

# What Plagiarism Was Not: Some Preliminary Observations on Classical Chinese Attitudes Toward What the West Calls Intellectual Property

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# WHAT PLAGIARISM WAS NOT: SOME PRELIMINARY OBSERVATIONS ON CLASSICAL CHINESE ATTITUDES TOWARD WHAT THE WEST CALLS INTELLECTUAL PROPERTY

Our debt to tradition through reading and conversation is so massive, our protest or private addition so rare and insignificant,—and this commonly on the ground of other reading or hearing,—that, in a large sense, one would say there is no pure originality. All minds quote. Old and new make the warp and woof of every moment. There is no thread that is not a twist of these two strands. By necessity, by proclivity, and by delight, we all quote.

Ralph Waldo Emerson<sup>1</sup>

## I. INTRODUCTION

China has never viewed intellectual property the way we do in the West.<sup>2</sup> While some Western scholars argue that comparable legal protections for intellectual property did not exist in China until the West attempted to introduce them at the turn of the twentieth century,<sup>3</sup> Chinese scholars continue to aver that China invented at least one kind of protection—copyright—over six hundred years earlier.<sup>4</sup> They also disagree upon the factors that led to the recognition of intellectual property. In the context of book publishing, William Alford thinks that copyright was “directed overwhelmingly toward

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1. RALPH WALDO EMERSON, *Quotation and Originality*, in *WORKS OF RALPH WALDO EMERSON* 467, 467 (George Routledge & Sons 1883).

2. WILLIAM P. ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION* 2 (1995); Wei Shi, *Cultural Perplexity in Intellectual Property: Is Stealing a Book an Elegant Offense?*, 32 *N.C. J. INT'L L. & COM. REG.* 1, 12 (2006); Peter K. Yu, *Piracy, Prejudice, and Perspectives: An Attempt to Use Shakespeare to Reconfigure the U.S.-China Intellectual Property Debate*, 19 *B.U. INT'L L.J.* 1, 3 (2001); see William P. Alford, *Don't Stop Thinking About . . . Yesterday: Why There Was No Indigenous Counterpart to Intellectual Property Law in Imperial China*, 7 *J. CHINESE L.* 3 (1993); William P. Alford, *How Theory Does—and Does Not—Matter: American Approaches to Intellectual Property Law in East Asia*, 13 *UCLA PAC. BASIN L.J.* 8 (1994); see also William P. Alford, *Making the World Safe for What? Intellectual Property Rights, Human Rights and Foreign Economic Policy in the Post-European Cold War World*, 29 *N.Y.U. J. INT'L L. & POL.* 135 (1997).

3. ALFORD, *STEAL*, *supra* note 2, at 2.

4. See ZHENG CHENGSI, *ZHISHICHANQUANFA: XINSHIJI CHU DE RUOGAN YANJIU ZHONGDIAN [INTELLECTUAL PROPERTY LAW: A NUMBER OF RESEARCH FOCAL POINTS AT THE BEGINNING OF THE NEW CENTURY]* 154–58 (2004).

sustaining imperial power.”<sup>5</sup> Zheng Chengsi and Michael D. Pendleton say that “all agree that copyright emerged with the invention of printing.”<sup>6</sup> At this juncture, perhaps only one thing is beyond dispute: in the area of writing, book production, and printing, the fundamental differences between Eastern and Western understandings of the origins of intellectual property in China are as visible as they are unresolved.

Due in part to China’s culture, educational system, language, and the origins of its extraordinary book culture, in imperial China (221 B.C.–1912) concepts like plagiarism and copyright developed quite differently than in the West.<sup>7</sup> Where, for example, a classical Chinese historian found precision, we in the West might see only copying from unidentified sources. Where a student in the traditional Chinese educational system found valuable instruction, we might see only rote memorization. From the Western vantage point, sometimes it seems that the concept of intellectual property did not develop in China at all: in the case of classical history, for example, it was possible to publish a work comprised almost entirely of unidentified verbatim quotations and still be celebrated as a great historian.<sup>8</sup> Verbatim copying was in some genres the norm, not the exception. It was one way to produce accurate scholarship and was not automatically regarded as an infringement of the rights of others. Thus, when the issue of intellectual property is viewed from China’s perspective, it is perhaps more appropriate to appreciate how quickly China has attempted to implement Western conceptions rather than lament that it has failed to achieve compliance as efficiently as we would prefer.

In any event, although China has now acceded to the World Trade Organization and has passed many laws similar to those of the West, problems with the enforcement of intellectual property rights are not uncommon.<sup>9</sup> Some claim that our attempts to protect intellectual property

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5. ALFORD, STEAL, *supra* note 2, at 17.

6. ZHENG CHENGSI & MICHAEL D. PENDLETON, COPYRIGHT LAW IN CHINA 11 (1991); *see also* ZHENG, *supra* note 4, at 154–58.

7. *See* ALFORD, STEAL, *supra* note 2, at 16–17.

8. *See* Robert André LaFleur, *Literary Borrowing and Historical Compilation in Medieval China*, in PERSPECTIVES ON PLAGIARISM AND INTELLECTUAL PROPERTY IN A POSTMODERN WORLD 141, 141–44 (Lise Buranen & Alice M. Roy eds., 1999).

9. For a discussion of intellectual property developments after China acceded to the WTO, *see* KONG QINGJIANG, WTO, INTERNATIONALIZATION AND THE INTELLECTUAL PROPERTY RIGHTS REGIME IN CHINA 180–94 (2005). *See also* Angela Gregory, *Chinese Trademark Law and the TRIPs Agreement—Confucius Meets the WTO*, in CHINA AND THE WORLD TRADING SYSTEM: ENTERING THE NEW MILLENNIUM 321, 321–44 (Deborah Z. Cass et al. eds., 2003). *See generally* JIANG ZHIPEI, RUSHIHOU WOGUO ZHISHICHANQUAN FALÜ BAOHU YANJIU [A STUDY OF LEGAL PROTECTION FOR INTELLECTUAL PROPERTY IN CHINA AFTER ITS ACCESSION TO THE WTO] (2002); ANDREW MERTHA, THE POLITICS OF PIRACY: INTELLECTUAL PROPERTY IN CONTEMPORARY CHINA (2005); XUE HONG & ZHENG CHENGSI, CHINESE INTELLECTUAL PROPERTY LAW IN THE 21ST

rights are doomed to fail because the West is indifferent to Chinese culture and history.<sup>10</sup> Others conclude that America's approach has at times been nothing less than a "farce."<sup>11</sup> And as Zheng Chengsi puts it, the lack of progress regarding intellectual property in the Chinese context is due to the fact that its origins are not understood: if a researcher does not understand Chinese history, he might as well be blind.<sup>12</sup>

While I agree that a greater understanding of Chinese history and culture might help us comprehend its attitude toward intellectual property, many law review articles that purport to address Chinese history and culture do so in generalities that are of little assistance when they are not, in fact, misleading.<sup>13</sup> And even though it is reasonable to assume that traditional Chinese attitudes must be taken into account if Western efforts to address intellectual property problems with China are going to succeed, it is not easy to illustrate them to an audience that does not read classical Chinese.

Fortunately for the legal reader, the way that Western legal opinions refer to previous opinions is more analogous to traditional Chinese writing practices than might at first seem possible. This Comment first mentions some cultural factors that continue to affect Chinese attitudes toward the written word, citation, and intellectual property. It then briefly describes some relevant characteristics of China's hitherto dominant philosophy—Confucianism—and attempts to illustrate with more specificity how traditional Chinese authors often chose to construct their texts. Finally, it compiles a text similar to a Western legal opinion written in a style that might have been used by a traditional Chinese historian. The conclusions of recent law review articles notwithstanding, Western notions of "transformative use" are not relevant to traditional Chinese practices.<sup>14</sup> Nor are China's attitudes

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CENTURY (2002); ZHENG CHENGSI, WTO ZHISHICHANQUAN XIEYI ZHUTIAO JIANGJIE [THE WTO INTELLECTUAL PROPERTY AGREEMENT EXPLAINED CLAUSE BY CLAUSE] (2d prtg. 2001).

10. Yu, *supra* note 2, at 2, 69–76. Yu counsels patience while China is "undergoing transition to a new intellectual property regime." *Id.* at 57. Yu also says that "the failure to resolve piracy and counterfeiting problems in China can be partly attributed to the lack of political will on the part of U.S. policymakers and the American public to put intellectual property protection at the very top of the U.S.-China agenda." Peter K. Yu, *Three Questions That Will Make You Rethink the U.S.-China Intellectual Property Debate*, 7 J. MARSHALL REV. INTELL. PROP. L. 412, 413 (2008). Alford's criticism not only regards China's past but also extends to the West's failure to understand the Chinese political system today: "Washington's lack of familiarity with, or intolerance for, the impact of history seems easier to countenance than its indifference to current Chinese political and economic circumstances." Alford, *Making*, *supra* note 2, at 140–41.

11. Alford, *Making*, *supra* note 2, at 138–39; John R. Allison & Lianlian Lin, *The Evolution of Chinese Attitudes Toward Property Rights in Invention and Discovery*, 20 U. PA. J. INT'L ECON. L. 735, 790–91 (1999).

