topic of importance which will endure for decades.

One aspect of China's emergent power is labor law.⁴ With its rock-bottom wages, China "has become 'the factory of the world'"⁵ as companies from all over the globe clamor to make use of low production costs to increase corporate profits.⁶ But those low production costs come hand-in-glove with myriad problems for workers.⁷ In many cases, the conditions for Chinese laborers are poor at best.⁸ The ripple effect that has for workers, especially in manufacturing sectors in the United States and other countries like Japan and Australia, is a hotly debated topic.⁹

It is against this background that the newly developing labor laws of China and the new international law measures aimed at Chinese labor standards (such as the attempts by assorted U.S. administrations to link labor conditions to trade agreements) have been put in to place.¹⁰ It is to these debates and developments that this Article contributes.

The argument of this Article is that the raising of Chinese labor standards is a matter of acute significance to the United States, her allies, and her trading partners such as Japan and Australia. In the first place, there is a human rights imperative in seeing vast swathes of the Chinese working population progress from the conditions they have traditionally suffered, which in some instances amount to basic exploitation. Secondly, and of more direct concern, it is in the interests of America and American workers that the world avoids a "race to the bottom" in which companies only operate using the world's cheapest labor along with the worst pay and conditions.¹¹

The Article advances that argument in three parts. Part II briefly recounts the appalling conditions of Chinese workers and then sets out the newly developing Chinese labor laws aimed to improve the working lives

4. Chang Hee Lee, *Industrial Relations and Collective Bargaining in China*, INTERNATIONAL LABOUR ORGANIZATION, iii (Oct. 2009), <http://www.ilo.org/public/english/dialogue/ifpdial/downloads/papers/wp7.pdf>.

5. *Id.* at 1.

6. ROBERT B. REICH, *SUPERCAPITALISM* 4, 9 (2007).

7. See Edgar Chen, *The Minimal Impact of Corporate Social Responsibility in Chinese Factories* 7 (Sep. 26, 2008) (paper prepared for the Cornell University Conference on Breaking Down Chinese Walls: The Changing Faces of Labor and Employment in China), available at http://www.ilr.cornell.edu/international/events/092608_LaborEmploymentChina.html.

8. See *id.* at 9–10.

9. See Michael A. Cabin, *Labor Rights in the Peru Agreement: Can Vague Principles Yield Concrete Change?*, 109 COLUM. L. REV. 1047, 1052 n.28, 1055 n.39 (2009).

10. *Id.* at 1047–48.

11. *Id.* at 1047, 1053.

of Chinese laborers. In this context, the Article makes the crucial point (first made by luminaries such as Professor Jerome A. Cohen and those who have built upon his foundation, such as William C. Jones), that today's newly developing law can only be understood through an understanding of Chinese tradition, culture, and legal history.¹² That tradition, culture, and legal history includes periods of strong centralized government, an actual basic conception of law that is different from a Westerner's conception of law, and an emphasis on custom which is unusual to a Western lawyer. While there may be some strengths to Chinese legal traditions and developments, these traditions can also form part of the problems experienced when enforcing the new laws.

In Part III, whilst acknowledging that inroads have been made on the enforcement of fair labor standards by the Chinese government, this Article discusses and analyzes very real enforcement problems. In the first place, the strong position of the central government means that criticism of the state regarding the treatment of workers can be muffled or even eliminated. The emphasis on custom and tradition in law can cause weaknesses in enforcing the new law. Further, the basic nature of China—its vast, often uneducated population spread across remote parts of its huge land mass¹³—means that it may be difficult for some workers to even be educated as to the rights they now have, not to mention develop the self-confidence to actually use those rights. Added to this are aspects of the Chinese welfare system. There is a Hukou system through which workers from the rural regions have fewer benefits than their urban counterparts.¹⁴ If they move to the cities for work (and join the vast numbers of rural migrant workers), they are often forced into the lowest paid jobs with the fewest benefits.¹⁵

Part IV analyzes what can be done to foster better working conditions in China and to aid law enforcement, and it examines why doing so is important to the West. As the vast body of academic literature discussed in this Article agrees, the shape of the Chinese legal system is still developing—no one can or does know exactly how it will end up.¹⁶ In this formative stage it is therefore important for the West to champion the ideals it upholds and protect the standards its own citizens rely on. This can be done in a number of ways:

12. C. Stephen Hsu, *Introduction*, in UNDERSTANDING CHINA'S LEGAL SYSTEM: ESSAYS IN HONOR OF JEROME A. COHEN 1, 3 (C. Stephen Hsu ed., 2003).

13. Ian Buruma, *The Ghosts of Tiananmen*, 159 PROSPECT MAG. (2009), available at http://tria.fcampalans.cat/images/tiananment_prospect.pdf.

14. Kam Wing Chan & Will Buckingham, *Is China Abolishing the Hukou System?*, THE CHINA Q. 582, 582–83 (2008).

15. Li Shi, *Rural Migrant Workers in China: Scenario, Challenges and Public Policy* 12–13 (Int'l Labour Org., Working Paper, June 2008), available at http://www.ilo.org/wcmsp5/groups/public/---dgreports/---integration/documents/publication/wcms_097744.pdf.

16. See, e.g., William C. Jones, *Trying to Understand the Current Chinese Legal System*, in UNDERSTANDING CHINA'S LEGAL SYSTEM: ESSAYS IN HONOR OF JEROME A. COHEN 7, 40 (C. Stephen Hsu ed., 2003).

- *Chinese Self-Interest*—As the Chinese government itself acknowledges, there is a need for social cohesion in China.¹⁷ Sustaining decent working conditions helps foster that cohesion.
- *Upholding International Labor Standards and Law Enforcement Mechanisms, Linking Trade and Labor Standards, and Developing Corporate Social Responsibility*—Supporting the activities of bodies such as the International Labour Organization in their quest to uphold the humane treatment of workers is the obvious starting point for raising standards for Chinese workers. Linking those standards to trade is something already adopted in agreements like the U.S.–Peru Agreement,¹⁸ and this approach should be further developed. Such a tactic characterizes exploitative working conditions as trade barriers and demonstrates commitment to human rights rather than simply profit. Further, as to those practices which focus on the worker, emphasis should also be placed on the transnational corporations that employ workers. There should be an acknowledgement that ethical production of goods is important.
- *Making Use of Sympathetic Parts of the Chinese Government, Such as the Hong Kong Special Administrative Region, and Ensuring There Is Balance in the Asia-Pacific Region*—Hong Kong is part of China.¹⁹ Its British heritage placed a deliberate emphasis on human rights and workplace fairness.²⁰ This is a useful mechanism through which to imbue the Chinese legal culture with workplace rights. It is also important to foster balance in the Asia-Pacific region, for instance between Japan and China. The two nations have traditionally had an uneasy relationship,²¹ and Japan has a workplace culture traditionally sympathetic to workplace fairness.²² As China develops, fostering balance between those two countries, as opposed to abandoning Japan to focus only on a growing China, should allow Japan to act as a breakwater against unfair work practices.
- *The Internet (Twitter, Facebook and WikiLeaks)*—Recent legal and social events have shown the importance of social media in influencing culture.²³ While this Article does not support all of the activities of WikiLeaks, the website at least underscores that there are mechanisms that can be used to develop human rights, workplace fairness, and accountability in China.²⁴

17. Lee, *supra* note 4, at 3–6.

18. Cabin, *supra* note 9, at 1047–48.

19. *2008 Human Rights Report: China (Hong Kong)*, CONSULATE GENERAL OF THE UNITED STATES: HONG KONG & MACAU (Feb. 25, 2009), http://hongkong.usconsulate.gov/ushk_hr_2009022501.html.

20. *See id.*

21. *Scaring the Salarymen*, *ECONOMIST*, May 1, 2010, at 69.

22. *See Takashi Araki, Changing Employment Practices, Corporate Governance, and the Role of Labor Law in Japan*, 28 *COMP. LAB. L. & POL'Y J.* 251, 253–57, 272, 279 (2007).

23. *Social Media: The Spark of Revolution?*, *SOC. MEDIA MARKETING MGMT.* (Mar. 18, 2011), <http://www.smcubedconsulting.com/2011/03/social-media-sparks-egyptian-revolution/>.

24. *See What is WikiLeaks?*, *WIKILEAKS*, <http://www.wikileaks.org/About.html> (last visited Sept. 14, 2011).

In analyzing these measures, this Article concludes that China's legal development is a real opportunity for the West and that there is cause to be cautiously optimistic that some basic levels of fairness will be established and maintained. But for that optimism to be justified and realized, the West must maintain its pressures on China and not succumb to short-term thinking that China is a trade option to be pursued at all costs. Support for such a view is found in the literature; in particular, Lord Chris Patten (the last governor of Hong Kong) saw the United States as playing a crucial role in Asia.²⁵ He viewed strength as an important and necessary element of dealing with the Chinese government.²⁶ Those words echo the words of Confucius himself and demonstrate the opportunities ahead when old meets new.²⁷

Before commencing the main analysis, it is important to note that this Article focuses on the relationship between the United States and China. Some aspects of the laws of Japan and Australia are also analyzed in terms of their relationship with China. Obviously the United States is the world's largest economy and has recently reiterated its commitment to the Asian region.²⁸ Japan is also important. As noted above, it has traditionally had a difficult relationship with China,²⁹ and the balance of power between Japan and China is seen as significant in the region.³⁰ Finally, Australia (the author's home) is included as it is both an ally of the United States and a key local link to China. Moreover, some emerging issues of executive employment have been raised concerning Australian nationals working in China.³¹ Cases such as the Stern Hu prosecution demonstrate the lack of fairness even senior managers can face in Chinese employment and underscore why an interest in Chinese labor law is an imperative for businesses in most countries.

25. See CHRIS PATTEN, *EAST AND WEST* 115, 209–328 (1998).

26. *Id.* at 275–312.

27. See THE ANALECTS OF CONFUCIUS, *supra* note 1, at 62–63.

28. Geoffrey Garrett, *China Challenge Will Bind Us Closer to Washington*, THE AUSTRALIAN, Mar. 10, 2011, <http://www.theaustralian.com.au/news/opinion/china-challenge-will-bind-us-closer-to-washington/story-e6frg6zo-1226018636983> (In November 2010, U.S. Secretary of State Hillary Clinton visited Australia to discuss Asian issues affecting the United States and enunciated her vision of a China that respected free trade, investment, and political openness. The idea of the United States renewing its commitment in Asia was also enunciated by President Obama.); see also Michael Wines, *U.S. Alarmed by Harsh Tone of China's Military*, N.Y. TIMES, Oct. 11, 2010, <http://www.nytimes.com/2010/10/12/world/asia/12beijing.html> (This article discusses a problem facing the United States, namely that older Chinese tend to respect U.S. military strength, while younger Chinese often view the United States as a possible enemy, which curtails China's strength. Reaffirming the United States' commitment requires the country to deal with such conundrums.).

29. *Scaring the Salarymen*, *supra* note 21.

