

CHINA'S NETWORK JUSTICE

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INTRODUCTION

China's internet revolution has set off a furious debate in the West. Optimists from Thomas Friedman to Bill Clinton have predicted the crumbling of the Chinese Party-state, while pessimists suggest even greater state control. But a far less discussed and researched subject is the effect of China's internet revolution on its domestic institutions. This article, the product of extensive interviews across China, asks a new and different question. What has China's internet revolution meant for its legal system? What does cheaper if not free speech mean for Chinese judges?

The broader goal of this article is to better understand the relationship between how a legal system functions and how judges communicate, both with each other and with other parties, including the media, public, and political actors. Information transmission is an important but poorly understood part of any legal system. A precedent system, *amicus* briefs, and the rules on *ex parte* contacts all serve to regulate how parties in a system communicate, and what kind of information "counts." Media and political pressure cannot help but affect a legal system. The underlying premise is that the speech system surrounding the judiciary matters, and affects how judges decide cases.

The People's Republic of China stands as a nearly ideal case to understand these more general questions. Over the last fifteen years the Chinese legal system has undergone important transformations in the costs and means of disseminating information -- the consequence both of new technologies and of the commercialization of the Chinese media during the same period. This has led to changes in both the information available to judges and the attention paid to the judiciary's decisions. Such changes have come precisely as the Chinese courts are undergoing dramatic reforms, whose stated aim is to make courts more competent, fair, and authoritative actors in the Chinese political system.

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An optimistic free speech theory suggests that greater exposure to information and ease of communications will be an unmitigated good for a legal system. In the broader internet context, writers like Yochai Benkler, Eugene Volokh and Glenn Reynolds have argued that cheaper mass communications technology will improve government and lead to healthier political systems.¹ As Benkler writes, “we are [now] witnessing a fundamental change in how individuals can interact with their democracy and experience their role as citizens.”

Our study of the Chinese judiciary² uncovers evidence to support the optimistic theory -- exciting examples of internet pressure that have uncovered injustice and forced courts and Communist Party officials to take action. But overall we find a mixed picture that includes both optimistic, headline-grabbing stories and decidedly more ambiguous developments.

We present two groups of findings. The first, under the heading *Net Justice*, are developments in communications between the judiciary and the media, public, and the Communist Party officials who oversee both the courts and the media. The media and the public's new ease in finding out what judges are doing has already clearly had important benefits. In cases such as that of Sun Zhigang -- a university graduate brutally murdered in a detention center for migrant workers³ -- it is clear that internet and media pressure led to both judicial action and salutary institutional reform. But the flip side is the use of the internet to generate extreme public pressure and consequent political intervention in reaction to certain types of inflammatory cases. That is, of course, not an entirely new development. The Chinese legal system has long been characterized by Party-state intervention in important or sensitive cases. The difference is the rise of cases where public reaction and outrage online leads officials to intervene and predetermine or change judicial action. In one of the examples discussed below, internet pressure resulted in a convicted gangster, Liu Yong, having his life sentence reversed, and being swiftly put to death. The same efficiencies of communication that make exposing unfair or unjust decisions easier also facilitate, and make more likely, public pressure and political intervention.

The second set of findings is developments in *Judicial Networks*, or the communications patterns among judges. There are signs of important changes in how Chinese judges communicate with each other. Chinese judges have traditionally made decisions based on consultation that is mostly *vertical*— with “adjudication committees” that resolve difficult or sensitive cases within a court, with court presidents, with Communist Party Political-Legal Committees, and with higher courts. Judges have had limited abilities to consult with other

¹ YOCHAI BENKLER, *THE WEALTH OF NETWORKS* (2006); GLENN REYNOLDS, *AN ARMY OF DAVIDS* (2006); *see also* Eugene Volokh, *Cheap Speech and What It Will Do*, 104 *YALE L. J.* 1805 (1995).

² In China, references to “the judiciary” and “judicial” encompass both the courts and the procuratorates. In this article, we use “judiciary” and “judicial” to refer to the courts alone.

³*See infra* Part II.

members of the judiciary outside their court, other than those in directly superior courts, and sometimes have had limited access to relevant laws and other legal materials. Today, much is changing, particularly through use of the internet and other communications technologies. Chinese judges increasingly communicate and consult along *horizontal* lines, with other judges, and also with academics and the public. Many judges use the internet from home or web cafes to do extra research, finding either Chinese or foreign cases. Judges report an emerging and informal system of quasi-precedent made possible by horizontal networking. Judges' decisions are also much better publicized through a variety of means, including the internet, and as a result are subject to more external criticism.

Finally, in *Innovative Uses*, our study shows that some Chinese judges have begun use to the internet as a judicial tool in ways that are unusual and perhaps unprecedented in other parts of the world. For example, some judges use chat rooms and email in the course of deciding hard cases, communicating with other judges, academics, and even the public. Other judges and courts maintain blogs that comment on cases, and make their case decisions available to the public and other judges. These types of behavior are relatively unique and may lead to distinctly Chinese judicial communications practices.

* * *

The study of the China's judiciary yields important and general insights into the poorly understood relationship between judicial power and judicial speech. As generations of American scholars have suggested, the power of the judiciary to act independently from other branches depends on the availability and acceptability of higher principles to which judges may appeal. Whether Herbert Wechsler's "neutral principles" or the appeals to tradition or accepted moral doctrine contemplated by others,⁴ the degree to which society and other government actors accept the principles to which judges appeal does much to determine the judiciary's power.

Changes in the costs and means of communication in a society can affect the ability of judges to make claims to legitimacy. The major examples are through access to the laws themselves, and through the ease of forming judicial networks. As horizontal, judge-to-judge communications become easier and cheaper, judges can make new claims to the authority to decide cases according to cases already decided. Networked judges, like common-law judges, also gain the ability to learn from other judges.⁵ The development of horizontal judicial networking may be an crucial means for strengthening the autonomy and professional identity of courts.

⁴ See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959); ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* (1962).

⁵ See, e.g., ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER*, ch. 2 (2004) (describing global trend toward judicial networking).

But there's a flip side, for cheap communications also make it easier to attack the judiciary and diminish its legitimacy. In the China example we see an extreme version -- the "internet manhunt" leading to political intervention -- with important lessons for the rest of the world. The dominant writing on internet criticism in the United States stresses improvements in government and media accountability. Yet not all criticism is socially useful, and when criticism is used as a political weapon against an already weak judiciary it does not improve governance but endangers progress toward a rule of law system. At its worst, and when supported by the state, cheap mass criticism can lead to judges unwilling to make decisions that run the risk of inflaming the public, and a surrender of judicial authority to the vicissitudes of public opinion.

* * *

The paper is divided into three parts. Part I introduces theoretical background on the relationship between communications technologies, government, and judicial behavior. Part II is a study of the Chinese judiciary. Part III discusses the relationship between speech and judicial legitimacy.

I. SPEECH AND INFORMATION IN A LEGAL SYSTEM

A. *Free Speech, Information, and Government*

Since the early 20th century the relationship among communications technologies, government, and free speech has been a field of intense interest. The rise of the telegraph, telephone, and the mass media of the 20th century led writers from Charles Cooley through Wilbur Schramm and Marshall McCullen to forecast great changes in human governance.⁶ This is the field of "communications studies" of the 20th century, which in its earliest days tended to optimism. Writers such as Charles Cooley wrote with moving confidence that technologies such as the telegraph might "make it possible for society to be organized more and more on the higher faculties of man, on intelligence and sympathy, rather than authority, caste, and routine."⁷ These ideas reflected both a faith in technological progress and the more general belief in the power of free speech to improve society embodied in the American First Amendment.

One hundred years later, the optimism of the early 1900s was reborn during the internet revolution of the 1990s. Consistent with the American free speech tradition the writing is mostly buoyant. It suggests, with a few exceptions, that cheaper speech will yield a more participatory democratic culture, more attention to public opinion, and generally better and more responsive governments.

⁶ The field of early communications studies is far too vast to describe here. For an introduction, see WILBUR LANG SCHRAMM, *THE BEGINNINGS OF COMMUNICATION STUDY IN AMERICA: A PERSONAL MEMOIR* (1997).

⁷ CHARLES HORTON COOLEY, *ON SELF AND SOCIAL ORGANIZATION* 103 (1963).

One stream of writing centers on the governance processes of the internet itself, and how they might form a model for the “real world.” The internet has been, since its inception, loosely governed by an informal management process dominated by technocratic engineers. In Paulina Borsook’s 1995 *Wired* piece, “How Anarchy Works,”⁸ she described internet governance as the “kind of direct, populist democracy that most of us have never experienced.” The engineers were “the masters of the metaverse” engaged in “a radical social experiment.” The thesis was that the internet’s founding engineers hadn’t just built a good network, but had solved certain intractable problems of human governance along the way.

