

Fordham International Law Journal

Volume 39, Issue 3

2016

Article 3

Chinese Gift-Giving, Anti-Corruption Law, and the Rule of Law and Virtue

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Abstract

This Article addresses the question of whether virtuous giftgiving in China can be used in the fight against corruption. Giftgiving, ubiquitous in Chinese familial, business, and official practices, has been under fire by both laws outside and within China.

KEYWORDS: FCPA, Chinese Anti-Corruption Law, Bribery, GlaxoSmithKline, Gift-Giving, China

ARTICLE
CHINESE GIFT-GIVING, ANTI-CORRUPTION LAW,
AND THE RULE OF LAW AND VIRTUE

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INTRODUCTION

This Article addresses the question of whether virtuous gift-giving in China can be used in the fight against corruption.¹ Gift-giving, ubiquitous in Chinese familial, business, and official practices, has been under fire by both laws outside and within China. For example, the US Foreign Corrupt Practices Act (the “FCPA”) forbids gift-giving to foreign officials in order to procure business. China’s recent anti-corruption campaign has targeted the use of banquets, mooncakes,² and luxury goods in the bribing of officials.³ China is considered a high-risk business environment, and multinational corporations are advised to have robust compliance programs to monitor illegal payments and gifts.⁴

In particular, under the FCPA two issues make China a business environment fraught with peril: (1) because of China’s multitudinous state-owned enterprises (“SOEs”), many persons can be considered “foreign officials;” and (2) a gift of any value can trigger a FCPA violation.⁵ United States businesses sometimes consider themselves at a disadvantage because non-US businesses may not be subject to the same restrictions. Accordingly, they use middlemen to pay bribes and hope they will not be caught.⁶ Many articles acknowledge in passing that a pervasive Chinese gift-giving culture exists and is problematic

1. This is part of a series of Articles I am writing on the relationship between contemporary and traditional Chinese ritual and law.

2. Mooncakes, described further below, are round pastries with fillings exchanged among family, friends, and businesses during the Mid-Autumn Festival, the second most important holiday during the lunar year.

3. Andrew Jacobs, *Elite in China Face Austerity Under Xi's Rule*, N.Y. TIMES, Mar. 28, 2013, at A1; see also Chris Priddy, *China Compliance: The Mooncake Version*, CHINA LAW BLOG (Sept. 3, 2014), <http://www.chinalawblog.com/2014/09/china-compliance-the-mooncake-version.html>.

4. See generally Daniel C.K. Chow, *Three Major Risks under the Foreign Corrupt Practices Act for U.S. Multinational Companies Doing Business in China*, 37 *FORDHAM INT'L L.J.* 1183 (2014).

5. *Id.*

6. STEVEN P. FELDMAN, *TROUBLE IN THE MIDDLE: AMERICAN-CHINESE BUSINESS RELATIONS, CULTURE, CONFLICT, AND ETHICS* 42-43 (2013).

for compliance with anti-corruption laws.⁷ The goal of this Article is to fill a gap in the literature by addressing the origins of these practices, and whether virtuous gift-giving can be used in the fight against corruption.

First, I will discuss elements of the FCPA and Chinese anti-corruption measures. Then, I will discuss the recent US prosecution of Avon for FCPA violations and Chinese prosecution of GlaxoSmithKline (“GSK”). These illustrate pervasive corrupt business practices in China. Then, I will discuss the ancient origins of Chinese gift-giving, and gift-giving’s connection to *guanxi*, *mianzi* and China’s traditional rule of virtue. *Guanxi*, which literally means “relationships” or “connections,” is widely acknowledged as essential for successful business dealings in China. However, *guanxi* is different than United States networking in that effective *guanxi* requires *ganqing* and *renqing*, or friendship or familial feelings.⁸ *Mianzi* is the concept of status and saving and losing face. China’s traditional rule of virtue is a tenet of Confucianism that a government’s promotion of virtue is superior to governance by legal measures. Virtue is cultivated through ritual.

I will discuss how the ritual of gift-giving is not only essential to *guanxi* and *mianzi*, but was originally part of good governance and virtue cultivation. Chinese governance involved bestowing and receiving gifts, epitomized by the *ding*, sacrificial vessels which recorded the earliest law codes. I will also discuss that the Chinese nation, family, and business enterprise are all types of families, where gifts are welcome and expected. Businesses originated in ancestral trusts where profits were used for ancestral worship, charity, and education for officialdom. Also, the advent of modernization and China’s recent meteoric economic growth has not lessened the practices of gift-giving, but has amplified them. Today, Chinese are the largest number of consumers of luxury goods in the world.⁹ In

7. See, e.g., Daniel Chow, *China Under the Foreign Corrupt Practices Act*, 2012 WIS. L. REV. 573, 590 (2012); Mike Koehler, *The Unique FCPA Compliance Challenges of Doing Business in China*, 25 WIS. INT’L L.J. 397, 417 (2007); F. Joseph Warin, Michael S. Diamant, & Jill M. Pfenning, *FCPA Compliance in China and the Gifts and Hospitality Challenge*, 5 VA. L. & BUS. REV. 33, 59 (2010).

8. Tong Chee Kiong & Yong Pit Kee, *Guanxi Bases, Xinyong and Chinese Business Networks*, 49 BRIT. J. OF SOC. 75, 80 (1998).

9. See Lyu Chang, *China World’s Biggest Luxury Consumer*, CHINA DAILY (Feb. 21, 2014), http://www.chinadaily.com.cn/bizchina/2014-02/21/content_17298225.htm. As of 2015 China also has more billionaires than the United States. Jonathan Chew, *China Now Has More*

2013, they bought US\$102 billion worth of luxury goods, almost 47 percent of the world's total.¹⁰ It is estimated that 20¹¹ to 50¹² percent are gifts to government officials.

I conclude that virtuous gift-giving should be used in the fight against bribery and corruption. Costly compliance measures, a ritual in itself, are not enough. As mentioned below, Walmart expects their FCPA compliance costs for fiscal 2016 to be between US\$160 and US\$180 million.¹³ Virtuous gift-giving is always transparent and properly recorded. One example I will describe below about foreign firms possibly encouraging virtuous gift-giving is Häagen-Dazs and its ice-cream mooncakes. I also propose an international and interdisciplinary taskforce to enumerate what are appropriate and virtuous gifts in different settings.

In sum, the solution to pervasive gift-giving in Chinese business is not to eliminate or ignore it, but to understand its origins and to seek its positive practice. Otherwise US and international businesspeople will not only forgo certain business opportunities in China, but also practices that can be part of a rule of virtue. A rule of virtue can be complementary to a rule of law and anti-corruption measures.

Billionaires than the U.S., FORTUNE (Oct. 15, 2015), <http://fortune.com/2015/10/15/china-billionaires/>.

10. See Chang, *supra* note 9. Two-thirds of purchases are bought overseas because of high import tariffs, consumption taxes and twenty-five to forty percent markups by luxury goods companies. See S.N., *China's Addiction to Luxury Goods*, THE ECONOMIST (Apr. 29, 2014), <http://www.economist.com/blogs/economist-explains/2014/04/economist-explains-17>; Clare Baldwin, *Luxury in China Loses Luster as Wealthy Flee*, REUTERS (Jan. 16, 2014), <http://www.reuters.com/article/2014/01/16/us-china-luxury-hurun-idUSBREA0F0H320140116>; *Luxury Goods Industry*, THE DILENSCHNEIDER GROUP, INC. (Feb. 2015), http://www.dilenschneider.com/files/march_2015/Luxury_Consumer_Trend_Report_1st_Quarter_2015.pdf.

11. See Stephen Coates, *Exploring China's Mix of 'Guanxi', Gift Buying and Politics*, CHINA POST (Oct. 1, 2012), <http://www.chinapost.com.tw/china/national-news/2012/10/01/356061/Exploring-Chinas.htm>; see also Tom Doctoroff, *Second Wives and China's Booming Luxury Market*, HUFFINGTON POST (Feb. 17, 2011), http://www.huffingtonpost.com/tom-doctoroff/second-wives-and-chinas-b_b_824380.html. Unfortunately, it is estimated that approximately one-third of luxury goods are purchased for mistresses. Mistresses are often seen as a status symbol, preferable to luxury cars because keeping a mistress is by nature a more discreet activity than owning a flashy car. *Id.*

12. See David Barboza, *For Bribing Officials, Chinese Give the Best*, N.Y. TIMES, Mar. 14, 2009, at A4.

13. *WAL-MART Stores, Inc. Q4 2015 Earnings Call Transcript*, 38 (Feb. 19, 2015), http://media.corporate-ir.net/media_files/IROL/11/112761/4Q15/FY15_Q4_earnings_transcript_final.pdf [hereinafter Walmart Earnings Call].

I. THE FCPA

Ironically, the FCPA grew out of concerns of corruption within the highest levels of the US government. In the Watergate scandal, President Richard Nixon and his top advisors were accused of covering up a break-in of the Democratic Party headquarters in the Watergate complex in Washington, DC. As special prosecutors investigated the extent of this scheme, they came across not only campaign contributions by major corporations to US political parties, but contributions to foreign officials as well.¹⁴ Ultimately, more than 400 US corporations divulged gifts of hundreds of millions of dollars to foreign officials as part of the regular course of doing business overseas.¹⁵ Several US senators expressed dismay that such payments were sabotaging US foreign policy.¹⁶ The FCPA was enacted in 1977 to combat this corruption and perceived threat to national security.¹⁷

The FCPA applies to US individuals, publicly listed firms,¹⁸ and private firms¹⁹ doing business overseas, or any other individual or entity acting on US territory.²⁰ The FCPA prohibits offering anything of value to any foreign official or political party, or an intermediary, in order to obtain or retain business.²¹ A “foreign official” includes “any officer or employee of a foreign government or any department, agency, or instrumentality thereof . . . or any person acting in an

14. SEC. AND EXCH. COMM’N, 94TH CONG., SESSION REP. ON QUESTIONABLE AND ILLEGAL CORP. PAYMENTS AND PRACTICES (Comm. Print 1976) [hereinafter SESSION REP. ON QUESTIONABLE AND ILLEGAL CORP. PAYMENTS AND PRACTICES]; see also *Foreign Corrupt Practices and Domestic and Foreign Investment Improved Disclosure Acts of 1977 Before the H. Comm. On Banking, Hous., and Urban Affairs*, 95th Cong. (1977) (statement of Lee Metcalf, United States Senator from the State of Montana). American Airlines was one of these companies. SESSION REP. ON QUESTIONABLE AND ILLEGAL CORP. PAYMENTS AND PRACTICES, *supra*. According to Senate testimony, American Airlines had revealed to the Special Watergate Investigator that it had given US\$55,000 to the Nixon campaign in violation of campaign finance law. *Id.* However, American Airline’s history of political contributions went as far back as 1964 and amounted to US\$275,000. *Id.*

15. U.S. Department of Justice, Criminal Division & U.S. Securities and Exchange Commission, Enforcement Division, *FCPA: A Resource Guide to the U.S. Foreign Corrupt Practices Act*, 3 (2012), <http://www.justice.gov/criminal/fraud/fcpa/guide.pdf> [hereinafter *FCPA Resource Guide*].