30. Kevin Rudd, Austl. Shadow Minister for Foreign Affairs & Int'l Sec., *Australia and China: A Strong and Stable Partnership for 21st Century* (July 1, 2004) (transcript available at <http://au.china-embassy.org/eng/zagx/t142076.htm>) (Mr. Rudd stated that “[t]he interdependencies between our three economies (Japan, China and Australia) are also an important factor for the future. In this connection, good relationships between Beijing, Tokyo and Canberra are of the highest importance.”).

31. See D'Arcy Doran, *Shock As Rio Tinto's Stern Hu Gets 10 Years' Jail*, NEWS.COM.AU (Mar. 30, 2010, 12:58 PM), <http://www.news.com.au/business/shcok-as-riointos-stern-hu-gets-10-years-jail/story-e6frfml1-1225847244830>.

II. THE “DEVELOPING” LAW IN CHINA

Over a decade after the enactment of its broad statement of principle in the 1994 Labor Law, the Chinese government enacted a series of laws to reinforce, elucidate and supplement that legislation in the form of:

- *The Labor Contract Law*;
- *The Trade Union Law*;
- *The Employment Promotion Law*; and
- *The Labor Disputes Law*.³²

The net effect of this suite of reforms was aimed at addressing some of the myriad problems facing the working people of China—such as overwork, lack of rights at the point of termination and engagement in employment, the overuse of contract labor, difficulty settling disputes, and either non-existent or ineffective employee organization.³³ Obviously, it is not the purpose of this Article to provide a detailed recitation of the content of those instruments. There are many excellent volumes that have been written on that subject already.³⁴ Rather, the point is to highlight the main features of these laws, the difficulties involved with their interpretation and enforcement, and the relevance of that struggle to the laws in the West, particularly the United States.

A. AN OUTLINE OF “THE NEW LAW”

The centerpiece of reform is the Labor Contract Law (LCL).³⁵ In addition to prescribed minimum conditions (such as a 44-hour working week, payment of overtime, the acknowledgement of annual leave and certain statutory holidays, and the requirement for employers to regularly and fully pay at least the minimum wage as set by local authorities), the LCL places emphasis on the need for employers to enter a written con-

32. As to the relationship between the Labor Law, the Labor Contract Law, and other reforms, see Hilary K. Josephs, *Measuring Progress Under China's Labor Law: Goals, Processes, Outcomes*, 30 COMP. LAB. L. & POL'Y J. 373, 379 (2008); MIAO Qingqing, *An Urge to Protect Is Not Enough: China's Labor Contract Law*, 2 TSINGHUA CHINA L. REV. 159, 161, 163, 165, 178 n.1144 (2009–2010); Lee, *supra* note 4, at 4–7.

33. At a general level, the problems besetting Chinese workers are notorious. For a particularly good, brief discussion of these difficulties, see QIAO Jian, *Labor Contract Law in China: Changes and Implications 2-4* (Sep. 27, 2008) (paper prepared for the Cornell University Conference on Breaking Down Chinese Walls: The Changing Faces of Labor and Employment in China), available at http://www.ilr.cornell.edu/international/events/092608_LaborEmploymentChina.html.

34. For a particularly good and detailed account of the laws, see Kay-Wah Chan, *Employment Law in China*, in THE CHINESE COMMERCIAL LEGAL SYSTEM 271 (Helen van der Geest ed., 2008). See also Josephs, *supra* note 32; Qingqing, *supra* note 32; Yun Zhao, *China's New Labor Dispute Resolution Law: A Catalyst for the Establishment of Harmonious Labor Relationship?*, 30 COMP. LAB. L. & POL'Y J. 409 (2009); Jian, *supra* note 33. Although the present writer is critical of Qingqing's work in some respects (these criticisms are discussed later in this Article), the work does provide a good outline of the key reforms in Chinese labor law.

35. See Qingqing, *supra* note 32, at 161.

tract of employment with employees or face penalties.³⁶ While Chinese law provides employers with a capacity to employ workers under either fixed-term or ongoing agreements, if no written contract is entered into one month (but before a year) after the start of employment, then the employer must pay the employee double his usual salary.³⁷ When a written contract is not entered into even after one year, then the employment relationship is said to be ongoing.³⁸ The emphasis placed on written contracts is an attempt to overcome the problem of de facto employment—the situation where workers performed work which, because of its undocumented nature, left them with no evidence to prove that wages were owed to them in the event that the employer simply did not pay.³⁹ The new prominence of open-ended or longer-term employment relationships is also significant in adding stability and quality to the employment relationship.⁴⁰

In addition to the lack of documentation, some employers abused the contract system.⁴¹ To deal with those types of issues, a labor contract will be invalidated where, for example, it is the result of coercion; however, an employee should be paid for any work he has already performed.⁴² Further, to avoid a situation where employers try to avoid some statutory obligations by placing workers on rolling short-term contracts, there is now a limit on the number of times a contract can be renewed before a worker is regarded as an ongoing employee.⁴³ Finally, in this connection, there are regulations governing the supply of labor through labor management companies (that is, staffing firms for work placements).⁴⁴ This labor should now be paid on the same terms as regular labor.⁴⁵ Further, the establishment of staffing firms is more carefully monitored by the Labor Departments.⁴⁶

Importantly, so far as termination of employment is concerned, employees can resign from a position either with notice (if they wanted to move to another position, for example), or without notice if their employer has taken certain actions inconsistent with the law.⁴⁷ Employers are able to terminate employees' employment either without notice (where the employee was not competent, put others at risk, or breached

36. *Id.* at 174, 196; Virginia E. Harper Ho, *From Contracts to Compliance? An Early Look at Implementation Under China's New Labor Legislation*, 23 COLUM. J. ASIAN L. 35, 46 n.29 (2009).

37. Qingqing, *supra* note 32, at 173–74.

38. See Articles 82 and 14 of the Labor Contract Law as discussed in Chan, *supra* note 34, at 280. See Qingqing *supra* note 32, at 173–74; Jian, *supra* note 33, at 7.

39. See *id.* at 6–7.

40. See Qingqing, *supra* note 32, at 177–78; Jian, *supra* note 33, at 1–10.

41. See Ho, *supra* note 36, at 93 & n.258.

42. See Chan, *supra* note 34, at 280.

43. Jian, *supra* note 33, at 10.

44. *Id.* at 13–14.

45. *Id.*

46. *Id.* There is even a need for certain amounts of base capital to be established for the labor management firm to exist under the Company Law. *Id.* at 13.

47. Qingqing, *supra* note 32, at 176–77.

codes of conduct) or with notice (where the worker becomes ill).⁴⁸ Termination may also arise in the event of redundancy.⁴⁹ Most redundancies trigger a need for an employer to have discussions with relevant unions.⁵⁰ Further, economic compensation is payable in the event of redundancy or where the employer has breached the LCL in some way.⁵¹ Obviously, the financial recourse available to workers for termination of employment is significant and demonstrates the importance of the LCL's emphasis on ongoing employment as opposed to short-term contract employment, under which the worker would not be entitled to financial benefits on the simple expiration of the term of the contract.⁵²

If the termination laws show a balancing of some interests between the employing business and the rights of the worker, then this is underscored by further provisions allowing non-competition clauses to be included in the contracts of senior managers or those having access to confidential business secrets.⁵³ Likewise, where the employer is paying considerable sums for the training of employees, then the employer may specify a minimum length of service.⁵⁴

The panoply of provisions and statutes introduced acknowledges that there is more to labor law than a simple statement of what the rules should be—attention must also be paid to enforcement and mechanisms by which workers can voice their concerns.⁵⁵

While the original Labor Law acknowledged the notion of collective bargaining for progressing workers' rights and gave more bargaining tools to the major national union, the All China Federation of Trade Unions (ACFTU), there was little real progress in terms of the organization of Chinese workers in the 1990s.⁵⁶ The Trade Union Law emphasizes that the interests of workers are a central pursuit for trade unions.⁵⁷ It also allows for the organization of workers in different manners.⁵⁸ For example, where a workplace has few members (below twenty-five, the threshold number for establishing a union) then there might be a possibility of organizing workers into joint trade unions for small to medium businesses.⁵⁹ This means there might be enterprise unions or small sector-based unions.⁶⁰ Further, there is a role for trade unions in consulting with government on labor issues.⁶¹

As well as providing some legal right to organize, there is a framework

48. Chan, *supra* note 34, at 296–97; Qingqing, *supra* note 32, at 174–76.

49. Chan, *supra* note 34, at 297.

50. *See id.*

51. *Id.* at 295.

52. Qingqing, *supra* note 32, at 171.

53. *Id.* at 172.

54. Jian, *supra* note 33, at 11; Qingqing, *supra* note 32, at 177.

55. *See* Ho, *supra* note 36, at 65–71.

56. Lee, *supra* note 4, at 4–5.

57. *Id.* at 7.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 7–8.

for dispute resolution provided through the Labor Disputes Law.⁶² This provides a mechanism for the conciliation/negotiation, mediation, arbitration, and litigation of labor disputes, particularly at a devolved local level by regional authorities.⁶³ Topics in dispute can range from questions of formation of the contract to issues involving remuneration and termination of employment.⁶⁴ The operation of the system is a fairly light touch at this stage. In other words, authorities try to work with parties to resolve disputes and gain back pay or foster compliance with the new labor laws.⁶⁵

Over and above legislating in the above manners, the Chinese government is also taking its place in the world at a diplomatic and political level.⁶⁶ It is a member of the World Trade Organization, the United Nations, and the International Labour Organization—and all this since it first opened itself up to the outside world in 1978.⁶⁷

B. BUT THE IDEA OF LAW IS NOT NEW—WHY AN APPRECIATION OF
TRADITIONAL CHINESE LAW, CULTURE, AND ENFORCEMENT
BARRIERS ARE CRITICAL TO UNDERSTANDING
CHINA AND CHINESE LAW TODAY

While the above is a useful overview of the developing Chinese labor law, it is still simply an outline about the new laws that have been passed—and, in some senses, as new laws, they are just words on a page. There is far more to Chinese law—and more importantly, to an understanding of Chinese law—than simply those words.

The wonderful emerging crop of commentators on the recent Chinese legal developments follow in the footsteps of renowned scholars who have been studying the legal history of China for years. The work of the likes of Professor Jerome A. Cohen spans decades.⁶⁸ One of the many contributions of Professor Cohen and those who have built on his research, such as William C. Jones, is the acknowledgement that few people truly understand Chinese law.⁶⁹ In particular, no one can understand

62. Zhao, *supra* note 34, at 412, 418.

63. *See id.* at 418–20.

64. *Id.*

65. *See id.* at 419–21.

66. Josephs, *supra* note 32, at 377.

67. *Id.* at 376–77; Patricia Blazey & Gisele Kapterian, *Traditional Chinese Law, in THE CHINESE COMMERCIAL LEGAL SYSTEM* 19, 20 (Helen van der Geest, ed., 2008).