12. ZHENG, *supra* note 4, at 144.

13. See *infra* notes 39–53 and accompanying text.

14. Yu, *supra* note 2, at 76–77.

toward its book culture, printing, and copying simply the products of what is generally called its Confucian culture.<sup>15</sup> The bulk of early book publishing in China was in fact inspired by Buddhism, not Confucianism, and was directed at the acquisition of religious merit that appears to have been unrelated, and was perhaps even antithetical, to what we today would consider a property right.<sup>16</sup>

This Comment is not written for professional sinologists. Nor does it purport to be an exhaustive legal analysis of the related issues of plagiarism, copyright, and intellectual property as they apply, or do not apply, in the Chinese context. Its purpose is more modest: to introduce to a Western legal audience some basic aspects of traditional Chinese culture and writing that illustrate how some concepts that we group under the general heading of “intellectual property” developed in imperial China, primarily in relation to its traditional educational system and extraordinary book culture. It concludes that although the influence of Confucianism in its various incarnations is unmistakable, the influence that Buddhism exerted, and continues to exert, is still relevant and therefore deserving of further study.

## II. TRADITIONAL CHINESE LITERARY PRACTICE

The point where allusion ends and plagiarism begins can be difficult to ascertain in both East and West, but it is safe to say that the Chinese have long been inclined to see allusion or otherwise acceptable borrowing long after we would see plagiarism.<sup>17</sup> When traditional Chinese authors borrow from a preexisting text, and especially from a classic, the reader is expected to recognize the source of the borrowed material instantly. Chinese texts can therefore quote the classics at great length and the issue of improper borrowing will not arise. If a reader is unfortunate enough to fail to recognize such quoted material, it is his fault, not the author’s.

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15. Andrew Evans, Note, *Taming the Counterfeit Dragon: The WTO, TRIPS and Chinese Amendments to Intellectual Property Laws*, 31 GA. J. INT’L & COMP. L. 587, 589 (2003); see *infra* notes 77–89 and accompanying text.

16. JOHN KIESCHNICK, THE IMPACT OF BUDDHISM ON CHINESE MATERIAL CULTURE 167–68, 172–74 (2003).

17. By plagiarism I mean the intentional misappropriation of another author’s work without attribution. See Laurie Stearns, *Copy Wrong: Plagiarism, Process, Property, and the Law*, in PERSPECTIVES ON PLAGIARISM AND INTELLECTUAL PROPERTY IN A POSTMODERN WORLD, *supra* note 8, at 5, 7. According to my definition, intentionally alluding to a previous work is not plagiarism even though the source is not noted, quotation marks are not used, and the reader does not recognize that he is reading quoted material. For a discussion of the relationship between allusion and plagiarism, see Kevin J. H. Dettmar, *The Illusion of Modernist Allusion and the Politics of Postmodern Plagiarism*, in PERSPECTIVES ON PLAGIARISM AND INTELLECTUAL PROPERTY IN A POSTMODERN WORLD, *supra* note 8, at 99. See also RICHARD A. POSNER, THE LITTLE BOOK OF PLAGIARISM 16–17 (2007). See generally MARK ROSE, AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT (1993).

But we in the West are inclined to find plagiarism before acceptable borrowing. Even though Shakespeare transformed some mediocre works into the most memorable plays in the English language, he too is called a plagiarist today.<sup>18</sup> One crucial difference is that even if a reader recognizes that much of *Romeo and Juliet* is based upon preexisting sources, this knowledge is not likely to affect his interpretation of this work. This is generally not the case with Chinese borrowing. A reader who does not recognize that a Chinese author has copied passages from a classical text, even a very obscure one, is often going to have a hard time figuring out what the author is saying. In some cases, and especially in the case of historical poetry, it might, indeed, be impossible. Sometimes the only way to determine what a historical poem means is to search through original historical sources, as traditional Chinese scholars delight in incorporating historical allusions that are too obscure to be found in even the best reference works.<sup>19</sup>

But, as we will see, it is not appropriate to regard all Chinese borrowing as allusive either. Borrowing can be done for many purposes. Sometimes the purpose is to ensure accuracy, sometimes the purpose is to clarify, and sometimes, curiously, verbatim borrowing introduces inconsistencies and contradictions that an author has intentionally left to the reader to interpret.

There is no shortage of theories that purport to explain China's traditional attitude toward intellectual property. One common explanation is that China possesses "a culture deeply embedded with traditions completely antithetical to the patenting of inventions and to the granting of property rights."<sup>20</sup> Whether categorical statements like this can be shown to be true, it is safe to say that China's traditions and its attitude toward the written word are inextricably linked to an educational system that was profoundly influenced by the teachings of its most famous philosopher and first professional teacher, Confucius (551–476 B.C.).<sup>21</sup>

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18. POSNER, *supra* note 17, at 51–54; RICHARD A. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION 344–47 (1988); Max W. Thomas, *Eschewing Credit: Heywood, Shakespeare, and Plagiarism Before Copyright*, 31 NEW LITERARY HIST. 277, 280–81 (2000). Posner notes that "[c]oncoction is at the heart of plagiarism." POSNER, *supra* note 17, at 17.

19. See THE PLUM IN THE GOLDEN VASE, OR, CHIN P'ING MEI: VOLUME ONE: THE GATHERING, at xlv–xlvi (David T. Roy trans., Princeton University Press 1993–2006) (1618).

20. Allison & Lin, *supra* note 11, at 737. Wei Shi, however, says that "counterfeiting and piracy are not problems caused by Confucian ethics, as conventional wisdom underscores, but rather, among other things, a unique political phenomenon resulting from the systemic dystrophy fundamental to the institutional development." Wei Shi, *The Paradox of Confucian Determinism: Tracking the Root Causes of Intellectual Property Rights Problem in China*, 7 J. MARSHALL REV. INTELL. PROP. L. 454, 455 (2008).

21. For a brief introduction to the thought of Confucius, see WING-TSIT CHAN, A SOURCE BOOK IN CHINESE PHILOSOPHY 14–48 (1963). See also WM. THEODORE DE BARY, THE LIBERAL TRADITION IN CHINA (1983); CONFUCIANISM: THE DYNAMICS OF TRADITION (Irene Eber ed., 1986); I JAMES LEGGE, THE CHINESE CLASSICS: WITH A TRANSLATION, CRITICAL AND EXEGETICAL

Confucius was China's most famous humanist. His interest was man, not spirits or an afterlife.<sup>22</sup> "His primary concern was a good society based on good government and harmonious human relations. To this end he advocated a good government that rules by virtue and moral example rather than by punishment or force."<sup>23</sup> A good moral example was, in turn, established by performing rituals properly and adhering to the rules of propriety. He viewed business with disdain and considered profit an unworthy pursuit. And, of course, he viewed the ancients and serious scholarship with great reverence. Although Confucius claimed he was merely transmitting what in 500 B.C. was already a rich cultural heritage, and although he claimed that he did not create anything new, there is reason to be skeptical.<sup>24</sup> Chinese philosophy would not have been the same without him. Perhaps China's traditional educational system, its reverence for classical texts, and its propensity to borrow from other classical texts might not have been quite the same either.

What eventually came to be known as a classical Confucian education required, among other things, the rote memorization of a massive body of classical texts.<sup>25</sup> Students were taught how to read the classics only after they had memorized at least 2000 Chinese characters.<sup>26</sup> One common method of memorizing the characters was to trace them; a rate between 1500 and 4000 characters per day was thought optimal.<sup>27</sup> Only then would a student preparing for the imperial civil service examinations have begun the laborious process of memorizing verbatim a corpus of classical texts that contained between 500,000 and 600,000 characters.<sup>28</sup> It is estimated that students memorized texts at the rate of about two hundred characters per day and that the process took about six years.<sup>29</sup> Geniuses and those who possessed photographic memories were, of course, capable of completing this task more expeditiously.<sup>30</sup> But only upon the completion of this task was a student first taught how to write an essay.<sup>31</sup> And because a library of classical works was

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NOTES, PROLEGOMENA, AND COPIOUS INDEXES: CONFUCIAN ANALECTS, THE GREAT LEARNING AND THE DOCTRINE OF THE MEAN 56-127 (3rd ed., rev. vol. 1998); TU WEI-MING, CONFUCIAN THOUGHT: SELFHOOD AS CREATIVE TRANSFORMATION (1985).

22. CHAN, *supra* note 21, at 15.

23. *Id.*

24. *See id.* at 15-17; *see also* ALFORD, STEAL, *supra* note 2, at 25.

25. BENJAMIN A. ELMAN, A CULTURAL HISTORY OF CIVIL EXAMINATIONS IN LATE IMPERIAL CHINA 260-63 (2000).

26. *Id.* at 265-66.

27. *Id.* at 265.

28. *Id.* at 266-68; *see also* JOHN KING FAIRBANK, THE GREAT CHINESE REVOLUTION: 1800-1985, at 28 (1986).

29. ELMAN, *supra* note 25, at 268.

30. *Id.* at 268-69.

31. *Id.* at 277.

mentally available at all times to all students, appropriate selections would be woven effortlessly into practically everything they wrote. It is not remarkable that traditional Chinese scholars accustomed to copying, memorizing, and quoting classical texts in this manner were not inclined to attach property rights to them. Indeed, it would have been remarkable if they did.

