

## CHINA'S TURN AGAINST LAW

CARL F. MINZNER\*

### ABSTRACT

*Chinese authorities are reconsidering legal reforms they enacted in the 1980s and 1990s. These reforms had emphasized law, litigation, and courts as institutions for resolving civil grievances between citizens and administrative grievances against the state. But social stability concerns have led top leaders to question these earlier reforms. Central Party leaders now fault legal reforms for insufficiently responding to (or even generating) surging numbers of petitions and protests.*

*Chinese authorities have now drastically altered course. Substantively, they are de-emphasizing the role of formal law and court adjudication. They are attempting to revive pre-1978 Maoist-style court mediation practices. Procedurally, Chinese authorities are also turning away from the law. They are relying on political, rather than legal, levers in their effort to remake the Chinese judiciary.*

*This Article analyzes the official Chinese turn against law.*

*These Chinese developments are not entirely unique. American courts have also experienced a broad shift in dispute resolution patterns over the last century. Litigation has fallen out of favor. Court trials have dropped in number. Alternative dispute resolution mechanisms have increased in number. Observing such long-term patterns, Marc Galanter concluded that the United States experienced a broad "turn against law" over the 20<sup>th</sup> century.*

*China's shift also parallels those in other developing countries. In recent decades, nations such as India, Indonesia, and the Philippines have resuscitated or formalized traditional mediative institutions. This is part of a global reconsideration of legal norms*

*and institutions imported or transplanted from the West.*

*Despite these similarities with global trends, this Article argues that Chinese leaders' shift against law is a distinct domestic political reaction to building pressures in the Chinese system. It is a top-down authoritarian response motivated by social stability concerns.*

*This Article also analyzes the risks facing China as a result of the shift against law. It argues that the Chinese leadership's concern with maintaining social stability in the short term may be leading them to take steps that are having severe long-term effects of undermining Chinese legal institutions and destabilizing China.*

*Last, this Article argues for rethinking the trajectory of Chinese legal studies. Scholars need to shift away from focusing on formal Chinese law and legal institutions in order to understand how the Chinese legal system actually operates and the direction it is heading.*

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我希望天下无讼 — I hope for a world without litigation.

- Judge Chen Yanping<sup>1</sup>

## Introduction

In the early 21<sup>st</sup> century, Chinese authorities turned against law.

What does this mean?

Similarities exist with the American “turn against law” over the 20<sup>th</sup> century, as characterized by Marc Galanter.<sup>2</sup> Trial rates are declining. Court presidents and administrators are expressing a new official preference for mediation, rather than adjudication. Suspicion of lawyers has risen. A new narrative has emerged which views litigation as a pathology to be cured, and law as cold and unresponsive to human needs.

The Chinese shift has a broader component as well. Procedurally, Party authorities are relying on political levers to remold the Chinese judiciary. Chinese authorities are altering financial and promotion standards facing judges in order to steer them toward mediating, rather than adjudicating, cases. Party propaganda authorities are presenting Chinese courts and judges

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\* Associate Professor of Law, Washington University in St. Louis, School of Law; Visiting Associate Professor of Law, Fordham Law School. Thanks to Cardozo, Fordham, Jiaotong University, Washington University in St. Louis, NYU, University of Michigan, University of North Carolina, and Yale for organizing conferences and workshops in 2010 and 2011 at which this paper was presented, and to all of the participants and commentators at those events. Particular thanks are due to Ai Jiahui, Don Clarke, Frances Foster, He Haibo, Keith Hand, Tom Kellogg, Tom Lee, Maggie Lewis, Sida Liu, Greg Magarian, Ethan Michelson, Jeffrey Prescott, Ben Read, Rana Siu, Kent Syverud, Brian Tamanaha, Wang Qinghua, Melissa Waters, Fan Yu, and others in China. All errors are those of the author. Unless otherwise noted all translations are by the author.

<sup>1</sup> Ou Qingping, *Sanwu faguan yuan tianxia wusong* [*The “Three No’s Judge” Seeks World Without Litigation*], January 18, 2010, available at <http://cpc.people.com.cn/GB/64093/64104/10788439.html>.

<sup>2</sup> Marc Galanter, *The Turn Against Law: The Recoil Against Expanding Accountability*, 81 Tex. L. Rev. 285 (2002).

with an official depiction of their roles that is a dramatic reversal from the emphasis on judicial professionalism prevalent in the 1990s. These trends are playing out against the background of Party political campaigns that aim to reassert tighter control over the Chinese judiciary, restrict the activities of public interest lawyers, and curtail the influence of foreign rule-of-law norms among Chinese judges and officials.

The official Chinese turn against law, and back toward mediation, is thus tied to a politicized rejection of many legal reforms advanced in the 1980s and 1990s. It is a part of a broader reconsideration of role of law, lawyers, courts, and adjudication. This Article analyzes these shifts by examining Chinese judiciary's treatment of civil and administrative grievances – the centerpiece of earlier legal and court reform efforts.

Naturally, such statements are subject to important caveats. Law has not been abandoned in China. State authorities continue to issue statutes and regulations. Citizens and corporations continue to invoke legal norms as they seek to protect their interests. There is still some (albeit reduced) room for progressive institutional reform in China under the “rule of law” rubric.

Nor are current developments without prior precedent. Law has never been far removed from politics in China. Chinese officials pushed legal and court reforms of the 1990s and early 2000s for political purposes. Even in the height of this reform wave, limits existed as to how far such activity could go. And current struggles in the Chinese judiciary find historical echoes in swings between professionalism and populism that have deeply marked both imperial and modern Chinese history.

Despite these caveats, the shifts in Chinese dispute resolution practices merit both the attention (and characterization) advanced by this Article. Legal reforms pursued in the 1980s and 1990s have been halted or reversed. Chinese legal intellectuals are voicing alarm. Jiang Ping, one of the key drafters of China's post-1978 civil and administrative codes, has warned that “China's rule of law is in

full retreat.”<sup>3</sup>

Shifts in Chinese dispute resolution do bear similarities with developments elsewhere. Officials and scholars in many countries are raising questions regarding the appropriate role of formal law and court adjudication in dispute resolution practices. They are searching for effective alternatives to litigation to respond to (and resolve) citizen grievances. In many countries, such efforts involve reviving traditional mediative institutions or founding new ones.

But this Article argues that Chinese leaders’ shift against law is different. The shift is not being led by lawyers or parties who are opting out of the court system in search of an alternative to litigation. Nor is it being implemented by neutral entities with a degree of independent legitimacy, whether traditional village structures or modern neutral mediators.

Rather, China’s turn against law is a top-down authoritarian political reaction to building levels of social protest and conflict in the Chinese system. Chinese leaders face increasing levels of unrest generated by civil conflicts between citizens, and between citizens and the state. Yet Chinese officials remain unwilling to allow the gradual emergence of independent legal institutions capable of dealing with such disputes – precisely the reform track pursued by some in the late 20<sup>th</sup> century. Instead, Party authorities are imposing (or re-imposing) ideological and bureaucratic controls on the court system in the name of social stability.

These efforts are loosely clothed in the language of mediation or alternative dispute resolution (ADR). But this does not accurately reflect their true nature. Their main focus is not on assisting parties to resolve their grievances (although this may be a beneficial side effect in some cases). Rather, it is aimed at preventing legal

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<sup>3</sup> Jiang Ping, February 21, 2010 speech “China’s Rule of Law is in Full Retreat,” translation available at [http://lawprofessors.typepad.com/china\\_law\\_prof\\_blog/2010/03/jiang-ping-chinas-rule-of-law-is-in-full-retreat.html](http://lawprofessors.typepad.com/china_law_prof_blog/2010/03/jiang-ping-chinas-rule-of-law-is-in-full-retreat.html). Jiang also served as the president of the China University of Politics and Law in the late 1980s.

conflicts and citizen petitions from rising toward central officials. As the top Chinese Party official in charge of political-legal affairs has stated, the aim of these reforms is to ensure that “small problems do not leave the village, large problems do not leave the township, [and] conflicts are not passed up to higher authorities.”<sup>4</sup>

Shifts in Chinese dispute resolution efforts are not entirely negative. Excessive emphasis on formal litigation and trials during the 1990s corresponded poorly with the realities of rural Chinese courts. The new policy line may concentrate official and scholarly attention on concretely analyzing the mediation practices that actually dominate the workload of these courts. It may produce some practical changes that respond more effectively to the very real difficulties that they face. And it may open up some room for useful ADR reforms throughout the Chinese legal system.

But this Article argues that the official shift away from law carries real risks for China. Naturally, classic normative concerns exist with regard to the effect of these developments on the rights of parties, the role of the judiciary, and the legitimacy of legal institutions.<sup>5</sup> But another set of concerns exists as well. Chinese judges are being told to - at all costs - avoid issuing decisions that might result in citizen protests, petitions, or complaints to higher authorities. Judge’s careers and salaries are being tied to attaining mandatory target rates for successful mediations. This is undermining legal norms, and rendering the judicial system susceptible to a range of populist pressure as citizens strategically elect to engage in coordinated protests on the internet or in the streets in an effort to sway court outcomes.

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<sup>4</sup> Zhou Yongkang, *Shenru tuijin shehui maodun huajie, shehui guanli chuangxin, gongzheng jianjie zhifa, wei jingji shehui you hao you kuai fazhan tigong genghao youli de fazhi baozhang*, [Deeply Push Forward Resolution of Social Conflict, Innovation in Social Management, Just and Clean Execution of the Law, to Provide Even More Favorable Rule-of-Law Protections for Positive and Rapid Development of Economy and Society], Qiushi [Seeking Truth], 16 Feb. 2010, available at [http://www.qstheory.cn/zxdk/2010/201004/201002/t20100209\\_20841.htm](http://www.qstheory.cn/zxdk/2010/201004/201002/t20100209_20841.htm).

<sup>5</sup> See e.g., Owen Fiss, 93 Yale Law Journal 1073 (1984).

This represents more than a mere shift away from the emphasis on litigation and trials in the 1990s. Central to the definition of “law” is an effort to systematically apply rules and standards.<sup>6</sup> But in a range of civil and administrative grievances, Chinese officials are backing away from earlier (albeit tentative) efforts at doing this. Instead, Chinese authorities are increasing their demands that courts abandon such norms in order to meet political goals of appeasing popular sentiment and warding off social protest.

This turn against law is dangerous. It is eroding the very institutions Chinese authorities themselves attempted to construct in the late 20<sup>th</sup> century as a bulwark against social instability.

The Article is divided into three Parts.

Part I of this Article examines the substantive shift in the Chinese judiciary. It tracks the dramatic U-turn in official Chinese dispute resolution efforts over the past three decades. Reliance on Maoist-era mediation practices gave way to judicial reform efforts in the 1980s and 1990s that emphasized court adjudication and trials according to formal law. But since 2003, Chinese Party and court authorities have begun to resurrect earlier mediation practices,

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<sup>6</sup> See HAN DIAN [Character Dictionary] (2010) defining *fa* (law) as “rules of conduct established and promulgated by the state, embodying the will of the rulers, which citizens must observe,” and with a secondary definition of “standard” or “model.” Emphasis (at least rhetorically) on the need for systematic application of rules, albeit without the expectation such rules would necessarily independently constrain Party power, has been a hallmark of the reforms launched by Chinese authorities in the wake of the chaos of the Cultural Revolution. *See, e.g.*, Deng Xiaoping, *Emancipate the Mind, Seek Truth From Facts And United as One in Looking to the Future* (1978) 157-58. For the corresponding English definition, see BLACK’S LAW DICTIONARY (9<sup>th</sup> ed. 2009) 962 (defining “law” as “1. The regime that orders human activities and relations through systematic application of the force of politically organized society, or through social pressure backed by force, in such a society. 2. The aggregate of legislation, judicial precedents, and accepted legal principles; the body of authoritative grounds of judicial and administrative action; esp., the body of rules, standards, and principles that the courts of a particular jurisdiction apply in deciding controversies brought before them . . .”).

largely as a result of increasing citizen protests and concerns regarding social stability.

Part II of this Article explores the political mechanisms by which Chinese authorities are implementing this shift. It analyzes the content of a recent 2010 “model judge” propaganda campaign surrounding Judge Chen Yanping (quoted at the introduction to this Article). It compares this with similar campaigns in the late 1990s. It identifies the new ideal that authorities are seeking to present for Chinese judges to emulate. These include a heightened responsiveness to populist demands and Party policy (rather than legal norms), a reliance on mediation rather than litigation to resolve problems, and a commitment to upholding social stability at all costs.

This Part also examines official efforts to shift the concrete financial and performance incentives facing Chinese judges. Chinese authorities have reversed course from the late 1990s, when judicial salary and advancement rewards were strongly based on their rates of issuing judicial decisions in cases. Since the early 2000s, Chinese judicial authorities have strengthened the target mediation ratios that judges and courts are expected to attain. They have also decreased their tolerance for judicial decisions that result in disgruntled parties mounting petitions to higher authorities. Both of these have directly incentivized Chinese judges to shift away from issuing decisions in civil and administrative cases.

Part III explores the broader implications of these shifts. It analyzes the risks facing China as a result of the shift against law. It argues that the Chinese leadership’s concern with maintaining social stability in the short term may be leading them to take steps that are having severe long-term effects of undermining Chinese legal institutions and destabilizing China. It also examines recent signs that suggest Chinese leaders’ turn against law may be expanding into legal education. And it compares China’s shift against law with developments in other countries, fitting them into a broader literature regarding “law and society” and “law and development.”



Last, Part III argues that we need to rethink the trajectory of Chinese legal scholarship. Modern research on Chinese law has tended to be heavily dominated by studies of formal Chinese law and legal institutions. But given Chinese authorities' own shift away from law in civil and administrative dispute resolution, and in light of the continued influence of extra-legal institutions and mechanisms, this may not be warranted. Scholars too, may need to "turn away from law" in their studies. If they want to understand how the Chinese state operates, they may need to directly incorporate study of Party propaganda and bureaucratic personnel tools in their research.

Methodologically, this article attempts to illustrate what such a broader approach might look like. It analyzes the shift in Chinese dispute resolution practices through an extensive examination of the full panoply of tools that central officials employ to guide bureaucratic institutions such as the judiciary, including formal law, propaganda materials, internal Party directives, and court evaluation systems. It fuses this textual analysis with first-hand interviews, public statements of Chinese judges and officials, and research conducted by domestic Chinese academics.

## I. 1978-2010: Substantive Shifts in Dispute Resolution

On the eve of the reform period in 1978, Chinese dispute resolution remained marked by practices that had characterized the People's Republic of China since the 1950s.<sup>7</sup> These relied on mediation led by community activists or officials to resolve civil grievances. Maoist practices differed from traditional mediative structures present in pre-1949 China. They were tightly interwoven with the official Party apparatus and carried a strong political cast.<sup>8</sup> Mediators did not just resolve grievances. Rather, they were also expected to transmit Party doctrine and correct “feudal thinking” of parties. Voluntary compromise, though desirable, was not essential. Mediators could (and often did) bring coercive official or community pressure to bear on particularly troublesome or obstinate parties in order to force them to concede.<sup>9</sup> Procedures remained informal; legal rights were not emphasized.

Beginning in the early 1980s, Chinese authorities began to gradually back away from such practices. Officials advanced court adjudication according to formal law as the preferred means to resolve civil disputes. 1982 legislative reforms clarified that mediation was merely to be “emphasized,” rather than “the primary method” for resolving disputes.<sup>10</sup> The 1991 Civil Procedure Law deepened this shift. It stipulated that court mediation must be voluntary on the part of parties. It also required courts to issue

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<sup>7</sup> The early years of the PRC did witness tentative experiments in creating a formal legal system, later abandoned with the onset of more radical Maoist policies in the late 1950s. Glenn Tiffert, *Epistrophy: Chinese Constitutionalism and the 1950s*, in BUILDING CONSTITUTIONALISM IN CHINA (Stephanie Balme, Michael Dowdle, eds., 2009).

<sup>8</sup> PHILIP HUANG, CHINESE CIVIL JUSTICE, PAST AND PRESENT 107-108 (2010).

<sup>9</sup> For a description of such practices, see STANLEY LUBMAN, BIRD IN A CAGE: LEGAL REFORM AFTER MAO 40-70 (2000).

<sup>10</sup> Hualing Fu and Richard Cullen, *From Mediatory to Adjudicatory Justice: The Limits of Civil Justice Reform in China*, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1306800](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1306800), at 53, chart 5, (November 25, 2008).

decisions in the absence of an agreement between the parties.<sup>11</sup> In the following decade, Chinese judicial authorities gradually fleshed out and formalized trial practices through a range of procedural and evidentiary rules.<sup>12</sup> Naturally, actual implementation of these pro-trial reform efforts varied dramatically. Urban court practices altered quickly. But mediation continued to dominate the workload of Chinese basic-level rural courts.<sup>13</sup>

Chinese authorities pursued parallel reforms in the field of administrative law. They enacted a raft of laws and regulations, including the 1989 Administrative Litigation Law (ALL), the 2003 Administrative Licensing Law, and the 2007 Regulations on Open Government, that gave citizens limited rights to challenge government actions in court. The ALL confirmed the preference for litigation, specifically barring courts from resorting to mediation in administrative cases.<sup>14</sup>

Other reforms followed. Legal educational reforms ensured that students studied formal law (rather than Party doctrine) while in university. This groomed a cadre of judges and officials inclined to rely on formal law and court adjudication as a means to resolve citizen grievances.<sup>15</sup> Reformers even imported (and indigenized) the

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<sup>11</sup> Zhonghua renmin gongheguo minshi susong fa [Civil Procedure Law], (promulgated April 4, 1991, amended October 28, 2007), art. 9, available at [http://www.chinacourt.org/flwk/show.php?file\\_id=122225](http://www.chinacourt.org/flwk/show.php?file_id=122225).

<sup>12</sup> LUBMAN, *supra* note 9; Fu and Cullen, *supra* note 10, at 42-44.