Since the 1990s many have doubted whether internet governance serves as a plausible model for purposes other than technical standard-setting. The 2006 book *Who Controls the Internet* (co-authored by one of us) questioned the viability of government structures that lack access to physical coercion.⁹ Notably, since the 1990s, few areas of government have successfully mimicked the “working anarchy” of the early internet. Instead the self-governance structures on the internet have turned to territorial government for assistance. The internet, in turn, has increasingly become subject to the power of nation-state governments.¹⁰

In the 2000s, a new body of scholarship promoted the possibilities of internet-communications for improving the nature of national deliberation, in particular by supplementing or replacing traditional media as the primary source of scrutiny of government. One of the first to present what we can now call “blogger theory” was Professor Eugene Volokh, in *Cheap Speech and What It Will Do*.¹¹ Yochai Benkler presented a full treatment of this thesis in his book, *The Wealth of Networks*,¹² as did writer Dan Gilmour in *We the Media*¹³ and law professor and blogger Glenn Reynolds in *An Army of Davids*.¹⁴

These authors present an attractive thesis: in a country where every citizen has the means to act as a critic, the result will be a more responsive government. Roughly the idea is that the marketplace of ideas has been hindered by barriers to market entry. The high costs of communications have stood in the way of regular citizens participating in political discourse, leaving participation to specialized entities such as professional interest groups and the professional media. But since the 1990s, the decreased costs of communication made possible by technological changes have facilitated greater access to the political process, making it possible for amateurs and regular citizens to be involved. As Benkler writes, the rise of the internet has “fundamentally altered the capacity of individuals, acting alone or with others, to be active participants in the public

⁸ Paulina Borsook, *How Anarchy Works: On Location with the Masters of the Metaverse, the Internet Engineering Task Force*, WIREd, Oct. 1995, available at <http://www.wired.com/wired/archive/3.10/ietf.html>.

⁹ See generally, TIM WU & JACK GOLDSMITH, WHO CONTROLS THE INTERNET, ch. 2,3 & 10 (2006).

¹⁰ See generally, *id.*

¹¹ 104 YALE L.J. 1805 (1995).

¹² YOCHAI BENKLER, THE WEALTH OF NETWORKS 212-272 (2006).

¹³ DAN GILMOUR, WE THE MEDIA (2004).

¹⁴ GLENN REYNOLDS, AN ARMY OF DAVIDS (2006).

sphere as opposed to its passive readers, listeners, or viewers It is in this sense that the Internet democratizes.”¹⁵

The dissent from this view has come in clearest form from Professor Cass Sunstein in his books *Republic.com* and *Echo Chambers*.¹⁶ Sunstein argues that technologies such as the internet are not aiding national political discourse but splintering it. “If Republicans are talking only with Republicans, if Democrats are talking primarily with Democrats, if members of the religious right speak mostly to each other, and if radical feminists talk largely to radical feminists, there is a potential for the development of different forms of extremism, and for profound mutual misunderstandings with individuals outside the group.”¹⁷ A glut of information and the ease of listening to only what you agree with, argues Sunstein, will lead to national factions that generally ignore one another -- the fractionalization of the Republic.¹⁸

China's own internet revolution has touched off a similar debate. Many argued that, in Thomas Friedman's words, “the Internet and globalization, are acting like nutcrackers to open societies. . . .” Bill Clinton argued that the Internet will “democratize opportunity in the world in a way that has never been the case in all of human history,”¹⁹ while George W. Bush argued that, in China, the Internet takes “freedom's genie . . . out of the bottle.” However, so far the political change forecast in the 1990s has been far less than predicted. In previous work, we have explored many of the ways the Chinese Party-state has managed to maintain a grip on political power despite the dramatic changes in communications. We have suggested that, in some ways, the Party-state has fine-tuned its use and control of information flows for political purposes.²⁰ Nonetheless, writers from Friedman through Nicolas Kristof continue to argue that the Party-state's grip will not survive the internet revolution. As Kristof wrote in a 2005 column, *Death by a Thousand Blogs*, “the Chinese leadership . . . is digging the Communist Party's grave, by giving the Chinese people broadband.”²¹

¹⁵ BENKLER, *supra* note 12, at 212. Writers like Benkler focus on internet-based, mass political movements that make use of network technology. For example, Benkler tells the story of how a variety of internet activists managed to make the security of Diebold voting machines a matter of public concern in the 2000s, an issue in which the mass media was originally uninterested. Other well-discussed examples are the internet-driven fundraising behind the Howard Dean campaign in the 2004 election, the exposure of fraud behind various anti-Bush war records, and the purge of Trent Lott from the Senate leadership. The general tenor is to suggest that, but for a more democratic “citizen media,” history would have taken a much different course.

¹⁶ CASS SUNSTEIN, *REPUBLIC.COM* (2001); CASS SUNSTEIN, *ECHO CHAMBERS* (2001); *see also* Cass R. Sunstein, *The First Amendment in Cyberspace*, 104 *YALE L.J.* 1757, 1785–87 (1995).

¹⁷ SUNSTEIN, *ECHO CHAMBERS*, *supra* note 16, at 5.

¹⁸ See Federalist 10 (Madison), in *THE FEDERALIST PAPERS* 77 (CLINTON ROSSITER ed., 1961).

¹⁹ William J. Clinton, The White House, Office of the Press Secretary, *The Gateway Computers European Facility, Santry County Dublin, “Remarks by the President to Business Leaders, and Officials and Employees of Gateway Computers,”* Sept. 4, 1998, <http://clinton4.nara.gov/WH/New/html/19980904-9108.html>.

²⁰ See WU & GOLDSMITH, *supra* note 9, at ch. 6; Benjamin L. Liebman, *Watchdog or Demagogue? The Media in the Chinese Legal System*, 105 *COLUM. L. REV.* 1, 82-91 (2005).

²¹ Nicholas Kristof, *Death By a Thousand Blogs*, *N.Y. TIMES*, May 24, 2005.

In this article we come at these debates from a new angle by providing detailed evidence of what is actually happening in China. What much of the present debate misses is what happens when speech becomes far *cheaper*, yet still not *free* -- where some forms of criticism are allowed, but not others.²² In our example of China, direct criticism of Party rule is off limits, yet critiques of the courts are more acceptable. The consequence, as we'll see, is a directed form of criticism whose social function is not well appreciated by our existing and dominant means of understanding speech.

This study is also an opportunity to examine the impact of focused criticism not on government in general, but on the courts specifically. Previous writing in this area, focused on the media, has not devoted much attention to the intricate relationship between mass, inexpert participation, and the functioning of a legal system. The American free speech caselaw does concede the need for restrictions on speech *within* the courts, and in exceptional cases for restrictions on media coverage of court proceedings, but the effects of cheaper speech on the judiciary itself are not as well understood. There is a simple explanation for this. In the United States, the most obvious consequences of the internet revolution have been for the media and business. Conversely, the operation of the judiciary has been far less affected. This may reflect the American judiciary's particular tradition of independence and relative isolation from the direct influence of public opinion. Aside from better legal blogging, an occasional URL citation in Supreme Court opinions, and greater competition for Westlaw and Lexis, it may be that few of the decision-making methods of courts have changed.

But it is unsurprisingly that different countries are being differently affected by a major change in the costs of communications. The effects of the internet on the Chinese legal system are arguably far more profound than in Europe or the United States. Yet since these developments are largely not discussed in the West, we find ourselves writing on new ground, with regard to both China and the broader question of how new technologies may be affecting judicial decision-making.

* * *

Judges are decision-makers, and to pursue the question of how information affects judging, the tools of information economics will prove useful. For that reason, we turn now to a review of some of the relevant literature on information-transmission and decision-making.

B. The Economics of Information and Decision-Making

²² For more general commentary on the impact of the internet, see Anupam Chandler, *Whose Republic?*, 69 U. CHI. L. REV. 1479 (2002), Thomas S. Ulen, *Democracy and the Internet*, 2 J.L. TECH & POL 224 (2002); Mark S. Nadel, *Customized News Services and Extremist Enclaves in Republic.com*, 54 STAN L. REV. 831, 857 (2001).

Fredrick Hayek's 1945 work *The Use of Knowledge in Society* is a starting point for much of what has followed on the relevance of information to decision-making.²³ Hayek argued that the advantages of the free market over a planned economy were largely related to how a free market makes use of information. The free market, he pointed out, is not obviously more efficient than a centralized, planned production, since competition tends to be disorganized, duplicative, and wasteful. Instead, said Hayek, the problem with models of centralized planning is informational: no single actor can possess sufficient information to make all the decisions necessary in a complex economy. Conversely, the market's decentralized decisions about production, while certainly prone to error and waste, are at least made on the basis of much more of the relevant information -- leading to, in the aggregate, better decision-making. Market prices, in Hayek's view, were valuable public information about resource scarcity that a centralized planner had difficulty replicating.

