

HEINONLINE

Citation:

YuFan Stephanie Wang, The Triumph of Confucianism: How a Subjugated Legal System is Failing a Generation of Chinese Women and Girls, 15 Cardozo J.L. & Gender 691 (2009)

Content downloaded/printed from [HeinOnline](#)

Thu Feb 7 22:01:55 2019

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <https://heinonline.org/HOL/License>

-- The search text of this PDF is generated from uncorrected OCR text.

-- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[Copyright Information](#)



Use QR Code reader to send PDF to your smartphone or tablet device

THE TRIUMPH OF CONFUCIANISM: HOW A SUBJUGATED LEGAL SYSTEM IS FAILING A GENERATION OF CHINESE WOMEN AND GIRLS

YUFAN STEPHANIE WANG*

I. INTRODUCTION

Since the Fourth World Conference on Women was held in Beijing in August of 1995, there has been a flurry of legal research scrutinizing the status of Chinese women under China's market reforms.¹ In a society that has sacrificed so much in the name of economic growth, what has happened to the Communist Party's vaulted claims that "women hold up half the sky?"² Both domestic and international reports have noted that since China began its shift in 1978 from a planned economy to market socialism, the economic reforms have significantly affected the status of Chinese women.³ In particular, employment issues familiar to women in the West are taking on new prominence for Chinese women accustomed to the safety net of state enterprises.⁴

*J.D. Candidate, Benjamin N. Cardozo School of Law, 2009. The author wishes to thank Professor Barton Beebe for his valuable input in the formulation of this Note. The author also wishes to thank her mother, Li ZhiJie, and grandfather, Li DongFu, for passing on their wisdom and vision for the world.

¹ Human Rights in China, *Caught Between Tradition and the State: Violations of the Human Rights of Chinese Women*, 17 WOMEN'S RTS. L. REP. 285, 286 (1996) (abridged version of report released by Human Rights in China marking the Fourth World Conference on Women).

² See Stacy H. Leong, Note, *Women in China: Free Market Reforms Decrease Gender Equality*, 2 U.C. DAVIS J. INT'L L. & POL'Y 137, 137 (1996). "China's Cultural Revolution . . . offered women equal status in the face of a long history of oppression. China took strides to ensure women's political, cultural, economic, and social equality. What could a country with a long-standing constitutional commitment to gender equality fear from a women's conference?" *Id.* at 138.

³ See Christine M. Bulger, Note, *Fighting Gender Discrimination in the Chinese Workplace*, 20 B.C. THIRD WORLD L.J. 345, 353 (2000); BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, U.S. DEP'T OF STATE, 1999 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES (Feb. 25, 2000), *available at* http://www.state.gov/www/global/human_rights/1999_hrp_report/china.html (finding "that despite the equal rights promised by the Constitution . . . Chinese women have continued to report discrimination, sexual harassment, unfair dismissal, demotion, and wage discrepancies in employment."); Allison J. Wells, *Chinese Women Experience A Negative Side Effect of the Growing Private Sector in Gender-Based Employment Discrimination*, 6 IND. INT'L & COMP. L. REV. 517, 517 (1996) ("The Chinese government is loosening its traditionally tight grip on the economy, intending to allow the development of a market economy. Lifting some of the numerous regulations restricting private businesses allows employers more freedom to act on their biases and prejudices, resulting in an increase in gender-based employment discrimination in China"). *Cf.* Carrie Liu Currier, *Redefining 'Labor' in Beijing: Women's Attitudes on Work and Reform*, 13 ASIAN J. WOMEN'S STUD. 71 (2007) (examining the losses to Chinese women under marketization, and arguing that there are some gains depending on employment sector, age, and other employment characteristics).

⁴ Margaret Y.K. Woo, *Biology and Equality: Challenge for Feminism in the Socialist and the*

The regression of Chinese women's status in China's new economic order, in media portrayals, and in sex-related crimes, indicates a surge in traditional morality throughout Chinese society. As the Communist Party has relaxed its ideologies—including its attempt to impose radical gender equality—in favor of economic growth, traditional ethics based on Confucianism have rushed in to fill the void. The erosion of socialist ethics, coupled with the growing uneven distribution of social resources, has fueled a resurgence of patriarchal ideology throughout Chinese society.

This Note offers one explanation for the regression in the status of Chinese women—that despite China's reputation for gender progressivism, the Communist Party has never successfully eradicated the fundamental hold that Confucianism has on China's social and legal culture. An examination of the historical treatment of female workers by the post-revolutionary government indicates that the Party was not above using Confucian moral principles when it served policy goals such as decreasing the labor pool during periods of high unemployment.

The People's Republic of China's ("P.R.C.") legal system continues to echo Confucianism in two fundamental ways. First, the P.R.C. continues to enshrine the Confucian focus on morality, perpetuating an enervated legal system where the law is merely a tool of the state's policies. Termed "Confucianization of the law" by scholars, this structural preservation of Confucian principles casts the law in a subordinate position, undermining its recognition and enforcement. As "moral principles rather than legal directives," P.R.C. laws designed to enforce gender equality are easily compromised when government policy stresses economic growth above all else.⁵ The second form of perpetuation is more substantive and is reflected in the continued incorporation of archaic Confucian views of gender characteristics and relationships in the laws themselves. The laws that appear to mark the P.R.C. as a progressive champion of women's rights often contain disturbing references to a woman's particular "physiological characteristics."⁶ Thus, employment laws designed to protect women and equalize workplace conditions—such as mandating maternity benefits and facilities to accommodate nursing mothers—also contain provisions that limit the type of work women can engage in.⁷

Confucianism has been incorporated into the structure and substance of the P.R.C.'s legal system from the very beginning. Unlike the recent and possibly

Liberal State, 42 EMORY L.J. 143, 144 (1993).

⁵ Teemu Ruskola, *Law, Sexual Morality, and Gender Equality in Qing and Communist China*, 103 YALE L.J. 2531, 2553 (1994).

⁶ Nuzigong Laodong Baohu Guiding [Regulations Governing Labor Protection for Women Staff Members and Workers], Art. 1 (promulgated by St. Council, July 21, 1988, effective Sept. 1, 1988)(P.R.C.), available at <http://www.lawinfochina.com/law/display.asp?db=1&id=447> (hereinafter "Labor Protection Regulations").

⁷ See *infra* Parts IV(B) and III(C).

momentary resurgence of traditionalism,⁸ Confucianism's legacy is potentially much more troubling because it has engendered a morality-based legal system in modern China. This allows the law to shift with the dominant ethics of the society rather than keep them in check. Thus, the Chinese legal system in its current state fails to be an engine for change and Chinese women cannot rely upon it in their fight toward gender equality.

Though the Communist Party insisted during its revolutionary phase that it was demolishing the house of Confucius,⁹ it has somehow managed to build its own house over the same foundations. A legal system subjugated to moralistic policy and incorporating traditional gender roles not only undermines China's strivings towards the rule of law, it betrays the P.R.C.'s constitutional mandate and allows the shadow of Confucianism to claim another generation of Chinese women and girls.

This Note begins in Part II with a discussion of the concept of "Confucianization of the law" and how Confucianism triumphed over Legalism in China's development as a nation-state. Confucianism was not always China's ruling philosophy, but its relatively early dominance as the sole doctrine of China's ruling class has made it the underpinning of Chinese culture for almost two thousand years. Part III briefly describes the evolution of legal rights for Chinese women. A comparison of women's legal status under feudal rule with the Communist Party's early efforts reveals that Chinese women clearly made tremendous progress during the first few decades of Communist rule. Since the Communist Party made women's employment outside the home an early and important priority in the advance of women's status, the section goes on to analyze the current state of P.R.C. laws designed to protect women, particularly those meant to ensure workplace equality. Despite progressive language and detailed provisions, with limited private rights of action and declining government enforcement, these laws and regulations have failed to combat the reality of widespread discrimination. Part IV discusses signs that Chinese women are backsliding under market socialism—the phrase often used to describe China's economic reforms—in terms of both social status, education, and most importantly, employment. The inability of the P.R.C.'s laws and regulations to address current employment inequalities stems from their focus on female workers' physiological characteristics. Stemming from patriarchal Confucian ideas that have shaped popular beliefs about women and their biological "differentness," the protectionist language in these laws threatens to hasten the decline of female social standing.

⁸ After all, passing fads of social morality can change dramatically in short periods of time; compare the dominant social ethics of the 1960s versus the 1980s, or even in contrast to today. Depending on economic circumstances and even foreign policy, societal norms can shift rapidly in response to shocks such as market crashes, wars, and even environmental changes.

⁹ See *infra* Part III(B).

Despite the government's assurances that Chinese women's social and political status "ha[ve] risen steadily over the past decade,"¹⁰ it is clear that traditional gender stereotypes have been gathering strength.¹¹ The P.R.C. has some of the world's most progressive gender-equality and women's protection laws on its books, yet it is clear that these laws are frequently underenforced.¹² Once Chinese women recognize that Confucianism continues to pervade all facets of Chinese society, they can mobilize to prevent legal and cultural backsliding through constant vigilance against cultural justifications in the application of laws.

II. CONFUCIANIZATION OF THE LAW: LEGALISM V. CONFUCIANISM

Chinese legal thought has always fluctuated between two major schools of thought—Legalism and Confucianism.¹³ Legalist thinkers believed that humans are guided by the "crude pleasure-pain principle" and should therefore be governed by *fa*, literally translated as "law," or a coercive set of external laws and penalties.¹⁴ In contrast, the Confucians believed that human nature is inherently good and can learn to govern itself internally through "*li*, or moral suasion by rites."¹⁵ As the Confucians gained political patronage and their philosophies were adopted for real-world use, the penal sanctions of the legalists were reduced to tools used in enforcing Confucian morality in a process known as "Confucianization of the law."¹⁶

Confucius (551-479 B.C.E.) lived during the late Spring and Autumn period (770-475 B.C.E.) and early Warring States period (475-221 B.C.E.)—turbulent eras

¹⁰ *Chinese Women's Status Rising Steadily*, XINHUA NEWS AGENCY, Aug. 27, 2002, available at <http://www.china.org.cn/english/China/40642.htm>. Such political reassurances are commonly applied by Wu Yi, until recently the Vice-Premier of the State Council and the highest ranking female official in the P.R.C. government. She is often upheld as the ultimate example of the modern Communist woman. Interestingly enough, Councilor Wu is often praised for her dedication to public service, as exemplified by the fact that she has never married or had children—a prime example of the "iron woman" image cultivated by the Communist Party in its earlier days. Councilor Wu is also Director of the Women and Children Work Committee of the State Council and made the remarks in this article in a report to the 29th meeting of the Standing Committee of the Ninth National People's Congress (NPC) on the protection of women.

