

2014

Ideological Renewal and Nostalgia in China's "Avant-garde" Legal Scholarship

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Recommended Citation

Samuli Seppänen, *Ideological Renewal and Nostalgia in China's "Avant-garde" Legal Scholarship*, 13 WASH. U. GLOB. STUD. L. REV. 083 (2014), <http://digitalcommons.law.wustl.edu/globalstudies/vol13/iss1/7>

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IDEOLOGICAL RENEWAL AND NOSTALGIA IN CHINA'S "AVANT-GARDE" LEGAL SCHOLARSHIP

SAMULI SEPPÄNEN*

ABSTRACT

This Article examines certain attempts in Chinese legal scholarship to formulate alternatives to “Western” or “liberal” rule of law ideology. The Article discusses three different strands of contemporary Chinese “avant-garde” legal scholarship: (i) neo-conservative critical scholarship, which builds on American legal realism, critical legal studies, and critical social theory; (ii) a form of New Confucian virtue-based legal thought, which combines traditionalist Chinese ethics with Western virtue ethics; and (iii) certain communitarian rule of law theories. The Article identifies a paradox in the premise of Chinese avant-garde scholars’ ideological renewal project: avant-garde scholars can only hope to create illusions of ideological change, often through nostalgic arguments, lest their proposals appear too unrealistic or outlandish.

TABLE OF CONTENTS

I. INTRODUCTION	84
II. OUTSIDE THE MAINSTREAM	88
III. CRITICAL AVANT-GARDE SCHOLARSHIP	92
A. <i>Critique of Liberal Rule of Law Ideology</i>	93
B. <i>Aesthetic Experiences Instead of Managerial Needs</i>	97
IV. NEW CONFUCIAN HYBRIDS	99
B. <i>New Confucianism in Chinese Legal Academia</i>	104
V. COMMUNITARIAN RULE OF LAW—AN OXYMORON?.....	108
A. <i>From Confucianism to Communitarianism</i>	108
B. <i>The Communitarian Rule of Law Principle</i>	110

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VI. ANALYSIS.....	114
A. <i>Taking Stock of Avant-Garde Proposals</i>	114
B. <i>Ideological Repression and Avant-Garde Scholarship</i>	115
C. <i>Paradoxes of Ideological Renewal</i>	118
VII. CONCLUSION.....	123

I. INTRODUCTION

Since the early 1990s, elite Chinese law schools have been torn by ideological divisions. The fiercest debates have been conducted between “liberal” law professors, who support the Westernization of China’s judicial and political system, and their “neo-conservative,” “New Leftist,” and “New Confucian” opponents. The former group of scholars emphasizes liberal values, such as individual freedoms and equal concern and respect for all; the latter group sets out to formulate new alternatives to both socialism and what they define as “Western” or “liberal” rule of law ideology, thus forming the scholarly “avant-garde” of Chinese legal academia. To be sure, avant-garde scholarship accounts for only a small fraction of Chinese legal scholarship, most of which can be broadly described as “legal dogmatics” or “legal hermeneutics.” As is the case in continental Europe (but not so much in the United States), mainstream legal scholarship in China analyzes and systemizes legal norms and aims to be of immediate use to the practitioners of law. But while only a handful of Chinese legal scholars work on avant-garde projects, these scholars play a significant role in Chinese legal academia. For better or for worse, Chinese avant-garde scholars have been able to cast doubt on the universally beneficial nature of liberal legal thought.¹

1. For an introduction to Chinese intellectual debates, see Deng Zhenglai, *Academic Inquiries into the Chinese “Success Story,”* in STATE AND CIVIL SOCIETY: THE CHINESE PERSPECTIVE 1 (Deng Zhenglai ed., 2011); JOSEPH FEWSMITH, CHINA SINCE TIANANMEN: THE POLITICS OF TRANSITION (1st ed. 2001); MERLE GOLDMAN, FROM COMRADE TO CITIZEN: THE STRUGGLE FOR POLITICAL RIGHTS IN CHINA (2005); PETER R. MOODY, CONSERVATIVE THOUGHT IN CONTEMPORARY CHINA (2007); Wang Chaohua, *Introduction, in ONE CHINA, MANY PATHS* 9 (Wang Chaohua ed., 2003). For ideological debates within Chinese legal academia, see DENG ZHENGLAI, ZHONGGUO FAXUE XIANG HE CHU QU [WHITHER CHINESE LAW] (2008); RANDALL PEERENBOOM, CHINA’S LONG MARCH TOWARD RULE OF LAW (2002); Randall Peerenboom, *Let One Hundred Flowers Bloom, One Hundred Schools Contend: Debating Rule of Law in China*, 23 MICH. J. INT’L L. 471 (2002); Shen Yuanyuan, *Conceptions and Receptions of Legality: Understanding the Complexity of Law Reform in Modern China*, in THE LIMITS OF THE RULE OF LAW IN CHINA 20 (Karen G. Turner et al. eds., 2000). For a critical description of mainstream legal methods in Chinese legal academia, see Zhu Suli, *Yexu Zhengzai Fasheng: Zhongguo Dangdai Faxue Fazhan de Yige Gailan [Possible Developments—An Outlook of the Development of Contemporary Jurisprudence of China]*, BIIIAOFA YANJIU [COMPARATIVE LAW] 1 (Mar. 2001), available at http://article.chinalawinfo.com/Article_Detail.asp?ArticleID=26048.

Compared to the study of Chinese society and politics, Chinese legal theory, including its avant-garde strand, has received little attention outside China.² One reason for this may be the well-justified suspicion that Chinese legal scholarship is compromised by ideological constraints imposed by China's authoritarian state. There may also be an assumption that Chinese law—and, by extension, Chinese legal theory—is substandard in comparison to its American and European models.³ Even in China, there is much skepticism about the intellectual integrity of Chinese legal scholars. A common observation among Chinese scholars is that what Chinese academics write and what they think are two different things. Some prominent scholars are thought to be motivated by careerist objectives, while others acknowledge that they cannot state publicly what they actually think about the rule of law in China.⁴

This Article seeks to demonstrate that the critical analysis of Chinese avant-garde scholarship provides not only an interesting window to inter-elite rivalry in contemporary China, but also an opportunity to examine certain background assumptions of contemporary development studies. Today, few development theorists adhere to the stage theories of the 1950s and 1960s, which postulated a universally valid development path.⁵ The new global "common sense" on development planning is based on the search for context specificity.⁶ Development studies as a discipline finds itself in a "Post Moment," in which "big ideas and grand solutions have been abandoned."⁷ Instead of providing universal solutions, contemporary

2. Probably the best-known Chinese legal theorist in the West is Professor Zhu Suli. See Frank Upham, *Who Will Find the Defendant if He Stays with His Sheep? Justice in Rural China*, 114 *YALE L.J.* 1675 (2005). For foreign-published research on Chinese legal theory, see Albert Y. Chen, *Toward a Legal Enlightenment: Discussions in Contemporary China on the Rule of Law*, 17 *UCLA PAC. BASIN L.J.* 125 (2000); Peerenboom, *Let One Hundred Flowers Bloom*, *supra* note 1; Yu Xingzhong, *Legal Pragmatism in the People's Republic of China*, 3 *J. CHINESE L.* 29 (1989); Yu Xingzhong, *Western Constitutional Ideas and Constitutional Discourse in China, 1978–2005*, in *BUILDING CONSTITUTIONALISM IN CHINA* 111 (Stéphanie Balme & Michael W. Dowdle eds., 2009).

3. See Teemu Ruskola, *Legal Orientalism*, 101 *MICH. L. REV.* 179 (2002).

4. For obvious reasons textual references for such statements are hard to find. See, however, *infra* note 202.

5. For a prominent example, see WALT WHITMAN ROSTOW, *THE STAGES OF ECONOMIC GROWTH: A NON-COMMUNIST MANIFESTO* (3d ed. 1990).

6. See David M. Trubek & Alvaro Santos, *Introduction: The Third Moment in Law and Development Theory and the Emergence of New Critical Practice*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* 1, 13–14 (David Trubek & Alvaro Santos eds., 2006); David Kennedy, *Laws and Developments*, in *LAW AND DEVELOPMENT: FACING COMPLEXITY IN THE 21ST CENTURY* 17 (John Hatchard & Amanda Perry-Kessaris eds., 2003); David Kennedy, *The "Rule of Law," Political Choices, and Development Common Sense*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL*, *supra*, at 95.

7. See Scott Newton, *Law and Development, Law and Economics and The Fate of Legal Technical Assistance*, in *LAWMAKING FOR DEVELOPMENT: EXPLORATIONS INTO THE THEORY AND*

development studies emphasize that answers to development questions emerge from “a recognition of the *contextual* nature of policy solutions.”⁸ “Gone is the confidence [of development scholars] that they have the correct recipe, or that privatization, stabilization, and liberalization can be implemented in similar ways in different parts of the world.”⁹ Extended to the field of law and development, the new common sense of development studies stresses the contextual nature of legal institutions and calls into question the supposed benefits of rule of law advocacy.¹⁰ Parallel to these developments, the so-called semiotic turn in social theory has convinced scholars that concepts such as the rule of law are “floating signifiers” (or, more colloquially, “empty vessels”), which are open to endless redefinitions.¹¹ From this perspective, the components of the rule of law (the “independence of the judiciary,” for instance) should take on different meanings in the Chinese context or be abandoned all together. To claim otherwise would be to adhere to philosophically outmoded “essentialism” or deterministic structuralism, both of which see little possibilities for social agents to redefine concepts such as the rule of law.

Building on these trends as well as Western critical theory, part of the Chinese avant-garde scholarship criticizes the supposed universalism of the liberal rule of law ideology. A central argument of certain avant-garde scholars is that, rather than being the cure for China’s social ills, the elements of the liberal rule of law have contributed to increasing social inequality, corruption, illegality, and other adverse social effects.¹² Another part of the Chinese avant-garde scholarship consists of attempts to envision a China-specific legal governance model. A small number of Chinese scholars have taken up the challenge of articulating a new kind of

PRACTICE OF INTERNATIONAL LEGISLATIVE PROJECTS 23, 29 (J. Arnscheidt et al. eds., 2008).

8. See Dani Rodrik, *The New Development Economics: We Shall Experiment, but How Shall We Learn?*, in *WHAT WORKS IN DEVELOPMENT?: THINKING BIG AND THINKING SMALL* 24, 25 (Jessica Cohen & William Easterly eds., 2009).

9. *Id.* at 40.

10. See David Kennedy, *The “Rule of Law,” supra* note 6; and *infra* notes 36, 37, and accompanying text. The new mainstream on law and development holds as a matter of fact that “familiar institutions of liberal democracy must be tailored, and supplemented with other measures, in order to deal with the often starkly different ethnoeconomic and ethnopolitical conditions of the developing world.” Amy L. Chua, *The Paradox of Free Market Democracy: Rethinking Development Policy* 41 *HARV. INT’L L.J.* 287, 362 (2000).

11. See Matthew C. Stephenson, *A Trojan Horse Behind Chinese Walls? Problems and Prospects of U.S.-Sponsored “Rule of Law” Reform Projects in the People’s Republic of China*, 18 *UCLA PAC. BASIN L.J.* 64, 74–79 (2000); CLAUDE LÉVI-STRAUSS, *INTRODUCTION TO THE WORK OF MARCEL MAUSS* 63 (Felicity Baker trans., 1987).

12. See Cui Zhiyuan, *Liberal Socialism and the Future of China: A Petty Bourgeoisie Manifesto*, in *THE CHINESE MODEL OF MODERN DEVELOPMENT* 157 (Tian Yu Cao ed., 2005); DENG, *WHITHER CHINESE LAW*, *supra* note 1. For these scholars’ understanding of “liberalism,” see *infra* Part III.A.

rule of law ideology based on Confucian ethics and communitarian social theory.¹³

The search for contextual, China-specific legal governance models undertaken by Chinese avant-garde scholars is far from being an unqualified success. Within Chinese legal academia, avant-garde scholarship covers the most intellectually, politically, and emotionally charged terrain. While some intellectuals—the avant-garde scholars themselves—relate positively to such scholarly projects, Chinese avant-garde scholars also stand accused of irrelevance, naïveté, or of being cynical apologists for an ethically bankrupt regime. From the liberal scholars' perspective, avant-garde scholarship constitutes a precarious academic game in which scholars adopt the habitus of a Western "critical intellectual" for careerist or otherwise dubious objectives. The avant-garde scholars' skeptical approach to liberal legal institutions especially, such as the independence of adjudication and the universality of human rights, has been considered a dangerous intellectual practice in China's present political context.¹⁴

Intentionally and inadvertently, Chinese avant-garde scholarship raises interesting questions about the prospects of ideological renewal and contextual policy setting in China. The most thought-provoking questions emerge from the discrepancy between the radical role that the Chinese avant-garde scholars have assumed and the actual results of their scholarship. The institutional designs promoted by many avant-garde scholars are surprisingly nostalgic and conservative, and they arguably fall short of the avant-garde scholars' goals.

This Article first describes the political and ideological context of Chinese avant-garde scholarship. The Article then considers three strands of this scholarship: (i) neo-conservative critical scholarship, which builds on legal realism, critical legal studies scholarship, and critical social theory; (ii) a form of New Confucian virtue-based legal thought, which

13. See Xia Yong, *Human Rights and Chinese Tradition*, in HUMAN RIGHTS: CHINESE AND DUTCH PERSPECTIVES 77 (Peter R. Baehr et al. eds., 1996); XIA YONG, THE PHILOSOPHY OF CIVIL RIGHTS IN THE CONTEXT OF CHINA (2011), to which I will be referring in its original Chinese language version: XIA YONG, ZHONGGUO MINQUAN ZHIXUE [PHILOSOPHY OF CHINESE CIVIL RIGHTS] (2004) [hereinafter XIA YONG, PHILOSOPHY]. For communitarian social theory, see GAO HONGJUN, XIANDAI FAZHI DE CHULU [PATH OF THE MODERN RULE OF LAW] (2003).