The study of decision-making given imperfect information has developed into an entire field since Hayek's time, often called "information economics."²⁴ The tools of information economics are valuable for understanding the importance of communications within a legal system.

First, in the information economics literature, a major distinction is made between decision structures that are more horizontal or "polyarchical" in nature, and those that are more vertical, or "hierarchical."²⁵ That difference in decision structures is, for example, an essential difference between a planned and market economy. Economists Raaj Kumar Sah and Joseph Stiglitz originally focused on the differences between hierarchies and polyarchies for purposes of error-correction. But other writers, including economist Jeremy Stein, write about the differences in information transmission in vertically -- and horizontally -- organized institutions.²⁶

²³ 35 AM. ECON. REV. 519 (1945).

²⁴ Since Hayek's time the relationship between information-transmission and decision-making has received much attention, and only the briefest of summaries will be attempted. Michael Spence, Joseph Stiglitz and others have developed the field of information economics, which emphasizes economic decision-making under conditions of imperfect information. *See generally*, Joseph Stiglitz, *Information and the Change in the Paradigm in Economics*, Nobel Prize Lecture, December 8, 2001. That has led to work on information asymmetries as a form of market failure (and signaling as a remedy), the relative performance of decentralized and centralized decision makers, the phenomenon of "herding behavior," and other interactions between information and the market. *See, e.g.*, Raaj Kumar Sah & Joseph Stiglitz, *The Architecture of Economic Systems: Hierarchies and Polyarchies*, 76 AMER. ECON. REV. 716 (1984); Raaj Sah & Joseph Stiglitz, *The Quality of Managers in Centralized Versus Decentralized Organizations*, Q. J. ECON. 289 (1991); PAUL MILGROM & JOHN ROBERTS, *ECONOMICS, ORGANIZATION & MANAGEMENT* 113-125 (1992); David S. Scharfstein & Jeremy C. Stein, *Herd Behavior and Investment*, 80 AMER. ECON. REV. 465 (1990); Patrick Bolton & Mathias Dewatripont, *The Firm as a Communication Network*, 109 Q. J. ECON. 809 (1994). Versions of these ideas have reached the public in widely-read works such as James Surowiecki's *The Wisdom of Crowds* (2004).

²⁵ *See* Sah & Stiglitz, *The Architecture of Economic Systems*, *supra* note 24; Sah & Stiglitz, *The Quality of Managers in Centralized Versus Decentralized Organizations*, *supra* note 24.

²⁶ *See* Jeremy C. Stein, *Information Production and Capital Allocation: Decentralized Versus*

One type of decentralized decision-making system of great interest is common-law courts. First, Hayek himself in 1960 argued that the English legal system was a superior institution to the French, based on its decentralized decision-making.²⁷ Later, Richard Posner described the common law litigation process as a source of rules -- and viewed judges as decentralized decision-makers acting on the basis of local information, whose collective decision-making might, over time, reach efficient results.²⁸ The challenges to Posner's thesis are well-known.²⁹ Nonetheless, the theory of common-law "learning" and the potential of moving toward better rules has been influential.³⁰

A second and particularly useful tool from information economics is the theory of the "rational herd" or "information cascade." The herding literature is interested in the puzzles of mass behavior, like fashion trends, and mass mistakes, such as stock market bubbles or the tendency of mutual fund managers to underperform the market. These theories model what happens when decision-makers weigh not only their own judgment, but the collective volume of the decisions of others.³¹ The phenomenon of rational herding identifies situations where decisions are decreasingly driven by one's own information, and increasingly driven by the actions of others.

The notion of rational herding has obvious implications for a legal system. The prospect is that judges may similarly, and rationally, herd around a bad or

Hierarchical Firms, 57 J. FIN. 1891, 1891-93 (2002) (arguing that information that might be easier to transmit, or "hard" information, like numbers, can be handled well by a hierarchy, while "soft" information, such as a subjective assessment of managerial ability, might be better processed by decentralized actors).

²⁷ FREDRICH HAYEK, *THE CONSTITUTION OF LIBERTY* 194-196 (1960).

²⁸ See RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW*, 320-28 (1st ed. 1973); Paul Rubin, *Why is the Common Law Efficient?*, 6 J. LEGAL STUD. 51 (1977); George Priest, *The Common Law Process and the Selection of Efficient Legal Rules*, 6 J. LEGAL STUD. 65 (1977).

²⁹ One obvious point is that judges who choose the wrong rules do not, like firms, go out of business, and few today seem to believe that all common-law rules are efficient. See, e.g., Priest, *supra* note 28; Lewis Kornhauser, *Some Notes on the Logic of Legal Change*, in *THE LOGIC OF SOCIAL CHANGE* 169, 169 (D. BAYBROOKE ed., 1996); Gillian Hatfield, *Bias in the Evolution of Legal Rules*, 80 GEO. L. J. 583 (1992).

³⁰ Paul Mahoney, for example, has sought to demonstrate empirically that common law, precedent-based systems create faster economic growth than civil systems, with data showing, on average, slightly more than one-half a percent faster growth in the world's common-law countries, during the period 1962-1990. See Paul Mahoney, *The Common Law and Economic Growth: Hayek Might Be Right*, 30 J. LEGAL STUD. 503, 503-525 (2001). Mahoney "[controlled] for starting per capita GDP, secondary school enrollment, population growth, investment, and other factors." *Id.*

³¹ For example, imagine that Restaurants A and B serve similar quality food, and that ten people, who know nothing about the restaurants, arrive one by one. The first sequential decision-maker D1 might decide, randomly, to go to restaurant B. The next, D2, if he weights D1's decision heavily, might make the same choice. Over time, restaurant B may be full, a powerful signal of quality having nothing to do with the actual quality of the food. For a more in-depth overview, see Sushil Bikhchandani, David Hirshleifer & Ivo Welch, *Learning from the Behavior of Others: Conformity, Fads, and Informational Cascades*, J. ECON. PERSPECTIVES 12:3 151-170 (Summer 1998).

suboptimal rule, yet due to the weight of cases behind the rule, be increasingly hesitant to run against the crowd. Economists Andrew Daughety and Jennifer F. Reinganum, in their paper on horizontal judicial herding, gave the example of *Eastern Enterprises v. Apfel*, where six circuit courts had agreed a law was constitutional but were later reversed by the Supreme Court.³² The example showed that, perhaps due to herding effects, errors might remain long uncorrected in a common-law system.

The prospect of judicial herding may seem like a serious challenge to the utility of a common-law system. But as we discuss in Part III, doing what other judges have done in similar cases may also be desirable -- for it's a means for judges to build their own political power. Herding may also be another word for following a rule.³³ As Eric Talley has written, healthy legal systems aim for a balance between blind obedience and learning.³⁴ They employ devices, like life tenure, or the technique of distinguishing cases, that allow judges to break from sub-optimal rules when they deem it necessary. An ideal system ought simultaneously to provide predictability and the capacity to adapt, despite the apparent contradiction.

These tools from the information economics literature help us understand what's at stake when we study communications within a judicial system. We now to turn our empirical study of recent developments in the communications practices in the Chinese judiciary.

II. CHINESE JUDGES AND THE INTERNET

Before beginning our analysis of the impact of the internet on the courts, we offer a brief primer in the functioning of China's courts and the Chinese media.³⁵ China has a lot of judges—most estimates say about 200,000, or roughly twice the number of lawyers. Until recently, relatively few Chinese judges had significant legal training: reports in mid-2005 stated that, for the first time, more than fifty percent of judges were university graduates. A decade earlier the figure was just twelve percent. In the past, many judges were retired military officials or government cadres. As of 2002, however, new judges are required to be university graduates and to pass the difficult national bar exam (which has a pass rate of about ten percent). The Supreme People's Court (SPC) has also devoted enormous resources to training existing judges. Many of those who lack formal training in law have been required to attend night-school or special training

³² Andrew F. Daughety & Jennifer F. Reinganum, *Stampede to Judgment: Persuasive Influence and Herding Behavior by Courts*, 1 AM L & ECON REV 158 (1999).

³³ See Clayton P. Gillette, *Lock-In Effects in Law and Norms*, 78 B.U.L. REV. 813 (1998).

³⁴ See Eric Talley, *Precedential Cascades: An Appraisal*, 73 S. CAL. L. REV. 87 (1999).

³⁵ This discussion is based on Liebman, *Watchdog*, *supra* note 20; Benjamin L. Liebman, *China's Courts: Restricted Reform*, CHINA Q. (forthcoming 2007); and Benjamin L. Liebman, *Innovation through Intimidation: An Empirical Account of Defamation Litigation in China*, 47 HARV. INT'L L. J. 33 (2006).

programs. Older judges who lack legal training are being pushed into early retirement, or are sometimes no longer permitted to hear cases.