It has also been suggested that the Chinese valued imitation more than originality and regarded unacknowledged quotation as a necessary component of the creative process.<sup>32</sup> In China, everything from painting to the martial arts is first learned through extensive copying and imitation, so the issue of copying and reproduction is by no means limited to the memorization of the written word.<sup>33</sup> Some claim that recognition of intellectual property rights has nothing to do with Confucius per se, but that his teachings have led to a predictable lack of legal enforcement.<sup>34</sup> Others have concluded that “the subject of individual property rights was not simply foreign to their mode of thinking, but was essentially beyond the scope of their mental picture of the world.”<sup>35</sup> It has even been asserted that a “protosocialistic” mental picture “shared many values” with a socialistic economic system that would not appear for over two thousand years.<sup>36</sup> As one author puts it, Communism requires that people share.<sup>37</sup>

But traditional Chinese attitudes toward “borrowing” from their vast store of classical literature and history, the question of originality, and the relationship between borrowing and what we in the West call plagiarism require closer analysis than this. I doubt that even extensive borrowing necessarily detracts from an author’s originality. And even if it is true that “Confucianism is a cultural predisposition leading to a lack of consciousness of intellectual property,”<sup>38</sup> it is not clear that this tells us anything of practical value that can be applied to the current situation in China. In other words,

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32. Yu, *supra* note 2, at 19.

33. Chris Shei, Plagiarism, Chinese Learners and Western Convention 1, 2 (2007), <http://citeseerx.ist.psu.edu/viewdoc/summary?doi=10.1.1.98.7086>.

34. See Jeffrey F. Levine, Note, *Meeting the Challenges of International Brand Expansion in Professional Sports: Intellectual Property Right Enforcement in China Through Treaties, Chinese Law and Cultural Mechanisms*, 9 TEX. REV. ENT. & SPORTS L. 203, 217–18 (2007); Jeanmarie Lovoi, Note, *Competing Interests: Anti-Piracy Efforts Triumph Under TRIPS but New Copying Technology Undermines the Success*, 25 BROOK. J. INT’L L. 445, 465 (1999). Wei Shi correctly notes that “if Confucian philosophy were the cause of the enforcement problem in China, it failed to explain the current lower rates of counterfeiting and piracy in Japan and Korea which are equally, if not more, influenced by Confucian value[s] than China.” Shi, *supra* note 2, at 44.

35. See Allison & Lin, *supra* note 11, at 744.

36. *Id.*

37. Eric M. Griffin, Note, *Stop Relying on Uncle Sam!—A Proactive Approach to Copyright Protection in the People’s Republic of China*, 6 TEX. INTELL. PROP. L.J. 169, 182 (1998).

38. Shi, *supra* note 2, at 3.



before concluding that current problems are the result of cultural norms, an attempt should be made to explain them.

In any event, examinations of traditional Chinese attitudes toward intellectual property are usually long on generalities and short on specifics. Even when they are accurate, they are often misapplied. For example, William Alford succinctly describes the Chinese tradition in just a few pages,<sup>39</sup> yet even his clear introduction has often been paraphrased inaccurately and has led to propositions it could not have been meant to support.<sup>40</sup>

It is no wonder. Few Chinese or Western legal scholars today receive anything close to the classical education that is required to describe this tradition accurately.<sup>41</sup> And those who have studied this tradition are still left with what might be considered an even more daunting task: how does one explain traditional Chinese attitudes toward the use of its classical texts to an audience that cannot read Chinese? In my opinion, the Chinese example is quantitatively and qualitatively different from the kind of intertextual borrowing generally employed in Western literature. Before attempting to illustrate what is happening when traditional Chinese authors refer to preexisting texts, I will first briefly examine recent Western examinations of intertextual borrowing in traditional Chinese culture.

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39. ALFORD, STEAL, *supra* note 2, at 26–29.

40. For an example of one of the many problematic paraphrases, see Evans, *supra* note 15, at 589.

41. In Mainland China, classical literature and history fell out of favor after 1949 as professors in the educational system underwent “thought reform” to atone for their former subservience to “capitalist imperialism” which had “betrayed the Chinese people.” JOHN KING FAIRBANK, CHINA: A NEW HISTORY 361 (1992).

The traditional “full” style of writing Chinese characters that had been used for over two thousand years was then “simplified”; while this does make writing some individual Chinese characters easier, it does not appear to have affected literacy rates as originally hoped. Donald J. Treiman, The Growth and Determinants of Literacy in China (2002), <http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1028&context=ccpr>. Simplified characters do, however, make it much more difficult for a normally educated person to read classical texts. Also, during the late 1960s and early 1970s, Chinese universities were essentially closed for a decade. See LUCIAN W. PYE, CHINA: AN INTRODUCTION 351 (3d ed. 1984). The tribulations experienced by China’s educational system over the past few decades are not recounted here for their academic interest alone: according to one of the more prolific commentators on China’s legal system today, China’s judiciary has felt the effects of its lack of educational opportunities, and this has affected its development of a rule of law. RANDALL PEERENBOOM, CHINA’S LONG MARCH TOWARD RULE OF LAW 289–98 (2002). For criticism of Peerenboom’s observations on modern China, see Nicholas Becquelin, Book Review, FAR E. ECON. REV., Dec. 2007, at 60 (reviewing RANDALL PEERENBOOM, CHINA MODERNIZES: THREAT TO THE WEST OR MODEL FOR THE REST? (2007)).

## III. INTERTEXTUAL BORROWING IN HISTORICAL PERSPECTIVE

William Alford's *To Steal a Book is an Elegant Offense* is an excellent book paired with an unfortunately clever title that misrepresents almost everything it contains.<sup>42</sup> In imperial China, authors rarely thought they were "stealing" from another book even if they copied whole chapters. For example, although the masterpiece of sixteenth-century Chinese fiction called *Jin Ping Mei Cihua*, or *The Plum in the Golden Vase*, copied a few chapters almost verbatim from an equally famous novel called the *Shuihu Zhuan*, or *Outlaws of the Marsh*, discussions of plagiarism in relation to this borrowing are virtually nonexistent.<sup>43</sup> Even the most scholarly Western translation of this work does not mention the term.<sup>44</sup> It is true that the writing of fiction was, at that time, not considered a worthy pursuit, and it would not have made sense to complain that something had been stolen if it had not been worth doing in the first place. It is also true that the authors of these two novels remain unknown to this day. But if copying a few chapters almost verbatim from a famous previous work did not make the Chinese consider that something might have been misappropriated, it is hard to imagine what would.

On the other hand, if the book in question is a famous classic or history, extensive quotation would not only be condoned, it would be mandatory. One of the most famous Chinese histories, the *Zizhi Tongjian*, or *Comprehensive Mirror for Aid in Government*, is a massive work that occupies over nine thousand pages in a modern edition; although it is almost entirely comprised of unattributed verbatim quotations from other works, its author Sima Guang (1019–1086) is not only not considered a plagiarist, he is considered one of the foremost historians of his age.<sup>45</sup> Rephrasing historical sources to "make them your own" was not only not required, it was considered inaccurate. "[T]he work of the historian was to compile a set of documents which would speak for themselves rather than to make an imaginative reconstruction of

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42. Shi, *supra* note 2, at 11. Zheng Chengsi does not like the title either. See ZHENG, *supra* note 4, at 158–59. I disagree, however, with the imputation that Alford's choice of title shows he does not understand this topic. See *id.*

43. XIAOXIAOSHENG (pseud.), JIN PING MEI CIHUA (Ming Wanli ed., Daian 1963) (c. 1618). For a translation of the first sixty chapters, see THE PLUM IN THE GOLDEN VASE, *supra* note 19; for a translation of the remainder, see CLEMENT EGERTON, THE GOLDEN LOTUS: A TRANSLATION, FROM THE CHINESE ORIGINAL, OF THE NOVEL CHIN P'ING MEI (1972). SHUIHU QUANZHUAN (Zheng Zhenduo et al. eds., 1954) (1589) (attributed to LUO GUANZHONG or SHI NAIAN). For a translation of SHUIHU QUANZHUAN, see OUTLAWS OF THE MARSH (Sidney Shapiro trans., 1981).

44. THE PLUM IN THE GOLDEN VASE, *supra* note 19, at xlv–xlvi. The identification of the sources contributes significantly to the reader's understanding of the novel. See KATHERINE CARLITZ, THE RHETORIC OF CHIN P'ING MEI (1986).

45. SIMA GUANG, ZIZHI TONGJIAN (Zhonghua shuju 6th prtq. 1996) (1085); LaFleur, *supra* note 8, at 141–44.

past events.”<sup>46</sup> Thus, in the case of history, a well-respected work could be constructed almost exclusively of quoted materials and the question of inappropriate borrowing would not even arise.