16. Mike Koehler, *Ten Seldom Discussed Foreign Corrupt Practices Act Facts That You Need to Know*, 10 WCR 347, 1 (2015).

17. *Id.* at 2.

18. 15 U.S.C.A. § 78dd-1(a) (1998).

19. § 78dd-2(a).

20. § 78dd-3(a).

21. § 78dd-1(a).

official capacity” for such entity.²² The FCPA has an exception for making payments to facilitate or expedite services for “routine governmental action.”²³ In 1988, the FCPA was amended to allow affirmative defenses for payments authorized by the host country’s written laws,²⁴ and for “reasonable and bona fide expenditures, such as travel and lodging expenses” related to “the promotion, demonstration, or explanation of products or services” or “execution or performance of a contract.”²⁵

“Routine governmental actions” include obtaining permits to do business,²⁶ processing visas and work orders,²⁷ and providing services such as “police protection, mail pick-up and delivery, scheduling inspections . . . for contract performance . . . or transit of goods”²⁸ and “phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration.”²⁹ Although this list seems comprehensive, it does not include decisions to “award new business or to continue business.”³⁰ “Routine government actions” is narrowly interpreted by the courts and can be a pitfall for companies who attempt to seek refuge in this exception.³¹ Public companies must also keep accurate records of transactions and maintain internal controls that guard against off-the-books accounting.³²

Remedies for each violation of the anti-bribery provisions of the FCPA include injunctive relief,³³ fines of up to US\$2,000,000 for entities,³⁴ and fines of up to US\$250,000 and prison sentences of up to five years for individuals for willful violations.³⁵ For a violation of the accounting provisions of the FCPA, entities may be fined up to US\$25 million, and individuals up to US\$5 million; individuals may

22. § 78dd-1(f)(1).

23. H.R. Rep. No. 95-640, at 4 (1977); § 78dd-1(b).

24. § 78dd-1(e).

25. § 78dd-1(c)(2).

26. § 78dd-1(f)(3)(A)(i).

27. § 78dd-1(f)(3)(A)(ii).

28. § 78dd-1(f)(3)(A)(iii).

29. § 78dd-1(f)(3)(A)(iv)-(v).

30. § 78dd-1(f)(3)(B).

31. *See United States v. Kay*, 359 F.3d 738, 747, 750-51 (5th Cir. 2004).

32. 15 U.S.C.A. § 78m (1998).

33. § 78dd-2(d).

34. § 78dd-2(g)(1); *see also* § 78dd-3(e)(1)(A).

35. § 78dd-2(g)(2); § 78dd-3(e)(2); 18 USC § 3571(b)(3), (e) (general fine provision that supersedes FCPA-specific fine).

also be sentenced to imprisonment up to 20 years.³⁶ Entities and individuals may also be subject to civil fines of up to US\$10,000 imposed by the Attorney General.³⁷ Companies may not pay fines on behalf of officers, directors, employees, agents or stockholders.³⁸

In 1998, the FCPA was amended to coincide with the Anti-Bribery Convention. These amendments included expanding prohibited payments to include “any improper advantage;” reaching foreign persons who commit prohibited acts on US territory; and imposing criminal penalties on foreign nationals who act on behalf of US companies.³⁹ The US Department of Justice (“DOJ”) has used expansive definitions of who is a “foreign official.”⁴⁰ Even low-level employees of state-owned and state-controlled enterprises may be considered foreign officials.⁴¹ Especially in China, this multiplies the possible instances of violations that businesses subject to the FCPA can incur.

Over the years, the US Securities and Exchange Commission (“SEC”) and the DOJ have prosecuted cases from locales around the world. Since 2010, the DOJ has resolved around 85 percent of its enforcement actions through non-prosecution and deferred prosecution agreements.⁴² These settlement mechanisms may lead to both under and over-enforcement of the FCPA because judicial scrutiny does not play a role.⁴³ In 2013, DOJ spokespersons stated that FCPA enforcement is a top priority.⁴⁴

A. *Avon Calling: A Recent Example of FCPA Enforcement in China*

The Avon case is illustrative of corrupt business practices in China involving gift-giving and FCPA enforcement. In 2014, after a three-year US federal investigation,⁴⁵ Avon and its Chinese subsidiary

36. See 15 U.S.C.A. § 78ff(a) (2002).

37. § 78dd-2(g)(1)(B), (2)(B); §78dd-3(e)(1)(B), (2)(B).

38. § 78dd-2(g)(3); §78dd-3(e)(3).

39. *FCPA Resource Guide*, *supra* note 15, at 4.

40. See Daniel Chow, *The Interplay Between China’s Anti-Bribery Laws and the Foreign Corrupt Practices Act*, 73 OHIO ST. L. J. 1015, 1025 (2012) (citations omitted).

41. *Id.*

42. See Koehler, *supra* note 16, at 6-7.

43. See *id.* at 7.

44. Thomas Gorman, *Emerging Trends in FCPA Enforcement*, 37 FORDHAM INT’L L.J. 1193, 1195 (2014).

45. Philip Wahba, *Avon Settles Justice Department Charges of China Bribery for \$135 Million*, FORTUNE (Dec. 17, 2014), <http://fortune.com/2014/12/17/avon-bribery-probe-settlement/>.

(“Avon China”) were sentenced and found liable for US\$135 million in criminal and regulatory penalties for violating the FCPA from 2004 to 2008.⁴⁶ Avon had also spent at least US\$344 million on its own internal investigation,⁴⁷ begun three years earlier in 2008.⁴⁸ The incriminating events surrounded Avon’s receipt of the first direct-selling license in China in 2006.⁴⁹ Ironically, China’s regulations required that licensees have “a good business reputation.”⁵⁰ Avon insured this with gifts to government officials and state media reporters to achieve a “zero penalty policy,” i.e. no fines against Avon or negative publicity.⁵¹

For FCPA criminal violations, Avon China pled guilty to “conspiring to violate the accounting provisions . . . to conceal more than [US]\$8 million in gifts, cash and non-business meals, travel and entertainment it gave to Chinese government officials in order to obtain and retain business benefits for Avon.”⁵² Avon, the parent company, also “admitted its criminal conduct, including its role in the conspiracy and its failure to implement internal controls.”⁵³ The Avon entities will pay US\$67,648,000 in criminal penalties.⁵⁴ “Avon also agreed to implement rigorous internal controls, cooperate fully with the department and retain a compliance monitor for at least 18 months.”⁵⁵ For civil violations, Avon agreed to pay an additional US\$67,365,013 in disgorgement and prejudgment interest.⁵⁶

Many of the Chinese officials who received things of value were associated with the Ministry of Commerce (“MOFCOM”) and the State Administration for Industry and Commerce (“AIC”), the

46. *See id.*

47. Patricia Hurtado, *Avon Unit Gave Gucci Bags, Trips as China Bribes: U.S.*, BLOOMBERG BUSINESS (Dec. 17, 2014), <http://www.bloomberg.com/news/articles/2014-12-17/avon-ends-bribery-probe-tied-to-china-with-unit-guilty-plea-1->

48. *See* Wahba, *supra* note 45.

49. *Id.*

50. Securities and Exchange Comm’n v. Avon Products, Inc., Complaint No. 14-CV-9956, ¶ 26 (S.D.N.Y. Dec. 17, 2014).

51. *Id.* ¶¶ 32-33.

52. Press Release, Dep’t of Justice, Avon China Pleads Guilty to Violating the FCPA by Concealing More than \$8 Million in Gifts to Chinese Officials, (Dec. 17, 2014), <http://www.justice.gov/opa/pr/avon-china-pleads-guilty-violating-fcpa-concealing-more-8-million-gifts-chinese-officials>.

53. *Id.*

54. *See id.*

55. *Id.*

56. *See id.*

government agencies in charge of direct-selling regulation.⁵⁷ Avon China's employees "made approximately 9,600 payments totaling [US]\$1.65 million for meals and entertainment involving government officials."⁵⁸ In 2004 and 2005, around US\$70,000 to US\$90,000 was spent on tickets or corporate boxes at the China Open tennis tournament to thank AIC and other officials "for their support."⁵⁹ In 2005 and 2006, US\$93,000 was spent for "an eighteen-day, all-expenses-paid trip to the United States by the Guangdong Food and Drug Administration officials . . . including one-half day of visiting Avon's research facilities in Suffern, NY."⁶⁰ Other cities visited included New York, Montreal, Las Vegas and Washington.⁶¹ Travel to Europe by AIC officials was also paid for, but there was no record of these expenses.⁶²

Avon's 2005 global audit uncovered meal and entertainment expenses for government officials that omitted the names of the officials or the purpose of such expenses.⁶³ The internal audit team later drafted a report that stated that it was common for the Chinese subsidiary to

offer gifts and meals to various government officials and that the majority of the government-related activities . . . were not adequately documented. The draft report also noted that the gifts and meals might be construed as the company's intent to expedite licenses from the government or to avoid unfavorable rulings against the company, therefore potentially violating . . . the FCPA.⁶⁴

Senior management of the Chinese subsidiary "told the internal audit team that recording the name of the government official and the purpose of the meeting would have a chilling effect with the officials."⁶⁵ After consultations with Avon's Legal Department, the Vice President of Internal Audit, and Vice President of Finance, Asia-Pacific; the internal audit team was later "directed to redraft [its]

57. Securities and Exchange Comm'n v. Avon Products, Inc., Complaint No. 14-CV-9956, ¶ 15 (S.D.N.Y. Dec. 17, 2014).

58. *Id.* ¶ 40.

59. *Id.* ¶ 41.

60. *Id.* ¶ 42.

61. See Hurtado, *supra* note 47.

62. Avon Products, Inc., Complaint No. 14-CV-9956, ¶ 42.

63. *Id.* ¶ 19.

64. *Id.* ¶ 21.

65. *Id.*

report, recall and destroy all hard copies, and delete any e-mail to which the draft was attached.”⁶⁶ That same year, Avon determined that its budget would not allow for stand-alone FCPA training for the Asia-Pacific region.⁶⁷ Avon’s General Counsel then consulted a major US law firm in 2005,⁶⁸ and implemented some remedial measures in 2006;⁶⁹ however, “there was no instruction to the employees at Avon Products China to otherwise change the practice of providing things of value to Chinese government officials.”⁷⁰ In 2007, one Corporate Affairs associate submitted an expense report for US\$8,100 for entertainment of government officials over two months; this was at the same time Avon was “negotiating a certification of apparel for sale in China.”⁷¹ The same year US\$4,147 was spent for a Pearl River cruise for “200 State and Regional AIC officials. . . .”⁷²

Avon’s gifts also included Louis Vuitton merchandise, Gucci bags, and Tiffany pens.⁷³ Payments were also made to “suppress negative news in state-owned media and to obtain competitor information”⁷⁴ and to pay a third-party consultant even though the consultant provided false invoices.⁷⁵ The consultant was also not contractually required to comply with the FCPA.⁷⁶

In 2008, after Avon’s audit committee of the Board of Directors began its own investigation, Avon informed the SEC and DOJ and instituted extensive reforms.⁷⁷ This included worldwide FCPA training for all employees.⁷⁸

B. *Morgan Stanley and Bruker: Cases with No or Reduced FCPA Penalties*

In contrast to Avon’s debacle, a 2012 case involving Morgan Stanley shows that robust compliance measures may reduce or lead to

66. *Id.* ¶ 22.