For much of the reform period (1978-present), China's courts have remained relatively minor actors in the Chinese political system. Courts lack significant power over other state institutions and have no formal powers of judicial review. Under the Chinese Constitution, only the National People's Congress and its Standing Committee have the power to interpret laws or the Constitution, though in practice the SPC plays an important role in interpreting the law.

China's legal system is national and unitary, with four levels of courts. Most first instance cases are brought in basic level courts in counties or in districts within cities. Appeals from such cases go to intermediate courts in municipalities, or *shi*. Intermediate courts also hear certain categories of first instance cases -- generally those involving large sums of money, or serious crimes, but also sometimes cases that are politically sensitive. Provincial high courts (and the high courts of municipalities with provincial rank, such as Beijing and Shanghai) oversee the courts in their provinces, hear appeals from intermediate courts, and have the power to rehear cases brought in all lower courts in their jurisdiction. The SPC, with more than 200 judges, manages the court bureaucracy, hears appeals and rehearings, and issues a large volume of interpretive documents intended to guide lower courts in the application of the law. These range from formal interpretations of laws, which often read like statutes themselves, to responses to courts regarding the handling of individual cases pending in lower courts.

Court caseloads have grown significantly since the beginning of legal reforms in the late 1970s -- with some stating that China is now experiencing a "litigation explosion." Over the last five years the total number of cases heard in China, has held steady at about eight million a year. Courts continue to be one of many state institutions with responsibility for resolving disputes and hearing grievances.

Problems in the Chinese courts have received widespread attention in both the Chinese and international media. Corruption is said to be common, courts often lack the power to enforce their decisions, and external intervention in pending cases is widespread. Intervention comes from a range of sources. Local government officials frequently pressure the courts in cases involving key local interests. Courts find it hard to resist such pressure, in particular because judges depend on local governments for their jobs and salaries. Court appointments (and removals from office) are generally made by the local Communist Party branch and government, and court budgets are dependent on local governments. Communist Party Political-Legal Committees, which include senior police, court, procuratorate, justice bureau, and Party officials, exist at each level of the Party-state, and discuss (and sometimes issue written suggestions in) major cases. People's congresses -- China's legislatures -- have the formal power to "supervise" the courts, and may from time to time issue requests or views to

courts regarding cases. Individual Party officials also may intervene in cases of particular concern, issuing written instructions to the courts regarding pending cases, or sometimes simply discussing cases with court presidents.

In contrast to the courts, the Chinese media have long occupied a privileged position in the Chinese political system. The media serve as both the mouthpiece and the “eyes and ears” of the Party -- not only writing public reports that appear in print or in broadcasts, but also “internal reports.” Internal reports contain information for officials of a particular rank, reports that are deemed not suitable for public dissemination. This means that when media views conflict with those in the courts, Party officials tend to side with the media.

Commercialization of the Chinese media in the 1990s resulted in major changes. Thousands of new publications appeared, mostly offshoots of traditional Communist Party mouthpiece newspapers. These commercialized papers compete fiercely with one another, often by providing sensational or hard-hitting reports. They also generate profits for their parent publications, which continue in their “official” or “mouthpiece” propaganda roles. The growth of the internet brought further competition, with papers and web portals now competing to attract readers on-line as well as in-print, often by providing content that skirts the edges of what is permissible.

China's media regulatory system, although challenged by the growth of commercialized media and the internet, remains fundamentally unchanged. Regulations restrict who can enter the market -- ensuring that the overwhelming majority of publications and broadcasters in China are state-controlled (albeit often in corporatized form). The Party's Central Propaganda Department (“CPD”) oversees all media content, relying on both circulars that prohibit certain content, and also on a system of post-publication sanctions that target those who go beyond permissible boundaries. Local propaganda departments at the provincial, municipal, and local level likewise oversee content in local media, often supplementing CPD restrictions with their own local restrictions on content.

The job of the CPD and local and provincial propaganda departments has become much more difficult in recent years. The commercialization of the media means that there is vastly more content available than at any prior point in Chinese history. And the growth of the internet, as we will show, means that news spreads much more quickly than before -- often before propaganda departments can react to impose bans. Chinese authorities have not been passive in response to such challenges. As has been widely reported in the western media, China devotes substantial resources to monitoring and controlling the internet. This includes ordering websites to prohibit discussion of certain topics, or to remove controversial articles. Sites that go too far are shut. One result is that self-censorship by commercial internet news providers is perhaps the most effective means by which authorities maintain control over reporting and discussion of controversial topics online.

The following sections set forth our empirical findings. They are based on extensive review of Chinese writings and on interviews with more than 100

scholars, reporters, lawyers, and judges about the impact of the internet on China's courts. Interviews with judges were conducted in three provinces in China and in two cities with provincial rank. Judges ranged from those sitting on provincial high courts, to well-educated judges in major cities, to judges in small county towns who lacked formal training in law.³⁶ We freely admit the limitations of our methodology: those likely to interact with us are most likely younger, more liberal, and more likely to use the internet, than many others in China. Nevertheless, their descriptions of the impact of the internet provide a crucial base for understanding the important changes we believe are taking place in China's courts.

A. *External Pressures*

China's own internet revolution has made it much easier for the public, the media, and the Party-state to become aware of and criticize the Chinese legal system and its courts. Although that may sound good, the results, from a rule-of-law perspective, have both attractive and less attractive aspects.

Sometimes cheaper information has meant better accountability and pressure for important reform. As we discuss below, courts or legal institutions that are neglecting or deliberately abusing their duties can be exposed and subjected to public or media pressure. Bad decisions, corrupt judges, and unjust procedures are sometimes brought to light by internet communications, leading to important reforms.

Yet the same mechanism can create excessive pressure on the courts. As we discuss, unpopular decisions can attract a strong public reaction — the “internet manhunt” — and subsequent political intervention to quell public outrage. The internet plays a crucial role in making both Party leadership and the courts aware of public opinion, which is important in a system in which other outlets for public opinion are restricted. But the effect may be more mixed in a system where only one segment of public opinion is being heard, where the media play an active role in generating popular outrage online, and when such opinion is significantly restricted due to Communist Party control and oversight of the media.

1. Greater Accountability. -- In 2003, Sun Zhigang, a university graduate working as a graphic designer in the southern city of Guangzhou, was detained by police for failing to have the temporary residence permits required of migrant workers. Three days after his arrest Sun was beaten to death while in a local detention center for migrants.³⁷

More than a month after Sun's killing, on April 25, 2003, the leading commercial newspaper in Guangdong Province, *Southern Metropolitan Daily*, carried a report on the case, entitled “Only Missing a Temporary Residence

³⁶ All interviews were conducted by Liebman. All interviewees were promised complete anonymity, and thus we identify neither their name nor the location in which the interviews took place.

³⁷ For details of the case see Liebman, *Watchdog or Demagogue?*, *supra* note 20, at 82-91 (2005).

Permit, College Graduate is Beaten to Death.” Local Communist Party Propaganda Department officials immediately banned any further discussion of the case in the local media. But the ban was ineffective. The *Southern Metropolitan Daily* article had already been posted to the paper’s web site on the day of publication, and had been subsequently reposted to numerous other internet web sites. It even showed up on the web site of the *People’s Daily*, the mouthpiece of the Chinese Communist Party.

Within hours, internet discussion forums filled with discussion of the case.³⁸ Noting the article in the Party’s *People’s Daily*, numerous other newspapers subsequently reported on the case, carrying follow-up stories that were also posted and reposted online. On May 13, three weeks after the original report and following weeks of online discussion of the case, authorities announced that they had detained thirteen suspects. A month later, twelve defendants were convicted for their roles in the case, and the two “primary culprits” were sentenced to death and life in prison, respectively.³⁹

The impact of the case -- and of the internet -- did not end with the trial. Following the arrests in May, a group of academics and journalists launched an assault on the detention system under which Sun had been apprehended, known as Custody and Repatriation. In an effort coordinated with print and online media, two groups of lawyers and scholars issued petitions calling on the system to be abolished because it was unconstitutional. The petitions themselves were not printed in full in the official media, but were widely available online.⁴⁰ Media

³⁸ *Nanfang Zhoumo: Renmin Wang Wenzhang Zengjia Le Zhenpo Sun Zhigang An De Juexin* [Southern Weekend: Articles on People’s Daily Online Strengthens the Determination to Crack the Sun Zhigang Case], NANFANG ZHOUMO [SOUTHERN WEEKEND], June 6, 2003, available at <http://past.people.com.cn/GB/news/8410/20030606/1010138.html> (discussing the internet’s role in the case) [LZ-36]; *Zhongguo Zhi Sheng: Sun Zhigang Shijian* [The Voice of China: The Sun Zhigang Affair], Human Rights Watch, http://www.hrw.org/campaigns/china/beijing08/voices_ch.htm (last visited Feb. 26, 2006) (stating that tens of thousands of postings protesting the case appeared, on all popular websites in China, and including examples of such postings) [LZ-37]; see also Teng Biao, *Sun Zhigang Shijian: Zhishi, Meijie Yu Quanli* [The Sun Zhigang Affair: Intelligence, Media and Power], FALŪ SIXIANG WANG [LAW THINKER WEB], Oct. 25, 2004, <http://law-thinker.com/show.asp?id=2703> [LZ-39] (describing online discussions of the case and the important role of the internet).

