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Deconstructing *Shanzhai*–China's Copycat Counterculture: "Catch Me If You Can"

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"Why join the navy if you can be a pirate?" –Steve Jobs

"Truth becomes fiction when the fiction's true,
Real becomes not real when the unreal's real"
–Cao Xueqin, (1715-64) *Dream of the Red Chamber*[1]

I. Introduction: What is the *Shanzhai*?

What is a "Chinese copy"?[2] And why does China have a reputation as the quintessential "copycat culture," where nimble knock-offs of virtually any article are in the daily news and respect for and protection of the intellectual property owned by others is widely perceived to be either weak or non-existent?[3] Are copying and creativity diametrical opposites, two sides of the same coin, or unrelated to one other? Are wildly successful imitators uncreative? Does the charge that "the Chinese are the masters of copying" reflect something unique about China's traditions and culture?[4] Do China's cultural traditions (particularly Confucianism) foster copying

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[1] Cao Xueqin, The Story of the Stone, (tr. David Hawkes) (Penguin 1973) p. 55

[2] The Online Britannica Dictionary defines "Chinese copy" as "an exact imitation or duplicate that includes defects as well as desired qualities" and dates its first use in 1920. See http://www.britannica.com/bps/dictionary?query=copy

[3] A recent SSRC report is entitled *Media Piracy in Emerging Economies* (hereinafter "SSRC Piracy Report" (available at http://piracy.ssrc.org) In an interview with one of its authors, Ravi Sundaram, states: "In India, pirate is part of popular vocabulary along with 'local' commodities–an allusion to goods outside the brand economy. A new term in the last few years is 'Chinese', used for all low-cost commodities." see, Ramon and Thomas, Julian, Transnational Piracy Research in Practice: A Roundtable Interview with Joe Karaganis, John Cross, Olga Sezneva and Ravi Sundaram (October 20, 2011). Television and New Media, 2012. Available at SSRN: http://ssrn.com/abstract=1950482, quoting Ravi Sundaram, at p. 5 *see also* "Chinese factories now manufacturing *shanzhai* Indian goods" http://shanghaiist.com/2012/01/02/chinese_factories_now_manufacturing.php (January 1, 2012) The two best books describing (but not analyzing) China's *shanzhai* commerce are Robert Neuwirth, The Stealth of Nations: The Global Rise of the Informal Economy (Pantheon 2011) (especially Chapter 4, "The Culture of the Copy" about the sellers at the Guangzhou Dashatou market) and Gordon Mathews, Ghetto at the Center of the World (Univ. of Chicago 2011) (describing the activities of African and South Asian traders purchasing *shanzhai* products at Chungking Mansions, a block away from the Peninsula Hotel in Hong Kong.)

[4] The pioneering study of copying in Chinese culture is William P. Alford, To Steal a Book Is an Elegant Offense: Intellectual Property Law in Chinese Civilization (1995) The *shanzhai* phenomenon

or suppress creativity?[5] Is copying the works of others so embedded in Chinese culture that the copyists are totally unconcerned about the fact that what they are doing is copying?[6] Or are they engaged in a new kind of innovation and social commentary?[7]

In popular slang in contemporary China, "to copy" and "to parody" as self-aware, casual, and public behavior by ordinary citizens is referred to as "*shanzhai*." The literal meaning of the word *shanzhai* is "mountain stronghold" which in traditional Chinese popular culture refers to the hide-out of bandits and other outlaws. The use of the term with that meaning as a cultural expression goes back almost a millennium, to a body of oral stories about wandering fighters and rascals, told by itinerant professional storytellers (*shuoshude*) in town and country village squares at least as early as the 12th Century. A sub-genre of these stories concerns the adventures of bands of political rebels against the empire and all-around ruffians who lived in mountains or marshy wastelands throughout China. When commercial printing took off in China in the 14th and 15th centuries, these stories

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was not current at the time Alford did his study. The focus of the present study is on *shanzhai* as a popular perception of elite culture in traditional and modern China.

[5] For an empirical study of some of the issues here with specific reference to "creativity" in China, see Weihua Niu & Robert J. Sternberg, "Cultural influences on artistic creativity and its evaluation" 36 International Journal of Psychology (2001) 225-241 ("Two studies were designed to compare (a) the rated creativity of artworks created by American and Chinese college students, and (b) the criteria used by American and Chinese judges to evaluate these artworks. The study demonstrated that the two groups of students differed in their artistic creativity. American participants produced more creative and aesthetically pleasing artworks than did their Chinese counterparts, and this difference in performance was recognized by both American and Chinese judges. The difference between the use of criteria by American and Chinese judges was small, and consisted mainly of the American judges' use of stricter standards in evaluating overall creativity. *Moreover, in general, there was a greater consensus among Chinese judges regarding what constitutes creativity than among American judges.* The study also revealed, but preliminarily, that the artistic creativity of Chinese students was more likely to be reduced as a function of restrictive task constraints or of the absence of explicit instructions to be creative. The results of this study seem to support the hypothesis that an independent self-oriented culture is more encouraging of the development of artistic creativity than is an interdependent self-oriented culture. Other possible explanations, such as differences in people's attitudes toward and motivation for engaging in art activities, or socioeconomic factors might also account for differences in people's artistic creativity."[*emphasis added*])
Abstract available at http://www.tandfonline.com/doi/abs/10.1080/00207590143000036

[6] *See, e.g.,* "When copycat becomes cultural norm in China: Foreign movie posters ripped off" www.haohaoreport.com/l/33681 (March 3, 2012) *and* Tom Carter, "Six Degrees of Shanghai Girls" http://shanghai.talkmagazines.cn/issue/2012-03/six-degrees-shanghai-girls *and* Brian Ling, "Why Does China Copy Designs?" http://sgentrepreneurs.com/contributors-corner/2007/05/17/why-does-china-copy-designs/ (May 17, 2007)

[7] *see* "Just Because Something's Fake Doesn't Mean It Can't Be Innovative" http://www.techdirt.com/articles/20111021/06241416447/just-because-somethings-fake-doesnt-mean-it-cant-be-innovative.shtml . Former Google China President Kaifu Lee has opened some new copycat websites. Critics have nicknamed him Kai(shi) "Start" Fu(zhi) "Copy" Lee (or "Start to Copy" Lee.) *See* http://www.ministryoftofu.com/2011/04/picture-of-the-day-diandian-tumblr-another-classic-chinese-copycat-in-the-internet-age/

were recast into a number of historical romances written in a racy vernacular Chinese for an urban popular (and literate) readership.[8]

The use of the term *shanzhai* to apply to a contemporary cultural phenomenon is only one component in the resurgent contemporary interest in China's rich traditional culture called generally "returning to the past (*fugu*)" or "time travel (*chuanyue)*," somewhat but not exactly identical to the revival of interest in traditional culture that has occurred in other Asian countries such as modern Japan and Korea as their populations have grown in material prosperity and developed unique and flourishing modern lifestyles with roots not in "the West" but in "the Past."

> In recent years, the return to traditional culture/fashion has suddenly become popular [in China.] Traditional costumes and etiquettes began to appear in various occasions; whether to show off one's personality, or to attract attention. However, this resurgence of returning to a nation of etiquettes also brought about many awkward cases of "time travel" [things looking out of place/time or being historically inaccurate, not literal time travel]. [9]

Since sometime around the Beijing Olympics in 2008, a new meaning of the term *shanzhai* has appeared: the "*shanzhai* copycat." Now *shanzhai* has been adopted and used to refer to the places where cheap knock-off mobile phones and laptop computers (often cobbled together by "moonlight" manufacturers who have day-jobs in southern China's vast mobile phone manufacturing industry) are made.[10] *Shanzhai* now refers to such "product extensions" as the playfully *shanzhai*

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[8] The *locus classicus* for the term *shanzhai* as a "mountain stronghold" is the 14th-15th century vernacular novel *Shuihu Zhuan*. Morohashi Tetsuji, 4 Great Dictionary of Chinese-Japanese (*Daikanwa Jiten*) (Tokyo 1955-60) 3597.The book's title has been variously translated into English as *The Water Margin, Outlaws of the Marsh,* and *All Men are Brothers.*

[9] This revival includes, for example, the reappearance of traditional Chinese dress (*hanfu*) at festive occasions such as weddings, Lunar New Year, etc. *see* "Hanfu Movement: Cultural Revival or Awkward Time http://www.chinasmack.com/2012/pictures/hanfu-movement-time-travel-cultural-revival.html Modern Chinese "time travel" (*chuanyue*) literature is best represented in the magnificent *oeuvre* of the Hong Kong novelist Jin Yong (pseudonym of Louis Cha), among many others. *See, e.g.* Ann Huss and Jianmei Liu (eds.) The Jin Yong Phenomenon: Chinese Martial Arts Fiction and Modern Chinese Literary History (2007) *and* John Christopher Hamm, Paper Swordsmen: Jin Yong and the Modern Chinese Martial Arts Novel (2011) The powerful image of a vibrant, prosperous Chinese urban society (*shengshi*) is captured cogently in a perennially popular scroll painting by the Northern Song artist Zhang Zeduan (1085-1145) called "Down on the River During the Qingming Festival", an imaginary voyage through the Chinese countryside "rivers and lakes" and villages, to the Imperial capital, Kaifeng, ending in the west at the silent gates of the Song Emperor Huizong's imperial palace. *See* http://www.chinaonlinemuseum.com/painting-along-the-river.php

[10] For a pictorial narrative of the making of a knock-off iPad, *see* http://www.ministryoftofu.com/2011/07/video-chinese-young-man-liu-xinying-makes-ipad3-by-hand/. Mathews explains the difference between "copies" and "knock-offs" as follows: "Most commentators use the terms "copy" and "knock-off" as synonyms. In this book, I differentiate between these terms: a copy, in my usage, is manufactured to seem indistinguishable from the original, whereas a knock-off, in the effort to obtain a degree of legal protection, has small differentiations, such as a change in one letter in the brand name, to make it not exactly the same as the original." Mathews, at 111. Neuwirth *at* 89-90, comments: "The Guangzhou Dashatou market is essentially a series of stalls rented out as independent booths. The merchants here are all Chinese. But most of the customers… are from Africa. And the economy here, as in almost all haphazard

"Adidas" sneaker-shaped mobile phone.[11] Products and services of the Apple Corporation are especially targeted–for example, *shanzhai* iPhones and iPads[12] and *shanzhai* Apple computer outlets in both Kunming, China[13] and Flushing, New York.[14] There is even a *shanzhai* personal products brand called "iShampo."[15] How about *shanzhai* iPhone gas stoves?[16] Chinese usage of *shanzhai* now extends to *shanzhai* fast food restaurants and coffee bars[17], and even *shanzhai* TV shows.[18]

"山寨 Shanzhai"culture is still popular in China. "Shanzhai" literally means "mountain village" or "mountain stronghold" and implies lack of official control. *Shanzhai* culture began [with] name-brand knockoffs flooding the market. However as it gains popularity its meaning expands. *Shanzhai* is not limited to imitation and pirated products, but also parody to … mainstream culture and famous people and … look alike[s], like the model of the Beijing national stadium made out of sticks, *shanzhai* spring gala show and so on. It [reflects] a new spirit and a laughing stock among the Chinese public, which adds fun into their daily life but of course this still can't be the justification for rip-off products. Whether *shanzhai* culture is the grassroots creativity or a violation of intellectual property, it's popular among the people." [19]

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markets around the world, is cash-only….Mobile phones are a big business in China. According to government figures, China exported six hundred million mobile phones in 2008. The phones sold here are unofficial. …There's "Sansung," "Motorloa", and "Sany Erickson."… In Guangzhou's garment and leather markets, you can find stores with names like Hogoo Boss and Zhoumani and Verscc and S. Guucci…" Mathews, *at* 133, observes that many African traders prefer to shop at Chungking Mansion in Hong Kong because they don't have to worry about confiscation of "fakes" at the Shenzhen border as those who purchase in Guangzhou do. "The big fish go to China. We little fish stay in Hong Kong. China is there for large scale, for the big fish, not the small fish."

[11] http://cellphones.techfresh.net/shanzhai-adidas-shoe-phone/

[12] http://www.gooapple.com/ *see also* Makiko Taniguchi and Eddie Wu, "Copycat design as an open platform for innovation" http://patterns.ideo.com/issue/shanzhai/: *"Shanzhai* is an open platform for grassroots innovation: Apple, Nokia, and Samsung smartphones get copied, but the knockoffs adapt the original designs in ways that appeal to Chinese customers. *Shanzhai* designers might add a flashlight key in areas with unstable electricity. The effect is to make products accessible to common folks in terms of price, aesthetics, values, and needs. *Shanzhai* designs are an opportunity for international companies to introduce Chinese consumers to their brands, and then observe how local Chinese culture adapts their offerings." Reports in official newspaper accounts suggest that *shanzhai* mobile phones now constitute more than thirty percent of China's 450 million user market. *See* Wang Xing, "*Shanzhai* Culture now in the Crosshairs" China Daily (May 18, 2009) http://www.chinadaily.com.cn/bw/2009-05/18/content_7785393.htm

[13] China inspects electronics stores after fake Apple shops report http://www.reuters.com/article/2011/07/23/us-china-apple-idUSTRE76M2NP20110723

[14] "Apple takes aim at copycat fake retail stores with new lawsuit" http://www.appleinsider.com/articles/11/08/04/apple_takes_aim_at_copycat_fake_retail_stores_with_new_lawsuit.html

[15] http://www.ministryoftofu.com/2011/10/picture-of-the-day-epic-win-the-latest-chinese-grassroots-innovation-ishampoo/

[16] http://www.ministryoftofu.com/2012/02/picture-of-the-day-iphone-gas-stove/

[17] http://www.chinasmack.com/2008/pictures/funny-clever-chinese-shanzhai-brands.html

[18] http://online.wsj.com/article/SB123257138952903561.html On the famous *shanzhai* "knock-off" of China's government-run CCTV Lunar New Year gala, *see* Yi-Chieh Jessica Lin, Fake Stuff: China and the Rise of Counterfeit Goods (Routledge 2011), especially Chapter 5, "Counterfeit Culture as Protest and Rebellion"

[19] Translated from a blog on the Chinese Baidu website, http://tieba.baidu.com/p/1158948699?pn=1 For a hilarious look at some recent examples, see

How is it then that *shanzhai* as "mountain stronghold" has come to mean Chinese take-offs, knock-offs and playful fakes? A well-known young Chinese hacker, Andrew "Bunnie" Huang, explains what his father told him about the origins of the *shanzhai*:

First, let's try to understand the cultural context of the word *shanzhai*. *Shanzhai* comes from the Chinese words "mountain fortress". The literal translation is a bit misleading. The English term "fortress" connotes a fortified structure or stronghold that is large, perhaps conjuring imagery of castle turrets and moats. On the other hand, the denotation simply states that it is simply a fortified place. This latter denotation is closer to the original meaning from Chinese; in fact, the fortress they are referring to is closer to a cave or guerrilla-style hideout. In its contemporary context, *shanzhai* is a historical allusion to the legends that dwelled within. One such legend is the 12th-century story of the 108 bandits of Song Jiang. It is still a popular tale today; my father recognized it instantly when I asked him about it. A friend of mine described Song Jiang as a sort of Robin Hood meets Che Guevara; Song Jiang was a rebel and a soldier of fortune, yet selfless and kind to those in need.[20]

Huang is referring to the perennially popular, indeed irrepressible, stories captured in a 14th century Chinese vernacular novel called *Shuihu Zhuan,* narrating the last "glorious" days of the Northern Song dynasty in the early 12th century before the country was overrun by "barbarian" tribes.