68. Professor Jerome A. Cohen's works go back as far as his books. *See* JEROME A. COHEN, *THE CRIMINAL PROCESS IN THE PEOPLE'S REPUBLIC OF CHINA, 1949–1963: AN INTRODUCTION* (1968); JEROME A. COHEN & HUNGDAH CHIU, *PEOPLE'S CHINA AND INTERNATIONAL LAW* (1974); JEROME A. COHEN, YVONNE Y.F. CHAN & HO YUK MING, *CONTRACT LAW OF THE PEOPLE'S REPUBLIC OF CHINA* (1988). In addition to his prolific academic writings, Professor Cohen is now frequently seen on television and even in modern social networking sites. *See* teleconference interview by Tony Jones with Jerome Cohen, U.S.–Asia Law Inst., N.Y. Univ. (July 21, 2009), available at www.abc.net.au/lateline/content/2008/s2632959.htm; *NYU Law Professor Jerome A. Cohen on Rights Defender Chen Guangcheng*, YouTube (Feb. 20, 2009), <http://www.youtube.com/watch?v=J2tTniV-7k8>.

69. Hsu, *supra* note 12, at 1–3.

Chinese law unless they first understand Chinese tradition, history, and culture.⁷⁰ This is because that tradition, history, and culture shapes both the application of the law and the very conception of what law in China actually is.⁷¹

China is one of the world's oldest societies; it has existed for over 2000 years.⁷² During that time, it has known many forms of government, from that of an emperor to the Communists who rule China today.⁷³ Most of those forms of government have been strong and centrally controlled.⁷⁴ Consequently, while law in the West acknowledges many private rights—like contract law—and upholds a separation of law and state, much of the law of China has been about public law and has seen little of the separation of law and state that Westerners might see as a basic principle of the rule of law.⁷⁵ So, in the centuries of the dynasties of the emperors (which lasted until about 1911),⁷⁶ many of the codes the emperors wrote were about the operation of government.⁷⁷ There were magistrates at a local level, and though they did arbitrate some disputes that was only *one* of their functions.⁷⁸ Their main job was to assist in implementing and upholding the will and laws of the emperor for the country and government.⁷⁹ There was thriving commerce, but individual disputes about private matters like contracts were often resolved by local guilds and elders through mediation.⁸⁰ There was therefore a strong form of customary law.⁸¹

Similarly, when the Communists took over through the ironically termed “Liberation of 1949,” law was heavily colored by the agenda of the government.⁸² Private property was often seized and redistributed by the state, local villagers were sometimes brainwashed, and enemies of the state were tortured.⁸³ While there may have been some acknowledgement of agreements that Westerners would call “contracts,” the enforcement of those agreements was colored by the state's political agenda.⁸⁴ Contracts could either be things that advanced the cause of the Commu-

70. *Id.* at 3.

71. See Jones, *supra* note 16, at 7–41; see also Donald C. Clarke, *Puzzling Observations in Chinese Law: When Is a Riddle Just a Mistake?*, in UNDERSTANDING CHINA'S LEGAL SYSTEM: ESSAYS IN HONOR OF JEROME A. COHEN 93 (C. Stephen Hsu ed., 2003); William P. Alford, *Exporting the “Pursuit of Happiness”*, in UNDERSTANDING CHINA'S LEGAL SYSTEM: ESSAYS IN HONOR OF JEROME A. COHEN 46 (C. Stephen Hsu ed., 2003). See generally Chan, *supra* note 34.

72. Jones, *supra* note 16, at 8.

73. *Id.* at 7–41.

74. See *id.* 8–9.

75. *Id.* at 8–9, 28.

76. *Id.* at 8–9.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at 13.

81. *Id.* at 10.

82. *Id.* at 20–22.

83. See *id.* at 29–30.

84. *Id.* at 15–16.

nists or they could be bourgeois and oppressive, depending on who the beneficiary of the agreement actually was.⁸⁵

One needs only to add to this brief historical outline the notorious events of the Cultural Revolution,⁸⁶ Tiananmen Square,⁸⁷ and recent condemnation of the Chinese Nobel Peace Prize Winner—*by the Chinese Government*⁸⁸—to appreciate that the people administering and being administered by the developing new laws of China are used to authoritarianism; the notion of law in China is conceptualized differently from the manner in which it is conceptualized in the West; and the categories of law with respect to which we are trained, for example, contract law, may not necessarily be interpreted the same way in China.⁸⁹ For these reasons, it is unsurprising that the practice of law in China requires an understanding of significant aspects of Chinese culture. Two such aspects are “face” and “relationship building.”⁹⁰

Perhaps stemming from the days when the resolution of contract disputes was mediated at a local level, it is important in Chinese culture, business, and laws for parties to agreements to “save face,” or, in other words, for their standing in the community not to be derided, ridiculed, or needlessly lessened.⁹¹ Related closely to that is the notion of relationship building. In China, building a relationship with those with whom you seek to do business is an important precursor to striking the deal itself.⁹²

85. *Id.* at 15–16, 25.

86. JONATHAN D. SPENCE, *THE SEARCH FOR MODERN CHINA* 602–09 (1st ed. 1990).

87. Jan-Michele Lemon, *CHINA: United States Policy After Tiananmen Square* 3 HARV. HUM. RTS. J. 195, 195 (1990) (That article summarizes the brutal nature of the massacre—that the Chinese government used its tanks to literally mow down its own nationals when they were protesting for democracy. That article is also interesting because it outlines the split in the congressional view of how to best respond to the Chinese government’s actions and that of the President George H.W. Bush Administration. Essentially, Lemon argues that former President Bush may have been influenced by economic and trade concerns into taking a softer approach to China than that sought by some congressional representatives. The Administration did suggest, however, that a strong approach would isolate China and the West would lose its influence over Chinese policy.). These are the sorts of issues considered throughout this Article and in particular taken up by Lord Chris Patten, as analyzed in the conclusion to this Article.

88. *Nobel Peace Prize Awarded to China Dissident Liu Xiaobo*, BBC NEWS (Oct. 8, 2010), www.bbc.co.uk/news/world-europe-11499098?print=true (Liu was a leader of the Tiananmen protests in 1989 and received an eleven-year sentence for “inciting subversion.” He was praised by the Nobel Foundation for his close connection between human rights and peace. The Chinese government condemned the award saying it could damage relations between China and Norway.). The present writer also thanks her sister, Penny Floyd, and brother-in-law, Peter Skinner, for their first-hand account of and insights into the Chinese government’s response to the award. They were in Shanghai (for the Trade Expo in September 2010) and Beijing at the time.

89. Jones, *supra* note 16, at 14.

90. See Patricia Blazey, *Culture and its Relationship to Undertaking Business in China*, in *THE CHINESE COMMERCIAL LEGAL SYSTEM* 57, 57, 61 (Helen van der Geest ed., 2008). These concepts were also discussed separately in a most interesting, informative, and conversational manner at the 2008 Lexis Nexis Contract Law Master Class in Brisbane and Sydney, Australia. The present writer also discussed legal practice in China and in particular these concepts with lawyers of the China practice of Deakins Lawyers on her visit to Beijing in April 2008.

91. Blazey, *supra* note 90, at 61–62.

92. *Id.* at 63.

The Chinese need to know who they are dealing with, not simply what the raw terms of a deal are. For these reasons, the giving of gifts and long periods of gestures of courtesy and discussion are important.⁹³

At its most positive, these cultural aspects almost encase the law and seem to foster human dignity, and they could be seen as having some link back to the beliefs of Confucius. He once said about the law, "In hearing cases I am as good as anyone else, but what is really needed is to bring about that there are no cases."⁹⁴ Unfortunately, such culture can also bring about enormous problems for law enforcement and Western lawyers dealing with China. For instance, the words of a contract may be overshadowed by the Chinese need to appease their government. A robust approach to negotiation of an agreement may cause a Chinese negotiator to feel they have lost face. That loss of face may sully the relationship, and the long memory of the negotiator may foster retaliation. Further, the question arises as to when gift giving becomes corruption. Underpinning all of this is the might of the Chinese government and its history of crushing dissent.

III. PROBLEMS WITH ENFORCING LABOR LAW IN CHINA AND WHY THE WEST, INCLUDING THE UNITED STATES, SHOULD CARE

A. UNION GROWTH—BUT STATE CONTROL OF UNIONS

That there has been progress in advancing workplace standards in China should first be reiterated.⁹⁵ As Chang Hee Lee of the International Labour Organization reports in *Industrial Relations and Collective Bargaining in China*, the Chinese government is well aware that almost half of the collective disputes that have happened in the country are labor-related protests.⁹⁶ Because the income and wage gaps in the country, along with slow wage growth, are threatening social cohesion and stability, the Chinese government has not only enacted the legislation discussed in this Article, it has "discovered the new value of trade unions" as "a 'protector' of workers."⁹⁷ It has facilitated a situation where increasing numbers of trade union leaders are members of provincial governments.⁹⁸ Similarly, the ACFTU has conducted a recruiting drive and has recently enjoyed a startling membership growth of approximately 13%, many of whom have been rural migrant workers in search of work in the

93. *Id.* at 63–64.

94. Jones, *supra* note 16, at 7.

95. Lee, *supra* note 4, at iii.

96. *Id.* at 3; see also Chris King-Chi Chan & Pun Ngai, *The Making of a New Working Class? A Study of Collective Actions of Migrant Workers in South China*, 109 *THE CHINA Q.* 287, 287–88 (2009). The appalling conditions of Chinese workers, especially rural migrant workers, is further analyzed by the present writer *infra* Part III.C.

97. Lee, *supra* note 4, at 5–6.

98. *Id.* at 16.

cities.⁹⁹

However, as Lee acknowledges, “a deeper incorporation of trade unions into the formal state structure allows the Party-State to exercise more direct control over the trade unions.”¹⁰⁰ Indeed, there is neither the right to strike nor freedom of association in China.¹⁰¹ In other words, the ACFTU is the *only* union and it *only exists* with the imprimatur of the Chinese government.¹⁰² While Lee regards this situation as “problematic,”¹⁰³ other academics have questioned the very efficacy of Chinese unions and raised questions as to whether the situation is one of collective bargaining or collective begging to the state.¹⁰⁴ To put it bluntly, how can the ACFTU robustly criticize the government’s labor laws and policies when it is connected to the government and cannot function without the government’s approval?¹⁰⁵ The same problem confronts other groups that have traditionally championed the plight of the most vulnerable members of the community, such as churches.¹⁰⁶ If they seek to actively embarrass the government on social and workplace issues, they can simply be shut down.¹⁰⁷

B. CULTURAL BARRIERS TO ENFORCEMENT AND DIFFICULTIES WITH RESEARCHING THEM

It is broadly accepted that there is a significant gap between the law on the books in China and the law in practice—how it is enforced and policed may not be as forceful as the words of the legislative instrument.¹⁰⁸ Part of the procedure for determining the effectiveness of legal enforcement is through independent academic research that examines the practical operation of the law—socio-legal research—through interviews with citizens, workers, etc. There are many barriers to this research in China. The most obvious is language. Much of the research that has been done is printed in Chinese, which means that many in the West cannot read it.¹⁰⁹ Language is also a barrier when Western researchers seek to discuss

99. *Id.* at 11 (at this part of the report there is a diagram detailing the increase in both union members and those workers covered by collective agreements).