67. *Id.* ¶ 20.

68. *See id.* ¶ 25.

69. *See id.* ¶ 28.

70. *Id.* ¶ 29.

71. *Id.* ¶ 40.

72. *Id.*

73. *See id.* ¶ 41.

74. Wahba, *supra* note 45 (citations omitted).

75. Avon Products, Inc., Complaint No. 14-CV-9956, ¶ 4.

76. *Id.* ¶ 17.

77. *Id.* ¶ 36.

78. *Id.* ¶ 37.

no FCPA penalties. Even though a US employee of Morgan Stanley paid bribes for real estate investments in Shanghai and was given a prison sentence, the DOJ did not prosecute Morgan Stanley.⁷⁹ From 2004 through 2007, Garth Peterson, then a managing director in Morgan Stanley's Shanghai office, transferred at least US\$1.8 million to himself and a former chairman of a Chinese SOE who helped obtain business for Peterson.⁸⁰ Morgan Stanley was not prosecuted because Morgan Stanley had a pre-existing comprehensive FCPA compliance program.⁸¹ This included regular and comprehensive FCPA training, monitoring of transactions, and required employee disclosures.⁸² Over several years, Peterson had been trained in FCPA compliance seven times and been reminded to comply at least 35 times.⁸³

A recent settlement with Bruker Corporation also shows compliance measures that led to a reduced civil penalty. From 2005 through 2011, the Bruker China subsidiaries paid around US\$119,710 for sightseeing trips for Chinese officials, e.g., to New York, Los Angeles, Frankfurt, and Paris.⁸⁴ After the parent company discovered this, Bruker reported to the SEC and cooperated with an investigation.⁸⁵ Then, Bruker implemented pre-approval processes for non-employee travel, a new internal audit function, translation of FCPA policies and training programs into Chinese and other local languages, and a global whistleblower hotline.⁸⁶ Because of Bruker's cooperation with the SEC, they received a civil penalty of only US\$375,000.⁸⁷

In general, FCPA compliance costs are staggering. For example, Walmart announced that its costs for fiscal 2015 were US\$121 million for investigations and inquiries, and US\$52 million for

79. United States v. Peterson, Nos. 12-CR-224, 12-CV-2033, 2012 WL 1448108 (E.D.N.Y. April 26, 2012).

80. SEC v. Peterson, Complaint No. 12-2033, ¶ 1 (E.D.N.Y. April 25, 2012).

81. *Id.* ¶¶ 23-26.

82. *Id.* ¶¶ 24-26.

83. See Douglas Tween & Paul McNulty, *Effective Compliance Program Helps Investment Bank Avoid FCPA Criminal Charges*, BAKER & MCKENZIE 4 (May 2012), <http://ethisphere.com/wp-content/uploads/2014/05/Effective-Compliance-Program-Helps-Investment-Bank-Avoid-FCPA-Criminal-Charges.pdf>.

84. Bruker Corp., S.E.C. Release No. 73835, ¶¶ 4-6 (Dec. 15, 2014).

85. See *id.* ¶ 10.

86. *Id.* ¶ 11.

87. *Id.* § IV(C).

programs and “organizational enhancements.”⁸⁸ They expect their FCPA costs to be US\$160 and US\$180 million for fiscal 2016.⁸⁹

We now turn to our discussion of Chinese anti-corruption law.

II. *CHINESE ANTI-CORRUPTION LAW*

Within China, anti-corruption measures have dramatically increased in recent years. After President Xi Jinping took office in 2013, his administration has aggressively pursued high-profile prosecutions of corruption.⁹⁰ It is well acknowledged that battling corruption is a top priority of his administration, as this is necessary to win the trust of a populace weary of official corruption.⁹¹ On December 5, 2014, it was announced that Zhou Yongkang, the former head of domestic security, had been arrested for bribery and similar charges.⁹² This is the first time any active or retired member of the elite Politburo Standing Committee had been prosecuted.⁹³ In June 2015, he was sentenced to life in prison.⁹⁴

China’s current legal system arose in the late 1970’s in the aftermath of the chaos of the Cultural Revolution (1966-1976). The goals of China’s current legal regime were to both avoid the lawlessness of the Cultural Revolution and to advance economic development.

Parallel to China’s legal system lie the policies and disciplinary measures of the Chinese Communist Party. Usually government officials are Party members and are disciplined within the Party

88. See Walmart Earnings Call, *supra* note 13, at 10.

89. See *id.* at 38.

90. See, e.g., Tim Donovan, *China’s Crackdown on Corruption and Government Spending: A Timeline*, CHINA BUSINESS REVIEW (Jan. 23, 2014), <http://www.chinabusinessreview.com/chinas-crackdown-on-corruption-and-government-spending-a-timeline/>. For a discussion of the anti-corruption campaign as a tool to transform political culture, see Macabe Keliher & Hsinchao Wu, *Corruption, Anticorruption, and the Transformation of Political Culture in Contemporary China*, J. OF ASIAN STUDIES (2016).

91. See generally Fu Hualing, *Wielding the Sword: President Xi’s New Anti-Corruption Campaign*, in GREED, CORRUPTION, AND THE MODERN STATE: ESSAYS IN POLITICAL ECONOMY 134-58 (Susan Rose-Ackerman & Paul Lagunes eds., 2015).

92. Chris Buckley, *China Arrests Ex-Chief of Domestic Security in Graft Case*, N.Y. TIMES, Dec. 6, 2014, at A6.

93. See *id.*

94. Michael Forsythe, *Zhou Yongkang, Ex-Security Chief in China, Gets Life Sentence for Graft*, N.Y. TIMES, June 12, 2015, at A8.

before they are exposed to the legal system.⁹⁵ This practice is reminiscent of ancient Confucian practices where officials were exempt from law applied to commoners.⁹⁶ Even when today's government officials are tried in the legal system, the outcome has already been determined by Party channels.⁹⁷ Chinese anti-corruption law can be found in its Criminal Law and the Anti-Unfair Competition Law.⁹⁸

A. Chinese Criminal Code

The Criminal Code prohibits bribes to State personnel, entities, foreign officials, and close relatives and associates of State personnel. It also prohibits bribes to companies.

1. Bribery of Officials

Article 389 states, “[w]hoever, for the purpose of seeking unlawful profits, gives property to a state functionary shall be guilty of bribing.”⁹⁹ The briber may be subject to up to life imprisonment and concurrently fined.¹⁰⁰ The duration of imprisonment is based on the gravity of the circumstances.¹⁰¹ Accepting a bribe by a state functionary is also a crime, and serious infractions may lead to life imprisonment or the death penalty.¹⁰² If a briber commits a minor crime, but confesses before an investigation and plays a key role in an investigation or otherwise has deserving behavior, the briber’s punishment may be lessened or waived.¹⁰³

95. *The Interplay Between China’s Anti-Bribery Laws and the Foreign Corrupt Practices Act*, *supra* note 40, at 1026.

96. For discussion on the relationship of Chinese rulers to law, see Qiang Fang & Roger Des Forges, *Were Chinese Rulers Above the Law? Toward a Theory of the Rule of Law in China from Early Times to 1949 CE*, 44 STAN. J. INT’L L. 101 (2008).

97. See *The Interplay Between China’s Anti-Bribery Laws and the Foreign Corrupt Practices Act*, *supra* note 40, at 1027.

98. See Samuel R. Gintel, *Fighting Transnational Bribery: China’s Gradual Approach*, 31 WIS. INT’L L.J. 1, 12 (2013).

99. [Criminal Law of the People’s Republic of China], art. 389 (1979).

100. *Id.* art. 390 (as amended, 2015).

101. *Id.*

102. [Criminal Law of the People’s Republic of China], art. 385-86 (1979).

103. *Id.* art. 390 (as amended, 2015). Before 2015, someone who committed a minor crime but confessed before investigation did not have to play a key role in an investigation to have a lessened punishment. See Eric Carlson & Ping An, *China Amends its Criminal Law: Impact on Anti-Bribery Enforcement*, THE FCPA BLOG (Sept. 1, 2015, 9:18 AM), <http://www.>

2. Bribery of Close Relatives or Associates of Current and Former State Functionaries

In 2015, the Criminal Code was amended to make bribe-giving to close relatives or associates of current and former state functionaries also punishable by imprisonment and concurrent fines.¹⁰⁴ The prison terms are less than for bribing a state functionary.¹⁰⁵

3. Commercial Bribery and Bribery of Foreign Officials

The original Article 164 of the Criminal Code prohibited giving large amounts of money or property to a company for illegitimate benefits. In 2011, this section was amended to also prohibit giving any money or property to a foreign public official for an illegitimate commercial benefit. It is unclear what the significance of the narrowing of “illegitimate benefit” to “illegitimate commercial benefit” means. The 2011 amendments brought the Chinese Code in closer conformity with international conventions.

Penalties for offering large amounts of money or property to a company for unjustified benefits, or any money or property to a foreign official for unjustified business benefits, include up to three years of imprisonment for smaller amounts and concurrent fines, and up to ten years of imprisonment and fines for larger amounts.¹⁰⁶ A person who confesses before prosecution may receive a mitigated sentence or no sentence.¹⁰⁷

B. *Chinese Anti-Unfair Competition Law*

In addition to Article 163 of the Criminal Code, which prohibits commercial bribery, Article 8 of the Anti-Unfair Competition Law does as well. It states:

fcablog.com/blog/2015/9/1/china-amends-its-criminal-law-impact-on-anti-bribery-enforce.html.

104. [Criminal Law of the People's Republic of China], art. 390(a); *see also* Carlson & An, *supra* note 103.

105. [Criminal Law of the People's Republic of China], art. 390(a); *see also* Carlson & An, *supra* note 103.

106. [Criminal Law of the People's Republic of China], art. 164. Concurrent fines for smaller amounts were added in the 2015 amendments. *See* Carlson & An, *supra* note 103.

107. [Criminal Law of the People's Republic of China], art. 164; *see also* Carlson & An, *supra* note 103.