Shuihu Zhuan, known to the West through the partial translations of Pearl Buck (*All Men Are Brothers*) and J.H. Jackson (*Water Margin*) is one of the most popular traditional novels in China. Written in the vernacular language of the Yuan and Ming [dynasties, 1224-1644], it tells…of the exploits of a band of 108 lusty, courageous bandit-heroes of the 12th century, and how, under various circumstances, they one by one, and then in groups, seek sanctuary at Liangshan Po, a mountain lair [*shanzhai*] in the midst of a huge marsh (*shuihu*). These bandits do not hesitate to attack the wealthy and powerful and rob them of their ill-gotten property, and to fight against government troops commanded by corrupt and oppressive officials. For all their defiant actions, however, deep in their hearts, especially in the heart of Song Jiang, the leader of the group, they still yearn for a chance to serve the Emperor and demonstrate their loyalty to him. In the end they are pardoned by the Emperor, and being incorporated into the imperial army, take part in a series of campaigns against the invading enemies from abroad and against other rebellious forces at home. The campaigns are very successful, though the last one proves to be rather costly, for more than half of the band of heroes die in the course of it. Those who survive became further dispersed, and the novel ends tragically, with the death of Song Jiang at the hands of intriguing court officials.[21]

The story of "The 108 Heroes," women as well as men, hard-fighting hard-drinking ruffians, murderers, kungfu fighters, wandering knights, and errant vagrants who stand for a curious sort of loyalty and justice, mayhem and deception, is part of the basic popular cultural fabric of a Chinese upbringing to this day. Most

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"Photo hunt game of Chinese Shanzhai products" http://www.chinahush.com/2011/07/31/photo-hunt-game-of-chinese-shanzhai-products/#more-8691

[20] http://www.bunniestudios.com/blog/?p=284 The word "hacker" in Chinese is *haike,* loosely translated as "troublemaker.")

[21] John C.H. Wang at 53. For an English translation of the earliest extant print version of the Song Jiang story (mostly copied without attribution from other Chinese literary sources), *see* William O. Hennessey (tr.) PROCLAIMING HARMONY, (Michigan Papers in Studies No. 41 (Ann Arbor, 1982) pp. 51-58

of the heroic characters in the stories hail from the lower strata of Chinese society, have little or no formal education, and devote themselves to physical pursuits such as martial arts, drinking, and fighting. They also live and die in accordance with a consistent (if ambiguously contingent) *shanzhai* moral code. The *shanzhai* milieu represented in the novel is a treasure-house of moral dilemmas. Most of the protagonists are ordinary people who ended up on the wrong side of the law and had to escape to *somewhere*. Some are wandering swordsmen (and women.) Others are upstanding junior officials and military warriors who, through no fault of their own, have crossed their high-handed and corrupt superiors and are forced to flee to the *shanzhai* to escape punishment. The "world of rivers and lakes (*jianghu*)" they inhabit is "the mirror image of political spaces."[22]

The novel's establishment villains are typically avaricious and haughty government officials and their hangers-on, drawn in stark contrast to the ideal of the "Sage official" heralded by Confucian establishment culture, the latter of whom are supposed to resemble one another in their cookie-cutter moral perfection and mastery of the Confucian past. The anti-establishment protagonists of the *shanzhai* culture as portrayed in this novel are wildly idiosyncratic, often misogynistic, intemperate, and perpetually adolescent. They manage to get along with one another only after establishing relationships through physical combat that defines who among them have mastered the best fighting styles and thus are most worthy of respect in the *shanzhai*.

Needless to say, Chinese officialdom has always strenuously disapproved of this book, and it was repeatedly banned but unsuccessfully suppressed from publication by the imperial government during the late imperial Ming and Qing periods (1368-1911).

"Local troupes present operas dealing with disloyal servants and rebellious [subjects.] They completely ignore ethics and principles and stress only strength [*haoqiang*], jumping and fighting throughout the performance. There are a hundred variations on the same theme. But ignorant masses know no better than to roar their unanimous approval. This is teaching the people to be rebellious… Local officials should also keep their eye on the book market, where publishers are selling lewd novels and tales of mountain rebels. These should all be burned"[23]

Vignettes within the novel describing the high-handedness and hypocritical behavior of government officials are part of the entertainment that the lower classes so enjoy. In the very first chapter, a football player, Gao Qiu (a pun on his skill with the football), owing to his sports talent and "hale fellow well met" chumminess, gets himself appointed "Grand Tutor" to the emperor. Later on, the first leader of the *shanzhai* gang, Chao Gai, a village headman who plays both sides of the street, manages to maintain good relations with both the imperial forces and the robbers. He eventually leads a heist of an imperial convoy carrying birthday presents from the provinces to the Grand Tutor in the capital for the robber band.

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[22] Weijie Song, "Nation-State, Individual Identity, and Historical Memory: Conflicts between Han and Non-Han Peoples in Jin Yong's Novels" *in* Huss and Liu, 121, 134

[23] comments by a 19th Century Chinese official in Taiwan, Chen Huanzhang. *Quoted in* David Ownby, Brotherhoods and Secret Societies in Early and Mid-Qing China (Stanford 1996) p, 21

The morally ambiguous *shanzhai* ethos of "robbers as heroes" embedded this story has been the subject of at least two popular television series (as well as video games) shown in mainland China, Taiwan, Hong Kong, and the Chinese diaspora over the past decade since 2000, making it accessible to a younger generation of Chinese that would not be as familiar with the printed novel as their parents and grandparents have been. That the *shanzhai* meme lives on in contemporary Chinese "grass-roots" culture has significance for what it means for many Chinese to make a living in the informal economy in contemporary China, with important ramifications for China's "official" system of intellectual property protection.[24] Needless to say, the very use of the term *shanzhai* in Chinese contemporary popular culture to refer to such activities is extremely uncomfortable –indeed awkward–in official government circles, for the obvious reasons. It suggests that China's traditional *shanzhai* "counterculture" may be resurging because of popular perceptions that China's official traditional "establishment culture" has not really changed very much to the present day from what it was for most of the populace over many centuries. [25]

II. Intellectual Property and Official Industrial Policy in 21st Century China: Contradictions, Uncertainties, and Ambiguities

While not an outright apology for the rampant copying of everything from manufactured goods to faking Harry Potter books[26] in China, the most-often encountered explanation for the phenomenon is that emergent from the trauma of its "Great Proletarian Cultural Revolution" in the 1960s and 1970s, China has had only a 30-year period of "modern" economic development in which to "crossover" to strong intellectual property protection, and that given that modern history, a "culture of imitation" has not yet yielded to a "culture of innovation." This familiar argument takes historical insight from the fact that, in the near or distant past, now-developed, sophisticated market economies such as those of Japan and Korea (and much earlier the United States itself) went through their own similar "developing nation" periods of weak protection for intellectual property (particularly when it

[24] In the ancient Confucian canonical text, the *Li Ji* or *Book of Rites*, cited again and again by later Confucian scholars, it says: "Those who are in superior position and those inferior both know their appropriate place." ("*zunbei youxu"*) The Chinese popular expression in the face of such official pretense is captured in the Chinese saying: "Those in superior positions have their policies; we in inferior positions have our ways of dealing with those policies." (*shang you zhengce; xia you duice*) For a funny description of a recent "culture clash" employing the latter expression concerning a dispute over the construction of a research park between government officials from Singapore and their victorious partners from Suzhou Province in China, *see* Hong Hai and Lee Chay Hoon, Educating Singaporeans on Cultural Intelligence: Enhancing the Competitive Edge *(2011)* Educational Research Association of Singapore www.eras.org.sg/Cultural%20Intelligence.pdf

[25] The contemporary Chinese "culture/counterculture" distinction has been noted previously, *see, e.g.*, Geremie R. Barmé, In the Red: On Contemporary Chinese Culture (Columbia 2000) Barmé's treatment has little relevance to the present study.

[26] Howard W. French, "Chinese Market Awash in Fake Harry Potter Books", New York Times (August 1, 2007) http://www.nytimes.com/2007/08/01/world/asia/01china.html?pagewanted=all

was owned by foreigners) in order to "catch up."[27] According to this view, when any emerging economy, including China's, finally achieves a certain level of material prosperity, intellectual property protection will naturally – indeed inevitably - become stronger. This view was recently reiterated by the most influential Chinese judge on intellectual property matters, Jiang Zhipei, formerly a member of China's Supreme People's Court:

Jiang agrees that IP infringement in China is serious, yet it mustn't be taken out of context. "[T]he crime of IP infringement is quite serious and rampant in certain areas and sectors, especially [when you look] at the aggregates," he says. "However, measurements that show that China is the leading violator do not take its size into account. When the population is taken into account, China's IP violation rates are much lower than those of many other countries, including the US. He dismisses the notions that counterfeiting and piracy are anything other than development issues. "IP infringement is generally attributed to Chinese traditional culture, the economic system, the legal environment, and even nationalist sentiments of the Chinese populace. These ideas are making the situation too complex." He explains: "China's [IP infringement] problem …is purely a matter of poverty. Piracy was similarly rampant in other Asian countries such as Korea and Japan until people there got richer and domestic needs emerged to encourage their governments to take action to protect IP. With Chinese nationals getting wealthier, the situation will get better in the near future."[28]

A variant on this apologetic points to the immaturity of legal systems, judicial institutions, public awareness, and "Rule of Law" issues generally in resource-challenged developing countries. This "Less-Developed-Country [LDC]" condition is expressly recognized by the WTO system's exemption from the general obligations in the Enforcement Provisions of Part III of the WTO TRIPS Agreement.[29] For example, Professor Randall Peerenboom, who has written widely (and wisely) on China's evolving legal system, observes generally the challenge all developing nations, including but not limited to China, face in modernizing:

Developing states are regularly advised to adopt international best practices. These practices are often succinctly captured in rule of law —toolkits or international documents such as the 22-article "UN Basic Principles on the Independence of the Judiciary" or IFES's[30] 18 judicial integrity principles

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[27] Anne Stevenson-Yang and Ken DeWoskin, "China Destroys the IP Paradigm", 168 Far Eastern Economic Review 9, 17 (2005) (positing that the structural causes of China's "IP problem" "emanat[e] from the peculiarities of Chinese economic policy and from the information revolution internationally.") *at* 11

[28] Inside Man: An Interview with Zhipei Jiang, World Intellectual Property Review (May/June 2011) 16, 17-18 *see, e.g.,* Laurie Burkett, "Retailers Rush In as Chinese Lose their Taste for Fakes" Wall Street Journal (February 14, 2012) B1 ("Fakes remain a problem though. Chinese authorities seized counterfeit goods valued at 5.33 billion yuan ($847 million) last year…The country is also the leading source for counterfeit and pirated goods seized in the U.S., accounting for 62 percent of the $124.7 million in goods seized last year, according to the U.S. government.")

[29] World Trade Organization, Agreement on the Trade-Related Aspects of Intellectual Property (1994) Article 41.5 of the TRIPS Agreement states:

It is understood that this Part does not create any obligation to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of laws in general, nor does it affect the capacity of Members to enforce their laws in general. Nothing in this Part creates any obligation with respect to the distribution of resources as between enforcement of intellectual property rights and the enforcement of laws in general.

[30] Int'l Foundation for Electoral Systems http://www.ifes.org/Content/Publications/White-Papers/2004/Global-Best-Practices-Judicial-Integrity-Standards-and-Consensus-Principles.aspx

-although Eastern European countries were required to comply with more than 80,000 pages of highly specific technical requirements to join the EU! Unfortunately, LICs and MICs cannot simply mimic legal systems in Western liberal democracies. Exhorting developing countries to adopt international best practices is like telling a 10 year-old with a stick in his hand for a golf club and rock for a ball that if he wants to win the Masters he should watch Tiger Woods videos. [31]

A third explanation focuses on China's role as a key stakeholder in the international trading system more directly, including its obligations to its trading partners extending even beyond its membership in the WTO. Is unilateral government pressure from China's trading partners effective in bringing about improvements in its system of intellectual property protection and suppression of rampant piracy and counterfeiting? Or is such pressure counterproductive?[32] A trenchant illustration of the efficacy of this "carrot and the stick" approach would appear to be the case of ethnically "Chinese" Taiwan, as evidenced in the 2011 Special 301 Report of the U.S. Trade Representative, giving special recognition to the dramatic changes in Taiwan's protection of intellectual property by removing "Chinese Taipei" (Taiwan) from its regular appearance on the USTR's annual "Special Section 301" Watch Lists identifying the worst violators of U.S intellectual property rights. [33]

Criticism of China's mercantilist trade policies has grown more strident as China's trade surplus has soared over the last decade and China has entered the "upper middle level" of the World Banks listing of national per capita GNP.[34] Related to this, a fourth explanation for rampant violation of intellectual property rights is that the "Chinese copy" phenomenon has a political explanation–so much so that neither a cultural nor a "stage of economic development" explanation is necessary.[35]

"China's failure to protect [intellectual property] has little to do with stages of economic development or cultural attitudes. It has everything to do with the [Chinese] government's

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[31] Randall Peerenboom, "The Future of Law in a Multipolar World: Toward a Global New Deal" La Trobe University, Faculty of Law and Management Working Papers, p.7 Electronic copy available at: http://ssrn.com/abstract=1846263 *see, e.g.* Peter K. Yu, "Intellectual Property, Economic Development, and the China Puzzle" *in* Daniel Gervais (.ed) *Intellectual Property, Trade, and Development* 173 (2007) *see also,* Peter K. Yu, "The Middle Kingdom and The Intellectual Property World" (2011) *available at* http://ssrn.com/abstract=1934887

[32] Analyzing the situation in Taiwan (culturally Chinese but miniscule in size in comparison to mainland China) as a positive example in the mid-90s, Prof. Andy Sun's aptly suggested that what is needed is to link "political leadership" within a country where IP protection and enforcement is weak with careful, steady and respectful "outside pressure." *See* Andy Y. Sun, "From Pirate King to Jungle King: Transformation of Taiwan's Intellectual Property Protection" Univ. of Maryland Occasional Papers No. 6 (1997) Taiwan has just been added to the World Bank's "high income" countries. *See* http://data.worldbank.org/about/country-classifications

[33] *see* 2011 Special 301 Report, Office of the United States Trade Representative (April 2011) p. 5 http://www.ustr.gov/about-us/press-office/reports-and-publications/2011/2011-special-301-report

[34] *see* World Bank http://data.worldbank.org/about/country-classifications "China"

[35] Anne Stevenson-Yang and Ken DeWoskin, "China Destroys the IP Paradigm", 168 Far Eastern Economic Review 9, 17 (2005) (positing that the structural causes of China's "IP problem" "emanat[e] from the peculiarities of Chinese economic policy and from the information revolution internationally.")

ownership and control over the economy, which undermines property rights–especially the intangible kind.... Piracy is not just the result of lax enforcement, but also incentives built into the structure of China's economy. The state has maintained its historical control of economic value; in that economy IP protections are not in its interest and therefore not in the interest of the companies the government owns, nurtures or favors. Only the smallest companies in China want IP rights, but as soon as they grow large, the rights are arrogated to the state." [36]

Both the various "catch-up/crossover" and the "state-controlled economy" explanations for weak intellectual property protection and blatant copying in China merit considerable attention, but in this non-Chinese observer's experience, both are incomplete. The first would be more plausible if other similarly situated countries (such as the other BRIC countries–Brazil, Russia, and India–for example) manifested the same "copycat" phenomenon at the same stage of development. Clearly on this point, they do not, and China is in a class all by itself.[37] The second assumes that "cultural attitudes" can be separated from "ownership and control" behavior of China's bureaucratic officialdom. It also overstates the extent to which China's authoritarian rulers actually control or even presume to control (as opposed to merely appear to outside observers to control) "copying" as it occurs in the quotidian commercial lives of hundreds of millions of its people. (As I intend to explain more fully, the official "ownership and control" behavior of China's current

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[36] Id. At 12

[37] This point has been made in a recent interview conducted by Robert Capps of WIRED Magazine with Robert Neuwirth, author The Stealth of Nations: The Global Rise of the Informal Economy (Pantheon 2011) mentioned above. Neuwirth devotes an entire chapter to the *shanzhai* markets of China's Guangdong province entitled "The Culture of the Copy":
Capps: You talk a lot about wares that are sold through tiny kiosks, street stalls, and little informal markets. Where do those goods come from?
Neuwirth: The biggest flow of goods is from China. It's no secret that China is the manufacturing engine of the planet. In a lot of ways, they're more capitalist than we are. If someone wants something made—even if that person isn't licensed—a Chinese factory will make it. It's also easy to deal with China. You can go to the local Chinese consulate and get a tourist visa within a couple of hours. You can't say the same about coming to the US. So African importers, for instance, travel to China and commission Chinese firms to make goods for them to sell in Africa.
"Neuwirth calls such economies "System D" There's a French word for someone who's self-reliant or ingenious: *débrouillard*. This got sort of mutated in the postcolonial areas of Africa and the Caribbean to refer to the street economy, which is called *l'économie de la débrouillardise*—the self-reliance economy, or the DIY economy, if you will. I decided to use this term myself—shortening it to System D—because it's a less pejorative way of referring to what has traditionally been called the informal economy or black market or even underground economy. I'm basically using the term to refer to all the economic activity that flies under the radar of government. So, unregistered, unregulated, untaxed, but not outright criminal—I don't include gun-running, drugs, human trafficking, or things like that." Robert Capps, "Why Black Market Entrepreneurs Matter to the World Economy", www.wired.com/magazine/tag/slumdog/ (December 16, 2011) Gordon Mathews, "Ghetto at the Center of the World" (Univ. of Chicago 2011) analyzes the South Asian and African traders who purchase goods in the Chinese *shanzhai* from the safety of a Hong Kong slum high-rise called "Chungking Gardens." *See also* Mark Findlay and Nafis Hanif, "International Conventions and the Failure to a Transnational Approach to Controlling Asian Crime Business" Sydney Law School Legal Studies Research Paper No. 11/75 (October 2011) *electronic copy available at* http://ssrn.com/abstract=1950031 For a more traditional and less nuanced "cops and robbers" approach to the Chinese "knock-off" problem, see Moisés Naím, "Illicit: How Smugglers, Traffickers, and Copycats are Hijacking the Global Economy" (Anchor 2006)

authoritarian rulers follows closely a long history of consistent official bureaucratic attitudes in China going back hundreds of years, based upon a medieval offshoot of ancient Confucian philosophy known as *Neo-Confucianism*.)