<sup>13</sup> Sida Liu notes that even at the height of the pro-trial, pro-decision reforms in 1999, over 75% of civil cases in one rural Hebei court were resolved by mediation, rather than decision. Sida Liu, *Beyond Global Convergence: Conflicts of Legitimacy in a Chinese Lower Court*, 31 Law & Soc. Inquiry 75, 96-7 (2006). Note, however, that the late 1990s pressure in favor of resolving cases through decision rather than mediation even shows up here. The 33% of civil cases decided through decision in 1999 represents a near doubling in comparison with the 17% (average) percentage of such cases so decided in the 1980s. *Id.*

<sup>14</sup> Zhonghua renmin gongheguo xingzheng susong fa [Administrative Litigation Law], (promulgated April 4, 1989), art. 50, available at [http://news.xinhuanet.com/ziliao/2005-02/23/content\\_2609459.htm](http://news.xinhuanet.com/ziliao/2005-02/23/content_2609459.htm).

<sup>15</sup> Fu and Cullen, *supra* note 10, at 26.

trappings of Western judicial proceedings to add gravitas to Chinese judges and set them apart from other officials. Chinese judges exchanged their military uniforms for black judicial robes in 2001, and adopted the use of the gavel the following year.<sup>16</sup>

Multiple reasons motivated these changes. First, Party authorities abandoned their revolutionary principles in the post-Mao era. They retreated from earlier efforts to control all aspects of social and economic life. This sapped the vigor from Maoist institutions, such as people's mediation committees, which relied on a degree of ideological fervor and official coercion to function.<sup>17</sup> Second, China's rapid economic development generated an increasing number of civil disputes. Many of these involved strangers, migrants, or corporate entities disconnected from traditional village or state-owned units. As such, they were less amenable to resolution by mediative institutions that relied on existing family or social ties to lead parties toward compromise.<sup>18</sup>

Other factors played a role as well. Relative disinterest of central Party authorities in dealing with civil disputes created an opening for the Supreme People's Court (SPC) to occupy the field of civil justice. Court authorities were able to steer reforms in a technocratic direction that enhanced their own institutional relevance.<sup>19</sup> The infusion of foreign norms emphasizing formal law gave coherence and legitimacy to reform efforts.<sup>20</sup> Official Chinese desires to be

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<sup>16</sup> Ethan Michelson, *Global Institutions, Indigenous Meaning: Lessons from Chinese Law for the New Institutionalism* (2005), 32-42, available at <http://ssrn.com/abstract=876472>. The author remembers seeing digital bulletin boards outside basic level Chinese courts in 2002 with instructions that "the gavel should not be used to hit the plaintiffs or defendants."

<sup>17</sup> Fu and Cullen, *supra* note 10, at 10-16. Aaron Halegua, *Reforming the People's Mediation System in Urban China*, 35 Hong Kong L. J. 715, 718-24.

<sup>18</sup> HUANG, *supra* note 8, at 129.

<sup>19</sup> Fu and Cullen, *supra* note 10, at 16-18.

<sup>20</sup> HUANG, *supra* note 8, at 129. Academic legal exchanges have played a key role in facilitating transmission of these norms. See Randle Edwards, *Thirty Years of Legal Exchange With China: The Columbia Law School Role*, 23 Colum. J. Asian L. 3 (2009).

seen as adopting international legal standards enhanced receptivity to reforms, particularly during the difficult negotiations surrounding China's accession to the World Trade Organization in 2001.<sup>21</sup>

Chinese judicial authorities and legal activists advanced legal reforms to address governance problems they saw in China's institutions. The SPC's first five-year plan for court reform, issued in 1999, identified corruption and local protectionism as major reasons for deepening court reform and strengthening reliance on formal legal norms.<sup>22</sup> Similarly, top Party authorities supported administrative law reforms as a means to enlist citizens in the difficult task of checking corruption and abuse of power in lower levels of the Chinese bureaucracy.<sup>23</sup>

Such reforms shifted the workload of Chinese courts. The percentage of civil cases resolved via mediation declined steadily from the early 1980s to the early 2000s, shrinking from around 70% to slightly over 30%.<sup>24</sup> Following the passage of the ALL in 1989, administrative suits against the government boomed, rising from zero to roughly 100,000 in 2001.<sup>25</sup>

But in recent years, Chinese authorities have shifted tone. They are turning away from trials and adjudication according to law. Top Party political-legal authorities are promoting mediation as the key to resolving all disputes. They have linked it to the Party's new "harmonious society" political doctrine, enshrined as central policy

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<sup>21</sup> For an excellent first-hand account of the negotiations surrounding the U.S.-China Rule of Law Initiative under the Clinton administration, *see generally* Paul Gewirtz, *The U.S.-China Rule of Law Initiative*, 11 *William & Mary Bill of Rights J.* 603 (2003).

<sup>22</sup> Renmin fayuan wunian gaige gangyao [Five-Year Reform Plan of the People's Courts], issued Oct. 20, 1999.

<sup>23</sup> Minxin Pei, *Citizens v. Mandarins: Administrative Litigation in China*, 152 *China Q.* 832, 834-5 (1997).

<sup>24</sup> Fu and Cullen, *supra* note 10, at 53, chart 5.

<sup>25</sup> Kevin O'Brien and Li Lianjiang, *Suing the Local State: Administrative Litigation in Rural China*, 51 *China Journal* 75, at 96, table 1.

in 2006.<sup>26</sup> Central judicial authorities have simplified the new policy in the phrase *tiaojie youxian*, *tiaojie shenpan jiehe* - “Mediation has priority, and trials should be fused with mediation.”<sup>27</sup> Mediation experiments have spilled over into criminal and administrative litigation, the ALL’s explicit bar notwithstanding.<sup>28</sup>

In their effort to revive court mediation practices, Chinese authorities are drawing on their Maoist heritage for inspiration. As Ben Liebman has shown, Chinese political-legal authorities are invoking revolutionary-era models of judging from the 1930s and 1940s for judges to emulate. These models emphasize a fusion of mediation, populism, and Party political work as the preferred means to resolve citizen grievances, instead of trial adjudication according to formal legal norms. Extreme pressure is being brought on Chinese judges to do whatever it takes to resolve popular grievances in the name of upholding social stability. In pursuit of that goal, informal practices and flexible norms are again the watchwords of the day.<sup>29</sup>

Official statistics reflect the shift in central preferences away from litigation and toward mediation. Administrative litigation

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<sup>26</sup> Zhou Yongkang, *supra* note 4.

<sup>27</sup> 2010 Work Report of the Supreme People’s Court [2010 Zui gao renmin fayuan gongzuo baogao], Mar. 18, 2010, available at [http://www.gov.cn/2010lh/content\\_1558531.htm](http://www.gov.cn/2010lh/content_1558531.htm).

<sup>28</sup> Administrative experiments have taken place via the semantic distinction of authorizing courts to approve the withdrawal of administrative suits following “reconciliation” [*hejie* – as contrasted with mediation, or *tiaojie*] between parties. Supreme People’s Court Decision on Several Questions Regarding Withdrawal of Suits in Administrative Litigation Proceedings [Zuigao renmin fayuan guanyu xingzheng susong chesu ruogan wenti de guiding], art 4, issued December 17, 2007, available at [http://www.chinacourt.org/flwk/show.php?file\\_id=124166](http://www.chinacourt.org/flwk/show.php?file_id=124166). For a discussion of criminal mediation and reconciliation efforts conducted since the early 2000s, see Song Yinghui, ed., *XINGSHI HEJIE: SHIZHENG YANJIU* [EMPIRICAL RESEARCH ON CRIMINAL MEDIATION (sic)] (2010).

<sup>29</sup> Ben Liebman, *A Return to Populist Legality: Historical Legacies and Legal Reform* [forthcoming in Perry and Heilman, eds. *MAO’S INVISIBLE HAND* (2010)].

caseloads of Chinese courts reached a plateau in 1998, remaining little changed a decade later.<sup>30</sup> With regard to civil litigation, Chinese authorities are reporting figures that - at least on the surface - reflect massive increases in mediation. According to the Supreme People's Court (SPC) work reports, the percentage of civil cases resolved through mediation in China *doubled* from 31 percent in 2004, to 62 percent in 2009. If true, this would represent an astounding tripling (from 1.33 million to 3.59 million) of the total number of cases closed through mediation in just five years!<sup>31</sup> Closer examination reveals that the SPC is fudging the numbers in an apparent effort to inflate their totals, changing their reporting (starting in 2007) to include cases withdrawn by parties as well as those successfully mediated.<sup>32</sup> But such numerical manipulation by the SPC, and parallel lower court reports of suspiciously high

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<sup>30</sup> He Haibo, *Xingzheng susong chesu kao (1987-2008)* [An Examination of Withdrawal of Administrative Litigation Cases (1989-2008)], available at [http://law.china.cn/features/2009-12/31/content\\_3325153.htm](http://law.china.cn/features/2009-12/31/content_3325153.htm). But see the 2010 SPC Work Report (containing the relevant statistics for 2009), indicating a 20% increase in first-instance administrative cases by comparison with 2007, *Zui gao renmin fayuan 2010 nian gongzuo baogao* [2009 Sup. People's Ct. Work Report], issued 2010 (P.R.C.), available at [http://www.court.gov.cn/xwzx/yw/201003/t20100319\\_3244.htm](http://www.court.gov.cn/xwzx/yw/201003/t20100319_3244.htm).

<sup>31</sup> Compare *Zui gao renmin fayuan 2005 nian gongzuo baogao* [2005 Sup. People's Ct. Work Report], issued 2005 (P.R.C.), available at <http://www.court.gov.cn/work/200503180013.htm> (containing the relevant statistics for 2004), with *Zui gao renmin fayuan 2010 nian gongzuo baogao* [2009 Sup. People's Ct. Work Report], issued 2010 (P.R.C.), available at [http://www.court.gov.cn/xwzx/yw/201003/t20100319\\_3244.htm](http://www.court.gov.cn/xwzx/yw/201003/t20100319_3244.htm) (containing the corresponding statistics for 2009).

<sup>32</sup> In 2007, the SPC shifted its statistical reporting to include in the total not just those cases closed through mediation but also those withdrawn by parties. Compare *Zui gao renmin fayuan 2007 nian gongzuo baogao* [2007 Sup. People's Ct. Work Report], issued 2007 (P.R.C.), available at <http://www.court.gov.cn/work/200503180013.htm> (noting that 30.41% percent of civil cases were resolved through mediation, while 55.06 percent of first-instance civil cases were resolved through "mediation and withdrawal of the case"), with *Zui gao renmin fayuan 2008 nian gongzuo baogao* [2008 Sup. People's Ct. Work Report], issued 2008 (P.R.C.), available at [http://news.xinhuanet.com/newscenter/2008-03/22/content\\_7837838.htm](http://news.xinhuanet.com/newscenter/2008-03/22/content_7837838.htm) (noting merely that 50.74% of civil cases were resolved by "mediation and withdrawal of the case").

mediation rates, give some idea of the practical pressures facing Chinese courts.<sup>33</sup>

The official emphasis on mediation has taken several different forms. The first is the promotion of extra-judicial mediation. Since 2002, Chinese authorities have made significant efforts to resuscitate people's mediation committees administered by local villagers and residents committees. A cornerstone of Maoist-era dispute resolution practices, these institutions had fallen into disrepair in the wake of the legal reforms of the 1980s and 1990s. In recent years, national authorities have attempted to reverse this trend, increasing the resources available to these committees and strengthening the binding nature of mediated agreements reached under their auspices.<sup>34</sup>

The 2010 Law on People's Mediation builds on these efforts, codifying earlier pro-mediation measures in national law. It provides that courts may instruct litigants to seek mediation by people's mediation committees.<sup>35</sup> It also creates procedures for courts to judicially ratify agreements reached via such mediation (following application by both parties within 30 days of the effective date of the agreement, and after court examination of the content). Once so ratified, the subsequent violation of the agreement by one party allows the other side to immediately initiate enforcement proceedings.<sup>36</sup>

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<sup>33</sup> See, e.g. Ma Teng, *Suide fayuan minshi anjian tiaojie lü da dao 95.7* [Civil Mediation Rates for Suide Court Reach 95.7%], Suide Government Website, May 23, 2010, available at <http://www.sdhan.com/sdh/Article/ShowArticle.asp?ArticleID=4709>.

<sup>34</sup> Halegua, *supra* note 17, at 722-29.

<sup>35</sup> *Zhonghua renmin gongheguo tiaojie fa* [Law on People's Mediation] (promulgated by the Standing Comm. Nat'l People's Cong., August 28, 2010, effective Jan. 1, 2011), art. 18, available at [http://www.china.com.cn/policy/txt/2010-08/30/content\\_20819825.htm](http://www.china.com.cn/policy/txt/2010-08/30/content_20819825.htm).

<sup>36</sup> *Id.*, arts. 32-33.



Within the judiciary, Chinese authorities are also pushing judges themselves to aggressively resort to mediation. In 2007, the SPC issued a judicial opinion pressing lower courts and judges to employ mediation themselves as the preferred avenue for resolving cases before them.<sup>37</sup> Depictions vary as to what such judicial mediation involves in practice. Official propaganda portrays model judges (invariably imbued with an unwavering desire to serve the masses) patiently visiting aggrieved individuals in their homes, day after day, listening to their heartfelt complaints, gradually leading them down the path of compromise and reconciliation, and restoring social harmony.<sup>38</sup> One Chinese public interest lawyer offers a different picture:

It depends whether you are in front of one of the “slippery old judges” or one of the younger ones. The older judges will work the parties over. They will tell the villagers [plaintiffs in an environmental suit]: “It might be a good idea to accept the settlement offer in front of you – it is not certain that my decision regarding compensation will be as favorable.” Then they will go over to the defendant [corporation] and say: “You should compromise – you wouldn’t want your image to suffer if I publicly issue an adverse judicial decision.” Doing this requires a degree of social skills and an ability to push people. Younger judges just don’t have that. Their tendency is to simply try to resolve things by the book.<sup>39</sup>

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<sup>37</sup> Supreme People’s Court Opinion on Further Increasing the Positive Role of Mediation (in Litigation) in Constructing Socialism and a Harmonious Society [Zui gao renmin fayuan guanyu jin yi bu fahui susong tiaojie zai goujian shehui zhuyi hexie shehui zhong jiji zuoyong de ruogan yijian], issued Mar. 7, 2007, available at [http://www.chinacourt.org/flwk/show1.php?file\\_id=116688](http://www.chinacourt.org/flwk/show1.php?file_id=116688). Note that the 2007 opinion explicitly calls for courts to increase their rates of cases resolved through mediation. This is significantly stronger language than that used in a parallel 2004 decision, which merely reminded lower courts, “all cases that can be mediated, should be mediated.” Supreme People’s Court Decision on Several Questions Regarding Civil Mediation Work in the People’s Courts [Zuigao renmin fayuan guanyu renmin fayuan minshi tiaojie gongzuo ruo’gan wenti de guiding], issued August 18, 2004, available at [http://www.chinacourt.org/flwk/show1.php?file\\_id=96343](http://www.chinacourt.org/flwk/show1.php?file_id=96343).

<sup>38</sup> See *infra* notes 52-89, and text.

<sup>39</sup> Interview, Beijing, July 13, 2010.

Yet a third model of mediation exists as well. Since 2004, Chinese political-legal authorities have promoted Party-led “big mediation” (*da tiaojie*) practices to handle complex disputes that may generate mass citizen discontent or social unrest. Examples include land seizures, corporate reorganizations of failed enterprises, and collective grievances against local officials.<sup>40</sup>

As the transcript of one such “big mediation” proceeding reveals, these are primarily political conferences aimed at coordinating responses between government bureaus (including the judiciary) and crafting solutions to ward off protest.<sup>41</sup> Discussions can be conducted with limited reference to legal norms, outside of legal channels (including before cases are filed, or after judicial decisions are issued), and without the actual participation of the nominal parties. Horse-trading between officials takes place. Political pressure is brought to bear on recalcitrant bureaus to compromise.

Naturally, in such high-pressure cases, judges are but one party at the political bargaining table. Often with their own career evaluations at stake (discussed below), judges’ role is far removed from that of a disinterested neutral. In some cases, they may play a role of legal advisors, offering proposals that (if accepted) might generally keep the ultimate solution within the rough bounds of

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<sup>40</sup> Ai Jiahui, *Weiwen luoji xia de “da tiaojie” ji qi kunjing* [“Big Mediation” Under the Logic of Social Stabilization and Its Problems] (draft on file with author), 1-2.

<sup>41</sup> Specifically, this was a “big mediation” proceeding conducted in the spring of 2010, in the offices of a township government outside of Beijing, and involving a contractual dispute arising from the failure of a construction company to complete government-funded resettlement housing for 30 families. The contractor cited the alleged failure of the village head to pay required installments on the contract as the reason for the breach. Both trial and appellate courts rejected the contractor’s suit, finding a lack of evidence. Nonetheless, mass petitions by disgruntled villagers during the Beijing Olympics prompted high-level attention to the case, resulting in a complex multi-party negotiation involving jousting between township and county court authorities (on the one hand) and the village head (on the other) regarding how to resolve the protests and who should pay for the costs of finishing the residences. *Id.*

legality. In others, mediation can devolve into what Hualing Fu has termed “an exercise of state power by local bureaucrats under the guise of tradition.”<sup>42</sup>

What explains the shift in central attitudes away from law, courts, and adjudication in recent years? Scholars broadly agree on a common narrative. Late 20<sup>th</sup> century Chinese court reforms failed to create effective institutions for resolving citizen grievances. Central leaders had heavily emphasized formal law as a tool (and courts as forums) for resolving civil and administrative grievances. But because of failures to deepen institutional reform, courts remained weak actors vis a vis entrenched local Party, government, and commercial interests. At the same time, China experienced a growing number of economic and social disputes resulting from rapid development. The result: pervasive inability to enforce court verdicts, increasing numbers of extra-legal petitions and protests to higher Chinese authorities, and violent confrontations between court personnel and disgruntled citizens.<sup>43</sup>

Fear of mounting social unrest led central Chinese authorities to rethink reform policies. Starting around 2003, civil dispute resolution moved from a marginal field to a central Party concern. Some reform projects were criticized for importing formal law and legal institutions that meshed poorly with practical realities in China’s rural areas. Others were faulted for leading Chinese courts and officials away from their populist roots, creating artificial barriers between the people and officials that weakened support for

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<sup>42</sup> Hualing Fu, *The Politics of Mediation in a Chinese County: The Case of Luo Lianxi*, 5 *The Australian Journal of Asian Law* 107, 122 (2003).