A business operator shall not resort to bribery, by offering money or goods or by any other means, in selling or purchasing commodities. A business operator who offers off-the-book rebate in secret to the other party, a unit or an individual, shall be deemed and punished as offering bribes; and any unit or individual that accepts off-the-book rebate in secret shall be deemed and punished as taking bribes. A business operator may, in selling or purchasing commodities, expressly allow a discount to the other party and pay a commission to the middleman. The business operator who gives discount to the other party and pays commission to the middleman must truthfully enter them in the account. The business operator who accepts the discount or the commission must also truthfully enter it in the account.¹⁰⁸

A bribe, or kickback, therefore is done in secret and hidden from transparent accounting; a legitimate discount and commission are reported truthfully. Kickbacks, false accounting; the use of fictitious entities, such as travel agencies to channel such kickbacks; and payments to physicians and hospitals for prescribing certain drugs are common practices in China as described further below.¹⁰⁹

C. Judicial Interpretations

In 2008, the Supreme People's Court and Procuratorate issued an opinion on commercial bribery. In Article 10, it stated the following factors should be considered in distinguishing a bribe from a gift: whether there is a family or friend relationship; the history, circumstances and extent of interaction between the donor and recipient; the value of the gift; the reason for the gift, and the timing and manner of the gift and presence of a request; and whether the recipient improperly uses his or her position on behalf of the donor.¹¹⁰

Effective 2013, the Supreme People's Court and Procuratorate's Judicial Interpretation stated that a bribe for RMB¥10,000

108. [The Law of the People's Republic of China Against Unfair Competition] (promulgated by People's Republic of China, Sept. 2, 1993) (1993).

109. *The Interplay Between China's Anti-Bribery Laws and the Foreign Corrupt Practices Act*, *supra* note 40, at 1030-33.

110. 最高人民法院 最高人民检察院 关于印发《关于办理商业贿赂刑事案件适用法律若干问题的意见》的通知 [Supreme People's Court and Supreme People's Procuratorate Opinion on Handling Commercial Bribery Cases], Nov. 25, 2010, <http://www.spp.gov.cn/site2006/2008-11-25/0005421244.html>.

(approximately US\$1600 today) would lead to a criminal penalty.¹¹¹ Bribes of more than RMB¥200,000 (approximately US\$31,400 today) deserve more severe punishment.¹¹² However, bribes under RMB¥200,000 could still be considered grave if given to agencies such as the State Food and Drug Administration and the Environmental Protection Bureau and lives or property and the public interest are endangered.¹¹³ Bribes of over RMB¥1 million (approximately US\$157,300 today) are considered the most serious.¹¹⁴

D. *The GlaxoSmithKline Case*

We now turn to the Chinese government's 2013 prosecution of GlaxoSmithKline ("GSK") for commercial bribery. In 2014, a Chinese court imposed its largest fine ever, RMB¥3 billion (US\$479 million).¹¹⁵

In 2013, the Chinese government decided to investigate senior executives of GSK, a British global healthcare company, for bribery by falsifying travel expenses.¹¹⁶ This sent shockwaves through the multinational business community in China because until this time, the Chinese had not prosecuted such cases. In fact, GSK, a company with significant resources, conducted its own investigation and found no violations.¹¹⁷ Before 2013, GSK China had ranked first in the

111. Wantao Yang, Emilia Shi, Timothy P. Peterson & Robertson Park, *Understanding China's Approach to Anticorruption*, MURPHY & MCGONIGLE (Jan. 28, 2014), <http://www.mmlawus.com/Data/Files/Articles/Corporate%20Counsel%20China%20article.pdf>.

112. See *The Interpretation of the Supreme People's Court and the Supreme People's Procuratorate of Several Issues Concerning the Specific Application of the Law in the Handling of Criminal Bribery Cases*, COVINGTON & BURLINGTON LLP (Dec. 26, 2012), https://www.cov.com/files/upload/Carlson_SPP_SPC_Judicial_Interpretation_on_Bribery_Enforcement.pdf [hereinafter *Covington & Burlington Interpretation of Criminal Bribery Cases*].

113. Eric Carlson, *China Releases New Judicial Interpretation on Bribery Enforcement*, THE FCPA BLOG (Jan. 3, 2013, 3:32 AM), <http://www.fcpablog.com/blog/2013/1/3/china-releases-new-judicial-interpretation-on-bribery-enforc.html#sthash.q8NkHPwg.dpuf>.

114. See *Covington & Burlington Interpretation of Criminal Bribery Cases*, *supra* note 112.

115. *GSK China Faces Record Fine for Bribery*, XINHUA (Sept. 19, 2014), http://news.xinhuanet.com/english/china/2014-09/19/c_133656354.htm.

116. *Id.*

117. *Id.*

Chinese market.¹¹⁸ In 2012, GSK China's sales climbed to RMB¥7 billion (US\$1.12 billion) from RMB¥2.3 billion (US\$367 million) in 2008; this 25 percent growth rate far exceeded its 10 percent growth rate in the United States and Europe.¹¹⁹

In September 2014, after a one-day,¹²⁰ closed-door trial¹²¹, the Changsha Intermediate People's Court of Hunan province fined GSK China RMB¥3 billion (US\$479 million) for bribing hospitals and doctors, and using travel agencies and pharmaceutical associations to front kickbacks.¹²² As mentioned, this was the largest fine ever imposed by a Chinese court. The former president of GSK China, Mark Reilly, was sentenced to three years in prison, suspension for four years, and deportation.¹²³ Other GSK officers were also sentenced to suspended prison terms: Zhang Guowei, Zhao Hongyan, Liang Hong and Huang Hong.¹²⁴ Although the individual defendants had faced much longer terms,¹²⁵ the court took into account the officers' confessions.¹²⁶ The Court also stated that non-governmental personnel were bribed;¹²⁷ therefore this case fell under the commercial bribery laws.

GSK issued an apology in Chinese and English on its website¹²⁸ stating, "GSK PLC sincerely apologizes to the Chinese patients,

118. *GSK China Reports More Layoffs as Reshuffle Continues*, WANTCHINATIMES.COM (Mar. 10, 2015), <http://www.wantchinatimes.com/news-subclass-cnt.aspx?id=20150310000117&cid=1206>.

119. *See id.*

120. *See* Hester Plumridge & Laurie Burkitt, *GlaxoSmithKline Found Guilty of Bribery in China*, WALL STREET JOURNAL (Sept. 19, 2014), <http://www.wsj.com/articles/glaxosmithkline-found-guilty-of-bribery-in-china-1411114817>.

121. *See* *GSK China Faces Record Fine for Bribery*, *supra* note 115.

122. *See* Keith Bradsher & Chris Buckley, *China Fines GlaxoSmithKline Nearly \$500 Million in Bribery Case*, N.Y. TIMES, Sept. 20, 2014, at B1; Xinhua, *GSK China Faces Record Fine for Bribery*, CHINADAILY.COM (Sept. 19, 2014), http://www.chinadaily.com.cn/business/2014-09/19/content_18630086.htm.

123. *See, e.g.*, Rupert Neate & Nick Fletcher, *GlaxoSmithKline Ex-Boss to Be Deported Back to UK from China*, THE GUARDIAN (Sept. 19, 2014), <http://www.theguardian.com/business/2014/sep/19/glaxosmithkline-china-mark-reilly-deported-uk-guilty-bribery-hunan>.

124. *See* Bradsher & Buckley, *supra* note 122.

125. *See* Richard Cassin, *China Fines GSK \$490 Million for Bribery*, THE FCPA BLOG (Sept. 19, 2014), <http://www.fcpablog.com/blog/2014/9/19/china-fines-gsk-490-million-for-bribery.html>.

126. *See* Bradsher & Buckley, *supra* note 122.

127. *See* Xinhua, *Xinhua Insight: GSK China Hit with Record Fine, Apologizes*, XINHUA (Sept. 19, 2014), http://news.xinhuanet.com/english/indepth/2014-09/19/c_133656872.htm

128. *See* Cassin, *supra* note 125.

doctors and hospitals and to the Chinese government and the Chinese people.”¹²⁹

Before the trial, Chinese police investigations had found that GSK’s global headquarters had raised its sales targets in China to compensate for decreases in the United States and Europe.¹³⁰ Guo Jianhua, a GSK human resources manager, stated that the sales force “increased from about 1,000 in 2008 to 5,500” in 2014.¹³¹ Sales representatives who met their targets received “big bonuses, promotions and overseas vacations” while those who didn’t were “demoted or fired.”¹³²

One of the defendants, Liang Hong, a company vice president and operations manager, had told the police that “every representative was allowed to spend 3,000 to 5,000 yuan on kickbacks to doctors” and that, if this was not enough, they could ask for more.¹³³ “For hepatitis medicines, the kickback [could] account for five to eight percent of the drug’s price.” For other drugs this could be as high as 30 percent for a total of “hundreds of million yuan.”¹³⁴

A doctor at a Hunan hospital told investigators that a GSK sales representative offered the doctor “20 yuan (3 US dollars) for every box of Heptodin [for Hepatitis B] that he prescribed and 100 yuan for every new patient who started using the drug.” The doctor prescribed “150 to 200 boxes of Heptodin and recruited five to eight new patients each month, which brought him about 4,800 yuan of extra income.” These payments to the doctor were recorded as payments for the doctor lecturing in the company’s training programs.¹³⁵ He had only given a couple of lectures, but he continued to receive monthly payments.¹³⁶ Doctors were also bribed by having their costs for medical seminars covered.¹³⁷ Travel agencies were used to funnel monies for fictional conferences.¹³⁸ In China, most hospitals are state-owned and doctors are paid low salaries; doctors are also prohibited

129. Plumridge & Burkitt, *supra* note 120.

130. *Police Close Investigation of GSK Bribery*, XINHUA (May 14, 2014), http://news.xinhuanet.com/english/china/2014-05/14c_133333340.htm.

131. *Id.*

132. *See id.*

133. *See id.*

134. *See id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. David Barboza, *Glaxo Used Travel Firms for Bribery, China Says*, N.Y. TIMES, July 16, 2013, at B1.

from taking second jobs.¹³⁹ According to one Hong Kong expert, “[i]t’s very hard to do business in the Chinese health care and pharmaceutical sectors without doing payoffs. . . . Everyone else pays bribes. Glaxo just got caught.”¹⁴⁰ A few months after the court verdict, it was reported that GSK China would lay off over 1,000 employees.¹⁴¹

In a related case, GSK China hired investigators to find out who had given information to Chinese authorities about bribes at the company. These investigators, a Briton and his Chinese-American wife, were sentenced to prison and fined for using illegal tactics, including tracking and secret photography.¹⁴² We turn now to why gift-giving in China is ubiquitous. And, should certain gift-giving in business be allowed? Or, is it always bribery?

III. THE ORIGINS OF CHINESE GIFT-GIVING

In the highest antiquity they prized (simply conferring) good; in the time next to this, giving and repaying was the thing attended to. And what the rules of propriety value is that reciprocity. If I give a gift and nothing comes in return, that is contrary to propriety; if the thing comes to me, and I give nothing in return, that also is contrary to propriety. If a man observe the rules of propriety, he is in a condition of security; if he does not, he is in one of danger.¹⁴³

In the sacrifice to God in the suburb, we have the utmost expression of reverence. In the sacrifices of the ancestral temple, we have the utmost expression of humanity. In the rites of mourning, we have the utmost expression of leal-heartedness. In the preparation of the robes and vessels for the dead, we have the utmost expression of affection. In the use of gifts and offerings between host and guest, we have the utmost expression of what is

139. *GlaxoSmithKline Fined \$492M by China in Bribery Scandal*, ASSOCIATED PRESS (Sept. 19, 2014), <http://www.dailymail.co.uk/wires/ap/article-2762042/China-fines-GSK-492M-jails-managers-bribery.html>.