Finally, an author in imperial China would not have considered borrowing passages from other works an “elegant offense.” While unidentified quotations from the classics are found in virtually all classical writing, and although they would have been considered erudite, I can think of few circumstances where such borrowing would have been considered an “offense.”<sup>47</sup> For historical works in particular, they are, in fact, indispensable.<sup>48</sup>

Except for the unfortunate title, Alford’s book accurately explains the significance of much of the borrowing from other works found in traditional Chinese writing: “As the ‘very method of universal speech,’ such allusion and reference, in effect, constituted a sophisticated cultural shorthand that was potentially accessible, at least in theory, throughout the civilized (i.e., sinicized) world, facilitating access from the present to the past or, for that matter, the future.”<sup>49</sup> Quoted works were part of a “shared intellectual vocabulary.”<sup>50</sup> This is an important part of the story, but only part of it.

The Chinese practice of borrowing from earlier texts can also place burdens upon the reader that we in the West would not usually expect to encounter. In the context of Chinese literature and history, borrowing is often more than just a shorthand that makes a text richer or easier to understand; it can also make it much harder to interpret. As a general rule, elite Chinese literature does not identify the sources of its quotations, even if they are rare. And because the quoted works are said to speak for themselves, dissonant and contradictory voices are often not harmonized or interpreted by the author

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46. ALFORD, STEAL, *supra* note 2, at 27. As LaFleur notes, “Sima Guang and his assistants formed a new historical record from older texts, providing only transitions and occasional commentaries in their own words. Sima Guang himself referred to the method as ‘scissors and paste.’” LaFleur, *supra* note 8, at 143. Peter Yu, however, compares traditional Chinese practice to the “transformative use” standard described in *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994). Yu, *supra* note 2, at 77. Yu says that “traditional Chinese culture does not call for *verbatim* reproduction. Rather, it calls for transformative use of preexisting works that is tailored to the user’s needs and conditions.” *Id.* at 76. This observation is misleading. For historians like Sima Guang and countless others, *verbatim* reproduction was almost always preferred. Nor would such historians have regarded their borrowing from earlier texts as transformative in the sense of *Campbell v. Acuff-Rose*: to do so would have been to make such quotations inaccurate, which would have defeated the very purpose of quoting them in the first place. See discussion on transformative use *supra* notes 68–76 and accompanying text.

47. Alford does mention a class of imperially sponsored works that were illegal to copy, but copying these would not have been an “elegant offense” either. ALFORD, STEAL, *supra* note 2, at 13.

48. LaFleur, *supra* note 8, at 147.

49. ALFORD, STEAL, *supra* note 2, at 26.

50. *Id.*

during the process of composition. The reader, therefore, is “expected to play an integral role in shaping the meaning of the text.”<sup>51</sup> Authors not only assume that the reader possesses a broad classical education and is capable of identifying the quoted material, they also assume the reader is able to interpret a final product that contains subtle internal contradictions caused by the introduction of these verbatim quotations from other works. In short,

[I]t is clear that the scholar who reads passively through the vast swaths of quoted material will miss the power and complexity of a work that borrows extensively from earlier documents and calls to mind a classical education that was the common property of every educated scholar-official of the time.<sup>52</sup>

Using borrowed materials in this manner creates more work for the reader, not less. A reader who does not recognize the provenance of a crucial phrase in a work written like this, or who does not investigate further when a work incorporates voices that seem to contradict one another, should not assume that he understands what he is reading.<sup>53</sup>

The word “plagiarism” does not do justice to borrowing of this sort. Nor does the word “allusion.” They mischaracterize the relationship between author, reader, and text. Countless passages do not make sense if one assumes they were written by the current author or were meant to be taken at face value merely because they were copied verbatim from a classic. And, of course, it does not seem fair to accuse an author of misappropriating something he expected his reader to identify and appreciate in the first place. But where does one draw the line between acceptable and unacceptable

51. LaFleur, *supra* note 8, at 149.

52. *Id.*

53. Due in large part to the abundance of obscure borrowed material, much of classical Chinese literature is so difficult to translate that even scholars trained in the field usually avoid doing so: “The difficulties are so enormous that very few students of Chinese are willing to undertake integral translations of texts, preferring instead to summarize, paraphrase, excerpt and render into their own language those passages which are relatively transparent. . . . For those who do make the effort, the number of hours wasted in looking up words in Chinese dictionaries and other reference tools is absolutely staggering.” Victor H. Mair, *The Need for an Alphabetically Arranged General Usage Dictionary of Mandarin Chinese: A Review Article of Some Recent Dictionaries and Current Lexicographical Projects*, 1 SINO-PLATONIC PAPERS 1, 1–2 (1986), available at <http://www.sino-platonic.org/>. This problem is no less severe if one’s native language is Chinese. In my experience it is often worse because Chinese scholars writing in Chinese have the option of quoting difficult passages verbatim and are under no compulsion to decipher them or identify their sources. This, I suspect, is one more reason why Chinese historians have always been strongly inclined to quote previous works verbatim: quoted materials and allusions can be so difficult to identify that paraphrasing them involves a substantial risk of missing something and introducing error. It is always safer to quote verbatim.

borrowing in the traditional Chinese context, and is it even possible to draw such a line in the first place?

I will attempt to illustrate Chinese attitudes toward borrowing from classical texts with two examples. The first is a translation of a famous passage from an ancient Chinese history that shows this process happening in real time, as it were, in the sixth century B.C. This example is similar to the use of allusion in the West, although there is, as we shall see, still more work for the Chinese reader to do. Because there is a limit to the usefulness of explaining arcane textual references, my other example will try to recreate this kind of spontaneous, multi-dimensional interaction between author, quoted material, and a highly educated reader. I compile a new text based on verbatim references to famous United States Supreme Court cases that a well-trained lawyer cannot help but read quite differently from any layperson. A lawyer familiar with the sources of this passage should, I think, read it in a way that is roughly analogous to the way a Chinese scholar might have interacted with brief, arcane, and sometimes contradictory references to the Confucian classics that he knew as well as any good lawyer knows the law.

#### IV. BORROWING IN CLASSICAL CHINESE HISTORY

The *Zuo Zhuan*, or *Zuo Documentary*, is the earliest sustained narrative history in Chinese literature.<sup>54</sup> It was once thought that Confucius wrote it as a commentary to the even more laconic *Chunqiu*, or *Spring and Autumn Annals*.<sup>55</sup> Although few today believe that Confucius had a hand in this work, and many doubt that it was written as a commentary, there is no question that it was one of the most influential works written in ancient China.<sup>56</sup> It is celebrated for its lively narrative, accuracy, and realism. While the virtuous tend to prosper, and the bad meet deserved ends, “there is too much sordid detail for the book to become a straightforward morality play. In fact, it is precisely for the relentlessly realistic portrayal of a turbulent era marked by violence, political strife, intrigues, and moral laxity that the book is treasured as a literary masterpiece.”<sup>57</sup>

As is usually the case in Chinese history, what the characters in the *Zuo Documentary* say is reported as direct speech and is not paraphrased. But

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54. 5 JAMES LEGGE, *THE CHINESE CLASSICS: WITH A TRANSLATION, CRITICAL AND EXEGETICAL NOTES, PROLEGOMENA, AND COPIOUS INDEXES: THE CH'UN TS'EW WITH THE TSO CHUEN* (2d ed., rev. vol. 1998).

55. For a history of the text of the *Zuo Documentary*, see Anne Cheng, *Ch'un Ch'iu*, in *EARLY CHINESE TEXTS: A BIBLIOGRAPHICAL GUIDE* 69–71 (Michael Loewe ed., 1993). For an appraisal of the significance of this work, see John Wang, *Tso-chuan*, in *THE INDIANA COMPANION TO TRADITIONAL CHINESE LITERATURE* 804, 804–06 (William H. Nienhauser, Jr. ed., 1986).

56. Cheng, *supra* note 55, at 69–71; Wang, *supra* note 55, at 804.

57. Wang, *supra* note 55, at 805.

because classical Chinese texts are rarely punctuated, and quotation marks are not used, it is often difficult to determine who is speaking and what is meant to be a direct quotation. Punctuation marks were considered superfluous and were not even used in private correspondence. Quotation marks would not have been used for references to the classics because they would have been considered superfluous as well.

In any event, countless passages in the *Zuo Documentary* illustrate what Alford calls the “sophisticated cultural shorthand” of Chinese references to the classics,<sup>58</sup> although the reader often has more work to do than a Western reader who encounters a classical reference. One example that dates to 525 B.C. is particularly interesting because it shows how automatic and sophisticated the process of identifying and interpreting such references was supposed to be.<sup>59</sup> In the third month of that year, an emissary named Han Xuanzi from the state of Jin paid a friendly visit to the neighboring state of Zheng. A feast was held in his honor, but a lapse of protocol by one of his hosts instigated an extended discussion to determine whether their guest had been slighted. It is not clear if Han Xuanzi had an opportunity to discuss what he had intended to discuss during this feast.

At a later date, Han Xuanzi requested that he be given, or at least be allowed to purchase, a ring of jade that was in the possession of a merchant of the state of Zheng. This was also discussed at length and the ministers of Zheng concluded that acceding to this request would have been improper, so they refused, even though it would have been interpreted as a gesture of goodwill between the two states.

