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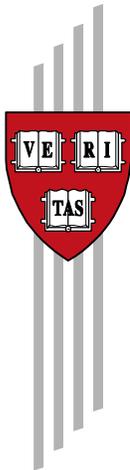
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Matthew C. Stephenson

Abstract

The US government has announced an initiative to promote the “rule of law” in the People’s Republic of China. However, though China has also endorsed building the “rule of law” as a goal, the American and Chinese views of what “rule of law” entails differ substantially. In the US government, rule of law reform is seen as a way to promote human rights and political reform, whereas the Chinese government wants to restrict law reform to those areas closely related to developing a market economy. To deal with this divergence in goals, the US has adopted a “Trojan Horse” strategy: the belief is that the Chinese will allow US-sponsored law reform programs for economic reasons, but once established, these programs will lead to broader political reform. However, this view is not well-supported by theory or empirical evidence. Thus, while law reform programs in China may be worthwhile, we should be skeptical of their ability to trigger more fundamental political reform.

Keywords: rule of law; China; legal reform; political reform

JEL Classification codes: K10, K20, K30, K40

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Introduction

Consider the following scenario. Members of the American governmental, academic, and nonprofit communities notice that, in an important region of the developing world, legal institutions and substantive law appear inadequate. Laws seem opaque, unpredictable, and unfair. Legal institutions are inefficient, inaccessible to ordinary people, and subject to corruption and political interference. These legal deficiencies, it is believed, threaten sustained and equitable economic development, the protection of individual rights, and the possibility for greater democratic political reform. Thus, it seems logical to these American observers that the United States, with its sophisticated laws and legal institutions, and its years of experience developing a legal system, could provide useful expertise and assistance in promoting legal reform and development in this region.

The region in question is Latin America (and to a lesser extent Africa and Southeast Asia), and the time is the mid-1960s. US legal assistance efforts in these countries – which came to be known as the Law and Development Movement – began with great optimism.¹ Yet the movement came to a virtual halt only a decade later, after a crisis of disillusionment not only with the specific projects, but with the whole vision of legal development which sustained them. The definitive critique of the Law and Development Movement came from two of its most distinguished practitioners. In their 1974 article, “Scholars in Self-Estrangement”, David Trubek and Marc Galanter claimed that the Law and Development Movement was based on a flawed theory of law and society, and a flawed ideal of “liberal legalism.”² In many ways their criticisms echoed the prescient observations of Lawrence Friedman, who noted as early as 1969 that, among other failings, Americans who went abroad to promote legal reform in developing countries lacked any “careful, thought out, explicit theory of law and society or law and development.”³ A more lengthy critique of the projects in Latin America came from a former Ford Foundation official, James Gardner, who

¹ For the classic statement of the project’s vision and spirit, see Justice William O. Douglas “Lawyers of the Peace Corps” *American Bar Association Journal* 48:909-913 (1962)

² Trubek, David M. and Marc Galanter “Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States” *Wisconsin Law Review* 1974(4):1062-1102 (1974)

³ Friedman, Lawrence M. “On Legal Development” *Rutgers Law Review* 24:11-64 (1969) p.12

claimed that these programs, though well-intentioned, amounted to “legal imperialism”.⁴ Under the weight of such intense internal and external criticism, the Law and Development Movement withered. Funding dried up, programs were cancelled, and scholars turned their attention to other issues.⁵

It is important, when reflecting on the failure of the Law and Development Movement, to keep in mind that many did not accept all of the critical arguments leveled against the enterprise. Several leading professionals in the law and development field at the time took issue with Trubek and Galanter, both in their theoretical approach and their conclusions.⁶ More recent scholars have pointed out that ten years was far too little time to declare such a complex endeavor a failure, and suggest that Trubek and Galanter’s “self-estrangement” may have had more to do with a home-grown crisis of faith in American institutions than experience in the developing world.⁷ Nonetheless, it is undoubtedly true that the Law and Development Movement collapsed in the late 1970s, and that much of this collapse can be traced to the weakness of the theoretical foundations of the enterprise. Even if Trubek and Galanter were too hasty in concluding that the movement was fatally flawed, the lack of a well-thought-out, cogent theory of how and why legal reform programs were supposed to work no doubt made the movement especially vulnerable to a crisis of confidence.

Given this history, anyone following the recent US announcements of a “Rule of Law Initiative” to help China reform its laws and legal institutions has reason for concern. The opening paragraph of this paper could apply to the current Rule of Law Initiative, focused on China, just as well as it applies to the previous Law and Development Movement, focused on Latin America. There are, of course, important differences, and I do not mean to suggest that legal reform efforts in China are bound to meet the same fate as the first Law and Development Movement. Nevertheless, there are clearly parallels between the two. Therefore, given the fact that weak theoretical foundations contributed to the failure – or at least the termination – of the earlier movement, it is

⁴ Gardner, James *Legal Imperialism: American Lawyers and Foreign Aid in Latin America* (Madison: University of Wisconsin Press, 1980) 401 pp.

⁵ For contemporary post-mortems of the movement, see Merryman, John H. “Comparative Law and Social Change: On the Origins, Style, Decline & Revival of the Law and Development Movement” *American Journal of Comparative Law* 25:457-491 (1977) and Burg, Elliot M. “Law and Development: A Review of the Literature & a Critique of “Scholars in Self-Estrangement”” *American Journal of Comparative Law* 25:492-530 (1977). For more recent reflections on the history of the movement and its lessons, see Tamanaha, Brian Z. “The Lessons of Law-and-Development Studies” *American Journal of International Law* 89:470-486 (1995) and Messick, Richard E. “Judicial Reform and Economic Development: A Survey of the Issues” *World Bank Research Observer* 14(1):00-000 (1999)

⁶ See, for example, Seidman, Robert B. “The Lessons of Self-Estrangement: On the Methodology of Law and Development” *Research in Law and Sociology* 1:1-29 (1978)

⁷ Tamanaha (1995)

worth examining more closely the theoretical foundations supporting the US-China Rule of Law Initiative.

The goal of this paper is to identify the most important elements of the theory of law and social change implicit in the China Rule of Law Initiative and related programs, and to reflect on those theoretical suppositions in light of the available scholarly research. The paper has two chief audiences. The first is the US policy and non-governmental community engaged in China law reform projects. For this group, the goal of the paper is to convey some of the important insights of scholars who have studied law and social change, and to suggest that greater attention to the theories implicit in various policy proposals is important – even for practical (and busy) men and women of affairs. The second intended audience is the scholarly community interested in law and development, and law and society more generally. For this group, the goal is to suggest, by describing the types of implicit theory used by policy makers, the types of research that would be particularly useful in the policy world.

Before proceeding, a few caveats and disclaimers are in order. First, the focus of this paper is on strategy on a large scale. This sort of paper cannot and will not try to describe and critique in detail all the existing programs related to law reform and legal education in China. Rather, it will attempt to describe the vision of social and legal change that drives many of these programs. Criticisms of this broad vision should not be taken necessarily as criticisms of specific programs. But the broad vision and the specific projects have a clear relationship, as the history of the previous Law and Development Movement makes clear, and rethinking the former may imply reorienting the latter.

The focus of the paper is also on the vision articulated by the US government, though the views of major non-governmental organizations (NGOs) are considered as well. This focus may seem odd, given that the US government's activities in this area have so far been minimal. The government focus is due, first, to the belief that government-sponsored initiatives are especially important in this field; second, to the belief that the government has the broadest-ranging interests and widest constituency, and is therefore likely to have a more comprehensive vision of the goals of legal reform than individual non-governmental programs; and third, to the fact that recent US announcements of interest in Chinese "rule of law" are the source of much of the increased attention to these issues.

Because there is little secondary literature on the US government and NGO China law reform programs, much of the information in this paper comes from interviews conducted with

people in the US Department of State, the academic community, and several major US NGOs. However, because many of parties involved in these projects proved difficult to contact, the number of interviewees was smaller than was originally hoped. In the end, nine people were interviewed, some more than once. Interviewees generally wanted to remain confidential, and therefore they are identified by sector (government, academe, NGO) but not by name or position.

The rest of the paper is organized as follows. The first section describes how “rule of law” made it onto the Sino-US bilateral agenda. The second section describes the objective of “rule of law” reform as perceived by the US and the Chinese governments. The third section describes the US strategy for promoting its vision of the “rule of law”, and the theoretical model of law and society that underlies this strategy. The fourth section assesses this theory and strategy in light of the existing academic literature, concluding that the model of legal change implicit in this strategy may have serious problems.

I. How “Rule of Law” Got on the Sino-US Agenda

In the last year or two, the “rule of law” has become a higher-profile issue on the US-China governmental agenda. Legal reform in China, however, is hardly a new issue for US academics and NGOs.⁸ The China Legal Education and Exchange Committee (CLEEC), for example, has been in operation since 1984, funded initially by a grant from the Ford Foundation, and then with additional assistance from the US Information Agency (USIA).⁹ The Ford Foundation also sponsors numerous other projects in this field. The Asia Foundation has also been involved in sponsoring legal education programs in China for close to two decades, and recently it has started to initiate other types of legal reform projects as well.¹⁰ The American Bar Association has also undertaken grant-funded legal reform and education projects in China.¹¹ And these are only the largest and highest-profile non-governmental organizations. According to one source in the US State Department who works closely with these issues, there are perhaps thousands of individuals and NGOs doing projects in some way related to law reform in China.¹²

⁸ Also, numerous other governments, especially in Europe, are involved in China law reform projects. The focus of this paper, however, is on US-based programs, so the non-American programs will not be discussed here.