<sup>43</sup> See generally Fu and Cullen, *supra* note 10; Liebman, *supra* note 29, Randall Peerenboom, *More Law, Less Courts: Legalized Governance Judicialization and Dejudicialization in China*, September 2008, on SSRN. Chinese Party and judicial officials agree with this narrative. See the comments of the Yichang Intermediate People’s Court Court President (and Party secretary) Hu Xingru, Tan goujian sifa hexie ying shuli de jiben guannian [Discussion on the Basic Notions Necessary to be Established in Order to Construct of Judicial Harmony], April 11, 2008, available at [http://www.hicourt.gov.cn/theory/artilce\\_list.asp?id=5281&l class=2](http://www.hicourt.gov.cn/theory/artilce_list.asp?id=5281&l class=2).

the Party.<sup>44</sup> Party authorities also warned that some judges had used concepts such as “the supremacy of the law” or “deciding cases according to law” as excuses to avoid or oppose Party leadership in judging cases, particularly under the corrosive influence of Western legal concepts.<sup>45</sup>

Chinese authorities began to emphasize mediation in response to social stability concerns. Central Party authorities assert that this is necessary to resolve increasing numbers of extra-judicial citizen petitions and protests.<sup>46</sup> Indeed, when SPC officials ordered lower courts to increase their use of mediation in 2007, they singled out several types of cases for which closed-door mediation was particularly encouraged – those “involving large numbers of people” or those “that are very sensitive, receiving significant social attention.”<sup>47</sup>

At the same time, authorities also took steps to rein in politically wayward courts and judges. In 2006, Party authorities launched a “socialist rule of law theory” campaign in courts and other legal institutions that stressed loyalty to the Communist Party and the need to avoid the pernicious influence of Western rule-of-law theories.<sup>48</sup> In 2008, central authorities named a former provincial public security chief as the new head of the SPC. He replaced the outgoing president, closely identified with earlier judicial reform and rule-of-law efforts. Within months, Chinese courts were enmeshed in the “Three Supremes” campaign, which emphasized Party doctrine and populist sentiment as equal (if not superior) to the

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<sup>44</sup> *Id.*

<sup>45</sup> See, e.g., the comments of the Yichang Intermediate People’s Court Court President (and Party secretary) Hu Xingru, *supra* note 43.

<sup>46</sup> Zhou Yongkang, *supra* note 4.

<sup>47</sup> Supreme People’s Court Opinion on Further Increasing the Positive Role of Mediation, *supra* note 37, art 5.

<sup>48</sup> Ben Liebman, *China’s Courts: Restricted Reform*, CHINA Q. (2008), at 628. [Cite to Luo Gan speech]

constitution and law as sources for guiding judicial work.<sup>49</sup> In the following months, Chinese authorities reasserted control over the bar, and stepped up harassment of public interest activists and lawyers who had taken advantage of court and administrative law reforms to launch an increasingly well-organized series of legal challenges against local and central government policies.<sup>50</sup>

China has experienced a shift away from legal reform principles that Chinese authorities have pursued since the 1980s. As a result of political concerns regarding social (and regime) stability, Chinese authorities have shifted away from dispute resolution models emphasizing court adjudication according to legal norms. In their place, Chinese authorities are reviving dispute resolution models that emphasize Party-led mediation practices according to flexible norms, and that seek to prevent - at all costs - outbreaks of social unrest and mass citizen petitioning to higher authorities.

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<sup>49</sup> Carl Minzner, *Riots and Cover-Ups: Counterproductive Control of Local Agents in China*, 31 U. Penn. J. Int'l Law 53, 117-18 (2009).

<sup>50</sup> In April 2009, the Ministry of Justice and national bar association launched a political campaign stressing the nature of Chinese lawyers as "Socialist Legal Workers With Chinese Characteristics" (*zhongguo tese shehui zhuyi falü gongzuozhe*) - a title bearing no small resemblance to the pre-1996 definition of lawyers as "state legal workers" (*guojia falü gongzuozhe*). As with parallel campaigns in the judiciary, this one emphasizes Party leadership and the responsibility of Chinese lawyers for upholding the "Three Supremes." It specifically calls on Chinese lawyers to "consciously resist the plots of Western enemy forces to infiltrate the thinking of lawyers." *Guanyu zai lüshi duiwu zhong kaizhan "Zhongguo tese shehui zhuyi falü gongzuozhe" huodong de yijian* [Opinion on Launching the "Socialist Legal Workers With Chinese Characteristics" Campaign Among the Ranks of Lawyers], Ministry of Justice Website, Apr. 24, 2009, at [http://www.moj.gov.cn/2008zwgg/2009-04/24/content\\_1082558.htm](http://www.moj.gov.cn/2008zwgg/2009-04/24/content_1082558.htm). In the spring and summer of 2009, Chinese authorities followed these moves by raiding a number of activist law firms handling sensitive cases (such as the melamine-tainted milk scandal) that had gathered national attention. At the same time, justice bureau officials cancelled or refused to reissue licenses for dozens of lawyers, including several high-profile public interest activists. Donald Clarke, *Lawyers and the State in China: Recent Developments*, Testimony Before the Congressional-Executive Commission on China, Oct. 7, 2009, available at <http://www.cecc.gov/pages/hearings/2009/20091007/dclarke100709.pdf>.

## II. Implementing the Turn Against Law

Chinese authorities are using multiple tools to implement the above shift in dispute resolution policies. Some are legal in nature, such as the 2010 Law on People's Mediation discussed above.<sup>51</sup> But authorities are also employing political tools in their effort to reshape the Chinese judiciary. These include “model judge” propaganda campaigns and target responsibility systems.

Neither of these mechanisms is new. Both are deeply rooted in prior Party and imperial governance practices. Model judge campaigns are the modern incarnations of 1950s-era Communist “model worker” and imperial Chinese “model official” efforts.<sup>52</sup> Contemporary target responsibility systems are the lineal descendants of earlier Party and imperial bureaucratic management practices.<sup>53</sup>

### A. “Model Judge” Propaganda Campaigns Compared: 2010 and 1999

Chinese authorities regularly use ideological campaigns to press lower-level officials and bureaus to implement particular policy lines. These blend propaganda, official speeches, and small-group study sessions. Campaigns often focus on exalting a “model official” (or in the judiciary, a “model judge”) who inculcates specific policies or values that central authorities seek to promote.

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<sup>51</sup> Law on People's Mediation, *supra* note 35.

<sup>52</sup> See e.g., Patricia Stranahan, *Labor Heroines of Yan'an*, 9 *Modern China* 288 (1983).

<sup>53</sup> See e.g., Minzner, *Riots and Cover-Ups*, *supra* note 43, at 61-66; MICHAEL DUTTON, *POLICING CHINESE POLITICS* [2005], 258-300; JEAN C. OI, *STATE AND PEASANT IN CONTEMPORARY CHINA: THE POLITICAL ECONOMY OF VILLAGE GOVERNMENT* (1989). Separate work in progress by the author explores the historical, institutional, and philosophical roots of both practices – particularly the extent to which they are aimed at addressing deep-seated principal agent monitoring problems facing central Chinese authorities.

Comparing two model judge campaigns, in 2010 and in 1999, illustrates the shift in official Chinese dispute resolution policies.<sup>54</sup>

The Chen Yanping campaign is a good example of a recent, nationwide model judge campaign. Unfolding over the first half of 2010, it was no small affair. On January 19, top Party and judicial officials gathered in Beijing to commemorate the accomplishments of Judge Chen, a district court judge from Jiangsu province.<sup>55</sup> Extensive propaganda followed in subsequent months. State media effusively praised her, detailed her exploits, and provided an official hagiography of her life. [For a translated sample of two shorter articles, see the appendix.] From January to June 2010, the home webpage of the Chinese judiciary carried a banner headline extolling Judge Chen. In March, the head of the Supreme People's Court singled her out for praise in his annual work report to the national legislature (a session for which Judge Chen was also selected as a legislative delegate). Local courts throughout China mobilized their judges to attend internal study sessions to learn from Judge Chen's

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<sup>54</sup> Aside from its recent, large-scale nature, the 2010 Chen Yanping campaign was chosen because extensive reporting on the campaign is available online, including a dedicated section on the main website of the Chinese judiciary with a full archive of state media reports, available at [http://www.chinacourt.org/zhuanti/subject.php?sjt\\_id=454](http://www.chinacourt.org/zhuanti/subject.php?sjt_id=454). The 1999 model female judge campaign was chosen for its roughly similar nature: a nationwide campaign, including a formal appearance with the head of the Politburo member in charge of political-legal affairs. The fact that Chen and the ten judges in the 1999 campaign are all female helps in controlling for any differences in gender depictions. Last, sufficient state media articles on the ten judges in the 1999 campaign exist to permit comparisons with the 2010 one.

<sup>55</sup> For the official praise of Judge Chen by the head of the Supreme People's Court at the conference commemorating her accomplishments, see Luo Shuqin, Chen Yonghui, Wang Shengjun: *Yi Chen Yanping tongzhi wei bangyang zuo renmin xinfu de hao faguan* [Wang Shengjun: *Take Comrade Chen Yanping as a Model, Be Good Judges That People Trust*], China Court Bulletin, January 21, 2010, available at <http://cpc.people.com.cn/GB/64093/64094/10814789.html>.

example.<sup>56</sup>

Suppose you are an astute, ambitious young Chinese judge sitting in one such study session. You seek to absorb official expectations regarding your role, perhaps in order to advance your judicial career. What do you learn?

Well, Judge Chen is clearly a paragon of judicial perfection for you to emulate. You read official reports that she has handled over 3100 cases in 14 years. Without a *single* complaint or appeal. Without a *single* petition by a disgruntled party. Without even *one* wrongly decided case. Her decisions are uniformly accepted by all parties.<sup>57</sup> You read that her correct work ethic, merged with her earnest desire to realize the Confucian ideal of ‘a world without litigation’ (*tianxia wusong*),<sup>58</sup> helps her achieve the Party’s goal of a “harmonious society” (*hexie shehui*).<sup>59</sup> You may not believe the content, but you get the message. They are clearly telling you – be like her.

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<sup>56</sup> Jiangsu gaoji renmin fayuan gongzuo baogao [Jiangsu Province High People’s Court Work Report], Jiangsu Court Web, February 10, 2010, available at <http://www.jsfy.gov.cn/ztlm/qglh/lhxxw/2010/02/505436908421543.html>.

<sup>57</sup> He Chunzhong, *Yi wei shengbai jiefu de nongcun jiceng faguan* [A Rural Basic Level People’s Judge Whose Decisions Are Accepted By Victors and Losers Alike], China Youth Daily, Jan. 18, 2010, at [http://zqb.cyol.com/content/2010-01/18/content\\_3043751.htm](http://zqb.cyol.com/content/2010-01/18/content_3043751.htm).

<sup>58</sup> *Id.* Naturally, this is an indirect reference to Confucius, Analects 12, “In hearing litigation, I am as good as any other. What is necessary, however, is to cause the people to have no litigation.”

<sup>59</sup> Judge Chen’s own comments cast doubt on whether the wildly exuberant claims of official propaganda can (or actually have) been realized. As she herself notes in an interview, “‘A world without litigation,’ this is my New Year’s wish every year. Of course, this can’t be achieved. Not only can it not be achieved, in today’s transitional society, conflicts can only increase. Take my own court, for example. Our caseload has increased 30% in the last three years . . .” Gu Weizhong, “*Neng dong sifa*” *de hexie shizhe jihao Chen Yanping faguan* [A Harmony-Maker Who Can ‘Move the Judiciary’: Remember Well Judge Chen Yanping], Xinhua Daily, Dec. 29, 2009, available at [http://www.js.xinhuanet.com/xin\\_wen\\_zhong\\_xin/2009-12/29/content\\_18622749.htm](http://www.js.xinhuanet.com/xin_wen_zhong_xin/2009-12/29/content_18622749.htm).



You clearly sense the newfound official preference for mediation,<sup>60</sup> and you perceive some disdain for formal legal norms. Judge Chen's successes are ascribed to her avoidance of law and her unflagging effort to mediate all cases that come before her.<sup>61</sup> Unlike "some judges" who feel mediation too time-consuming or difficult, Judge Chen is willing to spend hours, days, or weeks to reach a mediated conclusion. While such work may not demonstrate or require "any consummate trial skills or [any] deep grounding in basic legal skills," and will not result in fame or attention as the result of a media-worthy decision, it receives the "true love and admiration of the masses."<sup>62</sup> Direct instructions grab your attention. "Judges should not be legal craftsmen who pay excessive attention to wording, believe the laws of statutes to be the only scripture, and pay no attention to social harmony and the popular interest."<sup>63</sup>

Popular interest? Ah, you see. This is an effort to return the Chinese judiciary to its populist roots. Your court president (also the court Party secretary) is lecturing you that Judge Chen's style of work is the spiritual successor to 1940s and 1950s "mass line" practices aimed at maintaining tight links between Party officials and

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<sup>60</sup> Huang Xiuli, [*Tiaojie tiaojie zai tiaojie: Sifa tiaojie youxian huajie shehui maodun*], *Mediate, Mediate, and Then Mediate Again: The Principle of Judicial Mediation Above All Else Resolves Social Conflict*, Southern Weekend, Mar. 4, 2010, at [http://nf.nfdaily.cn/nfzm/content/2010-03/04/content\\_9744376.htm](http://nf.nfdaily.cn/nfzm/content/2010-03/04/content_9744376.htm).

<sup>61</sup> "The reason why Judge Chen's mediation succeeds is that she relies not on law, but on morality and human sentiment." *Chen Yanping: Ai tiaojie, shao panjue de jiceng faguan, yi 'de' fu ren* [*Chen Yanping: A District Court Judge Who Favors Mediation, Issues Judicial Decisions in Few Cases, Uses Morality to Convince People*], Beijing News, January 18, 2010, available at <http://comment.bjnews.com.cn/2010/0118/18046.shtml>.

<sup>62</sup> Xie Ying, *A Judge for the Average Person: Understanding the Epitome of Judicial Perfection*, [*Pingmin faguan: Yanyi wanmei de sifa renga*], China Court Net, Mar. 3, 2010, available at <http://www.chinacourt.org/html/article/201003/03/397566.shtml>.

<sup>63</sup> Wang Zichen, *Junzi bu qi: Chen Yanping de sifa zhihui*, [*An Exemplary Person Should Not Become a Vessel: The Judicial Wisdom of Chen Yanping*], People's Court Bulletin, February 9, 2010, pg 2, at [http://rmfbyb.chinacourt.org/paper/page/1/2010-02/09/02/2010020902\\_pdf.pdf](http://rmfbyb.chinacourt.org/paper/page/1/2010-02/09/02/2010020902_pdf.pdf).

the people.<sup>64</sup> Sure, you are expected to firmly adhere to Party doctrine.<sup>65</sup> But you are also expected to maintain “true sentiment,” “true love,” and “a true heart” for the people, “draw close to the masses, walk among the masses . . . and feel the people’s concerns as [your] own.”<sup>66</sup> You should not be like those other judges who merely rely on “cold” law and “mechanical procedures” to handle cases,<sup>67</sup> separating themselves from the people.

You see Western legal norms explicitly rejected. Campaign materials instruct that “simply adopting Western concepts of rule of law,” or “fantasizing about ‘transplants’ or ‘integrating [with the rest of the world]’ as a means to replicate foreign legal systems – this is to confuse tangerines for oranges.”<sup>68</sup> Western judges are criticized for “living in seclusion,” for “separating themselves from society,” and for “divorcing themselves from reality.”<sup>69</sup> In contrast, China’s “socialist judicial road” and national character (*guoqing*) demands adherence to revolutionary practices and populist spirit.<sup>70</sup>

But you notice something else as well. The campaign materials don’t limit themselves to Communist rhetoric. Rather, they also

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<sup>64</sup> See comments by the Jiangsu High People’s Court president and Party secretary, *Gong Pixiang: Chen Yanping gongzuo fa shi xin yidai Ma Xiwu shenpan fangshi*, [Gong Pixiang: The Chen Yanping Work Style is the Ma Xiwu System of Adjudication for a New Era], Legal Daily, Feb. 24, 2010, available at [http://www.legaldaily.com.cn/bm/content/2010-02/24/content\\_2063569.htm?node=20731](http://www.legaldaily.com.cn/bm/content/2010-02/24/content_2063569.htm?node=20731); Liebman, *supra* note 29.

<sup>65</sup> Zhao Xunqing, *Faguan de zeren*, [Judge’s Responsibilities], Beijing Court Net, Feb. 23, 2010, available at <http://bjgy.chinacourt.org/public/detail.php?id=83258>.

<sup>66</sup> Wang Mingzhao, *Chen Yanping jingshen shi dangdai faguan de zhiyin* [The Spirit of Chen Yanping is the Guide for Today’s Judges], China Court Net, Jan. 22, 2010, at <http://www.chinacourt.org/html/article/201001/22/392473.shtml>

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> Pan Shichang, *Ta yong da’ai shixian falü de zunyan*, [She Uses Great Love to Realize the Dignity of the Law], *Xuexi xuanchuan Chen Yanping tongzhi xianjin shiji zuotanhui fayan zhaiyao*, [Summary of the Speeches at the [Taizhou Government] Symposium on Studying and Propagating the Advanced Deeds of Comrade Chen Yanping], Dec. 15, 2010, Taizhou Municipal Government website, available at [http://www.taizhou.gov.cn/art/2009/12/15/art\\_18\\_48626.html](http://www.taizhou.gov.cn/art/2009/12/15/art_18_48626.html).