When nuanced to take into account China's rapid development over the past two decades, an argument can be made that the country is effectively a "time capsule", with urban seacoast cities such as Beijing and Shanghai positioned in the 21st Century, populated with cosmopolitan and sophisticated political and economic elites; meanwhile, travel into the hinterlands transforms a visitor into a "time traveler" back to an agrarian economy so linked by culture and history to the land, its rudimentary social system and "local strongman" legal system, that little in rural China or its governance has changed, despite wars and revolutions, in a century or more. News reports of strife of "mass protests" over land development occurring at the border between "old China's" agrarian population and "new China's" industrial one are far from rare.[38]

While one view of "informal economies" is that they lie outside the effective control of developing states, another view is that local governments themselves tacitly condone (or even covertly encourage) euphemistically described "local entrepreneurial actors" to go out and copy anything they want as long as they remain unobtrusive and "don't make trouble." These two positions are not totally irreconcilable. For example, an interesting recent business study on China's economic development makes the assertion that because of the tension between central and regional politics and priorities in China and the sheer scale of the country in its diverse regional character, geographical vastness, and teeming population, certain features of its political economy point to "structured uncertainty"–not as a failure of China's economic system but as a conscious development strategy (a political bargain, if you will) such that the same policies can be simultaneously interpreted differently at the national level from how they are interpreted at the regional level. The focus at the national level may be on "national innovation policy"; simultaneously, the focus at the regional/provincial/local levels will be on adapting (or appropriating wholesale) technology created *elsewhere*. In this view, local government officials naturally pay little heed to the focus at the national level on seeking technology independence or preeminence, in favor of allowing the locals to make a quick buck in any way they can.

> "To understand the economic behavior of actors, an institutional account of China must look at not only official institutions, organizations, and procedures, but also the spheres of structured uncertainty. [W]e define structured uncertainty as a part of the institutional system, although a part that prevents its 'institutionalization' by ensuring that instead of patterns of behavior becoming routinized, a multiplicity of behaviors can be followed on a specific subject without any of the actors knowing in advance which behaviors are appropriate. In other words, structured uncertainty may be defined as an agreement to disagree about the goals and methods of policy, a condition leading to intrinsic unpredictability and, hence, to inherent ambiguity in implementation. This ambiguity leads to some tolerance of multiple interpretations and implementations of the same policy. Therefore,

[38] *see, e.g.* "China's Wen says farmers' rights flouted by land grabs" (Reuters, February 5, 2012) http://in.reuters.com/article/2012/02/05/china-land-wen-idINDEE81403P20120205

structured uncertainty is an institutional condition that cements multiplicity of action without legitimizing a specific course or form of behavior as the proper one."[39]

This observation and analysis suggests looking at the phenomenon of Chinese imitation and innovation not just from the "top down" but also from the "bottom up." Sociologist John Cross, (one of the authors of the SSRC Piracy Report mentioned above) explains the advantages of looking at the piracy phenomena in the countries it studied (incidentally, not including China) from the bottom up, rather than top-down as previous industry studies (and Section 301 reports) have tended to do:

"Industry research into this issue is…applied research from the basis of [the industries'] interests. True scholarship uses our knowledge of the world to understand basic principles. One of the best ways of doing this is to take the counterintuitive approach, or at least to approach things in a different direction from the bulk of existing research. This is what this research does in various different ways. First, by approaching the research from the standpoint of the pirates as opposed to the standpoint of the industry. This is not done, at least as I see it, merely to be obstreperous or to rail against the evils of greedy industry executives—Hollywood does a pretty good job of that itself (and makes good money at it)—but rather because this approach had been understudied and because this allows us to look at the process of policy formation as a social process in which neither the state nor 'industry' are seen as omnipotent. On the contrary, we show among other things that there is a substantial social capacity for resistance to formal norms that does not need to show itself in organized social movements, but shows itself in the everyday behavior of people struggling to survive. This is one reason why it was particularly important to me to challenge the 'bogeyman' image of 'organized crime' as being yet another omnipotent actor (except on the 'evil' side) that the industry has attempted to promote. It is not that I am saying that organized crime is never involved, but that it is not the root cause of the issue and not the most interesting aspect of it. Thus, rather than seeing piracy in terms of 'good' vs. 'evil' (the way the industry obviously tries to promote the debate, with themselves obviously claiming, somewhat unsuccessfully, the 'good' role), I see it as an expression of contentious politics that takes place not primarily in street protests but in household economies and informal social dynamics. Attempts [are made] to find even worse metaphors for these people, by associating them with organized crime, terrorism, and so on. To what extent should we as scholars use these metaphors without scepticism? Of course we should not, and I don't think we did. The metaphor is a part of the framing of the issue, and the ways in which they are used by one group to stigmatize others and then turned around to be used as an organizational tool is in itself a fascinating area of research[40]

China has had a 3,000 year history of brilliant and materially wealthy civilization, but as is often repeated, the concept of intellectual property protection was not part of China's culture over that long period. And in the face of that, given the persistence of China's inbred official value-systems, vast geography, and

[39] Dan Breznitz and Michael Murphree, Run of the Red Queen: Government, Innovation, Globalization, and Economic Growth in China (Yale 2011) at 12. Their approach is similar to the one adopted in a recent study of the strategic behavior of mainland Chinese NGOs. *See* Rachel E. Stern and Kevin J. O'Brien, "Politics at the Boundary: Mixed Signals and the Chinese State" (2011) *available at* http://polisci.berkeley.edu/people/faculty/OBrienK/MC2012.pdf

[40] SSRC Piracy Report, p. 10 Cross, one of the interviewees on the SSRC Piracy Report is author of *Informal Politics: Street Vendors and the State in Mexico City (Stanford 1998)*

enormous population, modernization (including building a modern and effective system of intellectual property protection) takes time–lots of time.[41]

"When China was forced to modernize, [at the end of the 19th Century] the revolution was expected to undo the works of a millennium. Unlike what happened in western Europe and Japan, where the adaptation of commercial practices could be started at the middle level, with the merchants playing an active role, in China it was to apply to thousands of bureaucrats and millions of peasants amidst a cultural tradition that paid little attention to the civil law, and where property rights had always been rendered ambiguous by the custom that gentlemen never spoke of profit, which was unbecoming in the face of the spirit of self-restraint and mutual deference. Needless to say, the revolution had to be excruciating and protracted"[42].

Stevenson-Yang and DeWoskin seem to suggest that no matter how much time China is given, whether it as a political and cultural entity will *ever* "crossover" to strong IP protection as it is understood in fully developed (but "Asian values") countries (including Japan Korea, Singapore, and now, Taiwan) is still not a foregone conclusion by any means.[43] A fair reading of their work is that this is a "lose-lose" scenario in which no such crossover will ever occur, and the "Western" developed nations will just have to grin and bear the triumph of the 'Beijing Consensus."[44] On this issue, official Chinese Communist Party spokespersons often take refuge in a rather self-serving political mantra of "Chinese exceptionalism" – what the Chinese Communist Party, spearheaded by former leader Deng Xiaoping, called China's "socialist market economy with special Chinese characteristics." Most recently, Chinese President Hu Jintao, in an October 2011 address, extended the concept of the "socialist market economy with Chinese characteristics" to what the Chinese leaders now calls the "socialist culture with Chinese characteristics." China's uniqueness is no longer just a question of its unique economy but of its unique "culture" as well.

To persist in the development path of socialist culture with Chinese characteristics, we must inherit and carry forward excellent Chinese cultural traditions, forcefully carry forward Chinese culture, construct a common spiritual garden for the Chinese nation. Chinese culture is long-standing and well-established, wide-ranging and profound, accumulating the profound spiritual requirements

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[41] see 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. 12 (1994) and ____, To Steal a Book Is an Elegant Offense: Intellectual Property Law in Chinese Civilization (1995)

[42] Ray Huang, China: A Macro History (Sharpe 1997) 223-4

[43] see Anne Stevenson-Yang and Ken DeWoskin, "China Destroys the IP Paradigm", 168 Far Eastern Economic Review *at* 9 (2005)

[44] This position is described by one recent study as the "lose–lose" scenario. *see* Richard P. Suttmeier and Xiangkui Yao, "China's IP Transition: Rethinking Intellectual Property Rights in a Rising China" National Bureau of Asian Research Special Report No.l 29 (July 2011) (hereinafter "NBR Special Report] ("Is China's emergence as a major player in the international economy a game in which all win to some extent, a game in which everyone is a loser (as implied by Stevenson-Yang and DeWoskin) or a zero-sum game with clear winners and losers?") On the "Beijing Consensus," *see* Joshua Cooper Ramo, "The Beijing Consensus: Notes on the New Physics of Chinese Power" Foreign Policy Centre (2004) fpc.org.uk/fsblob/244.pdf and Yasheng Huang, "Rethinking the Beijing Consensus" National Bureau of Asian Research (2011) http://www.nbr.org/publications/element.aspx?id=481

of the Chinese nation is a never-ending driver for the Chinese nation to multiply endlessly, to unite and to advance, it is a profound basis for developing socialist culture with Chinese characteristics.[45]

According to this new view, China's modern economic and social development is, and always will be, unique and "non-Western."[46] Whether the theoretical basis for the assertion is Marxist-Leninist (with a dash of Mao Zedong Thought), some post-Socialist concept of "state capitalism", or something inherent in Chinese language, history, and culture, there is no "timetable" for China *ever* to crossover from the "special Chinese characteristics" model to one following Japan, Korea, or even Taiwan, which do not share such self-asserted "special characteristics" to anywhere near the same degree.[47] "China," according to this view, is not only fundamentally different from "the West"; it is also fundamentally different from "the rest." China may modernize to the point that Shanghai's Pudong is superficially the 21st Century version of mid-20th Century American Manhattan, but modern "Chinese culture" must adamantly resist and avoid "Western influences" (especially so-called "Western" liberal democratic influences) in the process, because the current globalization game is stacked against China.[48]

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[45] Hu Jintao's Article in Qiushi Magazine – translated (January 1, 2012) http://chinacopyrightandmedia.wordpress.com/2012/01/04/hu-jintaos-article-in-qiushi-magazine-translated/ Drawn from a speech President Hu gave to Second Plenary Meeting of the Sixth Plenum of the 17th Central Committee (October 18, 2011)

[46] This argument often appears in the context of the "uniqueness" of China's cultural heritage. e.g., Wu Kuang-Ming, "Let Chinese Thinking Be Chinese, not Western: *Sine Qua Non to Globalization*" 9 Dao 193-209 (2010) ("Globalization consists of global interculture strengthening local cultures as it depends on them. Globality and locality are interdependent, and "universal" must be replaced by "inter-versal" as existence inter-exists. Chinese thinking thus must be Chinese, not Western, as Western thinking must be Western, not "universal"; China must help the West be Western, as the West must help China be Chinese. As [the hypothetical] Mrs. Tu speaks English in Chinese syntax, so "sinologists" logicize in Chinese phrases. English speakers parse her to realize the distinctness of English; Chinese thinkers parse Western "sinologists" to realize the distinctness of China. Inter-versal parsing toward cultural inter-enrichment occurs in three stages. This is intercultural globalization.") abstract at http://www.springerlink.com/content/j821158x307t5q25/ For a contemporary "anti-anti-Marxist" critique of "culture trap" analysis such as that deliberately employed in the current paper (and Wu's), *see*, John D. Haskell," "Against Culture: Indeterminacy, Structural Inequality, and the 'Opaque-Box of Culture' in Law," Univ. of London School of Oriental and African Studies Research Paper No. 10/2011 *available at* http://ssrn.com/abstract=1896279

[47] *compare* Andy Sun, "From Pirate King to Jungle King: Transformation of Taiwan's Intellectual Property Protection" Univ. of Maryland Occasional Papers No. 6 (1997)

[48] For a radical and enlightening critique of the notion of the concept of "the West" as the "universal observer" Subject and "the Rest" as "ethnicities" particularly observed as mere Object, *see*, Naoki Sakai, "Theory and Asian humanity: on the question of *humanitas* and *anthropos*" 13 Postcolonial Studies 441-464 (2010) ("'The West' is structured as a *doublet* with one side in the empirical and the other in the transcendental, striding over both the determinate and the indeterminate; it is fashioned after what that eighteenth-century neologism called 'the subject.' Unlike Asia, whose identity must depend upon its recognition, the West does not seem to need the other to recognize it. Or, to put it slightly differently, the West claims–and this claim must be questioned…–that it is capable of initiating its own self-recognition. And, in this regard, the West thinks itself to be ubiquitous and spontaneous; it is omnipresent and unique; it represents the universalism of the international world and is the exceptional leader of that world.") *At* 450.

How China approaches the challenges of innovation is central to the question of whose game is being played, and by what rules. This was made clear…by Fang Bingxin… regarded as the father of China's "great firewall" of Internet censorship.…:

"Suppose two people engage in a martial arts competition. If one imitates completely the other's movements, how can one overcome the other? This is the fundamental reason why it is difficult for China to overcome Western countries in the fields of science and technology…. [A]midst this kind of mutual confrontation, the weaker party can only overcome its opponent by utilizing tactics different from its opponent."[49]

Carrying the argument further, the "*shanzhai* copycat" development model has recently not only not garnered criticism–but to the contrary, high praise–perhaps not among legal scholars, but in the business management literature; and not just in China, but in the United States as well.

"The idea of *industrial clusters* has been popularized by Harvard's Michael Porter, who argued that the concentration of industry players and their supporting industries provides a competitive edge. Clusters have been commended for their power to support innovation by providing the infrastructure, knowledge, and intellectual exchange that are helpful for the incubation of new ideas. Examples include Silicon Valley, Route 128 in Boston, Cambridge in the United Kingdom and Herzliya-on-the-Sea in Israel. *Imitation clusters* also consist of a large number of industry competitors in close proximity; however, unlike *innovation clusters*, imitation clusters do not form around first-rate research universities but rather around technical schools and applied research centers. Most are organized in industry groupings, such as cell phones in Shenzhen or string instruments in Donggaocun, both in China. (Clusters specializing in fake goods–which are widespread in China and Vietnam, among other nations– are outside the scope of this book, although they, too, facilitate imitation.)"[50]

As the author of this quotation speculates, shouldn't technology followers in places like China be encouraged to continue to learn from technology leaders elsewhere "like children imitating their parents" instead of striking out on their own?[51] In an affirmative view, the *shanzhai* meme has now been extended by some Chinese writers (including two researchers at Cambridge University's Institute of Manufacturing in the U.K.) to describe the unique characteristics of Chinese "*shanzhai"* innovation.