14. For critical assessments of avant-garde scholarship, see Ji Weidong, *Rang Women Lai Chongjian Zhengzhi Gongshi [Let Us Build Political Consensus]*, in XIANZHENG XIN LUN: QUANQIU HUA SHIDAI DE FA YU SHEHUI BIANQIAN [NEW CONSTITUTIONAL THEORY: LEGAL AND SOCIAL CHANGE IN AN ERA OF GLOBALIZATION] 285 (2002); He Weifang, *Jiechu Minzhu Renshi Jiang Daxie Ci [Acceptance Speech for Democracy Award]* (Nov. 15, 2010) (transcript available at <http://heweifang.blog.caixin.com/archives/13873>).

combines traditionalist Chinese ethics with Western virtue ethics; and (iii) certain communitarian rule of law theories, which emerge from the critique of liberal political theory.¹⁵ The final Part of this Article examines explanations for the surprisingly modest outcomes of Chinese avant-garde scholarship. The Article points out that innovative work within Chinese academia may be impeded by certain institutional constraints, such as political taboos. The Article also argues that there is an inbuilt paradox within the ideological renewal project of the avant-garde scholars. Avant-garde scholars can only hope to create illusions of ideological change, often through nostalgic arguments, lest their proposals appear too unrealistic or outlandish for their audiences.

II. OUTSIDE THE MAINSTREAM

Chinese avant-garde scholarship is best seen as an intellectual response to the political ideology and development policies of the late 1980s and early 1990s, which took for granted that China's development would proceed toward a liberal democracy, following the experience of Latin American and East Asian countries.¹⁶ Legal avant-garde scholarship is part of a broader intellectual movement, which includes “post-studies” (*houxue*), “neo-conservatism” (*xin baoshou zhuyi*), “neo-authoritarianism” (*xin quanwei zhuyi*), “New Confucianism” (*xin ruxue*), and “New Leftism” (*xin zuopai*).¹⁷ The most prominent early promoter of neo-conservative

15. In addition to legal scholars (Xia Yong and Gao Hongjun), the Article discusses the works of social theorists (Cui Zhiyuan, Deng Zhenglai, and Wang Hui) who write about the law and who have been influential for Chinese legal discourse. To keep the exercise manageable, the Article discusses only some of the most interesting and thought provoking avant-garde texts. Some prominent texts have been left out because they have been thoroughly discussed in Western scholarship. *See infra* note 211 and accompanying text. Moreover, the generation that is considered in this article was prominent in the 1990s and 2000s—while the academic influence of this generation is undisputed, their avant-gardism is already somewhat nostalgic. There is a younger generation growing on Chinese campuses *See* CHEN DUANHONG, *ZHIXIANQUAN YU GENBENFA* [CONSTITUTIONAL RIGHTS AND FUNDAMENTAL LAW] (2010); JIANG SHIGONG, *LIFAZHE DE FALIXUE* [LEGAL THEORY FOR LAW-MAKERS] (2007); ZHAO XIAOLI, *NONGCUN FAZHI XIANZHUANG: LAIZI QINGHUA XUESHENG DE SHIJIAO* [LEGAL SYSTEM IN CHINA'S RURAL AREA: FROM THE PERSPECTIVE OF STUDENTS OF TSINGHUA LAW SCHOOL] (2006). Even Christianity influences Chinese legal scholarship. *See* GERDA WIELANDER, *CHRISTIAN VALUES IN COMMUNIST CHINA* (2013).

16. *See* Wu Jiayang, *Commenting on Neo-Authoritarianism*, *SHIJIE JINGJI DAobao* [WORLD ECON. HERALD], January 16, 1989, at 12, *translated in* BEIJING SPRING: CONFRONTATION AND CONFLICT: THE BASIC DOCUMENTS 130 (Michel Oksenberg et al. eds., 1990); Xiao Gongqin, *Wuxu Bianfa de Zai Fanxing: Jian Lun Zaoqi Zhengzhi Jijin Zhuyi de Wenhua Genyuan* [Reflections on the Hundred Days Reform Movement: The Cultural Roots of Early Political Radicalism], *ZHANLUE YU GUANLI* [STRATEGY & MANAGEMENT] 11 (Apr. 1995).

17. These movements have influenced Chinese intellectuals since the late 1980s. *See* FEWSMITH, *supra* note 1, at 80; MOODY, *supra* note 1, at 154; Juntao Wang, *Reverse Course: Political Neo-*

legal thought was Professor Zhu Suli of Peking University, who called for a pragmatic, China-specific legal governance ideology.¹⁸ Zhu argued that Western legal institutions, such as contract law, property law, corporate law, tort law, and law on negotiable instruments, had developed naturally as a result of trial and error over a long period of time.¹⁹ In Zhu's view, China should allow its legal institutions to develop according to its "native resources" (*bentu ziyuan*) and depart from Western institutional models—such as judicial independence—when necessary.²⁰ Often the native resources identified by Zhu were embodied by Communist Party institutions, such as village-level Communist Party cadres.²¹ In the late 1990s and early 2000s, Chinese legal scholars extended the search for such native resources to constitutional law, arguing, for instance, that China had a unique "unwritten constitution" that differed from the liberal models.²² Also in the 1990s and 2000s, a group of Chinese scholars began to seek inspiration for ideological renewal from China's Confucian traditions. These scholars sought to combine elements of liberal political thought—in particular individual rights and parliamentary representation—with Confucian traditionalist conceptions of social harmony.²³ In the mid-2000s, the intellectual movements against liberalism gained a political expression in increasingly critical attitudes toward judicial reforms and in the ascendancy of Bo Xilai, the now-purged mayor of Chongqing.²⁴

Conservatism and Regime Stability in Post-Tiananmen China 236–37 (2006) (Ph.D. dissertation, Columbia University) (on file with author).

18. See ZHU SULI, FAZHI JI QI BENTU ZIYUAN [RULE OF LAW AND ITS NATIVE RESOURCES] 21 (2d ed. 2004).

19. *Id.* at 11.

20. See *id.*; Zhu Suli, *Political Parties in China's Judiciary*, 17 DUKE J. COMP. & INT'L L. 533, 556 (2007). See Upham, *supra* note 2.

21. See ZHU SULI, NATIVE RESOURCES, *supra* note 18, at 17; ZHU SULI, SONG FA XIA XIANG [SENDING LAW TO THE COUNTRYSIDE] 48 (2000).

22. See Jiang Shigong, *Written and Unwritten Constitutions: A New Approach to the Study of Constitutional Government in China*, 36 MODERN CHINA 12 (2010).

23. Professor Jiang Qing is perhaps the most prominent of these scholars. See DANIEL BELL, CHINA'S NEW CONFUCIANISM: POLITICS AND EVERYDAY LIFE IN A CHANGING SOCIETY 180 (2008). For Professor Jiang's original work, see JIANG QING, ZHENGZHI RUXUE: DANGDAI RUXUE DE ZHUANXIANG, TEZHI YU FAZHAN [POLITICAL CONFUCIANISM: THE TURN, CHARACTERISTICS, AND DEVELOPMENT OF CONTEMPORARY CONFUCIANISM] (2003). In law, the most important of these scholars is Xia Yong. See XIA YONG, PHILOSOPHY, *supra* note 13.

24. The so-called Chongqing model, promoted by Bo's supporters, stood for popular (or "populist") large-scale infrastructure projects, clampdown on organized crime, and disregard for legal formalities. The neo-conservative political project suffered an abrupt setback in 2012, when Bo Xilai was ousted from the Communist Party and influential neo-conservative websites were blocked. See Jamil Anderlini, *Bo Xilai: Power, Death and Politics*, FIN. TIMES (July 20, 2012), <http://www.ft.com/cms/s/2/d67b90f0-d140-11e1-8957-00144feabdc0.html#axzz2ivm4FSSS>; *Chongqing Rolls On: A*

In this polarized political context, Chinese avant-garde scholars are easily grouped together with the leftist wing of the Chinese Communist Party (“CCP” or “the Party”) and dismissed as their naïve or cynical apologists. Professor He Weifang, for instance, sees New Leftism as “a gorgeous and incomprehensible academic discourse,” which endangers China’s transformation into a constitutional democracy through its glorification of political autocracy.²⁵ It is true that the avant-garde scholars’ criticism of the rule of law coincided with, and perhaps contributed to, the growing skepticism about the autonomy of the law within the Party.²⁶ Since the mid-2000s, conservative factions within the Party have mounted a sustained campaign to promote extra-legal governance methods and weaken supremacy of the law and the judiciary.²⁷ At the same time, it would be too simplistic to see avant-garde scholars exclusively as apologists of the Party and the central government. Changing political winds have possibly alienated some avant-garde scholars from the centers of political power.²⁸ Moreover, some avant-garde scholars criticize the government’s economic and social policies in a way that has set them at odds not only with the reform-minded liberals, but also with the centrist and reformist factions of the Party.²⁹ Finally, some avant-garde scholars have been willing to acknowledge the failures of China’s

City’s Deposed Leader Had Tried to Be Different. But Was He?, *ECONOMIST* (Apr. 28, 2012), <http://www.economist.com/node/21553495>; Tania Branigan, *China Shuts Down Maoist Website Utopia*, *GUARDIAN* (Apr. 6, 2012), <http://www.guardian.co.uk/world/2012/apr/06/china-maoist-website-utopia>. For the rollback on judicial reforms, see Carl F. Minzner, *China’s Turn Against Law*, 59 *AM. J. COMP. L.* 935 (2011).

25. See He Weifang, Acceptance Speech, *supra* note 14. New Leftism was first used as a derogatory term by the liberals. Wang Hui prefers to speak of “new criticism” but at present accepts the label “New Leftism.” See Wang Hui, *The New Criticism*, in *ONE CHINA, MANY PATHS*, *supra* note 1, at 55, 61.

26. For such skepticism, see Luo Gan, *Shenru Kaizhan Shehui Zhuyi Fazhi Linian Jiaoyu: Gieshi Jiaqiang Zhengfa Duiwu Sixiang Zhengzhi Jianshe [Bolstering the Teaching of the Socialist Rule of Law Concept: Earnestly Strengthening the Political Ideology of the Political and Legal Ranks]*, *QIU SHI [SEEK TRUTH]* 3 (Dec. 2006).

27. See *id.*, a landmark speech by Luo Gan, a former politburo member and one of the principal advocates of the “socialist rule of law conception”. For a comment, see Benjamin B. Liebman, *China’s Courts: Restricted Reform*, 8 *CHINA Q. SPECIAL ISSUES* 66, 74 (2008).

28. In the short run this may have been the case with those scholars who associated themselves with Bo Xilai. See Cui Zhiyuan’s endorsement of the Chongqing model in Cui Zhiyuan, *Chongqing Shiyan de San Ge Lilun Shijiao: Qiaozhi, Mide Yu Gelanxi [Three Theoretical Perspectives to the Chongqing Experiment: Henry George, James Meade, and Antonio Gramsci]*, *KÁIFÀNG SHÍDÀI [OPENING TIMES]* 52 (Sept. 2011). For a liberal critique of the Chongqing model, see Tong Zhiwei, *Fengyu Guohou Kan Chongqing [Chongqing After the Storm]*, *JINGJI GUANCHÁ BAO [ECON. OBSERVER]* (Sept. 21, 2012), <http://www.eeo.com.cn/2012/1026/235178.shtml>.

29. See, e.g., WANG HUI, *THE END OF THE REVOLUTION: CHINA AND THE LIMITS OF MODERNITY* 59–62 (2011) (criticizing reformist “neo-liberalism” and centrist “developmentalism”).

autocratic political system in a way that political opportunists would find hard to do.³⁰

Chinese avant-garde scholars have also gone against the mainstream with regards to the broad outlines of ideological development in China. Just as the avant-garde scholars have been promoting China-specific legal institutions, many of the characteristics that have distinguished Chinese legal thought from Western scholarship have become extinct. China's state-sanctioned legal ideology is still based on the promotion of the "socialist rule of law principle,"³¹ but Marxism itself is not a thriving theoretical practice in China's legal academia.³² The occasional references to Marxism in Chinese legal scholarship usually appear as boilerplate acknowledgements of the need to learn from Marxism-Leninism.³³ More often than not, these references to Marxism take the form of "vulgar materialism"—that is, the conception that the primitive stage of China's socialist economic system necessitates a distinctively market-orientated form of the so-called "socialist" rule of law.³⁴

While the avant-garde scholars are on the wrong side of many political and ideological trends in China, the global development discourse has approached their position in recent years. Indeed, as Chinese legal scholars have abandoned their non-liberal ideological basis, the confidence in the universality of liberal rule of law ideology has been declining both in

30. Professor Deng Zhenglai views China's globalization efforts in a way that conflicts with the Party leadership's economic policies. See DENG ZHENGLAI, SHUI SHI QUANQIU HUA? HE ZHONG FA ZHEXUE? KAIFANGXING QUANQIUHUA GUAN YU ZHONGGUO FALU ZHEXUE JIANGOU LUNGAN [WHOSE GLOBALIZATION? WHICH LEGAL PHILOSOPHY? OPENING THE CONCEPT OF GLOBALIZATION AND OUTLINING A CHINESE LEGAL PHILOSOPHY] (2009). Gao Hongjun criticizes the effects of orthodox Marxism on Chinese legal thought in GAO HONGJUN, *supra* note 13, at 4. Xia Yong, it should be noted, is part of the politically correct mainstream. A significant exception to the political marginalization of avant-garde scholars is Professor Xia Yong, who served as director of the National Administration for Protection of State Secrets, the state agency in charge of internal and international secrecy issues, until 2013. As I point out *infra* Part IV, Xia Yong's politics are enigmatic and as such reflect Chinese intellectuals' ambivalent attitudes about the law. For Xia Yong's biography, see Xia Yong, CHINA VITAE (Apr. 24, 2013) http://www.chinavitae.com/biography/Xia_Yong.

31. See POLITICAL AND LEGAL COMMITTEE OF THE CHINESE COMMUNIST PARTY, SHEHUI ZHUYI FAZHI LINIAN DUBEN [THE SOCIALIST RULE OF LAW PRINCIPLE—A READER] (2009) [hereinafter THE SOCIALIST RULE OF LAW PRINCIPLE].

32. It is telling that a compilation of articles on the rule of law, published by the Chinese Academy of Social Sciences, discusses the rule of law mainly through the theories of Max Weber, Joseph Raz, Lon L. Fuller, Friedrich Hayek, and Jürgen Habermas. See FAZHI YU 21 SHUI [THE RULE OF LAW AND THE 21ST CENTURY] (Xia Yong & Li Lin eds., 2004).

33. For one such reference, see Xin Chunying's statement that law is a reflection of interests and needs to be produced by a material mode of production. See Xin Chunying, *Fazhi Zai Zhongguo Lishi de Mingyun* [The Fate of the Rule of Law in Chinese History], in FAZHI YU 21 SHUI, *supra* note 32.