³⁹ In addition, twenty-three officials were given administrative sanctions for their mishandling of the case.

⁴⁰ For discussion of the petitions, see Guo Liang, *Zhongguo Hulianwang De Fazhan: Dongli Yiji Dui Minyi De Yingxiang* [The Development of Internet in China: Dynamics and Influence on Public Opinion], *Zhongguo Hulianwang Yanjiu Xiangmu* [China Internet Research Project], Apr. 26, 2004, <http://www.wipchina.org/?p1=content&p2=05013000345> [LZ-34]; Teng Biao, [LZ-39], *supra* note 38; Cui Li, *Wu Zhuanjia Jiu Sun Zhigang An Tiqing Renda Qidong Tebie Diaocha Chengxu* [Five Experts Petitions to the NPC to Initiate Special Investigation Proceedings], *ZHONGGUO QINGNIAN BAO* [CHINA YOUTH DAILY], May 28, 2003, available at <http://www.npcnews.com.cn/gb/paper7/30/class000700001/hwz236693.htm> [LZ-41]; *San Gongmin Shangshu Renda Jianyi Dui Shourong Banfa Jinxing Weixian Shencha* [Three Citizens Petition to the NPC Calling for Constitutional Review of the Custody and Repatriation Provisions], *ZHONGGUO QINGNIAN BAO* [CHINA YOUTH DAILY], May 16, 2003, available at <http://www.people.com.cn/GB/shizheng/20030516/993964.html> [LZ-40].

coverage highlighted their demands, leading to online discussion and reposting of the petition.⁴¹ Reports also noted some of the widespread abuses in the system, including numerous reports of other inmates also being murdered while in detention. Websites provided significantly wider-ranging discussions of the case than those appearing in the traditional media.⁴²

Shortly after the June trial of the defendants in the Sun case, China's State Council announced that the Custody and Repatriation System was being scrapped and replaced with a system designed to shift the emphasis from punishing migrants to assisting them by establishing "a caring assistance system" of "aid stations" that provide migrants with shelter and food.⁴³ Although official comments stated that the changes simply reflected changed conditions in China and some involved in the drafting of the new regulations noted that the changes had been contemplated since before the incident, the link to the Sun Zhigang case and ensuing public outcry was clear.

The Sun Zhigang case is an example of how the growth of investigative journalism in China, in particular among the market-driven newspapers that developed throughout the 1990s, combined with the internet, is resulting in much greater attention to law and the legal system than at any prior point in Chinese history.⁴⁴ Prior to commercialization of the media, press reports on the courts tended to be declaratory statements of the outcomes of cases, often written by court officials. Increased competition among the print media brought greater scrutiny to the courts and to legal issues more generally, along with greater critical coverage of decisions perceived as unjust. Yet prior to the growth of the internet, discussions of cases in one region, even in the commercialized media, often went unnoticed elsewhere, and it was relatively easy for Propaganda Department officials to terminate discussion of cases by banning further media reports. A daring newspaper, such as *Southern Weekend*, might expose gross injustice, but officials could move swiftly to terminate follow-up reports. Otherwise, courts often operated in relative obscurity. Decisions might be reported in a local newspaper, or not at all.

⁴¹ For discussion of the internet's role in the case, see Ouyang Bin, *Hulianwang Chongji Zhongguo Shehui Shengtai* [Internet's Impact on the Environment of Chinese Society], Fenghuang Wang [Phoenix TV Net], available at <http://www.phoenixtv.com.cn/home/phoenixweekly/141/30page.html> (last visited Feb. 27, 2006) [LZ-31]; Guo Liang [LZ-34], *supra* note 40.

⁴² For example, a well-known Peking University professor engaged in a pointed two-hour online discussion on the case; the transcript is available at He Weifang, *Cong Sun Zhigang Shijian Kan Zhongguo Fazhi Fazhan* [Development of Rule of Law in China as Reflected by the Sun Zhigang Affair], RENMIN WANG [PEOPLE'S DAILY ONLINE], June 10, 2003, <http://www.people.com.cn/GB/shehui/46/20030610/1013342.html> [LZ-42].

⁴³ *670,000 Urban Vagrants Get Assistance in China*, PEOPLE'S DAILY ONLINE, Dec. 23, 2004, available at http://english.people.com.cn/200412/23/eng20041223_168443.html; *Vagrants Get Aid as New System Begins in China*, PEOPLE'S DAILY ONLINE, Aug. 1, 2003, available at http://english.people.com.cn/200308/01/eng20030801_121435.shtml.

⁴⁴ For discussion of the development of the commercialized media in China and the rise of investigative journalism, see Liebman, *Watchdog or Demagogue*, *supra* note 20, at 23-41

That's changing. As the Sun case shows, thanks mainly to the internet and the birth of competing internet news sites, cases that might once have been invisible, or have disappeared, can receive national attention, sometimes virtually instantly. In other cases, web sites and web discussion forums spread news of cases where local Propaganda Department officials have instructed the official media not to report on such cases. In addition to the famous Sun Zhigang case, numerous other cases of alleged injustice have attracted widespread coverage and discussion on the internet. We now discuss two additional examples, the wrongful convictions of She Xianglin and Nie Shubin.

In 1994 a woman named Zhang Zaiyu disappeared. Zhang's family accused her husband, She Xianglin, of killing her. When police found the body of an unidentified woman in a nearby water tower, which relatives identified as Zhang, they charged She with murder. After She confessed to the murder, allegedly under torture, he was sentenced to death. On appeal the Hubei Province High People's Court sent the case back for retrial due to insufficient evidence, and She was sentenced to 15 years in prison for intentional homicide.⁴⁵

Eleven years later, on March 28, 2005, Zhang Zaiyu reappeared alive and married to a different man.⁴⁶ An initial report on Zhang's reappearance ran in a local paper in Wuhan, the capital of Hubei Province. Following the report, local authorities banned further reporting on the case pending an official investigation, and instructed the media to use only an officially approved report on the case.⁴⁷ But news quickly spread online and to other newspapers. A few weeks later, on April 15, She was released from custody. Media coverage may not have been solely responsible for She being freed -- authorities reopened the case immediately after Zhang returned home. But such coverage did appear to assist She in obtaining 460,000 yuan (approximately 57,000 U.S. dollars) in compensation for his wrongful incarceration. The settlement was reported to be the largest from the state in Chinese history.⁴⁸

As in the Sun Zhigang case, the media linked the case to broader problems in the Chinese criminal justice system. One report on the She case argued such wrongful conviction cases reflected the pressure placed on local authorities to solve cases and assuage popular anger.⁴⁹ Official explanations, in contrast, blamed the case on historical circumstances and the weakness of the legal system

⁴⁵ *Cong Nie Shubin Dao She Xianglin: Cuoan Zhaoxue Buneng Jiwang Yu Ouran* [From Nie Shubin to She Xianglin: Correcting Wrongful Convictions Cannot Rely Only on Chance], Apr. 3, 2005, http://news.xinhuanet.com/legal/2005-04/03/content_2779236.htm [LP-35].

⁴⁶ *Id.* [LP-35].

⁴⁷ See Lü Zongshu, *Jizhe Diaocha: She Xianglin "Sha Qi" Cuo An* [Journalist's Investigation: The Wrongful Conviction of She Xianglin for "Killing his Wife"], RENMIN WANG [PEOPLE'S DAILY ONLINE], July 27, 2005, <http://media.people.com.cn/GB/22114/47850/47855/3572767.html> [LZ-44].

⁴⁸ Hu Bing & Yan Hua, *She Xianglin Nadao 46 Wan Peichang He Buchang Kuan* [She Xianglin Obtains 460,000 Yuan in Compensation], ZHONGGUO FAYUAN WANG [CHINA COURT WEB], Sept. 3, 2005, <http://www.chinacourt.org/public/detail.php?id=176316> [LP-38].

⁴⁹ *From Nie Shubin to She Xianglin* [LP-35], *supra* note 45.

at the time of She's conviction, and praised the efforts of local authorities to resolve the matter.⁵⁰

Another illustrative example is the wrongful conviction case of Nie Shubin. In 1994, a court in Hebei Province found Nie Shubin guilty of rape and murder. Nie was executed the following year. Eleven years later, in 2005, a second man named Wang Shujin confessed to the original rape and murder.