¹¹ Aside from the overt difficulties that Chinese women face in employment, education, and health, traditional stereotypes regarding all aspects of gender relationships now saturate the media. For example, the Xinhua News Agency, one of China's premier media outlets, reported that a joint study by the Marriage and Family Society of China and the Psychology Department of Beijing Normal University found that "[w]hen a Chinese husband earns twice as much as his wife, they are most likely to communicate on an equal footing, and enjoy a harmonious sex and home life . . ." *Marriage Most Stable When Husband Earns Twice as Much as Wife*, XINHUA NEWS AGENCY, June 7, 2002, available at <http://www.china.org.cn/english/SO-e/34079.htm>. Media portrayals of sexuality are often even more skewed toward reinforcing the Neo-Confucian cult of female fidelity and chastity. In newspaper advice columns, young women are taught how best to fend off sexual advances, while advice to young men focuses on whether "magnanimity requires one [to] forgive one's girlfriend for having slept with someone else." Ruskola, *supra* note 5, at 2555.

¹² See Ruskola, *supra* note 5, at 2531.

¹³ Woo, *supra* note 4, at 177.

¹⁴ Ruskola, *supra* note 5, at 2532-33.

¹⁵ *Id.*

¹⁶ *Id.* at 2533; Woo, *supra* note 4, at 178.

marked by the fall of the Zhou dynasty and warfare between its successor states.¹⁷ Witnessing the decline of the *zú*, or clan, as the principal non-governmental unit of social organization, Confucius “espoused a conservative, even reactionary model of government that idealized the political and social environment of the early Zhou.”¹⁸ Thus, traditional Confucianism was effectively “an ideological institutionalization of early Chinese social norms.”¹⁹

Confucius believed that society is not just an organization that enhances our survival but the medium through which man becomes a human being.²⁰ Without enculturation through society, Confucius believed that humans are no different from beasts—a “human *qua* member of the biological species.”²¹ Chapter two, verse three of the *Analects of Confucius* sets forth Confucianism’s central tenants and the advantage of *li zhi*²² over *fa zhi*:²³

Lead the people with government regulations and organize them with penal law, and they will avoid punishments but will be without shame. Lead them with virtue and organize them though the *li*, and the people will have a sense of shame and more over will become humane people of good character.²⁴

Confucius believed that while laws may curb the beast within each person, it was powerless to transform the inner character of societal members.²⁵ He was not interested in a “stable political order in which everyone coexists in relative harmony” but in “isolation from each other” for fear that interference in the lives of others may somehow result in legal punishment.²⁶ Instead, Confucius believed that human beings and society could be capable of much more. He stressed that in order for human beings to realize their full potential, they must engage in mutually beneficial relationships with others as part of a harmonious social order.²⁷

¹⁷ Hayden Windrow, *A Short History Of Law, Norms, And Social Control In Imperial China*, 7 ASIAN-PAC. L. & POL’Y J. 244, 247 (2006).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Randall Peerenboom, CHINA’S LONG MARCH TOWARDS RULE OF LAW 28 (2002).

²¹ *Id.* at 28-29.

²² The idea of *li zhi* is traditionally associated with Confucianism and refers to a political order “predicated on and achieved primarily by reference to the *li* or rites, that is, traditional customs, mores, and norms.” *Id.* at 28.

²³ *Fa zhi* is associated with legalism and refers to a “political order attained primarily through reliance on *fa* or laws, that is, publicly promulgated, codified standards of general applicability backed up by the coercive power of the state.” *Id.*

²⁴ *Id.* I find Prof. Peerenboom’s translation the most accessible version for the purposes of this Note. A more literal translation of this verse reads as: “Lead through policies, discipline through punishments, and the people may be restrained but without a sense of shame. Lead through virtue, discipline through the rites, and there will be a sense of shame and conscientious improvements.” THE ANALECTS OF CONFUCIUS, Ch. 2, Verse 3, available at <http://www.confucius.org/lunyu/ed0203.htm>.

²⁵ Peerenboom, *supra* note 20, at 28.

²⁶ *Id.*

²⁷ *Id.*

Confucius was, however, practical and never advocated the complete abandonment of law.²⁸ Rather, he believed that laws only provided a minimum level of protection for society by removing those individuals who rejected society and humanity.²⁹ Confucius thus discouraged the codification and public promulgation of laws because he felt that it focused society's attention on the lowest required level of social participation and encouraged people to manipulate the system.³⁰ A society based primarily on law could not attain social order because it focused on external compliance.³¹ Since an individual is merely expected to bend to the legal norm, there is never full participation in the creation of a society reflective of every individual's needs.³² By nature, a formal legal system elevates procedural justice relative to substantive justice.³³ Confucius advocated a "contextualized justice" that is able to take into account the individuals and particular circumstances of every situation.³⁴ Thus, while Confucius was not against litigation, he would have wanted the participants to resolve their differences in another manner in order to keep the imposition of laws to a minimum.³⁵

An alternative school of philosophy also arose during the early Warring States period in response to the power vacuum created by the decline of centralized government and the breakdown of clan-based social structure.³⁶ The Legalists objected to the power granted to the literati and the ruler in a *li*-based society.³⁷ To them, the Confucian system of *li zhi* was nothing more than *ren zhi*, or "the rule of man."³⁸ Confucianism called for the ruler and literati class—the Confucian

²⁸ *Id.* at 29

²⁹ *Id.*

³⁰ Peerenboom, *supra* note 20, at 29. "[W]hen ... tripods with penal laws on them are cast instead, the people will study the tripods, and not care to honor men of rank." *Id.* at 30.

³¹ *Id.* "In light of the precepts of Confucianism, the conduct of social relations should rely on the ritual norms (*li*), instead of being governed by a set of rules that are backed up by state-imposed sanctions in case of non-compliance and are, so to speak, exterior to each individual." Li Zhaojie, *Traditional Chinese World Order*, 1 CHINESE J. INT'L L. 20, 29 (2002).

³² *Id.*

³³ *Id.*

³⁴ *Id.* As a consequence of Confucius' views on the moral nature of law, Chinese law had to be "relatively open ended and flexible," which called for the use of two devices when rendering legal decisions—the "catch-all provision" and "the analogy." Ruskola, *supra* note 5, at 2532. During the Han Dynasty, the *Dàobù li*, who were government official specializing in legal affairs, "employed the practices of *dāng*, making the punishment fit the crime, and *bī*, sentencing by analogy, when devising sentences for transgressions not explicitly mentioned within the code." Windrow, *supra* note 17, at 270.

³⁵ THE ANALECTS OF CONFUCIUS, *supra* note 24, at Ch. 12, Verse 13.

[E]mphasis on law would lead people to think only in terms of their self-interest and make them more litigious and loophole-happy (by trying to manipulate the laws to suit their own interests), and would also divert attention away from the more important work of moral education. As Schwartz noted, "in a society dominated by *fǎ* [law], the people as a whole will all develop the peculiar talents of the shyster lawyer and the sense of shame will suffer.

Li, *supra* note 31, at 29.

³⁶ Windrow, *supra* note 17, at 254.

³⁷ Peerenboom, *supra* note 20, at 33.

³⁸ *Id.*

sages—to interpret the rites and determine the best course of action in every situation.³⁹ The Legalists saw this as a dangerous grant of power to the elitist ruling class.⁴⁰ They advocated clearly codified, publicly promulgated laws that were applicable to all members of society, in order to prevent a society where “the *li* do not reach down to the common people” and the “penal law does not reach up to the great official.”⁴¹ Instead of a great sage, the Legalists believed that most rulers are average and that exemplary leaders, as well as evil ones, were rare.⁴² Instead, they sought to create a system that would work in spite of an average leader and screen a ruler’s mistakes from the public through institutional mechanisms, such as law and an impartial bureaucracy.⁴³ Nonetheless, the ruler was still the ultimate authority figure and remained above the law.⁴⁴ The Legalists believed that laws existed exclusively to strengthen the monarch’s authority and state power.⁴⁵ Like the inner restraint advocated by Confucius, Legalism’s positive law was still designed to create an ordered society, albeit through the external restraint of rigid and specific laws designed to deter anti-social behavior.⁴⁶

A. The Qin Dynasty – Legalism’s Initial Triumph

The Qin Dynasty is China’s famously short-lived example of the reign of Legalism. In 357 B.C.E., Lord Shang became minister for Duke Xiao of Qin (361-338 B.C.E.), and overhauled the state according to legalist ideals.⁴⁷ His detailed reform of Qin’s penal and administrative rules, together with the installation of an elaborate bureaucracy, placed efficient control in the hands of the ruler.⁴⁸ Lord Shang’s Legalist policies shaped the economy to favor agricultural production and the construction of a powerful military.⁴⁹ His policies were so successful in bolstering Qin’s power that by 221 B.C.E., its ruler, King Zheng (246-210 B.C.E.), conquered his rivals and established the Chinese Empire, declaring himself Shi Huangdi (221-210 B.C.E.)—the first emperor.⁵⁰ Shi Huangdi adopted Legalism as his empire’s orthodoxy and appointed the great legalist Li Si (c. 280-208 B.C.E.) prime minister.⁵¹ The Qin Dynasty’s innovative, legalist-inspired methods of

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* (quoting the *Li Ji* 1966 [Book of Rites], 1:35a.).

⁴² Peerenboom, *supra* note 20, at 34.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Windrow, *supra* note 17, at 254.

⁴⁶ Peerenboom, *supra* note 20, at 34.