34. *Id.*

China and in the West.³⁵ China itself has played an important role in the erosion of the Western rule of law orthodoxy and the belief, advocated by international development agencies such as the World Bank, that the rule of law is necessary to establish social stability, attract foreign investment, and promote economic growth.³⁶

III. CRITICAL AVANT-GARDE SCHOLARSHIP

These political and ideological developments have rendered Chinese avant-garde scholarship both more controversial and appealing among Chinese intellectuals. The most controversial part of the avant-garde scholarship is its critique of the liberal rule of law ideology. This critique is more profound than the critique of liberal democracy alone, and is not reducible to the support of the rule by law or the socialist rule of law principles.³⁷ Instead of Marxism and Maoism, this form of critique is most

35. Thomas Carothers, one of the principal promoters of rule of law advocacy in the 1990s, defined the rule of law in 1998 as

[A] system in which the laws are public knowledge, are clear in meaning, and apply equally to everyone. They enshrine and uphold the political and civil liberties that have gained status as universal human rights The central institutions of the legal system . . . are reasonably fair, competent, and efficient. Judges are impartial and independent [And] the government is embedded in a comprehensive legal framework.

Thomas Carothers, *The Rule of Law Revival*, 77 FOREIGN AFF. 95, 96 (1998). Carothers went on to state that the “effects of . . . rule-of-law aid are generally positive, though usually modest.” *Id.* at 104. A few years later Carothers conceded that “the base of knowledge” on which rule of law aid practitioners operate “is startlingly thin.” Thomas Carothers, *The Problem of Knowledge, in PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE* 15 (Thomas Carothers ed., 2006). For a China-based critique of Carothers’s original view, see William P. Alford, *Exporting the “Pursuit of Happiness,”* 113 HARV. L. REV. 1677, 1685 (2000). For a seminal critique of Western rule of law advocacy, see David M. Trubeck & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV. 1062.

36. For a critique of the rule of law orthodoxy, see Frank Upham, *Mythmaking in the Rule of Law Orthodoxy* 7 (Carnegie Endowment Rule of Law Series, Democracy and the Rule of Law Project Working Paper No. 30, 2002). For a target of Upham’s criticism, see WORLD BANK, WORLD DEVELOPMENT REPORT 2002: BUILDING INSTITUTIONS FOR MARKETS 131 (2002), available at <http://econ.worldbank.org/wdr/subpage.php?pr=2391> (stating that the “judicial system plays an important role in the development of market economies”). For a position of the rule of law in World Bank policies, see Alvaro Santos, *The World Bank’s Uses of the “Rule of Law Promise,”* in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL, *supra* note 6, at 253. For the relationship between legal institutions and China’s development process, see Donald C. Clarke, *Economic Development and the Rights Hypothesis: The China Problem*, 51 AM. J. COMP. L. 89 (2003); Frank K. Upham, *From Demsetz to Deng: Speculations on the Implications of Chinese Growth for Law and Development Theory*, 41 N.Y.U. J. INT’L L. & POL. 551 (2009).

37. According to Brian Tamanaha, the “rule by law” connotes the use of law as an instrument for government action. BRIAN Z. TAMANAHA, ON THE RULE OF LAW 91 (2004). The socialist rule of law principle, as defined by Luo Gan in his keynote speech, stands for “ruling the country according to

closely related to European critical theory, American legal realism, and the Critical Legal Studies ("CLS") movement, as well as to the global critiques of the law and development movement.³⁸ Three interrelated elements stand out in this strand of criticism: (i) the suggestion that liberal legal institutions are one of the many possible developmental models; (ii) the association of the rule of law with (neo-)liberalism and modernization theory; and (iii) the characterization of liberal legal thought as part of global hegemonic ideological structures, which continue to influence Chinese legal thought.

A. Critique of Liberal Rule of Law Ideology

The starting point of avant-garde scholarship is the notion that liberal rule of law ideology is not an inevitable development model. Professor Cui Zhiyuan, a political economist at Tsinghua University, was one of the first contemporary proponents of this theory.³⁹ Cui is often cited as an example of a CLS-inspired Chinese scholar,⁴⁰ but his remarks on law seem to be more indebted to American legal realism of the early twentieth century than to the CLS. A prominent legal theoretical innovation of Professor Cui's economic project is the notion that property rights and other legal concepts have no transcendental essences.⁴¹ Cui emphasizes this point, often made by American legal realists such as Robert L. Hale and Felix Cohen, in order to make the argument that there is no single correct model of a legal concept, such as "property" or a "corporation," or indeed the "rule of law."⁴² Cui, for instance, states that the notion of "absolute, unified property rights" needs to be replaced by "a scheme for reallocation of the disintegrated elements of property among different

law, implementing law for the people, serving the overall situation and following party's leadership." See Luo Gan, *supra* note 26, at 5.

38. See *supra* note 36.

39. See Wang Chaohua, *supra* note 1, at 28.

40. A likely reason for this is his personal association with Professor Roberto Unger, one of the founding fathers of CLS. For citations, see, e.g., Wang Hui, *The New Criticism, in ONE CHINA, MANY PATHS*, *supra* note 1, at 55, 59; FEWSMITH, *supra* note 1, at 255 n.78 (noting that CLS is not as widespread in China as Cui claims).

41. See Cui Zhiyuan, *Whither China? The Discourse on Property Rights in the Chinese Reform Context*, 55 SOC. TEXT 67, 77 (1998) (arguing that property is a "bundle of rights").

42. Cui himself makes the connection to American legal realism, *id.* at 81 n.34. See also Robert Hale, *Coercion and Distribution in a Supposedly Noncoercive State*, 38 POL. SCI. Q. 470 (1923); Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 811 (1935). Like Cui, Cohen disputes the notion that there is a transcendental definition of "corporation": "Nobody has ever seen a corporation. What right have we to believe in corporations if we don't believe in angels?" Cohen, *supra*, at 811.

types of rights holders.”⁴³ Cui insists that it is possible to use “the clarification of property rights thesis” for many other purposes than to turn state-owned enterprises (“SOEs”) into private corporations, for instance, to advance labor’s property rights.⁴⁴ In other words, no legal necessity or logic compels the privatization of SOEs in China. Cui has advanced a similar argument about land ownership. Since “private property, understood as a universal right applying to everyone, cannot exist,”⁴⁵ China’s rural landownership system is not only analytically sounder than the traditional bourgeois notion of land ownership but also socially more valuable because of its attempt to “realize socialized production without depriving peasants” of economic and political power.⁴⁶

A second element in the Chinese avant-garde critique of the rule of law associates the rule of law with neo-liberalism, and more generally, with “modernization.” According to Wang Hui, a prominent social theorist and historian at Tsinghua University, neo-liberalism “permeates every aspect of contemporary society and has enormous ideological coordinative capacity.”⁴⁷ Wang Hui attacks neo-liberalism as a market-fundamentalist principle, which is constituted by the belief in the power of free markets at the expense of economic planning and social justice.⁴⁸ Wang insists that neo-liberalism “understands development as a narrow problem of economic growth and is not concerned with the relationship between this growth and political freedom and social security.”⁴⁹ Wang criticizes the way in which the rule of law ideology has been used to legitimize neo-liberal economic policies, arguing, for instance, that “the ‘reform’ of property rights . . . uses the law to depoliticize the property rights transfers.”⁵⁰ Wang places the rule of law and neo-liberalism into the wider project of “modernization” arguing that the modernization movement perceived the world through dualisms, such as “China/the West, quietistic/dynamic civilization, Chinese/Western learning, and

43. See Cui Zhiyuan, *supra* note 12, at 171–72.

44. See Cui Zhiyuan, *supra* note 41, at 76.

45. See Cui Zhiyuan, *supra* note 12, at 158.

46. See *id.*

47. See WANG HUI, *supra* note 29, at 58.

48. Postcolonial critique of neoliberalism associates economic neoliberalism closely with human rights and democracy advocacy. See Makau Mutua, *What is TWAIL*, 94 AM. SOC’Y INT’L L. PROC. 31, 37–38 (2000); James Thuo Gathii, *Neoliberalism, Colonialism and International Governance: Decentering the International Law of Governmental Legitimacy*, 98 MICH. L. REV. 1996, 2001 (2000) (reviewing BRAD R. ROTH, *GOVERNMENTAL ILLEGITIMACY IN INTERNATIONAL LAW* (1999)).

49. See WANG HUI, *supra* note 29, at 58, 62.

50. *Id.* at 13.

spiritual/material civilization.”⁵¹ According to this dualistic perception, “science, knowledge, reason, and utility” was associated with the West and “morality, spirituality, instincts, and aesthetics” with China.⁵² The new “scientific worldview justified attacks on the family system and its ethical presuppositions.”⁵³ Whereas social order in pre-modern China was based on a plurality of legal norms, local social networks, and status considerations, the modern legal system brought about the principle of blindness to status.⁵⁴ This rendered individuals “into atoms of society” and separated them from “kinship ties, geographical nexus, and other social networks.”⁵⁵

A third element in the avant-garde criticism against the liberal rule of law ideology consists of the exposition of concealed global hegemonic structures which influence Chinese legal thought. These structures are thought to support neo-liberalism and the modernization paradigm and have unacknowledged negative consequences for China. Deng Zhenglai, a prominent advocate of this view, argued in his seminal work, *Whither Chinese Law*, that the reception of Western developmentalism and legal thought within China altered Chinese views about societal legitimacy.⁵⁶ According to Deng (whose intellectual journey had started with Hayekian liberalism), the cultural hegemony of Eurocentric social and legal theory constituted a kind of “‘violence’ of legitimacy.”⁵⁷ Deng pointed out that the Eurocentric distinction between “modernity,” characterized by the rule of law, and “tradition,” characterized by local knowledge, was foundational for modern Chinese legal scholarship.⁵⁸ Deng also argued that Chinese jurists had accepted the fiction of the “universal applicability” of Western legal concepts and principles (such as human rights, democracy, the rule of law, and constitutionalism) as well as the fictions of law’s “neutrality” and “objectivity.”⁵⁹

Deng provided the reception of consumer protection legislation as a concrete example of the consequences of Western ideological hegemony

51. *Id.* at 153.

52. *Id.*

53. *Id.* at 141–42. The present Article, to be clear, identifies “aesthetics” with Chinese and foreign avant-garde scholars and not with China.

54. *Id.* at 142.

55. *Id.* at 141.

56. See DENG, *WHITHER CHINESE LAW*, *supra* note 1, at 107–14.

57. *Id.* at 107. Professor Deng taught at Shanghai’s Fudan University until passing away in 2013. For an obituary of Deng Zhenglai, see *Deng Zhenglai 邓正来*, CHINA STORY, <http://www.thechina-story.org/key-intellectual/deng-zhenglai> (last visited Aug. 5, 2013).

58. *Id.* at 108–09.

59. *Id.* at 109–10.

on Chinese legal thought and society.⁶⁰ In Deng's view, legal scholars working within the modernization paradigm were primarily concerned with legal dogmatic issues rather than with the actual implications of the consumer protection legislation. At the same time as consumer protection legislation increased steadily in China, so did counterfeit and substandard goods.⁶¹ Deng argued that the market for counterfeit goods emerged as a result of China's drive for urbanization and mostly benefited urban citizens. The negative consequences of counterfeit goods—substandard food products and drugs—affected the rural poor disproportionately.⁶² Local governments that were supposed to enforce consumer protection legislation were unable or unwilling to do so because of local protectionism and corruption.⁶³ According to Deng, these developments were due to the modernization paradigm and the conception that the Western consumer legislation model was a universal characteristic of modern societies and thus also applicable to China.⁶⁴

As another concrete example of Western ideological hegemony, Deng discussed the Sun Zhigang incident, which was one of the landmark cases in Chinese rights advocacy in the last decade. Sun Zhigang, a twenty-seven-year-old unlicensed migrant worker, died in police custody in 2003 when he was in the process of being deported back to his home county.⁶⁵ This caused a public outrage, and the government quickly relaxed its practice of detaining and repatriating unlicensed migrant workers.⁶⁶ In contrast to this mainstream narrative of the Sun Zhigang case, Deng provided the case as an example of the globalizing notions of legitimacy. Whereas the outcome of the case was heralded as a victory for human rights, Deng lamented the fact that the Chinese discussion discounted the “value of security,” ignoring the possibility that the new practice might lead to “social disorder and increasing crime rates.”⁶⁷ Again, Deng argued

60. *Id.* at 115–16.

61. *Id.* at 118.

62. *Id.* at 120–22.

63. *Id.* at 122.

64. *Id.* at 129–30.

65. See Keith J. Hand, *Citizens Engage the Constitution: The Sun Zhigang Incident and Constitutional Review Proposals in the People's Republic of China*, in BUILDING CONSTITUTIONALISM IN CHINA, *supra* note 2, at 221, 226.

66. The case also became a constitutional issue when a group of legal scholars argued that the regulations enabling the deportation of migrant workers had been issued unconstitutionally by the State Council, rather than by the National People's Congress, which had the exclusive authority to restrict people's fundamental rights. See *id.*

67. See DENG ZHENGLAI, *supra* note 30, at 218–19.

that Western legal conceptions were potentially disruptive for China's local needs.

B. Aesthetic Experiences Instead of Managerial Needs

Within Chinese legal academia, critical avant-garde scholarship has probably made liberal legal reforms appear less self-evident and inevitable than before. The increasing popularity of critical avant-garde scholarship has inspired or at least coincided with ideological developments in China's state-sanctioned legal thought. An element in this development has been the discrediting of the liberal rule of law model, and in particular, the doctrine of the separation of powers that builds on the notion that judicial reasoning can and should be independent of the political sphere. The CCP's textbook on the conception of the socialist rule of law argues with reference to "Holmes, Cardozo, Pound, Posner, the law and society movement and legal pragmatism" that "no country, at no given time, can establish a legal code that is able to cover all the social facts and processes."⁶⁸ The textbook argues that adjudication is a creative activity that is based on a number of pragmatic considerations rather than dogmatic law application.⁶⁹ Because of this, adjudication "must emphasize politics and the overall situation."⁷⁰ The textbook's message is essentially the same as the one made by Professor Zhu Suli in the 1990s: since the "legal" mode of reasoning is insufficient for governance purposes, the nature of the "overall situation" is ultimately best determined by those in charge of the big picture, i.e., the relevant Party authorities.⁷¹

In legal academia, the characterization of liberal legal institutions by avant-garde scholars as false necessities was particularly effective in the mid-1990s. At this time even neo-conservative Chinese scholars often perceived development as a one-way street towards liberal democracy.⁷² Their arguments have been less effective against those legal scholars who

68. See THE SOCIALIST RULE OF LAW PRINCIPLE, *supra* note 31, at 30.

69. *Id.*

70. See *id.* But although the textbook attacks "legal dogmatism," it includes formalist elements when it directs legal and political personnel to "strictly handle matters according to law." *Id.* at 109. Legal formalism has been seen as a characteristic of legal thought in authoritarian regimes. See Tom Ginsburg, *Administrative Law and Judicial Control of Agents in Authoritarian Regimes*, in RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES 58, 60 (Tom Ginsburg and Tamir Moustafa, eds., 2008).