About a month later, Han Xuanzi was to return to the state of Jin. Six ministers of the state of Zheng held a farewell feast in his honor. But although he had spent about a month in the state of Zheng, Han Xuanzi still did not know where the relations between the two states stood. Having received an education in the classics, however, he knew how to solicit the views of his hosts with diplomatic discretion. During the feast, he asked his hosts to sing ancient love poetry, and they happily complied:

“Let me ask all you gentlemen to sing from the odes, and I will thence understand the views of Zheng.” Zichi then sang: “Out in the bushlands a creeper grows.” Xuanzi said: “Good! young sir. I have the same desire.” Zichan sang the Zheng ode: “His furs of lamb’s wool so glossy!” Xuanzi said: “I am not equal to this.” Zidashu sang: “If you tenderly love me.” Xuanzi said: “I am here. Dare I trouble you to go to

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58. ALFORD, STEAL, *supra* note 2, at 26.

59. LEGGE, *supra* note 54, at 660–65.

any other body?" on which the other bowed to him. Xuanzi then said: "Good! your song is right. If there were not such an understanding, could [the good relations between our states] continue?" Ziyou sang: "Wind and rain, chill, chill!" Ziqi sang: "There was a girl with us in our carriage." Ziliu sang: "Fallen leaves, fallen leaves." Xuanzi was glad, and said: "Zheng may be pronounced near to a flourishing condition! You, gentlemen, received the orders of your ruler to confer on me this honour, and the odes you have sung are all those of Zheng, and all suitable to this festive friendliness. You are all heads of clans that will continue for several generations; you may be without any apprehensions."<sup>60</sup>

To clarify the state of the diplomatic relations between the two states, each of the six ministers sings a poem from the *Shi Jing*, or *Book of Poetry*, a famous anthology of 305 poems that dates to the twelfth through seventh centuries B.C.<sup>61</sup> Today it is impossible to figure out what they are saying unless every line is annotated, but such was not the case at the time. The *Book of Poetry* is one of the classics that every educated man memorized. It was, in fact, required reading for more than two thousand years, and the political connotations evoked by the poems are so strong that some claim this anthology was not appreciated as poetry until the beginning of the twentieth century.<sup>62</sup>

In any event, Han Xuanzi immediately appreciates the political overtones of the classical love poems that have been sung in his honor. It is safe to assume that the ministers sang these poems in their entirety, as they are all short. The author of the *Zuo Documentary*, however, provides only the title of each, which is generally the first line of the poem or some part of it. Any more would have been superfluous, as any educated reader would have automatically provided the rest from memory. When viewed in their entirety, the possible political connotations of the poems are not mysterious. The full text of the first poem, for example, is:

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60. This translation is based upon Legge's *Id.* at 664. Legge's text also contains the Chinese original. I have replaced Legge's method of romanizing Chinese names with modern Pinyin and have replaced the phonetic translations of the names of the songs with the first line of each poem as translated by Arthur Waley. See *THE BOOK OF SONGS: THE ANCIENT CHINESE CLASSIC OF POETRY* (Arthur Waley trans., Grove Press, Inc. 1960) (1937) (poems 1, 119, 39, 91, 82, and 210, in that order).

61. Ching-hsien Wang, *Shih-ching*, in *THE INDIANA COMPANION TO TRADITIONAL CHINESE LITERATURE*, *supra* note 55, at 692-94; see also Michael Loewe, *Shih Ching*, in *EARLY CHINESE TEXTS: A BIBLIOGRAPHICAL GUIDE*, *supra* note 55, at 415-23.

62. Wang, *supra* note 55, at 692.

Out in the bushlands a creeper grows,  
 The falling dew lies thick upon it.  
 There was a man so lovely,  
 Clear brow well rounded.  
 By chance I came across him,  
 And he let me have my will.

Out in the bushlands a creeper grows,  
 The falling dew lies heavy on it.  
 There was a man so lovely,  
 Well rounded his clear brow.  
 By chance I came upon him:  
 “Oh, Sir, to be with you is good.”<sup>63</sup>

It is not difficult to imagine that the political connotations of this poem might have been auspicious. However, the traditional interpretation of each poem was sometimes quite specific.<sup>64</sup> The fact that the first poem recited by the ministers describes a chance encounter might also be significant, and it appears that each of the other poems describes a different aspect of the political relationship between the state of Jin and the state of Zheng.

This interaction between ministers of state is also a display of erudition that amounts to a very public test of Han Xuanzi's scholarship. This is where quoting preexisting texts can get more complicated for a reader who is paying attention. The reader has, of course, already passed this test. It is assumed that he knows the provenance of all these unidentified references and knows what they traditionally mean. Han Xuanzi has not yet demonstrated his mastery of this literature, but because he was an emissary of a state and as such would have received an education in the classics, the reader would be very surprised if he could not.

Nevertheless, it is interesting to see how Han Xuanzi reacts to each reference. Although all of the poems have been radically abbreviated, his reactions to them have not. The reader is thus free to decide for himself whether and to what extent Han's interpretations are accurate and appropriate. Han says that the ministers received prior authorization to sing these specific odes and that he interprets this occasion as a great honor. He is correct to assume that the ministers received prior approval, but the reader might still wonder if Han correctly interprets their political import. He was, after all, not

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63. THE BOOK OF SONGS, *supra* note 60, at 21.

64. See LEGGE, *supra* note 54, at 663–65.



treated with particular respect by the ministers of Zheng until he was in fact leaving the country. Does he now misinterpret their intentions?

Although that may or may not be the case here, in classical Chinese literature the reader is asked to make such determinations on a continuous basis: a central character says he understands the import of the classical texts he is interpreting, but often he does not. The author allows this to happen without comment, and the reader who is paying attention therefore has a surprising amount of work to do. In the end, the reader might conclude that the author has not provided as much help as the reader might have preferred. Thus, while it is accurate to say that this is an example of a “sophisticated cultural shorthand,” in practice there is much more to it than that.<sup>65</sup> In traditional Chinese literature and history, the identification of allusions and other borrowed materials is often where interpretation begins, not where it ends. The reader is often required to interpret without the help of the author. A good historian would not consider that his job and would try to separate and label sections that explicitly contained his own opinion.<sup>66</sup>

#### V. A MODERN ILLUSTRATION USING WESTERN JUDICIAL OPINIONS

Western judicial opinions are, I think, surprisingly good analogies for illustrating how Chinese authors borrowed from the classics. I will therefore use some famous Supreme Court cases and their sources to construct a text about the law of eminent domain the way a traditional Chinese historian might have written it. I quote lines from cases almost verbatim, add little, and cite nothing. A new work is created that cannot help but be read on several levels that depend not on the text itself but on the education of the reader. Like traditional Chinese borrowing, the case could be made that something original has been created even though I have added virtually nothing. And as with Chinese practice, it requires extra work on the part of the reader who should soon realize he has seen all of these sentences before but that something is not right. A version of this passage annotated in the style of a judicial opinion immediately follows a brief discussion.

##### A. *The Law of Eminent Domain*

That alone is a just government which impartially secures to every man whatever is his own. So great is the regard of the law for private property that it will not authorize the least violation of it, not even for the general good of the whole community. Due protection of the rights of property has thus been regarded as a vital principle of republican institutions.

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65. ALFORD, STEAL, *supra* note 2, at 26.

66. See LaFleur, *supra* note 8, at 143.

Next in degree to the right of personal liberty is that of enjoying private property without undue interference or molestation.

Private property, therefore, cannot be taken for public use without just compensation. Indeed, in a free government, almost all other rights would become worthless if the government possessed an uncontrollable power over the private fortune of every citizen. The Takings Clause authorizes the taking of property, but only if the public has a right to employ it, not if the public realizes any conceivable benefit from the taking. It cannot be presumed that any clause in the constitution is intended to be without effect. No word was unnecessarily used, or needlessly added.

But the Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation. The taking must be for a “public use” and “just compensation” must be paid to the owner. This prevents the public from loading upon one individual more than his just share of the burdens of government. The Public Use Clause, as originally understood, is therefore a meaningful limit on the government’s eminent domain power.

Once the question of the public purpose has been decided, the amount and character of land to be taken for the project rests in the discretion of the legislative branch. It is well established, however, that the question of what is a public use is a judicial one. If a legislative declaration on the question of public use were conclusive, citizens could be subjected to the most outrageous confiscation of property for the benefit of other private interests without redress, and the Public Use Clause would amount to little more than hortatory fluff.

While many state courts in the mid-19th century endorsed “use by the public” as the proper definition of public use, that narrow view steadily eroded over time. When this Court began applying the Fifth Amendment to the states at the close of the 19th century, it rejected the notion that a use is a public use only if the property taken is put to use for the general public. For more than a century, public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny. When the legislature’s purpose is legitimate and its means are not irrational, empirical debates over the wisdom of takings are not to be carried out in the federal courts. The government does not itself have to use property to legitimate the taking; it is only the taking’s purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause.

And thus the sovereign may, in fact, take private property currently put to ordinary private use, and give it over for new, ordinary private use, so long as the new use is predicted to generate some secondary benefit for the public—such as increased tax revenue, more jobs, maybe even esthetic pleasure. There is virtually no limit to the use of condemnation to aid private businesses. Any business enterprise produces benefits to society at large. No homeowner's, merchant's or manufacturer's property, however productive or valuable to its owner, is immune from condemnation for the benefit of other private interests that will put it to a "higher" use. Nothing is to prevent the state from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. The government thus has license to transfer property from those with fewer resources to those with more.