⁹ Interview (F).

¹⁰ Interview (E).

¹¹ Interview (D).

¹² Interview (A). My sense is that “:thousands” is an exaggeration of the number of people and organizations conducting activities in this field, but the actual number is nonetheless very large.

Thus, when the Clinton Administration announced its “China Rule of Law Initiative” in 1997-1998, the government was not exactly moving into uncharted territory. It seemed, however, that the Administration was staking out a place for greater government involvement, and attempting to bring together diverse non-governmental activities into a common framework, conceived of as promoting the “rule of law”.¹³ (Some of the people already in the field were surprised that their work was now considered part of the announced Rule of Law Initiative. One academic who had been working for some time with Chinese legal education issues commented, “I never really thought of my work as ‘rule of law’ work, though I definitely thought of it as legal reform ... I found myself sort of roped into this ‘rule of law’ focus.”¹⁴) Why did the Clinton Administration suddenly start paying so much attention (at least rhetorically) to the rule of law in China? The answer has to do with the politics of US China policy, especially in the field of human rights.

Since the 1989 Tienanmen Square crackdown, there has been an annual effort in the US Congress to deny Most Favored Nation (MFN) trading status to China unless it improves its human rights record. (Over time, the list of issues tied to MFN status expanded to include things like nuclear and missile nonproliferation, but human rights has remained the primary focus.) The Clinton Administration initially supported linking MFN status to human rights, but soon changed course when it became clear that the policy was not viable. The threat to revoke MFN status was not credible, given the US stake in political and economic relations with China. Furthermore, the linkage between MFN status and human rights, and the yearly battle over MFN renewal, created substantial political difficulties for the Administration and was widely criticized as corrosive to the overall Sino-American relationship.

Therefore, in 1994, the Clinton Administration – in keeping with its professed strategy of “engagement” – declared an end to the policy of linking the continuation of MFN status with China’s human rights performance. Citing China’s strategic, political, and economic importance to the United States, President Clinton declared that the policy of using MFN status to pressure China to improve its human rights performance was unwise and unworkable. However, it was politically important that the President articulate a constructive human rights strategy concurrently with the decision to de-link human rights issues and MFN status, lest the Administration be seen as

¹³ This statement should *not* be taken as implying that the government sought a controlling role, or even that it intended to run a lot of programs directly. According to one of the State Department officials working directly on the Initiative, none of the government’s activities are intended to supplant existing NGO programs. Rather, the idea is to help raise the profile of issues, serve as a launching pad for new initiatives, and work through public-private partnerships. [Interview (A).] Nevertheless, the public rhetoric suggested a central role for US government involvement.

¹⁴ Interview (G).

abandoning the goal of promoting human rights in China. Therefore, Clinton announced several instruments the United States would use to promote human rights in lieu of MFN pressure. Among these was “support for efforts underway in China to promote the rule of law, in particular for efforts to achieve legal reforms aimed at specific human rights abuses.”¹⁵

Thus, “rule of law” began to find its way onto the Sino-US agenda, at least on the US side. According to an official at the State Department, “rule of law” was actually just one component of a broader human rights strategy to promote “civil society” in China. This strategy was, in turn, related to the more general principle, sponsored by then-Assistant Secretary of State for Democracy, Human Rights, and Labor John Shattuck, of a “two-track” human rights policy. The first track would consist of traditional human rights pressure – speaking out about alleged human rights violations, sponsoring resolutions in international forums, applying diplomatic pressure, and so forth. The second track would emphasize supporting positive trends within countries – such as the growth of civil society – that would lead to greater protection of human rights. This “two-track” strategy was re-formulated under Shattuck’s successor, Harold Koh, as an “inside/outside” human rights policy. The basic idea was the same; the underlying belief was that major human rights breakthroughs would come when internal and external pressure combined.¹⁶

However, despite Clinton’s announcement in 1994 that the US would sponsor programs to promote civil society – and, under that rubric, the rule of law – the proposed programs ran into all sorts of problems because of US laws that prohibit the government from dealing with “gross human rights abusers.” Some influential members of Congress believe that the US should not engage in any cooperative programs with the current Chinese government, and they successfully blocked funding for most of the initiatives the Administration proposed. In the end, the State Department had to retreat, settling for much more modest programs using development assistance money not covered by the problematic laws.¹⁷ Ultimately, the US government did little to follow up on Clinton’s 1994 declaration that the US would support efforts in China to build the rule of law.

Nonetheless, interest within the State Department and the Administration for rule of law programs (not only in China, but throughout the world) persisted. In late 1996, the post of “Special Coordinator for Global Rule of Law” was created within the State Department, and Clinton brought Paul Gewirtz, a Yale Law School professor, on board to fill the position. Though Gewirtz’s

¹⁵ President Clinton’s opening statement at a news conference, 26 May 1994. “U.S. Renews Most-Favored Nation Trade Status for China” Available from White House web site.

¹⁶ Interview (B).

¹⁷ Interview (B).

portfolio was global, he was, in the words of one outside observer, “bitten by the China bug.”¹⁸ This same general observation was made, less colorfully, by one of Gewirtz’s colleagues in the State Department, who estimated that he spent about 90 percent of his time working on issues related to China.¹⁹ According to another State Department source, Gewirtz was ultimately responsible for getting “rule of law” more prominently on the agenda for the 1997 Clinton-Jiang summit in the US, and for getting the two presidents to sign on to the Rule of Law Initiative.

Thus, on 29 October 1997, the Clinton-Jiang Summit Joint Statement prominently mentioned “Cooperation in the Field of Law” as an important way the two countries could promote their common interests.²⁰ In June 1998, on Clinton’s visit to Beijing, the two sides issued another Joint Statement, this time making somewhat more specific declarations about the areas for cooperation in the field of law. The two sides announced their intention to cooperate in six specific areas: judicial and lawyer training, legal protection of human rights, administrative law, legal aid for the poor, commercial law and arbitration, and law enforcement.²¹ The idea of promoting “rule of law”, seemingly dormant since Clinton’s speech in 1994, reemerged as a high-profile item on the Sino-US agenda.

However, although Gewirtz seems to have succeeded in getting “rule of law” back onto the table, the so-called Rule of Law Initiative appears to be foundering on the same political obstacles that stymied Clinton’s 1994 interest in Sino-US rule of law cooperation. Simply put, powerful and influential members of Congress who oppose any cooperation with China have obstructed funding for the programs envisioned by the Initiative. A couple of conferences under the auspices of the Rule of Law Initiative have been held – a high level, off-the-record discussion of human rights issues, held in the US, and a Law School Deans’ Conference, held in Beijing²² – but there has been little other follow-up. Part of the explanation for this is that, shortly after the conclusion of the second Clinton-Jiang summit in Beijing, Gewirtz left the government, and for more than six months, the Global Rule of Law Coordinator position remained vacant. During that time, responsibility for the China Rule of Law Initiative was diffused to different desks in the State Department. In February 1999, Joe Onek was appointed Global Rule of Law Coordinator, and a month later Phoebe Yang came on board as the State Department Coordinator for China Rule of Law Programs, a new

¹⁸ Interview (F).

¹⁹ Interview (B).

²⁰ “Joint U.S.-China Statement” 29 October 1997. Available from the White House web site.

²¹ “Fact Sheet – Achievements of U.S.-China Summit” 27 June 1998. Available from the White House web site.

²² Interviews (A, B).

position.²³ However, Congressional opposition and US laws regulating the types of programs the State Department can fund have continued to prevent additional progress.

Thus, despite the fanfare that accompanied the announcement of the Rule of Law Initiative in 1997 and 1998, little has actually been done. The lack of progress in the year since the Clinton-Jiang Beijing summit has led some observers to criticize the Administration for unveiling the Rule of Law Initiative with little or no thought given to program specifics – things like funding, organization, and programming. The sense among these observers is that the US wanted to announce the new initiative for political reasons – it would constitute one of the summit’s “deliverables”, to use the diplomatic lingo – but it hadn’t given much thought to how such an initiative would actually work.²⁴ According to another American observer, the lack of follow-through has irritated many on the Chinese side, who apparently were led to believe that funding for cooperative programs would be forthcoming. These people now feel a sense of frustration and grievance that the US government doesn’t put its money where its mouth is.²⁵ One US scholar summed up the feeling of many in both the US and Chinese legal communities, stating that, despite all the declarations and speeches, “there’s really no interest in high levels of the US government in rule of law in China.”²⁶

If this sentiment is correct, this whole paper may be gratuitous. There’s little point in assessing and critiquing the underlying theoretical assumptions of a program that doesn’t exist. Moreover, given the tight political constraints under which China law reform programs must operate, any projects that actually get funded will reflect what is politically practical, rather than any larger vision of how to effectively promote legal change and development in China. This was the view put to me by one official in the State Department involved in developing these programs.²⁷

Nevertheless, I think there are four reasons it’s worth taking the time to think about and critique the theory of law and development implicit in the China Rule of Law Initiative. First, unlikely as it may be, political realities could change such that substantial US government resources become available for China rule of law projects. If this occurs, it would behoove policy makers to have thought through the more fundamental issues ahead of time. Second, even if the initiative

²³ Interview (A).