[The] Chinese government has called for indigenous innovation to upgrade Chinese manufacturing capability and value creation as well as appropriation. Based on the fast growth of the Chinese indigenous mobile phone industry in the last two years, the *shanzhai* manufacturing system is recognized as a new positive alternative way for Chinese manufacturing companies to achieve this

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[49] *quoted in* Suttmeier. NBR Special Report at 22.

[50] Oded Shenkar, "Copycats: how smart companies use imitation to gain a strategic edge" (Harvard Business Press 2010) at 57. The authors conclude: "Traditional defenses against imitation, including branding and legal remedies, are weakening." *at* 63

[51] According to Shenkar, "Biologists are well aware of the benefits of imitation. … Human newborns are so prone to imitation that scholars have labeled them "imitation machines." … As children grow, imitation becomes more complex, and for the rest of their lives they continue to imitate, observing each other for clues about how to present themselves and how to behave in various social settings. Not surprisingly, and as economists now acknowledge, humans are especially likely to imitate those activities that appear to yield positive outcomes." id. at 28-29 On the "infantilization" of Chinese adults by bureaucratic officials, see Parts IV and V below.

aim. Behind the *Shanzhai* phenomenon, there is a strong globally specialized and collaborated network enabling the down-stream Chinese small- and medium-sized mobile phone companies to very quickly respond to customers' demands or lead the demands. This new type of alternative innovation system is transforming unaffordable luxury goods into affordable for normal consumers. Because of its mass volume and involvement, however, government policies to harness the energy and development direction become essential.[52]

It can be argued that the use of the term *shanzhai* is inappropriate here, because, by definition, *shanzhai* refers to activities outside of the Chinese government's control. Official embrace of *shanzhai* behavior is a contradiction in terms.

One author has gone so far as to suggest that China's best innovation policy should be to frame itself as a "*shanzhai* counterculture" in opposition to a foreign (particularly "Western")-dominated "global innovation culture" and maintain its foothold in economic development as, oxymoronically, "the Third World's 'stronghold of the weak.'"

"Shan-Zhai" (alternatively spelled Shan-zai山寨, literally, mountain village, mountain stronghold, bandit fortress), the creation of an outlawed but communal form of self-preservation in times of utter social unrest or in face of invasion by alien tribes, carries significant socio-historic-political connotations of criminality and nonconformity, as well as those of fraternity and heroism, in the non-western linguistic and cultural context of Chinese history. The term is now widely used in the greater Chinese world to characterize the emergence of a new mode of production, esp. in the mobile phone industries located in Southern China, that had begun as imitation and copycatting but has now developed beyond traditional rules and practices of production with surprisingly successful results in innovative products, locally-customized designs, as well as unconventional business practices. Viewed as "the Third World's stronghold of the weak" and riding on the complex/conflicting sentiments and needs of economic gains and national sovereignty, [the] *shanzhai* concept and its practices have captured public imagination and come to stand for a growing trend of witty, sometimes outlandish, parodization in almost every cultural sphere, sending off reverberations that jerk on elitist as well as nationalistic nerves surrounding the rise of China.[53]

The view that whatever China's economic prowess China has earned as the world's second-largest economic power and largest holder of foreign exchange, it must be perceived by outsiders as still economically "weak," comports with the Chinese government's long-held foreign relations strategy to "emphasize your

[52] see, e.g. Shang ZHU and Yongjiang SHI, "Shanzhai manufacturing –an alternative innovation phenomenon in China Its value chain and implications for Chinese science and technology policies" 1 Journal of Chinese Science and Technology Policy 1 (2010) ISSN: 1758-552X http://www.emeraldinsight.com/journals.htm?articleid=1846302&show=abstract The authors of this study report that local officials tend to be more supportive of *shanzhai* innovation than those in the central government. ("Compared with central government, local government is even more open. As *Shanzhai* indeed brings [a] boom to relevant industries, local government tends to protect these industries, as long as they do not break the laws.") at 35. Beyond this citation's usage of the term *shanzhai*, China's official or unofficial innovation policy is not the subject of this study, and it is suggested that China's official "indigenous innovation" policies and China's "grassroots" *shanzhai* phenomenon are unrelated to one another.

[53] See, e.g., Jennifer Ho, "Shan-zhai: Ecoonomic/Cultural Production through the Cracks of Globalization, www.scribd.com/doc/62132407/Josephine-Ho-Shan-zai

weaknesses and wait for the opportune time." (*taoguang yanghui*)[54] But to suggest that official government policy should foster or sanction "criminality", as seemingly suggested by Ho, is far-fetched.[55] From the pinnacle of Chinese authority "top down," Chinese central government IP officials regularly decry the entire *shanzhai* phenomenon in public pronouncements.

> Tian Lipu, director of SIPO [China's State IP Office], said at a press conference in April that the popular *Shanzhai*, or copycat culture, is not an example of innovation. He said many *Shanzhai* products actually have violated others' intellectual property and should be regarded as piracy rather than innovation. "There is no country that can survive and thrive on piracy and that's why we have established the national intellectual property protection strategy to fight for these acts," said Tian. He said only by making a shift in the social culture and in people's mindsets can China reduce piracy. [56]

Another interpretation of "*shanzhai* phenomenon" as used by Zhu and Shi is possible, however. I will use the term "grassroots innovation" as distinguished from their reference to an officially-sanctioned policy of "indigenous innovation." *Shanzhai*, or "grassroots innovation" takes place outside of government control, not within it. Moreover, *shanzhai* "grassroots innovation" does necessarily violate intellectual property rights.

I have already dealt with some of these issues (including the structural one) elsewhere, in a narrative rather than an analytical format for a general readership of legal professionals–including U.S. practitioners and members of the judiciary–that may not be that intimately familiar with Chinese culture, rather than a narrow scholarly audience.[57] My intention here to explore more deeply and analytically the questions of whether, and if so how, modes of "cultural expression through copying" such as *shanzhai* and their public recognition, non-recognition, repudiation or rejection may operate in China from the bottom up in ways that may frustrate its own central leaders' seemingly genuine, publicly touted, and far from insignificant efforts to create a modern system of legal protection and enforcement for the contributions and efforts of authors, inventors, and entrepreneurs, including its own nationals. But the historical lesson of *shanzhai*'s irrepressible persistence is that radical social transformation from the top down has led to much human suffering, but has *never* been a winning strategy in China in the past. (Transforming cultural

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[54] The phrase, borrowed from Chinese martial arts, literally means "to sheath one's gleaming sword and wait for the opportune moment to make one's move." *also mentioned e.g., in* Peter Yu, "Sinic Trade Agreements" 44 U.C. DAVIS L. REV. 953, fn188

[55] The persistence of industrial-scale piracy and counterfeiting as abetted by corrupt local officials, in contravention of national policy, on the other hand, seems consistent with what Breznitz and Murphree suggest is going on.

[56] *See* Wang Xing, "Shanzhai Culture now in the Crosshairs" China Daily (May 18, 2009) http://www.chinadaily.com.cn/bw/2009-05/18/content_7785393.htm More recently, at a December 2011 Symposium in London, Director Tian said, "Industrialized countries, with the United Kingdom as one of the initiators, have spent hundreds of years on intellectual property system. For China, it has only been 30 years since the IP system was put in place. There is still much left to be done in the years to come. But I don't think it will be hundreds of years."
http://english.sipo.gov.cn/news/official/201112/t20111208_635482.html

[57] *see generally*, Hennessey, "Protecting Intellectual Property in China (Thirty Years and More): A Personal Reflection" 46 HOUSTON L. REV. 1258 (2009)

norms is not the same as damming rivers.) From the "bottom up", in the provinces and in the streets, making money any way one can, often with humor and parody as a statement of gentle protest, out of reach of government controls, are a large part of *shanzhai*'s popularity among certain lower socio-economic echelons of Chinese society, far from the centers of power. Take "the proverbial Mr. Li" as an example:

> Li is saving money to buy a QQ, the *Shanzhai* version of the economical GM Sparkle. He plans to customize it with a "Mercedes emblem."
> "It's the Mercedes of ordinary folks," says Li with a laugh. "With this car I will be a true 'successful businessman' like my mom always brags to her fellow villagers!"
> A young migrant worker with only a high school diploma, Li is doing well to have found a job as a clerk in Shenzhen, but he is nowhere near the popular image of the "successful businessman" who gets driven around in a Mercedes. QQ adds color to everyday life by making fun of ordinary people's reality. It's the grassroots humor of *Shanzhai* culture that attracts consumers like Lee — people who work hard, whose lives are improving, and who are optimistic about the future.[58]

The combined "top down" and "bottom-up" approach adopted here, admittedly partial, argues from a starting point in Chinese *popular* cultural perceptions in an attempt to explain some distinctive features of law, politics, and economics in China's *official* culture.[59] It also attempts to link recurrent *present* Chinese cultural attitudes–popular and official–to *past* ones, asserting that while the *shanzhai* cultural meme appears to have transmogrified from one special place far in the past in China's "traditional" popular culture to another in China's "modern" one, from the "bottom-up" popular culture perspective, *shanzhai* is actually a "cultural space" very close to what it was in traditional China: *shanzhai* in China means "counterculture," outside, beyond, and in reaction to official government control.[60] It argues that many economic actors operate virtually completely outside of the control of Chinese government authority; others, more well-connected, succeed because those very government authorities just lower their eyes or look the other way, or perhaps even tacitly and complicitly approve. The former are *shanzhai*; the latter are not.

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[58] Design Insights: Emerging and Converging http://patterns.ideo.com/issue/shanzhai/

[59] For a critical reassessment of various aspects of modern historical determinism, see e.g., the work of Princeton historian Yu Ying-shih. "[T]he study of culture is not an experimental science in search of law but an interpretive one in search of meaning" Yu Ying-shih's "Clio's New Cultural Turn and the Rediscovery of Tradition in Asia" 6 Dao 39, 50 (2007) available at www.springerlink.com/index/l30v4210lu047j5k.pdf Arguably, the idea that the term *shanzhai* should apply also to China's official "indigenous innovation" policies is incorrect.

[60] The term "counterculture" appears to have been first used by the late Theodore Roszak, The Making of a Counter Culture: Reflections on the Technocratic Society and Its Youthful Opposition, 1968/1969, Doubleday, New York. See also his From Satori to Silicon Valley: San Francisco and the American Counterculture (Lexicos 1986) The term does not appear in the 1970 edition of the OED, but does appear in the 2001 edition of the New Oxford American Dictionary (Jewell and Abate, eds.) 391 as "a way of life and set of attitudes opposed to or at variance with the prevailing social norm." *see also* the online New World Encyclopedia entry "Counterculture" ("Counterculture is a term used to describe a group whose values and norms of behavior run counter to those of the social mainstream of the day, the cultural equivalent of political opposition.") *at* http://www.newworldencyclopedia.org/entry/Counterculture

"Puma, Feiyang said, was the most commonly pirated brand of clothing in China, and many of the highest quality fakes–"triple A" he called them–were so good that even the people that designed them probably couldn't tell the difference. Indeed, he noted, they're often produced by the same factories that have contracts with the brands: they produce genuine items on the day shift, and counterfeits on nights and weekends….The Chinese government, Feiyang said, took a relatively hands-off approach to pirate manufacturers–except at times when Western brands were pressing it to crack down….Even so, it was relatively easy to avoid being detected by the authorities. For instance, he said, at the factory and in the showroom, it was common to work on holidays. Why? Because public officials were generally not working at that time. 'Government rests on vacations and weekends, so that's when we did business' he said. And Feiyang's boss seemed to have an arrangement with the cops. He would normally close the story just before the police raided. And, even if a raid caught them off guard, the owner was never around when the authorities arrived, as if he had been tipped off about the police action.'"[61]

This phenomenon is not necessarily as indicative of *shanzhai* counterculture as it is corruption in China's *official* culture. Importantly, the *shanzhai* "counterculture" (referred to within China in a more acceptable fashion as a "subculture") in striking ways actually mirrors, in a fun-house sort of way, Chinese official culture (sometimes referred to obliquely in Chinese as *quanshi* or "The Powers That Be.")[62] The following sections address the dynamic (but not dialectical) relationship between modes of behavior in China's "official bureaucratic culture" (whether traditional Confucian or "modern" Communist officialdom) and its refracted mirror image, *shanzhai* counterculture, in more detail.

But before reaching that discussion, it is critically important to dispel the perception that the term *shanzhai* necessarily entails an amoral lawlessness. "Outlaws" in the *shanzhai* counterculture live by their own internal ethos and according to mutually acknowledged rules, albeit "outside the law."[63] *Shanzhai* also suggests freedom, playfulness, irreverence, spontaneity, and working within an alternative set of social rules–a theme that is not entirely remote from popular sentiments in an agrarian, feudal culture familiar to an English-speaking audience.[64]

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[61] Neuwirth, at 93, quoting a Chinese observer going under the pseudonym of "Feiyang." describing Nigerian traders seeking to purchase counterfeit Puma products in Dashatou market,

[62] see Jiang Fei, Game Between "Quan" and "Shi": Communication Strategy for "Shanzhai" Subculture in China Cyber Space http://www.scribd.com/doc/15919031/Fei-Jiang-Chinese-Shanzhai-Culture-Studies (January 2012) Jiang is Associate professor of International and Intercultural Communication, Deputy Director for the Department of Communication, and Director for the Center of World Media Studies at the Institute of Journalism and Communication of the Chinese Academy of Social Sciences (CASS)

[63] The "knight errant" (*xia*) tradition in Chinese popular culture from which *shanzhai* ultimately springs harks back to China's Warring States period (403-221 B.C.) and forms the cultural foundation for the wildly popular genres of martial arts novels, motion pictures, TV shows, and video games in China today. The wandering knights are "altruistic independent individuals." "They are local strongmen, exercising their power outside the purview of or sometimes in direct defiance of established government authority, rendering private justice and offering protection to those who seek their aid." *see* John Christopher Hamm, Paper Swordsmen: Jin Yong and the Modern Chinese Martial Arts Novel (Hawai'i 2005) at 12.

[64] The nobility of the "property outlaw" in intellectual property is examined in the recent work of Penalver and Katyal. *see* Eduardo Moises Penalver & Sonia K. Katyal, "Property Outlaws", 155 U. Pa. L. Rev. 1095 (2007) and their book of the same name, (2010). The "outlaw hero" in literature, both

In the early English era of outlaws, the outlaw was often fleeing from the possibility of being a key player in a public spectacle of dismemberment or execution. Ironically, in today's age of mass incarceration, the public derives enjoyment from the spectacle of the outlaw's crime, not the outlaw's punishment. And so, we find ourselves cheering for young and energetic celebrities on the screen who play assassins, rogue spies, vampires, gangsters, and pirates engaged in all sorts of things that we find fascinating and terrifying–and that are, by and large, illegal.

The appeal of the outlaw story is not all about the spectacle of the outlaw life, though. The outlaw's psychology is probably just as important. The outlaw that we imagine is a truly free individual. Living a hunted existence, the outlaw is at liberty to come up with a social code from scratch. …Although we see an abundance of outlaw villains, the outlaw hero–the rebel against tyranny–is really the perennial favorite, with Robin Hood being the classic example and Avatar's Jake Sully being one of the more recent incarnations. These idealistic and self-sacrificing outlaws find themselves in violent conflict with state authorities due to their devotion to justice."[65]

Sherwood Forest mirrors traditional China's *shanzhai*. Robin Hood's "band of merry outlaws" had the Sheriff of Nottingham and his "foreign" French Norman masters as a foil. China's "Outlaws of the Marsh" were outsiders that had their foil in the form of corrupt imperial officials in thrall of a rigid unyielding social order stacked against them, populated by Confucian (or more precisely "Neo-Confucian") government officials, overlorded by Mongol, Ming, and Manchu masters.