<sup>70</sup> *Id.*

claim that Judge Chen embodies classical Chinese values as well. They praise her work as being “deeply nurtured by Confucianism.” They describe her belief that a judge must rule through virtue and moral suasion.<sup>71</sup> Her work is said to incarnate the Confucian concept of benevolence (*ren*).<sup>72</sup> She is hailed as the “perfect embodiment” of the Confucian moral exemplar of a *junzi* (gentleman, exemplary person).<sup>73</sup> (Odd. Didn’t your parents tell you that they had participated in a Maoist political campaign during the 1970s explicitly aimed at *wiping out* Confucian influence?)<sup>74</sup> Passages from the Confucian classics are explicitly reinterpreted for campaign purposes. The Supreme People’s Court bulletin eulogizes Judge Chen for adhering to the concept of “*junzi bu qi*.” [As Chinese philosophers note, the original phrase indicates that an exemplary person (or gentleman) should not be a mere specialist, but rather a comprehensive vessel, capable of being used for many purposes].<sup>75</sup> The SPC bulletin, however, provides its own gloss on the phrase:

From the perspective of the judiciary, this phrase can be

<sup>71</sup> The campaign downplays specialized knowledge. Chen herself is quoted as saying “in order to serve as a judge, just like serving as a doctor, one must first establish one’s moral principles and have a compassionate heart.” Zhang Liang, *Bu ju qingli falü wennuan ru si* [Not Excluding The Accepted Codes of Human Conduct: The Warmth of the Law], Jan. 20, 2010, at [http://www.legaldaily.com.cn/bm/content/2010-01/20/content\\_2030784.htm?node=20729](http://www.legaldaily.com.cn/bm/content/2010-01/20/content_2030784.htm?node=20729).

<sup>72</sup> Li Xiaomei, *Chen Yanping gongzuo fa de lishi chuancheng yu xianshi gongxian*, [The Historical Heritage and Practical Significance of Chen Yanping’s Style of Work], China Court Net, Feb. 11, 2010 at <http://www.chinacourt.org/html/article/201002/11/395312.shtml>. Very roughly, benevolence encompasses the idea of compassion for others. Deep awareness and attention to one’s interpersonal relationships, such as that between parent and child (or vice versa) allows one to cultivate a benevolent heart. In the Confucian ideal, this can then be extended to other relationships, such as that between ruler and ruled, thereby helping achieve social harmony.

<sup>73</sup> Wang Zichen, *supra* note 63.

<sup>74</sup> See A. James Gregor and Maria Hsia Chang, *Anti-Confucianism: Mao’s Last Campaign*, 19 Asian Survey 1073 (1979).

<sup>75</sup> Wu Ning, Peking University, *Becoming a Vessel or Not*, paper presented at the Third BESETO Conference of Philosophy, Jan. 10-11, 2009, available at [http://utcp.c.u-tokyo.ac.jp/events/pdf/023\\_Wu\\_Ning\\_3rd\\_BESETO.pdf](http://utcp.c.u-tokyo.ac.jp/events/pdf/023_Wu_Ning_3rd_BESETO.pdf).

understood as saying that a judge with good moral conduct cannot simply be a tool that mechanistically applies the law in the process of handling cases. Rather, a judge must grasp social conditions, be well-versed in all forms of judicial skills, be good at resolving disputes, and amply bring into play the utility of the judiciary as a good defender of the social order.<sup>76</sup>

The 2010 campaign's portrayal of Judge Chen is particularly striking when compared with press depictions of model Chinese judges in the late 1990s.<sup>77</sup>

Similarities do exist. As with Judge Chen, late 1990s model judges are shining examples of hard work, even at the expense of their own health.<sup>78</sup> Their annual case closure rates are double or triple of that of other judges.<sup>79</sup> And they are almost never wrong in their decisions. Out of the ten judges selected as "National Outstanding Female Judges" in 1999, six were reported as never having a single case reversed on appeal or sent back for retrial.<sup>80</sup>

Media depictions of late 1990s model judges also somewhat parallel Judge Chen. Judges stand firmly on the side of the

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<sup>76</sup> Wang Zichen, *supra* note 63.

<sup>77</sup> Naturally, disclaimers are warranted. The 2010 campaign belongs to a series of national "Model Court, Model Judge" campaigns held regularly since 2003. Zui gao fayuan guanyu biao Zhang quanguo mofan fayuan, quanguo mofan faguan de jue ding [SPC Decision on Commemorating National Model Courts, National Model Judges], issued Dec. 8, 2003, available at <http://www.chinacourt.org/public/detail.php?id=95425>. Extensive materials are easily available on the website of the Chinese judiciary. This is not the case for many earlier model judges. But state media reports do exist for high profile model judges from the late 1990s, such as those mentioned in SPC Work Reports.

<sup>78</sup> See e.g., the description of Judge Yue Lu, in *Kua shiji de xianfeng zhanshi* [Vanguard Warriors for the New Century], 12 (continuing to work while receiving extensive treatments for cancer).

<sup>79</sup> See, e.g., the description of Judge Zhao Xiaoli, in *Shensheng de zhuiqiu* [Sacred Pursuit], pg 23-4.

<sup>80</sup> *Quanguo shi jiechu nü faguan shiji jianjie* [A Brief Introduction to the Accomplishments of Ten National Outstanding Female Judges], Guangming Daily, February 26, 1999, (hereafter *A Brief Introduction*) available at <http://www.gmw.cn/01gmr/1999-02/26/GB/17979%5EGM3-2609.htm>.

Communist Party. They are praised as good Party members.<sup>81</sup> They firmly support key Party-state objectives. One publishes an article in the national Party theoretical journal publicly praising official efforts to wipe out the Falun Gong spiritual movement.<sup>82</sup> And judges receive praise for their out-of-court efforts to resolve disputes, and their unflagging efforts to serve the needs of the people.<sup>83</sup>

But key differences exist as well. There is no overwhelming emphasis on miraculous successes with mediation. When late 1990s model judges are extolled for resolving large numbers of cases, they are praised for doing so via *shenjie* (resolving cases through trial), rather than through mediation (*tiaojie*).<sup>84</sup> Sure, passing mention is made of high mediation ratios achieved by particular judges.<sup>85</sup> But there is no politicized narrative presenting mediation as a miracle cure for all instances of social discontent. And there is no effort to explicitly invoke Confucian norms to legitimate the judging styles of late 1990s model judges.

In fact, the official depiction of several late 1990s model judges is *diametrically* opposed to that of Judge Chen. Take Judge Qin Lingmei. Her nickname in the state media? The “Stone-Cold [Faced] Judge.”<sup>86</sup> This refers to her reputation for “cool-headedness,” “rationality,” “adherence to neutrality,” and “rejection of excessive social contacts.” Her impassiveness and lack of contact

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<sup>81</sup> See e.g., the description of Judge Yue Lu, in *Kua shiji de xianfeng zhanshi* [Vanguard Warriors for the New Century], 12.

<sup>82</sup> Shang Xiuyun, *Jianchi yifa zhiguo, qudi feifa zuzhi* [Firmly Support Rule of Law, Suppress Illegal Organizations], 16 *Qiushi* [Seeking Truth] 15-16 (1999).

<sup>83</sup> [Citation]

<sup>84</sup> ‘Tie faguan’ Tan Yan [“Iron Judge” Tan Yan], Xinhua, September 9, 1999, available at <http://gmw.cn/01gmr/1999-09/09/GB/gm%5E18174%5E3%5EGM3-0908.htm>; Ji Yanan, *Tianping zhong yu shan* [Heavenly Peace is Weightier than a Mountain], Guangming Daily, February 10, 1999, available at [gmw.cn/01gmr/1999-02/10/GB/17964%5EGM1-1016.htm](http://gmw.cn/01gmr/1999-02/10/GB/17964%5EGM1-1016.htm).

<sup>85</sup> Ji Yanan, *Tianping zhong yu shan* [Heavenly Peace is Weightier than a Mountain], Guangming Daily, February 10, 1999, available at [gmw.cn/01gmr/1999-02/10/GB/17964%5EGM1-1016.htm](http://gmw.cn/01gmr/1999-02/10/GB/17964%5EGM1-1016.htm).

<sup>86</sup> A Brief Introduction, *supra* note 80.

toward parties are particularly highlighted. She maintains that, although nearsighted, she often does not wear glasses while working. When parties try to find her after a court hearing, she is thus able to pretend that she “doesn’t recognize” them, enabling her to escape difficult interpersonal relationships.<sup>87</sup> Judge Zhu Xiaomei is another example. State media praises her as the judge who “distrusted the county Party committee,” for challenging a county Party secretary’s decision regarding a pending criminal case, eventually reversing it.<sup>88</sup>

Judge Gao Binghuan provides yet another contrast with Judge Chen. Judge Gao is eulogized for her fearless efforts in executing court judgments. After a factory boss refused to comply with a court order in commercial litigation proceedings, Judge Gao made an initial visit to attempt to reason with him. When that failed, she arrived at the factory gates with a team of judicial personnel to order his arrest. As they advanced to handcuff the factory head, he shouted for assistance from the surrounding mob of 200 factory workers (and his supporters). A large-scale riot ensued. Judges were attacked, vehicles destroyed. Judge Gao herself was beaten senseless and passed out. After being held hostage for 12 hours, she was rescued and sent to the hospital with a concussion. Following due attention to the case from the Beijing High People’s Court and the prefectural Party committee, the factory head received a prison sentence for interfering with the execution of judicial verdicts. And Judge Gao? “She said it well: ‘[w]e must uphold the authority of the law, even at the cost of our lives.’”<sup>89</sup>

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<sup>87</sup> Fang Ning, *Yu rennao zhi wai* [*Outside the Hubbub (of Life)*], Shanghai renda yuekan [Shanghai People’s Congress Monthly], 2003.

<sup>88</sup> Ni Siyi, *Quanguo shi da jiechu nü faguan shou biao* [*Ten National Outstanding Female Judges are Recognized*], Xinhua, available at <http://web.peopledaily.com.cn/haiwai/199902/26/newfiles/B111.html>

<sup>89</sup> Li Enshi, *Nü faguan Gao Binghuan* [*Female Judge Gao Binghuan*], 17 Labor Union Reader (2001). Note that Judge Gao is also quoted as saying that it is essential for judges to rely on *li* (reason) rather than *qing* (sentiment, feelings) in their work, as people are too often lead astray by the latter. Exactly the opposite claim is made for Judge Chen Yanping. See Zhang Liang, *supra* note 71.

Such media descriptions are strikingly discordant with the current propaganda portrait of Judge Chen. The 1990s model judges above are not warm and fuzzy. They do not miraculously achieve social harmony. Judge Gao's actions actually trigger an anti-government riot. Judges in the late 1990s are exalted for adhering to a somewhat autonomous concept of law. With regard to civil disputes, they are depicted as enforcing legal norms, even at the cost of social discontent. And with regard to criminal (or administrative) cases, they are depicted as enforcing legal norms, even at the cost of conflict with core local Party leaders.

The Chinese propaganda narrative regarding judges (and law) *has* shifted in the last ten years. The campaign surrounding Judge Chen is part of an effort to reinterpret the role of judges: towards mediation and away from adjudication according to law.

*B. Target Responsibility Systems: Money For Mediation*

But official Chinese efforts to alter judicial behavior and increase the use of mediation are not limited to propaganda portrayals of exemplary officials. Rather, they are also shifting the concrete performance incentives facing judges.

As one Chinese district court clearly explains in an article entitled "How to Raise Mediation Rates:"

In the 2009 campaign, the Yancheng (district) court paid great attention to mediation work. It made civil mediation a component of (court) target responsibility systems, thereby altering the views of court personnel with regard to trials . . .

In the past, we highly emphasized judicial rates of issuing verdicts in the courtroom [as a component of evaluating judicial work performance]. This led to high rates of cases decided by verdict. It also led to conflictual relationships between parties, difficulty enforcing verdicts, and was not beneficial for the purposes of finally and completely resolving problems (*anjie shiliao*).

In accordance with changing times, this court has strengthened the use of mediation. We have made mediation rates "hard targets" in

annual target responsibility systems used for evaluating judicial performance. We have made financial awards to judges for mediating cases higher than those awarded for deciding cases. . . . We have insisted that every case be mediated, and paid much attention to the [judicial] rates of successful mediation. These policies have led to large increases in mediation rates for this court – 15% higher compared with last year. Mediation has become a bright spot in the work of the Yancheng district court.<sup>90</sup>

Such methods are not unusual. In 2007, the SPC specifically called for courts to implement such policies in order to press judges to actively pursue mediation.<sup>91</sup> These calls have since echoed down through the Chinese judicial bureaucracy.<sup>92</sup>

What are the target responsibility systems that the Yanping court refers to? These are performance target systems, widely employed by Chinese authorities to evaluate, discipline, and reward Party and government officials (including judges). They link officials' careers and salaries to success in attaining designated work targets, frequently numerical in nature. Local Party secretaries, for example, face annual targets for economic development, tax collection, birth control, poverty alleviation, Party building, and social order. Judges also face targets. These include mediation, case closure, and appellate reversal ratios.<sup>93</sup> Officials who succeed in making target receive salary and career rewards, such as enhanced chances for

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<sup>90</sup> Xu Fengmei, *Ruhe rutigao tiaojie lü*, [How to Raise Mediation Rates], Nov. 3, 2009, website of the Yancheng District People's Court of Tahe Municipality, available at <http://lhycfy.chinacourt.org/public/detail.php?id=107>.

<sup>91</sup> See, e.g., Supreme People's Court Opinion on Further Increasing the Positive Role of Mediation (in Litigation) in Constructing Socialism and a Harmonious Society [Zui gao renmin fayuan guanyu jin yi bu fahui susong tiaojie zai goujian shehui zhuyi hexie shehui Zhong jiji zuoyong de ruogan yijian], Mar. 7, 2007, art. 21, at [http://www.chinacourt.org/flwk/show1.php?file\\_id=116688](http://www.chinacourt.org/flwk/show1.php?file_id=116688).

<sup>92</sup> For the comments of the vice-president of a Shandong intermediate court, see Meng Wei, *Nuli kaichuang susong tiaojie gongzuo xin jumian wei goujian hexie shehui tigong sifa baozhang* [Strongly Realize a New Face of Judicial Mediation Work, Provide a Judicial Guarantee for the Creation of the Harmonious Society], China Court website, January 15, 2007, available at <http://www.chinacourt.org/html/article/200701/15/230610.shtml>.

<sup>93</sup> Minzner, *Riots and Cover-Ups*, *supra* note 49, at 67-74.



promotion. Those who fail (or perform lower than others) are correspondingly sanctioned.<sup>94</sup> Targets differ in importance. Exceptionally important targets – such as social order, birth control, or (in the Yancheng court) mediation – may be designated as “hard” targets or “priority targets with veto power.” Failure to attain these can unilaterally cancel out positive performance in other fields. Naturally, this makes officials particularly attentive to meeting (or at least appearing to meet) such targets.<sup>95</sup>

Target responsibility systems play a crucial role in Chinese governance. As this author has detailed in earlier work, they are a key mechanism for higher authorities to implement policy.<sup>96</sup> Setting (or altering) specific targets incentivizes lower-level officials to engage in (or change) particular behavior. Higher-level Chinese officials use this to steer the lower bureaucracy.

Over the past two decades, Chinese authorities have altered target responsibility systems in order to shift court dispute resolution practices. Beginning in the 1990s, Chinese authorities started to de-emphasize the importance of mediation ratios (prominent during the 1980s) in performance evaluations of judges. They strengthened the weight given to rates of judicial decisions issued in court.<sup>97</sup> Court officials set higher targets for the numbers of cases to be resolved via

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<sup>94</sup> *Id.*; Maria Edin, *State Capacity and Local Agent Control in China: CCP Cadre Management from a Township Perspective*, 173 CHINA Q. 35, 38–40 (2003); Susan H. Whiting, *The Cadre Evaluation System at the Grass Roots: The Paradox of Party Rule*, in HOLDING CHINA TOGETHER 101, 112–15 (Barry J. Naughton & Dali L. Yang eds., 2004).

<sup>95</sup> *Id.*

<sup>96</sup> This is particularly the case given significant principal-agent monitoring problems faced by central authorities. See generally Minzner, *Riots and Cover-Ups*, *supra* note 49.

<sup>97</sup> Chinese judges point this out. See, e.g., Meng Wei, *supra* note 92; Chi Xiaoran, *Qiantan minshi shenpan zhong tiaojie he panjue zhi jiehe* [A Brief Discussion of Fusing Mediation and Adjudication in Civil Trial Work] (comments by a Heilongjiang judge), available at [http://article.chinalawinfo.com/ArticleHtml/Article\\_43942.asp](http://article.chinalawinfo.com/ArticleHtml/Article_43942.asp).

judicial decision.<sup>98</sup> This (unsurprisingly) led to decreases in numbers of cases reported to be resolved via mediation, and similar increases in numbers of judicial decisions issued.<sup>99</sup>

Exactly the same process – but in reverse - has been playing itself out in Chinese courts in recent years. Starting around 2003, courts across China began to increase the importance of mediation in judicial target responsibility systems, increasing required mediation target rates for civil litigation.<sup>100</sup> Since 2006, the same process has taken place in the field of administrative litigation.<sup>101</sup> Nor is this phenomena limited to courts. The full spectrum of Chinese government (and quasi-government) entities engaged in dispute resolution - including local governments, judicial bureaus, urban people's mediation committees, and rural village committees - are being presented with elevated target ratios for cases successfully closed via mediation that they are expected to reach. Targets range from the merely high (60-80%) to the astronomically unbelievable (97% or higher).<sup>102</sup>

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<sup>98</sup> See Rizhao Intermediate People's Court Research Office, *Shenpan fangshi gaige daodi gaicheng shenmeyang* [What Form Should Trial Reform Take After All], Shandong shenpan [Shandong Trial], 1996 (setting a target for 50% of cases to be resolved via decision).