The confession story was originally reported on in March by a reporter from the *Henan Commercial News*, reprinted in the *Beijing News* and followed-up on by a report in *Southern Weekend*.⁵¹ All of the reports subsequently were posted to and circulated online. Local authorities refused to reopen Nie's case, and the media began to complain of a cover-up. A report in *Southern Weekend*, for example, asked why the local authorities failed to release details of their investigation into the case, and inquired whether the case would "disappear."⁵² The report also noted that all details about the case had been removed from the police website.⁵³ Likewise, a report in the *Beijing News*, issued on March 15, questioned why the police, procuratorate, and court involved in the case had refused to take any action or to comment on the case.⁵⁴ Following the report, propaganda department officials apparently ordered the media not to carry further reports on the case.⁵⁵ However, reports continued to circulate, both in print and online, suggesting that the ban was either very limited or was widely ignored.⁵⁶

⁵⁰ *Jingmen Shouci Gongkai Zongjie She Xianglin An Jiaoxun: Youzui Tuiding Shi Shouyin* [Jingmen for the First Time Summarizes Publicly the Lessons from the She Xianglin Case: The Crucial Reason is the Presumption of Guilt], XINHUA WANG [XINHUA WEB], July 19, 2005, http://news.xinhuanet.com/legal/2005-07/19/content_3239399.htm [LP-36].

⁵¹ "Nie Shubin Yuansha An" Xuan Er Wei Jue, Fang "Goudui" Gongzhong Yu Yidi Diaocha ["The Case of Nie Shubin's Wrongful Execution" is Pending, and the Public Calls Out for an External Investigation in Order to Avoid "Compromising"], NANFANG ZHOUMO [SOUTHERN WEEKEND], Mar. 24, 2005, <http://www.southcn.com/weekend/commend/200503240006.htm> [LZ-57].

⁵² Zhao Ling, *Nie Shubin An Juedui Buhui Bu Liao Liao Zhi* [Nie Shubin Case Will Absolutely Not End Up With No Outcome], NANFANG ZHOUMO [SOUTHERN WEEKEND], Apr. 28, 2005, available at <http://www.nanfangdaily.com.cn/ZM/20050428/xw/fz/200504280005.asp> [LP-41].

⁵³ Previously, the Guangpin county public security web site had included details of the case in a prominent place. *Id.* [LP-41].

⁵⁴ *Wugu Qingnian 10 Nian Qian Zao Cuo Sha?* [An Innocent Youth Was Executed Wrongfully 10 Years Ago?], XIN JING BAO [THE BEIJING NEWS], Mar. 15, 2005, available at <http://news.hexun.com/detail.aspx?lm=1697&id=1068197> [LZ-49]; see also Zhao Ling, [LP-41], *supra* note 52; "Nie Shubin An" Geng Xuyao Gongzhong Haobu Songxie De Jinmi Guanzhu ["Nie Shubin Case" Needs More of the Public's Continuing and Intense Attention], NANFANG DUSHI BAO [SOUTHERN METROPOLITAN NEWS], Apr. 22, 2005, available at <http://www.southcn.com/opinion/politics/200504220359.htm> (discussing the case) [LP-42].

⁵⁵ *Zhongxuanbu Jinji Tongzhi Jinzhi Baodao Nie Shubin Bei Cuosha An* [The Central Propaganda Department Urgently Circulates Notice Banning Reports of the Case of Nie Shubin's Wrongful Execution], BOXUN XINWEN WANG [BOXUN NEWSNET], Mar. 21, 2005, <http://www.peacehall.com/news/gb/china/2005/03/200503211409.shtml> [LZ-51]; Fu Yingji, *2005 Nian Zhongguo Wangluo Shier Da Bei Shan Xinwen* [Twelve Big Pieces of News Deleted from the Chinese Internet in 2005], available at <http://forum.chinesenewsnet.com/archive/index.php/t-19858.html> (last visited Feb. 28, 2006) and

On the same day the *Beijing News* report appeared, the Hebei Province High People's Court launched an investigation into the case. The Court did so after written instruction from leaders of the Political-Legal Committee of the Provincial Communist Party.⁵⁷ Although rumors later circulated online that an internal investigation had determined that the case had not been incorrectly decided,⁵⁸ as of mid-2006 no official decision had been announced.⁵⁹

Nie Shubin's family may still be waiting for justice. But, as with the Sun Zhigang case, the most important effect of the Nie and She cases was not the outcome of the individual cases, but their effect on national policy. At the end of 2005, China's Supreme People's Court (SPC) announced that it was revising China's procedures for handling capital cases. Under the new rules, final review of all capital cases will be conducted by the SPC. In the past, such review power was delegated to provincial high courts -- which were also responsible for hearing appeals of capital cases. The new procedures create a third tier of review. In addition, the SPC rules require appeals in capital cases to be heard in open court.⁶⁰ Although pressure, both domestic and international, had been building for such changes for some time, the wave of public attention to the Nie, She, and other

<http://www.wangbingzhang.us/forum/wbz/messages/4381.html> [LZ-59]. The two sources that reported on the ban are overseas media, and may have overstated the reach of the ban. Although both reports stated that the CPD had imposed a ban, it appears more likely that any ban was imposed by local, not national, propaganda department officials. For a collection of commentary on the case, see Xiao Han, *Guanzhu Nie Shubin Mengyuan Sixing An [Pay Attention to Nie Shubin's Wrongly Adjudicated Death Penalty Case]*, ZHONG PIN WANG [CHINA REVIEW WEB], Mar. 22, 2004, <http://www.china-review.com/tbzt/050322bianzhean.htm> [LZ-60].

⁵⁶ *The Case of Nie Shubin Killed Wrongfully is Pending*, [LZ-57], *supra* note 51; Zhao Ling, [LP-41] *supra* note 52; Qian Haoping, *Hebei Chongxin Diaocha Nie Shubin An, Cheng Zuiduan Shijian Nei Huan Shishi Zhenxiang [Hebei Re-investigates the Nie Shubin Case, Stating They will Reveal the Truth in the Shortest Time Possible]*, HEXUN YAOWEN [HEXUN CRITICAL NEWS], Mar. 18, 2005, <http://news.hexun.com/detail.aspx?lm=1716&id=1073687> [LZ-50].

⁵⁷ Qian Haoping [LZ-50], *supra* note 56.

⁵⁸ *Hebei Zuochu Nie Shubin An "Bushu Cuoan" De Rendeng [Hebei Makes Determination that the Nie Shubin Case "Was Not Wrongfully Decided"]*, BOXUN XINWEN WANG [BOXUN NEWSNET], Apr. 22, 2005,

<http://www.peacehall.com/news/gb/china/2005/04/200504220259.shtml> [LZ-52].

⁵⁹ *Nanfang Dushi Bao: Feiyao Zhaoqi Nie An De Yuanshi Xingzhen Jilu Ma [Southern Metropolitan Daily: Are All the Original Administrative Records of Nie Case Required]*, NANFANG DUSHI BAO [SOUTHERN METROPOLITAN DAILY], Jan. 7, 2006, available at <http://news.163.com/06/0107/01/26R26J510001124T.html> [LZ-53]. One report stated that the family of Nie Shubin had heard that officials had determined that there was no error, but had not received any formal notification to this effect. "*Nie Shubin Qiangjian Sharen An' Bushu Cuoan*" [*"The Nie Shubin Rape and Murder Case' Was Not Wrongfully Decided"*], GUANGZHOU RIBAO [GUANGZHOU DAILY], Apr. 20, 2005, available at http://gzdaily.dayoo.com/gb/content/2005-04/20/content_2023768.htm [LZ-61].

⁶⁰ *Yearender: Media's Frequent Exposure of Unjust Cases Promotes Judicial Reform*, PEOPLE'S DAILY ONLINE, Dec. 19, 2005, available at http://english.people.com.cn/200512/19/eng20051219_229034.html.

wrongful conviction cases during 2005 appeared to be a crucial factor leading the SPC to make the changes.⁶¹

Most such cases follow a pattern similar to those of the Sun, She and Nie cases. Traditional print media initially report on the case, the report is posted to the media's official web page, and then is reposted to numerous other websites. The articles result in widespread discussion online, in particular in web discussion forums.⁶² Such discussion and coverage encourages follow-up reports in the print media, reports that are subsequently reposted to the internet.