140. See Bradsher & Buckley, *supra* note 122.

141. See, e.g., *GSK China Reports More Layoffs as Reshuffle Continues*, *supra* note 118; Chunwei He, *Scandal-Hit GlaxoSmithKline to Lay off 1,000 Employees in China*, CAIXIN ONLINE (Jan. 22, 2015), <http://english.caixin.com/2015-01-22/100777515.html>.

142. *GSK-Linked Investigators Confessed to Trafficking Personal Data*, CHINA DAILY (Aug. 9, 2014), http://www.chinadaily.com.cn/china/2014-08/09/content_18279739.htm.

143. The Book of Rites is part of the Confucian canon. It is said that Confucius compiled several books of ancient wisdom. See BOOK OF RITES (James Legge trans. 1885), <http://ctext.org/liji/qu-li-i>.

right. Therefore when the superior man would see the ways of humanity and righteousness, he finds them rooted in these ceremonial usages.¹⁴⁴

This Section discusses the origin of Chinese gift-giving and whether certain gift-giving in business should be allowed and used in the fight against corruption. I will first examine the central role of ritual and gift-giving in governance, and then specific examples of gifts in the related realms of family, government, and business.

The origins of Chinese gift-giving are found in ancient practices that propound a rule of virtue. Confucius (551-479 B.C.), China's ethical giant, taught that a nation should be led by virtue, and not law.¹⁴⁵ Law is necessary when virtue fails. In contrast, if a ruler leads first with law, the populace will not have a conscience and will only fear punishment.¹⁴⁶ How does virtue come about? Virtue is cultivated through ritual. In fact, the tie among governance, virtue, ritual and giving is so close that the Book of Rites, China's ancient book of propriety, teaches that governance and ritual *are* giving.

The Chinese characters for "gift" literally mean "ritual object" [禮物] [*liwu*]. The character for ritual [禮] in turn is composed of two words which mean seeking revelation [示] [*shi*] through the offering of sacrifices with a vessel [豐].¹⁴⁷ The character for revelation [示] [*shi*] itself is composed of strokes to indicate the sun, moon and stars and heaven [上] above, where the gods, and thus revelation, reside.¹⁴⁸ The sacrificial vessel [豐] is depicted as a ceremonial plate [豆]¹⁴⁹ accompanied by music [曲]¹⁵⁰.

Sacrificial offerings are so related to what it means to be human that the Chinese character for the human body [體] also contains the character for the sacrificial vessel.¹⁵¹ This character [體] consists of the sacrificial vessel [豐] and bones [骨].¹⁵² In other words, in

144. *See id.*

145. Confucius taught "[l]ead a people by law . . . and they will have no shame, lead a people by virtue and they will order themselves harmoniously." CONFUCIUS, THE ANALECTS OF CONFUCIUS 2:3 (Burton Watson trans., 2007).

146. *Id.*

147. RICK HARBAUGH, CHINESE CHARACTERS: A GENEALOGY AND DICTIONARY, Entry for 禮 (2009), <http://zhongwen.com/d/194/x167.htm>.

148. *Id.* entry for 示 [seeking revelation].

149. *Id.* entry for 豆 [ceremonial plate].

150. *Id.* entry for 曲 [music].

151. MAYFAIR MEI-HUI YANG, GIFTS, FAVORS, AND BANQUETS: THE ART OF SOCIAL RELATIONSHIPS IN CHINA 226 (David Laitin & George Steinmetz eds., 1994).

152. HARBAUGH, *supra* note 147, entry for 體 [sacrificial vessel].

traditional Chinese thinking, our bodies are offerings for ancestors and gods.

Ritual is giving because in the traditional Chinese worldview, the border between the seen and unseen worlds is porous. While the spirit world bestows gifts on the living, the living sustain the spirit world with gifts. This mutuality of gift-giving fosters harmony with nature and in society. As giver becomes receiver, and receiver becomes giver, humility, reverence, generosity, and virtue result. Thus, gifts are both a response to and a prerequisite for receiving blessing, and blessing is directly proportional to one's gift-giving. As gods receive and give the most gifts, the amount of gifts a person receives and gives is a sign of privilege and status. In fact deceased persons can achieve deity status by receiving offerings.¹⁵³ If the giver seeks blessings for others, the giver is also a priest and mediator. Other prime Chinese rituals, such as eating, drinking, music, and dance, are gift offerings.

In contrast, the Chinese characters for “bribe,” 贿赂 [*huilu*], mean merely the possession of money. The character 贿 is composed of the character for “money” [貝], which depicts a cowry shell,¹⁵⁴ and the character for “have” [有].¹⁵⁵ The Chinese character for “greed” [貪] means to want money [貝] today [今]! Thus, there is no ritual or sacrificial aspect to bribery, or greed. Greed is about an immediate exchange.

Guanxi, necessary for doing business today, is fostering familial ties among business partners that lead to trust. The Chinese characters for *guanxi* [關係]¹⁵⁶ depict a door [門] blocked with threads [絲]¹⁵⁷ on a loom [杼], which is entered by a person [人] pulling [] fine thread [糸].¹⁵⁸ Gifts are part of cultivating *guanxi*. Gifts instill *renqing* [人情], which may be translated as human warmth, favor, or sympathy; and *ganqing* [感情], which may be translated as affection.

We will now discuss three main realms of offerings and gifts: ancestral rites, imperial rites, and merchant rites. They are intimately related, because the nation and the merchant realm are considered

153. See Michael Puett, *The Offering of Food and the Creation of Order: The Practice of Sacrifice in Early China*, in *OF TRIPOD AND PALATE: FOOD, POLITICS, AND RELIGION IN TRADITIONAL CHINA* 75ff (Roel Sterkx ed., 2005).

154. HARBAUGH, *supra* note 147.

155. *Id.*

156. See *id.* entry for 關 [to close]; see also *id.* entry for 係 [belong to].

157. See *id.* entry for 絲 [threads].

158. See *id.* entry for 糸 [fine thread].

families too. The family is the central theme of Chinese philosophical thought and culture.¹⁵⁹ We will also discuss the New Year's celebration and the Mid-Autumn Festival, where mooncakes are exchanged. Mooncakes, to this day, play a prominent role in official, familial and business gifts. Unfortunately, they are also used as bribes.

A. Ancestral Rites and Gifts and the Kitchen God

A British magistrate in the Shanghai Mixed Court in the 1920's observed that "[t]he most potent agent in forming Chinese law and maintaining its permanence is ancestral worship."¹⁶⁰ This is indeed central to traditional Chinese law and society; and gifts to ancestors are central to ancestral worship. Gifts to ancestors are necessary for familial blessing. If descendants do not regularly offer food and other provision to deceased loved ones, they become hungry ghosts and wreak havoc on earth. There are at least four types of spirits: ancestors, non-relative spirits, officials in the spirit realm, and spirits from other cultural groups.¹⁶¹

How can ancestors materially bless their descendants? Ancestors, related by blood, mediate between their living descendants and other spiritual beings. Therefore, gifts of sustenance to one's ancestors simultaneously ensure the comfort of ancestors, and their ability to provide for their living loved ones. This exchange promotes filial piety and deference to a sacred order. Similarly, in this lifetime, while parents provide for their children when they are young, children should provide for their parents when they are old. Therefore, the goal of gift-giving is to engender a familial connection.

Gifts to ancestors are offered daily in the home at a family altar, and on special occasions such as weddings, the annual tomb-sweeping holiday and the annual New Year's celebrations. These gifts include favorite foods of the deceased loved ones, and paper offerings of

159. Vance Kope-Kasten, *Meeting Chinese Philosophy, in AN INTRODUCTION TO CHINESE CULTURE THROUGH THE FAMILY* 48 (Howard Giskin & Bettye S. Walsh eds., 2001).

160. GEORGE JAMIESON, *CHINESE FAMILY AND COMMERCIAL LAW* 6 (1921). Jamieson was British Consul-General in Shanghai and a judge of the Shanghai Mixed Court that adjudicated cases of foreign and Chinese residents in the Shanghai International Settlement.

161. FRANCES L.K. HSU, *UNDER THE ANCESTORS' SHADOW* 244 (1967).

items helpful for their afterlife, e.g., money, clothes, and houses.¹⁶² During these gift ceremonies, ancestors are also regularly consulted and advised on family matters.

Weddings represent a marriage of two families blessed by ancestors.¹⁶³ Elaborate gift exchange includes multiple presents between the two families.¹⁶⁴ Marriage pools resources, and provides offspring for the ancestral line, thereby ensuring continual gifts for ancestors, and multiplying blessing.

The family dwelling is a temple not only to ancestors but also to the Kitchen God. The family stove is literally an altar to the Kitchen God.¹⁶⁵ Each meal prepared in the home is thus an offering. Once a year, the Kitchen God ascends to the Jade Emperor to report on the family's conduct in the previous year.¹⁶⁶ Past good deeds will lead to blessing in the coming New Year. To avoid bad reports from the Kitchen God, he is sometimes offered honey or sticky rice so that he will only report sweet things about the family, or be unable to open his mouth to utter bad reports.¹⁶⁷ Unfortunately, this seemingly harmless act may lead to harmful bribery in other contexts.

We will now discuss gift-giving and governance.

162. For an excellent discussion of paper offerings, see generally JANET LEE SCOTT, *FOR GODS, GHOSTS AND ANCESTORS: THE CHINESE TRADITION OF PAPER OFFERINGS* (2007). Today paper offerings of cars, computers, etc. are given. See *Chinese Buy Paper iPads for Dead Ancestor*, THE TELEGRAPH (Mar. 28, 2012), <http://www.telegraph.co.uk/technology/apple/9170796/Chinese-buy-paper-iPads-for-dead-ancestor.html>.

163. David C. Buxbaum, *A Case Study of the Dynamics of Some Aspects of Family Law And Social Change In Rural China*, in *CHINESE FAMILY LAW AND SOCIAL CHANGE IN HISTORICAL AND COMPARATIVE PERSPECTIVE* 219, 238-40 (David C. Buxbaum ed., 1978); see also JORDAN PAPER, *THE SPIRITS ARE DRUNK: COMPARATIVE APPROACHES TO CHINESE RELIGION* 25, 34 (1995).

164. Traditional Chinese marriage was a series of ritual gifts. There was first an engagement. The marriage ceremony then lasted two days. It included food and drink offerings at the groom's ancestral temple, then a meal offered to the ancestral spirits and then eaten by the bride and groom. On the second day, the groom's parents offered wine to the bride, which the bride then offered to the spirits. She then served a meal to the groom's parents after offering it to the spirits. Her in-laws then gave her a feast, with the remainder sent to her parents. JORDAN PAPER, *THE SPIRITS ARE DRUNK* 33-34 (1995).