<sup>99</sup> For comments from the president of one Tianjin court, see Li Jianguo, *Dui xin shiqi fayuan minshi tiaojie gongzuo de diaocha yu sikao* [Research and Thoughts on a New Era of Civil Mediation Work], December 7, 2005, available at <http://tjfy.chinacourt.org/public/detail.php?id=2268>.

<sup>100</sup> *Id.*; Meng Wei, *supra* note 92.

<sup>101</sup> He Haibo, SHIZHI FAZHI [SUBSTANTIVE RULE OF LAW], 79-81 (2009).

<sup>102</sup> Compare Wang Hongwei, *Yichang jiufen, tiaojie haishi panjue* [A Dispute, Mediate or Adjudicate?], Legal Daily, October 21, 2009 (detailing the requirement of the Henan provincial High People's Court that 60-80% of first instance civil disputes before the courts be successfully mediated), available at [http://www.legaldaily.com.cn/misc/2009-10/19/content\\_1168114.htm](http://www.legaldaily.com.cn/misc/2009-10/19/content_1168114.htm), with *Pujiang sifa ju 2007 nian zhongdian gongzuo zeren fenjie biao* [Jinjiang Municipal Justice Bureau Chart Allocating Responsibilities for Achieving Key Work Responsibilities for 2007] (making Wang Jialang personally responsible for ensuring that 97% of mediations conducted by people's mediation committees in the city during 2007 are successful), pg 2, available on the website of the Jinjiang

Methods can be very direct. In one northeastern Chinese district court, judges who successfully mediate 82% of their civil cases receive a bonus of 10 yuan per mediated case, and 5 yuan for each case withdrawn by the parties. Higher mediation rates generate larger rewards. Judges who successfully mediate 86% of their civil cases receive 20 yuan per mediated case, and 10 yuan for each case withdrawn by the parties.<sup>103</sup> Local court officials report (also unsurprisingly) that the adoption of such systems has been responsible for the large increases in cases resolved via mediation in recent years.<sup>104</sup>

Naturally, these moves are part of a larger governance shift. Consistent with increased concerns regarding social stability, central Chinese authorities have ratcheted up pressure on lower-level Party and government officials to prevent instances of citizen petitioning (*shangfang*) to higher levels of the bureaucracy. Relevant responsibility systems have been strengthened as a result. Local officials are receiving increasingly severe sanctions for larger and more organized instances of social protest by citizens in their jurisdictions.<sup>105</sup> This extends to the courts. Judges are being held individually liable for judicial decisions they issue which generate petitions by disgruntled litigants to higher officials.<sup>106</sup> Increased

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municipal government at  
app.jinjiang.gov.cn/jjgov/files/2008/8/200882316950D601.doc.swf.

<sup>103</sup> *Muling Municipal People's Court Hearing Standards for Mediation in Civil and Commercial Cases* [Muling renmin fayuan minshang shi tiaojie anjian shenli guifan], Jun. 20, 2006, available at [http://www.muling.gov.cn/xwzx/xwzx\\_nr\\_2.asp?id=7151](http://www.muling.gov.cn/xwzx/xwzx_nr_2.asp?id=7151).

<sup>104</sup> See Meng Wei, *supra* note 92, (reporting a rise in the percentage of civil and commercial cases resolved via mediation from 42.3 to 68.2% between 2003 and 2007, as a result of making mediation an "important" part of judicial evaluations and adopting a system for rewarding judges appropriately); Li Jianguo, *supra* note 91 (noting a 7-13 percent rise in numbers of cases resolved via mediation in one year).

<sup>105</sup> Carl Minzner, *Xinfa: An Alternative to Formal Chinese Legal Institutions*, 42 *Stan. J. Int'l L.* 103, 134-35, 178-79 (2006).

<sup>106</sup> Ma Yuhong, *Zhongwei zhongyuan 'Qi bi' cu 'da xuexi, da taolun'* [Zhongwei Intermediate Court 'Seven Compares' Promotes 'Great Study, Great Discussion'],

mediation targets are simply one component of this broader shift. Party institutions are issuing comprehensive orders to courts and other institutions instructing them to both keep petitioners away from higher authorities at all costs, and to successfully resolve massive percentages of disputes through mediation.<sup>107</sup>

Target responsibility systems coexist uneasily alongside formal Chinese legal norms. Sometimes, the two move in tandem. During the 1990s, judicial performance targets emphasizing trials and judgments were strengthened, just as procedural and judicial legal reforms created a framework that courts were supposed to use for these purposes. In other cases, they clash.<sup>108</sup> In recent years, Chinese officials have increased mediation targets facing courts and judges. But authorities have not amended the requirement under the 1991 Civil Procedure Law (ALL) that mediation be voluntary. Nor have they removed the bar under the 1989 Administrative Litigation Law on mediation in administrative proceedings. This creates tension. Judges and courts are being rewarded (or disciplined) for actions that do not correspond with legal norms.<sup>109</sup>

Naturally, the clash between law and target responsibility systems reflects a much deeper tension in Chinese governance.

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September 17, 2008, Ningxia Court Net, available at <http://www.nxfy.gov.cn/1/2008-9-17/2920302@384.htm>.

<sup>107</sup> For one such example, see *2009 Nian kafa qu zongzhi, sifa, xinfang kaohe xize* [2009 Comprehensive Social Stability, Judicial, and Xinfang [Letters and Visits] Evaluation Details for the [Nantong Gangzha] Economic Development Zone] March 2, 2009, available at <http://www.gzedz.gov.cn/jiguan/04/01/764809251420.html> (setting targets for local authorities that include both limiting mass petitions and attaining a 96% successful mediation rate for disputes).

<sup>108</sup> In some cases, targets explicitly violate legal norms. See Carl Minzner, *Judicial Disciplinary Systems for Incorrectly Decided Cases: The Imperial Chinese Legal Heritage Lives On*, 39 N.M. Law. Rev. 63 (2009) (discussing many local Chinese courts use of responsibility systems for “incorrectly decided” cases that discipline judges for simple legal error, and openly violate SPC directives).

<sup>109</sup> The district court system described above explicitly instructs judges to remain neutral in carrying out mediation. It also reiterates the CPL instruction that parties should only enter into mediation voluntarily.

Target responsibility systems and personnel management structures are the beating heart of Party control at each level of the Chinese bureaucracy. Unsurprisingly, no clear institutional channels exist for working out conflicts between personnel targets and law.<sup>110</sup> In fact, the ALL specifically bars courts from reviewing decisions of administrative organs regarding personnel rewards or sanctions of their employees.<sup>111</sup>

#### IV. What Road Ahead? Implications of the Turn Against Law

##### A. *Practical Effects: A Destabilizing State-Society Interaction*

Central leaders' strategy for maintaining short-term stability is actually undermining the long-term development of China's legal norms and institutions.

Intense pressure on Chinese courts to resolve disputes via mediation (rather than trial) creates problematic judicial behavior. One example: judges forcing settlements on parties (*qiangzhi tiaojie*). Chinese judges openly flag this as a serious issue.<sup>112</sup> This isn't entirely unique to China. One of the classic criticisms of mediation is the fear that the legal rights and interests of parties will be sacrificed, particularly when significant power imbalances prevent equal

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<sup>110</sup> Carl Minzner, *Riots and Cover-Ups*, *supra* note 49, at 94-97.

<sup>111</sup> Zhonghua renmin gongheguo xingzheng susong fa [Administrative Litigation Law] (promulgated by the Standing Comm. Nat'l People's Cong., April 4, 1989, effective Oct. 1, 1990) 1989 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ., art. 12(2, 3) (P.R.C.), available at <http://www.lawinfochina.com/law/display.asp?id=1204>.

<sup>112</sup> See, e.g., the comments of Wenshan Intermediate People's Court judge Li Yajing, *Woguo minshi susong tiaojie cunzai de wenti ji wanshan tujing* [Existing Problems With Mediation in Chinese Civil Cases and Avenues for Addressing Them], Yunnan Province Court Net, October 23, 2008, available at <http://www.gy.yn.gov.cn/Article/sflt/fglt/200810/8080.html>.

bargaining.<sup>113</sup> This can lead to courts simply ratifying mediated agreements that are manifestly unfair. But such concerns are massively exacerbated when the salary and career evaluations of the judge who is conducting the mediation is directly tied to whether it reaches settlement. When that happens, the judge herself may twist the arms of parties in order to meet her own performance targets. This detracts from the substantive fairness of the process and undermines the legitimacy of the court system.

This, however, is just the tip of the iceberg. The social stability pressures being placed upon Chinese courts and other institutions are fueling a much more complex and destabilizing state-society interaction. Two examples help illustrate this point.

Take the field of anti-discrimination. Chinese hepatitis and AIDS activists are actively attempting to use the legal system to seek redress. National Chinese law bars employers from discriminating against carriers of contagious diseases, such as hepatitis and AIDS.<sup>114</sup> But the Supreme People's Court has not yet recognized an individual right of action (*anyou*) on these grounds. And actually gathering evidence from corporate or government entities to prove they have engaged in discrimination remains difficult. Both of these present serious difficulties for anti-discrimination activists seeking to use litigation channels to push for change.

Official pressure on judges to reach mediated settlements and avoid citizen petitions, however, actually creates openings for civil society activists. One of the leading Chinese anti-discrimination organizations employs savvy media strategies and expressions of social discontent to bring significant pressure on judges in mediation proceedings. Concerned with negative performance evaluations under target responsibility systems, judges then apply pressure on

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<sup>113</sup> For criticism of American mediation practices in domestic violence cases, see Aimee Davis, *Mediating Cases Involving Domestic Violence: Solution or Setback*, 8 Cardozo J. of Conflict Resolution 253, 279-81 (2006).

<sup>114</sup> P.R.C. Employment Promotion Law, issued August 30, 2007, art. 30, available at [http://www.gov.cn/flfg/2007-08/31/content\\_732597.htm](http://www.gov.cn/flfg/2007-08/31/content_732597.htm).

defendants to make concessions in closed-door mediation proceedings even when there is no legal basis for them to do so.<sup>115</sup> Eroding Chinese legal structures and weakening formal legal norms can thus actually increase opportunities for some plaintiffs to press their cases – at least those capable of mobilizing civil society or media pressure to do so.

Labor grievances provide a second example. Yang Su and Xin He detail how top-down pressures on courts to deal with social unrest affect judicial treatment of labor grievances by workers seeking back pay from their employers.<sup>116</sup> Facing severe career sanctions under target responsibility systems for failing to handle street protests, southern Chinese “courts in such circumstances become less concerned with their own procedural requirements than with the imperative dictated by the stability doctrine.”<sup>117</sup> They “completely neglect the neutral position that a court is supposed to assume”<sup>118</sup> and throw legal norms out the window in their effort to reach a settlement. This includes abandoning evidentiary and procedural standards, independently assisting workers to bring their grievances, and ordering unrelated parties (bearing no actual legal liability) to assume the burden of paying workers’ wages.<sup>119</sup> Such court actions are part of coordinated Party responses that aim to “buy off” instances of social unrest through tactical concessions. This includes court or government authorities literally paying protesting workers out of their own budgets to get them off the streets.<sup>120</sup>

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<sup>115</sup> Interview, Beijing.

<sup>116</sup> Yang Su and Xin He, *Street as Courtroom: State Accommodation of Labor Protest in South China*, 157 *Law and Society Review* (2010)

<sup>117</sup> *Id.* at 174.

<sup>118</sup> *Id.* at 167.

<sup>119</sup> *Id.* 157-170.

<sup>120</sup> Su, He, and Liebman note the creation of designated “social stability” funds within courts and governments for precisely this aim – paying off petitioners. *Id.* at 168. Ben Liebman, *A Populist Threat to Chinese Courts?* (forthcoming), at 13, 24.

One might think that these are positive examples of change. Heroic anti-discrimination activists win their case. Suffering workers receive compensation. But look deeper. This state-society dynamic does not generate long-term institutional change. Rather, it is a short-term response to particular expressions of social unrest or public outrage, not the underlying causes.

Indeed, this isn't even what Chinese activists themselves want. As the head of the above anti-discrimination organization himself notes, neither their strategies nor the government responses they prompt are viable long-term solutions to underlying institutional problems. Media pressure cannot be mobilized in every case. Civil society organizations cannot make every individual violation of citizen rights a cause célèbre. Rather, he notes, "what we need is for the government to develop standards to handle these problems in a regularized manner."<sup>121</sup>

But Chinese authorities are not doing this. Rather, they are forcing individual parties to make concessions in closed-door proceedings as a means of addressing cases that attract significant social attention or that generate petitions by disgruntled parties. If civil and administrative dispute resolution norms simply devolve to oiling the loudest and squeakiest wheel in every case, what is left of the Chinese legal system?<sup>122</sup>

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<sup>121</sup> Interview, Beijing.

<sup>122</sup> It is unclear what effect the shift in Chinese dispute resolution practices, particularly within the court system, will have on the interests of foreign corporations doing business in China. Disputes involving such entities do not commonly end up in the Chinese court system. Rather, the China International Economic and Trade Arbitration Commission (CIETAC), one of the busiest arbitral centers in the world, or local arbitration committees (LAC) have emerged as alternative fora for foreign corporations seeking to resolve their disputes in China. Stanley Lubman, *Looking for Law in China*, 20 Colum. J. Asian L. 1, 31 (2006); Fuyong Chen, *Striving for Independence, Competence, and Fairness: A Case Study of the Beijing Arbitration Commission*, 18 Am. Rev. Int'l Arb. 313 (2007). As a result, such commercial disputes may remain somewhat insulated from the social stability pressures that are reshaping the Chinese court system. Of course, as scholars have pointed out, Chinese arbitration proceedings remain



Such policies have long-term ramifications. In any legal system, most grievances (if not simply dropped) are privately settled in the shadow of the law – with the parties reaching agreement between themselves to resolve their disputes based partly on their perceptions of what the outcome might be if they took it to courts or other formal legal institutions.<sup>123</sup> Formal legal norms or publicly adjudicated cases can provide standards against which individual parties can bargain and privately resolve their disputes. Overwhelmingly high percentages of mediated or settled cases are not necessarily cause for concern. For example, a hypothetical rate of 99 percent of mediated or settled cases could suggest that the remaining one percent of cases are successfully providing disputants with perfect information as to the likely success of their disputes via formal channels, allowing them to privately reach mutually acceptable settlements.

But in China, the reverse is taking place. Not only does intense pressure on judges to ward off petitions by dissatisfied parties or to attain high mediation rates affect those cases that are mediated, but they also mean that those cases which are adjudicated are done so in the shadow of responsibility systems and the fear of social protest. As Ben Liebman has noted, this is fueling a “populist threat” to Chinese courts.<sup>124</sup>

These policies are also sending dangerous signals to disputants. Official judicial responses that represent simple tactical concessions to particular instances of popular protest undermine existing legal norms and institutions. Disgruntled parties quite logically conclude that staging a coordinated internet protest or launching a mass petition of hundreds of disgruntled farmers to the provincial capital

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characterized by their own procedural problems. See *id.*, Jerome A. Cohen, Time to Fix China's Arbitration, *Far Eastern Econ. R.*, Jan.-Feb. 2005, available at <http://www.feer.com/articles1/2005/0501/free/p031.html>.

<sup>123</sup> This is true in systems other China. See e.g., Robert Mnookin and Lewis Kornhauser, Bargaining in the Shadow of the Law: The Case of Divorce, 88 *Yale Law Journal* (1979) 950, 997.

<sup>124</sup> Ben Liebman, *A Populist Threat to Chinese Courts?* (forthcoming).

(regardless of underlying validity of their complaint) stands a better chance of getting what they want rather than actually using legal channels. This dynamic has severe long-term implications for social stability.<sup>125</sup>

Further, it isn't even clear that the current high-pressure emphasis on judicial mediation actually helps Chinese authorities meaningfully resolve disputes in the short-term. Take one of the key official rationales advanced for the shift toward mediation: the presumably higher voluntary execution rates associated with mediated agreements. Local Chinese courts face pervasive difficulties enforcing their decisions as a result of limited resources and low institutional standing.<sup>126</sup> Top Chinese judicial authorities emphasize that the shift toward mediation will help solve such enforcement difficulties.<sup>127</sup> Conceptually, this makes sense. Judicial mediation theoretically represents a voluntary settlement by parties of their dispute, in contrast to the compulsory nature of an adjudicated court decision. As such, execution rates for mediated decisions should be higher. After all, the parties agreed themselves to settle the dispute, right?

Well, no. Once Chinese courts and judges start aggressively pushing mediation in order to meet their own performance targets, these assumptions go out the window. As the voluntary nature of mediation itself declines, levels of voluntary compliance also start to go down. Parties begin to have second thoughts about agreements that they were pushed into signing. Plaintiffs begin to discover an increasingly wide gap between the compensation they received in

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<sup>125</sup> For a more extensive discussion of this point, see Minzner, *Xinfang*, *supra* note 105.

<sup>126</sup> Xin He, *Enforcing Commercial Judgments in the Pearl River Delta of China*, 59 *American J. of Comp. L.* (2009).