100. *Id.* at 16.

101. *Id.* at 9.

102. *Id.*

103. *Id.* Quite aside from the state sponsorship, the lack of competition means there is nothing against which the ACFTU can judge itself in terms of its operation.

104. See Ho, *supra* note 36, at 84–85; Qingqing, *supra* note 32, at 179.

105. See Qingqing, *supra* note 32, at 179.

106. See *Persecution of Protestant Christians in China in the Approach to the Beijing 2008 Olympic Games*, 4 CHINESE L. & RELIGION MONITOR 9, 11 (2008).

107. Churches have often been a voice for workers, but they too have been punished for criticizing the state. See, e.g., *id.*

108. Ho, *supra* note 36, at 39. The point has been made by many other scholars. For a particularly interesting discussion see analysis of the Stern Hu case later in the present Article *infra* Part III.B.2.

109. Some research is available in the English language. See, e.g., *Laws & Regulations, THE CENTRAL PEOPLE’S GOVERNMENT OF THE PEOPLE’S REPUBLIC OF CHINA*, <http://english.gov.cn/laws/laws.htm> (last visited Sept. 4, 2011); *Resource Center: Labor*, LEHMAN, LEE & XU, <http://lehmanlaw.com/resource-centre/laws-and-regulations/labor.html> (last vis-

legal developments in China. Over time, that barrier may recede as increasing numbers of Westerners learn the Chinese language. But there are other barriers to research.

Socio-legal research conducted in the West sometimes requires printed agreements from subjects that the material discussed can be used in published articles.¹¹⁰ As demonstrated throughout this Article, many Chinese citizens have spent their lives inculcated to accept a strongly centralized system of government in which they cannot speak out against the state.¹¹¹ Many subjects, therefore, may either be too frightened to speak to Western researchers or cannot be named in the actual research.¹¹²

Over and above this, there are the difficulties in establishing a valid sample from which to draw conclusions. China has a population of approximately 1.3 billion.¹¹³ Many of these are located in remote regional areas; they do not speak enough English to understand the questions of researchers, and they may be too scared of authorities to complain anyway.¹¹⁴

Despite all of these problems, there have been some interesting and useful academic studies undertaken on the efficacy of Chinese labor laws, such as Virginia Harper Ho's 2009 study in the *Columbia Journal of Asian Law*¹¹⁵ and Aaron Halebua's study in the 2008 *Berkeley Journal of International Law*.¹¹⁶ These studies both agree that there is a long way to go before the final shape of the Chinese legal system is settled.¹¹⁷ They both acknowledge that their studies are not the conclusive insight into Chinese law enforcement.¹¹⁸ Harper Ho's study, for example, was con-

ited Sept. 4, 2011); Han Dongfang, *Collective Bargaining and the New Labour Contract Law*, CHINA LABOUR BULLETIN (Feb. 26, 2008), <http://www.china-labour.org.hk/en/node/100210>; E-mail from Jinke Tan to Louise Floyd, Director of Research, Senior Lecturer in Law, James Cook University (Jan. 24, 2011) (citing Jude Howell, Centre for Civil Society, London Sch. of Econ. and Political Sci.: Reforming China's Trade Unions; Restraints and Challenges (Sept. 15, 2010)) (on file with the author); E-mail from Chang Hee Lee to Louise Floyd, Director of Research, Senior Lecturer in Law, James Cook University (Mar. 2011) (on file with the author).

110. See, e.g., Julia A. Pedroni & Kenneth D. Pimple, *A Brief Introduction to Informed Consent in Research with Human Subjects*, IND. UNIV. (June 2001), <http://poynter.indiana.edu/sas/res/ic.pdf>. See *Socio-Legal Research Centre*, GRIFFITH UNIV., <http://www.griffith.edu.au/criminology-law/socio-legal-research-centre> (last visited Sept. 5, 2011) for some of the principles normally adhered to in socio-legal research.

111. See WENFANG TANG, PUBLIC OPINION AND POLITICAL CHANGE IN CHINA, 70-73 (2005).

112. Ho, *supra* note 36, at 35 n.*. This practical difficulty is illustrated when the author states, "I am most of all indebted to the workers, lawyers, labor rights advocates, and labor administration officials interviewed during this study who cannot be acknowledged by name. . . . All Chinese sources cited herein are on file with the author." *Id.*

113. *The World Factbook: China*, CENT. INTELLIGENCE AGENCY (Aug. 30, 2011), <https://www.cia.gov/library/publications/the-world-factbook/geos/ch.html>.

114. See TANG, *supra* note 111, at 44, 46-48.

115. Ho, *supra* note 36.

116. Aaron Halebua, *Getting Paid: Processing the Labor Disputes of China's Migrant Workers*, 26 BERKELEY J. INT'L L. 254 (2008).

117. See *id.* at 321-22; Ho, *supra* note 36, at 38-39.

118. Ho, *supra* note 36, at 40; see Halebua, *supra* note 116, at 258.

ducted during a brief window of time in 2008 and pertains to the Guangdong area,¹¹⁹ while Helegua's was conducted in Beijing and largely centers around the time immediately prior to the operation of the new laws.¹²⁰ The studies also acknowledge that Chinese culture (which, as this Article has noted, includes an emphasis on saving face, building relationships, and the acceptance of a strong central government) underscores that there is worth in an enforcement system that is local, based on mediation, and seeks to work with parties as they accept a new system.¹²¹

However, both studies also note the very real problems with enforcement.¹²² Some workers are too scared to make complaints for fear of retribution.¹²³ The devolved nature of enforcement also makes assembling data on enforcement even more difficult.¹²⁴

The further question is of course whether the localization of standards could cause a "race to the bottom" within China as local governments seek to outbid other low-wage destinations in an attempt to attract business and investment.¹²⁵ While some authors question whether all local authorities will behave in this way, there is certainly evidence of corruption.¹²⁶ While it is obviously very difficult (if not a practical impossibility) to precisely calculate levels of corruption, in a culture of gift giving there will always be questions of when those gifts go too far.¹²⁷

C. PROBLEMS WITH RURAL WORKERS, REGIONAL MIGRANT WORKERS, AND THE HUKOU SYSTEM

All of these problems with enforcement are exacerbated by the position of rural workers and regional migrant workers. As Will Buckingham and Kam Wing Chan write in *The China Quarterly*, in addition to the Great Wall, there is an "invisible wall" that divides the standard of living of the wealthy city dwellers who are reaping the profits of China's economic strength and industrialization, and the rural peasants who are uneducated and have a lesser entitlement to social benefits, and who come to the cities as rural migrant workers.¹²⁸ That invisible wall is the Hukou system.¹²⁹

The Hukou system is a type of internal passport scheme or household

119. See Ho, *supra* 36, at 85.

120. Halegua, *supra* note 116, at 258.

121. See *id.* at 257, 308; Ho, *supra* note 36, at 42–44, 100–02. The authors do not expressly use the words "face" or "relationships," however, the notion that mediation is in keeping with Chinese culture is clearly central to their conclusions. See *id.*

122. See Halegua, *supra* note 116, at 263; Ho, *supra* note 36, at 46–50.

123. *Id.* at 55–56.

124. See *id.* at 93–95.

125. Lee, *supra* note 4, at 5; see Qingqing, *supra* note 32, at 183. It was mentioned earlier in footnote 34 of this Article that the present writer has problems with part of this latter article. For example, the article relies on a sample of only two companies, one of which he has a close relationship with.

126. Ho, *supra* note 36, at 50–51, 99 n.284; Halegua, *supra* note 116, at 313.

127. See Halegua, *supra* note 116, at 265; Ho, *supra* note 36, at 88.

128. Chan & Buckingham, *supra* note 14, at 582–83.

129. *Id.* at 583.

registration system.¹³⁰ Unlike other such schemes, which serve only to supply governments with statistical data, the Hukou is, as Buckingham and Chan describe it, “one of the most important mechanisms determining entitlement to public welfare, urban services and, more broadly, full citizenship. In its application, it is the basis for the most serious form of institutional exclusion against mainly rural residents.”¹³¹

In practice, what the Hukou means is that if rural peasants seek to move to the cities seeking work to share in the new found urban prosperity, they cannot access all the local social benefits, such as bus passes, or access welfare and government services, such as enrolling their children in nearby schools.¹³² Further, the rural peasants are largely confined to undertaking the most low-paying jobs and often the most dangerous and dirty jobs, too.¹³³ The living conditions of regional migrant workers is squalid, and some commentators have called rural migrant workers the new proletariat.¹³⁴

Although there have been reports that the Hukou system has been abolished or substantially modified, as Buckingham and Chan conclude, “the thunder is loud, but the raindrops are tiny.”¹³⁵ There may have been slight modifications and changes to some classification of benefits, but the system is still fundamentally in place.¹³⁶

This disparity between urban and rural working conditions is graphically illustrated by the statistics compiled by the International Labour Organization (ILO):

According to the Asian Development Bank, inequality has been growing faster in China than in most other developing countries. Inequality has grown between regions, industries and occupations.

. . . [T]he urban-rural per capita income ratio became 3.33 to 1 in 2007 . . . The decentralized fiscal regime in China tends to widen the regional gaps, as is evidenced by the fact that the richest province has more than eight times per capita public spending than the poorest province.

The ratio of the average wages of highest paying industry to lowest paying industry grew . . . to 4.88:1 in 2005. Under China’s highly decentralized minimum wage system, the highest local minimum wage . . . has become 2.25 times higher than lowest local minimum wage

Overall, it is believed that real wage growth for workers – particularly those with low skills – lagged behind overall productivity gains and GDP growth. As a result, the wage share of GDP has declined from 52 per cent in 1999 to 40 per cent in 2007

130. *Id.* at 587.

131. *Id.*

132. *Id.* at 582–83.