²⁴ Interview (G).

²⁵ Interview (F). Another NGO official, though, downplayed the importance of these feelings of frustration on the Chinese side. According to this source, “the Chinese are realistic. They know that leaders and initiatives come and go, but the work will go on, as it has been going on for the last 20 years.” [Interview (E).]

²⁶ Interview (H).

²⁷ Interview (A).

must operate under significant constraints, there is still room for variation in the types of programs that are sponsored, and in how scarce political and financial resources are allocated. Third, even if no substantive programs come directly out of the China Rule of Law Initiative, the policy discussions surrounding that program, and issues with which it deals, affect how people think about legal development in China. This may have indirect effects on the approach to legal reform that is adopted outside the government sector. Finally, the justifications articulated for promoting law reform can affect political support for the law and development enterprise. Policy makers, in their public rhetoric, can create expectations for what law reform programs can accomplish, and if these expectations are unfulfilled, support for law reform programs can evaporate quickly. This phenomenon, it seems, has something to do with the collapse of the first Law and Development Movement. And the same concern has been raised by at least one scholar about the China Rule of Law Initiative: “The danger is over-selling the project and having people become disillusioned and abandoning it altogether.”²⁸ Thus, despite the risk of irrelevance, I will push on to discuss, first, what the US policy objectives seem to be; second, what strategy the US appears to have adopted to achieve these objectives.

II. Conflicting Objectives: What is the “Rule of Law”?

One of the most fundamental questions one must ask about this or any law and development program concerns what, exactly, is being promoted. The US has declared that it wants to see China build “the rule of law”.²⁹ But “rule of law” is a notoriously plastic phrase. Sometimes it is used in an expansive, substantive sense, and is meant to describe a legal system that effectively protects specific individual rights.³⁰ However, many scholars have criticized this use of the term as too broad. As Joseph Raz puts it, “If the rule of law is the rule of good law then to explain its nature is to propound a complete social philosophy. But if so the term lacks any useful function. We have no need to be converted to the rule of law just in order to discover that to believe in it is to

²⁸ Interview (F).

²⁹ See, for example, “Remarks by the President in Address on China and the National Interest” (Voice of America, 24 October 1997), available from the White House web site; “Secretary of State Madeline K. Albright, Remarks at the National Judges’ College, Beijing” (Office of the Spokesperson, US Department of State, 20 April 1998), available from the State Department web site; John Shattuck “Statement before the House Committee on Appropriations, Subcommittee on Foreign Operations, Washington DC, 1 April 1998), available from the State Department web site.

³⁰ See, for example Dworkin, Ronald *A Matter of Principle* (Cambridge: Harvard University Press, 1985) pp.11-12

believe that good should triumph.”³¹ Other scholars stress that the rule of law implies rules that are publicly-known and predictable, but do not necessarily embody specific substantive principles.³² Still others stress that the essence of the rule of law is the constraint of government discretion – here the “rule of law” is contrasted with the “rule of man.”³³ Thus, the definition of the phrase itself has been the subject of sustained academic debate for at least a century.³⁴

The ambiguity of the term “rule of law” is a disadvantage in academic discourse. However, the same ambiguity is an advantage in political discourse, which may go a long way to explaining why “rule of law” is used as the catchphrase for the China legal assistance projects. One academic China law expert put the point bluntly: “‘Rule of Law’ has no meaning. Everyone uses the phrase because everyone can get behind it and it might make it easier to get funding.”³⁵ Another scholar makes a similar observation on how the phrase is used in the policy discourse: “The ‘rule of law’ means whatever one wants it to mean. It’s an empty vessel that everyone can fill up with their own vision.”³⁶ This ambiguity serves a very clear policy purpose, stated explicitly by one State Department official: “The beauty of the ‘rule of law’ is that it’s neutral. No one – the human rights community, the business community, the Chinese leadership – objects to it.”³⁷

The political usefulness of this ambiguity is evident in how the “rule of law” is used in official US statements. When she was addressing US business representatives, Secretary of State Madeline Albright stressed that the “rule of law” will make China a good place to do business.³⁸ When responding to a reporter concerned with China’s treatment of political dissidents, she trumpeted the Rule of Law Initiative as a program that will address these concerns.³⁹ Indeed, in one speech, Albright listed all the virtues of a “rule of law” society. These included effective criminal law enforcement, lack of official corruption, protection of the environment, full political participation by

³¹ Raz, Joseph “The Rule of Law and its Virtue” *Law Quarterly Review* 93:195-211 (1977) pp. 195-196.

³² See, for example, Waldron, Jeremy “The Rule of Law in Contemporary Liberal Theory” *Ratio Juris* 2(1):79-96 (1989)

³³ Spader, Dean “Rule of Law v. Rule of Man: The Search for the Golden Zigzag Between Conflicting Fundamental Values” *Journal of Criminal Justice* 12:379-394 (1984)

³⁴ For comparisons of different conceptions of the rule of law, see Craig, Paul “Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework” *Public Law* (Autumn 1997) 467-487; Summers, Robert “The Ideal Socio-Legal Order: Its ‘Rule of Law’ Dimension” *Ratio Juris* 1(2):154-161 (1988); Summers, Robert “A Formal Theory of the Rule of Law” *Ratio Juris* 6(2):127-142 (1993)

³⁵ Interview (G).

³⁶ Interview (F).

³⁷ Interview (B).

³⁸ “Secretary of State Madeline K. Albright. Remarks to U.S. Business Representatives, Sheraton International Club, Beijing” (Office of the Spokesman, 30 April 1998) Available from the State Department web site.

³⁹ “Secretary of State Madeline K. Albright. Interview on CBS-TV ‘Face the Nation’” (Office of the Spokesman, 28 June 1998) Available from the State Department web site.

all citizens, protection of individual rights, and peaceful participation in the global economy.⁴⁰ It's easy to see why such an expansive definition of the rule of law is politically advantageous. After all, if the rule of law includes all these things, who could object to promoting it? And if the government has an initiative to promote the rule of law, isn't the government addressing all these concerns?

Not everyone in the field is thrilled with the way the US government is using the phrase, however. One scholar finds it "troubling that the rule of law is packaged by the US Chamber of Commerce as a good thing for the sale of US products. This is not really what is traditionally meant by 'rule of law'".⁴¹ Tom Carothers of the Carnegie Endowment warned that rule-of-law promotion, while useful, "will not miraculously eliminate the hard choices between ideals and interests" that have plagued US China policy.⁴² Another academic observer is even more critical, arguing that we need to push beyond "the 'feel good' rhetoric of advocacy of the rule of law" in order to understand the real effects legal reforms are having in China – effects that are not well-understood, and by no means always necessarily desirable.⁴³ And another law professor warned that, while using the phrase "rule of law" may seem like a good way to get different groups together, the danger is the "potential for acrimony and conflict once people realize they're very far apart."⁴⁴ The US Administration may be trying to avoid a clash between commercial and human rights interests by stressing the rule of law, but this harmony of interests may prove more rhetorical than real.⁴⁵

Another, perhaps more important aspect of the ambiguity of the term concerns divergence in American and Chinese law reform goals. To the US government, "rule of law" is an attractive term, not only because it may allow the American business and human rights communities to rally around a common banner, but also because it is seen as an area in which the Chinese side has an interest, and where there can therefore be productive cooperation.⁴⁶ It's generally agreed, though, that the US and Chinese sides have different things in mind when they talk about the rule of law. Indeed, it's not even entirely true that the term "rule of law" is generally acceptable to the Chinese government. Prior to the Clinton-Jiang summit in 1997, the US side had drafted a Memorandum of Understanding that identified "Rule of Law" as one potential area of Sino-US cooperation. The

⁴⁰ "Secretary of State Madeline K. Albright. Remarks and Q&A session at Delaware Theater Company, Wilmington, Delaware" (Office of the Spokesman, 19 May 1997) Available from the State Department web site.

⁴¹ Interview (H).

⁴² Carothers, Tom "The Rule of Law Revival" *Foreign Affairs* 77(2):95-106 (1998) p. 106.

⁴³ Interview (I).

⁴⁴ Interview (F).

⁴⁵ Most of the people I interviewed in the government and NGO communities insisted that, at this stage of China's legal development, there is in fact such a harmony of interests – specifically with regard to the need for greater transparency, accountability, and predictability of the legal system.