⁴⁷ Windrow, *supra* note 17, at 258.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* To consolidate Shi Huangdi’s rule over his subjects, Li abolished the feudal aristocracy and expanded the Qin bureaucracy into the newly conquered territories. In order to repress anti-regime philosophies, he mandated that all books in the imperial archives, except the memoirs of Qin, be burned. All persons, except members of the Academy of Learned Scholars, in possession of the *Book of Odes*,

political control—using a vast, tightly controlled bureaucracy to enforce a detailed, penal-oriented legal code—survived its collapse to be adopted by all successive dynasties.⁵²

*B. The Han Dynasty—The Adoption of Confucianism
and Its Absorption of Legalism*

After the death of Shi Huangdi, the Qin Dynasty quickly fell apart.⁵³ A peasant rebellion led by Liu Bang seized control of the empire and founded the Han Dynasty (206 B.C.E.-220 C.E.).⁵⁴ In reaction to the supposedly oppressive tactics of the Qin, Liu Bang, now Emperor Gaozu (206-194 B.C.E.), pledged to abolish the entire Qin bureaucracy and legal code.⁵⁵ However, faced with actually governing such a large empire, Gaozu eventually co-opted the Qin bureaucracy and enacted virtually identical criminal and administrative laws.⁵⁶ The Han emperors retained this Legalist apparatus even after they had secured their positions because the bureaucratic efficiency of the system permitted the Court to control vast populations and territories with a relatively minimalist government.⁵⁷ Yet, over time, new laws made by the Han emperors were tinged with Confucian morality and its focus on the family as the bridge between individuals and the state.⁵⁸ Eventually, Emperor Wu (140-87 B.C.E.) adopted a version of Confucianism infused with the operating efficiency of Legalism as the official state ideology.⁵⁹ This co-opting of Legalism's *fa* to serve Confucian morality as embodied in the *li* has been termed the "Confucianization of law."⁶⁰

the *Book of History*, and discourses of the hundred philosophers were order to take them to the local governors to be burned. Those who did not comply were sent to build the Great Wall. Those who talked to each other about the *Book of Odes* and the *Book of History* were to be executed and their bodies exposed in the market place. In accordance with the Legalist disparagement of the Confucian fixation on the past, anyone using the past to criticize the present would be put to death along with all members of his family. In addition, the Emperor had over 460 Confucian followers buried alive. However, as Windrow points out, much of these harsh punishments were recorded by the following Han Dynasty and may have just been propaganda. Excavations from a Qin official's tomb yielded over 1,100 bamboo scrolls inscribed with Qin laws that seem to paint a different picture of the Qin legal system, which Windrow describes as a combination of legalism and the popular cultural norms of Confucianism. *Id.*

⁵² Windrow, *supra* note 17, at 247.

⁵³ *Id.*

⁵⁴ *Id.* at 268.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 247.

⁵⁸ Windrow, *supra* note 17, at 247.

⁵⁹ *Id.*; Herbert H.P. Ma, *The Chinese Concept of the Individual and the Reception of Foreign Law*, 9 J. CHINESE L. 207, 211-12 (1995).

⁶⁰ Ruskola, *supra* note 5, at 2533 ("Upon eventually gaining political patronage, even Confucian ideologues found the "Pole Star" method of rule by *li* and the sheer force of superior virtue incapable of meeting all exigencies, and, as a concession to *realpolitik*, resorted to law as an instrument of social control. The penal sanctions of *fa* were recruited to enforce the Confucian morality embodied in the *li*. The moral code became, *mutatis mutandis*, the penal code; Ch'u T'ung-tsu has characterized the process as the 'Confucianization of law'").

The integration of Confucianism and Legalism was aided by the work of Jia Yi (201-168 B.C.E.), a Confucian scholar during the Former Han who developed a novel fusion of the two seemingly diametric philosophies:

Li can prevent sinfulness before it occurs, but law can reprimand wickedness after the wrong has occurred. Therefore, law is to be utilized for curbing evil, while Li has a difficult task that requires a lifetime to accomplish.... Li cultivates people, virtue and benevolence whereas punishment penalizes abominations.⁶¹

Pursuing a similar integration when overhauling the standard interpretation of the Confucian classics,⁶² the scholar Dong Zhongshu (179-104 B.C.E.) established the core tenets of a transformed Confucianism: (1) the dominance of rites and the subservience of the law; (2) the emperor's "sacrosanct power in governing the country and enacting the law;" (3) the Three Bonds—"the emperor's authority over his ministers, a father's authority over his children, and a husband's authority over his wife"—as the fundamental principles underlying law and punishment; and (4) solidification of the status of Confucian ideology by borrowing the Legalist tactic of banning "heretical" beliefs.⁶³ This shift in Confucian ideology legitimized the Han's use of the Qin bureaucracy.⁶⁴ In essence, the official ideological merge meant that "Legalism no longer posed an intellectual threat to the Confucianizing state."⁶⁵ This transformation marked the dawn of the "legalist structure-Confucian substance" model, which formed Imperial China's political foundation and continues to form the structural foundation of the P.R.C.'s legal system.

C. The Tang Dynasty – The Foundation of Chinese Law

The law's subjugation as a tool of Confucian morality was perfected during the Tang Dynasty. The Tang Code, first issued in 637 C.E. during Emperor Taizong's reign (627-649 C.E.), is one of Chinese history's seminal legal texts.⁶⁶ Even after the Tang's fall, the Code's structure and content survived to form the foundation of every Chinese government's legal system until the founding of the Republic of China.⁶⁷ In fact, many of its attributes survive in contemporary Chinese law despite the recent influence of Western laws,⁶⁸ a prime example that Confucianism continues to have a direct and enduring influence on modern P.R.C. laws. By the Tang Dynasty, the fusion of Legalism and Confucianism had become

⁶¹ Windrow, *supra* note 17, at 270.

⁶² *Id.* (stating that the four classics are Yi Jīng (*Book of Changes*), Shū Jīng (*Book of History*), Shì Jīng (*Book of Odes*), Chūn Qiū (*Spring and Autumn Annals*), and Lǐ Jì (*Ritual*)).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Windrow, *supra* note 17, at 283.

⁶⁷ *Id.*

⁶⁸ *Id.* at 284.

seamless.⁶⁹ In the minds of the ruling elite, “the use of penal laws to enforce Confucianism’s timeless, universal moral standards stretched back to the Shang dynasty (c. 16th century-c. 11th century B.C.), if not time immemorial.”⁷⁰

On a fundamental level, Confucian social theory is different from the Western assumption that individuals are inherently self-interested and that their needs will therefore necessarily clash with society’s needs.⁷¹ In Confucianism, every individual is not only defined by his or her own existence, but more importantly, by his or her relationship to the community.⁷² As Professor Benjamin I. Schwartz has encapsulated:

Individuals have legitimate interests, to be sure, and in the good society these interests will be taken care of (in accordance with requirements of the individual’s social status). To surround these interests with an aura of sanctity and to call them “rights,” to elevate the defence of these individual interests to the plane of a moral virtue, to “insist on one’s rights”—is to run entirely counter to the spirit of *li*. The proper predisposition with regard to one’s interests is the predisposition to yield rather than the predisposition to insist.⁷³

The purpose of these relationships, and the ridged rites that governed them, was to stabilize society by ordering it strictly along an age hierarchy governed through the male line of descent.⁷⁴ Thus, not only did Confucian ideology govern China legally and morally, it also formed the foundation of Chinese thought regarding women.⁷⁵ By using the law to codify its moral rites, Confucianism’s ritualistic distinctions based on “sex, seniority, and degree of kinship” were in turn enshrined in the law.⁷⁶

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Woo, *supra* note 4, at 178. See generally Ma, *supra* note 59.

⁷² Woo, *supra* note 4, at 178. (stating that Confucian values look at social life along series of relationships—*lun*, with the five most important *luns* being: father to son, monarch to subject, husband to wife, older to younger brother, and older to younger friend).

⁷³ Li, *supra* note 31, at 30 (quoting Benjamin I. Schwartz, *The Chinese Perception of World Order, Past and Present*, in *THE CHINESE WORLD ORDER: TRADITIONAL CHINA’S FOREIGN RELATIONS* 277 (John King Fairbank ed., 1968)).

⁷⁴ Ruskola, *supra* note 5, at 2532 (“Traditionally, Confucian ideologues preferred rule by internalized morality to the rule of law. Yet to the extent that law was a necessary tool of social control, it was harnessed to serve the traditional Confucian virtues. . .”).

⁷⁵ Leong, *supra* note 2, at 140. The subjugation of women to men was a central tenant of the Confucian moral structure; Confucius believed that “the female moon only served to reflect the glory of the male sun and that childbearing was a woman’s most important role.” *Id.*

⁷⁶ Ruskola, *supra* note 5, at 2533 (for example, the Qing penal code did not have categorical homicide statutes, but instead divided up homicide based on the relationship between the parties—i.e., killing of a senior family member by a junior one, of a father by his child, of a master by his slave, and of a husband by his wife.).

III. THE EVOLUTION OF MODERN LEGAL RIGHTS FOR CHINESE WOMEN

A. Confucian Ideology as the Foundation of Gender Roles

i. Tang Dynasty

By the time of the Tang Code, not only was the legal system's subjugation complete, Confucian morality was fully reflected in the substance of the law itself.⁷⁷ The preservation of the patriarchal family structure, and its attendant views of gender roles, had migrated to the center of state policy.⁷⁸ The Code consisted of two parts: (1) General Principles, which described the underlying premises of the laws and their implementation; and (2) Specific Offenses, which laid out each crime and its punishment.⁷⁹ "An examination of the General Principles reveals the complex, interlocking relationships between the state, inter- and extra-familial relationships, and social control formalized in the Tang and employed through the end of the imperial period."⁸⁰ For example, Article 6 describes the "Ten Abominations" and provides a coherent summary of the system's ideological underpinnings.⁸¹ The Abominations are the most serious offenses under the Tang Code and each involved either direct threats to the state—rebellion, plotting great sedition, plotting treason, great irreverence, unrighteousness⁸²—or actions that undermined the stability or survival of the older-generation and male-dominated family unit—contumacy, depravity, lack of filial piety, discord, and incest.⁸³ The severity of criminal punishments depended explicitly on the generation, age, sex, and mourning-period relationship between the criminal and victim.⁸⁴ Article 333, a domestic violence statute exemplifies the

⁷⁷ *Id.* at 2532 While Ruskola is discussing the Qing dynasty specifically, his characterization that "[t]he moral code became in effect the legal code" applies just as well to the Tang dynasty given that the Tang Code served as the model for subsequent dynasties. *Id.*

⁷⁸ Li, *supra* note 31, at 38 ("As Confucius himself advocates, "[t]he duties of universal obligation are five, . . . [They are] those between ruler and subject, between father and son, between husband and wife, between elder brother and younger, and those belonging to the intercourse of friends." Thus, if "affection between father and son, righteousness between the ruler and the ruled, separate function between husband and wife, proper order between old and young and fidelity between friends' could be maintained, peace and harmony could be achieved. . . . 'If a society follows the order in which subjects serve their ruler, son serves his father, and wife serves her husband, society will be in peace and harmony, otherwise, the society will be in chaos. This principle will perpetuate forever.'")