III. Establishment (Official) Culture and *Shanzhai* Counterculture

In 1977, as the Great Proletarian Cultural Revolution was coming to its exhausted close, the Chinese Communist Party [hereinafter CCP] famously announced the policy of the "Four Modernizations"–(modernization of industry, agriculture, science & technology, and defense), with the "avowed goal…to turn China into a leading modern state by the year 2000."[66] That may make it sound as

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East and West, was comprehensively treated by Hobsbawm. *see* Eric Hobsbawm, BANDITS (Weidenfeld & Nicolson 4th ed. 2000) (1969). Neuwirth, at 88, quotes Ambrose Bierce on the definition of piracy: "commerce without its folly-swaddles, just as God made it." Hamm calls the revitalized creativity of Jin Yong's novels a "Hobsbawmian invention." John Christopher Hamm, "The Labyrinth of Identity: Jin Yong's Song of the Swordsman", in Huss and Liu, *at* p. 97

[65] see Greg Lawtowka, "Property Outlaws, Rebel Mythologies, and Social Bandits", 20 Cornell J. of Law and Policy 377, 378 (2010) ("Penalver and Katyal hope to 'rehabilitate, at least to a certain extent, the image of the intentional property outlaw' by offering a systemic account of laudable outlawry. More specifically, the authors seem interested in creating greater legal leeway for those who violate property laws. They also seek to increase legal theorists' and policy makers' general appreciation of the social benefits provided by outlaws.") They also may, but not necessarily be engaged in political action or civil disobedience.[65] Lastowska, at 379-80 A most recent American expression of the meme is Stan Redding and Frank W. Abagnale, Catch me If You Can: The True Story of a Real Fake (2000), made into the 2002 motion picture of the same name starring Leonardo DiCaprio and Tom Hanks *see* http://www.imdb.com/title/tt0264464/ and more recently a Broadway musical. www.catchmethemusical.com/

[66] Immanuel C.Y. Hsu, China Without Mao: The Search for a New Order, (Oxford 1982) p. 91 "Self-reliance and the rejection of foreign technology for nearly two decades (1958-1976) left China an undeveloped abyss of poverty, while other countries through technological innovations charged ahead by leaps and bounds." Hsu at p. 117

though what happened before that fateful revolutionary period was not really modernization at all – "Westernization", perhaps, but not "modernization." Recent revisionist Chinese historical scholarship suggests otherwise. For example, in his survey of the entire sweep of Chinese civilization, historian Ray Huang (Huang Ren-Yu) identifies the year 1800 as a watershed–"a point for reflection" on what Chinese civilization had been, and what it was to become.

> [T]he Qianlong Emperor, who called himself "the old man who completed a perfect record" had been dead for barely a year. His favorite confidant, He Shen, had been arrested and ordered to commit suicide. Goods confiscated from his household were worth billions. The White Lotus Sect was getting out of hand. In Hubei, Shanxi, and Sichuan the rebels gained large followings. … The emperor decreed the prohibition of the importation of opium; the export of unminted silver had been proscribed a year earlier. These developments ushered in the new century, for China to be one of repeated defeats and insurmountable difficulties. In view of the success and splendor [that preceded this], the reader may wonder: How could China's fortunes change so quickly?[67]

Huang quotes a distinguished 18th century contemporary's observations on that period in China–Adam Smith's account from Book I, Chapter VIII of the *Wealth of Nations*:

> China has been long one of the richest, that is, one of the most fertile, best cultivated, most industrious, and most populous countries in the world. It seems, however, to have been long stationary. Marco Polo, who visited it more than five hundred years ago, describes its cultivation, industry, and populousness, almost in the same terms in which they are described by travellers in the present times. It had, perhaps, even long before that time, acquired that full complement of riches which the nature of its laws and institutions permits it to acquire.[68]

Was 18th century China dwelling in a "timeless past", only to be cast suddenly and traumatically into a "tumultuous present" when the long-reigning Qianlong Emperor died in 1799 after 64 years on the throne? Huang summarizes his observations on the end of the era by concluding: "Before facing the Western powers, China had weakened itself."[69] In Huang's view of China's "national humiliation (*guochi*)" during the 19th and early 20th centuries, the colonial powers were really not the primary cause of China's woes; rather, that humiliation was but merely a natural, if exacerbating, consequence of a tragic historical trajectory internal to China.

More recently, Ho-feng Hong explains that to understand "modern China" requires a deeper understanding of a much lengthier historical development. Social historians such as he increasingly focus on the late 15th and early 16th centuries as a period of "early Chinese modernity." (This is the very period in which the *shanzhai* meme gained its first popularity!) According to Hong, China's "new historiography":

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[67] Ray Huang, China: A Macro History (Sharpe 1997) pp. 218-219. Hong at 9, similarly alludes to "macrohistorical" developments in China

[68] at 221

[69] id. *See also* the entry, Knight Biggerstaff, "Ho-shen", in Arthur Hummell, Eminent Chinese of the Ch'ing Period (1943) 288 on the scale of corruption in the Qing Imperial Court at the end of Qianlong's reign in 1799

"posits that China's modernity, characterized by political and economic rationalization through state centralization and rise of an empire-wide market, did not begin with its nineteenth century clash with the western powers, as has been previously supposed, but started earlier and spontaneously, around the sixteenth century."[70]

What feeds China's modern *shanzhai* counterculture? One assertion of this paper is that, in popular perceptions at least, modern Chinese *official* culture increasingly shows great continuity with China's bureaucratic official culture in imperial times.[71] Indeed, there are distinct indications that in some quite remarkable ways China's contemporary official bureaucratic culture is actually reconnecting with its seemingly ineradicable Confucianist roots. Viewed in nuanced, if populist, retrospect, what the urban-centered vibrant prosperity of Chinese popular and material culture of 16th-18th Century China was, is not all that different from the family-centered communities a modern visitor might encounter on the grand avenues and back alleys of modern Beijing, Shanghai, or Hong Kong today.[72]

The second assertion is that China's contemporary *shanzhai* "copycat" counterculture responds to Chinese contemporary "official" bureaucratic culture in a strikingly similar fashion to the ways in which *shanzhai* counterculture of popular fiction and secret societies of yore reacted to its official Neo-Confucianist counterpart in imperial times. The following discussion attempts to explore how the recent official pronouncements concerning the need to preserve the uniqueness of "Chinese culture" in the face of "outside forces" resonate with what remnants of China's imperial past managed to survive numerous cultural upheavals, of which the Great Proletarian Cultural Revolution (1965-1976) upheaval is only the most recent. It briefly reviews the value system of "official bureaucratic society" of the Chinese state in the period from 1600 to the collapse of the whole edifice of the imperial system in 1911. The rebirth of Confucian "values" in official circles in mainland China and the resurgence of *shanzhai* counterculture are not just coincidental events. They are in fact intimately related.

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[70] Ho-Fung Hong, Protest with Chinese Characteristics (Columbia 2011) p. 4] (Questioning the proposition that "the unidirectional growth of centralized state power and markets in Asia, as landmarks of modernity, began at the turn of the twentieth century under the pressure of Western imperialism, constituting a replica of earlier Western development as a radical break from Asia's stagnant past.) "Rather, …parallel and independent developments of early modernities are first and foremost the result of a global economic integration following the discovery of the Americas and the subsequent surge in silver circulation and hence expansion of commercial wealth across civilizations." at 12 *see also*, Eric Hayot, The Historical Mandarin: Sympathy, Modernity, and Chinese Pain (Oxford 2009) (" Throughout the eighteenth century, Chinese demand for silver, largely a product of the Qing economy's remonetization, dominated its trade with the rest of the world. The resulting flow of silver bullion to China–Andre Gunter Frank estimates that between 1600 and 1800 China purchased as much as half of the world's production, much of it carried by Europeans from their New World mines.–created a great deal of mercantilist anxiety throughout Europe.") At 89

[71] The comparison is made expressly in a work (in French) by a famous Chinese dissident journalist, published (ironically) in Paris in May 1989, one month before the Tiananmen Incident and two months prior to the 200th anniversary of the French Revolution. *See* Liu Binyan, Le Cauchemar des Mandarins Rouges (Gallimard 1989)

[72] Hong locates the "apogee of China's early modernity" in the early to mid 18th century. id. at 20

IV. From the Confucian "Culture of Emulation" to the Neo-Confucian "Culture of Imitation": Masters (*not* Creators) of the Universe

To understand *shanzhai*'s anti-establishment "counterculture," then and now, it helps to understand a bit more about the establishment "culture" to which it is a foil. Joseph Needham observed, "China has always been a 'One-Party State', and for over 2,000 years the rule was that of the Confucian Party."[73] This section explores the extent to which modern references to a self-integrated "Chinese culture," seemingly impervious to foreign influences, are a product of the thought and followers of Confucius (BCE 551-471). Why is a two and a half millennia old philosophy still such a bone of contention in modern China? During the Great Proletarian Cultural Revolution, both Confucius and the *shanzhai* counter-culture's "heroes of the marshes" were subjected to "anti-rightist" campaigns of ferocious criticism. Confucius was attacked for his slavish worship of the past and of authority; the "108 Heroes" were attacked not because they were rebels, but because they were rebels who ultimately capitulated to and fought for the feudal empire instead of following through and bringing about its utter destruction.[74]

Some contemporary Chinese scholars, on the one hand, wholly question the continuing relevance of Confucian tradition to modern China and assert that Confucianism is fundamentally incompatible with modernity.[75] Others insist that

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[73] Joseph Needham, "Science and Society in East and West", 7(2) Science and Civilization in China 1, 15 (Cambridge 2004) The use of the term "Confucian Party" by Needham is curious, given that the Great Sage himself said "The gentleman …does not form cliques (or parties)." *Analects* 15:21.

[74] Colorful posters from the late Cultural Revolution criticizing Confucius (and by extension Premier Zhou Enlai) can be found at http://chineseposters.net/themes/criticize-lin-biao-confucius.php Similarly, portrayals of the heroes of the *Shuihu Zhuan* as "capitulationists" during the same period can be found, e.g. at http://chineseposters.net/themes/shuihu-campaign.php

[75] *see generally,* the readings in Zhao Duanhua, Dialogue of Philosophies, Religions and Civilizations in the Era of Globalization (2007) *See, e.g.*, the lively debate (in English) between Professors Liu Qingping and Guo Qiyong, "Filial Piety: The Root of Morality or the Source of Corruption" *Dao* VI(1) 1-19 (March 2007) VII(1) (March 2008) VII(2) (July 2008), (summarizing the views in a Chinese compendium by a number of mainland Chinese philosophy professors ___, *Rujia Lunli Zhengming JI* ("A Collection of Contention About Confucian Ethics") (Hubei Educational Publishers 2006) Professor Liu Qingping's steadfast assertions that "personal relations trump impartial justice" in Confucian ideology , obstructing the establishment of the "Rule of Law", have created a firestorm of controversy in recent Chinese Confucian scholarship. *See also,* Mark Elvin, "The Inner World of the Nineteenth Century", 11, 32-33 *in* Changing Stories in the Chinese World (1997) ("Traditional China–seen from a Western perspective, lacked a social and an intellectual dimension–that of law, justice, and jurisprudence. Courts had little conception of the weighing and testing of evidence unless protected by privileged status. Conviction required confession, and–unless protected by privileged status–accused and witnesses were tortured. There was no legal profession in the sense of qualified advocates who were heard by courts on behalf of litigants. Those who offered advice outside the courtrooms were regarded as social nuisances. In practice, the contents of a great part of the 'law' and 'legal' precedents were inaccessible to those who were not officials. Subjects of the emperor were not equal before the law, such as it was, and this was most notable the case as regards seniors and juniors in a kinship structure. The objective of the system was not justice–a term for which there is no satisfactory traditional Chinese translation–but social discipline and maintenance of the social structure, as it is with the rules governing a Western army, school, or church. Those who came

Confucianism, in some modern ethical form, is an essential component of what it means to be "Chinese."[76] It is impossible to understand China's contemporary popular countercultures such as *shanzhai* without some introduction to the unique patterns of thought of its "official culture," to which *shanzhai* is a foil. Traditions, particularly "living traditions" are supposed to be continuous, but that is far from meaning that they are changeless and not dynamic.

"[T]raditional practices and institutions, when reproduced in the present, are rarely exact replicas of what they had been in the past. They often interact or merge with other, exogenous traditions to form new, hybridized traditions, and they also constantly undergo change in response to changing circumstances or pressures from other traditions.[77]

It is necessary here to explain the difference between Confucianism and *Neo*-Confucianism. The words "Confucianist" and "Neo-Confucianist" are often bandied about in English-language discussions concerning China's central historical tradition without further examination or explanation[78] Fortuitously, two very recent events, one in New York City and one in Beijing, illustrate volumes about China's bureaucratic ideology, ancient and modern. These two events vividly and readily illustrate the differences between the roles played by a "Confucianist" Chinese *philosophy of government* and a "Neo-Confucianist" Chinese *philosophy of culture* in modern China today, in a manner that is very accessible even to an unfamiliar American observer.

In the first example, in a November 21, 2011 Op-Ed in the *New York Times* entitled "How China Can Defeat America," Yan Xuetong, Dean of the Institute of Modern International Relations at Tsinghua University states:

[M]orality can play a key role in shaping international competition between political powers — and separating the winners from the losers. I came to this conclusion from studying ancient Chinese political theorists like Guanzi, Confucius, Xunzi and Mencius. They were writing in the pre-Qin period, before China was unified as an empire more than 2,000 years ago — a world in which small countries were competing ruthlessly for territorial advantage. It was perhaps the greatest period for Chinese thought, and several schools competed for ideological supremacy and political influence. They converged on one crucial

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nearest to pursuing justice in China were the so-called knights-errant, who were moved by a 'public-spirited righteousness."…They were, almost by definition, impulsive and heroic beings outside the established systems of social discipline.")

[76] For a recent treatment in English of the dynamic interplay of Confucianism and modernization in China (as well as Korea and Japan) *see* Lai Chen, Tradition and Modernity: a humanist view, (tr. Edmund Ryden) (2009) Chapter 10, (particularly discussing Peter Berger's distinction between Neo-Confucianism as an "ideological theory of imperial China" and as a "norm to govern ordinary people's behavior, namely a set of moral norms brought out by Confucian thought, that have penetrated into ordinary people's daily life.") *at* 238.

[77] Id. At 199 Citing Edward Shils (1986/2001) see Yu Ying-shi at 45

[78] As used here, "Confucianism" refers to the orthodox state ideology of Confucius and his followers, officially adopted in the early second century B.C., forming the basis for the civil service examinations for officials until around the 14th Century. "Neo-Confucianism" refers to the transformation of that ideology into an instrument for social control and cultural continuity in the face of non-Chinese invasions beginning with the 9th Century philosopher Han Yu (768-824) and elaborated over the following four centuries, serving as the basis for the civil service examinations from the 14th to the early 20th century. Both should be distinguished from contemporary "'New' Confucianism", which attempts to reconcile Confucianism with modern Chinese culture. *See* Lai Chen, above.

insight: The key to international influence was political power, and the central attribute of political power was morally informed leadership. Rulers who acted in accordance with moral norms whenever possible tended to win the race for leadership over the long term. [79]

What seems with its inflammatory headline to be a gauntlet hurled at an American audience is in fact nothing of the sort; this *New York Times* Op-Ed writer is actually addressing (from a far distance) a Chinese official audience – not an American public one. This Op-Ed piece is almost classical in its tone, citing to the ancient Chinese philosophers as a remonstrance to Chinese government officials in the most venerable tradition of "Confucian persuasion," encouraging them to engage in "morally informed leadership" in the pursuit of "soft power" internationally.

This is part of a larger (if perhaps Sisyphean) effort in China's current one-party system of government to promote virtuous rule and stamp out official corruption. Training in "professional ethics" is now required of Chinese government employees to counteract "local leaders empowered to act with impunity."[80] According to a recent article in The Beijing News, China's State Administration of Civil Service recently released a document calling on all government employees in the country to complete at least 6 hours of training on "professional ethics" during the 12th Five-Year Plan period (2011-2015). Most significantly, the plan announces that this ethics training would focus on employees at the "grass-roots level" who deal most directly with the public. A post on this news story by the official microblog of *Caijing* magazine included a cartoon in which a bulldozer labeled "forced demolition" busts through a wall labeled "virtue"–the implication being that training on ethics and morals is fruitless so long as local leaders act with impunity.