Chinese side strongly objected to the use of the phrase, which was considered politically sensitive.⁴⁷ Thus, while the Fact Sheet released by the White House detailing the accomplishments of the October 1997 Summit lists “promoting the rule of law” as an area where the two sides agreed to cooperate, the official Joint Statement uses the phrase “cooperation in the field of law” instead.⁴⁸ In the last couple of years, the Chinese government seems to have become more comfortable using the term “rule of law”. However, the phrase the Chinese government has started using is *yifazhiguo*, meaning, “a country ruled according to law”. This phrase has started to replace *fazhi*, which was the original translation of the nineteenth century concept of the German *Rechtsstaat*. Though both are translated into English as “rule of law”, the former term lacks the political connotations of the latter.⁴⁹ Some have suggested that a more accurate translation of the preferred Chinese phrase would be “rule by law”.⁵⁰

Despite the ambiguity – perhaps the deliberate ambiguity – of the phrase “rule of law”, the US and Chinese visions of what this phrase means, and their legal reform objectives, are very different. The US government may try to take advantage of the ambiguity of the term in order to “sell” legal reform to the Chinese, but ultimately the State Department conception of the rule of law has a clear substantive and political component. The State Department official who claimed that the beauty of the “rule of law” is that it is a neutral phrase stated that the rule of law, to the US, means law that conforms to international standards, and a legal system that protects individual rights and preserves justice. According to this official, rule of law traditionally has been, and has been seen in the Department as, an aspect of US human rights policy.⁵¹ Another State Department official said that “rule of law” as used by the Department incorporates some substantive legal rights, though these rights need not be identical to those found in the United States. According to this individual, the “rule of law” means that all people are subject to and have access to a fair, equitable, transparent, and efficient legal system. Another official in the State Department argued instead that the essence of the rule of law was predictability, though this person also claimed that the legal system needed rules seen by the people as substantively right and just in order to be effective.⁵² Overall, there appears to be a general sense that the “rule of law” – that is, the vision of legal development that the

⁴⁶ Interview (E).

⁴⁷ Interview (H).

⁴⁸ Compare “Joint U.S.-China Statement” (29 October 1997) with “Fact Sheet: Accomplishments of U.S.-China Summit” (29 October 1997), both available from the White House web site.

⁴⁹ Interview (F).

⁵⁰ Interviews (A, E).

⁵¹ Interview (B).

US wants to promote – has a clear and central substantive component related to the protection of individual rights. This belief seems to be shared in the non-governmental community as well.⁵³

This is obviously not the vision of legal reform advocated by the Chinese government, and not what Beijing means when it articulates “rule of law” – or “a country ruled by law” – as a policy goal. The primary Chinese motivation for undertaking legal reform, according to most American observers, is economic. The need to attract foreign investment and integrate with the global economy was cited by experts both in and out of the US government as an important motive for the Chinese to undertake legal reform.⁵⁴ Other possible motives include China’s desire not to be perceived as a rogue, the need to control corruption, and the sense that a more rule-based system would the central government improve control over the provinces.⁵⁵ But, the Chinese leadership wants to make sure legal reforms are limited to specific areas, and that they remain under the control of the central government. Both US government officials and non-governmental experts maintain that, while China wants legal reform in the commercial sphere, the leadership wants to prevent reforms from seeping into the political sphere, and doesn’t want any reforms that would undermine the central leadership’s decision-making authority.⁵⁶

This divergence between the two sides’ fundamental objectives in this whole endeavor is the source of the most important strategic problem for the US Rule of Law Initiative, or indeed for any program that takes the US vision of a substantive rule of law as the objective of Chinese legal reform. Given that the Chinese side – at least the central leadership – does not share American objectives, how should legal reform proceed? It is here that underlying, implicit theories of legal and social change become important. For the US China Rule of Law Initiative to be coherent – that is, for the means adopted to match the end envisioned – law must interact with society and with political institutions in a certain way. Specifically, legal reforms undertaken by the Chinese for commercial purposes must lead to a broader transformation in the legal, and ultimately the political, system. This vision of snowballing legal reform is the cornerstone of the US rule-of-law promotion strategy, and will be discussed in greater detail in the next section.

⁵² Interview (C).

⁵³ Interview (D).

⁵⁴ Interviews (A, B, C, D, E, F).

⁵⁵ Interview (F).

⁵⁶ Interviews (B, C, D).

III. The Trojan Horse of Legal Reform

Given the divergence of US and Chinese objectives, the US appears to have adopted what I will call a “Trojan Horse” strategy.⁵⁷ The US belief seems to be that the Chinese will adopt an initial set of legal reforms and legal education programs in order to achieve economic goals, and that those reforms, once adopted, will take on a life of their own. The growth of legal means for dealing with commercial disputes will foster a culture of legality that will spread beyond economic transactions to other areas. The logic of controlling administrative discretion and corruption in the name of economics will evolve into stronger legal controls on government discretion at all levels. Because the same judicial institutions and legal profession handle commercial and other types of legal issues, improving training and organization will lead to improvements in all areas, even if the original motive is strictly economic. And the success of legal reforms in the commercial area will strengthen the hand of reformers in China who want to push for legal reforms in other areas.

A State Department official described the basic strategy as follows: “Once the Chinese open the door to legal reform, they won’t be able to control it, and legal reform – and the principles of legality, predictability, and judicial independence – will seep into other areas.” According to this official, because the underlying assumption is that the rule of law will spread as time goes on, the US strategy is to “plant seeds in patches of sunlight.”⁵⁸ This person went on to draw an analogy to China’s experience with the internet. The Chinese knew they needed to adopt this new technology for economic reasons. They wanted to control it, but ultimately couldn’t. As with the internet, the argument goes, so too with law.

The Trojan Horse approach to Chinese legal reform appears pervasive on the US side, in the NGO community as well as in the government.⁵⁹ An official in one of the major NGOs doing work in this area stated that the organization subscribes to the idea that once legal reform is introduced, there will be an inevitable transformation over time, even if the reform is initially introduced for

⁵⁷ I recognize that this characterization would be considered inaccurate and unfair by many of the people working on these projects. While I acknowledge that calling the approach a “Trojan Horse” strategy may have excessively pejorative connotations – most legal reform projects are not duplicitous ploys to sneak reform into the Chinese system, after all – I nonetheless believe that the term captures an important aspect of the thinking behind the Rule of Law Initiative, especially to the extent that the initiative is supposed to address the human rights and political concerns that seem largely responsible for getting it on the agenda in the first place.

⁵⁸ Interview (B).

⁵⁹ It is not clear whether the government’s thinking and rhetoric on this issue has influenced NGO thinking, or vice versa. My subjective impression is that both the government and the NGO community are independently attracted to the Trojan Horse theory, because it reconciles ambitious long-term goals with seemingly insurmountable political obstacles. Thinking on the NGO side, though, seems more varied on this point.

commercial reasons. The interest in promoting complex market transactions, it was asserted, would lead to the protection of individual rights, though such a transformation might take a long time.⁶⁰ An official in another US NGO made a similar claim, arguing that the organization's fundamental view of law reform is that once you start, you won't be able to stop; once the Chinese have a law to cover one thing, they'll find they need more laws to cover more things.⁶¹

The Trojan Horse view even affects those who are openly skeptical of the US approach to this Chinese law reform. To take one striking example, an academic who works on legal education, who was generally critical of the US Rule of Law Initiative, described legal education strategy in the following way: "A lot of the things we do in legal education are not explicit. That's not to say we bring in a Trojan Horse. But we need to get into institutions first. Once we start up training programs, we can do all sorts of other stuff. The Ministries have no idea what we're doing – they just think we're running some neat training program." This person went on to say that the idea is to teach Chinese students a more critical approach to law and policy analysis, concluding that training Chinese lawyers in critical thinking "is the most subversive thing we can get to happen. That starts to create subterranean fissures, by changing the way people think, understand, and process issues. That's ultimately more effective than standing in Tienanmen Square."⁶² Despite the disclaimer, it's hard to imagine a more explicit exposition of the Trojan Horse strategy. The Chinese Ministries let US legal educators in because they want more legal training (implicitly for economic reasons); once established, the education programs foster a type of critical thinking intended to lead to more dramatic political reform – presumably reform that the current government would not want.

Another scholar, also involved with legal education efforts, described the appropriate US strategy in similar, though less secretive, terms. This person noted that the US government and NGOs have been trying to sell legal reform as a package deal – that is, they have been trying to convince the Chinese side that in the long term respect for the rule of law will be undermined if they try to be selective and partial in the areas where they allow legal reform.⁶³ (This scholar didn't take a position on whether this assessment was accurate or not.)

In addition to the belief that legal reform, once introduced into China, will spread throughout the system, many on the US side maintain that there is support for such reform within

⁶⁰ Interview (D).

⁶¹ Interview (E).

⁶² Interview (G). Note that this explanation of the Trojan Horse strategy is somewhat different than the view articulated by the officials quoted above. Different conceptions of the mechanism through which the strategy would work are discussed in the following section.

⁶³ Interview (F).

China. State Department officials maintain that there's a split within the Chinese elite, and that in some sectors there's the political will to push for broader reform.⁶⁴ These sources generally concede, however, that the high-level leadership, though willing to take risks to achieve economic goals, is not enthusiastic about widespread legal reform outside the commercial and low-level administrative spheres. Thus, the fundamental approach is still basically a Trojan Horse strategy. The Chinese leadership is betting that it will be able to control the scope and extent of legal reform; the US government and NGOs interested in building the rule of law are betting that it will not.