71. See ZHU SULI, NATIVE RESOURCES, *supra* note 18.

72. See texts cited *supra* note 16.

support the liberal rule of law notion on the basis of its intrinsic values.⁷³ From the point of view of this latter group of scholars, the “false necessities” argument cuts both ways. While, for instance, Professor Cui Zhiyuan argues that it is not necessary to define “property” in the bourgeois sense, liberal scholars insist that nothing prevents the Chinese from relying on tried and tested legal concepts.⁷⁴

To its liberal critics, critical avant-garde scholarship seems nostalgic and conservative, because its institutional proposals typically consist of extinct or rapidly fading institutions, rather than of new institutional models. Professor Cui Zhiyuan, for instance, praises the Chinese “shareholding cooperative system” in which shares are “mainly collective.”⁷⁵ Whether such a system contributed positively to China’s economic development is open to debate. According to Professor Huang Yasheng, shareholding cooperatives were vehicles for the privatization of state-owned companies, rather than the means to facilitate their collective ownership.⁷⁶ Cui’s purpose is not, however, to outline a detailed blueprint for economic association, but to illustrate the point that Chinese peasant-workers were right to come up with institutional solutions that diverged from Western models. His aim is to generate an emotional experience and demonstrate, above all, that it is “possible to break away from the Stalinist idea that socialist ownership has only two possible types, namely, state ownership and collective ownership.”⁷⁷ Whether “shareholding cooperatives” are the best kind of institution for this project is beside the point.

Similarly, when discussing the Sun Zhigang incident, Professor Deng Zhenglai provided arguments in favor of the already abolished “custody and repatriation” (*shourong qiansong*) system in order to make a point about the domination of global structures within Chinese jurisprudence. Deng suggested implicitly that the practice of custody and repatriation served the interests of security better than the present, more relaxed residency permit (*hukou*) controls. At the same time, Deng insisted that he was not against improving migrant workers’ human rights per se.⁷⁸ The

73. See He Weifang, *Zhongguo Sifa Guanli Zhidu de Liang Ge Wenti [Two Problems in China’s Judicial Administration]*, ZHONGGUO SHEHUI KEXUE [CHINESE SOC. SCI.] 116, 130 (June 1997) (arguing that Chinese values had irrevocably turned toward rule of law and democracy).

74. For this argument, see Wang Yi, *From Status to Contract*, in ONE CHINA, MANY PATHS, *supra* note 1, at 189, 196–97.

75. See Cui Zhiyuan, *supra* note 41, at 75.

76. See YASHENG HUANG, CAPITALISM WITH CHINESE CHARACTERISTICS 46, 130–31 (2008).

77. See Cui Zhiyuan, *supra* note 41, at 77.

78. See DENG ZHENGLAI, *supra* note 30, at 219.

emphasis in Deng's scholarship was again on creating a sense of institutional possibilities, rather than detailing the content of new institutions.

Professor Wang Hui, finally, applauds rural "new collectivism" (essentially institutions such as shareholding cooperatives), through which the Chinese peasants "are for the first time moving out of their centuries-old isolation and rapidly developing rural industries."⁷⁹ Despite his sweeping critique of mainstream ideology, Wang's concrete ideological propositions, as well as the diagnostic elements of his scholarship, are conventional in the Chinese context. Wang supports key features of China's development policy, such as the chastised market economy that is tightly controlled by the Party.⁸⁰ He states that the "free movement of labor, public management, and government intervention are all necessary conditions for the market system."⁸¹ Rather than rethinking market economy, Wang wants to "limit its destruction on the environment, traditions, customs, and other aspects of life and values."⁸²

To a certain extent, the above-described critical avant-garde scholarship is aligned with "leftist" policies—hence the label "New Leftism," which some avant-garde scholars have come to endorse. However, for the critical avant-garde scholar, intellectual detachment and the subsequent expansion of visionary possibilities takes priority over the concrete managerial needs of today's economy. In this form of scholarship, institutions are often an afterthought aimed at evoking an experience of limitless possibilities and the assertion of Chinese selfhood. This is a striking contrast to the political confidence of both conservative socialist and liberal scholars, and, as I suggest in Part VI, a reason to believe that critical avant-garde scholarship itself is influenced by the hegemonic structures it criticizes.

IV. NEW CONFUCIAN HYBRIDS

While New Leftism was the principal counterpoint to developmentalism and liberalism in the 1990s, "New Confucianism" gained prominence in Chinese academic circles in the 2000s. New Confucianism is distinguishable from New Leftism and other neo-

79. See WANG HUI, CHINA'S NEW ORDER: SOCIETY, POLITICS, AND ECONOMY IN TRANSITION 164 (2003).

80. WANG HUI, *supra* note 29, at 41.

81. *Id.*

82. WANG HUI, *supra* note 79, at 4 (emphasis added).

conservative intellectual moments by its explicit attempt to derive principles of governance from traditional (or traditionalist) Confucian concepts.⁸³ It seems natural to assume that a China-specific legal ideology, should it ever emerge, will build on Chinese traditions, particularly those that are loosely grouped together as “Confucianism.”⁸⁴ This assumption is, however, controversial and easily appropriated for various political projects.⁸⁵ Despite such problems, there have been attempts in mainland China to recast socialist legal thought into a New Confucian mold. The following focuses on one such attempt by Professor Xia Yong, a well-known Chinese legal scholar who at present serves as Deputy Director of the Legislative Affairs Office of State Council.⁸⁶

A. *Traditionalist Virtues And the Rule of Law*

Professor Xia Yong is an enigmatic scholar, and as such exemplifies the complexities of contemporary Chinese legal scholarship. Xia rejects explicitly labels such as “New Leftism,” “neo-conservatism,” “communitarianism,” and “post-modernism,” and, in contrast to much New Confucian rhetoric, denies assigning the community a privileged position vis-à-vis the individual.⁸⁷ Judging by his texts, Xia can be placed somewhere between the liberal and the conservative ends of the Chinese scholarly mainstream. Like many Chinese lawyers, Xia is an unwavering supporter of the autonomy of the law.⁸⁸ At the same time, Xia’s theoretical ambition—at least before his government assignments—has been to formulate a new form of Chinese legal thought that is distinct from both

83. One example of this is Professor Jiang Qing’s proposition for a corporatist legislature, which houses Confucian civil society groups, governmental organizations, and descendants of great sages. See BELL, *supra* note 23, at 180.

84. The word “Confucianism” was originally invented in Europe in the eighteenth century and refers to the teachings of a number of Chinese scholars, as well as to social practices and values. See Tu Wei-ming, *The Confucian Tradition in Chinese History*, in HERITAGE OF CHINA: CONTEMPORARY PERSPECTIVES ON CHINESE CIVILIZATION 112 (Paul S. Ropp ed., 1990).

85. For instance, during the Cultural Revolution, Confucianism was appropriated for both radical leftist and moderate causes. See MERLE GOLDMAN, CHINA’S INTELLECTUALS: ADVISE AND DISSENT 167 (1981). For contemporary criticism, see *infra* note 128 and accompanying text.

86. See Biography of Xia Yong, CHINA VITAE, http://www.chinavitae.com/biography/Xia_Yong/ 2627 (last visited Oct. 17, 2013). See also LEGISLATIVE AFFAIRS OFFICE OF THE STATE COUNCIL P.R. CHINA, <http://www.chinalaw.gov.cn/article/jgznl/> (last visited Oct. 17, 2013).

87. See XIA YONG, PHILOSOPHY, *supra* note 13, at Introduction 11–12, 50. On New Confucianism, see Richard Madsen, *Confucianism: Ethical Uniformity and Diversity*, in THE GLOBALIZATION OF ETHICS: RELIGIOUS AND SECULAR PERSPECTIVES 117, 120 (William M. Sullivan & Will Kymlicka eds., 2007).

88. See Xia Yong, *Fazhi Shi Shenme: Yuanyuan, Guijie Yu Jiazhi [What is the Rule of Law? Sources, Precepts, and Values]*, in FAZHI YU 21 SHIJI, *supra* note 32, at 40, 51–58.

liberalism and socialism.⁸⁹ This theoretical project is so ambivalent—or so progressive—that it cannot be easily described as liberal or conservative or captured by any other shorthand.

Professor Xia sees Confucianism as a means to remedy China's "crisis of morality."⁹⁰ Xia maintains that this crisis is comparable to (but also different from) the crisis of Western moral thought that Alasdair MacIntyre identified in his seminal *After Virtue*.⁹¹ MacIntyre famously argued that the Western language of morality was in a state of grave disorder because it had lost one of its fundamental components: the notion of *telos*, or the "true end" of the development of man.⁹² The right course of action, for MacIntyre, was to return to Aristotelian virtue ethics.⁹³ Instead of seeking universally valid ethical norms in vain, people should attempt to obtain the goods that are internal to particular human practices.⁹⁴ In Xia's mind, Confucian virtues can occupy a similar role in reestablishing civic mindedness in the presently chaotic Chinese value system.⁹⁵ However, instead of the Aristotelian virtues, the Chinese ought to aspire to Confucian "morality" (*de*), "benevolence" (*ren*), "righteousness" (*yi*), "propriety" (*li*), "wisdom" (*zhi*), "fidelity" (*xin*), "loyalty" (*zhong*), and "kindness and forgiveness" (*shu*).⁹⁶

89. For discussion on Xia Yong, see STEPHEN C. ANGLE, HUMAN RIGHTS AND CHINESE THOUGHT: A CROSS-CULTURAL INQUIRY 231–33 (2002); Peerenboom, *Let One Hundred Flowers Bloom*, *supra* note 1, at 488 (2002).

90. See XIA YONG, PHILOSOPHY, *supra* note 13, at 127.

91. See *id.*

92. See ALASDAIR MACINTYRE, *AFTER VIRTUE* 1–3 (3d ed. 2010).

93. *Id.* at 118, 257.

94. By "human practices," MacIntyre meant "any coherent and complex form of socially established cooperative human activity through which goods internal to that form of activity are realized in the course of trying to achieve those standards of excellence which are appropriate to, and partially definitive of, that form, of activity." *Id.* at 187. Examples of such practices include the game of football, farming, architecture and enquiries of physics, chemistry and biology. See *id.* Western virtue ethics, in general, was a response to the perceived failure of law-based and utilitarian conceptions of ethics. Stanford Encyclopedia of Philosophy provides the following explanation for these three approaches to normative ethics:

Suppose it is obvious that someone in need should be helped. A utilitarian will point to the fact that the consequences of doing so will maximize well-being, a deontologist to the fact that, in doing so the agent will be acting in accordance with a moral rule such as 'Do unto others as you would be done by' and a virtue ethicist to the fact that helping the person would be charitable or benevolent.

Rosalind Hursthouse, *Virtue Ethics*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2012), available at <http://plato.stanford.edu/archives/sum2012/entries/ethics-virtue/>. For a seminal article, see G.E.M. Anscombe, *Modern Moral Philosophy*, 33 PHIL. 1 (1958).

95. See XIA YONG, PHILOSOPHY, *supra* note 13, at 126–28.

96. *Id.* at 50.

Xia Yong's New Confucianism owes much to Western virtue ethics, but it is also distinguishable from them, in particular, in its emphasis on the virtue of harmony.⁹⁷ Defined in contrast to Enlightenment values, New Confucianism is "neither secular nor anthropocentric," but "seeks harmony with nature and mutuality with Heaven."⁹⁸ In contrast to some strands of liberalism,⁹⁹ New Confucianism prescribes certain specific conceptions of the good life, such as filial piety and familial relationships.¹⁰⁰ The New Confucian perspective is often self-consciously holistic: some New Confucians make a point of rejecting the liberal distinction between the public and the private.¹⁰¹ Some New Confucians also imply a hierarchy of moral goodness that is alien to the liberal conception of morality. Contemporary versions of Confucianism have largely democratized the concept of the morally superior persons (*junzi*),¹⁰² but like MacIntyre's virtue ethics, still accept the notion that experience gives rise to ethical superiority.¹⁰³ Like MacIntyre, some New Confucians also recognize that morality is relational and that it is possible to depart from impersonal standards of justice to mark special relationships.¹⁰⁴ Finally, while New Confucianism typically opposes liberal universalism, especially as regards individualistic or "egoistic" rights conceptions,¹⁰⁵ some of its advocates promote Confucian

97. MacIntyre rejects the notion of earlier Western virtue ethics that virtues must be united. It is easy to see how the concept of human practices can give rise to conflicting virtues. See MACINTYRE, *supra* note 92, at 179.

98. See Tu Wei-ming, Tasan Lecture 4: Confucian Humanism as a Spiritual Resource for Global Ethics (Nov. 2001) (transcript available at <http://web.archive.org/web/20090621233833/http://www.tuweiming.com/lecture.8.html>, accessed by searching for <http://tuweiming.com/lecture.8.html> in the Internet Archive Index).

99. In Ronald Dworkin's view, the genuinely liberal conception of freedom, independence, and equality does not presuppose any conceptions of the good life. See RONALD DWORKIN, *A MATTER OF PRINCIPLE* 191–92 (1985).

100. See Joseph Chan, *On the Legitimacy of Confucian Constitutionalism*, in JIANG QING, *A CONFUCIAN CONSTITUTIONAL ORDER: HOW CHINA'S ANCIENT PAST CAN SHAPE ITS POLITICAL FUTURE* 99, 102 (Daniel A. Bell & Ruiping Fan eds., Edmund Ryden trans., 2012).

101. See Richard Madsen, *Confucianism: Ethical Uniformity and Diversity*, in *THE GLOBALIZATION OF ETHICS*, *supra* note 87, at 117, 120.