⁷⁹ Windrow, *supra* note 17, at 287.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* (Unrighteousness straddles both categories since it describes both attacks on the state—e.g., killing the leader of one's department, prefect, or magistrate, or one's teacher; as an employee or soldier, to kill one's own section chief or commander who is of the fifth rank or above—and attacks on the family patriarchy—e.g., hiding and refusing to mourn the death of one's husband, or to make music, wear ordinary clothing, or remarry during the mourning period).

⁸³ *Id.*

⁸⁴ Windrow, *supra* note 17, at 283 (for example, cursing at one's parents or paternal grandparents qualifies as lack of filial piety and warrants decapitation if performed with spells, or just strangulation if done solely with rude language. By contrast, cursing maternal grandparents does not even fall within

law's role in the reinforcement of this complex and rigid familial hierarchy. If a woman remarries and her new husband beats or injures her child from the previous marriage, his punishment is "one degree less than were the offense against a person of non-kin status."⁸⁵

By continuously fortifying traditional familial and social hierarchies, the Tang Code "transformed the family into a de facto extension of the bureaucratic state."⁸⁶ The male heads of families became the "unpaid foot-soldiers of government authority . . . because maintenance of the political/legal system granted them powers and privileges over their subordinates."⁸⁷ As noted in Part II, one of the main attractions of a Confucian infused legal system is the conservation of state resources. By allowing families to largely govern themselves and using those stable units to form the larger relationships of the state, Han rulers were able to control large and diverse geographic areas with a relatively skeletal administrative system. Thus, the Chinese Imperial government was not grounded in direct governance through laws or administrators, but rather through the setting of moral codes and exemplars—a shaping of social values and public opinion.⁸⁸

ii. Qing Dynasty

As China's last feudal dynasty, the Qing continued the well-established tradition of Confucian patronage and the codification of its moral rites into the legal system.⁸⁹ The Qing judicial system did not simply condone inequality in the law, it codified the unequal treatment of individuals from different classes and genders outright.⁹⁰ The lack of rights and legal protections for women during the Qing was not simply a matter of the unequal application of the law, but rather an inherent societal recognition that women were simply inferior in the Confucian social scheme.⁹¹ For example, a woman who beat her husband faced a statutory penalty

the Ten Abominations).

⁸⁵ *Id.*

⁸⁶ *Id.* at 299.

⁸⁷ *Id.*

⁸⁸ Li, *supra* note 31, at 29 ("As advocated by Confucius and his disciples, to maintain the peace and harmony of the Chinese world order, emphasis should be placed on the merits of government by education, persuasion, and moral example. The ruled should be taught what was right and wrong with the *li* so that they would behave properly according to their conscience and not merely because of the threat of punishment. The rulers themselves should also try to behave virtuously, so as to set good examples for their subjects to follow. In this regard, Confucianism stressed that government should be able to win the hearts of the people rather than securing their outward submission through the use of law").

⁸⁹ Ruskola, *supra* note 5, at 2532.

⁹⁰ *Id.* at 2534 ("As Confucian morality was one of hierarchy and inequality, so was Confucianized law").

⁹¹ *Id.* ("[T]his was not simply a matter of inequality *before* the law but, more fundamentally, of inequality *in* the law; it was not merely a question of biased application of the law (which undoubtedly also occurred), for the law itself, even when applied perfectly, treated members of different classes differently.").

of a hundred strokes, even if he was not injured.⁹² In contrast, a husband was punished for wife-beating only if her injuries were serious and she lodged a complaint, which was unlikely since a wife who accused her husband was sentenced to three years of penal servitude even if the complaint was found valid.⁹³

Continuing in its role as the primary enforcer of laws and social norms,⁹⁴ the Qing family often set clan rules that allowed for “systematic discrimination against the female members of the family, thus reflecting the gender inequality of the official statutory morality.”⁹⁵ Confucius’ indifference to women⁹⁶ eventually evolved in male-dominated feudal societies into deeply misogynistic attitudes, often reflected in maxims such as: “starving to death is a small matter, but losing one’s chastity is a grave matter” and “lack of talent is a virtue in a woman.”⁹⁷ Prior to the Communist takeover of the Chinese government, few women worked outside the home and the ones who did were often sold to factory owners as indentured servants who received no pay.⁹⁸ Working outside the home was a mark of shame and poverty, as working women labored under dirty and dangerous conditions for harsh hours and “shared the same status as prostitutes.”⁹⁹

B. The Communist Revolution:

Early Promise and the Extension of Legal Protection

The establishment of the People’s Republic in 1949 brought with it a radical new set of moral values based on equality and the promise of legal protection for women.¹⁰⁰ Prior to 1949, women had no right to own or inherit property and were dominated completely by the authority of their husbands.¹⁰¹ Seeking grassroots support, the Communist Party targeted peasant and working class women early on, promising “legal rights, educational opportunities and legal accountability” in return for their support.¹⁰² When the Party came to power, they sought to eradicate

⁹² *Id.* at n.68 (noting that if a man injured his wife seriously, divorce was still only possible if he consented to it).

⁹³ *Id.*

⁹⁴ “[I]nsofar as the law tended to call for the moral maximum, it often proved impracticable and hence at times was not enforced at all, or its enforcement was left to the discretion of extrajudicial institutions such as the family and the clan.” *Id.* at 2532.

⁹⁵ Ruskola, *supra* note 5, at 2545 (for example, clan rules often made it a punishable offense for a widow with a son to remarry).

⁹⁶ In fact, Confucius only made one negative reference to women in his ANALECTS: “In one’s household, it is the women and the [morally] small men that are difficult to deal with. If you let them get too close, they become insolent. If you keep them at a distance, they complain.” *Id.* at n.69.

⁹⁷ *Id.*

⁹⁸ Bulger, *supra* note 3, at 350.

⁹⁹ *Id.*

¹⁰⁰ Ruskola, *supra* note 5, at 2538.

¹⁰¹ Woo, *supra* note 4, at 147-48. “Mao Zedong noted that in traditional China, men were dominated by three systems of authority—the political, the clan, and the religious—while women were dominated by these and one additional system of authority—the authority of the husband.” *Id.* at 148.

¹⁰² Anna M. Han, *Holding-Up More Than Half the Sky: Marketization and the Status of Women in China*, 11 J. CONTEMP. LEGAL ISSUES 791, 796-97 (2001) (“While Marxism does not explicitly address

gender inequalities as part of its overall attempt to eliminate class inequalities and the Confucian elite.¹⁰³ Article 91 of the Chinese Constitution sought to acknowledge the contributions of Chinese women by “guaranteeing women equal rights with men in all areas of political, economic, cultural, social and domestic life.”¹⁰⁴ However, since the Chinese Constitution has no enforcement provisions, it was created to be a non-self executing document and continues to be largely aspirational.¹⁰⁵ Nevertheless, the fact that the overall status of women improved dramatically after 1949 is indisputable.¹⁰⁶ Legislation concerning marriage, property ownership, and inheritance all reflected the new morality of gender equality propagandized by the Party.¹⁰⁷

In a bit of practicality, the Party stressed the belief “that women would achieve equality through economic emancipation.”¹⁰⁸ During this early period of legislative activity, seven major labor laws were promulgated, including the Labor Insurance Law, the Trade Union Law, and the State Council Regulations Concerning Maternity Leave of Female Government Workers.¹⁰⁹ Thus, from 1940 to the late 1970s, women were ushered into the workplace in record numbers and were encouraged to take on non-traditional jobs outside the home.¹¹⁰ However, the Party’s initial elevation of Chinese women to “equal status” was aided by two factors. First, the strides made by Chinese women after the revolution seemed enormous because they had just emerged from a repressive feudal society where gender inequality was the cultural and legal norm.¹¹¹ Secondly, under Marxist Socialism there was little ownership of personal property to document gender inequalities—even under the best Communist policies, women never actually received equal economic leverage or political representation.¹¹² For example, despite legal guarantees of labor equality and equal pay, women workers often received three or four fewer work points per day, resulting in lower pay for the same work performed by men, or were assigned tasks that counted for fewer work points.¹¹³

the issue of equality between the sexes, the CCP [Chinese Communist Party] recognized that women, disproportionately underprivileged, needed to be included. Half of the peasants were women”).

¹⁰³ Leong, *supra* note 2, at 138; Woo, *supra* note 4, at 161.

¹⁰⁴ Han, *supra* note 102, at 797 (quoting Article 91 of the Constitution of the People’s Republic of China).

¹⁰⁵ *Id.*

¹⁰⁶ Human Rights in China, *supra* note 1, at 286.

¹⁰⁷ Han, *supra* note 102, at 798-803.

¹⁰⁸ Leong, *supra* note 2, at 138.

¹⁰⁹ Woo, *supra* note 4, at 154.

¹¹⁰ Han, *supra* note 102, at 801.

¹¹¹ See *supra* Part III(A)(ii) for a discussion of the codification of gender inequality under Qing Dynasty law.

¹¹² See generally Woo, *supra* note 4.