The interaction between print and online media is important. Chinese regulations on the internet restrict the ability of internet providers to create their own news content. With just a few exceptions, only traditional media are permitted to generate news stories.⁶³ The number of web sites legally qualified to print original news is unclear; a 2004 report stated that 163 web sites were legally qualified to publish news, while another 1400 were permitted to offer "news service" -- which generally means they are permitted to reprint articles that have already appeared in the official media.⁶⁴ Websites with the ability to generate original news content are generally those linked to national, provincial and local Communist Party mouthpiece newspapers.⁶⁵ Another important difference between the traditional media and online media is that the online media are more likely to carry commentaries on cases while they are pending. The traditional media usually wait to discuss cases until decisions have been made.⁶⁶

An additional crucial feature of the Sun, She and Nie cases is that the internet facilitates coverage by the media in jurisdictions other than those in

⁶¹ *Fazhi Ribao: Dianji 2005 Nian Si Da Falü Guanjian Ci* [Legal Daily: Clicking on Four Key Legal Words in the Year 2005], Jan. 10, 2006, <http://news.sina.com.cn/c/2006-01-10/08317940186s.shtml> (discussing the effect of the Nie and She cases) [LZ-58].

⁶² In some cases in which initial reports in the official media are blocked, information on the cases is first posted to web sites. Once sufficient public discussion has been generated, and official attitudes toward the case have become clear, the official media will then report on the case. Ouyang Bin [LZ-31], *supra* note 41.

⁶³ *Hulianwang Xinwen Xinxi Fuwu Guanli Guiding* [Provisions for the Administration of Internet News Information Services], Guowuyuan Xinwen Bangongshi, Xinxi Chanye Bu Di 37 Hao Ling [The Information Office of the State Council and the Ministry of Information, Industry Order No. 37] (Sept. 25, 2005), available at <http://law.chinalawinfo.com/newlaw2002/SLC/SLC.asp?Db=chl&Gid=60145> [LZ-46] (stating that only web sites linked to traditional media are permitted to generate their own news stories); *Hulian Wangzhan Congshi Dengzai Xinwen Yewu Guanli Zanxing Guiding* [Temporary Provisions for the Administration of Internet Websites' Service of Posting News Information], Guowuyuan Xinwen Bangongshi & Xinxi Chanye Bu [The Information Office of the State Council & the Ministry of Information Industry], Nov. 7, 2000, available at <http://info.people.com.cn/EComCInt/index2.jsp> [LZ-47].

⁶⁴ Shi Jiangmin, "Wangluo Chuanbo" Zai Jing Zhengshi Chuangkan ["Internet Broadcast" Officially Published in Beijing], RENMIN WANG [PEOPLE'S DAILY ONLINE], April 20, 2004, available at <http://www.people.com.cn/GB/14677/14737/22035/2458358.html> [LZ-48].

⁶⁵ *Id.* (listing examples); Liebman, *Watchdog or Demagogue?*, *supra* note 20.

⁶⁶ Interview 2006-26.

which a case occurred. In the Nie case, what might have been a local issue was reported by media from Beijing, Henan, and Guangdong. The significance lies in the fact that in many cases local propaganda authorities will block local media from reporting on local cases.⁶⁷

Another, recent example of such trans-provincial news coverage is the defamation action brought against the authors of the best-selling -- but subsequently banned -- book, *An Investigation into China's Peasants*. The book detailed problems facing China's peasants, including abuse and over-taxation by local authorities. A Party official in Anhui Province sued the publisher and author in local court, arguing that the book had defamed him.⁶⁸ After an initial flurry of coverage in the print media, the Central Propaganda Department banned further reporting on the case.⁶⁹ Despite the ban, widespread discussion of the case continued online -- putting the court under pressure not to act too obviously to protect the local official. Continued internet postings also highlighted the court's ongoing failure to resolve the case.⁷⁰

The *Investigation into China's Peasants* case has yet to be resolved, and the long delay suggests that the court either continues to struggle to determine how to handle the case, or has decided to ignore it.⁷¹ According to a widely circulated email written by the defendants' lawyer in April 2006, the court handling the case has decided to leave the case unresolved and not issue any decision. But it does appear that the continued attention to the case, in part via online media, resulted in pressure on the court to follow procedural norms and not to act immediately to protect local interests.

The Sun, She and Nie cases show how the combined efforts of traditional and online media can force authorities to reopen cases and redress longstanding injustices. Meanwhile, the *Investigation into China's Peasants* case shows how

⁶⁷ In mid-2005, China's Central Propaganda Department issued new rules restricting "non-local news." The rules, which ban local media from writing original news content on other jurisdictions in China, is apparently a direct response to the widespread practice of non-local media engaging in investigative reporting. Nailene Chou Wiest, *Closing of Loopholes to Further Gag Media*, S. CHINA MORNING POST (Online), June 11, 2005, available at <http://www.asiamedia.ucla.edu/article.asp?parentid=25640>.

⁶⁸ Ruo Qiao, "Zhongguo Nongmin Diaocha" Beigao Mingyu Qinquan Yuanshu Zuoze Jujue Tingwai Hejie [Authors of "Investigation into China's Peasants" Are Sued for Defamation and Refuse to Settle Out of Court], CHENGDU SHANG BAO [CHENGDU COMMERCIAL NEWS], Feb. 25, 2004, available at <http://www.booktide.com/news/20040225/200402250013.html> [LZ-62].

⁶⁹ Lianghui Qian Beijing Yankong Yulun Fengsha "Zhongguo Nongmin Diaocha" [Beijing Tightly Controls the Media before the Two Meetings, Bans "Investigation into China's Peasants"] BOXUN XINWEN WANG [BOXUN NEWSNET], Feb. 29, 2004, <http://www.peacehall.com/news/gb/china/2004/02/200402291359.shtml> [LZ-63].

⁷⁰ Bentai Dujia Huode "Zhongguo Nongmin Diaocha" An Bianhu Lüshi Pu Zhiqiang Zhi Shenpanzhang Yi Xin [Exclusive: Letter to the Chief Judge from Pu Zhiqiang, Lawyer for the Defendants in the "Investigation into China's Peasants" Case], Radio Free Asia, July 11, 2005, available at <http://www.rfa.org/mandarin/shenrubaodao/2005/07/11/puzhiqiang/> [LZ-64].

⁷¹ Chinese courts encountering difficult or sensitive cases frequently either refuse to allow such cases to be filed, or simply never decide such cases. For a discussion of the phenomenon, see Liebman, *Restricted Reform*, *supra* note 35.

online media may help keep discussion alive when traditional media are barred from such discussions, and how email can be used to spread news of cases where reporting has been banned.

2. *Internet Populism.* -- In the Sun Zhigang case, public pressure led to more attention to the treatment of migrants within China. Media pressure, fanned by internet discussion, forced authorities to investigate the case, make arrests, and abolish the detention system that led to his death. The case may have resulted in belated justice for Sun. But it was less clear that those accused of being his killers received fair trials. Public pressure resulted in rushed and closed trials of the defendants, with court judgments that appeared preordained by Party leaders. The trial in the case was held in June 2003, just six weeks after the case first came to light. The Guangdong Province High People's Court affirmed the lower court's decision in the case on June 27, and Qiao Yanqin, the principal defendant, was executed the same day.⁷²

Only three official media outlets were permitted to send reporters to the trial. Propaganda officials instructed other media to use only reports from the official *Xinhua News Agency*, and Internet portals were told to terminate discussion of the case. Some journalists and other observers questioned the fairness of the trial, arguing that the death sentence imposed on Qiao Yanqin was excessive, and asked why charges had focused on a low-ranking nurse and other inmates in the detention center, rather than on higher-ranking officials. But such discussions were generally not permitted online or in print. Instead, official accounts focused on praising authorities' speedy handling of the case, and on the court's responsiveness to public opinion.⁷³ And in a final development, the editors of the paper that originally broke the story of Sun Zhigang's murder were later imprisoned, albeit for "unrelated" corruption charges.⁷⁴

In 2003, Liu Yong likewise found that angry online discussion of a case can lead to execution. Liu, an organized crime boss, was convicted in the early 2000s of a range of crimes, including organizing a criminal syndicate, bribery, and illegal possession of firearms.⁷⁵ An intermediate court in Liaoning Province

⁷² *Sun Zhigang An Zhongshen Weichi Yuanpan, Zhufan Qiao Yanqin Bei Zhixing Sixing* [Final Decision of Sun Zhigang Case Affirms the First Trial Decision: Principal Criminal is Executed], RENMIN WANG [PEOPLE'S DAILY ONLINE], June 27, 2003, <http://www.people.com.cn/GB/shehui/1061/1939883.html> [LZ-43].

⁷³ See, e.g., *Gong An Bu: Sun Zhigang Anjian De Chuli Shi Xunsu, Jianjue He Yansu De* [The Ministry of Public Security: The Resolution of Sun Zhigang Case is Speedy, Determined and Serious], XINHUA WANG [XINHUA NEWS], Aug. 7, 2003, http://news.xinhuanet.com/weekend/2003-08/07/content_1016300.htm [LZ-54].