102. *Id.* at 124.

103. *Id.* at 125. See also Bryan W. Van Norden, *Virtue Ethics and Confucianism*, in *COMPARATIVE APPROACHES TO CHINESE PHILOSOPHY* 99, 114–15 (Bo Mou ed., 2003); XIA YONG, *PHILOSOPHY*, *supra* note 13, at 70.

104. See BELL, *supra* note 23, at 175–81.

105. Xia Yong, for instance, argues for the importance of accounting for the "national conditions and character of the people." Xia Yong, *Human Rights*, *supra* note 13, at 87. As I have already pointed out, sometimes this argument is made through Confucius's adage, according to which "a gentleman seeks harmony but not conformity." CONFUCIUS, *ANALECTS* verse 13.23, *translated in* SIMON LEYS, *THE ANALECTS OF CONFUCIUS* 64 (1997). For discussion, see also ANGLE, *supra* note 89, at 233.

cosmological universalism—the “Great Harmony” (*Datong*)—which is supposedly based on the interests of all-under-heaven (*Tianxia*).¹⁰⁶

In the same vein as Western virtue ethicists, but in contrast to critical Chinese avant-garde scholars, Xia Yong does not dispute the intrinsic value of the rule of law and human rights. Instead, he criticizes those Chinese scholars who have accepted the “Orientalist” dogma about traditional China “not possessing the spirit of equality, freedom and democracy.”¹⁰⁷ Xia insists that “rights” (*quanli*) are not foreign to China, even though the modern Chinese language word for “right” did not appear in pre-modern Chinese texts.¹⁰⁸ Xia argues that under the traditional, pre-Qin concept of the “people” (*min*), people were a source of governmental legitimacy, and they had, “of course, the right to overthrow a tyranny.”¹⁰⁹ According to Xia, although it is possible to see this right as an ancient Chinese “civil right” (*minquan*), the exercise of this right was obstructed by the lack of clear procedural law.¹¹⁰ Xia also disagrees with the notion that Western civilization emphasized rights whereas Eastern civilization focused on duties. According to Xia, this view is wrongly used to advocate “Asian values” and the idea that duties precede rights.¹¹¹ Xia argues that communal duties have existed almost everywhere in the world, including the West.¹¹²

The general point of Xia Yong’s nuanced argument is that (pre-Qin dynasty) Confucian concepts and Western legal precepts may reinforce and transform one another in a positive way.¹¹³ His purpose is not to reject civil and political rights, and he explicitly states that Chinese civil rights should not be conceptualized as “collective rights.”¹¹⁴ Xia resorts to traditional authority to argue that the basis of civil rights ought to be the dignity, liberty, and equality of the people, rather than the interests of the government or the nation.¹¹⁵ In Xia’s view, rights promotion in modern China is an outcome of the development of Chinese culture rather than a

106. Xia Yong maintains that human rights build on “Great Harmony.” See XIA YONG, PHILOSOPHY, *supra* note 13, at 150.

107. *Id.* at 45.

108. Xia Yong defines a right as an entitlement of one subject against another regarding an interest, will, or a claim. *Id.* at 4.

109. *Id.* at 14.

110. *Id.* at 50.

111. *Id.* chapter 1 at 5.

112. *Id.* at 5–6.

113. *Id.* at 51, 163.

114. *Id.* at 49–50.

115. *Id.* at 51–52.

foreign transplant.¹¹⁶ Confucian imagery also enables Xia to frame civil rights reforms as an ongoing learning process, in which people gradually (and only gradually) learn to defend their freedoms. According to Xia, “we can no longer focus on the legitimacy of one right or one ethical or political value, but we must make use of Confucian thought and complement its weak points, and to strive to develop society’s foundations and operable civil law concepts, mechanism and processes.”¹¹⁷ The purpose of this project is, “on the one hand, to make civil rights (*minquan*) part of social practices, and on the other hand, to cultivate new attitudes on solidarity and social cooperation through the coordination of rights and obligations, thus manifesting the people’s nature and raising its virtues (*de*) to change prevailing habits and customs.”¹¹⁸ It is possible that the operative term in this mission statement is “operability.” At least to a certain extent, Xia seems to be sympathetic to the elitist notion of “the rule by virtue” (*dezhi*) and the idea that people’s ethical capacities determine their possibility to take part in public life.¹¹⁹

B. New Confucianism in Chinese Legal Academia

As explained above, Xia Yong presents Confucian conceptions as desirable virtues, which on the one hand help implement civil rights and other elements of the rule of law principle and, on the other hand, redefine these concepts. It is easy to see how the first goal can be furthered through the New Confucian discourse. The proposition that people were a source of legitimacy in ancient China can be used to justify contemporary democracy reforms, no matter how ahistorical this idea may be. Similarly, contemporary rights claims can be justified through traditionalist Confucian virtues, such as “benevolence.”¹²⁰ It is more difficult to find examples of New Confucianism redefining human rights or elements of the rule of law ideology. The virtue-based approach to rights may perhaps lead to the moderation of rights claims that are based on individual interests.¹²¹ One may perhaps also argue that the New Confucian concepts enable Chinese judges to become more sensitive to people’s traditional values (such as, relational ethics) and hence increase law’s social

116. *Id.* at 95–96.

117. *Id.* at 54.

118. *Id.*

119. *Id.* at 69–70, 75–76, 83–84 (according to Xia Yong, people have equal capacity to improve their virtue).

120. *Id.* at 137.

121. *Id.* at 78, 128.

relevance. However, it is also easy to see how New Confucian ethics, while laudable in certain contexts, can clash with values that Chinese jurists (including Professor Xia Yong) hold equally laudable, such as uniform and impersonal justice.¹²² Indeed, the very purpose of many legal rights, in China and elsewhere, is to protect people from relational ethics. As Daniel Bell has noted, Confucian rhetoric about family-like relationships between employers and employees has been used to undermine employee's interests.¹²³ Because Xia Yong privileges the notion of harmony, he is unwilling to address fundamental contradictions between different values within his own legal thought. Instead, he states that "from the point of practice, human rights and harmony are not only compatible but mutually beneficial."¹²⁴

It can, of course, be argued that value conflicts are characteristically a Western or "liberal" concept. Some scholars insist that an ethical theory which focuses on the "unity" of values postulates conflicts within and between rights and values, whereas an ethical theory that is based on the notion of "harmony" sees human rights as harmonious with one another and with other values.¹²⁵ Be that as it may, Xia Yong both promotes social harmony and believes that China should build a rule of law system, which he explicitly characterizes as being internally contradictory.¹²⁶ Rather than emerging from a coherent, harmonious ideology, the New Confucian elements of Xia Yong's legal thought seem self-consciously speculative. In a compilation of articles on jurisprudence published in 2010, Xia Yong presents the New Confucian civil rights theory as something that China "ought to have," not something that already exists.¹²⁷

This raises the controversial question whether "Confucian" adjudication can be realistically made into a flourishing practice in contemporary China. In the introduction to his landmark work *Native Resources*, neo-conservative Professor Zhu Suli argues that attempts to base contemporary political ideology on Confucian concepts, such as "benevolence" (*ren*) and "kindness and forgiveness" (*shu*), are ultimately

122. Alasdair MacIntyre makes a similar point in MACINTYRE, *supra* note 92, at 192.

123. See BELL, *supra* note 23, at 175–81.

124. See XIA YONG, PHILOSOPHY, *supra* note 13, at 160.

125. Professor Stephen Angle has argued that Xia Yong's legal thought ought to be understood in the context of the already-mentioned distinction between harmony and unity: "Unity demands sameness of thoughts and interests; harmony does not." ANGLE, *supra* note 89, at 235.

126. Xia Yong, *Fazhi Shi Shenme: Yuanyuan, Guijie Yu Jiazhi [What Is the Rule of Law? Sources, Precepts, and Values]*, in FAZHI YU 21 SHIJI, *supra* note 32, at 65–66.

127. Xia Yong, *Zhongguo de Min Ben Sixiang [China's People-Based Ideology]*, in FALI JIANGYI: GUANYU FALU DE DAOLI YU XUEWEN (XIA) [LECTURES ON JURISPRUDENCE: KNOWLEDGE AND WISDOM ABOUT THE LAW: VOLUME II] 881 (2010).

derived from Western theoretical trends.¹²⁸ According to Zhu, attempts to find Confucian roots for essentially Western concepts are a sign of Chinese legal scholars' "lack of self-confidence."¹²⁹ Zhu does not name particular scholars, but Xia Yong's infatuation with human rights and Western virtue ethics obviously fits this description. Professor Zhu claims that faux traditionalism is a symptom of Chinese legal scholars' continued "Ah Q mentality."¹³⁰ Zhu's remark refers to Lu Xun's novel, in which the protagonist, Ah Q, withdrew to self-deceptive fantasies of spiritual victories, instead of coming to terms with his real-life problems.¹³¹ Indeed, it seems that much of the New Confucian project can be reduced to "social" jurisprudence that has been an influential strand of legal thought globally since the early twentieth century. Holistic thinking, objections against individualism, focus on collective interests, and the conviction that one's own culture is more "social" and "harmonious" than other cultures, were once mainstream ideas in legal theory from continental Europe to Northern Africa.¹³² Like social jurists in other countries before him, Xia adheres to pragmatism and a materialist conception of reality and urges scholars to "seek truth from facts" (*shishi qiushi*).¹³³ Also Xia's focus on identity and rights is in line with the general patterns of globalization in legal thought.¹³⁴

From non-sympathetic Chinese liberal scholars' perspective, Xia Yong's New Confucian legal thought may appear as inconsequential or even as an apology for repressive policies. In the former sense, Xia's notion of harmony operates on such a high level of abstraction that he is able to explain the individualism and antagonism of Western rights conceptions as instances of cosmological harmony.¹³⁵ In the latter sense,

128. See ZHU SULI, NATIVE RESOURCES, *supra* note 18, at iii.

129. *Id.* at iv.

130. *Id.*

131. See LU XUN, THE TRUE STORY OF AH Q (1990).

132. See Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850–2000*, in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL, *supra* note 6, at 19, 46–50, 56–58.

133. See Xia Yong, *Shizilukou Hua Fazhi [The Rule of Law at the Crossroads]*, BIANYUAN SIXIANG [EDGE THINKING] 138, 142 (2008).

134. See Kennedy, *supra* note 132, at 66 (arguing that identity/rights discourse is the lingua franca of contemporary legal consciousness).

135. See XIA YONG, PHILOSOPHY, *supra* note 13, at 161. A liberal Chinese scholar may also argue that the balancing act between harmony and unity collapses into the familiar liberal contradiction between individualism and collectivism. In the New Confucian version of this dichotomy, unpermitted limitations of individualism are labeled as requests from "unity," whereas permitted forms of individualism are seen as being compatible with acceptable "harmony." *Mutatis mutandis*, unpermitted demands for collectivism are seen to arise from "unity," whereas permitted forms of collectivism are seen as being compatible with "harmony." According to MacIntyre, what is crucial about the "supposed opposition between individualism and collectivism . . . is that on which the contending

Xia Yong's New Confucian interventions seem to imply that "Chinese" civil rights are not quite the same as those in the West. At least to a certain extent, Professor Xia is a value-conservative and a nationalist. Instead of being concerned with the moral condition of *Tianxia*, Xia regrets the lost connection between the *Chinese* people and the *Chinese* traditional morality.¹³⁶ In a telling quote about the deterioration of the Chinese language as a result of Western influence and China's social upheavals, Xia insists that "protecting the purity of language is tantamount to protecting the purity of the culture and the dignity of the nation."¹³⁷ It is equally worrying for Chinese liberals that Xia stresses the negative aspects of international human rights advocacy and argues that human rights have been used as a pretext, "an excuse or a tool" in international politics.¹³⁸ However, at the same time, Xia's agenda overlaps with that of the Chinese liberals in many respects. In the introduction to the *Philosophy of Chinese Civil Rights*, Xia notes that the Chinese human rights thought has been "strengthened" as a result of participation by Chinese academics in the international human rights dialogue, and China's accession to international human rights treaties.¹³⁹ Moreover, in contrast to the critical avant-garde scholars, Xia argues that Western scholars engaged in criticism of the rule of law "watch the scenery standing on the second floor, whereas China has not yet completed building the bottom of the rule of law building."¹⁴⁰

The ultimate implications and possibilities of New Confucian legal thought in contemporary China remain, therefore, a heavily contested matter. Using Xia Yong's own terms, it can be argued that Chinese moral philosophy has suffered a similar, possibly irrevocable, catastrophe as Aristotelian ethics did in the West.¹⁴¹ From this perspective, New

parties agree, namely that there are only two alternative modes of social life open to us, one in which the free and arbitrary choices of individuals are sovereign and one in which the bureaucracy is sovereign, precisely so that it may limit the free and arbitrary choices of individuals." See MACINTYRE, *supra* note 92, at 35.

136. See XIA YONG, *PHILOSOPHY*, *supra* note 13, at 127.

137. *Id.* at 18. Such nationalism distinguishes Xia Yong from those New Confucians who emphasize the universal aspects of Confucianism. See Tu Weiming, *Tasan Lecture #1: The Ecological Turn in New Confucian Humanism* (Nov. 2001) (transcript available at <http://web.archive.org/web/20090105202625/http://www.tuweiming.com/lecture.5.html>, accessed by searching for <http://tuweiming.com/lecture.5.html> in the Internet Archive Index).

138. XIA YONG, *PHILOSOPHY*, *supra* note 13, at 14.

139. Xia Yong mentions his own his participation in the 1993 World Conference on Human Rights as part of this process. *Id.* at 13.

140. Xia Yong, *supra* note 133, at 141.

141. An analogous argument was famously put forth by Joseph Levenson in his seminal *Confucian China and Its Modern Fate*. Levenson totalized China into two equilibriums: traditional Confucian China and modern China. Between these two equilibriums was a radical epistemological break. Levenson argued that the upheavals in twentieth century China created a new intellectual

Confucian concepts are no less arbitrary and unjustified in the eyes of modern-day Chinese audiences than the conceptions of Western morality that have supposedly caused China's present crisis of morality. Indeed, the conception that each society and "era" has its own, sharply distinct form of ideology has been popular among Chinese intellectuals at least since the 1970s.¹⁴² Even if this statement is too far-reaching—it is certainly possible to argue that Chinese traditions continue to shape Chinese political thought¹⁴³—it may still be the case that New Confucian legal thought is unconvincing and inconsequential in the eyes of many Chinese legal scholars.