165. CAROL STEPANCHUK & CHARLES WONG, *MOONCAKES AND HUNGRY GHOSTS: FESTIVALS OF CHINA* 6 (1991).

166. *Id.* at 7.

167. *Id.*; see also LIMING WEI, *CHINESE FESTIVALS: TRADITIONS, CUSTOMS AND RITUALS* 13-15 (2005).

B. *The Imperium*

The Master said, “If superiors consider and are guided by the words of the people, the people receive their gifts or commands as if they were Heaven. If superiors pay no regard to the words of the people, the people put themselves in opposition to them. When inferiors do not receive the gifts of their superiors as if they were from Heaven, there ensues violent disorder.”¹⁶⁸

The Chinese characters for nation, *guojia* [国家], mean “nation family.” Chinese governance is also familial giving. In China’s earliest dynasties, kings obtained virtue by “sacrificing to the spirits and ancestors, [and] by giving gifts to nobles and commoners.”¹⁶⁹

China’s government until 1911 consisted of the Emperor and his officials on the central, provincial and local levels. Each practiced extensive rituals, making offerings to his corresponding ruler in the spirit world to ensure blessings for those under his jurisdiction. Human authority paralleled spiritual hierarchy. For example, the Emperor, known as the Son of Heaven, made offerings to heaven, the Sun, Moon, and Earth.¹⁷⁰ District magistrates, who were officials on the local level, made offerings to the City God.¹⁷¹

The Book of Rites, compiled by Confucian followers, states that at the inauguration of spring and summer the Emperor would purify himself and offer sacrifices.¹⁷² Then he would convey gifts.¹⁷³ In conveying gifts, the Emperor had to heed the counsel of the governed; otherwise the populace would not receive the gifts as from Heaven, and there would be rebellion and disorder.¹⁷⁴ So gift-giving was part of governing, in conjunction with being attentive to the needs and counsel of the governed.

During the Shang and Zhou periods, the kings bestowed “meat, wine, jade, cowry shells, military gear, animals, land, and sacrificial vessels. . . .”¹⁷⁵ These sacrificial vessels [*ding* 鼎] or tripods, were

168. BOOK OF RITES, *supra* note 143, Fang Ji: 12.

169. Eric C. Mullis, *Toward a Confucian Ethic of the Gift*, 7 *DAO* 175, 179 (2008).

170. ANGELA ZITO, OF BODY AND BRUSH: GRAND SACRIFICE AS TEXT/PERFORMANCE IN EIGHTEENTH CENTURY CHINA 125-32 (1997).

171. For further discussion, see generally Mary Szto, *Strengthening the Rule of Virtue and Finding Chinese Law in ‘Other’ Places: Gods, Kin, Guilds, and Gifts*, 35 *SUFFOLK TRANSNAT’L L. REV.* 1 (2012).

172. BOOK OF RITES, *supra* note 143, Yue Ling: 4, 34.

173. *Id.*

174. *Id.* Fang Ji: 12.

175. See Mullis, *supra* note 169, at 179.

made of bronze; they were cast when offices were granted.¹⁷⁶ To commemorate the king's *largesse*, the *ding* were inscribed with a list of gifts conferred by the king, and were dedicated to the recipient's ancestors.¹⁷⁷ The king conferred the metals to cast the *ding*, but the *ding* was made by the recipient.¹⁷⁸ Gifts conferred by the king came from various regions of the empire and "signified both the ability to obtain exotic goods and the ability to control resources and trade with distant regions."¹⁷⁹ The *ding* linked the past, present, and future.¹⁸⁰ By offering sacrifices in the *ding* to one's ancestors, the sacrificer welcomed the blessing of past generations on present and future generations of the family.¹⁸¹ The *ding* also show the intimate connection between the government and the family;¹⁸² the ruler enabled families to make sacrifices to their ancestors. The *ding* were ornately decorated.¹⁸³ Gifts also symbolized virtue. For example, refined jade that is "smooth, translucent, and unyieldingly hard" symbolized "benevolence, intelligence, righteousness . . . [and] beauty."¹⁸⁴

During the Han period, "gift giving became definitive of the Chinese emperor's role . . . chronicles of court activities focus on the emperor's acts and decrees, and gift giving in all its forms is the single most frequently noted type of action."¹⁸⁵ At least eight types of gifts were conferred by the Han emperor: ranks for all free males, which included wine and meat; land; pardons for capital offenses; poor relief (including assistance during drought and floods, tax relief, and distribution of grain); dove-staffs to the aged; gold and grain to nobility; silk to foreigners; and sacrificial offerings, i.e., gifts to spirits.¹⁸⁶

In the last dynasty, Qing local magistrates were required to offer sacrifices not only to the City God, but to Confucius, the gods of War,

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.* at 180.

180. *Id.*

181. *Id.*

182. *Id.* at 181.

183. *Id.*

184. *Id.*

185. Mark Edward Lewis, *Gift Circulation and Charity in the Han and Roman Empires*, in *INSTITUTIONS OF EMPIRE: COMPARATIVE PERSPECTIVES ON ANCIENT CHINESE AND MEDITERRANEAN HISTORY* 122 (Walter Scheidel ed., 2009).

186. *Id.* at 122-28.

literature, earth and grain, wind, cloud, thunder, rain, mountains, and streams, shrines of local officials, virtuous local gentry; loyal and righteous men, filial and brotherly men, and chaste and filial women.¹⁸⁷ Thus, privilege and authority in China were synonymous with the right to offer sacrifices to spirits.¹⁸⁸ Officials were supposed to make offerings from the heart with reverence; they were themselves supposed to be ritual vessels.¹⁸⁹

Unfortunately, the dark side of gift-giving is that officials were usually underpaid, and many Qing officials demanded hefty gifts from subordinates; some were prosecuted for bribery.¹⁹⁰

C. Ancestral Trusts, Clan Corporations and Merchant Guilds

As the nation is considered a family in China, businesses are also extensions of families. The Confucian ideal profession was to be a degreed scholar official. This was obtained by passing the difficult civil service examinations based on the Confucian classics. Merchants therefore obtained respectability by sometimes purchasing degrees,¹⁹¹ and conducting their businesses as ancestral trusts.

Merchants in China formed the equivalent of corporations based on clan structures.¹⁹² These paralleled Confucian ideals of the patrilineal family.¹⁹³ As families were dependent on kings for the sacrificial vessels, *ding*, to make sacrifices to their ancestors; merchants were dependent on officials and ancestors for successful businesses.

Families owned common property in perpetuity that was used to perpetuate ancestor worship, help indigent members, and promote education for officialdom.¹⁹⁴ These ancestral trusts were then invested

187. T'UNG-TSU CH'U, *LOCAL GOVERNMENT IN CHINA UNDER THE CH'ING* 164-65 (1962).

188. Lewis, *supra* note 185, at 128.

189. Angela R. Zito, *City Gods, Filiality, and Hegemony in Late Imperial China*, 13 *MODERN CHINA* 333, 352 (1987).

190. For an excellent discussion of this, see NANCY ELIZABETH PARK, *CORRUPTION AND ITS RECOMPENSE: BRIBES, BUREAUCRACY, AND THE LAW IN LATE IMPERIAL CHINA* 34-82 (1993).

191. Teemu Ruskola, *Conceptualizing Corporations and Kinship: Comparative Law and Development Theory in a Chinese Perspective*, 52 *STAN. L. REV.* 1599, 1646 (2000).

192. For excellent discussions of this, see generally *id.* See also Teemu Ruskola, *What Is a Corporation? Liberal, Confucian, and Socialist Theories of Enterprise Organization (and State, Family, and Personhood)*, 37 *SEATTLE U. L. REV.* 637, 654-56 (2014).

193. See Ruskola, *supra* note 190, at 1627.

194. *Id.* at 1631.

in businesses.¹⁹⁵ Able managers who were not blood relatives were selected to handle these assets.¹⁹⁶ Adoptions of men and women were used to continue lineages and add human capital.¹⁹⁷

Ancestral trusts thus provided the structure for business enterprises. For example, loosely related investors would pool capital to create an ancestral trust, including provision for sacrifices to a common ancestor.¹⁹⁸ When two clans merged to form a larger business entity, they would also designate a common ancestor (sometimes fictitious) to whom sacrifices would be offered.¹⁹⁹ Some clans even invented a new surname in forming conglomerates.²⁰⁰

Clan corporations held the equivalent of shareholder meetings at least twice a year, at the time of the spring and autumn ancestral sacrifices.²⁰¹ Clan rules were often registered with the local magistrate to ensure their enforcement.²⁰² Merchant guilds also had at least annual offerings to the merchant gods. Guild members would gather to offer banquets and plays to the merchant god, and then convene as courts to decide disputes.²⁰³ Apprenticeships involved gifts to the master and his wife.²⁰⁴ Contract negotiations involved food and wine offerings.²⁰⁵ Getting drunk showed both spiritual blessing and trust among the contract parties.²⁰⁶ This practice persists to this day.²⁰⁷

In the late imperial and Republican eras (1550-1930) merchant manuals extolling Confucian virtues such as “inner mental attentiveness,” subduing selfish desires, distinguishing good from

195. *Id.* at 1632-33.

196. *Id.* at 1633 (citations omitted).

197. *See id.* at 1639-43.

198. *Id.* at 1636-37.

199. *Id.* at 1638.

200. *Id.* at 1639.

201. *Id.* at 1650.

202. *Id.* at 1659.

203. JOHN STEWART BURGESS, *THE GUILDS OF PEKING* 96 (2d ed. 1966) (detailing types of guild meetings); *see also Strengthening the Rule of Virtue*, *supra* note 171, at 122-24.

204. *See* BURGESS, *supra* note 203, at 164.

205. VALERIE HANSEN, *NEGOTIATING DAILY LIFE IN TRADITIONAL CHINA: HOW ORDINARY PEOPLE USED CONTRACTS, 600-1400*, 124 (1995).

206. JORDAN PAPER, *THE SPIRITS ARE DRUNK: COMPARATIVE APPROACHES TO CHINESE RELIGION*, 32, 112-115 (1995); *see also* Cui Jia, *Ganbei Culture Killing Officials*, *CHINA DAILY ONLINE* (July 20, 2009), http://www.chinadaily.com.cn/china/2009-07/20/content_8446843.htm; Mary Szto, *Contract in My Soup: Chinese Contract Formation and Ritual Eating and Drunkenness*, 25 *PACE INT'L L. REV.* 1 (2013).

207. INGMAR WIENEN, *DEVELOPING INTERNATIONAL BUSINESS IN THE CONTEXT OF CULTURE AND ETHICS IN TRANSFORMATION: THE EXAMPLE OF CHINA* 116-18 (2002); *see also Contract in My Soup*, *supra* note 206, at 2.

evil, and practicing reciprocity were popular.²⁰⁸ These virtues ensured the merchants' status as *junzi*, Confucian gentlemen.²⁰⁹ Thus, Chinese businesses started as ancestral trusts. This ritual framework necessarily involved offering sacrifices and gift-giving. Even today, Chinese businesses are guided by the family framework.