133. *Id.*

134. Chan & Ngai, *supra* note 96, 287–88.

135. Chan & Buckingham, *supra* note 14, at 604.

136. *Id.*

A host of factors are at work in widening income gaps and declining wage share of GDP, including the government policy favoring urban industrialization geared towards export-oriented economic development at the expense of rural population¹³⁷

Due to all the problems confronting rural China, more rural migrant workers than ever before are coming to the cities. The ILO notes that in 1978, 17.8% of the population lived in urban areas; by 2005, that figure had reached 43%.¹³⁸ Tragically, as Buckingham and Chan write, what awaits a lot of those workers when they reach the cities is a life of extremely low-paid work with few, if any, social benefits.¹³⁹ The rural workers who come to the cities each year to “knit the world’s clothes and assemble the world’s computers” are, as Halegua notes, a “subclass.”¹⁴⁰ Their lack of education make them particularly easy to exploit.¹⁴¹

D. CONSEQUENT REMARKS—WHY THE WEST SHOULD CARE ABOUT THESE CHINESE LABOR ISSUES AND WHY IT IS IN THE INTERESTS OF THE CHINESE GOVERNMENT TO TAKE THEIR OWN LABOR ISSUES SERIOUSLY

The rising rates of labor disputation in China are as stunning as they are significant.¹⁴² Given the reckoning of the ILO—that most of these concerns show a deep-seated, festering (and justified) resentment within the enormous Chinese working community—social cohesion is something that the Chinese government now acknowledges as a potential problem and appears to be trying to address.¹⁴³ As Chinese nationals become more exposed to the West and its culture of open debate on social mobility and human rights, one can expect that the social cohesion in China will be tested. The Chinese government has previously engaged in reprehensible acts of oppression, from Tienenman Square to recently ostracizing its own Nobel Peace Prize winner.¹⁴⁴ Surely, to take its place at the world’s table, the Chinese government must reach some human rights consensus. More practically, given the enormous Chinese population, surely they cannot keep repressing social unrest indefinitely—it must, at the very least, be practically impossible.

It is also in the interests of the West—the United States and her allies such as Australia and Japan—to address Chinese labor issues. As Michael Cabin notes in his *Columbia Law Review* article, there is a long history of the United States acknowledging that low working standards in other nations can constitute a trade barrier against American trade interests, such that it has argued for labor clauses to be included in a variety of

137. Lee, *supra* note 4, at 2.

138. *Id.*

139. Chan & Buckingham, *supra* note 14, at 583.

140. Halegua, *supra* note 116, at 256.

141. *Id.* This sentiment is echoed by many other authors such as Chan and Ngai.

142. Lee, *supra* note 4, at 3–4.

143. *Id.* at 3–6.

144. See *A Hard Stone in the Wilderness*, *ECONOMIST*, Oct. 16, 2010, at 53.

recent free-trade treaties.¹⁴⁵ These transnational labor issues go hand-in-glove with questions of corporate social responsibility.¹⁴⁶ As Robert Reich has suggested, there is now a form of “supercapitalism,” where international companies operating throughout the world are testing the very basis of the impact of corporations on modern society.¹⁴⁷ One of the key questions this development begs is the notion of corporate social responsibility—that the transnational corporation has a responsibility to the citizens of countries in which it operates, not just the traditional directors’ duty of turning a profit.

IV. WHAT THE WEST CAN AND MUST DO

A. INTERNATIONAL LABOR STANDARDS, LABOR LINKS TO TRADE, AND CORPORATE SOCIAL RESPONSIBILITY

1. *Labor Standards and Trade*

There is an old saying—the more things change, the more they stay the same. The idea that labor costs are relevant to trade is not new. In fact, the very existence of the world’s labor “watch dog,” the ILO, emerged at a time in the early 1900s when nations throughout the world were expanding and debating the impact of labor costs on trade.¹⁴⁸ The advent of the ILO was an acknowledgement that quality of life and quality of goods produced was more important than a blatant race to the bottom—through which cost of production of goods and the quality of life of workers is driven to the lowest point no matter the effect it had on society.¹⁴⁹

At the start of another new century, an almost identical argument is again raging as the world confronts the effects of globalization on trade *all over again*. As Cabin notes, the U.S. government is well aware that low-wage regimes constitute a trade barrier to America’s free trade interests.¹⁵⁰ Consequently, there have been many attempts in agreements—the North American Agreement on Labor Cooperation, the U.S.–Jordan Free Trade Agreement, the Central American Free Trade Agreement, and more recently the Peru Agreement—to link trade and labor.¹⁵¹ While the pursuit of agreements is not new, there are lingering questions as to how efficacious these measures might be. Problems typically involve lack of effective enforcement mechanisms in the treaties to a lack of

145. Cabin, *supra* note 9, at 1047–48.

146. See generally David Hambrick, *Reconsidering Extraterritoriality: U.S. Labor Law, Transnational Organizing, and the Globalization of the Airline Industry*, 47 COLUM. J. TRANSNAT’L L. 576 (2008–2009).

147. REICH, *supra* note 6, at 10–13; see also Louise Floyd, *Supercapitalism: The Transformation of Business, Democracy, and Everyday Life—Book Review*, HEARSAY (June 2, 2008), http://www.hearsay.org.au/index.php?option=com_content&task=view&id=366&itemid=35 (reviewing REICH, *supra* note 6).

148. N. VALTICOS, INTERNATIONAL LABOUR LAW 19 (1979).

149. See *id.*; see also Louise Floyd, *Castles in the Sand: A Legal Analysis of Australian Strike Law and its Effects on Trade Union Power* (1998) (unpublished LL.M. thesis, University of Queensland) (on file with the author); Cabin, *supra* note 9.

150. Cabin, *supra* note 9, at 1047–48.

151. *Id.* at 1056–64.

international consensus on what rights should be considered basic labor rights.¹⁵² One of the more interesting examples involves the Peru Agreement, which seeks to make enforceable the basic principles of the ILO Declaration of basic labor rights.¹⁵³ Although the Peru Agreement includes a reasonable enforcement mechanism, there is a legal issue as to what the basic labor rights in the ILO Declaration actually are.¹⁵⁴

The ILO has many detailed statements of basic labor rights in conventions that are typically written on specific topics such as collective bargaining, fairness in termination of employment, and so forth.¹⁵⁵ Sometimes few of these detailed treaties or conventions are adopted (ratified or passed into domestic law) by all member states (such as the United States) because the immense detail of the convention raises questions as to how those detailed provisions will sit with domestic legislation and legal culture.¹⁵⁶ In other words, countries like the United States have questioned whether the adoption of detailed conventions will interfere with the national control of their citizens. To prevent a situation arising where the basic rights of workers were undermined or obscured by disagreements as to details, the ILO adopted an ILO Declaration of basic norms of international labor law.¹⁵⁷ These norms are deliberately simple or vague as they are simply aimed at getting all ILO members to agree that there are certain values the members uphold.¹⁵⁸

The idea of labor standards being somewhat vague is neither new nor necessarily a fault of the international law. As Ruth Ben-Israel wrote, the right to strike was deliberately left undefined by the ILO so as not to define it out of existence.¹⁵⁹ While there is a purpose and rationale behind adopting broad or even vague basic labor rights to form an international consensus, problems arise when one seeks to enforce these broad notions in a formal trade agreement. In the latter context, there must be some certainty as to precisely what labor rights and standards are to be enforced and upheld.

Cabin suggests a novel and useful method of dealing with this problem. He suggests that the ILO be used to monitor trade agreements and the implementation and enforcement of the basic ILO principles within those treaties.¹⁶⁰ This way there will be an impartial enforcer of broad principles, but the countries concerned will not fear they have relinquished their national control over the day-to-day working lives of their own citi-

152. *See id.* at 1072.

153. *Id.* at 1072-73.

154. *Id.* at 1073.

155. *Id.* at 1074-75 & n.183.

156. *See id.* at 1074-75 & n.184.

157. *Id.* at 1074-75.

158. *See id.*

159. RUTH BEN-ISRAEL, INTERNATIONAL LABOUR STANDARDS: THE CASE OF FREEDOM TO STRIKE 36-37, 116-117 (1988). Essentially the problem was that if there was a formal definition of strike, then there would need to be exceptions. Perhaps one would be left with so many exceptions that the right itself would be meaningless.

160. Cabin, *supra* note 9, at 1090-91.

zens.¹⁶¹ In terms of giving clarity to what the broad principles proposed by Cabin actually mean, the ILO, as enforcer, could draw on its long history and jurisprudence of developing labor standards to actually enlarge on what shape the principles should take in practice. Over time, the ILO could gauge improvements in labor standards in countries and therefore also gauge compliance with the terms of the treaty.

2. *International Organization of Labor (Not Just the International Labour Organization)*

Along similar lines to linking trade and labor is the idea that labor organizations themselves start to cooperate internationally. As Hambrick notes in his piece in the *Columbia Journal of Transnational Law*, this raises questions about boycott law.¹⁶² If one union in one country goes on strike to support a second union in a second country, then has the first union engaged in an illegal boycott? When one considers that scenario along with the even more complex conflict of laws questions raised by industries such as airlines (which have some staff employed by U.S. companies overseas, others employed by foreign companies in the United States, and cooperation agreements between partner airlines), one realizes how complex this development is.¹⁶³ Notwithstanding that complexity, a transnational labor organization is a possibility worth exploring as labor deals with the transnational corporate entities that employ workers.¹⁶⁴

3. *Corporate Social Responsibility*

In addition to actually legislating for or facilitating the raising of standards according to which labor should be treated, it is also important to contemplate the role that the corporation employing labor can play. There is no question that the law on directors' duties along with the notion of the corporate shield or veil emphasizes the role of the corporation as a commercial entity—to produce profit for shareholders.¹⁶⁵ It is also important to acknowledge the role successful and profitable companies play in actually employing workers.¹⁶⁶

But as Reich forcefully argues, the manner in which companies operate

161. *Id.* at 1091–92.

162. Hambrick, *supra* note 146, at 578.

163. *Id.* at 584–86. Hambrick acknowledges that labor is now seeking to organize internationally and focuses his article on the conflicts of laws issue as to whether the National Labor Relations Act ban on secondary boycotts or the Railway Labor Act (which is less opposed to secondary boycotts) applies to boycotts in the airline industry. Hambrick ultimately argues in favor of an approach to conflict of laws issues that weighs the position of the United States against that of the nation in which the conduct occurs (the comity approach). *Id.* at 607–08; *see also* BEN-ISRAEL, *supra* note 159, at 117.

164. This is a modern day version of the old argument of Otto Kahn Freund, namely that there should be a countervailing force to balance the power of employers. OTTO KAHN-FREUND, *LABOUR AND THE LAW* 51 (2d ed. 1977).

165. *See* MODEL BUS. CORP. ACT §§ 8.30–8.33.

166. F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* 124 (2d ed. 1960).

has changed.¹⁶⁷ In the 1950s, there was almost a form of “enlightened despotism.”¹⁶⁸ Companies, run by families like the Carnegies, took a long-term view of corporate development and did not face the intense competition today’s companies often face.¹⁶⁹ Consequently, they could show benevolence to their staff (and often did).¹⁷⁰

In contrast, today’s companies face many pressures never seen before. In particular, the advent of the supercapitalist transnational company that can drive costs down, outsource, and pick the cheapest market from which to buy, causes pressure.¹⁷¹ Reich raises the notion of corporate social responsibility—that the transnational company owes some social responsibility to its workers and the citizens of the countries in which it operates.¹⁷² Reich observes that some corporations, like McDonald’s, have attempted to develop corporate social responsibility programs by, for example, changing to a healthier menu.¹⁷³ However, significantly, many of these changes are in response to customer demand, rather than an innate corporate conviction to some ideal.¹⁷⁴

Corporate social responsibility has been considered in the context of China. Multinational companies who use Chinese factories (such as for clothing manufacture) do send in auditors to monitor labor standards from time to time.¹⁷⁵ However, evidence adduced at the Cornell University Conference *Breaking Down Chinese Walls* suggests that these audits may be flawed by the usual problems that arise with most law enforcement in China—namely, the reliability of the information given to the auditor.¹⁷⁶ Have gifts been given to the auditor or to those reporting to the auditor?¹⁷⁷ Have the auditors been given full access to information, factories, and workers?¹⁷⁸ Have the workers been too afraid to talk?¹⁷⁹

That is why the work of independent bodies like China Labor Watch is interesting and important. This independent organization regards “Chinese workers’ rights as inalienable human rights and is dedicated to promoting workers’ fair redistribution of wealth under globalization.”¹⁸⁰ Their work has included conducting independent audits of factories to uncover forced labor and advocating for a collective bargaining

167. REICH, *supra* note 6, at 7.

168. *See id.* at 28–30.