<sup>127</sup> For comments by the head of the Supreme People's Court, see Chen Fei, *Wang Shengjun: Zhuzhong yunyong tiaojie shouduan jie jue susong nan, zhixing nan wenti* [Wang Shengjun: *Emphasize the Use of Mediation to Resolve Litigation and Enforcement Difficulties*], *Xinhua*, July 28, 2009, available at [http://news.xinhuanet.com/legal/2009-07/28/content\\_11788407.htm](http://news.xinhuanet.com/legal/2009-07/28/content_11788407.htm).

court mediation proceedings and what they are entitled under law. They begin to contest mediation agreements, despite their binding nature under Chinese law.<sup>128</sup> Enforcement problems reemerge. The extent of this phenomenon can be partially gauged by comparing the respective percentages of judicially mediated cases and adjudicated cases that are submitted to court enforcement tribunals for compulsory enforcement (*qiangzhi zhixing*). In several Beijing courts, those numbers are roughly equal – between 30-50%. In one, the rate of voluntary compliance with court decisions (63%) actually exceeds that for judicially mediated settlements (56%).<sup>129</sup>

Alternative dispute resolution succeeds when it truly represents an “alternative” to litigation. It allows for the resolution of those cases that can (and should) be resolved through channels such as mediation. But that is not the case when alternative dispute resolution becomes an artificial panacea for social stability, when Chinese courts face hard numerical targets for preventing petitions to higher authorities and for successfully mediating cases, and when litigation channels are simply shut in the face of disgruntled parties. At that point, the “alternative” in alternative dispute resolution vanishes. When that happens, all of the problems associated with litigation that Chinese officials are seeking to avoid – weak institutional legitimacy of courts and difficulties enforcing verdicts – simply re-emerge in new forms.

What do Chinese lawyers and scholars themselves think about the official shift against law? It depends on who you ask, and how tightly tied they are to the Party-state apparatus. Naturally, the official propaganda line details miraculous successes in resolving grievances with no negative consequences. An academic expert on mediation who is enjoying increasing official attention as a result of the shift in government policy describes “isolated implementation

<sup>128</sup> Jiaqi Ling, *The Enforcement of Mediation Settlement Agreements in China*, 19 Am. Rev. Int'l Arb. 489, 495-499 (2008).

<sup>129</sup> Li Gang, *Fayuan “tiaojie” rongyi, zhixing nan* [Court “Mediation” Easy, Enforcement Hard], Beijing Youth Daily, July 7, 2010, available at <http://bjyouth.yynet.com/article.jsp?oid=67378947>.

problems” involving forced mediation.<sup>130</sup> A Beijing local people’s congress representative carefully expresses more critical views. He warns that there is a real risk of “excessively emphasizing mediation,” that “law must be used as a ruler for determining settlements,” and that the failure to do so will simply generate more petitions by disgruntled citizens.<sup>131</sup>

Unsurprisingly, the harshest criticism comes from liberal Chinese legal scholars and public interest lawyers. They are very depressed. They view the current track as a complete repudiation of reforms on which they have worked and promoted over recent years. “There has been a serious regression from five to ten years ago.”<sup>132</sup> “I have completely lost the idealism I had in the late 1990s regarding courts and the law.”<sup>133</sup>

#### *B. A Comparative Look: Similar, But Different*

Naturally, China’s shift away from trials and toward mediation is not entirely unique. Parties in many countries face prohibitive litigation costs. National judiciaries are grappling with overloaded court dockets that result in lengthy trial delays. Many nations are consequently experimenting with alternatives to court adjudication. These range from efforts (such as in the Philippines) to revive traditional village dispute-resolution institutions,<sup>134</sup> to those (such as in Argentina) aimed at importing court-connected mediation models from abroad.<sup>135</sup>

<sup>130</sup> Interview, Beijing, July 11, 2010.

<sup>131</sup> Interview, Beijing, July 14, 2010.

<sup>132</sup> Interview, Xi’an, June 21, 2010.

<sup>133</sup> Interview, Beijing, July 13, 2010.

<sup>134</sup> Gil Marvel P. Tabucanon, James A. Wall, Jr., Wan Yan, *Philippine Community Mediation, Katarungang Pambarangay*, 2 J. Disp. Resol. 501 (2008).

<sup>135</sup> Timothy K. Kuhner, *Court-Connected Mediation Compared: The Cases of Argentina and the United States*, 11 ILSA J Int’l & Comp L 519 (2005). For a look at the Indian reform efforts, see Hiram Chodosh, Stephen A. Mayo, A.M. Ahmadi, Abhishek M. Singhvi, *Indian Civil Justice System Reform: Limitation and Preservation of the Adversarial Process*, 30 N.Y.U. J. Int’l L. & Pol. 1 (1997/1998).

With regard to developing countries, a “backlash” narrative has emerged out the law-and-development and law-and-society movements to partially explain these shifts. This narrative stresses how imported Western rule-of-law reforms (regarding law, litigation, and courts) pushed by international NGOs or multinational organizations such as the World Bank mesh poorly in practice with local realities. Reforms fail. This then generates a counter-reaction in the form of experiments (or calls for such) with traditional or community mediative institutions that respond better to local conditions. This depiction informs both the received wisdom regarding the failures of the law-and-development movement in Latin America during the 1960s and 1970s,<sup>136</sup> and criticism of the modern global rule-of-law movement made by scholars such as Brian Tamanaha.<sup>137</sup>

Superficially, at least, it is also possible to explain the official Chinese shift against the law through precisely this rubric. Indeed, as early as 2000, Matthew Stephenson warned that:

“[I]f [Chinese] legal reform undermines the informal institutions [such as mediation] that [groups such as the poor] have evolved to protect their interests, [legal reforms] cannot work. Even worse, if the unintended consequences create especially serious social problems, there may be a backlash against reforms.”<sup>138</sup>

Precisely this view - that late 20<sup>th</sup> century legal reforms are a poor fit for Chinese conditions - informs arguments made by foreign

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<sup>136</sup> For a broad discussion of the failings of the law-and-development movement, see David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 Wis. L. Rev. 1062 (1974).

<sup>137</sup> Brian Tamanaha, *The Primacy of Society and the Failures of Law and Development* (forthcoming).

<sup>138</sup> Matthew Stephenson, *A Trojan Horse Behind Chinese Walls?: Problems and Prospects of U.S.-Sponsored "Rule of Law" Reform Projects in the People's Republic of China*, 18 UCLA Pacific Basin Law Journal 64 (2000)

scholars such as Peerenboom, as well as the Chinese Party authorities who are currently leading the shift against law.<sup>139</sup>

A second effort to understand Chinese developments through a comparative lens emphasizes the extent to which the shift against trials and litigation is part of a broader worldwide phenomenon. Indeed, the United States is not exempt from these trends. As Marc Galanter has shown, American federal and state courts experienced a long secular decline in the percentage of cases resolved by trials over the 20<sup>th</sup> century.<sup>140</sup> Since the 1980s, this has been also coupled with a steep drop-off in the absolute number of cases resolved through trial.<sup>141</sup> This has led to dramatic growth of the number of cases resolved through alternative means, such as out-of-court settlements. These trends have also been behind efforts (such as the 1990 Civil Justice Reform Act and the 1998 Alternative Dispute Resolution Act) to press for the creation of alternative dispute resolution (ADR) institutions within American courts.

What explains the American shift away from trials? With regard to the long-term decline: resource constraints. Since the early 20<sup>th</sup> century, the United States has experienced rapid growth in both legal regulation and the numbers of lawyers. Barriers excluding minorities from accessing the courts have eroded. These factors led to a surge in efforts to rely on the courts to resolve grievances. But growth in judicial resources has not kept pace. The result has been an increase in court backlogs, trial delays, and litigation expenses. This has made litigants more willing to look for other mechanisms

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<sup>139</sup> Randy Peerenboom, *More Law, Less Courts: Legalized Governance, Judicialization and Dejudicialization in China* (forthcoming); *supra* note 43, at 10-11.

<sup>140</sup> Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 Stan. L. Rev. 1255, 1255-1262 (2005) (noting that 19.9 percent of federal court cases were terminated by trial in 1938, compared with 1.7 percent in 2003).

<sup>141</sup> Marc Galanter, *A World Without Trials*, 2006 J. Disp. Resol. 7, 13 (2006) (noting a decline in the number of federal civil trials from 12,529 in 1985 to 3,952 in 2004).

(such as mediation or settlement) in order to resolve their disputes.<sup>142</sup>

Different factors explain the rapid short-term decline in American trials over the last three decades. To use Galanter's phrase, the United States has experienced a broad "turn against law" since the 1970s.<sup>143</sup> Law, lawyers, and litigation have fallen in disrepute. On the left, the bar and legal institutions came under fire for supporting entrenched interests and inadequately responding to the interests of the underprivileged. This critique helped spawn the modern ADR movement. On the right, corporate interests and conservative politicians attempted to roll back what they viewed as the liberal excesses of the 1950s and 1960s.<sup>144</sup> Specific reforms limited the role of courts in addressing grievances, by restricting plaintiff standing, individual rights, and tort liability.<sup>145</sup> Both movements contributed to reducing the numbers of court cases brought to trial - the former through providing alternative fora for their resolution, the latter through shutting the courthouse door.

These developments fueled deeper ideological shifts. Beginning in the 1970s, "too much law" emerged as a prevailing critique of the American legal system. Litigation began to be perceived as a "pathology." It was a symptom to be cured, rather than a natural component of the legal and political system, or (as in the 1960s) an important tool to redress social injustice.<sup>146</sup> Self-perceptions of federal judges and court administrators shifted as well. They embraced the view that their job was to actively promote settlements, rather than to take cases toward trial or enforce public

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<sup>142</sup> *Id.*, at 13.

<sup>143</sup> Marc Galanter, *The Turn Against Law: The Recoil Against Expanding Accountability*, 81 Tex. L. Rev. 285 (2002).

<sup>144</sup> *Id.*, at 287-299.

<sup>145</sup> Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 Stan. L. Rev. 1255, 1269-1272 (2005).

<sup>146</sup> Marc Galanter, *The Turn Against Law: The Recoil Against Expanding Accountability*, 81 Tex. L. Rev. 302-304 (2002).

norms.<sup>147</sup> Beginning in the 1990s, the perceived need to “cure” the American legal system of litigation spawned institutional reform movements such as “therapeutic jurisprudence” and “problem-solving courts.” These explicitly de-emphasize reliance on adversarial litigation and trials. And they seek to redefine the role of lawyers away from solely focusing on the legal rights and interests of their clients.<sup>148</sup>

Just as in China, these changes have sparked critical commentary. American scholars have warned against embracing settlement as the penultimate goal of court work. They call for careful evaluation to ensure that court settlement and ADR practices conform to norms regarding the administration of justice.<sup>149</sup> Others caution against applying a “one-size-fits-all” approach, identifying a range of cases (such as domestic violence) where resort to mediation may be inappropriate.<sup>150</sup> The problem-solving court and therapeutic jurisprudence movements have come under fire for overlooking parties’ rights to due process and zealous representation.<sup>151</sup> Critics have proposed providing clearer guidance for judges, to ensure that judicial pro-settlement policies do not violate explicit bars in the

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<sup>147</sup> Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 Stan. L. Rev. 1255, 1266 (2005).

<sup>148</sup> David Wexler, *REHABILITATING LAWYERS: PRINCIPLES OF THERAPEUTIC JURISPRUDENCE FOR CRIMINAL LAW PRACTICE* (2008); David Wexler and Bruce Winick, eds., *JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS* (2003); Mae Quinn, *The Modern Problem-Solving Court Movement: Domination of Discourse and Untold Stories of Criminal Justice Reform*, 31 Wash. U. J. L. & Policy (2009).

<sup>149</sup> Marc Galanter and Mia Cahill, *‘Most Cases Settle’: Judicial Promotion and Regulation of Settlements*, 46 Stan. L. Rev. 1339, 1387-91 (1994).

<sup>150</sup> Aimee Davis, *Mediating Cases Involving Domestic Violence: Solution or Setback*, 8 Cardozo J. of Conflict Resolution 253, 279-81 (2006).

<sup>151</sup> Mae Quinn, *An RSVP to Professor Wexler’s Warm Therapeutic Jurisprudence Invitation to the Criminal Defense Bar: Unable to Join You, Already (Somewhat Similarly) Engaged*, 48 Boston College L. Rev. 539 (2007); “Drug Courts Need Intervention, Says Problem-Solving Courts Expert,” March 29, 2010, available at <http://www.newswise.com/articles/drug-courts-need-intervention-says-problem-solving-courts-expert>.



Federal Rules of Civil Procedure and the Model Code of Judicial Ethics against coercing parties into mediation.<sup>152</sup>

Chinese and American developments share some similarities. Resource constraints and efficiency concerns are prompting authorities in both countries to look for alternatives to litigation as a means of resolving disputes. Scholars and activists are honestly looking for better ways to respond to citizen problems. And current shifts against law in both the United States and China reflect a counter-reaction by vested elites (American corporations concerned with their litigation liability, Chinese Party leaders concerned with challenges to social stability and their rule) to earlier periods in which access to the judiciary was greatly expanded and courts were charged with hearing a much wider range of civil and administrative grievances.

Parallels between China and other developing countries are also partially justified. Gaps between legal norms (often imported) and actual realities are becoming clearer. In the first exhilarating blush with legal reform (whether in Latin America during the 1960s, or in China during the 1990s), it is easy to paper these over by focusing on exciting developments (new Labor Law passed!) as evidence of rapid change. But as time passes, discrepancies emerge. Because of the “connectedness of law” to the rest of society, legal reforms trigger reactions from other social forces (such as elite interests). These mute the content of the original reforms. Implementation stalls. And formerly breathtaking developments remain little more than yellowed documents (or outdated web pages) stashed in the forgotten corners of government bureaus.<sup>153</sup>

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<sup>152</sup> See Sylvia Shaz Shweder, *Judicial Limitations in ADR: The Role and Ethics of Judges Encouraging Settlements*, 20 Geo. J. Legal Ethics 51 (2007), 66-71 (proposing listing “downgrading the merits of one party’s case,” and “speaking directly to one party” as examples of specific judicial conduct that should be clarified to constitute inappropriate coercive behavior).

<sup>153</sup> Tamanaha, *supra* note 137, at 34.

But key differences exist as well. First, China does not fit the paradigm offered by law-and-society scholars and law-and-development critics. Outsiders did not impose late 20<sup>th</sup> century legal reforms on China. Rather, after the chaos of the Maoist years, Chinese leaders themselves decided that they wanted to revise their own institutions. They decided to pursue legal reform to address problems they perceived.<sup>154</sup> Foreign actors involved in the legal reform process, such as the American Bar Association or the Yale-China Law Center, have always been secondary partners invited to participate by Chinese authorities who have themselves controlled the pace, speed, and content of reforms.

China's shift against law is consequently an entirely indigenous rejection by Chinese leaders of their *own* reforms, not of externally imposed ones. Ironically, it is these late 20<sup>th</sup> century legal Chinese reforms that Tamanaha cites as a successful example of self-directed legal development, and contrasts with failed rule-of-law programs (imposed by outsiders) elsewhere in the developing world.<sup>155</sup> Now it is precisely these Chinese reforms that are going under the ax.

Second, the current rejection of legal reforms is being driven by Chinese leaders, not by society at large. Contrary to Stephenson's warning, ordinary Chinese citizens are not stampeding in droves out of courtrooms toward mediated channels. The picture is much more mixed. In a series of 2001-2 surveys, Benjamin Read and Ethan Michelson found that disputants in developed areas of China were much less likely to seek assistance from third-party mediative institutions, such as residents committees, than they were to

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<sup>154</sup> These efforts overlap in part with broader trends of China voluntarily adopting some international norms in the post-reform period. See, e.g. Wang Hongying, "Linking Up With the International Track": *What's in a Slogan?* 189 *China Quarterly* 1 (2007) (analyzing the rapid rise of Chinese political slogans emphasizing the need to "link up with the international track" in the 1990s, and noting their decline after 2001).

<sup>155</sup> *Id.*, at 52-53.

approach formal legal institutions such as lawyers and courts.<sup>156</sup> The surveys, conducted during the height of the official state emphasis on litigation and trials, revealed a reasonably high level of urban satisfaction with the formal legal system. Two-thirds of Beijing residents who had actually used the courts reported that the experience met their expectations both with regard to substance and process.<sup>157</sup> With respect to developed urban areas, this is hardly evidence of a widespread “backlash” by Chinese society against 1990s-era court reforms that might justify the official shift against law.

Of course, there is an important caveat: the picture differs dramatically in Chinese rural areas. Rural Chinese residents report overwhelmingly negative experiences with courts.<sup>158</sup> In contrast, they report much higher levels of satisfaction with village mediation institutions in resolving their disputes.<sup>159</sup> Michelson and Read find Chinese rural residents are experiencing what Mary Gallagher has termed “informed disenchantment” with the formal Chinese legal system.<sup>160</sup> Real-life encounters of rural residents with Chinese courts are reducing their confidence in and support for the formal Chinese legal system. Michelson consequently advises that dispute resolution reform efforts in rural China “should not be concentrated solely on opening up the courts,” but should “ensure that rural

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<sup>156</sup> Benjamin Read and Ethan Michelson, *Mediating the Mediation Debate*, 52 J. of Conflict Resolution 737, 751 (2008).

<sup>157</sup> Ethan Michelson and Benjamin Read, *Public Attitudes Toward Official Justice in Beijing and Rural China* (forthcoming), at 11.

<sup>158</sup> Roughly 60% of rural respondents having experience with courts report that it fails to meet their expectations with regard to either substance or process. *Id.*

<sup>159</sup> Benjamin Read and Ethan Michelson, *Mediating the Mediation Debate*, *supra* note 156, table 7, at pg 758 (noting that only 47% of rural respondents reported that their experiences with the legal system met or exceeded their expectations, compared with 69% of respondents reporting the same with regard to village committees).

<sup>160</sup> Ethan Michelson and Benjamin Read, *Public Attitudes Toward Official Justice in Beijing and Rural China* (forthcoming), at 28; Mary Gallagher, *Mobilizing the Law in China: “Informed Disenchantment” and the Development of Legal Consciousness*, 40 Law and Society Review 783 (2006).

residents continue to enjoy “access to local, informal solutions that appear to work relatively effectively.”<sup>161</sup>

So, even if the new policies represent a top-down, Party-led rejection of late 20<sup>th</sup> century legal reforms, and even if it appears to contradict the demands of urban Chinese residents, might there still be a rationale? Might the turn against law be an entirely reasonable Party response to practical problems facing rural Chinese society?