In a second, equally significant (but *Neo-Confucianist*) event, a monumental 7.9 meter tall "Martin Luther King-size" bronze statue of the great philosopher Confucius himself was unveiled in Beijing's Tiananmen Square in the front of China's National Museum on January 14, 2011. It was removed quickly and surreptitiously on the night of April 22, 2011. What prompted the enigma of the Great Sage's short-lived 88-days of renewed exposure and fame at the epicenter of the Chinese political universe? One wry observer on this rather startling news event was 105-year-old Zhou Youguang, the inventor of China's modern (and successful) Hanyu Pinyin alphabetic writing system that is the basis for keyboard entry of Chinese ideographic characters into computer wordprocessing.

[Zhou Youguang] becomes animated as talk turns to a statue of Confucius that was first placed near Tiananmen Square earlier this year, then removed.
"Why aren't they bringing out statues of Marx and Chairman Mao? Marx and Mao can't hold their ground, so they brought out Confucius. Why did they take it away? This shows the battles over Chinese culture. Mao was 100 percent opposed to Confucius, but nowadays Confucius' influence is much stronger than Marx's," he says.

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[79] http://www.nytimes.com/2011/11/21/opinion/how-china-can-defeat-america.html?_r=3&ref=opinion

[80] The Chinese Media Project at the University of Hong Kong posted a summary in English on 2 November 2011. Lessons in "Virtue" Mandated for Chinese Civil Servants (2011-11-02) cmp.hku.hk original in Chinese at http://politics.caijing.com.cn/2011-11-02/111370745.html

Has poor Confucius now been banished *post mortem* again to the countryside, just as he was during the Great Proletarian Cultural Revolution? The now-removed Confucius statute in Tiananmen Square did not face the great portrait of Mao on the entrance to the Forbidden City and the official residences of China's leaders in Zhongnanhai; it faced the Chinese public and the Great Hall of the People.

The erection of this monument is not apparently so indicative of the emphasis of the current leadership on morality and good governance as the Chinese Op-Ed writer's *New York Times* piece is; rather, it is quintessentially in the tradition of the *Neo-Confucianist* legacy of China's medieval period. Since that time, the most famous Neo-Confucianist philosophers directly emphasized universal public education serving primarily to instill "Confucian values" into mass society as an instrument of social control.[81] It is a highly significant feature in the above Beijing newspaper excerpt concerning ethical training for public officials that the training will focus on employees at the "grass-roots level" *who deal most directly with the public*–not those at higher levels of government who make policy and implement administration.

There is great risk of oversimplifying the distinction between classical Confucianism and medieval Neo-Confucianism. The central core of both systems of ethics is similarly based on the "Three Cardinal Guides of Social Order (*sangang*)" ruler/subject, father/child, and husband/wife, and the Five Constant Virtues (*wuchang*)"–benevolence, uprightness, propriety, knowledge, and good faith. Harmony within human society and harmony of human society with the natural world are indistinguishable, since human society is part of Nature.[82] Each of the "Three Relationships" is hierarchical, with the former in a hierarchically superior position to the latter. There never was and is now *no principle of social equality* in either Confucianist or Neo-Confucianist thought. [83] This traditional Confucianist

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[81] Official Neo-Confucianist orthodoxy (*zhengtong*) is called "The Study of Principle (*lixue].*" For an excellent explanation (in English translation) of how Neo-Confucianist (as opposed to Confucianist) ideology was exploited by the Chinese state purely as in instrument of social control rather than addressed toward a "morally informed leadership" *see* Gong Shuduo, "Characteristics of *Lixue* in Qing Dynasty" 2 Frontiers of Philosophy in China 1-24 (Springer Verlag 2007) ("The bottom line is that the so-called "true *lixue*", i.e., the earnest practice of what one advocates, just meant loyalty to the emperors." The Chinese word for "Neo-Confucianist" (*daoxue*) literally means "Study of the Dao." It is also, according to context, sometimes translated as describing "a person with affected morals."

[82] In traditional Chinese landscape painting, natural scenes are never totally representations of what we might call "wilderness"; there is always a small, sometimes diminutive representation of human habitation such as a hut, a temple, or the figure of a fisherman.

[83] *see* William Theodore De Bary, "The Trouble With Confucianism" Tanner Lecture on Human Values (Berkeley 1988) 133, *available at* www.tannerlectures.utah.edu/lectures/documents/debary89.pdf ("In classical Confucianism, Mencius, the spokesman *par excellence* for the noble man, underscored the fundamental importance of the 'people' (*min*) in politics, but the people seen primarily as deserving of leadership responsive to their needs, and only in the extreme case with rulers responsible to them by virtue of the people's reserved 'right of revolution.' Mencius also distinguished between an educated ruling class serving the interests of the 'people', and the larger mass of those who worked with their hands and lacked the education and training needed for them to take an active part in government, except when things got bad enough for the people to revolt. In making this distinction Mencius foreswore none of his

world-view is also echoed in some recent (rather startling) pronouncements by Chinese government officials. For example, a November 2006 news account commented on a speech by Xu Xianming, a member of the Standing Committee of the National People's Conference, in which he is reported to have said:

"[H]armony rights" will lay the foundation and fundamental elements for the building of a harmonious world as "Fourth Generation Human Rights." Harmony consists of three important aspects: the harmony of bodies and spirits, the harmony of spirits, and the harmony of human beings and nature. Based on this, in a harmonious society, people pursue their human rights with a completely different horizon and spiritual level from the first three generations of human rights." Xu analyzed: freedom-oriented human rights ignore the inherent inequality between human beings, and the unequal human rights make a harmonious human rights system impossible; subsistence-oriented human rights suppress the work force from actively incorporating with capital, and divert the society from a society of creativity to a society of welfare, which will make the society inactive and unharmonious; development-oriented human rights are overactive and will disrupt the human rights system, thus it will bring about an unharmonious society. [84]

Considered from the perspective of its historical persistence, the "Confucian persuasion" of deference to "the Past" has strongly influenced attitudes toward literary creativity in China from ancient times up to the present. From its earliest texts, Confucianist "secular humanism" stressed the importance of following and emulating the models of human perfection, those "Sage masters" of China's past. The late Frederick Mote, professor of Chinese philosophy at Princeton (and translator of the work of the 20th Century Chinese political thinker Xiao Gongquan) takes the "Confucian challenge to the West" to its logical conclusion: nothing in the Chinese Confucian Universe of cultural value is ever (or was ever) really "created" or "new".

"The basic point, which outsiders have found it so hard to detect, is that the Chinese, among all people ancient and modern, primitive and advanced, are apparently unique in having no creation myth – unless we use the word "creation" as is sometimes done in the more general sense of "genesis." That is, the Chinese have regarded the world and man as uncreated, as constituting the central features of a spontaneously self-generating cosmos having no creator, god, ultimate cause, or will external to itself.[85]

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meritocratic, egalitarian principles in favor of a social or political elitism, but only reflected a functional differentiation between leaders and commoners already well established by his time and not even to be effectively overturned by modern Maoists, with all their commitment to a classless society.") At 178

[84] http://chinadigitaltimes.net/2006/11/harmony-rights-as-human-rights-xu-xianming-et-al/

[85] Frederick W. Mote, "The Cosmological Gulf between China and the West," in *Transition and Permanence: Chinese History and Culture*, ed. David C. Buxbaum and Frederick W. Mote (Hong Kong 1972), p. 7. Although Mote does not specifically say so, his observation should be clarified as referring to what Confucianist ideology had constructed as the worldview of the "Chinese people"– *not* a modern sociological observation of the panoply of belief systems of the Chinese population over time, with their pantheons of gods, dragon kings, and primordial ancestors. An explanation of how the Chinese "official" belief system of Confucianism interacts *vel non* with its folk religions, ancestor worship practices, and the "revivalist religions" (Buddhism and Daoism), *see generally* Marcel Granet, The Religions of the Chinese People, (1977) The terms *zaowuzhe* ("Creator of Things") and *zaohua* (literally, "the process of Creation) appear in Daoist texts but never in Confucianist ones. *See 11* Morohashi 71(11613, 11616) Mote's thesis has recently been challenged by Paul of the Philosophy Dept. at the University of Pennsylvania. See Paul R. Goldin, "The Myth that China Has No Creation

Western cosmogony has its "creators" and creation myths; China, by contrast, has its "masters", mere mortals, among whom Confucius, "the Sage", is one paragon, but only so by virtue of his mastery of looking back at and emulating earlier Sages that perpetually serve as models for later ones–most famously Confucius himself.[86]

This "Confucian persuasion" also strongly affected perceptions of creativity in art and literature as practiced by the scholar-gentry elites. The core value of "learned mastery" in preference to "creativity" is most evidently reflected in the traditions of the highest prized art form of China's bureaucratic "scholar-elite"–the visual art of Chinese calligraphy.

> Chinese calligraphy has a history of more than three thousand years. During that time, calligraphers have perfected the same strokes and essential configurations of the characters, the nature of each defined by an inimitable structure and subsequently molded into a characteristic style or "image" by its master practitioners. As a result of this long history, specific methods and principles, as well as standards of judgment on all aspects of the art have accumulated to form a rich visual and written legacy.
>
> Each calligrapher must absorb and command this tradition, then transcend it, before he can achieve a "personal" style. Indeed, "to create one's own style," *while at the same time having derived it from the art of the ancient masters,* has been the criterion for greatness throughout the centuries. For the student and twentieth-century viewer, it is also essential to have a knowledge of the background and history of the art for his appreciation to be more than superficial. [*emphasis added*][87]

Creativity lacking derivation (and consequently pedigree) from, and mastery of the great works of the past is meaningless and unrecognizable in a Confucian cultural milieu. Moreover, the distinction between "reproduction" and "forgery" of the masters of the past is merely one of intent, not practice.[88]

Myth, 56 *MONUMENTA SERICA 1, (2008)* Goldin challenges Mote's interpretation, asserting that ancient China's creation myths were at least a robust as those of ancient Greece, but he does so on the basis of Daoist texts, not Confucianist ones. (Goldin does not mention Biblical genesis, which may be different from the Greek.) Mote's position is reaffirmed by scholars of the Confucianist classic of Chinese divination, the Book of Changes. see, e.g., Alfred Huang The Complete I Ching (2010) "The ancient Chinese had no personal god; they submitted to the Will of Heaven and resigned themselves to their fate. They believed that to live and act in harmony with the Will of Heaven was the nature and duty of humanity." at 224

[86] *see* William Theodore De Bary, "The Trouble With Confucianism" Tanner Lecture on Human Values (Berkeley 1988) 133, *available at* www.tannerlectures.utah.edu/lectures/documents/debary89.pdf on the Confucianist myth of the mythical Emperor Yao, the human Founder (*not* Creator) of Chinese culture. ("Note…what is simply given, what is so naturally assumed in the presentation of this heroic ideal: its setting is altogether a human world, a familial order, with its patriarchal leader already in place and, what is more, already in place at the center. There is no creation myth here, no Genesis. Even as a founding myth, the Canon of Yao projects neither conquest nor struggle; neither antagonist nor rival to overcome nor any countervailing power to be met. The sage-king stands alone, unchallenged and unchecked except by self-imposed restraints. There is nothing contested, nothing problematical except how to find another paragon of humble virtue to whom rulership may be entrusted.") at 138

[87] Shen C.Y.Fu et al., Foreword: Traces of the Brush: Studies in Chinese Calligraphy (Yale 1980) xi

[88] *see, e.g.,* Peter C. Sutton et al, Fakes and Forgeries: The Art of Deception, (Bruce Museum 2007) similarly noting the necessary intent "to deceive" in copying in European art.

In China, calligraphy was appreciated as an art form as early as the second century A.D. With appreciation there arose a demand for calligraphy among connoisseurs and collectors. By the fourth and fifth centuries, expert methods had been developed by which calligraphy could be copied and reproduced. Therefore, long before the invention of modern technology, the Chinese made reproductions by hand which were intended to be honest and exact duplications of the original. A distinction should be made, however, between "reproductions" and "forgeries"–that is, exact copies made with the intent to deceive and meant to be taken for originals.[89]

China's traditional high culture as we know it today is really a product of developments beginning in the Tang Dynasty (618-907). After the prior Period of Division (221-589), China reunified within its historical Han Dynasty borders and extended the cultural influence of the Chinese empire to the far west to Xinjiang and the far south to Guangdong and Yunnan. But this Great Second Empire of the Tang Dynasty was not ethnically purely Han Chinese; rather, it was led by an imperial clan (the Li family) with northern nomadic (Altaic) roots. Throughout the Tang dynasty and thereafter, right down until today, the "minority cultures" of the grasslands enriched Chinese culture with their "foreign" music (and musical instruments), "foreign" performance arts, "foreign" clothing, and "foreign" religions (most particularly Indian Buddhism early and Persian Manichaeism later.) The Tang dynasty was the most ethnically diverse period in China's entire history, and is retrospectively viewed as its great "Golden Age" for ceramics, music lyrics, dance, dress, entertainment, sport, and palace culture.[90]

But Tang cosmopolitanism was itself provincial. "Foreign influences" never penetrated the core constituent elements of "Chinese culture"–Chinese writing style and Chinese calligraphy, and for good reason: it was forestalled by the rise and triumph of Neo-Confucianism as a reaction to "foreign" influences. The late Tang period witnessed China's first "Return to Antiquity (*fugu*)" Movement. During the 9th Century, as the effective control of the Tang rulers over Chinese society waned and became increasingly challenged politically by those same "foreign" influences that had brought in exotic dress, music, and drama, an "anti-foreign" cultural rear-guard action set in among the scholar-elite and bureaucratic classes, with the express goal to defend the Han Chinese cultural core of the mythical ancient "Middle Kingdom" of

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[89] Shen C.Y.Fu et al., "Reproduction and Forgery in Chinese Calligraphy", in Traces of the Brush: Studies in Chinese Calligraphy (Yale 1980) 3 Professor Fu, formerly Curator of Chinese art at the Freer Gallery of the Smithsonian Institution, describes the major copyist methods: *lin* "to trace", *mo* "to copy by tracing," *fang* "to imitate", zao "to invent", and *ketie* "to lithograph" (ink rubbings off a carved stone or wood surface.) Significantly, according to Professor Fu, "to invent" is "essentially a sub-category of *fang* "to imitate", "adopt[ing] the style of a master, with the intention not to reproduce but rather to create a 'new' work, an invention." Id. At 4 For a short description of one of China's greatest contemporary painters (and forgers of ancient works), *see* the biography of Zhang Daqian (1899-1983) in Michael Sullivan, Modern Chinese Artists: a biographical dictionary, 2006) 215

[90] The finest studies of, respectively, Tang culture and Tang officialdom in English are, respectively, Edward H. Schafer, The Golden Peaches of Samarkand: A Study of T'ang Exotics" (Univ. of Cal. 1985) and Howard J. Wechsler, Offerings of Silk and Jade: Ritual and Symbol in the Legitimation of the T'ang Dynasty (Yale 1985)

the Yellow River valley from all "foreign" influences.[91] In this endeavor, the "challenge of unification" was to re-extend the reach of Han culture geographically to the nomadic and aborigine peoples of those regions that were the source of "border troubles" and to forestall the entry of any more "foreign" cultural influences into the country. This "challenge of unification" carried with it political, social, and ideological implications of great and lasting historical significance. For the Neo-Confucianists of the Tang (618-908) and Song (968-1279) periods, the writings of the Classical ("pre-Han") period (600-200 B.C.) became heralded as the *only* acceptable models of writing in Chinese.