Though citizens are safe from the government in their homes, the homes themselves are not. The taking clause has now been placed on a spectrum that admits of no principles and therefore no limits. It should, however, be noted that while the specter of condemnation hangs over all property, nothing in our opinion precludes any state from placing further restrictions on its exercise of the takings power, thus compensating for our refusal to enforce properly the federal Constitution.

If you are a reader trained in the Western legal tradition, odds are you have skipped most of this passage and have arrived at this spot before everyone else. Legal readers are taught to look for a highly structured succession of paragraphs comprised of thesis sentences followed by direct explanations. The expectations of a legal reader can be so strong that variations from the accepted formula are usually a source of annoyance. I suspect this passage on eminent domain falls into that category.

But here we are not dealing with judicial opinions or a brief to a court. The argument of a brief is generally on the surface of the text, and legal readers do not expect subcurrents that do not directly support the main argument. They certainly do not expect subcurrents that subvert it. When lawyers write for other lawyers, this is a very efficient and logical system; when it comes to judicial opinions, I can imagine no other. But these expectations are not appropriate when one is reading passages like my

purported outline of the law of eminent domain, Chinese histories, or Chinese literature.

As the passage from the *Zuo Documentary* discussed above shows, thesis sentences, outlines, and clear explanations could not make such a passage easier to read even if an author had chosen to insert them. This passage is structured to make the reader think why a character might be quoting a famous text, what this character might think it means, what other observers might think it means, and why the author might have included it in the first place. This kind of writing requires that the reader work line by line with sources and opinions that might contradict one another. Worst of all, the reader might not even be able to determine why. This can be very unsatisfying work for a reader who is trained as a lawyer, and it might partially explain why many law review articles fail to appreciate that Western legal concepts do not always work when they are applied to Chinese texts. This is particularly true for the Chinese classics.

Chinese texts written in the classical tradition cannot be analyzed using a reading strategy based upon the Western legal tradition. Traditional Chinese authors demand a much more active reader who will sometimes spend a great deal of time wondering why the text he is reading seems to contradict itself or does not reach a coherent conclusion. While these are often regarded as flaws in Western writing, and especially in legal writing, in the classical Chinese tradition they are not. Contradictory statements and ambiguous conclusions are the stuff of history. A historian who harmonizes contradictions and resolves ambiguity is not writing a good history, he is writing a bad one.<sup>67</sup>

The reactions of non-lawyers to my purported outline of the law of eminent domain should be quite different from those of lawyers. To a layperson, this passage should pose no serious problems, although most lawyers would safely assume that an average layperson could not truly understand it. It reads well enough, even though some sentences are comprised of phrases that were written hundreds of years apart. It makes sense, and may or may not be interesting, but that is about all a layperson could be expected to say about it.

For law school students who have studied Property, many phrases will sound familiar, and they should recognize that this is not an accurate account of the law of eminent domain, but they would not look up any of the references, and might not realize that virtually everything is quoted material.

A law school professor who specializes in this topic and who is intimately familiar with all of the cases, however, could conceivably view it as a challenge. Most of the quotations are famous, but some are not. Many are

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67. See LaFleur, *supra* note 8, at 147–50.

from dissenting opinions, and the author has arranged them in such a fashion as to undermine what is currently the law. Classical descriptions of the inviolability of property that date to the eighteenth century are found next to conflicting statements from what some might consider the most infamous modern cases on this subject. Thus, in one sense it can be said that the more educated the reader is, the harder this passage becomes. While I do not pretend that this exercise approaches the subtlety of a classical Chinese history, it is at least analogous to the kind of process engendered by quotations without attribution in traditional Chinese literature. A version of this passage annotated in the Western legal style is as follows:

*B. The Law of Eminent Domain, Annotated*

“[T]hat alone is a *just* government, which *impartially* secures to every man . . . whatever is his *own*.” *For the National Gazette, Property*, (Mar. 27, 1792), reprinted in 14 THE PAPERS OF JAMES MADISON 266 (Robert Rutland et al. eds., 1983). “So great . . . is the regard of the law for private property, that it will not authorize the least violation of it[,] . . . not even for the general good of the whole community.” 1 WILLIAM BLACKSTONE, COMMENTARIES \*135. “Due protection of the rights of property has [thus] been regarded as a vital principle of republican institutions. Next in degree to the right of personal liberty . . . is that of enjoying private property without undue interference or molestation.” *Chicago, Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226, 235–36 (1897) (citations omitted).

“[P]rivate property[, therefore, cannot] be taken for public use . . . without just compensation.” U.S. CONST. amend. V. “Indeed, in a free government, almost all other rights would become . . . worthless . . . if the government possessed an uncontrollable power over the private fortune of every citizen.” JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 234 (Harper & Brothers 1883). “[T]he Takings Clause authorizes the taking of property[, but] only if the public has a right to employ it, not if the public realizes any conceivable benefit from the taking.” *Kelo v. City of New London*, 545 U.S. 469, 510 (2005) (Thomas, J., dissenting). “It cannot be presumed that any clause in the constitution is intended to be without effect . . .” *Marbury v. Madison*, 5 U.S. 137, 174 (1803). “[N]o word was unnecessarily used, or needlessly added.” *Wright v. United States*, 302 U.S. 583, 588 (1938).

But “[t]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation.”

*Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194 (1985). “[T]he taking must be for a ‘public use’ and ‘just compensation’ must be paid to the owner.” *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 231–32 (2003). This “prevents the public from loading upon one individual more than his just share of the burdens of government.” *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 325 (1893). “[T]he Public Use Clause, [as] originally understood, is [therefore] a meaningful limit on the government’s eminent domain power.” *Kelo*, 545 U.S. at 506 (Thomas, J., dissenting).

“Once the question of the public purpose has been decided, the amount and character of land to be taken for the project . . . rests in the discretion of the legislative branch.” *Berman v. Parker*, 348 U.S. 26, 35–36 (1954) (citing *Shoemaker v. United States*, 147 U.S. 282, 298 (1893)). “It is well established[, however,] that . . . the question [of] what is a public use is a judicial one.” *City of Cincinnati v. Vester*, 281 U.S. 439, 446 (1930). “[I]f a legislative declaration on the question of public use were conclusive, citizens could be subjected to the most outrageous confiscation of property for the benefit of other private interests without redress . . . .” *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 461–62 (1981) (Fitzgerald, J., dissenting), and “the Public Use Clause would amount to little more than hortatory fluff,” *Kelo*, 545 U.S. at 497 (O’Connor, J., dissenting).

“[W]hile many state courts in the mid-19th century endorsed ‘use by the public’ as the proper definition of public use, that narrow view steadily eroded over time. . . . [W]hen this Court began applying the Fifth Amendment to the [s]tates at the close of the 19th century,” *Kelo*, 545 U.S. at 479–80, it “rejected the notion that a use is a public use only if the property taken is put to use for the general public.” *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1014–15 (1984). “For more than a century, . . . public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny . . . .” *Kelo*, 545 U.S. at 483. “When the legislature’s purpose is legitimate and its means are not irrational, . . . empirical debates over the wisdom of takings . . . are not to be carried out in the federal courts.” *Haw. Housing Auth. v. Midkiff*, 467 U.S. 229, 242–43 (1984). The “government does not itself have to use property to legitimate the taking; it is only the taking’s purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause.” *Id.* at 244.

And thus “the sovereign may[, in fact,] take private property currently put to ordinary private use, and give it over for new, ordinary private use, so long as the new use is predicted to generate some secondary benefit for the public—such as increased tax revenue, more jobs, maybe even esthetic pleasure.” *Kelo*, 545 U.S. at 501 (O’Connor, J., dissenting). “[T]here is virtually no limit to the use of condemnation to aid private businesses. Any business enterprise produces benefits to society at large. . . . [N]o homeowner’s, merchant’s or manufacturer’s property, however productive or valuable to its owner, is immune from condemnation for the benefit of other private interests that will put it to a ‘higher’ use.” *Poletown*, 304 N.W.2d at 464 (Fitzgerald, J., dissenting). “Nothing is to prevent the [s]tate from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory.” *Kelo*, 545 U.S. at 503 (O’Connor, J., dissenting). “The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. . . . [T]he government . . . [thus] has license to transfer property from those with fewer resources to those with more.” *Id.* at 505.

“Though citizens are safe from the government in their homes, the homes themselves are not.” *Id.* at 518 (Thomas, J., dissenting). “The . . . taking clause has now been placed on a spectrum that admits of no principles and therefore no limits.” *Poletown*, 304 N.W.2d at 480 (Ryan, J., dissenting). It should, however, be noted that while “[t]he specter of condemnation hangs over all property[.]” *Kelo*, 545 U.S. at 503 (O’Connor, J., dissenting), “nothing in our opinion precludes any [s]tate from placing further restrictions on its exercise of the takings power[.]” *id.* at 489 (majority opinion), thus “compensating for our refusal to enforce properly the [f]ederal Constitution[.]” *id.* at 504 (O’Connor, J., dissenting).