D. Gifts at New Year's and the Mid-Autumn Festival

The New Year's celebration is the most important festival of the lunar calendar and also involves extensive gift-giving. During the Han Dynasty, officials and dignitaries presented "jade disks, lambs, skins, and silk fabrics" to the Emperor on the first day of the year.²¹⁰ He in turn, inquired of the sufferings of the populace and opened the great granaries to distribute wealth to all, from the greatest official to the humblest servant.²¹¹

Among the populace, New Year's is celebrated at least over a two-week period. "New Year's Eve and New Year's Day are celebrated as a family affair, a time of reunion and thanksgiving. The celebration was traditionally highlighted with a religious ceremony given in honor of heaven and earth, the gods of the household, and the family ancestors. The head of each household presents incense, flowers, food and wine to ensure continued blessings and good fortune."²¹²

During this time, multiple visits (*bai nian*) and gifts are made to family members and friends to seek and convey blessings for the New Year. Packets of money in *hongbao* (red pockets) are given to children to protect them from evil.²¹³ Other small gifts may be exchanged.²¹⁴

208. RICHARD JOHN LUFRANO, *HONORABLE MERCHANTS: COMMERCE AND SELF-CULTIVATION IN LATE IMPERIAL CHINA* 2 (1997).

209. *See id.*

210. DERK BODDE, *FESTIVALS IN CLASSICAL CHINA* 143 (1975).

211. *See id.*

212. STEPANCHUK & WONG, *supra* note 165, at 17.

213. *See* LIMING WEI, *CHINESE FESTIVALS: TRADITIONS, CUSTOMS AND RITUALS* 21 (2d ed. 2010).

214. Leanne White & Daniel Leung, *Wishing You Good Health, Prosperity and Happiness: Exploring the Rituals and Traditions of Chinese New Year*, in *RITUALS AND TRADITIONAL EVENTS IN THE MODERN WORLD* 79 (Jennifer Laing & Warwick Frost, eds., 2015).

Families prepare and eat together spring rolls and dumplings on New Year's Eve. They are shaped in the form of silver or gold ingot to convey financial blessing.²¹⁵

E. *The Mid-Autumn Festival and Mooncakes*

The Mid-Autumn Festival is the second most important holiday during the lunar calendar. It celebrates the moon, which is *yin* in the *yinyang* complex in ancient Chinese thought,²¹⁶ and occurs the night of the most full moon during harvest. The full moon symbolizes reunion.²¹⁷ *Yuan*, or “roundness” is celebrated in all Chinese festivals.²¹⁸ The moon is also considered the home of immortals and many stories of the moon concern longevity.²¹⁹

Thus, round mooncakes are exchanged among family and friends to express gratitude, respect, and friendship. Mooncakes are pastries that contain various fillings, e.g., red bean, egg yolk, or lotus seed paste. They were considered a luxury food because of the intricate labor needed to produce them. The top of each mooncake is beautifully decorated, sometimes illustrated with flowers and characters.²²⁰ Legend has it that mooncakes were also used to pass secret messages that led to the overthrow of Mongol rule.²²¹

Thus, Chinese gift-giving cannot be reduced to a Western notion of economic rationality.²²² Gifts are part of the cosmic order. They are means of giving and receiving blessing. They are given in accordance with the lunar and solar calendars. The gift “. . . creates a spiritual connection between the giver and recipient, which is . . . *renqing*”²²³ and carries “. . . care, affection, moral concern, and emotional attachment.”²²⁴ Gifts therefore simultaneously express material provision and *renqing*.²²⁵ Gifts are necessary in all realms: the family,

215. See WEI, *supra* note 213, at 20-21.

216. The sun is *yang*.

217. See, e.g., WEI, *supra* note 213, at 45.

218. STEPANCHUK & WONG, *supra* note 165, at xiii.

219. See *id.* at 53.

220. WEI, *supra* note 213, at 52.

221. LI-CH'EN TUN, ANNUAL CUSTOMS AND FESTIVALS IN PEKING 66 (2d ed. 1965).

222. YUNXIANG YAN, THE FLOW OF GIFTS: RECIPROCITY AND SOCIAL NETWORKS IN A CHINESE VILLAGE 214 (1996).

223. *Id.* at 216.

224. *Id.*

225. *Id.* at 214.

government, and business, as these are all types of families. Governance is described as bestowing heavenly gifts on the populace.

IV. *TODAY'S GIFT-GIVING*

Today's gift-giving in China shows remarkable similarities to her ancient rituals. This is evident in rural communities, urban business, and official practices. In a study of village life conducted in the late 1980s, it was observed that skilled gift-giving to establish *ganqing* and cultivate *guanxi* is an art.²²⁶ *Ganqing* is a present feeling based on past treatment; it creates *guanxi*, or an obligation for the future.²²⁷ Having *guanxi* means having reliable people who can help when one is in need.

When and what does one give? Giving occurred at holidays and other special occasions, e.g., weddings, births, and funerals. The value of one's gift was directly tied to *ganqing*: obligation, strength of feeling, and dependability.²²⁸ Where no relationship existed, intermediaries were used.²²⁹ Because gifts create future obligations, the lapse of time between a gift and its return gift, heightened the moral stance of the gift.²³⁰ Therefore, giving a return gift of equal value within a day or two was considered an insult.²³¹ Thus, good *guanxi*, or plentiful resources, was cultivated through "wise and faithful giving."²³²

China's meteoric economic growth since the 1980's has not lessened gift-giving, but has amplified it. As mentioned earlier, today Chinese are the largest number of luxury goods consumers in the world. This is understandable because as Chinese income rises, *ganqing* and *guanxi* must be expressed through gifts of increased value.

As described earlier, the recent Avon and GlaxoSmithKline cases demonstrate the pervasive use of gift-giving in contemporary business practices. One commentator on business gift-giving notes that today's gifts are tied to *mianzi* or face. "Giving a gift

226. ANDREW B. KIPNIS, PRODUCING GUANXI: SENTIMENT, SELF, AND SUBCULTURE IN A NORTH CHINA VILLAGE 64-65 (1997).

227. *Id.* at 58.

228. *Id.* at 72.

229. *Id.*

230. *Id.* at 58.

231. *Id.* at 70.

232. *Id.* at 73.

demonstrates one's economic power, thus increasing face and rendering the giver the moral and symbolic superior. Simultaneously, however, the gift pays respect to the receiver, thus giving face."²³³ A bribe is distinguished from a gift of virtue, because a bribe requires an immediate return. Put another way, a gift develops a relationship, and a bribe achieves immediate gain, e.g., permit approval for a business.²³⁴ "[T]he dividing line between gift giving and bribery in the *guanxi* system is whether the payment is to develop a relationship or to achieve an immediate gain."²³⁵ This is in accordance with the ancient distinction between a gift and a bribe as is clear from the Chinese characters described above.

News reports also illustrate today's tight connection between business and gift-giving to officials. In 2009, it was reported that luxury goods sales spiked during the two weeks in March in Beijing when the National People's Congress and Chinese People's Consultative Congress met.²³⁶ Businessmen funded accounts whereby officials could buy luxury goods for top government leaders.²³⁷ These included "Gucci handbags, Hermès scarves, Montblanc pens and [US]\$30,000 diamond-studded Swiss watches."²³⁸ Anonymous sources from luxury companies noted that all year round, luxury goods are bought by businessmen using code names for officials, their families, and mistresses.²³⁹

In 2012, Swiss watch imports to China dropped 27.5 percent after the government's ban on officials' use of public funds to buy luxury goods.²⁴⁰ Before the ban, government officials were the primary recipients of luxury watch gifts.²⁴¹ When a railways minister visited a train disaster scene in 2011, he reportedly wore a US\$11,000

233. See Feldman, *supra* note 5, at 220 (citations omitted).

234. See *id.* at 197.

235. Feldman, *supra* note 6, at 197. For a discussion of how bribers try to simulate gifts, see Ling Li *Performing Bribery in China: Guanxi-Practice, Corruption with a Human Face*, 20 J. OF CONTEMPORARY CHINA 1 (2011).

236. *For Bribing Officials, Chinese Give the Best*, *supra* note 12.

237. See *id.*

238. *Id.*

239. See *id.*

240. Wang Wen, *Corruption Curbs Crimp Luxury Market*, CHINA DAILY (Jan. 17, 2013), http://www.chinadaily.com.cn/china/2013-01/17/content_16128533.htm.

241. See *id.*

Rolex.²⁴² This caused outrage among the general population.²⁴³ As mentioned earlier, government officials are perhaps the recipients of 25 percent to 50 percent of all luxury goods in China.²⁴⁴ This is astounding considering how few officials there are compared to the whole population; for example, in 2010, 1.6 million applicants vied for only 16,000 open civil servant positions.²⁴⁵ Today, many officials are fleeing to the private sector to avoid anti-corruption measures.²⁴⁶ While overall luxury goods sales are down, however, Chinese are still purchasing less ostentatious goods and redefining the luxury goods market.²⁴⁷ In particular, Chinese tourist spending for foreign luxury goods is still sky-high.²⁴⁸

This craving for foreign luxury goods is reminiscent of ancient Shang and Zhou era practices. Then gifts conferred by rulers came from exotic regions; this demonstrated the ruler's power to control trade and rare resources. The attention to luxurious style today is also reminiscent of the ornately decorated *ding*, and the exquisite jade that embodied Confucian virtue.

Unfortunately, mooncakes today are used as bribes in both business and official circles. Mooncakes, once considered luxuries in themselves, are now regularly adorned by elaborate packaging, Rolex watches, gold, and alcohol costing tens of thousands of US dollars.²⁴⁹ In 2012, companies bought gold mooncakes as gifts, weighing 50

242. Julie Zeveloff, *Chinese Government Officials Don't Want You to Know How Much Their Rolex Watches Cost*, BUSINESS INSIDER (Sept. 19, 2011), <http://www.businessinsider.com/china-censors-survey-of-government-officials-expensive-watches-2011-9>.

243. *Id.*

244. See Wen, *supra* note 240 (noting that government officials are the recipients of at least 25% of all luxury goods in China); *For Bribing Officials, Chinese Give the Best*, *supra* note 12 (estimating that government officials are the recipients of close to 50% of all luxury goods in China).

245. Alice Yan, *Chinese Government Officials Flock to Apply for Private-Sector Jobs Amid Graft Crackdown*, SOUTH CHINA MORNING POST (Apr. 6, 2015), <http://www.scmp.com/news/china/article/1757133/chinese-government-officials-flock-apply-private-sector-jobs-amid-graft?page=all>.