V. COMMUNITARIAN RULE OF LAW—AN OXYMORON?

A. *From Confucianism to Communitarianism*

As explained above, critical Chinese avant-garde scholars see the liberal rule of law ideology as a foreign tradition that has destroyed traditional Chinese social networks and value conceptions and, in combination with other modern influences, caused a "crisis of values" in China. An important line of critique in this form of scholarship situates the "subject" promoted by liberal and mainstream rule of law ideology into a particular Western-based worldview.¹⁴⁴ This argument coincides with, and partly emerges from, a form of communitarian critique against Western liberalism, which has been promoted by Professor Michael Sandel, among others.¹⁴⁵ According to Sandel, the problem with communitarianism is not "the relative weight of individual and communal claims, but the terms of relation between the right and the good."¹⁴⁶ Communitarians do not insist on the primacy of communal rights (say group rights), but instead argue

language rather than just new words to the Chinese vocabulary. In this new language, Confucianism turned from a living tradition to nostalgic traditionalism. See JOSEPH LEVENSON, *CONFUCIAN CHINA AND ITS MODERN FATE: VOLUME 1: THE PROBLEM OF INTELLECTUAL CONTINUITY* 156–57 (1958).

142. Xia Yong himself sees morality as part of the "grammar" of society. See XIA YONG, *PHILOSOPHY*, *supra* note 13, introduction at 12, 127. See also *infra* note 230.

143. Professor Stephen Angle, for instance, argues against both Levenson and MacIntyre that Chinese and Western traditions have existed in a dynamic and mutually supportive relationship. According to Angle, Chinese human rights concepts "have always drawn importantly on preexisting concepts and concerns." See ANGLE, *supra* note 89, at 143, 250, 253 (2002).

144. See WANG HUI, *supra* note 29, at 142, 153.

145. See Michael J. Sandel, *Political Liberalism*, 107 HARV. L. REV. 1765, 1766 (1994) (reviewing JOHN RAWLS, *POLITICAL LIBERALISM* (1993)). For the debate between communitarianism and liberalism, see STEPHEN MULHALL & ADAM SWIFT, *LIBERALS AND COMMUNITARIANS* (1992).

146. Sandel, *supra* note 145, at 1767. In his seminal *Liberalism and the Limits of Justice*, Sandel argued that John Rawls's *A Theory of Justice* was, in fact, a project of self-discovery of the liberal subject. See MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 131–32 (1982).

that the liberal project to establish formal procedural rights to arbitrate the selection of social goods must fail.¹⁴⁷

Communitarianism is essentially a project of self-discovery. Xia Yong also frames his project as an attempt to answer a question of self-knowledge.¹⁴⁸ However, as explained above, not all Chinese scholars find it plausible that pre-Qin Confucian concepts can define contemporary Chinese subjectivity. Instead of Confucian traditionalism, a number of Chinese legal scholars (who do not necessarily identify themselves as “communitarians”) have turned to legal pluralism in order to identify and protect a Chinese “self.”¹⁴⁹ One goal of this scholarship has been to increase the discretionary powers of local communities within the state system. Scholars have, for instance, examined traditional Chinese dispute resolution and prevention methods and their relevance to modern China.¹⁵⁰ These methods include not only mediation by community leaders and other third parties, but also the performance of certain rites (for instance, in the formation of marriage), which mobilize the community as witnesses and enforcers of the parties’ commitments.¹⁵¹ The argument is that legal pluralist perspectives help Chinese legal scholars to reconsider individual elements of contemporary rule of law ideology.¹⁵² A different question is whether communitarian legal thought or legal pluralist perspectives can give rise to a comprehensive ideology that could replace liberal legal thought. The answer to this question is not obvious, as the following analysis of Professor Gao Hongjun’s scholarship seeks to demonstrate.

147. Sandel, *supra* note 145, at 1767–68.

148. See XIA YONG, PHILOSOPHY, *supra* note 13, at 38.

149. A seminal text in this development was Professor Zhu Suli’s 1993 article on legal pluralism, in which he described the evasion of formal state law by local communities as potentially rational and reasonable. According to Zhu, greater attention to Chinese local customs could help resist harmful, Eurocentric rule of law ideals. The article was republished in ZHU SULI, NATIVE RESOURCES, *supra* note 18, at 59. Professor Fan Zhongxin of Hangzhou Normal University has promoted the “sinification of the rule of law.” Professor Fan envisions a Chinese legal system, which is tuned to the “national character, national manners, and national forms with which people are more familiar, and which can better understand the specific problems of the Chinese people.” Fan Zhongxin, *Fazhi Zhongguohua de Lishi Faxue Jinlu* [Legal Historical Approach to the Sinification of the Rule of Law], JIANCHA RIBAO [PROCURATORIAL DAILY] (Apr. 14, 2011), http://article.chinalawinfo.com/Article_Detail.asp?ArticleId=60364.

150. See Fan Zhongxin, *Jianquan de Jiufen Jiejue Jizhi Jueding Hexie Shehui: Chuantong Zhongguo Shehui Zhili Moshi Dui Women de Gishi* [The Contribution of Sound Dispute Resolution Methods to Harmonious Society: Inspiration from Traditional Chinese Methods of Social Control], BEIFANG FAXUE [NORTHERN L.] 138 (2007).

151. See Fan Zhongxin, *Jiufen Jiejue Shi Hexie Shehui de Di Yi Yaoyi: Guanyu Quan Fangwei Jiefen Moshi de Chubu Sikao* [Solution of Disputes Is an Essential Goal of Harmonious Society: Preliminary Thoughts on a Variety of Dispute Resolution Methods] HUBEI DAXUE XUEBAO [J. HUBEI U.] 45 (June 2008).

152. See ZHU SULI, NATIVE RESOURCES, *supra* note 18, at 60; Fan Zhongxin, *supra* note 149.

B. *The Communitarian Rule of Law Principle*

Professor Gao Hongjun, who teaches at Tsinghua University in Beijing, can best be placed at the liberal end of the scholarly avant-garde spectrum. Gao's theoretical ambitions mark him as an avant-garde scholar, but he does not promote himself as an intellectual revolutionary or a "post-modernist."¹⁵³ While Gao's works are widely cited, from Party journals to academic law reviews, he has not assumed as prominent a role in Chinese legal academia as Zhu Suli, He Weifang, and Xia Yong.¹⁵⁴ Nonetheless, Gao is one of the few Chinese legal scholars who is interested in examining alternatives to the mainstream and liberal rule of law principles.¹⁵⁵ Gao has also taken up the challenge of explicitly formulating a "communitarian rule of law" (*gongtongti fazhi*) principle, which sets him apart from most avant-garde scholars in China and in the West.¹⁵⁶

Gao begins his book *The Emergence of the Modern Rule of Law* by lamenting at the fact that Chinese legal thought has become resentful of grand theory and, thus, lost the view of the overall direction of Chinese law.¹⁵⁷ In contrast to this trend, Gao sets out to renew the rule of law principle at the highest level of abstraction. Gao describes the rule of law in Weberian terms as a product of increasing rationalization and secularization.¹⁵⁸ Like the vast majority of Chinese scholars, Gao believes in the progressive nature of these processes. At the same time, Gao does not subscribe to an uncritically positive view of the rule of law principle. Gao believes that the same social forces that brought about the rule of law also had negative effects on society.¹⁵⁹ He argues that the modern rule of law ideology reflects a form of "efficiency fetishism."¹⁶⁰ Elements of the rule of law, such as formal equality and legal regulation, increase

153. Stylistically, however, Gao does not fall squarely within the mainstream legal tradition either. See, e.g., Gao Hongjun, *Yuyan Yu Yuyan: Tian. De. Ren* [*Fables and Prophecies: Heaven. Earth. Man*], QINGHUA FAZHI LUNHENG [TSINGHUA J. RULE L.] 7 (Jan. 2010).

154. According to China Academic Journals Database, as of January 27, 2012, there were nearly 1300 articles referring to both Gao Hongjun and the rule of law (法治) as well as 50 references to Gao's book *The Emergence of the Modern Rule of Law*.

155. Gao has conducted theoretically ambitious comparative law research on American and Islamic law. See Gao Hongjun, *Meiguo Falü Wenhua de Ziyou Ji Qi Juxian* [*Freedom and Its Limits in the American Legal Culture*], QINGHUA FAXUE [TSINGHUA L.] 87 (Jan. 2009); *Chongtu Yu Jueze: Yisilan Shijie Falü Xiandaihua* [*Conflict and Choice: The Islamic World and the Modernization of Law*], BIIAO FA YANJIU [J. COMP. L.] 1 (Apr. 2001).

156. See GAO HONGJUN, *supra* note 13, at 7.

157. *Id.* at 4.

158. *Id.* at 2.

159. *Id.* at 264–72.

160. *Id.* at 287.

economic efficiency.¹⁶¹ However, at the same time, these elements have “incited a boundless desire for consumption, led to environmental degradation, exacerbated the meaning of internal life, implicitly increased wealth differences, and caused vulnerable groups to be neglected.”¹⁶² Gao concedes that the rule of law has provided protection against authoritarian rule, but he also argues that it has removed the traditional barriers against egoism.¹⁶³ Like the above-mentioned critical avant-garde scholars, Gao believes that the atomistic “individualism” of the rule of law ideology has led to the neglect of communal values.¹⁶⁴ In particular, he argues that the conception of individual human rights and property rights have obstructed non-utilitarian interpersonal exchanges and cooperation.¹⁶⁵ Gao describes the consequences of such individualism through four-character phrases, which can be translated as follows: “loneliness without companion; isolation without support; lonesome suffering without assistance; solitude without help.”¹⁶⁶

To solve these problems, Gao embarks on an ambitious effort to “analyze and integrate the basic values, structures and relations of modern society.”¹⁶⁷ He presents a far-reaching social program, which ultimately leads to the “communitarian rule of law.”¹⁶⁸ Gao’s program is centered on strengthening non-utilitarian social relations that are based on shared beliefs, affections, and interests.¹⁶⁹ Gao advocates the establishment of autonomous communities, which are based on voluntary and open membership, mutual cooperation, equal status between the members, participatory decision making, and the possibility to criticize all decisions.¹⁷⁰ Voluntary communities are needed, according to Gao, at all levels of human interaction from environmental organizations to international organizations.¹⁷¹ Gao admits that in the past large voluntary communities have not been able to eradicate hierarchies between their members or avoid bureaucratization.¹⁷² However, he believes that the advancements in information technology will solve these problems and

161. *Id.* at 285–86.

162. *Id.* at 288–89.

163. *Id.* at 292.

164. *Id.* at 293.

165. *Id.*

166. *Id.* at 292.

167. *Id.* at 284.

168. *Id.* at 315.

169. *Id.* at 307–08.

170. *Id.* at 309.

171. *Id.* at 310.

172. *Id.* at 319–20.

make it possible to establish “voluntary associations, in which oppositions between rulers and subjects, and orders and obedience will no longer exist.”¹⁷³ Ideally, these voluntary organizations will take the form of economic units, and enable their members to earn their living while pursuing an interest or a hobby.¹⁷⁴ Failing this, a social security system should be established to provide basic living conditions for everybody and to free people from utilitarian necessities.¹⁷⁵ Gao believes that efficiency gains will ultimately enable those members of society who actually have to produce goods to spend more time in non-utilitarian activities.¹⁷⁶

In the voluntary communities envisioned by Gao, each member is both a legislator and a rule follower.¹⁷⁷ Members discuss rules openly, and, if they cannot reach compromise about them, always have the option to walk away from the community.¹⁷⁸ Disputes between members of the communities are solved primarily through mediation, negotiation, and arbitration.¹⁷⁹ For disputes that cannot be solved through voluntary means, there will exist state-run judicial institutions.¹⁸⁰ Gao acknowledges that the multiplication of voluntary communities leads to increasing pluralism and increasing conflicts between such communities. Under the communitarian approach such conflicts are resolved not through adjudication but “through discussions and demonstrations between the voluntary communities and the communities and the State, which will lead to a consensus or at least a reasonable compromise.”¹⁸¹ The communitarian rule of law does not, according to Gao, seek absolute certainty of formal law, but “situational certainty,” embodying the “grammar of everyday life.”¹⁸² In these voluntary communities, “rules are no longer marked by a high degree of technical ‘jargon’ but reflect the words in which the communities’ members understand their own lives.”¹⁸³ Gao makes use of Confucius’s *Analects* to argue that in this communitarian utopia people and communities are “harmonious but different” (*he er butong*).¹⁸⁴

173. *Id.* at 313.

174. *Id.* at 312.

175. *Id.* at 314–15.

176. *Id.*

177. *Id.* at 316.

178. *Id.* at 310.

179. *Id.* at 316.

180. *Id.*

181. *Id.* at 314.

182. *Id.* at 317.

183. *Id.* at 316.

184. *Id.* at 322.

Gao presents this vision as highly speculative. Gao argues that the efficiency fetish and atomistic individualism can be remedied only by breaking away from the slavery of money, which he acknowledges is not a realistic prospect.¹⁸⁵ Gao also admits that the feasibility of the communitarian model rests on technological improvements, which enable people to abstain from utilitarian pursuits.¹⁸⁶ Gao finally asserts that it would be “obviously unrealistic to abandon the rule of law in favor of other governance models.”¹⁸⁷ Like other avant-garde projects, Gao’s communitarian rule of law turns out to be a distant vision.

For scholars who do not share Gao’s communitarian sensibilities, his rule of law model offers ample fodder for critique. From the critical avant-garde perspective, Gao’s vision of an ideal community member—a legislator and a rule follower who enjoys equal status with all the other members of the community—seems as unrealistic a description of human nature as the “liberal self” that the communitarians criticize. For the liberals, it is hard to see how the voluntariness of the communities and the freedom of movement between them can be guaranteed without an extensive system of liberal civil rights. If the communities are truly voluntary, it should be possible to establish political parties that advocate, for instance, transition to a liberal democracy or conservative fiscal policies based on private ownership. A liberal can also argue that the need to mediate between the plurality of political viewpoints, communal values, religious freedoms, and financial interests brings Gao’s communitarianism back to the starting point of political liberalism. For the liberal, the discovery of the non-liberal “self,” outlined by Professor Gao, cannot be obtained without the abstract rights of the liberal rule of law ideology. Indeed, the concrete solutions promoted by Gao Hongjun are distinctively liberal. Gao laments the fact that the Chinese judiciary lacks independence and that it cannot limit the powers of the National People’s Congress (NPC), let alone the government,¹⁸⁸ and advocates “truly free and open elections of [NPC] delegates.”¹⁸⁹

185. *Id.* at 294–96.