169. *Id.* at 30.

170. *Id.* at 34–35.

171. *Id.* at 50–87.

172. *Id.* at 168–208.

173. *Id.* at 191.

174. *Id.* at 170–72.

175. Chen, *supra* note 7, at 2.

176. *Id.* at 13–15.

177. *Id.* at 23.

178. *Id.* at 13.

179. *See id.* at 7.

180. *Who We Are*, CHINA LABOR WATCH, <http://www.chinalaborwatch.org/aboutus.html> (last visited Aug. 31, 2011).

process.¹⁸¹

4. *Closing Remarks on the Need for International Labor Law*

Where labor standards are concerned, many of the avenues discussed in this section of this Article are all about pressure.¹⁸² Pressure should be placed on governments to champion international labor standards. Pressure should be placed on governments to accept international enforcement bodies such as the ILO. Pressure should be placed on companies to acknowledge the rights of workers. One of the common themes of all of this is that the West actually stands for something apart from profit.

B. MAKING THE MOST OF SYMPATHETIC TRADING PARTNERS IN ASIA, ENSURING THERE IS BALANCE IN THE ASIA-PACIFIC REGION, AND STUDYING THE PROBLEMS OF EXECUTIVE EMPLOYMENT

Balancing trade and labor laws must be part of a broader strategy in which nations sympathetic to human and labor rights are supported and countries like the United States play a role in ensuring there is balance in the Asia-Pacific region.

1. *Asian Governments Sympathetic to Labor Standards—The Importance of the Hong Kong Government*

Control of Hong Kong was handed to the Chinese from the British in 1997.¹⁸³ But the laws of Hong Kong did not immediately change.¹⁸⁴ Instead, there has been a transition process called “one country, two systems,” in which the British-style and Chinese-style systems blend over a fifty-year period, ending in 2047.¹⁸⁵

While there are some who might seek to minimize the influence that the Hong Kong Special Administrative Region may have over the might of the Chinese government, the present writer holds the opposite opinion. Indeed, there is a body of support for the view that the Hong Kong government can have a significant voice in the development of Chinese law—especially during this formative period.¹⁸⁶

The last governor of Hong Kong, Lord Chris Patten, notes in particular

181. *Dell, HP, and NEC Supplier Factory Case Study: MSI Computer (Schenzhen) Co., Ltd.*, CHINA LABOR WATCH, 6 (Feb. 2011), http://www.chinalaborwatch.org/upfile/2011_2_7/201127105128606.pdf; *A Case Study: Adidas and Yueyuen*, CHINA LABOR WATCH, 17–18 (Oct. 2010) http://www.chinalaborwatch.org/upfile/2010_11_2/20101130143496.pdf.

182. See discussion *supra* Part IV.A.

183. PATTEN, *supra* note 25, 12.

184. *Id.* at 30.

185. *Id.* at 29–30.

186. See, e.g., Peter T.Y. Cheung, *Who's Influencing Whom? Exploring the Influence of Hong Kong on Politics and Governance in China*, 51 ASIAN SURVEY 713, 716 (2011) (stating that “basic evidence gathered here illustrates [Hong Kong’s] substantial and continuing influence across different dimensions” of politics).

that Hong Kong is a gateway for China to the West and vice versa.¹⁸⁷ Hong Kong, in which both Chinese and English are spoken, is in the unique position of sharing a language and culture with both the West and the Chinese.¹⁸⁸ Given its strong business and banking base, it is strategically important for the Chinese not to kill the goose that laid the golden egg.¹⁸⁹ Leading Hong Kong Queen's Counsel, Johnny Mok SC, supports that view and notes that on issues of advancing the rights of civil servants in the workplace, Hong Kong is a world leader.¹⁹⁰ It is on that latter topic which the present writer has extensively published in the *Hong Kong Law Journal*.¹⁹¹ Consideration of that issue is apposite in the present context.

Throughout this Article, the point has been made that China has known a long succession of centralized governments and that Chinese law was concerned largely with public law—that is, the implementation of the government's will on the people of China. It stands to reason, therefore, that the employment of civil or public servants was considered almost a means of implementing government policy, rather than something in which accountability and transparency of operation of that government was significant. In other words, the public servant employee was an apparatus of the Chinese state and had few personal rights as an employee.

Two cases decided recently in the Hong Kong appellate courts, *Lam Siu Po*¹⁹² and *Rowse*¹⁹³ have played a crucial role in eroding that principle. These two cases decided that Hong Kong civil servants have a right to be legally represented in internal disciplinary proceedings where significant allegations of misconduct have been made against them.¹⁹⁴ Further, the cases hold that no internal government rule which prohibits all forms of legal representation for civil servants can be valid.¹⁹⁵

To underestimate the significance of these findings—and the work of the litigants, lawyers, and academics who have supported these test cases—is, in the present writer's view, to miss a fundamental point in Chinese law. The public service is regarded by the Chinese government as its

187. See PATTEN, *supra* note 25, at 111–112.

188. Cheung, *supra* note 186, at 717.

189. See generally PATTEN, *supra* note 25.

190. Johnny Mok, *The Right to Legal Representation: The Fast-Developing Jurisprudence*, LEXISNEXIS (Aug. 7, 2009, 4:11 AM), <http://law.lexisnexis.com/webcenters/hk/Hong-King-Lawyer-/The-Right-to-Legal-Representation-The-Fast-Developing-Jurisprudence>.

191. See Louise Floyd, *Reforming Hong Kong Public Sector Employment Law After Lam Siu Po and Rowse: Some Useful Comparisons from Australian Law*, 39 H.K. L.J. 457, 457–58 (2009); Louise Floyd, *Whistle-Blowing and Compulsory Medical Examinations: Recent Developments in Australian Public Sector Employment Law and Their Relevance to Hong Kong Law*, 41 H.K. L.J. 155, 155–56, 174–75 (2011).

192. *Lam Siu Po v. Comm'r of Police*, [2009] 12 H.K.C.F.A.R. 237 (C.F.A.).

193. *Rowse v. Sec'y for Civil Serv.*, [2008] 5 H.K.L.R.D. 217 (C.F.I.).

194. *Lam Siu Po*, 12 H.K.C.F.A.R. at 238–39, 255–56, 286–88; *Rowse*, 5 H.K.I.R.D. at 243–52.

195. *Lam Siu Po*, 12 H.K.C.F.A.R. at 239–40; *Rowse*, 5 H.K.L.R.D. at 243–44.

apparatus.¹⁹⁶ Even the *Hong Kong* public service is being slowly politicized by the Chinese Communist government.¹⁹⁷ Landmark cases which accord employment law rights to Hong Kong public servants are a breakwater against that politicization and actually open governments and give some measure of accountability.¹⁹⁸ Were it not for these types of decisions, innocent, honest civil servants could be simply made scapegoats on any issue where it suits the government for there to be a scapegoat.

2. *The Stern Hu Decision*

The prospect that a worker can be used as a scapegoat by government or at least be denied basic natural justice is critically important in considering Chinese employment law. The recent Stern Hu decision, in which an Australian mining executive was imprisoned by the Chinese government for stealing trade secrets, is relevant to that consideration.¹⁹⁹ Returning to one of the most fundamental points to be made in this Article, most bodies in China are either strongly influenced by the government or exist only with the imprimatur of the government, including mining companies such as Chinalco.²⁰⁰

When Chinese companies seek to buy interests in foreign national companies (as Chinalco sought to merge with Australian mining company Rio Tinto),²⁰¹ in some senses the Chinese government is buying its way into a nation's resource base. That presented a number of problems in terms of whether foreign ownership of natural resources and strategic assets was in the Australian national interest.²⁰² Ultimately, the Australian government (and its Foreign Investment Review Board) did not have to decide that question as the deal fell through.²⁰³ But subsequently, an Australian executive of miner Rio Tinto, Stern Hu, was imprisoned in China as it was alleged that he had engaged in industrial espionage in negotiating the spot price of metals.²⁰⁴ The allegation that he had knowledge of the bottom line bargaining position of the Chinese negotiator was first construed

196. See David J. Clark, *The Basic Law: One Document, Two Systems, in THE HONG KONG BASIC LAW: BLUEPRINT FOR "STABILITY AND PROSPERITY" UNDER CHINESE SOVEREIGNTY?* 36, 37–38, 40 (Ming K. Chan & David J. Clark eds., 1991).

197. See *id.*

198. See, e.g., *Lam Siu Po*, 12 H.K.C.F.A.R. 237.

199. Doran, *supra* note 31.

200. Rowena Mason, *Pressure Grows on Rio Tinto-Chinalco Deal*, THE TEL. (Mar. 16, 2009, 10:01 PM), <http://www.telegraph.co.uk/finance/newsbysector/industry/mining/5002637/Pressure-grows-on-Rio-Tinto-Chinalco-deal.html>.

201. *Id.*

202. *Id.*; Rebecca Bream, Kate Burgess & Peter Smith, *Chinalco Deal Raises Questions for Rio Tinto*, FIN. TIMES (Feb. 11, 2009, 7:37 PM), <http://www.ft.com/cms/s/0/46d25e0c-f872-11dd-aae8-000077b07658.html#axzz1XJHy27Wt>.

203. *BHP 'Lobbied to Block Rio-Chinalco Deal'*, NEWS.COM.AU (Dec. 11, 2010, 4:01 AM), <http://www.news.com.au/national/bhp-lobbied-to-block-riochinalco-deal/story-e6frfkvr-12259697147>.