246. *See id.*

247. *China's Luxury Market Shrinks in 2014 as Luxury Brands Adapt to Shifting Consumer Preferences*, BAIN & COMPANY (Jan. 20, 2015), <http://www.bain.com/about/press/press-releases/chinas-luxury-market-shrinks-in-2014-press-release.aspx>.

248. *Chinese Tourists' Luxury Spending Soars*, REUTERS (Apr. 20, 2015), <http://www.reuters.com/article/2015/04/20/us-luxury-spending-idUSKBN0NB1NV20150420>.

249. *Mooncakes Hide in Baskets in Defiance of Beijing's Luxury Ban*, WANTCHINA TIMES.COM (Sept. 17, 2013), <http://www.wantchinatimes.com/news-subclass-ent.aspx?id=20130917000086&cid=1103>.

grams each and worth around US\$3,400.²⁵⁰ Their use as bribes has become so prevalent that regulations govern their packaging.²⁵¹ In 2013, after President Xi's sweeping anti-corruption measures, mooncake sales dropped by 60 percent.²⁵² In a 2014 report, a businessman states, "My company used to buy a large number of mooncakes as gifts for Mid-Autumn Festival. The cakes were an important element in maintaining business and work relations."²⁵³ Despite President Xi's anti-extravagance campaign, however, in 2015 it was reported that luxury mooncake packages were making a comeback.²⁵⁴

Consultants regularly advise foreigners to beware of an environment where "personal connections and bribery are culturally accepted means of doing business,"²⁵⁵ to tolerate gift-giving when not in conflict with core principles,²⁵⁶ or to give gifts with corporate logos or of only nominal value.²⁵⁷ Others state that trying to eliminate

250. Hu Tao & Yuan Ruting, *Gold Mooncakes Raise Suspicions of Corruption*, XINHUA (Sept. 28, 2012), http://news.xinhuanet.com/english/china/2012-09/28/c_131880342.htm.

251. *Market Still Craves Luxurious Mooncakes*, PEOPLE'S DAILY ONLINE (Oct. 5, 2006), http://english.peopledaily.com.cn/200610/05/eng20061005_309196.html (describing cultural value of mooncakes). According to the Compulsory State Standards for the Production of Mooncakes, mooncake packaging must represent no more than twenty-five percent of the total cost of the mooncake product, and the average space between mooncakes in a box should not exceed 2.5 centimeters. *Id.*

252. *Mid-Autumn Festival in China Goes Back to Basics*, CHINA.ORG (Sept. 23, 2013), http://www.china.org.cn/china/2013-09/23/content_30102195.htm. Another report states that sales dropped twenty percent. See Xu Junqian, *An Eclipse of the Mooncake*, CHINA DAILY (Sept. 19, 2013), http://www.chinadaily.com.cn/china/2013-09/19/content_16980312.htm; see also Caixiong Zheng, *Mooncake Sales Devastated by Anti-Corruption Drive*, CHINA DAILY (Sept. 5, 2014), http://usa.chinadaily.com.cn/china/2014-09/05/content_18552890.htm.

253. Zheng, *supra* note 252.

254. *Luxury Mooncakes Make Comeback*, CHINA.ORG.CN (Aug. 26, 2015), http://www.china.org.cn/china/2015-08/26/content_36418536.htm ("[B]uyers of a 1,588-yuan [approximately US\$250] and 1,888-yuan [approximately US\$300] basket have a total of 13 options to choose from, including wines, olive oils, abalone, iPhone cases and Moutai liquor, that have price tags ranging from 88 yuan to 1,000 yuan.").

255. See, e.g., *White Paper: China Anti-Corruption*, ROPES & GRAY 2 (Feb. 7, 2014).

256. Judith Irwin, *Occasional Paper 6: Doing Business in China: An Overview of Ethical Aspects*, INST. OF BUS. ETHICS 5 (2012), <http://www.ibe.org.uk/userfiles/chinaop.pdf>.

257. *Compliance in Asia: When is a Mooncake a Bribe?*, BAKER & MCKENZIE GLOBAL CORPORATE COMPLIANCE ADVISORY (2012), <http://www.bakermckenzie.com/files/Uploads/Documents/whenisamooncake.pdf>.

all corruption in business is equivalent to trying to eliminate *guanxi*, which is impossible.²⁵⁸

Can virtuous gift-giving, however, be used in the fight against corruption? An example of how a foreign business may be part of virtuous giving is Häagen-Dazs. Their wildly popular ice-cream filled mooncakes have provided a delightful addition to traditional mooncake fillings, and have also led to legitimate handsome profits for Häagen-Dazs in China.²⁵⁹ They were first introduced in 1997; and for many years their profits have grown 25 percent annually.²⁶⁰ China is Häagen-Dazs' biggest market, and ice cream mooncakes were so critical to owner General Mills' success, that its CFO Donald Mulligan mentioned mooncakes at a New York investor conference in 2013.²⁶¹ He said, "The Mid-Autumn Festival is approaching. . . . This year, we are expanding this business into eight additional cities across China. With price points ranging from just over [US]\$25 for a 14-ounce serve up to [US]\$120 for 40 ounces, these products create positive sales and margin mix for us."²⁶² In comparison, in Minnesota, General Mills' headquarters, a 14-ounce carton of Häagen-Dazs sells for less than US\$5.²⁶³ Because these ice cream mooncakes in China must be consumed within a short time, they may be less likely to be used as bribes. Although mooncake corruption should be eliminated, mooncakes should still be used to engender good-will, long term relations, and blessing.

An international and multidisciplinary taskforce should also be formed to enumerate how to give virtuous gifts. While many excellent anti-corruption taskforces currently exist, they focus on avoiding gift-giving, giving gifts of only nominal value, or general guidelines about what a proper gift is.²⁶⁴ A taskforce that focuses on virtuous gift-

258. *China: The Dilemma of Business Ethics and Corruption*, STRATFOR PROTECTIVE INTELLIGENCE 2 (2009), https://wikileaks.org/gifiles/attach/171/171248_China%20-%20Business%20Ethics%20and%20Corruption.pdf.

259. Neal St. Anthony, *Häagen-Dazs Mooncakes Are Big Sellers in China*, STAR TRIBUNE (Sept. 21, 2013), <http://www.startribune.com/business/224626561.html>.

260. Wendy Tai, *The Story Behind Häagen-Dazs Mooncakes*, TASTE OF GENERAL MILLS BLOG (Sept. 12, 2011), <http://www.blog.generalmills.com/2011/09/the-story-behind-haagen-dazs-mooncakes/>.

261. See St. Anthony, *supra* note 259.

262. *Id.*

263. *Id.*

264. See, e.g., *ICC Guidelines on Gifts and Hospitality Policy Document*, ICC COMM'N ON CORP. RESP. AND ANTI-CORRUPTION (June 26, 2014), <http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2014/ICC-Guidelines-on-Gifts-and-Hospitality/>; *Business*

giving beyond nominal gifts, however, will help businesses avoid guessing what will be prosecuted, and what is necessary to maintain and cultivate propriety. Because of the complexity of gift-giving, this taskforce should be composed of experts in ritual, art, religion, philosophy, ethics, business, law, anti-corruption prosecution, and government. Their enumeration should provide a safe harbor for businesses in giving gifts.

CONCLUSION

The recent prosecutions of Avon for FCPA violations in China and GlaxoSmithKline for Chinese anti-bribery violations illustrate pervasive corrupt business practices which involve gift-giving. The purpose of this article has been to fill a gap in the literature by exploring the origins of Chinese gift-giving and whether virtuous gift-giving can be used in the fight against corruption. I propose that in addition to complying with anti-corruption measures, businesses should give virtuous gifts. An international taskforce should be formed to enumerate not only what are inappropriate gifts, but also what are virtuous gifts.

Gift-giving in China is integral to its ancient rule of virtue. Virtue was taught through ritual, and the rule of virtue was seen as superior to a rule of law. The Chinese characters for gift, *liwu*, literally means “ritual object.” In contrast, the Chinese characters for bribe, *huilu*, merely means the possession of money. A bribe does not contain a ritual of respect, but unfortunately, is an immediate exchange resulting in illicit gain.

Gift-giving originated in both expressing gratitude to and providing sustenance for ancestors and other spirits who could in turn provide blessing. Gift-giving therefore represents respect and reverence for superiors and the generation, multiplication and distribution of resources, including food for sustenance. The Chinese characters for ritual, *li*, and human body, *ti*, show that humans are supposed to be ritual vessels for virtue.

Chinese rulers thus established their authority by offering sacrifices and then distributing gifts. This was done with the bronze tripod known as *ding*, a ritual cooking vessel which represented political authority. When kings and emperors bestowed access to *ding*

on privileged families, these families were then empowered to procure blessing and provision by offering sacrifices to their ancestors. China's earliest law codes were also placed on *ding*. The *ding* thus represents the intimate connection among government, law, gift-giving, family, and resource generation. Businesses grew out of ancestral trusts that held property in perpetuity for ancestral worship, helping the needy, and education for preparation for officialdom. Investments and profits were supposed to provide for the past, present and future ancestral clan. Business success was only possible with the blessing of ancestral spirits and government officials.

Therefore, it is not an accident that *guanxi*, essential to doing business in China today, requires gift-giving among business associates and government officials. *Guanxi* is about increasing resources through repeated reciprocal acts of favor and *ganqing* and *renqing*, or familial affection. Gift-giving also demonstrates the status or *mianzi* (face) of the giver and the receiver. It is also not an accident that today Chinese are the number one consumers of luxury goods in the world; and that officials may receive up to half of these goods.

How, then, do we fight corruption? Compliance with anti-corruption measures is part of the solution, but must be supplemented with virtuous gift-giving. Compliance with anti-corruption law is itself a ritual. It requires repeated training, recordation, monitoring and massive expenses. It involves a vast transfer of resources from companies to consulting firms and lawyers. As mentioned above, Walmart expects to spend around US\$160 to US\$180 million on compliance for fiscal 2016. If these expenses are analogous to Chinese ritual offerings, lawyers, accountants, and consultants have become the equivalent of the ancestral spirits that protect and ward off evil. However, this ritual often does not include reverence, respect, and affection. Compliance does not address the issue of business and government as familial networks, and human beings as ritual vessels.

Therefore, to combat corruption, we must also strengthen the ritual of virtuous gift-giving. We need an international taskforce to outline not only inappropriate, but virtuous gifts. These can be of more than nominal value. A list will take the guesswork out of navigating the shoals of anti-corruption prosecution and business propriety. The international taskforce should be composed of businesspeople, regulators, prosecutors, other lawyers, and experts from disciplines such as art, anthropology, food science, history,

sociology, philosophy, ethics, political science and religion. Häagen-Dazs ice cream mooncakes might be on this list because they may be less likely to be used as a bribe. In any case, business gifts should always be reported accurately and transparently, and currency limits are appropriate.

Hopefully, a rule of virtue and law can thus be embraced both within and outside China, including the ritual of virtuous gift-giving. Virtuous gift-giving can and should be used in the fight against corruption. And business all over the world should be more attentive to family, charity and government obligations.