186. *Id.* at 315.

187. *Id.* at 284.

188. *Id.* at 335.

189. *Id.*

VI. ANALYSIS

A. *Taking Stock of Avant-Garde Proposals*

Given their ambitious goals, the actual claims made by the above-described Chinese avant-garde scholars about a desirable non-liberal governance ideology and concrete legal institutions are strikingly modest. This is most obviously the case with the critical strand of avant-garde scholarship. Professor Deng Zhenglai, who set out to look for an “ideal image of Chinese law” in *Whither Chinese Law*, not only did not present such an image, but ended up stating that the quest for it reflected an “essentialist tendency” which he opposed.¹⁹⁰ Professor Deng framed his critique as only the beginning of a long process of research and reflection.¹⁹¹ Similarly, Professor Wang Hui’s far-reaching critique of modernity turns out to be only “a point of departure for discussion.”¹⁹² Wang acknowledges that “the critiques of modernity . . . are one of the most important characteristics of Chinese modernity.”¹⁹³ Moreover, despite Professor Cui Zhiyuan’s explicit wish to “liberate” mankind, he almost mockingly praises “petty bourgeois socialism.” Cui supports China’s current system of land ownership, shareholding cooperatives, and the trading of shares of the state-owned enterprises on the stock exchange.¹⁹⁴

The ideological and institutional proposals of Xia Yong and Gao Hongjun are more visionary, but they also fall short of articulating a workable alternative to the liberal rule of law principle. Gao Hongjun sets out to advance communitarian values instead of liberal “individualism,” but he ends up reaffirming individual autonomy and freedom in a way that arguably necessitates the very structures of political liberalism that he criticizes. Gao’s proposal is premised on liberal institutions such as the freedoms of speech, association, and political participation, and he envisions the judicial resolution of disputes as the ultimate remedy for dispute resolution.¹⁹⁵ Gao, it appears, is either too realistic or too committed to liberal values to abandon them in favor of more radical solutions, which he initially sets out to provide.¹⁹⁶

190. See DENG, *WHITHER CHINESE LAW*, *supra* note 1, at 9, 261.

191. *Id.* at 260.

192. See WANG HUI, *supra* note 29, at 66.

193. *Id.* at 66, 79.

194. See Cui Zhiyuan, *supra* note 12, at 157.

195. See GAO HONGJUN, *supra* note 13, at 309–10, 316.

196. The contrast is stark compared to the viewpoints presented both in China and elsewhere in

Xia Yong, on the other hand, makes far-reaching statements about the relevance of pre-Qin dynasty concepts to contemporary China, but it is questionable whether these statements are meaningful in contemporary China and, to the extent they are, whether they are politically desirable.¹⁹⁷ Moreover, Xia is too sophisticated and nuanced a scholar to discard the liberal rule of law principle. Xia is hostile toward liberal political thought, but sees the rule of law, human rights, and “democracy” (but perhaps not “multiparty democracy”) as necessary first steps for China’s developmental process.¹⁹⁸ Indeed, many New Confucian scholars acknowledge the central role of liberal political thought in contemporary societies. For instance, Professor Tu Weiming, the already mentioned New Confucian scholar, acknowledges that the “possibility of a radically different ethic or a new value system . . . is neither realistic nor authentic.”¹⁹⁹ Tu explains the New Confucians’ close proximity to liberalism as a necessary part of a learning process. Like the traditional Chinese character for the “sage” (聖), which “consists of both ear and mouth radicals,” Confucian sage’s “wisdom is nurtured by the art of listening and expressed through verbal communication.”²⁰⁰ Also in Xia Yong’s scholarship New Confucianism turns out to be a distant, and at present loosely articulated, goal, rather than something that exists today as a concrete alternative to the liberal rule of law ideology.

B. Ideological Repression and Avant-Garde Scholarship

The apparent failure of the above-described avant-garde scholarship to come up with credible alternatives to the liberal rule of law ideology is probably due to reasons more fundamental than China’s autocratic state. Tu Weiming, for instance, moved to Taiwan at an early age and made his career as a tenured professor in the United States. He has thus most likely been impervious to the influence of Chinese politics.²⁰¹ This suggests that the imagination of avant-garde scholars is limited by something other than

the 1970s. See Victor H. Li, *The Role of Law in Communist China*, 44 CHINA Q. 66, 73–74 (1970).

197. *Id.* at 127.

198. See Xia Yong, *supra* note 126, at 65; XIA YONG, PHILOSOPHY, *supra* note 13, at 9.

199. See Tu Weiming, *Beyond the Enlightenment Mentality*, in CONFUCIANISM AND ECOLOGY: THE INTERRELATION OF HEAVEN, EARTH, AND HUMANS 3, 5 (Mary Evelyn Tucker & John Berthrong eds., 1998).

200. See Tu Weiming, *Confucian Humanism as a Spiritual Resource for Global Ethics*, 16 PEACE & CONFLICT STUD. 1, 8 (2009).

201. For biographical information regarding Tu Wei-ming, see TU WEIMING & DAISAKU IKEDA, NEW HORIZONS IN EASTERN HUMANISM: BUDDHISM, CONFUCIANISM AND THE QUEST FOR GLOBAL PEACE 1–31 (2011).

crude political force. In any event, it is difficult to ascertain what counts as “political influence” in contemporary Chinese legal academia. The existence of political influence itself is a taboo in China, and there are few first-hand textual accounts of it.²⁰² Chinese academics are reportedly pressured politically and sometimes forced out of office for political reasons.²⁰³ When present, political influence most likely takes the form of self-censorship rather than overt coercion. As a consequence, it is difficult for an outsider to tell when the opinion of an individual scholar is sincere and when it is the result of self-censorship. This is, for instance, the case with statements by Chinese legal scholars about China’s democratic reforms. Vague formulations about democratic reforms may be carefully balanced attempts to nudge the reform process toward a multiparty democracy, but they may also reflect genuinely held ambivalent attitudes about China’s optimal development strategies.²⁰⁴ Moreover, it is most likely naive to assume that there is a single knowable intention behind avant-garde legal theory or any other complex text. At some point in the future, Chinese law professors may well be tempted to reassess the sincerity of their present scholarly work. Today’s ambivalent legal scholarship will offer ample opportunity for such re-characterizations.

Nonetheless, it also seems possible to conclude that the autocratic nature of China’s political system has discouraged scholars from freely engaging in path-breaking ideological debates. The most visible symptoms of political repression in Chinese legal academia are political taboo concepts and euphemisms that circumvent these taboos. The concept of “constitutional democracy” (*xianzheng minzhu*), for instance, is widely understood as a euphemism for multiparty democracy, a politically

202. For some suggestive references, see LIANG ZHIPING, ZAI BIANYUAN WAI SIKAO [THINKING OUTSIDE THE MARGINS] 260 (2009); GAO HONGJUN, *supra* note 13, at 4. For space to dissent within Chinese public discourse, see Gloria Davies, *Homo Dissensum Significans, or The Perils of Taking a Stand in China* 29 SOC. TEXT 29 (2012).

203. For recent reports of political pressure in Chinese academia, see Lara Farrar, *China Bans 7 Topics in University Classrooms*, CHRON. HIGHER EDUC. (May 20, 2013), <http://chronicle.com/article/China-Bans-7-Topics-in/139407/?key=Gm52dARjaXNEZyxnNjICyDpTYXE6NExxMnJJYnomblFREg%3D%3D>; Lara Farrar, *New Generation of Faculty Challenges China's 'Ideology' Courses*, CHRON. HIGHER EDUC. (June 24, 2013), <http://chronicle.com/article/New-Generation-of-Faculty/139963/>; Jane Perlez, *China Is Said to Be Holding a Professor Based in Japan*, N.Y. TIMES (Oct. 1, 2013), http://www.nytimes.com/2013/10/02/world/asia/china-is-said-to-be-holding-professor-over-his-activities-in-japan.html?_r=0; Chris Buckley, *Outspoken Chinese Professor Says He Was Dismissed*, N.Y. TIMES (Oct. 19, 2013), <http://www.nytimes.com/2013/10/20/world/asia/xia-yeliang-an-outspoken-chinese-professor-says-he-has-been-dismissed.html>.

204. See Xin Chunying, *supra* note 33, at 89 (arguing that in order to implement the will of the people in all aspects of the management of the country, government and public officials should be elected; the free expression of voters’ will requires improved electoral law and related regulations).

sensitive concept.²⁰⁵ The phrase “constitutional democracy” is sufficiently vague to allow plausible deniability for the promoters of multiparty democracy, even if the liberal implications of the phrase are commonly known.²⁰⁶ Similarly, today “judicial independence” (*sifa duli*) is a risqué concept marking the division of powers between the state and the judiciary, whereas the “independence of adjudication” (*shenpan duli*) is a safer way to talk about judicial independence.²⁰⁷ Political taboos have presumably deterred some scholars from entering ideological debates and made it more difficult for scholars already in that field to discuss alternatives to liberal and socialist political thought. Ironically, the state’s ideological repression has made it more difficult for Chinese scholars to articulate credible alternatives to the liberal rule of law ideology.

However, even if ideological repression may have affected Chinese legal scholarship on a general level, its influence on anti-liberal avant-garde scholarship has been less obvious. Avant-garde scholars do not promote liberal political institutions unequivocally, and hence have less use for euphemistic terms that are normally telltale signs of politically sensitive ideas. As outspoken critics of conventional socialism, avant-garde scholars also see no need to reproduce political slogans such as “the socialist rule of law conception.” The fact that Chinese avant-garde scholarship has been produced under politically repressive conditions can be inferred, if at all, from double standards that at times seem to affect the avant-garde texts. For instance, Professor Wang Hui’s social critique loses much of its sharpness when he discusses the Communist Party. Wang is concerned about the Party’s ability to keep itself distinct from “the interest of market society.”²⁰⁸ The disconnect between the Party and the economy, according to Wang, has helped the Party to “express the will of society

205. See Feng Chongyi, *The Chinese Liberal Camp in Post-4 June China*, in *THE IMPACT OF CHINA’S 1989 TIANANMEN MASSACRE* 66, 81 n.2 (Jean Philippe Béja ed., 2011).

206. *Id.* The concept “constitutional democracy” (*xianzheng minzhu*) does not appear in the 2004 Chinese Academy of Social Sciences compilation on the rule of law articles cited *supra* note 32, nor does the CCP refer to it in its textbook on the socialist rule of law principle. See *THE SOCIALIST RULE OF LAW PRINCIPLE*, *supra* note 31. On the other hand, the liberal professor He Weifang uses the concept in an op-ed piece. See He Weifang, *Minzhu Xianzheng Chuangzao Heping Yu Fanrong [Constitutional Democracy Brings About Peace and Prosperity]*, *CAIJING* (Jan. 30, 2013), http://blog.caijing.com.cn/expert_article-151302-14405.shtml.

207. According to Professor He Weifang, in Mainland China the term *sifa duli* signifies more extensive judicial independence than the term *shenpan duli*. See He Weifang & Su Yeong-Chin, *Sifa Duli: Yi Chang Mei You Zhongjie de Gemin [Judicial Independence: A Revolution Without an End]*, *QUÁNHÉNG ZÁZHÌ [THINK MAG.]* (Nov. 2006), http://article.chinalawinfo.com/Article_Detail.asp?ArticleID=35129.

208. See WANG HUI, *supra* note 29, at xxxi.

with relative independence and ‘neutrality.’”²⁰⁹ Although Wang places the word “neutrality” within quotation marks, the notion that a political organization could be a neutral outlet of the “people’s will” is not in line with Wang’s otherwise sophisticated scholarship, which seeks to question claims to neutrality.²¹⁰ If one accepts the absence of evidence as evidence of absence, similar double standards can be seen to affect many avant-garde texts. Deng Zhenglai’s and Cui Zhiyuan’s critique of essentialism and the modernization paradigm would seem to call to question the very *raison d’être* of the Chinese Communist Party, whereas New Confucian and communitarian scholarship would benefit from a frank analysis of the Party’s role in the destruction of the values promoted in these strands of scholarship.

C. Paradoxes of Ideological Renewal

Despite the fact that ideological debates are politically sensitive in China, being associated with avant-garde scholarship has certain upsides for Chinese scholars. Avant-garde scholars not only get a shot at historical prominence as potential reformers of Chinese legal and political thought, but they can also benefit from near instant fame in today’s academia. Ideological alternatives to liberalism and “socialism with Chinese characteristics” are so rare in China that, to use a Chinese saying, scholars “flock to them like ducks” (*qu zhi ruo wu*). For instance, a proposal for a “consultative rule of law regime” by Professor Pan Wei has generated a wealth of commentary in China and elsewhere.²¹¹ The works of Xia Yong, Cui Zhiyuan, and Deng Zhenglai have been widely commented on in China and also noted internationally.²¹² However, the price for their audacity to imagine new ideological alternatives can be steep. As one Western critic of liberalism characterized the problem: “I don’t see myself in the business of designing an alternative social order. People who do that

209. *Id.*

210. *Id.* at xxiii–xxiv.

211. Professor Pan Wei describes the rule of law as a first step in an elite-led liberalization process. Pan Wei’s consultative rule of law consists of: (i) “a neutral civil service system;” (ii) “an autonomous judicial system;” (iii) “extensive social consultation institutions;” (iv) “an independent anti-corruption system;” (v) “an independent auditing system;” and (vi) “the freedoms of speech, press, assembly and association.” Pan Wei, *Toward a Consultative Rule of Law Regime in China*, in *DEBATING POLITICAL REFORM IN CHINA: RULE OF LAW VS. DEMOCRATIZATION* 3, 32–35 (Suisheng Zhao ed., 2006). For commentary, see articles by Suisheng Zhao, Randall Peerenboom, Larry Diamond, Edward Friedman, and Gunter Schubert in the same compilation. For another thoroughly discussed text on democracy, see YU KEPING, *DEMOCRACY IS A GOOD THING: ESSAYS ON POLITICS, SOCIETY, AND CULTURE IN CONTEMPORARY CHINA* (2009).