This leads to the third difference. Take as given the need for strengthening village dispute resolution forums in rural China. Grant the law-and-society critique regarding the need to develop indigenous institutions (rather than transplanting foreign legal norms) as part of the development process. And (for the sake of argument) even accept prevailing American normative biases in favor of viewing litigation as a disease that needs to be “cured” through building mediative institutions. Even assuming all of those are correct, they are still of limited relevance to understanding the current shifts in the Chinese judiciary. Because that is not what Chinese authorities are doing. The main focus of the new official policy line is not on building the types of alternative institutions that all of these arguments suggest is necessary. Nor is it not a careful experiment with “dejudicializing” a limited number of disputes.<sup>162</sup>

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<sup>161</sup> Ethan Michelson, *Popular Attitudes Toward Dispute Processing in Urban and Rural China*, The Foundation for Law, Justice, and Society, pp 7-8 (2008), available at <http://www.fljs.org/uploads/documents/Michelson%231%23.pdf>.

<sup>162</sup> Peerenboom downplays the extent of the shift against law. Noting the shift toward “dejudicializing” disputes and the re-emphasis on mediation, he portrays this as a limited and “judicious” response to what he terms “growing pains and politically sensitive cases” that “will, and should be limited to certain areas.” But he undermines his own argument (and confirms the broad nature of the current shift against law) by acknowledging that such cases include “civil cases where people are not happy with results because of the perceived lack of competence of judges, actual or suspected corruption, the feeling that laws are at odds with local norms, difficulties in enforcing the judgment, or simply the plaintiff’s lack of understanding or unrealistically high expectations of what a legal system can do.” Randy Peerenboom, *More Law, Less Courts: Legalized Governance, Judicialization and Dejudicialization in China* (forthcoming). That, of course,

Rather, this is a political takedown of the Chinese judiciary, carried out in the name of social stability, and implemented via Party propaganda campaigns and strengthened responsibility targets for petitioning and mediation.

Now, this is where it gets tricky. Despite the highly politicized cast of the new policy line, official Chinese efforts to strengthen mediation will probably not be entirely negative in result. The Chinese bureaucracy is like a large cruise ship. Central authorities have firmly shoved the rudder of legal reform in a new (and problematic) direction. This is generating a bubbling and turbulent wake of actions among local Chinese authorities. Many will simply be aimed at papering over social stability pressures that are deforming Chinese judicial institutions by endowing them with the mantra of ADR. But some reforms may be positive. After all, once the fiction of magically resolving all disputes via mediation miracle workers fades, it is local authorities who are stuck with the practical problem of what to do with disgruntled people who are upset with each other (and with the state). Some officials will choose suppression. But others will experiment with meaningfully strengthening quasi-autonomous village mediation institutions in exactly the way that scholars have suggested is necessary.<sup>163</sup> The coming years will witness a range of reforms – good and bad – going

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includes almost every dispute. For a recent SPC directive which directly contradicts Peerenboom's assessment, laying out the extremely sweeping extent of current mediation policies, see *Zuigao renmin fayuan guanyu jinyibu guanhe "tiaojie youxian, tiaopan jiehe" gongzuo yuanze de ruogan yijian* [SPC Opinion on Further Carrying Out Work Principles Regarding "Mediation Has Priority, and Mediation and Trial Should Be Fused"], June 7, 2010, available at [http://news.xinhuanet.com/legal/2010-06/28/c\\_12271040.htm](http://news.xinhuanet.com/legal/2010-06/28/c_12271040.htm).

<sup>163</sup> Ethan Michelson, *Popular Attitudes Towards Dispute Processing in Rural and Urban China*, supra note 161, at 9. Of course, even if some local Chinese authorities do move to, say, meaningfully strengthen village mediation institutions, questions remain regarding whether this, by itself, is a long-term solution to the full range of disputes facing rural China. Certainly some disputes (say, land disputes involving local township authorities) would seem to be less amenable to resolution through village mediation.

under the rubric of mediation and ADR. The challenge will be to distinguish between them.<sup>164</sup>

What are the practical implications of this analysis for outside observers looking at China through a comparative lens?

First, keep a clear head in looking at China. It is easy for countries such as China to become an exotified Other for those who are discontented with the deficiencies of their own legal systems, and are searching for an imagined (and superior) reality to raise up in opposition to the perceived evils of their own systems. At least one American scholar has specifically proposed importing “Chinese court-performed mediation” into U.S. federal courts.<sup>165</sup> Mediation certainly has benefits. This author would be among the first to point out the need for Americans to broaden their vision and learn from other countries. But before blindly importing Chinese mediation practices (or setting up social stability preservation offices to coordinate governmental responses to dissatisfied litigants), make sure we really understand how these actually operate in China.

Second, foreign scholars and NGOs need to exercise a good deal of care in working on Chinese ADR issues over the next several years. Chinese institutions are reaching out to foreign scholars and international institutions for input with regard to their reforms. Mediation is now heavily promoted in US government rule-of-law

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<sup>164</sup> When in doubt, ask what responsibility targets mediators and government officials face, how those affect his salary and career performance, and think about what the resulting behavioral incentives might be.

<sup>165</sup> See Michael T. Colatrella, ‘Court-Performed’ Mediation in the People’s Republic of China: A Proposed Model to Improve the United States Federal District Courts’ Mediation Programs, 15 Ohio St. J. on Disp. Resol. 391, 415 (2000). In Colatrella’s defense, he does say that “there is evidence that the court-performed nature of [the Chinese] system would translate well to the federal courts, but a wholesale application of China’s process would be inconsistent with longstanding values underlying the American judiciary.” Id. For an example of an American state supreme court judge gazing at Chinese mediation practices and bemoaning excessive litigation in the United States, see Justice Robert Utter, *Dispute Resolution in China*, 62 Wash. L. Rev. 383 (1987).

programs. Scholars tout it as a key component for spreading the rule of law internationally.<sup>166</sup> Others emphasize the need to explore alternatives to state law in reform efforts.<sup>167</sup> As these trends merge, it is important not to make simplistic assumptions that “mediation here = mediation there.” And it is important to bear in mind the particular context in which mediation is being advanced and practiced. In the words of one Chinese public interest lawyer:

Foreign mediation experts who come to China may know a lot about mediation. But they just don’t see how it is being used here. These foreign experts talk about the benefits of mediation - how it can save time and expense. But in some cases, Chinese judges are pressing us to mediate after they have actually conducted a full trial - they do not want to issue a decision. They do this to protect their own judicial evaluations, raise their mediation rates, and guard against negative consequences of verdicts that are appealed or that generate citizen petitions (*shangfang*). Judicial mediation as practiced actually drags the process out and adds to the expense. Many foreign experts just don’t get that.<sup>168</sup>

It is easy to look at litigation as “pathological” and reflexively cheer for ADR when your system actually has other, well-established channels for holding officials accountable or resolving conflicts between citizens. But when the national shift toward mediation is tied to a broader politicized takedown of the key institutions that have been playing those roles over recent decades, it is essential to be nuanced and careful.

### *C. The Turn Away From Law: Is Legal Education Next?*

Recent years have witnessed a steady shift in China away from legal norms and ideals held out as models since the 1980s and 1990s. First Chinese courts, then the bar, have received official pressure to

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<sup>166</sup> Jean R. Sternlight, *Is Alternative Dispute Resolution Consistent with the Rule of Law? Lessons from Abroad*, 56 DePaul L. Rev. 569 (2007).

<sup>167</sup> Brian Tamanaha, *The Primacy of Society and the Failures of Law and Development* (forthcoming).

<sup>168</sup> Interview, Beijing, July 13, 2010.

conform themselves to new, politically correct ideals. These de-emphasize formal law and judicial professionalism. They stress the importance of Party leadership and the need to respond to populist demands.

But at least one field has remained relatively immune to such changes so far: legal education. Despite the mounting pressure on courts and lawyers to redefine themselves in accordance with the new (or revived) ideals, Chinese law schools have continued to churn out graduates largely educated in formal law. Chinese law professors - many with overseas experience in the West or Japan - continue to reflect the values of the late 20<sup>th</sup> century reform era in which they were trained. Their research and writing tends to emphasize the importance of formal law. Many are very resistant to the changes currently sweeping through China's legal system. How long can this disconnect persist?

Perhaps not long. Chinese authorities are taking steps to extend the rollback against late 20<sup>th</sup> century legal reforms into classrooms. Beginning in the fall of 2010, students in China's political science and law universities had a mandatory class on "Socialist Rule of Law" added to their studies, pursuant to a joint directive by Party political-legal, propaganda, and education authorities. They use a textbook compiled under the guidance of the former head of the central Party political-legal committee.<sup>169</sup> These reforms are likely to expand. Training sessions on "socialist rule of law" have begun for young faculty members at law schools throughout China.<sup>170</sup>

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<sup>169</sup> Zhao Lei, "Shehui zhuyi fazhi" jin jiaocai, jin ketang, jin naodai, ["Socialist Rule of Law" to Enter Textbooks, Classrooms, Minds], Southern Weekend, November 11, 2009, available at <http://www.infzm.com/content/37227>.

<sup>170</sup> Interviews. This environment is fueling a range of local educational experiments. For example, in Shenyang, local Party and school officials have supported altering law school curricula to better prepare graduates to work in *xinfang* organs and assist in addressing citizen petitions. Qian Wuping, *Shenyang daxue ban shouge xinfang zhuan ye beihou: shiwei shuji tiyi sheli*, [Behind Shenyang University's Establishment of the First Xinfang Major: The Municipal Party Secretary Proposal], June 8, 2009, Beijing News, available at <http://news.sina.com.cn/c/sd/2009-06-08/024617970425.shtml> (which - despite the



What these educational changes will actually involve remains unclear. “Socialist rule of law” is a mushy concept. Authorities have reduced it to a series of contradictory slogans that echo those reverberating through the judiciary and other institutions.<sup>171</sup> Comments made by key supporters of the “socialist rule of law” (such as the former dean of the Beijing University law school) emphasize that it is intended to emphasize social stability. It is explicitly intended as a contrast with “Western rule-of-law” concepts that are deemed inappropriate for China. It aims to direct scholarly attention away from book learning, in order to focus on and learn from China’s own characteristics, historical circumstances, and practical realities.<sup>172</sup> Some academics have embraced these calls. Rejecting the prevailing orthodoxy in Chinese legal academia regarding the importance of formal law, litigation, and legal institutions, they have lent their support to an alternative vision, pushing for increased emphasis on mediation and alternative dispute resolution (ADR) practices in Chinese law schools and training programs for judges.<sup>173</sup>

These efforts are unleashing deep conflicts in faculty meetings throughout China. Many Chinese legal academics are politically liberal, remain committed to earlier reform-era legal norms, and

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title of the article - details the creation of a *xinfang* specialization, rather than a major).

<sup>171</sup> Specifically, *yifazhiguo, zhifa weimin, gongping zhengyi, fuwu daju, dang de lingdao* “rule the country according to law, enforce the law in the popular interest, [uphold] equality and justice, serve the overall situation [i.e., not narrow legal technicalities], [uphold] Party leadership”. Zhao Lei, “Socialist Rule of Law” to Enter Textbooks, Classrooms, Minds, supra note XX.

<sup>172</sup> Zhu Suli, *Shehui zhuyi fazhi linian yu ziben zhuyi fazhi sixiang de bijiao* [A Comparison Between the Concept of Socialist Rule of Law and Capitalist Rule of Law Thought], Xinhua, June 17, 2008, available at [http://news.xinhuanet.com/legal/2008-06/17/content\\_8386868.htm](http://news.xinhuanet.com/legal/2008-06/17/content_8386868.htm).

<sup>173</sup> Fan Yu and Li Hao, JIUFEN JIEJUE [DISPUTE RESOLUTION] (2010). Such academics refer to themselves the “conservative faction,” in opposition to liberal intellectuals who emphasize the need for deeper institutional and political reforms. Interview, Beijing, July 11, 2010.

resist these shifts. Some oppose any effort to skew the content of higher education for political purposes. They view such moves as a swing away from the partial de-politicization of higher education over the past several decades, and a reversion to pre-1978 Maoist practices. Others, such as civil litigation and civil procedure professors, have more direct objections. They view the turn away from litigation and toward mediation and de-professionalization as a frontal attack on the relevance of their fields (and careers).<sup>174</sup>

Just to be clear: this is not a simplistic conflict between “good” liberal law professors who support litigation and “bad” Party officials or academics who support mediation. Many of the critiques of the 1990s-era legal reforms have merit. Excessive reliance on imported legal norms and institutions may not respond fully to the needs of rural China. Many Chinese academics (like their counterparts overseas) remain occupied with theoretical ruminations that have little relevance to practical reality. Carefully considered mediation policies could help improve dispute resolution in China. Indeed, if these critiques were raised in the context of a nuanced, balanced discussion, it might help address many of the pressing problems facing China today.

But that is not taking place. These shifts are taking place against the backdrop of an official political campaign reconsidering the role of law – a campaign sponsored by Party authorities for overtly political purposes. This is beginning to erode the room left for open academic debate. Academics who oppose these policies or work on fields that do not accord with them (such as constitutionalism) are finding their conferences cancelled, research funds unavailable. Those who support the official line are finding their stars rise. This is affecting scholarly output. Chinese ADR specialists are reframing their views to parrot central slogans and policies.<sup>175</sup>

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<sup>174</sup> Interview, Beijing, July 11, 2010.

<sup>175</sup> Compare the content of the Chen Yanping propaganda campaign with the introduction of Fan Yu and Li Hao’s textbook on alternative dispute resolution, *JUFEN JIEJUE [DISPUTE RESOLUTION]* (2010) (stating that the ideal of “a ‘world without litigation’ is not a concept lacking in actual evidence, that some local

Two dangers exist if China's turn away from law continues to expand in the educational realm. First, it may lead to the silencing of one of the key sets of voices calling for the concept of law as an institution for resolving civil grievances between citizens, or as a tool for limiting government power. Naturally, whether this qualifies as a "danger" may depend on one's political views.

Second, it may create a problematic "echo chamber" effect. What happens if increasing numbers of scholars searching for funding, promotions, or official recognition join the bandwagon of the politically approved line? Discussion will narrow. There will be a proliferation of academic articles and government research projects titled "Further Outstanding Successes in Building the Socialist Rule of Law: Rural Township in Gansu Province Achieves 'World Without Litigation'." Continue these trends far and long enough, and the role of Chinese legal academia as one of the few institutions able to (at least partially) speak truth to power could be degraded, gripped by a new legal orthodoxy that chokes off open discussion. Central Chinese leaders themselves would suffer. They will find themselves in a house of mirrors, lacking any objective means to gauge the success or failure of their own policies, with tame scholars and sycophantic local officials merely reflecting back a distorted Panglossian version of reality.

*D. Whither the Study of Chinese Law: Back to the Future?*

This Article also argues for the need to reconceptualize academic studies of Chinese law. We should recognize that we have entered a "third wave" of scholarship, and call into question prior assumptions dominating the field. A brief review of two earlier periods may be

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mediation committees have indeed successfully achieved Party goals of social stability in ensuring that "small problems don't leave the village, and large problems don't leave the township," and that alternative dispute resolution practices can help realize classical Chinese Confucian governance ideals better than adversarial litigation).

helpful.

As of the mid-20<sup>th</sup> century, Chinese law simply did not exist as a discrete field of research in the West. Imperial legal codes that governed Chinese dynasties reaching back to the 7<sup>th</sup> century AD were un-translated; imperial Chinese legal institutions were unstudied. True, historians did know of their existence. But the orthodox depiction in this “first wave” emphasized the relative unimportance of legal institutions. “Law was subordinate to morality,” according to the pithy 1948 summation by prominent China historian John Fairbank.<sup>176</sup> Imperial law was viewed as primarily penal in nature, and rarely applied with any rigor or consistency. Under this narrative, private law simply did not exist in China. Business dealings and transactions were instead handled according to time-honored local Chinese customs and traditions.<sup>177</sup>

Similar trends governed study of the People’s Republic of China (P.R.C.). During the decade after the founding of the modern Chinese state in 1949, foreign academic studies of P.R.C. law were almost zero. Communist authorities’ closure of the nation to all but a selected handful of foreigners certainly posed a practical barrier. But the polarized ideological atmosphere in international political and academic circles of the time also fostered a view of Chinese law as but a meaningless extension of Maoist political slogans. As one 1956 commentator noted, “[i]t is futile, therefore, to attempt any comparative study of criminal law on the Chinese mainland, for there appears to be no “law” as we understand its meaning in the free world.”<sup>178</sup> China thus remained the classic Other. Its legal system was inscrutable and impenetrable, operating on norms completely foreign to Western scholars.

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<sup>176</sup> John Fairbank, *THE UNITED STATES AND CHINA*, 108 (1948).

<sup>177</sup> *Id.*, at 108-110.