¹¹³ Han, *supra* note 102, at 801. See generally Kate Xiao Zhou, *Market Development and the Rural Women’s Revolution in Contemporary China*, in CHINA IN THE NEW MILLENNIUM: MARKET REFORMS AND SOCIAL DEVELOPMENT 279-80 (James A. Dorn ed., 1998).

This difference between the government's policy goal of eliminating discrimination and what actually occurred in practice is a prime example of the inherent tension in the P.R.C.'s legal system. While the Communist Party, and by extension the P.R.C., "undertook to legislate a new socialist morality" upon its establishment, it still inherited its view of the role of law from the Qing's Confucian based legal code.¹¹⁴ The law remained simply an enforcement mechanism for a government dictated morality, the only difference being that the new republic's laws were designed to "enshrine socialist morality."¹¹⁵ Thus, as with the Qing laws, the P.R.C.'s laws had to be broad and open-ended enough to cover "all possible violation[s] of the official morality" and were often open to compromise in actual enforcement.¹¹⁶

While women's entry into the workplace increased over time as they learned to implement their new-found rights, their actual numbers tended to fluctuate in accordance with the Party's political campaigns and the country's planned labor needs.¹¹⁷ During the post-revolutionary period, the need for a labor force to rebuild the country caused the government to banish Confucian thought and encourage women to participate in society.¹¹⁸ From 1949 to 1953, the percentage of women in the urban labor force increased at a healthy clip from 7.5% to 11%.¹¹⁹ However, the first Five Year Plan, which covered the period from 1953 to 1957, emphasized heavy industry and discouraged the entry of women into the workforce.¹²⁰ The Plan's policies resulted in an economic slump during which female labor participation inched from 11.7% to 13.4%.¹²¹ Women were encouraged to become "socialist housewives" and aid in the development of a socialist society through housework.¹²² Many of the virtues that women were suppose to devote themselves to during this period—including domestic thrift, hygiene, childcare, supporting their husband's work, and participation in neighborhood services—harked directly back to the virtues of a Confucian woman.¹²³ In contrast, the subsequent political campaign—the Great Leap Forward, which took place between 1958 and 1960, and called for the mass mobilization of the entire Chinese workforce as a means to economic development—increased the participation of female workers to 25% by 1963.¹²⁴

¹¹⁴ Ruskola, *supra* note 5, at 2537.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ Woo, *supra* note 4, at 148.

¹¹⁸ *See id.* at 161.

¹¹⁹ *Id.* at 149.

¹²⁰ *Id.*

¹²¹ *Id.* at 161.

¹²² Woo, *supra* note 4, at 161 (noting that during this period of high urban unemployment, the Party backpedaled its progressive labor policies and encouraged women to stay home and "contribute to the socialist cause through their housework").

¹²³ *See id.*

¹²⁴ *Id.* at 149 (it was also during this period that the government began to establish facilities such as nurseries, collective dining rooms, and laundries to alleviate the domestic responsibilities of women).

Women were called back into the workforce under the slogan of “anything a man can do, a woman can also do” and managed to gain social ground without any change in the legal framework.¹²⁵

With the outbreak of the Cultural Revolution, China’s fledgling legal system broke down and many of the rights accorded to women by the early labor and equality laws were effectively abolished.¹²⁶ Tellingly, however, estimates of women’s participation in the labor force leapt to as high as 48%, once again indicating that the ability of women to assert themselves in Chinese society was not based on legal rights and guarantees, but rather popular opinion shaped by “politicized models[s] of development.”¹²⁷ As the Communist Party actively recruited women in an effort to make itself more representative of the population, women gained greater access to social resources even without the aid of a functional legal system.¹²⁸ During this period, women benefited from the structure of socialism, or what is commonly called the “iron rice bowl” system.¹²⁹ Government propaganda helped to blur the difference between genders through images of the “iron woman” and women were suddenly encouraged to enter employment fields previously closed to them.¹³⁰

C. The Shift to Market Socialism:

Continuing Broad and Aspirational Recognition of Women’s Rights

China’s economic system changed dramatically in 1979 under the leadership of Deng Xiaoping, who set the country on the path toward “socialism with Chinese characteristics.”¹³¹ The focus on a markets-based economy has also led to a revival in China’s legal system. Between 1979 and 1985, over 400 new statutes and regulations were promulgated, most of which dealt with economic reforms.¹³² In addition, China adopted a new version of its Constitution in 1982, with several subsequent amendments, all of which continue to offer broad pledges of gender equality.¹³³

¹²⁵ *Id.* at 161.

¹²⁶ *Id.* at 154.

¹²⁷ Woo, *supra* note 4, at 149-50.

¹²⁸ See Leong, *supra* note 2, at 142.

¹²⁹ Woo, *supra* note 4, at 150 (under the “iron rice bowl system,” the state guaranteed every worker a job and a salary determined by the state. In addition to providing security, the system also came attendant with a plethora of social benefits such as subsidized medical care, housing, education, and retirement pensions). See also Han, *supra* note 102, at 804.

¹³⁰ *Id.* (the iron woman was pictured as “truck drivers, coal miners, and construction workers”). See also Charles J Ogletree & Rangita de Silva-de Alwis, *When Gender Differences Become a Trap: The Impact of China’s Labor Law on Women*, 14 YALE J. L. & FEMINISM 69, 72 (2002) (“Throughout the Cultural Revolution, workers . . . enjoyed a wide array of benefits including permanent employment, medical care, housing, education, and a pension upon retirement. During this period, there was a blurring of differences between men and women, and thus women were allowed to fill jobs involving heavy manual labor.”).

¹³¹ Woo, *supra* note 4, at 154.

¹³² *Id.* at 154.

¹³³ *Id.*; Bulger, *supra* note 3, at 348.

By emphasizing market forces, efficiency, and reorganization of state-run enterprises, the Chinese government has exposed China to the global marketplace and free market forces.¹³⁴ These new societal forces have had a “duel effect” on Chinese women—allowing them to benefit from increasing economic development, but at the same time, taking away the labor protections they enjoyed under China’s planned economy.¹³⁵ As part of its economic reform policies, beginning in 1982, the P.R.C. also began testing a series of labor reforms in its state owned enterprises, including employment via labor contracts, hiring through open recruitment, and allowing management discretion in the dismissal of workers.¹³⁶ After the surge of participation during the Cultural Revolution, the subsequent decade of reform saw female labor participation fall back to 38% of the country’s workforce.¹³⁷

As China’s gargantuan state-owned systems were slowly dismantled, unemployment became a major problem in a country that was used to the guarantee of full employment.¹³⁸ As in previous periods of labor contraction, female workers were used to bear the brunt of privatization’s consequences.¹³⁹ At the end of 1986, 61.5% of unemployed youths were female, with even higher percentages in key geographic areas.¹⁴⁰ In addition, women were increasingly segregated into service, textile, and food-processing industries.¹⁴¹ A 2002 survey by the All-China Women’s Federation (“ACWF”) found that “women were still in a ‘passive and disadvantageous’ position in the workplace.”¹⁴² According to the survey, between 1990 and 2002, the employment rate for women between the ages of eighteen and forty-nine decreased by more than 16%.¹⁴³ In 2004, the All-China Federation of Trade Unions (“ACTFU”) released a study based on female labor statistics from 1978 to 2002.¹⁴⁴ The ACTFU found that the number of urban female employees fell 17.2 million between 1996 and 2002.¹⁴⁵

The declaration of economic reform has once again pushed gender equality into the back seat.¹⁴⁶ The Chinese government maintains that “women’s liberation is both restricted by the level of economic development and closely related to non-

¹³⁴ Ogletree, *supra* note 130, at 70.

¹³⁵ *Id.*

¹³⁶ Woo, *supra* note 4, at 151.

¹³⁷ *Id.*

¹³⁸ *Id.* at 163 (discussing a 1987 survey of 600 enterprises, which indicated that while only 2% of employees were classified as surplus under the labor reforms, 64% of the surplusage were women.).

¹³⁹ See Han, *supra* note 102, at 806-07.

¹⁴⁰ Woo, *supra* note 4, at 162 (“In a worker exchange meeting held in April 1987 in Beijing, 80 to 90% of enterprises expressed a need for only male employees.”).

¹⁴¹ Bulger, *supra* note 3, at 351.

¹⁴² *Women Still a Long Way from Equal Pay*, CHINA DAILY, Dec. 16, 2002, available at <http://www.china.org.cn/english/2002/Dec/51263.htm>.

¹⁴³ *Id.*

¹⁴⁴ *Female Workers Feel the Pinch*, CHINA DAILY, June 16, 2004, available at <http://www.china.org.cn/english/China/98427.htm>.

¹⁴⁵ *Id.*

¹⁴⁶ Woo, *supra* note 4, at 161.

economic factors” and cautions women to “work honestly with selfless devotion and unremittingly make new contributions towards... socialist modernization.”¹⁴⁷ The ACWF has commented that “women are fast becoming the group most sensitive to the ‘tense’ employment situation in China,” with only 39% of laid-off women ever finding re-employment, 24.9% lower than the re-employment rate for men.¹⁴⁸ As Professor Woo summarizes:

Women workers have not fared well under the reforms. Overwhelmingly, they are the last to be hired and the first to be laid off. Even when hired, women are segregated into specific lower paid light industries. Furthermore, those who work... bear the double burden of family and work. All of these limitations are imposed in the name of upholding the goals of nationalism and development.¹⁴⁹

During this dismal period for women in the workforce, on-the-books legal protections for Chinese women did not lapse. On the contrary, as the analysis below will indicate, examination of the key employment laws promulgated by the Chinese government during the economic reforms provide very strong formal legal protections for female employees.

i. The Constitution of the People’s Republic of China (1954)

The 2004 amended version of the Chinese Constitution preserves the declaration of gender equality from Article 91 of the original 1954 Constitution.¹⁵⁰ Article 48 also sets forth an equal pay provision, which purports to apply “the principle of equal pay for equal work to men and women alike.”¹⁵¹ Articles 33, 34, and 49 also pledge that the state shall protect the interests of women and provide training to female workers.¹⁵²

The Chinese Constitution also reflects how deeply Confucian principles have been embedded into the Chinese consciousness. While professing to reject feudalistic principles, the Communist Party still utilizes Confucian concepts regarding social hierarchy and responsibility.¹⁵³ For example, the Chinese Constitution, unlike the U.S. Constitution, dictates “reciprocal duties and

¹⁴⁷ *Id.* at 161-62 (“One factory manager, reflecting official policy, was quoted as saying publicly, ‘we must not divorce ourselves from our nation’s economic conditions to discuss sexual equality.’”).