212. For Xia Yong, see *ANGLE*, *supra* note 89, at 231–33; for Zhu Suli, see Upham, *supra* note 2.

always end up making fools of themselves.”²¹³ Avant-garde scholarship is a balancing act between dreaming up ideological and institutional visions and trying not to stray too far from what seems possible. The result of this practice is the kind of tentative and self-reflective scholarship that this article has described.

Avant-garde scholars hope, of course, that their efforts generate ideological hybrids that will one day consolidate into true alternatives to the liberal rule of law ideology.²¹⁴ Some avant-garde projects may have already been politically effective. Xia Yong's texts have possibly contributed to the New Confucian themes that emerged in China's official state ideology during the 2000s. Today the Party teaches its law enforcement officials to lead through example and persuasion, rather than through strict law enforcement alone.²¹⁵ It is also true that neo-conservative legal thought has become an intellectual force on Chinese law school campuses. Yet at the same time, avant-garde scholarship itself provides analytical tools that render its project dubious.²¹⁶ In addition to the “false necessities” arguments, which seek to demonstrate that ideological boundaries are illusory,²¹⁷ avant-garde scholarship suggests that the modest nature of institutional and ideological arguments of avant-garde scholars is a reflection of hidden and repressed social forces that may ultimately frustrate the avant-garde scholars' attempts.

Professor Wang Hui provides once more a means for demonstrating this point. As noted above, Wang makes a number of “false necessity” arguments about legal and political institutions. Wang, for instance, calls for “the liberation of the value of freedom itself from its imprisonment in a monolingual understanding of economic relations, and for placing this

213. See Ronald Beiner, *What Liberalism Means*, in *THE COMMUNITARIAN CHALLENGE TO LIBERALISM* 190, 203 (Ellen Paul et al. eds., 1996).

214. Tu Weiming also speaks of New Confucianism as “a first step toward the ‘creative zone’ envisioned by religious leaders and teachers of ethics.” See Tu Weiming, *supra* note 199, at 9.

215. See *THE SOCIALIST RULE OF LAW PRINCIPLE*, *supra* note 31, at 82.

216. Following Duncan Kennedy's taxonomy of social theoretical critique, it is possible to distinguish between two forms of critique that clash within avant-garde scholarship. These critical traditions consist of (i) the claim that certain institutions or ideological conceptions are “false necessities”; and (ii) the argument that a scholar's supposed freedom to imagine institutions and ideologies is already determined by the “hidden logic” of, say, Western or capitalist cultural hegemony. Duncan Kennedy, *A Semiotics of Critique*, 22 *CARDOZO L. REV.* 1147, 1185 (2001).

217. Roberto Unger defines false necessities as “the deep structures of institutions and belief established in the societies to which we belong.” ROBERTO UNGER, *FALSE NECESSITY: ANTI-NECESSITARIAN SOCIAL THEORY IN THE SERVICE OF RADICAL DEMOCRACY: VOLUME 1: OF POLITICS* xvii (2004). In Western societies these beliefs are false, according to Unger, because the “present organization of society in the rich North Atlantic democracies is not the natural and necessary content of some abstract category like capitalism or the regulated market economy.” *Id.*

concept in a broader framework of understanding.”²¹⁸ Wang argues that “freedom” should not be perceived merely in terms of capitalist negative rights—such as the right to contract labor—nor as an end in its own right, but in its developmental and social context.²¹⁹ Wang suggests that “the contract form of labor” has contributed to the “emergence of slave labor” in China’s coastal regions.²²⁰ In this respect, contract freedom is “one of today’s many pressing social problems.”²²¹

Wang is not satisfied with Western notions of democracy either, but wishes “to make democracy something more than an empty form, into something with substantive meaning.”²²² In summary, Wang suggests that the Western-style democracy promoted by Chinese liberals is a false necessity, and that there are better ways to facilitate people’s democratic participation.²²³ In addition to such false necessity arguments, Wang makes use of the notion that concealed forces direct the Chinese ideological imagination of Chinese scholars. One of Wang’s principal claims is that a process of “depoliticization” has rendered Western, and in particular American, institutions natural and uncontestable in China.²²⁴ Wang extends this point to the processes of “modernization,” which builds on the dichotomy between science and tradition, “the market principle,” “individual rights system,” and so forth.²²⁵

From Wang’s perspective, then, it is a small step to see denied or repressed social forces behind critical avant-garde scholars’ own institutional imagination. This would explain, for instance, why Wang’s views on civil and political rights appear so conventional in the Chinese context. Wang states that,

[I]n light of the extremely complex contemporary social situation, the struggle for freedom of speech and of the press must be located within the historical horizon of broader democratic demands, from which would arise a much tighter connection between the demands

218. See WANG HUI, *supra* note 29, at 40–41.

219. See *id.* at 41.

220. *Id.*

221. *Id.*

222. *Id.* at xxx.

223. See *id.* at 9 (arguing that the Chinese advocacy of “Western-style multi-party representative democracy” is an extension of the global dynamic toward the “depoliticization” of politics). For “depoliticization,” see *supra* note 217 and accompanying text.

224. WANG HUI, *supra* note 29, at 15–16.

225. *Id.* at 145–46.

for constitutional rights and demands by other social strata and social movements.²²⁶

These demands are, according to Wang, those of the “worker and peasant classes.” Wang notes that those intellectuals who discuss constitutional rights, such as the freedom of thought, speech, and assembly, “have not been able to connect these pursuits with those of other social strata, namely the struggle for survival and the right to development.”²²⁷ Here Wang is either making a good faith plea for an entirely new political institution (and a philosophy supporting it) of which there are few traces in his scholarship, or he is reproducing the conservative socialist argument, according to which civil and political rights are secondary to “people’s right to subsistence and development.”²²⁸

The suspicion that repressed social forces influence critical avant-garde scholarship is strengthened by the similarities between the critical avant-garde sensibility and the sensibilities of Western critical theory. With some creative license, it is possible to see the Chinese avant-garde scholars as specimens of the inward looking “aesthete,” which MacIntyre identified as one of the caricatures of Western ethical life. MacIntyre described the “aesthete” as a person who was most interested in his or her own immediate aesthetic experience rather than any managerial issue or cosmopolitan universalism.²²⁹ From this perspective, the ironic detachment of the Chinese post-modern critical scholar may be no less a cultural import as the social engineer and the Leninist revolutionary before him.

Similarly, the path-breaking aspects of Xia Yong’s work may be obvious to a sympathetic reader who is willing to interpret them against some new syntax. Yet to a skeptical (liberal or conservative) reader, Xia’s project takes a liberal turn when he justifies civil rights on the basis of traditional Confucian values, and a more conservative one when he wishes to limit such rights in favor of the “Great Harmony.” Again, Xia himself provides the intellectual means to arrive at both these interpretations. As already mentioned, Xia sees morality as part of the “grammar” of society: concepts that diverge from this morality are like “books made of words and phrases without grammar or syntax.”²³⁰ The question is whether the

226. *Id.* at 62.

227. *Id.* at 65.

228. See THE SOCIALIST RULE OF LAW PRINCIPLE, *supra* note 31, at 78.

229. MACINTYRE, *supra* note 92, at 49.

230. XIA YONG, PHILOSOPHY, *supra* note 13, at 127. Xia Yong receives the grammar-word metaphor from Mary-Ann Glendon, who distinguishes between the “deep structure” of society and the

concepts provided by Xia belong to, or are able to give rise to, a new living grammar.²³¹ A skeptical reader would argue that Xia's New Confucian concepts are no less ungrammatical in the eyes of modern-day Chinese audiences than the conceptions of Western morality that have supposedly caused China's present crisis of morality.²³²

Regardless of the Chinese avant-garde scholars' efforts at "systemic and theoretical innovation,"²³³ their scholarship may also have the actual effect of reinforcing the ideological status quo. In some ways this is the express aim of the avant-garde scholars. As discussed above, Cui Zhiyuan and Wang Hui explicitly support China's existing political and legal institutions from one-party rule to the communal ownership of agricultural land. Yet even when avant-garde scholars genuinely attempt to articulate new ideological and institutional conceptions, the argument remains that these innovations are misunderstood and misconstrued by their audience—to use a term of critical theory, "[t]he language speaks the speaker."²³⁴ Therefore, even if Wang's above-mentioned position on constitutional rights truly aims to "build a [new kind of] participatory economic and political framework,"²³⁵ Chinese audiences may construe it as an apology for the repression of civil and political rights. From this perspective, the avant-garde promise of theoretical innovation appears as window-dressing for maintaining the political status quo. In addition, even when the ideological and institutional proposals of avant-garde scholars are truly radical, their contemporaries have arguably no means of recognizing and appreciating them. Visions of the "Great Harmony" that unites humanity with nature and the cosmos, and of self-sufficient, democratic communities, may simply be too tentative to be taken seriously by the majority of Chinese intellectuals. A focus on repressed social forces leads to the conclusion that reform-minded scholars can only hope to create

rights vocabulary, which do not match. MARY-ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 110 (1991).

231. Ironically, Xia Yong summarizes his central thesis through self-composed classical Chinese. This is a highly unusual choice in Chinese legal scholarship. See XIA YONG, *PHILOSOPHY*, *supra* note 13, at 54.

232. An analogous argument was famously put forth by Joseph Levenson in his seminal *Confucian China and Its Modern Fate*. Levenson totalized China into two equilibriums: traditional Confucian China and modern China. Between these two equilibriums was a radical epistemological break. Levenson argued that the upheavals in twentieth century China had created a new intellectual language rather than just new words to the Chinese vocabulary. In this new language, Confucianism turned from a living tradition to nostalgic traditionalism. See LEVENSON, *supra* note 141, at 156–57. For criticism of this view, see *supra* note 143 and accompanying text.

233. See WANG HUI, *supra* note 29, at 65.

234. See Kennedy, *supra* note 216, at 1185.

235. See WANG HUI, *supra* note 29, at 65.

illusions of limitless possibilities; these possibilities cannot be articulated in words lest they be dismissed as unrealistic. This would explain the nostalgic nature of much avant-garde scholarship. If nothing else, extinct social institutions provide concrete examples of alternatives to contemporary liberal legal institutions.

Yet, to make the argument truly circular, nothing prevents the Chinese avant-garde scholars from employing the false necessities argument against the analysis above. Avant-garde scholarship allows for the argument that a sympathetic audience will find a way to make the ideological sprouts that avant-garde texts provide into a flourishing social practice. Why this has not yet occurred may be due to the personal shortcomings of individual legal scholars, whose ideological arguments have not been sufficiently plausible, and the timidity of their audiences. It is difficult to quantify the social effects of this argument, but given the alarm with which liberal Chinese scholars have treated avant-garde scholarship, the vision of limitless possibilities painted by Chinese avant-garde scholarship is tempting to a number of Chinese intellectuals. Still, and in contrast to Marxist, liberal, and developmentalist certainties, avant-garde scholarship offers no guarantees for such ideological renewal. From the perspective of avant-garde scholars, ideological change is both enabled and obstructed by contemporary ideological structures, whose beneficiaries and prisoners avant-garde scholars themselves are. To put this in another way, seeing ideological development as a paradoxical project is an inherent element of the avant-garde project.²³⁶ The position of the avant-garde scholars is to step back and make the paradoxes of liberalism, modernity, and their own scholarship explicit, hoping that this posture will eventually bring about positive ideological change.

VII. CONCLUSION

It has proved far more difficult for Chinese avant-garde scholars to articulate credible "contextual" alternatives to the liberal rule of law ideology than what the development common sense would suggest. It is possible, of course, to come up with examples of non-liberal institutional practices, such as the repressive *hukou* system. However, Chinese avant-

236. Professor Wang Hui is explicit about this. See *supra* note 193 and accompanying text. For acknowledgement of the same in American critical theory, see Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205, 212 (1979). For the same point in relation to the Asian values debate, see also Teemu Ruskola, *Where Is Asia? When Is Asia? Theorizing Comparative Law and International Law* 44 U.C. DAVIS L. REV. 879, 890-92 (2011).

garde scholars examined in this Article find it difficult to describe such institutions as ideologically desirable. Consequently, these scholars do not hope to discard liberal legal thought, but on the contrary believe that making a clear break with it would be unrealistic. In the absence of a plausible ideological alternative, these scholars are left with an anti-managerial worldview that praises the paradoxical and resists declaring its core beliefs. This may be a necessary strategy when any definite statement of the elements of a new avant-garde ideology seems implausible or undesirable, but it also risks rendering avant-garde scholarship an ineffective academic discourse or even an apology for the political status quo. As Chinese avant-garde scholarship itself teaches, the assumption that there is no single, universally valid ideological blueprint for economic and social development needs, therefore, to be qualified with the recognition of contextual political and ideological conflicts and the preeminence of hegemonic ideological structures.

It is also clear that Chinese avant-garde scholarship is conducted on the strength of, rather than in spite of, global legal thought and social theory. Indeed, much of the appeal of Chinese avant-garde scholarship may be due to its claim that it represents the latest, most up-to-date phase of social theory and legal thought. It is no surprise, then, that Chinese avant-garde scholarship shares with American and European critical theory not only its dislike for the ideological status quo but also a sense of helplessness. Ironically, the same tradition of social theory that keeps the promise of ideological renewal hanging in front of the Chinese avant-garde scholars also convinces these scholars of their powerlessness in face of the liberal hegemony, thus reconstituting the cycle of hope and disillusionment from one research project to another. Again, this goes to demonstrate how deeply embedded the avant-garde critics of hegemonic ideological structures are in the object of their critique—a point that is not lost to the self-reflective Chinese avant-garde scholars.

Finally, it must be recognized that the avant-garde scholars' academic interventions have already been successful to a certain extent. Although political taboos and anti-managerialist inertia have prevented some avant-garde scholars from promoting concrete institutional models, their more elusive project to discredit the liberal rule of law model has been effective. Chinese university campuses teem with young intellectuals who view the liberal rule of law ideology with skepticism. These young scholars and students may not have a precise alternative in mind, but they find solace in avant-garde scholarship, which teaches that nailing down the meaning of ideological conceptions is "essentialist" and hence pointless. For the followers of avant-garde scholarship it is only understandable that they are

unwilling to give up the goods of the liberal rule of law ideology: ideological development is a paradoxical process, after all. The avant-garde scene provides, therefore, not only a sufficiently inconsequential forum for political radicalism, but also an aesthetically pleasing explanation for conflicting emotions about China and the West—and, possibly, a chance to be part of something truly new.