IV. Problems With the Trojan Horse Strategy

What are the presumptions about the nature of law and the dynamics of legal reform that give rise to the Trojan Horse strategy? It may, of course, be the case that it is less a well-thought-out strategy than a way to rationalize pursuing programs that are, of necessity, limited. But this is perhaps too cynical. Most of the people I talked to in both the State Department and in major NGOs seemed sincere in their belief that limited, modest legal reforms would eventually – perhaps inevitably – lead to more fundamental reforms in the direction of the rule of law. The principles behind the Trojan Horse strategy therefore ought to be examined more closely, to see whether there is a sound basis for this conviction.

The assumption of the strategy is that legal reforms in certain narrow sectors will diffuse throughout the legal and political system, leading to widespread transformation in the direction of the US vision of a “rule of law” society. But the mechanism by which this diffusion will take place is not clear, and is rarely specified explicitly. In fact, at least three mechanisms are conceivable, and all three are evident in the views expressed by officials in the government, academic, and NGO communities.

The first mechanism posits a fundamentally integrated and interdependent legal system. In this view, legal systems operate according to certain basic principles and institutions, and changes in institutions or principles in one area ultimately lead to changes in other areas as well. One can't, according to this theory, get impartial, rule-based adjudication in contract law while preserving political, discretionary decision-making in other matters – at least not in the long term. The legal system is too interdependent and institutionally coherent for such strict separation of spheres. Thus, once China begins legal reform in the economic sector, similar types of reforms will start to

⁶⁴ Interviews (A, B).

penetrate other sectors as well. This process would take time, but nonetheless it would result in the snowballing of “rule of law” principles throughout the Chinese legal system.

The second mechanism is similar to the first, but sees the unity of the legal system at the level of ideas about law rather than the internal interdependence of legal institutions. This second mechanism concerns the transformation of “legal culture”, especially the legal culture of judges, lawyers, and other professionals closely involved with the legal system. In this view, providing these professionals with sophisticated training – initially adopted by the Chinese government with the goal of making legal professionals more effective “transaction cost engineers” for market interactions – will change the way they think about law and legality. Growing practical experience with the principles of legality will contribute to this general transformation in legal culture. The bench and bar will become a force for reform, and the legal system they inhabit will become more consistent, in all spheres, with the American substantive vision of the rule of law. Therefore, even if the first mechanism is flawed, and there is nothing inherent in the internal logic of legal systems that causes reforms to spread, legal reform and legal education and training programs can still have a spillover effect by altering legal culture.

The third mechanism is more indirect. It is hypothesized that legal reforms in the economic and low-level administrative spheres will give people more autonomy, and increase their willingness and ability to challenge state authorities. This increase in the scope of individual action, generated by laws designed to secure property and contract rights and to protect people from arbitrary administrative action, will create a political base for further reform. Thus, legal, economic, and political reform feed on each other, with reform in one area strengthening the demand for further reforms in other areas. Even if both of the first two mechanisms fail, then, successful legal reforms in the fields of economic and administrative law may still snowball to broader reform by empowering Chinese citizens to demand more extensive changes in the system.

In order for the Trojan Horse strategy to make sense, one or more of these mechanisms must operate effectively.⁶⁵ If they do not, it’s hard to see what justification those on the American side have for believing that legal reform will inevitably spread and foster a legal system consistent with the substantive vision of the “rule of law”. That doesn’t mean that the legal reform programs being adopted and advocated are bad ideas. They might well be good ideas, especially if it can be established that improving the functioning of Chinese legal institutions in specific areas is possible

and desirable. But the Trojan Horse strategy articulated by US governmental and non-governmental advocates of legal reform may prove flawed. Indeed, there is evidence to suggest that all three hypothesized mechanisms for the spread of legal reform are problematic. Each will be considered in turn.

1. Mechanism One: The Interdependent, Unitary Legal System

Some advocates of the Trojan Horse strategy implicitly presume that “rule of law” in one sphere will spread to other spheres, simply because that is the nature of law. Like the internet, the analogy goes, the “technology” of legal modernization, by its nature, cannot be controlled. Specifically, it is thought that commercial law reform that builds an effectively independent judiciary⁶⁶ operating according to transparent, publicly-known rules, and staffed by a well-trained bench and bar, will foster similar sorts of changes in those fields of law more closely related to human rights concerns. This, proponents assert, is the nature of law. On the other hand, the Chinese central government, as has already been mentioned, has a strong incentive to limit “rule of law” reforms to the commercial sector, and to branches of administrative law that increase central control of the bureaucracy and check abuses by low-level officials. The US strategy implicitly (and sometimes explicitly) presumes that this is impossible.

However, a theoretical basis for this belief appears lacking. The dynamics of inevitably spreading legal reform are almost always couched in terms of assertions, analogies, or metaphors. I know of no theoretical work that gives a solid foundation to this hypothesis. Furthermore, there is some empirical evidence that setting up firewalls between sectors of the legal system – as the Chinese wish to do – is indeed possible. Consider the example of courts in authoritarian Spain under Franco, a case analyzed by Jose Toharia.⁶⁷ Toharia noted that in Spain, political authoritarianism co-existed with a great deal of judicial independence. Indeed, not only did the Spanish judiciary have a great deal of formal independence, but judges tended to be more liberal than the regime, and frequently more liberal than the general population. Moreover, corruption and

⁶⁵ Of course, there may be alternative mechanisms by which limited legal reforms will inevitably lead to broader systemic change in the direction of “rule of law”. But these alternative mechanisms, if they exist, are not clearly articulated by any sources I have encountered.

⁶⁶ Whether the judiciary must have actual, formal independence is another question. But even those US officials who question the necessity of a formally independent judiciary as a branch of government advocate a de facto independent judiciary as part of the administrative structure. [Interview (A).]

⁶⁷ Toharia, Jose J. “Judicial Independence in an Authoritarian Regime: The Case of Contemporary Spain” *Law and Society Review* 9(3):475-496 (1975)

political interference in judges' activities seemed minimal. The government also apparently didn't use other types of indirect controls, such as political screening of judicial candidates or manipulation of the promotion procedures, to insure the pliability of the judiciary.

How could a right-wing authoritarian regime tolerate such a liberal, independent judiciary? The simple answer is that, on sensitive issues, the judiciary had no power. The regular courts handled only those cases that were politically innocuous. Politically significant cases were handled by special tribunals – labor courts, military courts, and, most importantly, the State Security Tribunal – that were much more closely controlled by the executive. Not only did the government successfully control those areas of the law that might threaten its power and policies, but this system helped it economize on resources. After all, monitoring and disciplining the judiciary takes time and money. It was much easier to simply grant the judiciary a relatively high degree of independence in non-threatening areas, and maintain strict control over tribunals that handled sensitive disputes.

The analogy to the Chinese situation should be obvious. There is no particular reason that the Chinese government couldn't undertake extensive legal and judicial reform in certain areas – such as commercial and low-level administrative law – and maintain close control over politically-sensitive issues that touch on matters of political dissent, labor unrest, and so forth. In fact, China already appears to be making efforts to set up institutional firewalls between areas where legal reform is seen as desirable and areas where it is considered suspect. China is developing a separate system of rules for foreign enterprises, and disputes concerning foreign businesses are frequently referred to a commercial arbitration body rather than the Chinese courts. The system doesn't work perfectly, and weaknesses of domestic Chinese legal institutions still create headaches for foreign investors, but it's hard to see why the basic strategy of keeping different areas of law institutionally separate cannot work in China.⁶⁸ If the Franco government could tolerate and control a judiciary with substantial formal independence, a high degree of autonomy, and relatively liberal political attitudes, authoritarian China could certainly tolerate much more modest reforms.

A single counter-example does not disprove the prediction that legal reforms intended to improve economic performance will not have spillover effects into other areas. And it may be that the types of laws needed for more efficient commercial activity – clear property rights, for example, or transparent administrative procedures related to taxation and regulation – are themselves beneficial for individual rights and well-being. But the Trojan Horse strategy US advocates seem to

have in mind presumes that legal reforms will spread throughout the system – that legality will prove, like the internet, uncontrollable. Yet the Spanish case, and China’s own efforts to keep legal issues separate, gives us reason to doubt this strong spillover hypothesis. More general empirical research suggests that authoritarian regimes are frequently able to adopt systems that effectively protect property and contract rights, without more extensive reforms in other parts of the legal system.⁶⁹ Therefore, if advocates of the Trojan Horse strategy are to make the case that “legalism” or the “rule of law” will be able to jump the firewalls the Chinese government can set up, the mechanism must be specified much more clearly. As of now, the theory behind this first mechanism is not well-developed, and there is not terribly good empirical evidence for it either.