<sup>178</sup> Huai Ming Wang, *Chinese and American Criminal Law*, 46 *J. of Criminal Law, Criminology, and Political Science*, 797 (1956). Of course, consistent with the prevailing political biases of the time, not *all* Chinese law was dismissed. The author continues, “Only the law now effective in Nationalist China has legal and historical value, and it alone should be taken as a representation of real Chinese law.” *Id.*

Beginning in the 1960s, this orthodox portrayal of the Chinese legal system came under challenge by a “second wave” of scholarship. Historians such as Bodde, Ch’ü, Morris, and Watt broke open Western academic understanding of the imperial Chinese legal system with their detailed examinations of Qing dynasty legal cases and imperial legal institutions.<sup>179</sup> Full translations of the imperial Chinese codes followed.<sup>180</sup> Scholars such as Philip Huang delved into local Chinese archives, demonstrating that imperial Chinese civil disputes were not limited to informal dispute resolution mechanisms. Rather, imperial Chinese magistrates found themselves confronted with a wide range of inheritance, debt, and land claims, which they did not hesitate to resolve according to relevant statutory law.<sup>181</sup>

Similar processes took place with regard to modern Chinese law. Foreign scholars found that there was indeed law to study in mainland China, contrary to earlier assertions. Relying on interviews with mainland refugees in Hong Kong, Jerome Cohen published the first casebook on Chinese criminal law in 1968 (thereby directly refuting the assertion advanced 12 years earlier).<sup>182</sup> Other scholars took full advantage of what limited channels of access to the PRC existed for foreigners in the 1970s, attending events such as the semiannual Canton Trade Fair to observe how Chinese businessmen resolved commercial disputes in practice. Research and publications resulting from these activities helped erode the myth of the Other that surrounded the Chinese legal system.<sup>183</sup> PRC legal institutions and practices began to be seen as

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<sup>179</sup> T’ung-Tsu Ch’ü, *LAW AND SOCIETY IN TRADITIONAL CHINA* (1961); Derk Bodde and Clarence Morris, *LAW IN IMPERIAL CHINA* (1967); James Watt, *THE DISTRICT MAGISTRATE IN LATE IMPERIAL CHINA* (1972).

<sup>180</sup> William Jones, tr., *THE QING CODE* (1994); Jiang Yonglin, tr., *THE GREAT MING CODE* (2005).

<sup>181</sup> Philip Huang, *CIVIL JUSTICE IN CHINA* (1996), 21-109, 239-245.

<sup>182</sup> Jerome Cohen, *THE CRIMINAL PROCESS IN THE PEOPLE’S REPUBLIC OF CHINA: 1949-1963* (1968).

<sup>183</sup> As one foreign participant in the Canton Trade Fair summarized his experiences, “Rather than being an area where lawyers have no role, trade with the People’s Republic of China is a significant area for legal activity, and a fit subject

intelligible objects of study, albeit still very different from their foreign counterparts and subject to the political vagaries of a one-Party state.

The onset of the reform period in China in 1978 shifted these efforts into high gear. Chinese authorities sought to import laws and institutions to facilitate economic growth. The opening of China to the outside world made regular interactions possible. Exchange programs such as the Ford Foundation-funded Committee on Legal Educational Exchanges in China brought Chinese legal scholars to the United States for study during the 1980s. And beginning in the late 1990s, foreign governments began to directly fund rule-of-law projects in China.<sup>184</sup> Many of these efforts, as well as the scholarship they generated, emphasized the translation of foreign legal norms and institutions and the transplantation of them to China. In the case of U.S. government-funded programs, the purpose was openly stated: to support the development of democratic institutions and political liberalization in China.<sup>185</sup>

But Chinese authorities' reluctance to deepen legal reforms and their continued hostility to political liberalization has led many who pioneered research in Chinese law to question the fate of the field.<sup>186</sup> As Stan Lubman noted,

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for academic analysis." Roderick O'Brien, *One Lawyer's View of Trade with the People's Republic of China*, 1 *The Australian Journal of Chinese Affairs* 91, 104 (1979).

<sup>184</sup> See, e.g., State Department Fact Sheet FY 1999-2000, available at <http://2001-2009.state.gov/g/drl/rls/32893.htm>.

<sup>185</sup> *Id.* Similar assumptions - that the gradual development of the rule of law in China would be accompanied by political liberalization and the development of more independent judicial and legal institutions - were reflected in academic literature as well. See, e.g., Larry Diamond, *The Rule of Law as Transition to Democracy in China*, in *DEBATING POLITICAL REFORM IN CHINA: RULE OF LAW VS. DEMOCRATIZATION* (Suisheng Zhao, ed., 2006).

<sup>186</sup> See, e.g., Jerome Cohen, *China's Legal Reform at the Crossroads*, *Far Eastern Economic Review* (March 2006).

The search that I undertook forty years ago has changed, because China has undergone, and continues to be in the midst of, remarkable transformations. There is an impressive amount of Chinese law on the books now, and more will continue to appear. When I began, one question was whether law could ever be a lens that could be useful for viewing and deepening foreign understandings of China. The last twenty five years of Chinese history provide a ready answer, but another even more pointed question is present today: What is, and what will be, the significance of law in the governance of the Chinese Party-state?<sup>187</sup>

Since the 1990s, and partly in response to such questions, the field of Chinese law has begun to experience a new wave of scholarship. Some, such as Randall Peerenboom, openly challenge whether the adoption of foreign legal norms is practical, or even normatively desirable, given China's current political institutions and level of economic development.<sup>188</sup> Naturally, this is tightly interwoven with arguments elsewhere in legal academia. These include critical analyses of the law and development movement in Western academic circles, and an ongoing debate inside China between scholars who seek to deepen legal reform along Western lines (such as He Weifang) and those who reject it (such as Zhu Suli).<sup>189</sup>

Yet another critique exists. This does not focus on normative questions of whether China *should* adopt transplanted foreign legal norms. Rather, this critique emphasizes that extent to which China has not done so in practice. Historians such as Huang have demonstrated that traditional Chinese judicial practices continue to flourish in the People's Republic of China, notwithstanding the ruptures caused by the 1949 Communist revolution or the post-1978 effort by Chinese authorities to adopt formal Western law and

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<sup>187</sup> Stanley Lubman, *Looking For Law in China*, 20 Columbia J. of Asian Law 1, 92.

<sup>188</sup> RANDLE PEERENBOOM, *CHINA MODERNIZES* (2007).

<sup>189</sup> For an argument (in English) along the latter lines, see Pan Wei, *Toward a Consultative Rule of Law Regime in China*, in *DEBATING POLITICAL REFORM IN CHINA*, *supra* note 175, at 32-40.

norms.<sup>190</sup> Legal scholars such as Ginsburg have emphasized the extent to which foreign concepts such as judicial review have been indigenized in practice in Taiwan and Korea, creating a form of “Confucian constitutionalism.”<sup>191</sup>

This Article argues that this work collectively constitutes a “third wave” of scholarship that is nuancing earlier depictions of Chinese legal reform. It calls into question the extent to which Chinese law and legal institutions have been, will be, or can be affected by foreign models. And it suggests that China’s own traditions and historical legacy will continue to play a crucial role in determining the future course of reform.

This Article fits squarely into this “third wave” of scholarship. It emphasizes the importance of not simply examining the Chinese versions of institutions that foreign scholars are trained to look at when they try to understand legal change in their own societies – things such as formal laws and regulations. Rather, it emphasizes the importance of *also* examining those institutions that Chinese authorities themselves use to push legal and institutional change forward in their own society – tools such as politicized “moral exemplar” study campaigns and Communist Party personnel structures. Put aside the question of whether one these are good or bad, appropriate or inappropriate. If your aim is to understand how China and its legal system work, you have to look at these. And to date, these have remained sadly understudied as constituent components of the Chinese legal system.

Naturally, it also opens up the question of what is actually moving legal developments in China. If much of judicial reform shifts in China over the past three decades can simply be attributed to lower courts falling in line with the moral exemplar campaigns and performance evaluations that are the flavor of the day (Try

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<sup>190</sup> Philip Huang, CHINESE CIVIL JUSTICE, PAST AND PRESENT (2010).

<sup>191</sup> Tom Ginsburg, *Confucian Constitutionalism? The Emergence of Constitutional Review in Korea and Taiwan*, 27 Law and Social Inquiry 763 (2002).



cases! Wait, now mediate them!), how much do the vaunted national legislative or regulatory reforms (say, with regard to evidentiary standards) actually matter? Perhaps they simply represent the partial and incomplete detritus (coincidentally expressed in legal form) of much more important Party implementation mechanisms. If so, much of the focus on national law may be quite misplaced. And foreign scholars really should be rewriting textbooks on Chinese law, focusing much more on how local Party committees and organization bureaus implement higher-level norms in practice.<sup>192</sup>

Some may instinctively reject this argument. The current mainstream of Chinese legal scholarship (the “second wave”) found its roots in rejecting one-dimensional stereotypes of the Chinese legal system (in the “first wave”) as monolithic, unchanging, and weighted by its imperial, Confucian, or Communist heritage. Consequently, there is strong sensitivity towards arguments that raise history or philosophy, perceiving in them the veiled hint that China lacks “law,” that its culture creates a barrier to the import of legal institutions enjoyed by outsiders, or that Chinese people deserve or seek anything less than the institutions enjoyed by others.

But this Article is not reverting to the pre-1960s “first wave” depiction of the Chinese legal system. It does not portray China as an enigmatic (or intimidating) Other to be contrasted with idealized ethnocentric fantasies of superior Western norms and practices. Nor does it claim that China’s historical and cultural legacy mandates that it must follow a particular developmental track completely different from that of other countries.<sup>193</sup>

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<sup>192</sup> Alternatively, national developments might be largely irrelevant. The apparent shift of local Chinese court work from mediation to trial and back to mediation may be nothing more than a highly evolved response by local officials to central pressures - cooking the books and feeding higher authorities what they want to hear (“Get your editing pen out, Zhang San, the boys upstairs want our work reports to show more mediated cases this year”).

<sup>193</sup> Just to be clear – this article does not claim that Chinese authorities’ use of China’s own institutional and cultural resources as a source for legal reform is

Rather, this Article simply argues that we need to study China's historical and institutional legacy because that is where Chinese authorities have decided to take modern Chinese law. They are the ones who are resurrecting Maoist dispute resolution practices. They are the ones who are explicitly clothing judges in the mantle of Confucian exemplars. And they are the ones who are relying on responsibility systems rooted in Party and imperial bureaucratic practices to run their country.

Chinese leaders are the ones who have turned against law. They are the ones looking back to their past. And it isn't certain how far back they want to go.

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normatively or practically "better" or "more authentic" than foreign ones that "second wave" scholars sought to bring to China. Party authorities are mobilizing China's own ideological and institutional resources for a particular instrumental goal: to maintain their own control. As discussed above, that self-interested short-term strategy may be generating significant long-term costs for the nation at large.

## Appendix #1

“The Spirit of Chen Yanping is a Guide for Today’s Judges”  
Wang Mingzhuo, China Court Network - January 22, 2010

There is a cautious and conscientious judge in the Yangyuan District People’s Court of Jingjiang Municipality, Jiangsu Province. She has uncomplainingly given 14 years of her youth to trial work, remaining firmly rooted in the grassroots. She has meticulously handled 3100 cases, without a single error, without a single complaint, and without a single petition [i.e. from a disgruntled party], winning the trust and praise of the local populace in her region . . . Today, following the public exposition of this judge’s outstanding accomplishments in the media, her name will be sung throughout China and carved into the monuments to the outstanding judges of the People’s Republic of China. She is a paragon among judges - “National Model Judge Chen Yanping.”

. . . Chen Yanping’s sentiment for the people is the concentrated embodiment of her true heart, true sentiment, and true love for the people. Her spirit will undoubtedly become the guiding thought for today’s judges, leading other judges to carry out the sacred responsibilities of “people’s judges for the people” through their concrete actions.

A true heart is a direct prerequisite for judges to serve the people. As the steadfast guardian of last resort for completely and finally resolving all grievances, judges only need to be like Chen Yanping and have a true heart for the masses . . . If they draw close to the masses, walk among the masses . . . and feel the people’s concerns as their own . . . they can construct a bridge serving the people and linking judges and the people.

True sentiment is an effective means for judges to resolve conflict. True sentiment is the warmest thing on earth. It can melt hard ice and resolve conflicts. For Chen Yanping, using sentiment to explain rational concepts, using sentiment to move people is the

best starting point to resolve conflicts. Judges should be like Chen Yanping, always hold true sentiment for the people, and always maintain relations as close as flesh and blood with the people. They should take cold legal opinions and mechanical procedures, infuse them with judicial warmth and human concern, and transmit true sentiment to every party that comes before them.

True love is the best method for judges to resolve the concerns of the people. . . It is precisely because of Chen Yanping's true love for the masses that she can root herself in 14 years of work in the basic-level courts. It is precisely because she has true love for the masses that she can win their trust and support. Moreover, it is because of true love that she can shine her maternal radiance on disabled and handicapped parties. For judges, only if they are like Chen Yanping, using love to go forward, resolving the concerns of the people, and conscientiously carrying out their judicial duties, can justice for the people truly be realized.

. . . Judges should follow the principle of "people's judges for the people," absorb and carry on Chen Yanping's "True Heart, True Sentiment, True Love" spirit of service, wholeheartedly carry out the work of hearing cases . . . and let the flame of justice and fairness burn ever brighter with time.

## Appendix #2

“‘An Exemplary Person Should Not Become a Vessel’ -  
The Judicial Wisdom of Chen Yanping”  
Wang Zichen, Bulletin of the Supreme People’s Court –  
February 9, 2010

The Analects (Book Two) states “Confucius said: ‘An exemplary person [*junzi*] should not become a vessel.’” In today’s era, where social conflicts are exceedingly complex and the duties of judges exceedingly strenuous, Chen Yanping perfectly incarnates the meaning of this phrase through the reality of her work as a basic-level judge. From the perspective of the judiciary, this phrase can be understood as saying that a judge with good moral conduct cannot simply be a tool that mechanistically applies the law in the process of handling cases. Rather, a judge must grasp social conditions, be well-versed in all forms of judicial skills, be good at resolving disputes, and amply bring into play the utility of the judiciary as a good defender of the social order.

“An exemplary person should not become a vessel” first requires that a judge should be an exemplary person [*junzi*]. An exemplary person is a moral exemplar. Naturally, a judge as an exemplary person must thus have good professional and personal integrity. In a rule-of-law society, judges do not only operate the practical machinery of law and ensure the efficient operation of society’s mechanisms. They are also seen as the guardians of legal order and social justice. The rule-of-law environment for all of society depends to a great extent on their spirit and attitude toward the law. For this reason, it is particularly important that a judge have good moral conduct. Chen Yanping frequently says: “A lawsuit is but a once in a lifetime event, but the effects of a lawsuit will last all ones’ life. As a judge, if I cannot fairly administer justice, then I have dishonored the solemn national emblem above me, and I have dishonored the ordinary masses below me who come seeking the law.”

Chen Yanping once handled a case in which the plaintiff heard that the defendant was a village cadre and was a good friend with Chen Yanping's husband. As a result, the plaintiff feared that the case would not be handled fairly. But in short order, the decision in the case was handed down, the defendant lost, and the court's judgment was quickly carried out. In the 21 years of her judicial career, Chen Yanping has never accepted a gift from a party, and has never handled (or intervened) in a single case as a result of her personal relations or feelings.

"An exemplary person should not become a vessel" emphasizes that an exemplary person should not be limited to a single strength. They should not develop themselves to be a household utensil of limited utility. In historical periods when skills and reason were highly valued, judges were regarded as craftsmen. So, for judges guided by the concept of Socialist Rule-of-Law, how should they fully bring to play their technical role to satisfy popular demands and expectations? Judges should not be legal craftsmen who pay excessive attention to wording, believe the laws of statutes to be the only scripture, and pay no attention to social harmony and the popular interest. Even less should they be the kind of people who play with the law and abuse their power, using law as an evil weapon to help the tiger [i.e. evil people] pounce on his victims.

Through practice, Chen Yanping has cultivated many skills and developed an effective work style. She not only has paid attention to studying the local dialect and understanding local customs and attitudes, she also frequently takes legal language and translates it into the local dialect, allowing local residents to understand the point immediately. In order to blend in with the ordinary people, she works at grasping the mood of villagers, and she has learned to use "humanitarian" methods of executing the law to win the hearts of the people. In studying Chen Yanping, one should devote particular attention to research on experiences and skills accumulated by judges over time via practice, and which have guiding value for the judiciary, and spread the "Chen Yanping work style" far and wide.

The commentaries on the Book of Changes say: "The higher form [of understanding] is what we call the Way, the lower form [of understanding] is what we call a tool." One goal of judges' work is deciding cases and [completely] solving problems. But some judges only apply the lower form of understanding to the concept of "deciding cases and [completely] solving problems." They take their only goal that parties don't complain after cases have been handled, and they exalt mediation rates as the most important target to use in evaluating judges performance. Chen Yanping views the concept of "deciding cases and [completely] solving problems" as requiring values inspired by the higher form of understanding – complete resolving the case doesn't simply mean that the parties don't complain.

In the past, Chen Yanping has used plain language to incisively explain this [concept]. After one particular case was mediated to conclusion, one of the lawyers asked Chen Yanping – "This case would have been really easy to decide via adjudication. Why did you insist on mediating it?" Chen Yanping said, "The plaintiff's mother and father passed away a long time ago, leaving only the father's younger brother [presumably the defendant in the case]. To be sure, the grievances between the two of them are deep. But by diligently uncovering the crux of their grievances, and by reawakening their familial feelings for one another, the conflict is very easily resolved. If I tried to save time by issuing a verdict, the case would be finished, but the conflict would remain, and the dispute would emerge yet again. It is even possible that problems would escalate, the dispute would intensify, and a small grievance would become deep hatred. If a civil case becomes a criminal one, the result would be even more serious. That would be a situation where the case was decided, yet the issue was not."

We are currently in an era of legal transformation. Judges stand where the wind and waves are the strongest. Each step forward for rule-of-law in China has the deep official mark of scholars and legislators who have deeply thought about the issues. Even more, it has the solid judicial foundation of judges' work in practice. Chen

Yanping is worthy of this great era. Under the guidance of the concept of “Socialist Rule-of-Law with Chinese Characteristics,” she has continually improved her skills and self-cultivation. With the values and spirit appropriate for a judge, she has sought opportunities for the rule of law to grow where the soil for it is traditionally weak, and she has made her own contribution to upholding fairness and justice. We hope that the judicial philosophy of “An exemplary person should not become a vessel” will become the motto for even more judges engaged in resolving social conflicts.