For purposes of understanding what official "Chinese culture" in the imperial period meant, the 9th-Century scholar and official Han Yu (768-824) is the earliest, and indeed arguably because of that, the most influential figure in what was to become the Neo-Confucianist Movement.[92] For Han Yu, the only acceptable form of writing was "ancient writing (*guwen*),"that term referring to the written language used by the great writers of "literary Chinese" of the pre-Han period, writers such as Confucius himself. As Charles Hartman aptly observes of the Neo-Confucianist program, Han Yu's idealized Chinese polity might be "multiracial"–but it cannot and must not *ever* become "multicultural."[93] Only writing that "conformed to antiquity" is "authentic." In this regard it is absolutely critical to understand clearly the uniquely Neo-Confucianist concept of "authenticity." According to Hartman:

> Han Yu's cultural standards were social goals that resulted naturally from his adherence to Confucian moral injunctions. Scholarship thus became an attempt to isolate those texts and passages that, among all the existing traces of ancient times, best conformed to a view of Antiquity formulated as a moral imperative for the present. Writings that conformed to this view were "authentic," those that did not were "false." Authenticity in this sense has no relation to its modern meaning but rather reflects the degree to which an ancient work manifests "the Way of Antiquity."[94]

That the Neo-Confucianist antiquarian regimen of "letting the Past serve the Present" was not conducive to finding value in independent individual creativity or cultural progress goes without saying.[95] For the Neo-Confucianists, logically and by temperament, any form of imaginative literature was particularly discomforting.[96]

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[91] The tomb of the mythical king of the Han peoples, the Yellow Emperor, is located at Huangdiling in Shaanxi Province on the Yellow River, one hour north of the ancient capital of Xi'an.

[92] *see* the definitive biography, in English, Charles Hartman, Han Yu and the T'ang Search for Unity (Princeton 1986)

[93] Hartman, 131.

[94] Hartman, 175

[95] For an illuminating and characteristically "new Confucian" interpretation of "creativity," see the work of Harvard philosophy professor Professor Weiming Tu, following on Professor Mote's observation earlier. "Confucians take a positive attitude toward all human creations, *especially those in harmony with Heaven's life-generating functions." [emphasis added]* , *see* Weiming Tu, "An 'Anthropocosmic' Perspective on Creativity" in Zhao Duanhua, Dialogue of Philosophies, Religions and Civilizations in the Era of Globalization (2007) 143, 147 Whether any attribution to individual ("idiosyncratic") creativity can conceivably be recognized, much less flourish in such a cultural environment is open to serious question. An interesting vignette focusing on creativity in Chinese childhood art driven out by parental insistence upon stereotypical answers is found in modern

"Popular culture" as a self-standing breakaway from official culture as something discoverable in modern times had its origins in the same period as these beginnings of Neo-Confucian orthodoxy, from late Tang to late Song periods (9th-13th centuries.) But Chinese what we now call "Chinese popular culture" was never recognized by the Chinese scholar-elite.[97]

> In China, as late as the beginning of the [20th] Century, the word "literature" still meant almost exclusively the standard prose and poetry written in the *wen-yan* or literary language that had long since ceased to be used in everyday speech. Fiction and drama, written mainly in the living spoken language, were excluded from the realm of belles-lettres by the arbiters of taste. Although this disparagement of fiction and drama was not something unique to China, that such a tendency should have persisted until so late a date is rather unusual. Two explanations may be ventured. First, according to Confucianism, the dominant school of thought in China for the past twenty centuries or so, the basic function of literature is to be found in cultivating moral character and polishing social behavior. In both these respects, fiction and drama were not only considered to have a negligible positive moral value, but even to exert harmful influences. Second, the traditional civil service examinations tested individuals in the Confucian classics and a few standard prose and poetry works–all written in the literary language. Since these examinations provided a sure, if not the only, way to fame and position, the study and mastery of the literary language became an urgent task for practically all scholars of old China. The literary language thus became a language of prestige. Scholars who had spent years acquiring a mastery of the classical language tended, quite naturally, to look down on any form of literature not written in it, and to view such writings as unorthodox and unfit for a man of culture.[98]

Hartman summarizes the program of the Neo-Confucianists for preservation of the "essence" of Chinese culture as three-fold: the unity of contemporary politics; the unity the Past and Present in the figure of "the Sage", and the unity of

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writer Yuan Zenan's *A Commonplace Fellow (Fanfu Suzi),* "*discussed in* Strangers and Sojourners" *see* Mark Elvin, Changing Stories in the Chinese World (1997) 207, 232

[96] Hartman 21. The major Neo-Confucianists of the Tang and Song dynasties (9th-13 centuries) summarily rejected the very idea of imaginative literature as nothing but a form of mass entertainment. They also maintained steadfastly that "literature and history cannot be separated (*wenshi bufen*)." Neo-Confucianist orthodoxy, maintained until 1911 as the basis for officialdom, is but a partial explanation of traditional Chinese culture if China's *shanzhai*'s imaginative counterculture is not taken into account.

[97] For a preliminary study based upon two different orderings of hexagrams in the *Book of Changes*, positing a sharp distinction between the rhetorical methods and goals of imaginative "fiction" for a popular audience, as practiced by Chinese traditional storytellers and writers in the vernacular (the *xiangshu* or "images and numbers" school of interpretation), from "history for the masses", written in classical Chinese and exposited by the major Neo-Confucianist cultural preservationists (the *yili* or "meaning and pattern" school of interpretation), *see* William O. Hennessey, "Classical Sources and Vernacular Resources in *Xuanhe Yishi: The Presence of Priority and the Priority of Presence*, 6 CHINESE LITERATURE: ESSAYS, ARTICLES, REVIEWS 31-53 (1984) *see also* Bent Nielsen, A Companion to Yi jing Numerology and Cosmology: Chinese studies of images and numbers from Han (202 BCE-220 CE) to Song (960-1279 CE) (Routledge 2002) ("Traditionally, studies of The [Book of] Changes have in China been categorized as belonging to either the 'meaning and pattern' tradition or the 'image and number' tradition. Studies of "meaning and pattern' are grounded in the text of The Changes whereas studies of 'image and number' take as point of departure the imagery and numerology associated with divination and the hexagrams.") *at* xvii

[98] John C.Y. Wang, Chin Sheng-T'an (1972) 13

contemporary writing style with that of the ancient Masters.[99] In the process of formulating Neo-Confucianist philosophy, Han Yu and his successors studiously, deliberately, and liberally borrowed concepts from both indigenous Daoist and "foreign" Buddhist canons, but *never* attributed the concepts they adopted from those sources to them. Rather, as suggested by Hartman, if a concept was good enough to be adopted from Buddhism into Neo-Confucianist works, it must have been because it was "discovered" to have been essentially "Chinese" (not "Buddhist") in the first place. The Neo-Confucianist practice of quiet appropriation of "foreign" philosophical concepts without attributing them to their "foreign" sources (when it served their purposes) was a hallmark practice of later Neo-Confucianists.[100]

What reinforced and elaborated the "shift" from "classical" Confucianism to medieval *Neo*-Confucianism took place on these three fronts and became solidified (and institutionalized) from the 9th to the 14th centuries in the flowering of the Neo-Confucianist schools during the Song Dynasty (968-1279). The Neo-Confucianist program served a practical–indeed existential–purpose. From the 9th Century until the mid-14th century, the Chinese heartland was successively overrun by nomadic Central Asian tribes. Resisting the "barbarian" challenge to the continuing relevance of Han Chinese civilization following the invasion and occupation of North China by culturally distinct nomadic tribes such as the early Jurchen (Jin Dynasty 1127-1264) and Mongol (Yuan Dynasty 1264-1368) was central to the Neo-Confucianist program.[101] Neo-Confucian cultural preservation was characterized by quiescence, self-cultivation, obliqueness, and taciturnity rather than direct challenge to or confrontation with "foreign barbarian" control. For the "transmitters" of Neo-Confucianist philosophy during the "barbarian" occupations, preservation of the

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[99] Hartman *passim*.

[100] Elman at 504, noting the casual unattributed cultural appropriation of concepts from Buddhism and Daoism into the medieval Neo-Confucian canon, but observing that, given their intellectual milieu, it was probably "unwitting". This "unwitting" cultural habit appears to have become ingrained into a mainstream "copycat culture," upon which the *shanzhai* "copycat counterculture" is a commentary. For a recent hilarious example of the Chinese government CCTV channel's "unwitting" non-attribution of a foreign, fictional source to extol Chinese military achievements, *see* http://www.ministryoftofu.com/2011/01/cctv-news-suspected-stolen-scenes-top-gun-fighter-jet-news/. David Der-wei Wang, aptly applying Gregory Bateson's terminology, calls such amalgamation of fact and fiction "the peculiar double-bind of Chinese literary modernity." ("[N]ever have we seen such a moment as we have seen in modern times, when official history has been so dictated by the ideological and institutional imaginary as to verge on a discourse of make-believe, a discourse often associated with traditional fiction, and fiction so arrested by a desire to reflect the past *and* future as to appropriate the functions of traditional history with respect to completed fact.") David Der-wei Wang, The Monster That is History: History, Violence, and Fictional Writing in Twentieth-Century China (2004) *at* 3. Wang's view is echoed by mainland Chinese novelist, Murong Xuecun, "Living in China is like watching a play in a giant theatre. The plots are absurd and the scenarios are unbelievable—so absurd, so unbelievable that they are beyond any writer's imagination." *See* "Murong Xuecun: Caging a Monster" *at* http://chinadigitaltimes.net/2011/11/murong-xuecun-caging-a-monster/

[101] The most famous of the Neo-Confucianist philosophers, Zhu Xi (1130-1200) was noted for his advice to the Song court: "restore good government and repel the barbarians." (*xiu zhengshi, rang yidi*) *see. E.g.* Fang Shuzhi, "What is Feudalism?", http://www.hljswzw.gov.cn/yj/ReadNews.asp?NewsID=372 (in Chinese)

"special characteristics" of Han Chinese culture (as they defined it) became an end in itself. Public education in "Chinese culture" promoted in the halls of new "learning academies" was the most important part of the New-Confucianist program of ideological continuity and control.

When the Han Chinese finally recaptured the heartland and reunified the empire following the defeat of the Mongols, establishing the Han Chinese Ming dynasty in the mid-14th century, the "universal" humanistic values of Neo-Confucian philosophy were transformed into unquestioning official (and imperial) orthodoxy.

[T]he main contribution of Neo-Confucianism to ideological control was not chiefly institutional; it was its philosophical reflections on the purpose, and potential for abuse, of monarchical power. For Neo-Confucian political thinkers, the state was the single most decisive institution to exert shaping influence on the education and ideological consistency of the populace. A Neo-Confucian thinker sees a tension between the state's search for ideological control and conformity and the ultimate goal of an individual's moral cultivation. And yet, they considered that a good Chinese intellectual, defined especially in Neo-Confucian terms, was to, not intensify, but reduce the tension, and effect a harmonious coordination between the two. However, the state, especially after the Ming dynasty, often chose to exploit this stress for harmony, and tried constantly to mobilize all available social institutions, such as schools, clan organizations, and even guilds, to enhance the ideological unity, which could be essential to a stable empire. As a result, imperial ideology was constantly adumbrated to the commoners through these channels. This development was quite unforeseeable when early Neo-Confucian thinkers articulated their ideas. Therefore, the paradox of the Neo-Confucian approach to the education of the Chinese individual was vitiated by their premise that the ruler, if properly guided, should be trusted as the most effective source of moral influence. The development, needless to say, affected Chinese education for many hundreds of years.[102]

A Chinese peasant, the first Emperor of the Ming (or "Bright") dynasty, Zhu Yuanzhang (1328-1398) restored "Chinese culture" to the heartland with a vengeance.

"[T]he harsh autocratic practices of traditional Chinese rulers, sometimes known as neo-Confucianism, were more a structural imperative of dynastic rule and a product of Chinese legalism than a result of traditional Confucian thought."[103]

And solidifying this transformation from Confucianism to Neo-Confucianism as a tool of absolute rule, the "Five Social Relations" of classical Confucianist thought became conflated in Neo-Confucian thought into a single rule in mass society: obey your superiors, be they rulers over subjects, fathers over sons, husbands over wives, etc. As noted by Ray Huang:

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[102] Thomas H.C. Lee, Government Education and Examinations in Sung China (1985) p. 26 Elman *at* 506, calls the classical essay Ming-Qing examination system a "dual cultural and political litmus test."

[103] Davis, Michael C., The Political Economy and Culture of Human Rights in East Asia (October 20, 2010). Available at SSRN: http://ssrn.com/abstract=1946751 at p. 418 paraphrasing Wejen Chang, "The Individual and the Authorities in Traditional Chinese Legal Thought" (1995) That temperament continued unabated during the "barbarian" Qing dynasty (1644-1911) with its Manchu overlords. Describing the fall of the child "Last Emperor" of Qing Dynasty in 1911, Ray Huang notes the significance of the conflation of political order and family order in Neo-Confucian statecraft: "The monarchy had to go… because the absoluteness of the throne supported the uncompromising character of China's social order." Huang, at 253

[G]overnment by virtue always implies a form of despotism. When the Emperor must maintain a front of moral perfection, it makes the throne a most dangerous seat to occupy, and conversely, any sense of rivalry or challenge to it is inevitably a greater risk. All this underlies the notion that morality is an absolute quality, indivisible and unnegotiable, and its highest perfection in office tolerates no competition.[104]

All of these tendencies had important ramifications for the "culture of imitation" in imperial China. First, Chinese commoners (*pingmin*) were to be explicitly treated as though they were children by government officials. (A common sobriquet for government official was "father and mother of the people (*fumuguan*)"; for commoners, the "ignorant masses (*yumin)")* For example, in response to protests, the Qianlong Emperor is recorded as saying:

"County magistrates are the parents of the commoners. Commoners complaining about their magistrate is like children pointing fingers at their parents. I cannot respond to their one-sided complaint favorably, otherwise it will set a malign example for them to blackmail local officials. It is just like a grandfather, despite his love for his grandchildren, should not bestow his grandchildren with excessive love and make them disrespect their father.[105]

The "hardening" of Neo-Confucianist official ideology into rigid orthodoxy, paternalism, and official authoritarianism, and unquestioning obedience to the ruler by the subject, the elder by the younger, and the untutored masses by a literate elite, beginning in the Ming period, continued unabated throughout the "Manchu barbarian" Qing dynasty until it was challenged at the beginning of the 20th Century by "Western" ideologies. [106] Ray Huang calls the Ming dynasty "an introverted and noncompetitive state."