2. *Mechanism Two: Building a Universal “Legal Culture”*

Even if different sections of the legal system can be kept institutionally separate, certain types of legal reform projects might still be able to smuggle in the seeds of a broader transformation in the Chinese legal system. One way this might be done is via programs intended to change China’s “legal culture” – especially of the bench and bar, and also of other professionals and government officials who work closely with the legal system. This is an explicit goal articulated by people inside and outside of the US government.⁷⁰ In this view, the Chinese government recognizes that it needs better-trained judges and lawyers, and will therefore allow US-sponsored legal education projects. These education programs, however, have the potential, over time, to transform the way the Chinese elite thinks about the law. Hence, much of the Trojan Horse legal reform strategy stresses legal education and training of judges and lawyers, not only to improve their skills, but to change China’s legal culture.⁷¹

What exactly is China’s “legal culture”, and how should it be changed? This is not an easy question to answer, in part because the term “legal culture” is about as clear and precise as the term “rule of law”. And, much as “rule of law” gets used as shorthand for “a desirable legal system”,

⁶⁸ For an overview of some of the problems and issues related to China’s laws governing foreign economic transactions, see Lewis, Mark C. “Contract Law in the People’s Republic of China – Rule or Tool: Can the PRC’s Foreign Economic Contract Law be Administered According to the Rule of Law?” *Vanderbilt Journal of Transnational Law* 30:495-537 (1997)

⁶⁹ Clague, Christopher, Philip Keefer, Stephen Knack, and Mancur Olson “Property and Contract Rights in Autocracies and Democracies” *Journal of Economic Growth* 1:243-276 (1996). According to their work, authoritarian regimes tend to be successful in providing secure property and contracting when the ruling individual or elite group as a “long time horizon” – that is, the expectation of remaining in power for a long time into the future. This condition would seem to apply to China.

⁷⁰ Interviews (B, C, F, G).

⁷¹ Interviews (C, F, G).

“legal culture” tends to be used as shorthand for “what people think about law”, or sometimes even “those aspects of the legal system we can’t observe or measure.” Indeed, the phrase is so ill-defined that some have questioned whether there’s any point in using it at all.⁷² Because of the vagueness of the term, I will focus on only one aspect of Chinese “legal culture” that comes up in discussions of legal reform: the extent to which Chinese lawyers adopt a “formalistic” or “instrumental” approach to law. This focus is chosen, first, because it seems to capture one of the most important elements considered part of China’s legal culture, and second, because the problems in this area illustrate broader difficulties with this mechanism of fostering widespread systemic change.

“Formalism” and “instrumentalism” are terms used to describe the way lawyers and judges think about how laws should be interpreted and applied. The formalistic approach is characterized by relatively mechanical application of rules, and emphasis on statutory language. The instrumental approach places more stress on thinking about the goals a given law is meant to achieve, and the likely real-world consequences of making a particular legal decision. These are both obviously ideal types, and no legal practitioner is ever purely formalistic or purely instrumental. But these ideal types do illustrate a potentially important difference in “legal culture” that is worth considering in the context of Chinese legal reform and the Trojan Horse strategy.

For those that focus on this issue, the consensus seems to be that the Chinese approach to law is too formalistic, and that Chinese students tend to approach law with the attitude of wanting to know “the right answer” rather than thinking critically about the issues involved in legal questions.⁷³ (It is important to note that these opinions come from the NGO and academic communities. The State Department officials who spoke to this issue commented that the government does not have a position on the correct approach to legal education, but will follow the lead of the Chinese, the academic community, and NGOs.⁷⁴) The goal of several of the people working in the area of legal education in China appears to be getting the Chinese legal community to take a more critical, policy-oriented – implicitly instrumental – approach to the law. (Others in the NGO community, however, noted that these sorts of issues – formalistic versus critical or instrumental approaches in legal education – haven’t really become important yet.⁷⁵) At least one leading academic working on legal

⁷² Cotterrell, Roger “The Concept of Legal Culture” Chapter 1 in Nelken, David, ed. *Comparing Legal Cultures* (Aldershot: Dartmouth Publishing Company, 1997) pp. 13-31. For a defense of the concept of legal culture, see Friedman, Lawrence M. “The Concept of Legal Culture: A Reply” Chapter 2 in Nelken, David, ed. *Comparing Legal Cultures* (Aldershot: Dartmouth Publishing Company, 1997) pp. 33-39.

⁷³ Interviews (F, G)

⁷⁴ Interview (A).

⁷⁵ Interviews (D, E)

education, quoted above, argues that this sort of change in mindset will prove subversive, and could lead to widespread reform throughout the system.⁷⁶

Setting aside for the moment whether such a change in mindset is even possible, we should consider whether it is desirable. It might be heretical to suggest, in an academic paper, that there are drawbacks to spreading purposive, critical thinking in the legal community. But the critiques leveled at the first Law and Development Movement give us reason to consider the possibility that such drawbacks might exist. Much of the Law and Development Movement was concerned with changing legal education in Latin America, and some of the most scathing attacks on the movement concerned its attempts to export an allegedly inappropriate American model of legal education and practice.⁷⁷ It is worth restating the basic elements of Trubek and Galanter's critique of legal education projects in Latin America and elsewhere in the developing world.

According to Trubek and Galanter, American law and development scholars believed that lawyers in these countries should be trained in a more instrumental, less formalistic approach to law. An instrumental perspective, in this view, "would generate 'legal development,' which would in turn foster a system of governance by universal, purposive rules, and would accordingly contribute to the enhancement of liberty, equality, participation, and rationality."⁷⁸ The problem, according to Trubek and Galanter, was that this view neglected the social and political context in which this change in "legal culture" took place. An expanded and modernized legal profession tended to increase social inequality, since the social elite had greater access to the better-educated and professionalized legal personnel. Furthermore, these conservative elites could make use of better-trained lawyers to block changes that threatened their interests. Also, the instrumental orientation actually weakened what legal guarantees of individual rights did exist. Formalism can actually provide a kind of protection for individuals from government policy; instrumentalism makes it easier for individual "rights" to be circumvented in the name of some state-sponsored developmental goal.⁷⁹

The point is not that there's something inherently anti-reform about instrumentalism, or that sophisticated, critical thinking about the principles behind law is somehow pernicious. But there's no reason to presume that these modes of thought are necessarily conducive to reform, either. Trubek and Galanter may have overstated the negative aspects of cultivating the instrumental

⁷⁶ Interview. (G)

⁷⁷ See especially Gardner (1980). Even some of those who argue against the critics concur that "what is needed in a developing country – to protect against the dangers of a purely instrumental view of law – is an established and functioning, formalistic-oriented rule-of-law system". Tamanaha (1995), pp. 475-476.

⁷⁸ Trubek and Galanter (1974)

⁷⁹ *Ibid.*, p. 1076. See also Tamanaha (1995).

approach to law, but the basic concern is still valid. Social and political realities – especially the material interests of the legal elite and those members of society able to purchase their services – probably has more to do with how laws are interpreted and applied than the particular style of legal reasoning taught in law schools. Legal instrumentalism in the service of conservative groups is no more likely to spread deeper reform than strict legal formalism

Perhaps legal culture does matter, and changes in legal education may make a difference in legal culture. But there is no strong evidence to suggest that this impact is more than marginal. In any event, there's enough indeterminacy about the relationship between the types of "legal culture" that can be influenced by legal education that this mechanism for the Trojan Horse is problematic at best. Moreover, the criticisms of the first mechanism apply, for the most part, to this second mechanism as well. If the Chinese government is able to cordon off and control politically salient sections of the legal system, then changes in the legal culture of the overall legal community might not have much of an effect on the core human rights issues many in the United States are concerned about. Remember, the "legal culture" of Spanish judges under Franco seemed quite liberal.⁸⁰

In sum, this second mechanism for Trojan Horse legal reform rests on three dubious assumptions. First, that it is possible to influence Chinese legal culture. Second, that these cultural changes, if possible, would have desirable consequences for broader reform. Third, that a broad change in legal culture, even if generally conducive to greater reform, would be able to affect those sensitive areas of the law over which the Chinese government wants to maintain strict political control.

3. Mechanism Three: Building a Constituency for Further Reform

A third possible mechanism through which partial legal reforms might generate more widespread reform is the development of a public base of support for reform. The idea is that legal reforms in the economic sphere – especially those that guarantee property and contract rights, and those that provide means of redress against the administration – will make people better off, more secure, and willing and able to push for bigger reforms, not just in the economic realm, but overall. Thus, even if the spread of "rule of law" is not driven by the internal logic of the legal system, and even if it's not possible to change "legal culture" in ways that generate broader changes, partial

⁸⁰ Whether their style of adjudication was "instrumental" or "formal" is an issue Toharia does not discuss. Here I'm using "legal culture" in the broader sense.

reforms – to the extent that they are successful on their own terms – will create the social and political base for more reform.

The first obvious problem with this view has already been mentioned. Legal reform might well strengthen the position of conservative forces in society that oppose more widespread political, social, and economic reforms. This possibility has been discussed above, in reference to the efforts of the first Law and Development Movement to cultivate a professionalized bench and bar, and promote a more “instrumental” or “realist” adjudicative approach. Second, also as mentioned, some authoritarian regimes are able to provide relatively secure property and contract rights, yet still resist broader political or social reforms. But even putting these problems aside, there are reasons to question the assumption that legal reforms in contract, property, and administrative law will necessarily generate widespread public support for further reform.