¹⁴⁸ *Programs to Help Laid-Off Women*, CHINA DAILY, Dec. 16, 2002, available at <http://www.china.org.cn/english/2002/Dec/51235.htm> (quoting the ACWF President as commenting that “most employers tend to discharge a woman rather than a man, if someone has to be discharged.”).

¹⁴⁹ Woo, *supra* note 4, at 144.

¹⁵⁰ XIAN FA, art. 48, § 1 (1982)(P.R.C.), translated in THE CONSTITUTION OF THE PEOPLE’S REPUBLIC OF CHINA, Foreign Language Press (2004).

¹⁵¹ *Id.* at Article 48, §2.

¹⁵² Ogletree, *supra* note 130, at 73.

¹⁵³ “While Communism rejected feudal Confucianism in theory, Chinese society appears to have retained Confucian conventions. Confucian values have been integrated into the laws that presently govern the formerly private spheres, including the female reproductive function.” Woo, *supra* note 4, at 179.

obligations” for its citizens.¹⁵⁴ Such provisions are a direct reflection of the Confucian ethic that for their own edification, individuals must exist as a harmonious and integrated member of society, tied in by rites and mutual obligations. The Constitution also preserves Confucian social hierarchies by treating women, the elderly, and the young, as special classes of people meriting particular protection.¹⁵⁵

Also, unlike the Constitution of the United States, the Chinese Constitution is not a self-executing document and “cannot by itself be enforced in Chinese court[s]” unless the relevant Constitutional provisions are further incorporated into laws promulgated by the government.¹⁵⁶ Chinese citizens cannot bring legal actions under their Constitution because the rights enumerated in the document “are implemented according to current Chinese policy and [do] not [derive] from any universal theory of natural rights.”¹⁵⁷ Essentially, the Constitution of China is a declaration of government policy rather than actionable law.¹⁵⁸ In addition, Article 51 of the Chinese Constitution limits the exercise of individuals rights and freedoms to situations where they “do not infringe upon the interests of the state, or society or of the collective...”¹⁵⁹ Thus, while the Chinese Constitution has inspired the evolution of women’s rights in the last two decades, it continues to offer women little direct legal protection.¹⁶⁰

ii. Labor Protection Regulations (1988)

Part of a set of regulations promulgated toward the start of the economic reforms, the Regulations Governing Labor Protection for Women Staff Members and Workers (hereinafter Labor Protection Regulations), along with the Provisional Regulations for Health Care for Women Employees—issued two years earlier on May 30, 1986, displayed a clear paternalistic approach in the P.R.C.’s attempt to protect women in the workplace.¹⁶¹ While the Labor Protection Regulations covered a variety of labor issues, the Health Care Regulations focused primarily on protecting the health of female workers.¹⁶²

On the surface, the Labor Protection Regulations seem to be a sincere attempt to address problems faced by women in the workplace and guarantee them safe and

¹⁵⁴ *Id.* at 181 (“such as a duty on the young to take care of the old”).

¹⁵⁵ *Id.*

¹⁵⁶ Ronald C. Brown, *China's Employment Discrimination Laws During Economic Transition*, 19 COLUM. J. ASIAN L. 361, 389-90 (2006).

¹⁵⁷ *Id.*

¹⁵⁸ Bulger, *supra* note 3, at 351. “Many of the so-called ‘rights’ detailed in the Constitution were not accepted by society. The best evidence of the disparity between what the laws promised and what society was willing to tolerate was the periodic need to enact more laws to address specific areas of discrimination.” Han, *supra* note 102, at 797-98.

¹⁵⁹ *Id.*

¹⁶⁰ See Ogletree, *supra* note 130, at 72-73.

¹⁶¹ Woo, *supra* note 4, at 156-57.

¹⁶² *Id.* at 157.

equitable working conditions.¹⁶³ The Labor Protection Regulations prohibit wage reductions and the cancellation of employment contracts during periods when a female employee is pregnant, delivering, or breast-feeding.¹⁶⁴ Large employers are required to establish special facilities for women, such as health clinics, restrooms for pregnant women, breast-feeding rooms, and child care facilities.¹⁶⁵ However, due to its unjustified focus on the “social characteristics” of women, the Labor Protection Regulations are often seen today as the root cause of the majority of discrimination faced by female workers.¹⁶⁶

The Labor Protection Regulations specifically sets out in its first article that its purpose is to “reduce and solve special difficulties encountered in labor and work . . . by female . . . workers due to their physiological characteristics”¹⁶⁷ This focus on the physiological differences between women and men implies that while men are suitable for all types of work, women are somehow disabled and require special protections.¹⁶⁸ For example, in addition to specifying policies and facilities that benefit women, many provisions in the Regulations also restrict the type of work that women may perform. Articles 5, 6, and 7 not only ban women from underground mining and work of high “labor intensity,” it also restricts the type of work a woman can perform while menstruating and breast-feeding.¹⁶⁹ These regulations stand in direct contrast to the “iron woman” image of the Cultural Revolution and seem to resurrect the Confucian specter of sagely paternalism. The regulations presume that women need to be given extra care and protection, highlighting the pervasiveness of the idea that women are by nature inferior to men and leaving men with the right, or even the duty, to make decisions for the women under their protection.¹⁷⁰

In addition to its detrimental impact on the social and legal portrayal of women, the Regulations also lie at the heart of why employment discrimination has resurged in modern China. All of the benefits bestowed upon women by the Labor Protection Regulations translate into costs for employers. Even when costs are associated with maternity or child care related protections, they are entirely borne by the mother’s employer—reinforcing the view that women are solely responsible

¹⁶³ See generally Labor Protection Regulations, *supra* note 6.

¹⁶⁴ Bulger, *supra* note 3, at 361-62.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 362-63.

¹⁶⁷ Labor Protection Regulations, Art. 1.

¹⁶⁸ *Id.* at 362-63. “Under the Labor Protection Regulations, women are barred from fourth grade labor at all times, regardless of whether they are in a critical period. Labor law textbooks in China defend these limitations on the grounds that lifting more than twenty-five kilograms, the level of fourth grade labor, may cause dislocation of the uterus in women workers. Significantly, however, fourth grade work is paid higher than work of lower grades.” Woo, *supra* note 4, at 158.

¹⁶⁹ Bulger, *supra* note 3, at 362 (the rights enumerated under the Labor Protection Regulations lose all effect if the woman is found to have violated China’s strict family-planning regulations, making the protections granted by the Regulations not a right, but once again contingent on obedience to state policies).

¹⁷⁰ *Id.* at 362-63.

for the care of children.¹⁷¹ With the dismantling of large-scale state employers and the government's focus on economic growth, laws intended to protect female workers have become a convenient and economically legitimate excuse for discriminating against them.¹⁷² With fewer or no government subsidies, newly reorganized state enterprise and privatized companies have little incentive to hire or keep female employees in a tight labor market.¹⁷³

iii. Law Protecting Women's Rights and Interests (1992)

In April of 1992, the P.R.C. enacted the Law Protecting Women's Rights and Interests ("LPWRI")¹⁷⁴ to address women's "political, educational, cultural, employment, property, marriage, and family rights, as well as 'rights of the person,' which embody rights of personal freedom, bodily integrity, dignity, honor, and reputation."¹⁷⁵ The LPWRI is an expression of the gender equality guarantees in the Chinese Constitution, but was also enacted to satisfy China's obligations as a party to the Convention of the Elimination of All Forms of Discrimination Against Women ("CEDAW").¹⁷⁶ The CEDAW was adopted in 1979 by the United Nations General Assembly and is often described as "an international bill of rights for women."¹⁷⁷ The CEDAW defines what constitutes discrimination against women and sets up an agenda for national action to end such discrimination.¹⁷⁸ China ratified the CEDAW in 1980 and has since submitted six Period Reports documenting what it has accomplished pursuant to its obligations under the CEDAW.¹⁷⁹

The LPWRI specifically addresses a woman's right to work in Chapter IV and has provisions guaranteeing equal pay, equal assignment of benefits, and prohibitions against dismissal based on marriage, pregnancy, maternity leave, or lactation.¹⁸⁰ However, even though LPWRI prohibits gender discrimination in hiring, it does allow employers to refuse to hire women workers if the position has been deemed "unfit" for female workers by the government, echoing the same

¹⁷¹ *Id.* at 363.

¹⁷² *Id.*; Han, *supra* note 102, at 804-05.

¹⁷³ Han, *supra* note 102, at 804-05.

¹⁷⁴ Zonghua Renmin Gonghe Guo Funu Quanyi Baozhang Fa [Law of the People's Republic of China on the Protection of Women's Rights and Interests] (promulgated by Nat'l People's Cong., Apr. 3, 1999, effective Oct. 1, 1992)(amended Aug. 28, 2005)(P.R.C.) [hereinafter LPWRI], available at <http://www.lawinfochina.com/law/display.asp?db=1&id=4492&keyword=women>.

¹⁷⁵ Bulger, *supra* note 3, at 365.

¹⁷⁶ *Id.*

¹⁷⁷ Overview of the Convention of the Elimination of All Forms of Discrimination Against Women, <http://www2.ohchr.org/english/bodies/cedaw/index.htm> (last visited Mar. 3, 2009).

¹⁷⁸ *Id.*

¹⁷⁹ Office of the United Nations High Comm'r for Human Rights, Comm. on the Elimination of Discrimination Against Women, *Consideration of Reports Submitted by States Parties Under Article 18 of the Convention on the Elimination of All Forms of Discrimination Against Women, The Combined Fifth and Sixth Periodic Report of States Parties—China*, CEDAW/C/CHN/5-6 (June 10, 2004), available at <http://daccessdds.un.org/doc/UNDOC/GEN/N04/403/05/PDF/N0440305.pdf?OpenElement>.