204. Doran, *supra* note 31.

as stealing state secrets, then as stealing business secrets.²⁰⁵ The irony of this situation was obvious. Australians had objected to Chinalco on the basis that a foreign government might own part of Australia.²⁰⁶ But now it was the Chinese government calling an Australian a spy.²⁰⁷ There was speculation in some quarters as to the timing of the allegation, whether this was retaliation over Chinalco, and whether Stern Hu was a scapegoat.²⁰⁸

Not only did this affair demonstrate the central problem industrial theft poses in Chinese corporate dealing and employment, but there were very serious questions as to the fairness of the trial Hu received.²⁰⁹ As Professor Jerome Cohen pointed out, there was no open trial and little effective legal representation.²¹⁰ So, Stern Hu, an employee who may have faced dismissal proceedings in a normal situation, was now facing a justice system completely dissimilar to our own.²¹¹ As Professor Cohen said, such lack of a fair criminal trial is not unusual in politically sensitive trials in China, and the life of a lawyer who seeks criminal justice for a client can be made difficult by the Chinese government he opposes.²¹²

C. BALANCE IN THE ASIA-PACIFIC REGION

The recent years have seen an array of Chinese leaders receive foreign dignitaries for trade talks or be received by foreign governments in furtherance of economic opportunities.²¹³ The emergence of the Chinese economic “miracle” along with the global economic downturn has made the pursuit of Chinese trade a significant item on the agendas of most governments.²¹⁴ But as Patten observes, this is not the first Asian wonder economy.²¹⁵ The 1980s saw the emergence of the so-called tiger econo-

205. Stephen McDonnell, *China Law*, ABC.NET.AU (June 13, 2010, 8:05 AM), <http://www.abc.net.au/correspondents/content/2010/s2925458.htm>.

206. Bream, Burgess & Smith, *supra* note 201.

207. *See generally* teleconference interview by Tony Jones with Jerome Cohen, *supra* note 68; McDonnell, *supra* note 205.

208. Teleconference interview by Tony Jones with Jerome Cohen, *supra* note 68.

209. *Id.*

210. *Id.*

211. *See* Jerome Cohen, *Jerome Cohen on the Stern Hu case*, CHINESE L. PROF BLOG (Mar. 21, 2010), http://lawprofessors.typepad.com/china_law_prof_blog/2010/03/jerome-cohen-on-the-stern-hu-case.html; Teleconference interview by Tony Jones with Jerome Cohen, *supra* note 68.

212. Teleconference interview by Tony Jones with Jerome Cohen, *supra* note 68; McDonnell, *supra* note 205.

213. *See, e.g.*, Helene Cooper & Mark Landler, *Obama Pushes Hu on Rights but Stresses Ties to China*, N.Y. TIMES (Jan. 20, 2011), <http://www.nytimes.com/2011/01/20/world/asia/20prexy.html>; *David Cameron Raises Human Rights in China Talks*, BBC NEWS (Nov. 9, 2010, 6:02 PM), <http://www.bbc.co.uk/news/business-11715216>.

214. *See The Rising Power of the Chinese Worker*, ECONOMIST, July 31, 2010, at 9; *David Cameron Raises Human Rights in China Talks*, *supra* note 213. In early 2011, China overtook Japan to become the world's second largest economy. *See* Malcolm Moore *China Is the World's Second Largest Economy*, THE TEL. (Feb. 14, 2011, 5:26 PM), <http://www.telegraph.co.uk/finance/economics/8322550/China-is-the-worlds-second-largest-economy.html>.

215. *See* PATTEN, *supra* note 25, at 117–45.

mies (for example, Japan, most of which went into recession when their bubble of fast-paced economic development burst in the early 1990s).²¹⁶ While in-depth economic analysis is clearly beyond the scope of this legal Article, the notion of having balance in investment and spreading risks over a variety of countries is not new.²¹⁷ Likewise, the idea that a balance should be sought in one country's relationship with other countries in a region is important.²¹⁸

In addition to seeking opportunities with China, it is important not to forget neighboring trading partners like Japan, which is and has long been one of the three largest economies in the world, despite its economic problems of the last decade.²¹⁹ Especially after the tragic events of March 2011—which saw an earthquake, tsunami, and nuclear power emergency—the importance of not simply ignoring Japan and its potential and need to rebuild is obvious.²²⁰ The effect of a collapse of such an economy on not only the Japanese people but also the world economy almost goes without saying.²²¹ The waste of the considerable talent of the Japanese people would also be counterproductive—even ludicrous.

The difficult relationship Japan and China have had over the years underscores the importance of not elevating China to such an extent that the significance of Japan is forgotten. Not only does such an approach have obvious benefits for trade strategy and stability in the region, there are many legal reasons (particularly in terms of employment law) why such an approach should be pursued. Japan has a system of employment laws far more sympathetic to the West.²²² Writers such as Professor

216. *Id.* at 117–45, 247.

217. Former Australian Prime Minister Kevin Rudd MP stressed that, while China is an opportunity for neighboring Australia, Japan was still a significant part of Australia's trade and should not be forgotten. Indeed, obtaining a balance between China and Japan was something that should be sought. See *Australia Happy with Relationship with Japan*, ABC RADIO AUSTRALIA (Nov. 26, 2010, 5:02 PM), <http://www.radioaustralia.net.au/pacbeat/stories/201011/s3077800.htm>. Further, American commentators have warned against Australia relying too heavily on China and mining. See, e.g., Michael Schuman, *China's Mining Pit*, TIME INT'L, June 13, 2011, at 45.

218. See Rudd, *supra* note 30.

219. See *Watching China Whizz By*, ECONOMIST, Aug. 21, 2010, at 52. See generally *Country Statistical Profile: Japan*, OECD (May 27, 2010), http://www.oecd-ilibrary.org/economics/country-statistical-profile-japan_2075228-table.jp.

220. There was saturation coverage of these disasters on many news outlets, including CNN, BBC, and ABC. See, e.g., *3 Nuclear Reactors Melted Down After Quake*, CNN (June 6, 2011), http://articles.cnn.com/2011-06-06/world/japan.nuclear.meltdown_1_nuclear-reactors-fuel-rods-toyko-electric-power?_s=PM:WORLD.

221. See *Watching China Whizz By*, *supra* note 219. Additionally, the global community has given considerable input in rebuilding Japan. See *The Sun Will Rise*, BUS. STANDARD (Mar. 14, 2011, 12:47 AM), <http://www.business-standard.com/results/news/the-sun-will-rise/428539/> (“The entire world has come together to express its sympathy and extend help and support to Japan.”). An interesting boutique example includes the attempt by Australian beef farmers to assist waygu beef producers in Japan. See *Fukushima Farmers Ordered to Abandon Their Livestock*, ABC.NET.AU (May 13, 2011), <http://www.abc.net.au/rural/news/content/201105/s3215845.htm>.

222. See Liliane Jung, *National Labour Law Profile: Japan*, INT'L LABOUR ORG., <http://www.ilo.org/public/english/diaglogue/ifpdial/info/national/jp.htm> (last updated Mar. 30, 2011).

Araki and Professor Shimada have written about many features of Japanese employment, such as the loyalty companies have traditionally tried to instill in their working relationships²²³ and the development of protections for contract workers.²²⁴ Japan is important in the Asia-Pacific region in terms of generating norms of employment and production that consider quality and fairness, not simply profit.²²⁵ While some commentators have written Japan off, such an approach is a mistake in the view of the present writer.²²⁶

D. THE INTERNET—WIKILEAKS, TWITTER, AND FACEBOOK

The final mechanism that can be used to oppose Chinese labor practices is the Internet. The possibilities the Internet has for trade and commerce, and the dangers it poses for international money laundering and breach of copyright, have been known for some time.²²⁷

Recent years have thrown up the even more dynamic concept of the Internet as a tool for social change—even revolution.²²⁸ The year 2011 has seen the Internet and social networking sites such as Twitter, Facebook, and WikiLeaks play a role in the change of government in, for example, Egypt.²²⁹ People, particularly young people, instantaneously sent images through the Internet of protests by citizens against their government and scenes of injustice by government against its citizens.²³⁰ This power to inform the world of domestic political problems linked into the tremendous organizational capability of the Internet. Instantaneously, rallies and protests could be organized against government with the single click of a cell phone key or computer mouse.²³¹

Equally significant, 2010 saw “Cablegate”—when Australian, Julian Assange, the founder of WikiLeaks, used his website to publish previ-

223. See Araki, *supra* note 22, at 253–57, 272, 279.

224. Yoichi Shimada, *Labor Law Change in Response to Working Pattern Diversification Following the Collapse of Lifetime Employment in Japan*, WASEDA U. RESEARCHERS WEB MAG., <http://www.waseda.jp/rps/en/webzine/no16/no16.html> (last revised Oct. 5, 2006).

225. See *id.*

226. See, e.g., Peter Alford, *Japan's Setting Sun*, THE AUSTRALIAN (Feb. 25, 2009, 12:00 AM), <http://www.theaustralian.com/au/news/japans-setting-sun/story-e6frg6t6-111118953188>.

227. See, e.g., COMPUTERS AND LAW (Indira Carr and Katherine Williams eds., 1994); YEE FEN LIM, CYBERSPACE LAW: COMMENTARIES AND MATERIALS (2d ed. 2007) (discussing potential of criminal activity in cyberspace). Most law enforcement agencies throughout the world have cooperative relationships whereby they can attempt to trace cybercrime. See, e.g., *Cybercrime*, AUSTRALIAN FED. POLICE, <http://www.afp.gov.au/policing/cybercrime.aspx> (last visited Sept. 14, 2011).

228. *Where Might Social Media Aid a Revolt Next?*, CBS NEWS (Feb. 14, 2011, 8:36 AM), <http://www.cbsnews.com/stories/2011/02/12/earlyshow/saturday/main7343208.shtml>.

229. *Id.*; Scott Shane, Steven Lee Myers & Eric Schmitt, *WikiLeaks Prompts New Round of Diplomatic Uproar*, N.Y. TIMES, September 1, 2011, at A15.

230. These sorts of scenes were reported in detail on CNN from about January 27, 2011 through approximately February 11, 2011. See, e.g., Tim Lister & Emily Smith, *Social Media @ the Front Line in Egypt*, CNN (Jan. 28, 2011, 11:51 AM), <http://www.cnn.com/2011/WORLD/africa/01/27/egypt.protests.social.media/index.html>.

231. See *id.*

ously secret U.S. government documents on, for example, matters of security to the world.²³² These documents were leaked to him by an anonymous source, and Assange, through his website, facilitated publication.²³³

At a practical level, in many parts of the world, the Internet is facilitating social change.²³⁴ But as Andrew D. Murray wrote in his book, *The Regulation of Cyberspace Control in the Online Environment*, some governments, especially the Chinese government, have “firewalls” on their national Internet access.²³⁵ In other words, the Chinese government actively deploys significant resources to regulate the flow of information on the Internet and to actually block access to information on the Internet when that information is embarrassing to the government.²³⁶ This approach is breathtakingly effective in censoring Internet use.²³⁷ Legislation simply penalizing Internet users for accessing sites is notoriously difficult to enforce.²³⁸ People can search the Internet in private, so authorities may not know what is going on. Further, since people can access sites from all over the world, it is sometimes difficult to trace users and the creators of websites.²³⁹ The approach of actually blocking content, so that Internet users literally cannot access information, means that Internet users hit a metaphorical brick wall.

This issue combined with the fact that parts of the population, especially the vast Chinese rural population, may not even have Internet access or be so undereducated that they cannot effectively utilize the Internet,²⁴⁰ means there are special problems with using social media to effect social change in China. However, in the view of the present writer, those difficulties do not nullify the efficacy of social media as a vehicle for effecting social change—even in China.