There are many reasons to question this assumption; here I will focus on only one. We must consider the fact that greater “legalization” of economic relationships in China might have undesirable, unintended consequences as alternative informal institutions are disrupted. According to one expert, a fair assessment of current law reform efforts must “try to take account of the ways in which the elaboration of the formal legal system is both by design and unwittingly eroding less formal institutions and customs.”⁸¹ Such erosion, according to this observer, is most apparent in the decline in mediation that has accompanied the rise in litigation. Changing patterns of dispute resolution may lead to a constricting of access of poorer people, especially in rural areas. Such a phenomenon clearly could have negative implications for a theory of spreading reform based on a growing constituency of previously marginalized Chinese. This mechanism for spreading reform assumes that reforms make people become both stronger and more pro-reform. But even if it can be established that the disruption in informal institutions is a temporary problem, and in the long term a shift to more formal, law-based institutions would make everyone better off, the erosion of informal institutions in the short term can make people politically weaker, more anti-reform, or both.

Again, an example from another part of the world may help illustrate how reforms in formal institutions, if not thought through carefully, can have serious negative consequences on the general population as informal institutions are undermined. This time, the example comes from legal reforms introduced by the British in rural areas around Bombay in the nineteenth century, described

⁸¹ Interview (I).

by Rachel Kranton and Anand Swamy.⁸² The British governors of the region observed, correctly, that the rural credit markets were characterized by local moneylenders who were able to extract monopoly rents from borrowers – that is, they were able to charge interest rates in excess of those that could have been charged in a competitive market. They were able to do this because the lenders relied on informal mechanisms to enforce debt repayment. Reliance on these sorts of enforcement mechanisms in turn depended on ties between the lenders and other local elites. Hence only a small number of lenders could operate in any given village. The British reasoned that effective formal contract enforcement would allow lenders to operate in many more villages, would create a competitive market, and would bring interest rates for farmers down.

According to Kranton and Swamy, the British were right about all of these things. But what they did not anticipate was that the introduction of effective formal contract enforcement undermined what was effectively an informal insurance arrangement between lenders and borrowers. When lenders could charge monopolistic interest rates, they also had a vested interest in individual borrowers remaining economically viable. If a borrower suffered an unexpected disaster – if a cow died, or a field was destroyed by flood, or crop prices collapsed – the lender had an incentive to forgive debt, or at least postpone repayment. After all, any given borrower represented a future stream of monopolistic interest rates to the lender. That stream would disappear if the borrower lost everything and had to become a wage laborer. Why should the creditor kill a goose that lays golden eggs? But once effective civil courts created a competitive market in rural credit, there were no more golden eggs – interest rates were forced down to competitive market rates – and creditors had no reason to expect that they would deal with any particular borrower again with any frequency. Therefore, creditors had less incentive to forgive debt or postpone repayment if the borrower suffered a disaster. Thus, borrowers were better off in good years, but if a disaster hit, they could lose everything. This problem could be averted, of course, if borrowers could purchase insurance. But effective insurance markets didn't exist at the time. Hence Kranton and Swamy's warning about the hazards of "piecemeal" reform. The introduction of effective civil law did create a competitive credit market, but it also destroyed the existing informal insurance arrangement without replacing it with anything. In some villages, these reforms – coupled with exogenous economic shocks – led to rioting.

⁸² Kranton, Rachel E. and Anand V. Swamy "The Hazards of Piecemeal Reform: British Civil Courts and the Credit Market in Colonial India" *Journal of Development Economics* 55(1):1-24 (1999)

This example may at first seem far removed from Chinese “rule of law” reform. But it is not entirely implausible that the Chinese system – lacking as it does both effective formal contract enforcement and widespread formal insurance markets – has evolved informal risk-sharing mechanisms that are closely integrated with the informal contracting structure, and that could be disrupted by legal reform. More importantly, given that the Trojan Horse strategy relies on pushing incremental reforms – “planting seeds in patches of sunlight” – and hoping the reforms will snowball, the type of phenomenon the preceding case illustrates is especially important, even if this specific problem is not an issue.

In the absence (or sometimes even in the presence) of formal legal institutions, complex informal institutions of contract, property, risk-sharing, and dispute resolution can develop.⁸³ New legal reforms, especially those that prove effective, may disturb or undermine these informal institutions. This may be a good thing, but it may not be. Partial reforms – an inherent part of the “Trojan Horse” strategy – are particularly likely candidates to disrupt an important informal institution without providing an adequate substitute. The above example of increasing litigation and the rising quality of legal professionals potentially undermining mediation and other dispute resolution mechanisms accessible to the rural poor is one example of this kind of problem.

The fact that partial reforms can disrupt existing informal institutions may undermine the third mechanism for the Trojan Horse strategy. This mechanism assumes that reform protects and strengthens the interests and influence of pro-reform groups. But if legal reform undermines informal institutions that these groups have evolved to protect their interests, this mechanism cannot work. Even worse, if the unintended consequences create especially serious social problems, there may be a backlash against reforms. The point is not that legal reform should never proceed because informal institutions will be disrupted, but that legal reformers ought to proceed with caution. Sometimes incremental reform can be worse than no reform at all. And we cannot simply presume that incremental reforms will always lay the groundwork for more extensive changes.

⁸³ The following are only a small selection on the large and diverse literature on the informal institutions that can substitute for, or sometimes circumvent, formal law: Ellickson, Robert C. *Order Without Law: How Neighbors Settle Disputes* (Cambridge: Harvard University Press, 1991); de Soto, Hernando *The Other Path: The Invisible Revolution in the Third World* (New York: Harper & Row, 1989) 271 pp.; Fafchamps, Marcel et al. “Contract Flexibility and Conflict Resolution in African Manufacturing” [Unpublished paper, prepared for the World Bank, October 1998]; Posner, Richard A. “A Theory of Primitive Society, With Special Reference to Law” *Journal of Law and Economics* 23(1):1-53 (1980)

4. *Additional Problems: Tensions and Conflicts Between Fundamental Goals*

These examples suggest that the three most obvious candidate mechanisms for the Trojan Horse strategy, while not necessarily wrong, are problematic. At the very least, they need to be thought through much more thoroughly. But even if we could be confident that limited Chinese legal reforms would lead to more widespread evolution towards a “rule of law” system, and that the US government or NGOs could in some way support or influence this process, there are additional problems that must be considered. Here I will discuss four. First, genuine legal reforms that allow citizens to challenge the legality of government action may actually have negative implications for pressing forward with neo-liberal economic reform. Second, two of the most important aspects of the institutional reform agenda – fostering independent, impartial adjudication and controlling corruption – may come into conflict. Third, there is a tension between the two “rule of law” values of predictability and equity – a tension that has not been satisfactorily resolved in the West. Fourth, there is a danger that US involvement in rule of law projects in China will, despite the best intentions of American policymakers, create the perception that the US is helping to support and legitimize China’s authoritarian system.

The first problem – that rule of law reform may hinder needed policy flexibility – may seem far-fetched, especially given that the Chinese government is not likely to accept any real legal constraints on its central decision making. Nevertheless, it is worth at least considering the fact that widespread “rule of law” reform, if it is successful in its goal of giving more Chinese groups a voice in controlling the government, might not necessarily be a good thing for Chinese economic development. Indeed, the “rule of law” envisioned by the US government may actually create obstacles to other types of economic reforms that the American government favors. After all, the same means that can be used to check arbitrary government abuses can be used to obstruct dramatic policy changes. As one scholar points out, a common (though controversial) argument holds that the insulation of bureaucrats from politics was an important element of East Asian economic development, and this position would imply a tension between effective economic policy and the rule of law.⁸⁴

For a more concrete example of how rule-of-law reforms can have unintended consequences on economic liberalization, consider the case of Costa Rica. The Costa Rican government created a

⁸⁴ Interview (I).

new chamber of the Supreme Court (the fourth chamber, or Sala IV) in the 1980s, with the mandate to review the constitutionality of government actions. The new chamber was created largely in response to declining public opinion of the judiciary. Sala IV soon became a popular avenue for groups to challenge government action. In fact, both the court's popularity and its activism came as a surprise to the government that had created it. Ultimately, the court's decisions seriously affected – and frequently hindered – the government's program of neo-liberal economic reforms.⁸⁵

Again, such a scenario seems extremely unlikely in the Chinese case. But it is worth considering, since the claim is often made that “rule of law” legal reforms and market economy reforms are complements. This may in fact be true. But to the extent that law reform succeeds in giving ordinary people the right to challenge central government decisions (and not merely the low-level decisions of individual bureaucrats) it may make it more difficult for the government to adopt difficult neo-liberal market reforms. This may not be a bad thing, of course.⁸⁶ But it's important that reform advocates consider these potential consequences, especially if one subscribes to the (controversial) hypothesis that political elites need a relatively high degree of autonomy to implement painful reforms.⁸⁷

Thus, advocates of the Trojan Horse theory need to think their way out of a potential dilemma. If “rule of law” reforms don't really lead to greater legal constraints on the central government's policy-making ability, the Trojan Horse strategy is flawed, or at least is sharply limited in its potential. But if legal constraints on central government discretion actually do become viable, might this not interfere with Beijing's ability to undertake other types of potentially painful – but desirable – reforms?