¹⁸⁰ Bulger, *supra* note 3, at 365.

paternalistic tone found in the Labor Protection Regulations.¹⁸¹ In addition, the LPWRI continues to contain Confucian mandates regarding social obligation, mandating that women have a reciprocal duty to “observe state laws, respect social ethics, and fulfill obligations prescribed by law.”¹⁸² Further legislating Confucian morality, the LPWRI assumes that women workers will be married prior to pregnancy and childbirth and provides reduced benefits to unmarried mothers.¹⁸³

While the Chinese government could have used the LPWRI as a turning point for the tone of its gender policies, it chose instead to preserve the protectionist provisions of the Labor Protection Regulations and incorporate them wholesale into the LPWRI.¹⁸⁴ The LPWRI also lacks real initiative because it has no enforcement mechanisms of its own—a woman can only file suit if “there is a substantive and procedural basis for it in *another* law”—thereby reducing it to another largely aspirational piece of legislation.¹⁸⁵

iv. The Labor Law (1995)

After almost four years of debate and revisions, the P.R.C. promulgated the Labor Law on January 1, 1995.¹⁸⁶ The Labor Law essentially summarizes all of the existing labor law in China, including the Labor Protection Regulations, with the exception that it explicitly extends its protection to all workers, including employees of foreign-owned businesses.¹⁸⁷ In substance, however, the Labor Law follows in its predecessors’ footsteps by promising equal employment opportunities, prohibiting gender-based discriminatory hiring, but excepting jobs that have been “determined unsuitable for women by the State.”¹⁸⁸ The Labor Law is consistent with the government’s vision of gender-based employment discrimination and its resolution through administrative sanctions.¹⁸⁹ However, perhaps as a result of China’s increasing focus on the rule of law, there has been a

¹⁸¹ *Id.*

¹⁸² LPWRI, Art. 6.

¹⁸³ Under the LPWRI, unmarried women with children are only entitled to maternity leave, not to other child care benefits. Woo, *supra* note 4, at note 178. “Special protection for women workers, therefore, has support in the traditional ideological constructs of the role of women as ‘mothers and wives.’” *Id.* at 180.

¹⁸⁴ Ann D. Jordan, *Women’s Rights in the People’s Republic of China: Patriarchal Wine Poured from a Socialist Bottle*, 8 J. CHINESE L. 47, 59-66 (1994).

¹⁸⁵ Bulger, *supra* note 3, at 366 (emphasis in original).

¹⁸⁶ Zhonghua Renmin Gongheguo Lao Dong Fa [Labor Law of the People’s Republic of China] (promulgated by the Standing Comm. Nat’l People’s Cong., July 5, 1994, effective Jan. 1, 1995)(P.R.C.), available at <http://www.lawinfochina.com/law/display.asp?id=705>. See also Hiliary K. Josephs, *Labor Law in a “Socialist Market Economy”: The Case of China*, 33 COLUM. J. TRANSNAT’L L. 559, 560-61 (1995).

¹⁸⁷ Bulger, *supra* note 3, at 366. The inclusion of foreign owned businesses could be significant since a growing number of Chinese women are finding employment with multinational companies operating in China. *More Females Find Jobs in Multinationals*, CHINA DAILY, May 4, 2004 available at <http://www.china.org.cn/english/Life/94642.htm>.

¹⁸⁸ *More Females Find Jobs in Multinationals*, *supra* note 187.

¹⁸⁹ Josephs, *supra* note 186, at 568.

subtle shift towards allowing civil liability for breach of employment contracts and an increased emphasis on contractual obligations between employers and workers.¹⁹⁰ It is still unclear what the impact of the Labor Law on the status of Chinese women will be since few claims resulting from it have progressed to the Supreme People's Court.¹⁹¹

IV. BACKSLIDING UNDER MARKET SOCIALISM—THE SIDE EFFECTS OF REFORM

With China's economy booming for the past decade, Chinese women today appear to have more opportunities and resources. However, the reality is that they now face comparatively greater inequalities in education and social status. In the beginning, the Communist Party sought to empower women through employment and earning power—thus, in many ways, the larger problem of declining female status can be traced to employment inequities that have deepened as the economic reforms have advanced.¹⁹² Women at different points of the employment timeline face a varying array of problems. Young women and girls, who often start out short-shifted by inadequate education, now face increasing sexual objectification when they venture into the workplace.¹⁹³ Middle-aged and older women have their careers cut short by discriminatory, and sometimes illegal, mandatory retirement ages that prevent them from reaching positions of leadership.¹⁹⁴

A. Replacing Education with Objectification: Women and Girls Left Behind

In September of 2003, the United Nation's Special Rapporteur on Education raised a furor when she concluded that China's "educational shortcomings put it in violation of its international obligations."¹⁹⁵ For a nation that prides itself on its superb economic growth and increasing investment in compulsory education, it has become clear that girls are often the first to be sacrificed in impoverished areas where free basic education remains scarce.¹⁹⁶ According to statistics from the Ministry of Education, in early 2002, an estimated 70% of China's illiterate population consisted of women.¹⁹⁷ The Ministry's review noted that financial

¹⁹⁰ *Id.* at 569.

¹⁹¹ Bulger, *supra* note 3, at 364.

¹⁹² "Since China began to embrace free markets in the 1980's, the lay-off of women workers has been one of the greatest problems facing women in China." Ogletree, *supra* note 130, at 71.

¹⁹³ See Bulger, *supra* note 3, at 358.

¹⁹⁴ "Chinese law sanctions age discrimination in the form of earlier retirement ages, some as early as forty, for women than for men. . . . Some work units use this age differential as an excuse for not hiring women so that they can avoid making pension payments for five or ten years longer to women than men. Earlier retirement ages for women have also resulted in work units failing to train or promote women because they will work for fewer years than men." *Id.* at 358-59. See also *Chinese Women Want same Retirement Age As Men*, PEOPLE'S DAILY, Jan. 23, 2003, available at <http://www.china.org.cn/english/NM-e/54259.htm>.

¹⁹⁵ CHINA'S EDUCATION SYSTEM: READING BETWEEN THE LINES, HUMAN RIGHTS IN CHINA (2004), available at http://www.hrchina.org/public/PDFs/CRF.1.2004/b2_ChinasEducation1.2004.pdf.

¹⁹⁶ *Id.* at 47, 50.

¹⁹⁷ *Id.*

hardships, coupled with traditional views that intellectual development should be discouraged in girls, has led many teenage girls to drop out in pursuit of the increasing number of low-end jobs available in rural and urban enterprises or as domestics for China's growing middle class.¹⁹⁸ Higher illiteracy rates for women and high drop-out rates for girls has "had obvious impacts on their economic opportunities and social status," raising serious questions about the reality of China's compliance with CEDAW despite the LPWRI.¹⁹⁹

Aside from education, another indicator of the floundering status of Chinese women is their increasing objectification—both in employment settings and media portrayals.²⁰⁰ Increases in sex-based crimes such as prostitution, concubinage, forced marriages, and human trafficking have also risen sharply since the market reforms began.²⁰¹ Increasingly, every aspect of a Chinese woman's life is becoming tied to evaluations of her physical appearance, with attractive women "now considered commodities in Chinese society."²⁰² Long gone are the days when the Party discouraged makeup and fashion as bourgeoisie trappings and both men and women wore uniform clothing with utilitarian haircuts.²⁰³ With the introduction of market competition, advertising is becoming increasingly important and many Chinese companies have sought to increase their competitive edge by specifying that job applicants must be "young, female and attractive."²⁰⁴ As Professor Brown relates at the beginning of his article, while waiting outside the Ministry of Labor in Beijing, he noticed a job advertisement that read: "Seeking an office clerk. Female, decent height and appearance. All five facial organs must be in the right place (wu guan duan zheng)."²⁰⁵

The ACFTU's report, which compiled information from 1978 to 2002, found that: "sex discrimination [has become] the norm in today's workplace. The progress made in the early decades of the P.R.C. has in many cases been abandoned in the years since economic reform began."²⁰⁶ The report's statistical data tell a

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ A 1997 survey of 1,197 television commercials showed that "33.7% were gender based, showing women as helpless without men, insatiable shoppers, and constantly worrying about their hair and makeup. Of 957 characters, 54% were female and of those, 87% were young and attractive females." Han, *supra* note 102, at n.88.

²⁰¹ "The recent growing revival of Confucian values has been accompanied by disturbing reports of women being sold for marriage." Woo, *supra* note 4, at n.179. "Along with marketization, crimes against women are now on the rise." Han, *supra* note 102, at 809. *See generally* Ruskola, *supra* note 5.

²⁰² Han, *supra* note 102, at 808.

²⁰³ *Id.*; *See also* *Chinese Women's Status Rising Steadily*, XINHUA NEWS AGENCY (Aug. 27, 2002) available at <http://www.china.org.cn/english/China/40642.htm> ("At the same time, Chinese local governments had also taken effective measures to strike hard against the crimes of rape, prostitution and kidnapping to safeguard women's personal safety. 'We may firmly affirm our achievements in protecting the rights and interests of women, but we also need to realize clearly that problems still exist and some of them are quite serious,' said Wu.")

²⁰⁴ *Id.*

²⁰⁵ Brown, *supra* note 156, at 362.

²⁰⁶ *Id.* at 374.

grim story of the current status of women workers.²⁰⁷ Non-state owned enterprises rarely provide maternity benefits or accommodate the special needs of women as required under China's labor laws.²⁰⁸ Only 39% of the disproportionate number of women who have been laid off as part of the economic transition have been able to find re-employment—compared to 63.9% of men.²⁰⁹ And not surprisingly, given the government-sanctioned mandatory retirement ages, women held only 1.3% of management posts in all organizations during 2002.²¹⁰ On top of all this, China's wage disparities, which existed despite Communist efforts even in the pre-reform decades, have worsened. Among urban workers, women earn only 70% of what men make, while female executives and senior professionals only earn 58% and 68%, respectively, of what their male counterparts make.²¹¹

B. China's Focus on the Biological Characteristics of Women Employees

Given the uniform decline in the status of Chinese women in the employment arena, it is clear that China's numerous protectionist employment laws and regulations share a fatal flaw. China's legal framework focuses on the biological characteristics of female employees, as opposed to the rights based approach currently utilized in the United States.²¹² This difference may be a reflection of the fundamental differences in legal philosophy between the two nations or a sign that China's legal system is still in its infancy. In either case, laws focused on the biological "difference" of women serve to deepen gender stereotypes and often facilitate employment discrimination.