Like the unannotated version, this version again means something quite different to the layperson, law school student, and professor. A layperson will most likely find it unnecessarily difficult, as most law school students did when they first encountered opinions annotated in this fashion. Nobody who is not trained in the law will prefer this version. The professor, of course, will not even see the citations that are not interesting. And if he or she knows these cases as well as a traditional Chinese scholar knew the classics, the two versions would be the same: the citations would be superfluous.

Finally, I think that this passage, like the passage from the *Zuo Documentary* discussed above, demonstrates that what a traditional Chinese author did when he incorporated quotations from the classics was not analogous to what we today call “transformative use.”<sup>68</sup> According to the fair use doctrine, the fact that a work is copyrighted does not mean that later authors cannot refer to it or quote passages from it; such borrowing is often allowed, particularly when the work doing the borrowing is “transformative.”<sup>69</sup> As Pierre Leval puts it: “The use must be productive and must employ the quoted matter in a different manner or for a different purpose from the original. A quotation of copyrighted material that merely repackages or republishes the original is unlikely to pass the test . . . .”<sup>70</sup> In common parlance, transformative use allows an author to refer to an earlier work as long as he somehow “makes it his own.” A fair use does not merely “supersede” the original work, it “transforms” it by adding “new expression, meaning, or message.”<sup>71</sup> “Copying [is] not . . . excessive in relation to . . . [the original] merely because the portion taken was the original’s heart.”<sup>72</sup> Even “extensive use” can be fair use if the original is transformed.<sup>73</sup>

But there is a limit. In the West, even if the author succeeds in creating a new work, if too much is quoted, it is not fair use: “The existence of any identifiable transformative objective does not, however, guarantee success in claiming fair use. . . . The justification will likely be outweighed if the takings are excessive . . . .”<sup>74</sup>

But there is no such thing as excessive quotation in traditional Chinese history, and I do not think it is inaccurate to conclude that transformative use has never been an issue.<sup>75</sup> As is mentioned above, even a massive work like the *Comprehensive Mirror for Aid in Government* is comprised almost exclusively of unidentified quoted material.<sup>76</sup> This work would not only

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68. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994); Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990); Yu, *supra* note 2, at 76–77. For a discussion of “fair use” and the Chinese Copyright Law of 1990, see KONG, *supra* note 9, at 77–79.

69. 17 U.S.C. § 107 (2006); Leval, *supra* note 68, at 1111.

70. Leval, *supra* note 68, at 1111 (footnotes omitted).

71. *Campbell*, 510 U.S. at 579.

72. *Id.* at 588.

73. *Elsmere Music, Inc. v. Nat’l Broad. Co.*, 623 F.2d 252, 253 n.1 (2d Cir. 1980); *see Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1273 (11th Cir. 2001); *see also Fisher v. Dees*, 794 F.2d 432, 438–39 (9th Cir. 1986).

74. Leval, *supra* note 68, at 1111–12.

75. But the notion of fair use does, of course, exist in modern Chinese law. *See* KONG, *supra* note 9, at 77–79.

76. LaFleur, *supra* note 8, at 141; *see also* THE CHRONICLE OF THE THREE KINGDOMS (220–265) CHAPTERS 69–78 FROM THE TZÜ CHIH T’UNG CHIEN (Glen W. Baxter ed., Achilles Fang trans., 1952–1965).



violate our standards for fair use because of the extraordinary volume of quoted material, it would also violate these standards because it is not transformative by design. Its author quotes almost everything verbatim and, to the best of his ability, transforms nothing. Such is also the case with the passage I examined from the *Zuo Documentary*. The author and the diplomats take no liberties with the texts they quote. This would have defeated the purpose. If such passages were not quoted verbatim, it would have been considered a mistake and would only have served to puzzle the reader.

True, the traditional Chinese author might juxtapose dissonant quoted materials that invite, or demand, that the reader reach his own understanding of what the quotations mean in their new context, but this, I think, is not similar to our transformative use. In traditional Chinese usage, it is probably more accurate to say that the author is providing verbatim quotations without transforming them. It is the reader who is invited to do the transforming, provided that his level of education permits him to identify and interpret the provenance and meaning of what in the Chinese classics is often a constant stream of unidentified quoted material. This process is, I think, roughly analogous to the use of quoted materials in Western judicial opinions if the citations are omitted. I therefore think it is fair to conclude that in the Chinese tradition it is the reader who is ultimately doing the transforming, not the author.

#### VI. A WORD ON CONFUCIANISM AND THE ORIGINS OF THE CHINESE BOOK

Because Confucianism is more concerned with the written word, the copying of texts, and the production of books than some other Chinese schools of thought, it makes sense to focus on Confucianism when discussing the origins of intellectual property in imperial China.<sup>77</sup> But law review

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77. Daoism, for example, viewed the concept of "property" with some skepticism. See DANIEL L. OVERMYER, *RELIGIONS OF CHINA: THE WORLD AS A LIVING SYSTEM* 33–39 (1986). Daoists also emphasized the esoteric transmission of texts rather than mass propagation as did the Buddhists. KIESCHNICK, *supra* note 16, at 183–84. For an outline of China's major religions and philosophical schools, see generally CHAN, *supra* note 21; CHRISTIAN JOCHIM, *CHINESE RELIGIONS: A CULTURAL PERSPECTIVE* (1986); LAURENCE G. THOMPSON, *CHINESE RELIGION: AN INTRODUCTION* (4th ed. 1989). For an introduction to Buddhism, see generally ERIC ZÜRCHER, *THE BUDDHIST CONQUEST OF CHINA: THE SPREAD AND ADAPTATION OF BUDDHISM IN EARLY MEDIEVAL CHINA* (E.J. Brill 1972) (1959). Arthur Wright notes that the "golden age" of Chinese Buddhism was the first two hundred years of the Tang dynasty (618–907); it had a "wide influence on institutions and patterns of behavior." ARTHUR F. WRIGHT, *BUDDHISM IN CHINESE HISTORY* 70, 71, 74 (Stanford University Press 1979) (1959). "By the eighth century, Buddhism was fully and triumphantly established throughout China." *Id.* at 82. For a history of the major figures, schools, and development of Daoism, see generally ISABELLE ROBINET, *TAOISM: GROWTH OF A RELIGION* (Phyllis Brooks trans., Stanford University Press 1997) (1992), and HOLMES WELCH, *TAOISM: THE PARTING OF THE WAY* (rev. ed. 1966) (1957).

articles about intellectual property in China usually discuss Confucianism as if it were the only school of thought that existed in imperial China, and they fail to mention how much it changed over the course of its long history.<sup>78</sup> One such summary of Confucianism, chosen at random, is as follows:

Chinese culture was dominated by Confucian principles from about 100 B.C. until A.D. 1911. Confucian idealism emphasized the good of society over the pursuit of individual reward. Additionally, the belief that human beings were interconnected, and that previous generations called “Ancients” had discerned the essence of human understanding, created an emphasis on disseminating the written word. Thus, copying was a practice widely encouraged by Imperial rulers and it did not have the negative connotation as in the West.

When the Maoists came to power in China, they reaffirmed many of these Confucian principles.<sup>79</sup>

If Zheng Chengsi is correct when he says that an understanding of Chinese history is a prerequisite to the understanding of the origins of intellectual property in China, descriptions of Chinese culture have to be better than this.<sup>80</sup> While it is true that Confucianism emphasized the importance of the written word and the good of society over individualism as we conceive of it in the West, the notion that “Confucian principles” dominated Chinese culture for about two thousand years is misleading. After the fall of the Later Han dynasty (25–220), Confucianism fell out of favor and its influence waned.<sup>81</sup> Buddhism and Daoism became quite influential in their own right,<sup>82</sup> and by the twelfth century, Confucianism was so improved by an additional layer of metaphysics that Confucius no doubt would have dismissed it as

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78. See generally DANIEL K. GARDNER, *ZHU XI'S READING OF THE ANALECTS: CANON, COMMENTARY, AND THE CLASSICAL TRADITION* (2003); JAMES T. C. LIU, *CHINA TURNING INWARD: INTELLECTUAL-POLITICAL CHANGES IN THE EARLY TWELFTH CENTURY* (1988); THOMAS A. METZGER, *ESCAPE FROM PREDICAMENT: NEO-CONFUCIANISM AND CHINA'S EVOLVING POLITICAL CULTURE* (1977). For a description of the influence that Buddhism had over Neo-Confucianism, which has been said to simultaneously incorporate and reject Buddhism, see WM. THEODORE DE BARY, *THE BUDDHIST TRADITION IN INDIA, CHINA AND JAPAN 243–51* (Vintage Books 1972) (1969). Neo-Confucians also adopted some aspects of Daoist cosmology. See OVERMYER, *supra* note 77, at 48–51. One author does mention Daoism and Buddhism in an article about China and intellectual property but drops the topic after a sentence or two. See Yu, *supra* note 2, at 16 n.96.