The second issue to consider is the potential tension in institutional reform between strengthening adjudicative independence and controlling official corruption. Both of these goals come up in discussions of areas where the Chinese legal system needs improvement, though the US side tends to stress the former and the Chinese side emphasizes the latter. To the extent that the US side considers both important goals, though, we must consider the difficulties in achieving both of

⁸⁵ Wilson, Bruce M. and Roger Handberg “Opening Pandora's Box: The Unanticipated Consequences of Costa Rican Legal Reform” [Unpublished paper, prepared for the Midwest Political Science Association, Chicago IL, 23-25 April 1998] 26 pp.

⁸⁶ I must stress that I am *not* making the normative claim that it is worth sacrificing democracy, constitutionalism, or legal controls on government in order to safeguard neo-liberal economic reform, and no such normative claim should be read into this line of argument. I am merely trying to point out a potential tension between two goals that are both endorsed by many US “rule of law” reform advocates.

⁸⁷ For a summary of the inconclusive research and debate on this and related issues, see Przeworski, Adam and Fernando Limongi “Political Regimes and Economic Growth” *Journal of Economic Perspectives* 7(3):51-69 (1993)

them together. After all, the more adjudicators (be they judges or administrative officials) are subject to political controls, the more likely it is that their decisions will be influenced by political guidance than the application of supposedly impartial rules. But the fewer controls placed on these adjudicators, the greater the difficulty of insuring their accountability – and checking corruption. Judge Clifford Wallace puts the point succinctly: “Although both judicial independence and judicial accountability are vital for maintaining the rule of law, they sometimes seem to conflict.”⁸⁸ And a main conclusion of Mauro Cappelletti’s comparative survey of judicial processes in Western countries was the necessity of balancing the “conflicting values, independence and accountability.”⁸⁹

Both Wallace and Cappelletti conclude that independence and accountability are not mutually exclusive, and that they can be balanced effectively given appropriate institutional choices. But the potential conflict is real, and is something that China rule of law reform advocates ought to consider more closely. Furthermore, there are other institutional tensions as well. Richard Messick and Linn Hambergren, for example, suggest that mechanisms to ensure judicial accountability may also create obstacles to judicial efficiency.⁹⁰ These analyses suggest that advocates of Chinese institutional reform on both sides need to think more carefully about these sources of tension. To the extent that reformers are successful in pushing one goal of institutional reform, they may undermine another.

A third issue is the possibility that there may be tensions not only at the level of institutional arrangements, but at the level of fundamental rule-of-law values. Consider, as one example, the tension between the “rule of law” goals of predictability and equity.⁹¹ Clear rules, systematically applied, are the best way to ensure predictability. But rules can never capture all the possible variations in individual cases, and sometimes a mechanical application of the rules would lead to results that seem grossly unfair. Thus legal systems throughout history have tried to find ways to balance predictability – decisions based on clear rules – with equity – making sure that individual

⁸⁸ Wallace, J. Clifford “Resolving Judicial Corruption While Preserving Judicial Independence: Comparative Perspectives” *California Western International Law Journal* 28(2):341-351 (1998) p.344

⁸⁹ Cappelletti, Mauro “Who Watches the Watchmen?” Chapter 2 in *The Judicial Process in Comparative Perspective* (Oxford: Clarendon Press, 1989) pp. 57-113. See especially pp. 69-71, 112-113.

⁹⁰ Messick, Richard E. and Linn Hambergren “The Challenge of Judicial Reform” Chapter 6 in Burki, Shahid Javed and Guillermo E. Perry, eds. *Beyond the Washington Consensus: Institutions Matter* (Washington, DC: The World Bank, 1998) pp. 109-119.

⁹¹ These goals were expressed by a US State Department official. [Interview (A).]

cases are decided in accordance with principles of fairness and justice, even when the formal rules would dictate otherwise.⁹²

According to one source in the US government, American NGOs don't see a tension between promoting equity and predictability in the Chinese case. The two values, it was argued, are not inconsistent, and the Chinese system is currently in such a state that these sorts of questions aren't really relevant, at least not yet.⁹³ This official has a point. If the current system is both unpredictable and unfair, it may seem like academic hair-splitting to worry about philosophical inconsistencies between the two goals. Nevertheless, if the rule of law reform strategy is based on the idea that principles adopted for one area of the legal system will spread, it is worth considering the possible tension between different facets of the American rule-of-law vision.

A fourth and final concern is that US support for rule of law reform in China is ultimately counterproductive for true systemic change in China, since these sorts of reforms merely help to legitimize the authoritarian Chinese state. This seems to be the view of many members of the US Congress, and State Department officials and NGOs alike express their frustration over congressmen who refuse to support any program that might be seen as helping the Chinese government do anything.⁹⁴ But the association of this line of argument with members of Congress who are perceived as narrow-minded and short-sighted may have blinded some to the kernel of truth in the argument. As one professor put it, "One doesn't need to endorse Jesse Helms to believe that the legitimization issues are real."⁹⁵ After all, one of the reasons China would want to talk openly about promoting the rule of law – albeit secondary to attracting foreign investment – is that it may increase the regime's legitimacy. The extent to which it actually would, and whether the net effects for eventual political reform would be positive or negative, is a question that has not been explored systematically. My personal view is that supporting rule of law programs would not contribute substantially to the legitimacy of the Chinese leadership, but this opinion is not grounded in any strong theory or evidence. Once we dissociate the legitimization argument from some of its more crude formulations and distasteful proponents, it becomes clear that it is an argument that needs, at the very least, to be taken seriously.

⁹² For a good exposition of this tension in Western legal history, see Kelly, J.M. *A Short History of Western Legal Theory* (Oxford: Oxford University Press, 1992). For some of the more recent debates about the tension between predictability and equity as they relate to the rule of law, see Solum, Lawrence B. "Equity and the Rule of Law" and Burton, Steven J. "Particularism, Discretion, and the Rule of Law", Chapters 6 and 8 in Shapiro, Ian, ed. *The Rule of Law: Nomos XXXVI* (New York: New York University Press, 1994) pp. 120-147, 178-201

⁹³ Interview (A).

⁹⁴ Interviews (A, B, E)

Summary and Conclusions

The United States government began advocating Chinese “rule of law” reform as an extension of its human rights policy. The US wants China to move in the direction of a substantive vision of the rule of law, which, while not necessarily identical to the US system, protects certain basic rights and preserves certain procedural standards. However, the Chinese government has a very different idea of what is meant by “rule of law”, and wants to limit legal reform to those areas that are directly relevant for international economic integration and domestic market reforms. This creates obvious problems for US backers of a legal reform initiative conceived of as an extension of US human rights policy. Therefore, American rule-of-law advocates have adopted what I have called a “Trojan Horse” strategy. The belief is that limited law reforms will lead to more fundamental changes in the Chinese legal and political system, which the Chinese central government will not be able to control.

However, the mechanism by which this widespread change takes place is not specified clearly. Consideration of three of the possible mechanisms shows that each is problematic. There is not a good theoretical reason to believe that legal systems have a kind of fundamental unity of principles and institutions, nor is there convincing empirical evidence that this is the case. Attempts to change China’s “legal culture” – the way people, especially legal professionals, think about law – may not make much of an impact either. Not only is it difficult to bring about such change, but evidence suggests that the way people think about law itself is less important than social, economic, and political structures. The hope that limited legal reforms will stimulate growing public demand for further reforms may also be misplaced, given that incremental reforms are often disruptive and can generate anti-reform pressure. Moreover, there appear to be tensions between the goals espoused by rule-of-law reform advocates: legally-constrained government and decisive reform, independence and accountability, predictability and equity.

These considerations suggest that policy-makers need to take a long, hard look at what they hope to achieve by promoting “rule of law” in China, and how they hope to achieve it. Again, I must stress that this does not mean that the various legal reform programs advocated by the US government and NGOs are bad ideas. If the dangers inherent in these sorts of projects can be avoided, and the initiatives are successful in improving the functioning of Chinese courts, helping

⁹⁵ Interview (I).

China attract foreign investment and engage in world trade, controlling corruption, and reigning in the discretion of the administrative bureaucracy, then they can be considered valuable and worthwhile, even if they don't have any broader effects. I have not attempted to evaluate any of these individual programs; my subjective impression is that many of them are doing important, useful work. What I want to question is the larger claim that these programs will help promote some broader vision of the "rule of law" in China, and that they will lead to widespread reforms even against the wishes of the current Chinese leadership. "Rule of law" made its way onto the US governmental agenda, at least in part, because of this belief. But given the state of existing theory and empirical evidence, this conviction seems unfounded. I say "unfounded" rather than "false" because we don't have enough evidence to conclude that the Trojan Horse view is demonstrably incorrect. But given the weakness of the theory and evidence behind this element of US rule of law rhetoric and strategy, and in light of the sad history of the first Law and Development Movement, there is ample reason to think more rigorously and realistically about the means and ends of law reform – and sooner, rather than later.

Interview Codes

Interview A: US government official, interviewed July 1999

Interview B: US government official, interviewed July 1999

Interview C: US government official, interviewed July 1999

Interview D: NGO official, interviewed July 1999

Interview E: NGO official, interviewed July 1999 and October 1999

Interview F: US academic, interviewed August 1999

Interview G: US academic, interviewed August 1999

Interview H: US academic, interviewed November 1999

Interview I: US academic, interviewed January 2000