Micah Sifry, in his 2011 work, *WikiLeaks and the Age of Transparency*, discusses the manner in which the Internet could be used to open govern-

232. This was extensively reported on many programs. See, e.g., Rebecca MacKinnon, *WikiLeaks, Amazon and the New Threat to Internet Speech*, CNN (Dec. 3, 2010, 6:09 AM), <http://www.cnn.com/2010/OPINION/12/02/mackinnon.wikileaks.amazon/index.html?iref=allsearch>; Alan Greenblatt, *WikiLeaks Fallout: Unease over Web Press Freedoms*, NPR (Sept. 20, 2011), <http://www.npr.org/2010/12/08/131905226/wikileaks-fallout-unease-over-web-press-freedoms?ps=cprs>.

233. See *Secret US Embassy Cables*, WIKILEAKS, <http://wikileaks.org/static/html/faq.html> (last visited Sept. 14, 2011).

234. Andrew Keen and Jeff Jarvis *Debate Whether Online Sharing Destroys Personal Privacy*, CLICK BBC (Apr. 19, 2011), <http://www.bbc.co.uk/programmes/p002w6r2/episodes/player?page=1>.

235. ANDREW D. MURRAY, *THE REGULATION OF CYBERSPACE: CONTROL IN THE ONLINE ENVIRONMENT* 48 (2007).

236. See *id.*

237. Isabella Bennett, *Media Censorship in China*, COUNCIL ON FOREIGN RELATIONS, <http://www.cfr.org/china/media-censorship-china/p11515#pe> (last updated Mar. 7, 2011).

238. See Peter Shadbolt, *How Microbloggers Vault the 'Great Firewall of China'*, CNN (Feb. 20, 2011, 12:49 AM), <http://www.cnn.com/2011/WORLD/asiapcf/02/18/china.microblogs/index.html>.

239. See *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999).

240. See Buruma, *supra* note 13.

ment, effect social change, and possibly open up the prospect of collaborative government in which representatives are more consultative of their constituents.²⁴¹ Sifry writes mainly from a Western perspective (specifically an American perspective), where governments, like the Obama Administration, overtly champion the opening of government.²⁴² Clearly, that is a significant difference from the stance of the Chinese government. Further, Sifry himself acknowledges that no one knows the precise shape the Internet will take in terms of its final role as a facilitator of social change.²⁴³ However, in the view of the present writer, one can still distill from the literature some strategies that can be adapted to the Chinese context.

The Internet knows no national borders—it can be accessed with little censorship outside of China. Consequently, Chinese nationals, ex-nationals and sympathizers (especially living outside China) can use the Internet to communicate with an enormous world audience. Significantly, they can keep the spotlight on the injustice of the Chinese government so that poor labor standards and social conditions are not simply swept under the mat.

Secondly, while it is easy to shut down one website or one group of Internet users, it is difficult to attack many—especially where those websites or groups of Internet users are spread across China and throughout the globe.²⁴⁴ By organizing many groups (spontaneous and organic), it will be hard for the Chinese government to block all forms of resistance.

Thirdly, there is the vexed question of WikiLeaks. The present writer has previously published on not only the virtues of freedom of information laws, but also the potential difficulties and dangers.²⁴⁵ Whistleblowers can do enormous good, but they could also be wrong, misguided, have spiteful agendas, or simply leak comments that are damaging, mischievous, and have no real public good. The present writer fails to see, for example, why there was any need for some of the WikiLeaks to be published. What benefit is there, after all, in knowing that the U.S. government thought former Australian Prime Minister Kevin Rudd MP was a control freak?²⁴⁶

Notwithstanding the present writer's own reservations about the responsibility or otherwise of all of Julian Assange's exploits, there is one pithy observation of Micah Sifry which is relevant to the present Article. While critical of some aspects of Assange's approach, Sifry concludes:

241. See MICAH L. SIFRY, *WIKILEAKS AND THE AGE OF TRANSPARENCY* (2011).

242. *Id.* at 107–08.

243. *Id.* at 20.

244. See generally *Federal Authorities Take on Anonymous Hackers*, WASH. POST (Sept. 12, 2011), http://www.washingtonpost.com/politics/federal-authorities-take-on-anonymous-hackers/2011/09/11/g1QAYrhgMK_story.html (describing the difficulties of tracking and controlling Anonymous, a widespread network of affiliated internet hackers).

245. See Floyd, *Whistle-Blowing*, *supra* note 190, at 155–56, 174–75.

246. *WikiLeaks Tells Us What We Already Knew*, NEWS.COM.AU (Sept. 2, 2011, 9:33 AM), <http://www.news.com.au/breaking-news/wikileaks-tells-us-what-we-already-knew/story-e6frfku0-1226127894399>.

If anything, Assange's greatest contribution to global enlightenment is that the idea of a viable "stateless news organization," . . . beholden to no country's laws and dedicated to bringing government information into public view, has been set loose into the world. Even if Assange goes to jail and WikiLeaks is somehow shut down, others are already following in his footsteps. Or, as futurist Mark Pesce nicely put it, "The failures of WikiLeaks provide the blueprint for the systems which will follow it."²⁴⁷

And that is surely the point. The Internet is so expansive and transcends so many borders that it will always shine some light on Chinese workplace injustice. So long as the West acts on that light and combines Internet usage with the other strategies discussed in this Article, there is surely cause for some optimism that positive workplace reform can be facilitated in China.

V. CONCLUSION

This article began with the old words of Confucius, warning of the dangers of a national government only hearing praise and not robust opposition or criticism. It is perhaps ironic that 2000-year-old China is often considered a newly emerging power with a newly emerging legal system. It may be new to the rule of law as a Westerner knows it, but China has had centralized systems of government for almost its entire history. The level of control of China's governments—including its present government—underscores the age old concern of China's ancient philosopher. Indeed, while the new laws of China embrace some semblance of labor rights and openness, there are credible doubts as to the efficacy of those laws. These doubts stem from:

- the centrality of the Chinese legal system and its emphasis on public law and advancing the interests of the state or the central government (rather than the individual);
- its cultural nuances, which at their best preserve face and build relationships, but which at their worst breed corrupt gift-giving and retaliation or revenge; and
- its system in which some of the main avenues through which society's most vulnerable people can voice their concerns (such as through unions, the church, and access to legal justice) are unavailable without the imprimatur of the state.

The problems endemic in Chinese law are particularly obvious in a labor law context. China has become the factory of the world and the almost extortionate conditions in which its workers are employed represent both a human rights problem for the Chinese and a trade barrier for the United States and other Western nations. The difficulties are particularly problematic for rural migrant workers in China. They are the least educated, the least able to assert their rights, and they are accorded the lowest wages, social benefits and living conditions of all Chinese labor.

247. SIFRY, *supra* note 241, at 175–76.

It has been argued in this Article that it is in the interests of both the Chinese people and the government to address these concerns. For the Chinese government, fostering better working conditions will foster social stability for its 1.3 billion population. For the United States and the West, it will stop trade barriers and the slow erosion of our working conditions and human rights values.

This Article has enunciated a number of ways to deal with these problems. In the first place, it is important for the United States and the West to support international labor standards and the linking of trade and labor issues. In this connection, it is also important to consider the unfolding issues of global organization of labor and the need for corporate social responsibility on the part of transnational companies. Secondly, it has been argued that the United States should support areas of the Chinese government and Asia that are sympathetic to fair labor standards. In this vein, the Hong Kong legal system has consistently demonstrated a willingness to adopt fair working conditions for government workers even in the face of attempts by the Chinese government to politicize the Hong Kong public service. Similarly, the Japanese legal system advocates the importance of quality work and fair working conditions as a means of facilitating quality craftsmanship. When one considers the problems even executive employees have faced in their dealings with the Chinese government (such as Stern Hu), the significance of supporting Asian governments who seek to promote fairness is underscored—they create a benchmark of fairness in the region. Finally, it has been argued that Internet social media and websites play a role in promoting fairness in labor and government accountability.

While there are enormous difficulties in seeking to maintain a commitment to workplace fairness in China, there is, in the present writer's view, cause to show guarded optimism. For that optimism to be fulfilled and justified, it is important for the United States to remember the sentiments of the State of the Union speech—that although the United States is challenged by a globalized world and a restructuring, even faltering, economy, the United States is still the place the world looks to for invention and leadership – it is a country that has traditionally *stood for something*.²⁴⁸

Relating that to the practical matter of how best to deal with China, the following dialogue of Lord Chris Patten, the last governor of Hong Kong, is worth quoting at length:

A moratorium on high-level trade visits, new initiatives and all the rest would be a great bonus all round. If the Chinese want our goods, they will buy them. They certainly want our investment and access to our markets. The number of our own trade hustles mounts; the Chinese signatures on letters of intent add up; the Chinese trade surplus with the West soars. Who is kidding whom?

248. Obama, *supra* note 2.

Second, we should pursue our other interests on their own terms, too—from weapons proliferation to human rights. We should table resolutions in international forums and lobby for support for them. We should press China to sign up to international agreements and codes of conduct on human rights and other matters. We should offer China help – if the Chinese government wants it – in areas like the drafting of laws and the training of judges. We should make a fuss about dissidents and Tibet, and ignore Chinese petulance. When China complains that an American or a European leader sees someone who is on its blacklist or says something that offends its sensitivities, we should behave exactly as we would if anyone else was so impertinent; we should tell it that it is none of China's business, that we live in free societies, that we are under no obligation to tread gingerly around matters it may find unpalatable. If 'face' matters so much to Chinese Communist leaders, we should deny 'face' to them until they give some to us. Prestigious visits, twenty-one-gun salutes, red carpets, diplomatic flattery – all these have their modest place in the world, but they should be carefully rationed. We should, in short, behave normally with China.

Perhaps the worst aspect of the present muddle of objectives and tactics, which appears to most interested observers to leave the idealists without an effective strategy, and the engagement strategists without any ideals, is that it enables the Chinese to mix trade and politics so effectively that they win every diplomatic round and almost every political tussle. The Chinese government believes that all it has to do is to crack the whip – to threaten a blocked order here, a purchase from a rival there, a withdrawal of its goodwill, a cancellation of good relations until further notice – and we will all jump back into line. And by and large we actually do. . . . Sometimes one has to pinch oneself to remember who needs whom most. The Chinese government needs our investment. It needs access to our markets. Without our money and our purchase of Chinese goods, the very future of the Communist regime would be imperiled. We spin the wheels for it. So what are we afraid of losing – a market that represents 1.7 per cent of the total exports of the OECD countries.²⁴⁹

Although obviously some of the economic figures of these 1997 words are dated, the sentiments are not. It is important for the United States and the West not simply to seek trade opportunities with China, but to remember that they stand for something. It is in the context of labor law that those principles are particularly important. They should be remembered and progressed—as old meets new.

249. PATTEN, *supra* note 25, at 301–02.