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[104] Ray Huang, China: A Macro History 104 In essence, the Ruler was a Sage because he ruled, not a Ruler because he was a Sage. "The ideal Chinese state was one in which social status and moral worth were publicly labeled, and the ruler was the supreme labeling authority." Elvin calls this "the mania for moralism that gripped the Chinese mind in its Confucian mode, the importance of group approval in giving it effect, and the assumption that it was the state's obligation to define and induce in its subjects a sort of externally supported conscience." *See* Mark Elvin, "The Inner World of the Early Nineteenth Century", *in* ____, Changing Stories in the Chinese World (1997) 11, 30

[105] Ho-Fung Hong, Protest with Chinese Characteristics (Columbia 2011) p. 76 Professor Hong, who teaches at Johns Hopkins, recently noted that current Chinese Premier Wen Jiabao, in strikingly similar fashion, likes to refer to himself before the Chinese people as "Grandfather Wen." (*Wen Yeye*) http://thechinahotline.wordpress.com/2011/07/27/confucianism-and-political-dissent-in-china/

[106] Elman at 65-65 ("As in early modern Europe, where stress on order and conformity assured that rote learning (e.g., the catechism) played a fundamental role in the educational process, late imperial dynastic educators prized orthodoxy and the rote reception of that orthodoxy by insiders and outsiders alike. Repetition as a habit of learning was the key to developing the memory as a pedagogic tool to produce uniformity by education. The inculcation of classical literacy confirmed Han Chinese preeminence over the warrior in the precincts of the bureaucracy and on the higher ground of political ideology and moral truth. As long as their military power was not threatened by such political and social dynamics, the [alien dynasties such as the Mongols and Manchus] begrudgingly granted Han literati the ideological space that guaranteed their complicity in the conquest dynasty.") *see also* Elman, Chapter 2 *passim* and p. 437

Bureaucratism under the Ming … appeared to be the most rigid of its kind. The reliance on social values as the basis of government deepened. That man was superior to woman, the aged superior to the young, the educated elite superior to the illiterate was more than ever held as self-evident as a part of the Natural Law. Since these principles carried neither the weight of economy nor the variance between and among the several geographical sections, their universality strengthened the empire's solidarity. But the reliance on cultural cohesion made the Ming empire static. Its timeless and changeless outlook forbade development in any new direction. Toward the end of the dynasty, genuine clashes of interest could not be stated in explicit terms. Power struggles, even arising from disputes that were technical in nature, had to be disguised as moral issues.[107]

Second, with the renewed emphasis on cultural cohesion, imitation as a mode of survival took on a new life. By the 15th Century, the Antiquarian Movement (*fugu yundong*) of the late Tang dynasty figure Han Yu mentioned earlier was reinstated, albeit in a different, less substantive and much debased "copycat" form. John C.Y. Wang described the "theory of imitation" of the Ming Antiquarian Movement's founder, Li Meng-yang (1472-1528) as follows:

The literary world of early Ming times (the 14th and 15th centuries) had witnessed the rise of a powerful literary movement known as the Antiquarian Movement (*fugu yundong*). As suggested by its name, it was a movement in which the adherents asserted and actually tried to show that the best way to learn how to write an essay or a poem is to go back to the works of antiquity as models.… Inasmuch as literature, like any other human activity, is tradition-bound and cannot be said to be pure creation, the imitative theory of the Antiquarians is justifiable and even plausible. Indeed, this is exactly the basis on which Li Meng-yang…tried to defend his theory of imitation:
"Words must have methods and rules before they can fit and harmonize with musical laws, just as circles and squares must fit with compasses and rulers. The ancients used rules, which were not invented by them but really created by Nature. Now, when we imitate the ancients, we are not imitating the ancients but really imitating the natural law of things."
Li was able to render to the practice of imitation an air of dignity and respectability otherwise impossible. However plausible and high-sounding his theory may be, in actual practice Li and his followers produced very little literature of enduring quality. Imitation of the 'natural laws of things' became in reality wholesale stylistic borrowings from ancient writers.… Small wonder that in due course a strong reaction set in among men of independent spirit and mind, men who had the audacity to go along with the fashions of the day.[108]

A rival to the Antiquarian Movement, the Gong-an School arose, led by one of those "men of independent spirit and mind", Yuan Hongdao (1558-1610), vociferously attacked the "slavish copying" that was the practical result of the Ming Antiquarian position:

It was not until recent times that the literati began to outdo each other in promoting the theory of returning to antiquity. If it were just a matter of going back to antiquity, there would be nothing wrong. But what the literati have actually done is to steal from and plagiarize the ancient writers, and to call this going back to antiquity. … The talented*, restricted by models*, dare not develop their own talents. The mediocre merely select a few empty sentences and patch them together to form a poem. *The intelligent ones are restricted by tradition*, while the stupid are contented with the ease of copying. When one man shouts [the slogan of imitation], millions echo him. [*emphasis added*][109]

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[107] Huang, Macro History, p. 169 For example, the first Ming emperor issued a permanent injunction against expeditions to fifteen states, including Japan, Korea, Vietnam, and Indian Ocean states.
[108] John C. Y. Wang, Chin Sheng-T'an (Twayne 1972) p 14-15
[109] John C.Y. Wang *id. At 18*

Ironically, Yuan was also virtually unique for his time as a member of the scholar-elite publicly to recognize the dynamic value of the *shanzhai* counterculture within vernacular literary works such as *Shuihu Zhuan,* in glowing terms, for Chinese civilization.

> When I was young I was good at humorous stories,
> I reveled in the lives of the jesters.
> Later when I read the *Shui-hu* story,
> Its writing was still more fascinating and unusual.
> The Six [Confucian] Classics are no longer the model of style,
> Even [the Grand Historian] Ssu-ma Ch'ien fails in elegance.[110]

A generation later, an idiosyncratic scholar who had passed the local civil service examination but failed the metropolitan examination, Jin Shengtan (ca. 1610-1661) edited *Shuihu zhuan* into the work as it is familiarly known today, with a commentary similar to the commentaries to the Confucian classics done by his Neo-Confucian contemporaries, and raised the work to the pantheon of Chinese literature with the sobriquet "The Fifth Work of Genius" (*diwu caizi shu*).[111]

But scholar-intellectuals in the Ming-Qing period willing to risk their career by recognizing the *shanzhai* world of popular literature and popular culture were few and far between. In the Ming-Qing world of Chinese belles-lettres and the civil service examinations that led to political power, wealth, and social prestige, the more derivative the writing, the more it was likely to be welcomed by authorities.[112] The Three "Cardinal Relationships" of Neo-Confucianist ideology had devolved by the late Ming period into one simple "official" moral code rubric used to measure success from the 16th until the early 20th centuries: obey superior authority and mimic the ways and models of your teachers and leaders. Clearly, in the eyes of more "reality-grounded" critics such as Yuan Hongdao, the actual writings of the proponents of the Ming Neo-Confucianist Antiquarian School were nothing but "cut-and-paste" from previous writers. Plagiarism in official society was not always sanctioned with failure; it was often rewarded with success.[113] It was as though

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[110] id at 20

[111] Jin's first four "works of genius" were from China's rich [non-Confucian] imaginative and lyrical poetic literature. Many of the vernacular novels of the Ming-Qing period were written by scholars who had studied the classics for years but failed to pass the civil service examination. Such works were usually written anonymously or pseudonymously.

[112] In addition to the culture of derivation and imitation, Elman describes the various forms of cheating, corruption and irregularities among examinees during the civil service examinations. *at* 195-202. In stark contrast to lenient attitudes toward plagiarism, fraudulent use of state authority and legal instruments such as counterfeiting an Imperial order (*zhawei zhishu*) was considered one of the "Ten Abominations (*shi'e*)," subject to the harshest punishment in the Chinese Ming and Qing criminal codes: an irreducible sentence of "death by slicing (*lingchi*)". *See* Mark McNicholas, "Poverty Tales and Statutory Politics in mid-Qing Fraud Cases" *in* Robert E. Hegel and Catherine Carlitz (eds.) Writing and Law in Late Imperial China: Crime, Conflict and Judgment (2007) 143, 145-46

[113] Allegations of blatant plagiarism among Confucian scholars during the Ming and Qing dynasties were not always well-founded. Due to the intensity with which different scholars all studied the same ancient texts, independently created contemporary scholarly works occasionally resembled one another so completely as to attract charges of slavish plagiarism where it probably did not exist. For

there was an invisible osmotic pressure in favor of imitation and against new ideas and individual creativity throughout official Neo-Confucianist China during the entire Ming-Qing period. In popular culture, the virtual worlds of *shanzhai* and *jianghu* were the avenues of escapism, if not escape.

It comes then as no surprise, then, that by the time of the abolishment of the civil service examination system based on "imitation of the ancients" in 1905 and the collapse of the last imperial dynasty in 1911, China's new generation of public intellectuals, now versed in the works of 19th Century Western thinkers like Darwin and Marx, roundly blamed the use of classical Chinese–as the language–and Neo-Confucian orthodoxy–as the culture–of imitation, plagiarism and non-attribution, for China's problems modernizing.

> China's humiliation at the hands of the imperial powers, and its consequent failure to attain wealth and power in the new world order taking shape in the wake of the Great War came to be seen as a direct result of an irredeemably backward cultural legacy, of a civilization that was not only stagnant but also evolutionarily stunted. The New Culture movement that coalesced around Beijing University in 1917 was an effort to remove the shackles of that traditional culture by enacting a radical rupture with the Chinese past. And one of the most important aspects of this project was to dispense with the classical language, as well as much of the cultural baggage with which it was associated, in order to institute a modern and more adequately transparent representational regime, one predicated on the creation of a new national vernacular.[114]

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a fascinating account by one of the most famous 20th century Chinese scholars, describing falsified charges of plagiarism against the eminent Qing philologist Dai Zhen (1724-1777), *see* Hu Shih, "A Note on Ch'uan Tsu-wang, Chao I-ch'ing, and Tai Chen: A Study of Independent Convergence in Research As Illustrated in Their Works on The *Shui-Ching-Chu",* Arthur W. Hummell, Eminent Chinese of the Ch'ing Period (1943) 970

[114] Andrew F. Jones, Developmental Fairy Tales: Evolutionary Thinking and Modern Chinese Culture (Harvard 2011) 105-106 *see also* David L. Eng *et al.* "Introduction: China and the Human" 29 Social Text (2012) 1, *available at* http://ssrn.com/abstract=1997463:
("The fall of the Qing Dynasty in 1911 witnessed the acceleration of a series of ongoing political, social, and military crises, while the relationship of China and the Human entered another era, marked by the continuing precariousness of both. These unending crises–from the Opium War to the Sino-Japanese War, the Japanese colonization of Taiwan and Korea, the Boxer Rebellion, the Russo-Japanese War, and ultimately the dissolution of the dynastic state–were perhaps most potently symbolized in the writings of Lu Xun, China's great literary modernist. Lu Xun's gory images of flayed bodies, dead infants, and cannibalism rendered vivid the problem of a self-annihilating Chinese body, and body politic.") at 14-15 *referencing* Dai Jinhua *at* 15:
("[T]he two dominant motifs of Chinese modernity–an antifeudalism directed at China's Confucian past and an anti-imperialism directed at foreign aggressors–were hopelessly at odds with one another, with significant implications for the problem of the human. On the one hand, the repudiation of "feudal" Chinese culture (as it was problematically characterized in terms of European history) demanded a rejection of Confucian humanism in order to construct a modern China that, in turn, was build on a conflicted desire for westernization. On the other hand, the new Republic's anti-imperialism implied a repudiation of Western modernity. In other words… the modernization of China entailed the impossible task of "negating both the West and its own past." At 15 *compare* Sakai, *supra, at* 443 "Asia modernizes itself by negating both the West and its own past. Where there was no resistance to, or negation of, the West there could be no prospect of modernity for the Rest of the world."

The emblematic *ur-text* of the "New Culture" period is Lu Xun's 1918 short story "Diary of a Madman", which, as Andrew Jones remarks, has been "celebrated ever since as a herald of Chinese literary modernity." [115]

> As has often been remarked, the text [of "Diary of a Madman"] spectacularly enacts its own rupture with the past by way of an ingenious framing device. A preface constructed of the characteristic circumlocutions of classical Chinese informs us of the provenance of the diary we are about to read and the circumstances under which the narrator encountered it and came to copy it down. What follows is a shockingly direct, first-person, vernacular text that, in detailing the persecution complex of a man who suspects that those who surround him are secretly conspiring to kill and eat him, functions as an allegorical denunciation of what the text identifies as the "cannibalism" of Confucian culture and society.
> What is less often noted is that this lunacy is represented as a process of pedagogy in reverse, of unlearning the lessons of the Confucian canon.[116]

Over the entire course of the 20th Century since Lu Xun's time, Confucianist (or rather more correctly Neo-Confucianist) attitudes toward social order, "socially acceptable behavior", and political ideology (all of which are code words for "Do as we, your leaders, say, because we know what is best for you.") have proven to be a sort of recessive gene in Chinese cultural history, going latent for several generations only to reappear again quite recently. The "public face" of Chinese culture as appropriated (or more correctly, misappropriated) by the Neo-Confucians refuses to admit that *shanzhai* is inextricably part and parcel of what it means to be Chinese. The early 20th Century New Culture Movement's efforts to eradicate the Neo-Confucianist "culture of imitation" root and branch were followed by one political upheaval after another, such that a half century later the country bore witness to the parallel "Criticize Confucius" and "Criticize the 108 (*shanzhai)* Heroes" campaigns of the latter days of the Great Proletarian Cultural Revolution in 1974.[117] Claims that the New Culture Movement's embrace of Darwinism and

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[115] id. The title of Professor Alford's book, mentioned above, is taken from the lines of another of Lu Xun's short stories, "Kong Yiji."

[116] Id. Jones here quotes one of the most famous "paranoia" passages in Lu Xun's "Madman" story:

> "You have to really research something before you can understand it. I seemed to dimly remember that from ancient times on, people have eaten people, so I began to read through a history book to find such instances. There were no dates in the history, but scrawled this way and that across every page were the words BENEVOLENCE, RIGHTEOUSNESS, and MORALITY. Since I couldn't sleep anyway, I read that history very carefully for most of the night, and finally I began to make sense out of what was written between the lines; the whole volume was filled with a single phrase: Eat people!"

Jones praises Lu Xun's "narrative duplicity" as a framing device of the highest order. The term "Neo-Confucianist" in Chinese is *daoxue*, ("Tao Learning") alternately translated (as mentioned above) as "affected morality." It is a standard strategy for Neo-Confucianist writers to assert that challenges to their legitimacy are not directed at them personally as individuals, but rather general attacks on "Chinese culture." Elman, *passim* refers to Neo-Confucianism as "Tao Learning."

[117] The use of the term "Confucianism" is a late development. On the collapse of the Chinese official examination system in 1905 and the concurrent "invention" of "Confucianism" by late 19th Century Chinese intellectuals, particularly Kang Youwei (1858-1927), *see* Benjamin A. Elman, A Cultural History of Civil Examinations in Late Imperial China (2000) 585-625 and works cited therein

Marxism effectively substituted "westernization" for "modernization" in China are not unfounded.

Whether a *Neo-Confucian* Restoration as official political ideology can be forestalled or thwarted in now 'Net-savvy China in the 21st Century at the same time the nation is able to preserve what is the best of "humanist" *Confucian* values as merely one rich component of China's cultural heritage is a question highly relevant to the reemergence and continued significance of *shanzhai*. (The abrupt removal of the Confucius Memorial from the center of Beijing is certainly a hopeful sign.) *Shanzhai is* Chinese culture, but it is not Confucian. However loudly its proponents proclaim that "Chinese culture is Confucianism" and "Confucianism is Chinese culture," the modern *shanzhai* phenomenon as a social fact is a direct repudiation of those assertions.

V: Daily Life in The Modern *Shanzhai:* "Imitating Imitation" and "Grassroots Innovation"

There is a widespread perception, particularly among foreigners, that China's *shanzhai* counterculture among ordinary Chinese people is about industrial-scale counterfeiting and piracy. That perception is totally inaccurate. In fact, those activities are more likely a consequence of widespread corruption and impunity among local (and some national) government officials and their cronies and lack of effective law enforcement against those with connections in political power. They give *shanzhai* a bad name. *Shanzhai* behavior is not necessarily *against* the law; it is just outside of the government's control.[118] Small-scale counterfeits, piracy, and plagiarism are part of *shanzhai,* but *shanzhai* primarily means "knock-offs" (clearly recognizable as such), parodies, irreverent protests, and "grassroots innovations" that exploit "the ambiguities" and skirt the rules rather than break them.[119]

It is impossible in any human culture to mandate innovation and creativity. There are indications that remnants of the traditional Neo-Confucian establishment's "culture of imitation," implausibly denied, persist in today's paternalistic authoritarian China, symbolically represented by the recently restored and abruptly removed bronze statue of Confucius facing the Great Hall of the People. The monument was no doubt majestic when viewed from a distance, and more and more imposing upon approach, but overwhelmingly hard and unyielding on the surface, made of a material that is brittle and cold to the touch, with a hollow interior that is dark, silent, empty, and airless. Meanwhile, over in the Chinese *shanzhai*, the gates are wide open to anyone creatively inclined and audacious enough to enter. Inside the *shanzhai's* gates it is bustling, uncontrolled, but

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(*especially at 594,* discussing Kang's "cultural compensation" of "unilaterally declaring [Confucianism's] eternal moral superiority as a reward for its historical failure.")

[118] "It's hard to be labeled simply copying and pirat[ing], its emergence is the result of social tolerance and open minds; its existence [is consistent] with pressures to reforming the mainstream culture from outside the door; its way to the future has a lot to do with the trends toward a more civilized and open society, so the best way for us to deal with the phenomenon is: "leave it alone," "wait and see," "protect it and help it find its right way." Jiang Wei, at 13

[119] *see* Stern and O'Brien, *supra*

predictably peaceable, spontaneous, humor-filled, and irreverent; the teeming throng is perhaps still a bit adolescent, but on its way to full majority. The Chinese people are not children anymore.[120]

[120] Jiang Wei emphasizes the importance of the Internet for ordinary Chinese in their attempt to participate effectively in contemporary Chinese society. "[W[e] can see that the emerging of [the] *shanzhai* cultural phenomena is to some extent an Adult Ceremony for Chinese Netizens." Jiang Wei, at 9.