The origin of special protections for Chinese women in the workplace lies in the traditional medical belief that women are weakened by their reproductive responsibilities, particularly menstruation.²¹³ The restrictions imposed on menstruating women by traditional medical texts are extremely similar to the restrictions found in the Labor Protection Regulations.²¹⁴ These biological justifications are so commonly believed that they have faced little opposition within China.²¹⁵ In a 1990 Chinese women's conference, many participants justified the labor protections because "women have their own physiological features and have the task of bearing children so as to carry on the race"—echoing, once again, the Confucian idea that the protection of an individual is not only for their sake, but for

²⁰⁷ *Id.* at 372-74.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ Brown, *supra* note 156, at 372-74.

²¹¹ *Id.* at 364 (in addition, women only make up about 20% of professional fields and on average, female doctors earn 37% less than male doctors).

²¹² Ogletree, *supra* note 130, at 86 (this difference has been characterized as formal versus substantive equality).

²¹³ Woo, *supra* note 4, at 180.

²¹⁴ *Id.*

²¹⁵ *Id.*

the benefit of future generations and the larger community.²¹⁶ However, as the discussion in Part III noted, these biology-based protections have had a serious detrimental impact on the status and employability of women workers. While the laws call for equal treatment, their implementation allows employers to tacitly segregate the workplace, particularly in the blue-collar work world.²¹⁷

China is not alone in promulgating biologically based labor laws that deepen stereotypes and result in the facilitation of employment discrimination. It is reasonable to think that as China's legal system matures, it will eventually work out a system that can provide protection without codifying traditional sexist attitudes. In fact, China's current protective measures are reminiscent of labor laws in the United States during the early twentieth century.²¹⁸ In *Muller v. Oregon*, the Supreme Court similarly used women's reproductive capacities to uphold an Oregon law that limited work hours for women.²¹⁹ The Court espoused a perspective similar to that of the modern P.R.C. government: "That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious."²²⁰ Many of the United States' protective laws were not struck down until the passing of Title VII of the Civil Rights Act of 1964 required a gender blind workplace.²²¹ Even so, Title VII has not had the same type of success in blue-collar workplaces, precisely the type of work environment that also poses the greatest difficulty in China.²²²

While the labor laws of the United States in the early twentieth century were reflective of a traditional patriarchal culture, modern P.R.C. laws are the result of a system tensely rooted in a mix of socialism and Confucianism. As discussed in Part II, Confucianism's hold on China is not as simple as an expression of pre-modern patriarchy, its governing philosophies have also shaped the nature and structure of China's legal system. While the Communist Party rejected Confucianism in theory, its "values have been integrated into the laws that presently govern formerly private spheres" such as reproduction, child-care, and female biology.²²³ In fact, the Confucian and socialist conceptions of individual rights and law are quite compatible in that they both focus on the duties of an individual to the collective community.²²⁴ The truth is that Confucian ideology never disappeared from the P.R.C., it retained its hold on the Chinese legal system

²¹⁶ *Id.* at 180-81.

²¹⁷ Ogletree, *supra* note 130, at 78.

²¹⁸ *Id.* at 86.

²¹⁹ *Id.*

²²⁰ *Muller v. Oregon*, 208 U.S. 412, 421 (1908).

²²¹ Ogletree, *supra* note 130, at 87.

²²² *See id.* at 88-89.

²²³ Woo, *supra* note 4, at 179.

²²⁴ *See id.* at 181.

while its affect on morality and social norms simply waxed and waned with the needs of national policy.²²⁵

The reemergence of Confucian ethics is a natural result of the veneer of socialist ideology giving way under market pressures. As China has shifted from party worship to market worship, it is not surprising that “new religion and old philosophy has rushed to fill” the ideological void.²²⁶ As the ACFTU reports, the affirmative action policies of the state have receded while “traditional gender stereotypes and values have re-emerged, including gender discrimination in the labor market.”²²⁷ Confucianism is an essential theme underlying China’s cultural history and it is naive to think that millennia of feudalistic beliefs can be eradicated or even substantially altered in half a century. Despite its good intentions, the past few decades of Communist rule have only superimposed aspirational policies over a society steeped in Confucianism. And since sexual equality was not a distinct goal of Marxism, it was often subordinated to the greater national interest.²²⁸ Thus, China’s Communist government has at times even exploited the society’s underlying attachment to Confucian ideology to the advantage of its policies.²²⁹ In the current shift to marketization, the latest chapter of the P.R.C.’s policies have played out to the disadvantage of women. Privatization has led to massive government layoffs and a fiercely competitive labor market, and once again, women are expected to yield the best positions to men, while government rhetoric shifts to discussions of the “natural role” of women.²³⁰

V. CONCLUSION

The Chinese language is full of elegant and succinct sayings that make learning the language particularly challenging. One of these adages is the saying “*shui zhang chuan gao*,” or “as the water rises, all ships are lifted.” China’s economic reforms have lifted the standard of living for a fifth of the world’s population, but the broad tide of marketization also contains insidious undercurrents that threaten to immerse the most vulnerable segments of Chinese society.

²²⁵ “When Mao introduced Marxist reforms, it did little to change the status of Chinese women culturally.” Han, *supra* note 102, at 797.

²²⁶ Leong, *supra* note 2, at 139.

²²⁷ Brown, *supra* note 156, at 389.

²²⁸ Woo, *supra* note 4, at 160-61.

²²⁹ A Chinese song titled “*Shiwu De Yueliang*” [The Moon on the Fifteenth], which was popularized by the state media in the mid-1980s and continues to be a cultural touchstone, contains the following lyrics sung from the perspective of a devoted soldier’s wife: “I stay by the side of the infant’s cradle, while you patrol our nation’s frontlines. I till the fields of our homeland, while you stand guard at the boarder. . . . I am happy to labor after our parents, while you do not fear to serve the country with your sweat and blood. I carry the heavy burden of our family, while you ensure the safety of our country.” Author’s translation, lyrics in Chinese, *available at* http://news.xinhuanet.com/audio/2003-07/29/content_999116.htm. The song’s title is a reference to the Chinese Harvest Festival, a time of family unification, which takes place on August 15 of the Chinese lunar calendar.

²³⁰ Woo, *supra* note 4, at 162-63.

While Confucianism has remained the default mode of Chinese thinking for centuries, the early policies of the P.R.C. demonstrated that it is possible to alter even ingrained popular beliefs. Laws, even with fluctuating enforcement, have the “constitutive and transformative power” to affect the way that women perceive themselves and are in turn perceived by society.²³¹ If Chinese women are to hold on to the progress made by previous generations, they must use the progressive wording of China’s laws to wage battle against ingrained societal beliefs.

The dismantling of government monitored work collectives, coupled with the rapid migration of rural populations, has caused more and more women and girls to fall through the cracks. As it becomes more difficult to keep track of women and girls, their invisibility will inevitably lead to decreases in their social status. Whether exemplified by increases in human trafficking, sex crimes, or professional woman deciding that withdrawal from participation and civil society is easier than facing the inequalities of the workplace,²³² the future development of Chinese society will be shaped by the stories of this first generation raised under marketization.

Since equal employment has emerged as the most direct victim of marketization, China must struggle to find a balance between formal equality—which may not provide sufficient benefits to traditionally disadvantaged groups such as women—and biology-based equality—which may reinforce sexual stereotypes and lead to de facto workplace segregation. While many advocates from western legal traditions may automatically gravitate towards a vigorous system of lobbying and grassroots litigation, learning to take advantage of China’s growing legal system may not be enough to get at the root of the problem.²³³ Given Chinese society’s focus on popular morality, perhaps a better place to start would be to reshape Confucius’ message for the modern age. After all, one of the central tenets of Confucianism is the humanizing power of social interaction and civil participation. Before the Communist revolution, Chinese women could not participate in civil society, so their social roles were circumscribed by male

²³¹ Ogletree, *supra* note 130, at 92.

²³² A Women’s Federation survey of 2,000 couples in Beijing’s well-off Haidian District showed that “more than 60 percent of the professional women are willing to be full-time housewives.” Some viewed the results of the study as an example of societal retrogression, noting that: “[w]hen a woman gives up her social responsibilities and duties, she also gives up her rights and dignity. There will be no more equality between man and woman.” However, other experts think that the results are “a sign of social progress.” Yang YiYong, a human resources expert and deputy secretary-general of the China Labor Studies Society looks towards the U.S., Japan, and Holland, as examples of countries that are attempting to recognize the value created by housewives. According to Yang, “equality between men and women doesn’t mean women should do whatever men do, as there will be clearer work division. Man can also stay home to be a househusband, though for most men, it’s not a suitable job.” Wu Nanlan, *Full-Time Housewife: Most Women’s Choice*, CHINA NET, Jan. 22, 2003, available at <http://www.china.org.cn/english/2003/Jan/54184.htm>.

²³³ As Professor Peerenboom states in his introduction to the evolution of rule of law in China: “It is difficult for many modern Westerners in particular to imagine a rule of law being embedded in a nonliberal context, and as a result, for law to play a different role in society, such as state-strengthening rather than the protection of individual rights.” Peerenboom, *supra* note 20, at 27.

“caretakers.” Modern China may still subscribe to a Confucian world-view of social interdependence, but women can now demand to take their rightful place as full social participants.

Since the P.R.C.’s legal system is based on moral principals rather than legal directives, advocates can use the law as a marketing tool to change popular perceptions of gender roles and relationships. It is time for a new morality based on gender equality, but this time, instead of an elite group of revolutionaries imposing the idea from the top-down, Chinese women should participate in the shaping of their own images from the bottom up.