79. Evans, *supra* note 15, at 589 (footnotes omitted).

80. ZHENG, *supra* note 4, at 144.

81. See JOCHIM, *supra* note 77, at 68.

82. WRIGHT, *supra* note 77, at 70–85.

superstition.<sup>83</sup> Western sinologists call it Neo-Confucianism to distinguish it from the original; in any event, it was not limited to one dominant school.<sup>84</sup>

Nor is it clear what “Imperial rulers” “widely encouraged” the copying of texts. Such encouragement was scarcely necessary, as copying and memorization were already an indispensable part of every student’s education.<sup>85</sup> Perhaps this refers to the Confucian classics that had been engraved on stone under imperial auspices at least three times since the end of the second century, long before they were finally printed in 953.<sup>86</sup> Rubbings of these stone engravings were made, not handwritten copies, so that accurate versions of canonical texts would be widely available.<sup>87</sup> Finally, it is almost superfluous to note that the “reaffirmation” of Confucian principles was not the most conspicuous goal of Maoism. Indeed, as Lucian Pye says, the “major difference between Maoism and China’s traditional ideology of Confucianism is that now the Chinese are told to welcome conflict and disorder, while in the past the highest values were harmony and social order.”<sup>88</sup> Pye notes that in terms of formal doctrine,

Confucianism and Marxism stand poles apart. The traditions of reverence for the family, respect for hierarchy, and desire for harmony have been replaced by the doctrines of sacrifice of self and family for the state, egalitarianism, and struggle and class conflict. Mandarin values have been replaced by cadre values; the quest to become a “superior man” through leisurely study, philosophical speculation, and the refinement of artistic sensitivities has given way to the ideals of purposeful action, political dedication, and ideological consciousness-raising.<sup>89</sup>

But there is an even more fundamental problem than inaccurate descriptions of Confucianism. Although there is no doubt that Confucianism in its various incarnations played a central role in the development of printing and the dissemination of classical texts that, in turn, contributed to the eventual

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83. See JOCHIM, *supra* note 77, at 50–53; see also LIU, *supra* note 78, at 37–40.

84. See LIU, *supra* note 78, at 43–45.

85. See ELMAN, *supra* 25, at 260–70.

86. Tsien Tsuen-Hsuei, *Paper and Printing*, in 5 SCIENCE AND CIVILISATION IN CHINA 1, 156 (Joseph Needham ed., 1985).

87. *Id.* at 7–10, 28, 141–46.

88. PYE, *supra* note 41, at 204–05.

89. *Id.* at 370–71. The relationship between Confucianism and Communism continues to develop, and today there is said to be something of a “revival” of Confucianism. DANIEL A. BELL, CHINA’S NEW CONFUCIANISM: POLITICS AND EVERYDAY LIFE IN A CHANGING SOCIETY 3–18 (2008).

development of Chinese intellectual property, it is probably a mistake to focus all of our attention upon Confucianism in the first place.

It was not for two or three hundred years after the invention of printing that the Confucian classics appeared in print.<sup>90</sup> Chinese historians also note that as early as the turn of the seventh century, Buddhist scriptures reproduced among the populace outnumbered the Confucian classics by *thousands* of times.<sup>91</sup> The world's earliest extant complete book on paper is probably the Buddhist text *Parable Sutra* (256).<sup>92</sup> The earliest extant printed text is a Buddhist *dharani* sutra scroll (c. 704–751) discovered in a temple in Korea in 1966; it was probably printed in China.<sup>93</sup> The first complete printed book is probably the Buddhist *Diamond Sutra* (868) discovered by Aurel Stein in Dunhuang during his second expedition of 1907.<sup>94</sup> And when commercial printing arose in the tenth century, the output was unprecedented: “nearly half a million copies of Buddhist books and pictures are known to have been printed in the eastern part of China in one small area alone over a period of less than half a century.”<sup>95</sup>

It is thus no secret that Buddhism is inseparable from the earliest book copying, production, and printing in China.<sup>96</sup> The reproduction of religious texts is uniquely appealing to Buddhists because it is a tenet of that religion that the copying and distribution of its sutras is a way to receive the blessings of its founder.<sup>97</sup> The Buddha, it is said, once remarked, “Whoever wishes to gain power from the *dharani* [charms] must write seventy-seven copies and place them in a pagoda.”<sup>98</sup> The underlying “religious motivation is . . . confirmed by the earliest printings of the *dharani* discovered in Japan and

90. Tsien, *supra* note 86, at 378.

91. WEI ZHENG, SUSHU [HISTORY OF THE SUI DYNASTY (581–618)] 1099 (Zhonghua Shuju 1973) (636); *see also* KIESCHNICK, *supra* note 16, at 177.

92. Tsien, *supra* note 86, at 86; *see also* KIESCHNICK, *supra* note 16, at 179.

93. Tsien, *supra* note 86, at 149–51; *see also* KIESCHNICK, *supra* note 16, at 181. Tsien notes that a similar text was probably printed in Japan between 764 and 770; contemporary documents say that over a million copies were produced. Tsien, *supra* note 86, at 150.

94. Tsien, *supra* note 86, at 151.

95. *See id.* at 369.

96. *Id.* at 8–9. For an introduction to Buddhism from its Indian roots to Zen Buddhism in Japan, *see* DE BARY, *supra* note 78. Zheng and Pendleton mention the sutra published by Wu Zetian. ZHENG & PENDLETON, *supra* note 6, at 11. Buddhism had a profound influence on Chinese book culture in general. KIESCHNICK, *supra* note 16, at 168. For a discussion of the relation between Buddhism and the invention of printing in China, *see* T. H. BARRETT, *THE WOMAN WHO DISCOVERED PRINTING* (2008).

97. KIESCHNICK, *supra* note 16, at 164, 167; Tsien, *supra* note 86, at 8. Of course, the production of religious merit was not the only reason why books were copied; copying manuscripts was a way to study and memorize a text while practicing the art of calligraphy. KIESCHNICK, *supra* note 16, at 167. Books were also, of course, copied for money. *Id.* at 183–84.

98. Tsien, *supra* note 86, at 8–9.

Korea.”<sup>99</sup> Furthermore, because Buddhism ideally required the “austere ideal of renunciation of the world of things,” it is not a philosophy that would naturally be expected to place much value on the concept of “owning” rights to printed texts, especially when these texts were religious and produced for pious motives.<sup>100</sup> Indeed, the concept of “property” is something that Buddhism is unlikely to celebrate, as the material world is itself “a deception, a dream from which we must awaken sooner or later.”<sup>101</sup> In other words, Buddhism is not only inextricably related to all aspects of China’s earliest book production, reproductions of its texts were initially made in vastly greater numbers than the Confucian classics, and its underlying philosophy seems uniquely ill-suited to the creation of what we in the West might consider a property right.

After Buddhist book production was firmly established, the Confucians began printing large volumes of books as well. As early as the tenth century, the art of printing was borrowed “from the Buddhists to reproduce standardised Confucian texts . . . and since then, the printing of Confucian classics, histories, and other works intensified.”<sup>102</sup> By 1005, the wooden printing blocks found in the National Academy numbered one hundred thousand: “printing by this central government agency alone increased as many as twenty-five times within a period of less than twenty years.”<sup>103</sup>

The revival of Confucian learning, and Neo-Confucianism’s eventual dominance, does not, however, change the fact that printing in China was first motivated by the desire to reproduce great quantities of Buddhist texts.<sup>104</sup> Nor does the fact that Buddhism is not as influential as it once was necessarily mean that its effect on Chinese attitudes toward copying, printing, and book production was not more lasting. Indeed, Buddhism continues to “influence the development of the Chinese book, whether in the massive production of morality books in Taiwan and mainland China or, more directly, in the continued production of printed and now digital Buddhist books today.”<sup>105</sup>

It is difficult to overstate the effect that Buddhism had upon Chinese book culture. And because it is reasonable to assume that Buddhist attitudes toward property might also have affected attitudes toward copying, borrowing, and intellectual property in general, this is an area that seems to deserve more attention than it has heretofore attracted.

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99. *Id.* at 9.

100. *See* KIESCHNICK, *supra* note 16, at 2–3.

101. *Id.*

102. Tsien, *supra* note 86, at 370.

103. *Id.*

104. *Id.* at 378.

105. KIESCHNICK, *supra* note 16, at 185.

## VII. CONCLUSION

China has never viewed intellectual property the way we do in the West. Chinese culture and its educational system long placed great emphasis on borrowing passages from its rich heritage of classical texts. In imperial China, no man's education was complete until he could quote vast tracts of the Confucian classics verbatim and weave appropriate selections into his written work and daily conversation. When traditional Chinese authors borrowed words and phrases from a classic, they rarely identified the quoted material because all educated readers already recognized the source. It was superfluous. Yet it was also sometimes necessary for the reader to identify precisely where the quoted material was borrowed from before it was possible to determine what it meant in its new context. The assertion that China did not develop intellectual property rights for the written word because the Confucian tradition did not consider the provenance of borrowed material important is therefore not persuasive. Furthermore, other schools of thought, and Buddhism in particular, also affected early attitudes toward the lack of property rights in printed works. Buddhism was extensively involved in all aspects of early book production in China; because the motive was the acquisition of religious merit, and because Buddhism was inherently suspicious of the concept of property, it is not a surprise that several hundred years elapsed between the first mass printing of Buddhist works and the first claims that an author might possess some kind of property right to his printed work. This is an aspect of the development of intellectual property in China that has not received the attention it deserves.

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