⁷⁴ Lieberman, *Watchdog or Demagogue*, *supra* note 20. The same newspaper, *Southern Metropolitan News*, had also been the first to report on the SARS epidemic in 2003. Observers suggested that the editors were punished for their coverage of both the Sun case and the SARS crisis.

⁷⁵ *Zuigao Renmin Fayuan Zaishen Liu Yong An Xingshi Panjue Shu (2003) Xing Ti Zi Di 5 Hao* [Supreme People's Court Decision in the Retrial of the Liu Yong Criminal (2003) Criminal Retrial No. 5], Dec. 20, 2003, available at <http://www.chinacourt.org/public/detail.php?id=96393> [LZ-55].

tried his case and sentenced him to death. On appeal in 2003, however, the Liaoning High People's Court reduced his sentence to life in prison. One reason for the reduction was the fact that Liu's confession had been obtained through torture.⁷⁶

A Shanghai paper, *Bund Pictorial*, quickly questioned the reduction in sentence.⁷⁷ News of the court's decision spread rapidly online -- one major internet portal ran a headline on its news home page, stating in large font "Liu Yong Will Not Die." The media suggested that Liu's ties to officials in Liaoning Province resulted in favorable treatment.⁷⁸ Reporters criticized academics who had written expert opinions -- in return for sizable fees -- in support of Liu.⁷⁹ Web discussion forums filled with angry commentary, denouncing Liu's "lenient" treatment.

Following the public outcry, the Supreme People's Court decided to rehear the case. The Court invoked a rarely-used procedure that permits the court to try *de novo* questionably-decided cases.⁸⁰ In a carefully scripted trial, Liu's case was heard on a Friday. The court announced its decision -- reinstating the death penalty -- on the following Monday morning. Liu was executed the same morning.

⁷⁶ The court stated that it had reduced the sentence in light of the facts and circumstances of the case, and noted that torture could not be ruled out. The Provincial High Court Opinion is not publicly available, but the decision is summarized in the SPC's opinion.

⁷⁷ *Waitan Huabao: Dui Shenyang Heibang Toumu Liu Yong Gaipan Sihuan De Zhiyi [Bund Pictorial: Questions on the Gang Leader Liu Yong's Reduced Sentence of Death with Reprieve]*, WAITAN HUABAO [BUND PICTORIAL], Aug. 21, 2003, available at <http://news.sina.com.cn/c/2003-08-21/01351583471.shtml> [LZ-LY6].

⁷⁸ *Shenyang Heibang Laoda Liu Yong Heyi Ruci Xiaozhang, Gandie Ganma Houtai Ying [Why Is the Shenyang Gang Leader Liu Yong So Aggressive: He has Godparents as Strong Backup]*, SANLIAN SHENGHUO ZHOUKAN [SANLIAN LIFE WEEKLY], Mar. 8, 2001, available at <http://news.sina.com.cn/c/202847.html> [LZ-LY7].

⁷⁹ *Falü Zhuanjia Lunzheng Ganrao Sifa Gongzheng, Jixing Zhidu Chansheng Guaitai [Legal Experts' Analyze Interference in Judicial Justice, Monster Baby is Born By the Malformed System]*, NANFANG DUSHI BAO [SOUTHERN METROPOLITAN DAILY], Oct. 9, 2003, available at <http://news.sina.com.cn/c/2003-10-09/11591884089.shtml> [LZ-LY3]. In an online discussion forum on the case one posting claimed that each expert earned 300,000 yuan for writing in support of Liu Yong. The experts denied this. One of them told journalists that they received only 2000 yuan each. *Id.* [LZ-LY3]

⁸⁰ Pursuant to the *tishen*, or "elevation and trial" procedures, the SPC can rehear cases decided by lower courts even absent a request from the parties that they do so. One report stated that the case was the "first ordinary criminal case" in which the SPC had used the procedures; one prior known *tishen* case was the trial of the Gang of Four. *Gaofa Tishen Liu Yong You Liang Da Yuanyin, Zhuanjia Cheng Ci Tixian Fazhi Jinbu [Two Reasons for the SPC to Retry the Liu Yong Case, Experts Claim It Reflects Major Progress in the Legal System]*, BEIJING WANBAO [BEIJING EVENING NEWS], Dec. 17, 2003, available at <http://news.sohu.com/2003/12/17/81/news217048181.shtml> [LZ-LY1]; *Zuigao Yuan Jinri Tishen "Liu Yong An", Liang Da Xuannian Youdai Jiekai [SPC Retries the Liu Yong Case Today, Two Big Questions are Waiting to be Resolved]*, BEIJING CHENBAO [BEIJING MORNING POST], Dec. 18, 2003, available at http://news.xinhuanet.com/legal/2003-12/18/content_1236925.htm [LY-10].

Media outlets and some academics described the decision as an appropriate response to popular opinion.⁸¹ Various web sites carried morbidly detailed accounts of each step of the case -- including, on the date of Liu's judgment and execution, hourly reports that described the court judgment, transportation of Liu to the execution ground and his body to the crematorium, and then return of his ashes to his family.⁸² The sina.com page on the case included links to more than 100 articles and commentaries.⁸³ Some declared the case a victory for "public opinion."⁸⁴

The official media hailed the Liu Yong and Sun Zhigang cases as examples of successful official responses to public demands demonstrating China's progress toward a more just and democratic society. Yet subsequent cases also demonstrate that the Party propaganda officials have become increasingly conscious of the need to manage online discussion of cases, and not let public outrage go too far. In two high-profile cases the authorities went out of their way to demonstrate that public outrage expressed online would not necessarily affect or change court decisions.

What became known as the BMW case began in 2003, when, in the northeast city of Harbin, a peasant accidentally drove his onion-cart into a parked BMW. The driver, a woman named Su Xiuwen, got out, and argued with the driver of the onion cart, Dai Yiquan. After bystanders intervened, she retreated to the car. She then unexpectedly put the car into gear, striking and killing Liu Zhongxai, Dai's wife, and injuring several others.

At trial in Harbin, the issue was whether Su had intentionally or accidentally put the car into forward gear. After a trial notable for its lack of eyewitness testimony, the court ruled the killing an accident and imposed a suspended sentence.

As news of the story spread, the Internet reaction was overwhelming. Sina.com, a leading web portal, reported receiving more than 200,000 web postings on the case -- even more than the total number of postings regarding the SARS crisis earlier in 2003.⁸⁵ The class difference between owners of the BMW

⁸¹ See, e.g., Ouyang Bin [LZ-31], *supra* note 41 (arguing that the death sentence was reinstated due to the combined efforts of internet and print media); Guo Liang [LZ-34], *supra* note 40.

⁸² See, e.g., Shenyang "Heidao Bazhu" Liu Yong Bei Panchu Sixing [Shenyang "Godfather of Black Society" Liu Yong Is Sentenced to Death], <http://news.sina.com.cn/z/liuyongsy/index.shtml> (last visited Sept. 27, 2005) [LP-47]; Shenyang Liu Yong An [Shenyang Liu Yong Case], <http://news.sina.com.cn/z/liuyongsy/1.shtml> (last visited Mar. 1, 2006) [LZ-LY5].

⁸³ Shenyang "Godfather of Black Society" Liu Yong Is Sentenced to Death [LP-47], *supra* note 82.

⁸⁴ Xiao Yuheng, Panchu Liu Yong Sixing Ye Shi Yulun Jiandu De Shengli [Sentencing Liu Yong To Death Is Also the Victory of Public Opinion Supervision], XINLANG [SINA], Dec. 22, 2003, <http://tech.sina.com.cn/me/2003-12-22/1447271669.shtml> [LZ-LY4].

⁸⁵ "Baoma" Zhuangren An Wangshang Dianji Lü Weiju Di Yi, Chaoguo Feidian [The Case of "BMW" Hitting People Gets the Most Internet Reading, Exceeding SARS], XINHUA WANG [XINHUA WEB],

http://news.xinhuanet.com/legal/2004-01/08/content_1266893.htm [LZ-BMW5]. Sina first reported on the case on December 31, 2003; ten days later it reported 220,000 online comments.

Guo Liang [LZ-34], *supra* note 40; see also

and the onion-cart drove public outrage, as did the questionable nature of the trial. Many speculated that political connections of Su, the wife of a prominent businessman in Harbin, influenced the outcome.

In January 2004 authorities announced that the case would be reexamined. But the authorities at the same time banned further reporting on the case and ordered websites to terminate and remove discussions of the case. There seemed to be a clear effort to establish that internet rage would not overturn the verdict.

Three months later, official media announced that an investigation led by the Heilongjiang Province Communist Party's Political-Legal Committee had determined that the case had been correctly decided. Although official statements declared that the court's decision in the BMW case had been upheld, observers reported that in fact a number of persons involved in the case were sanctioned internally.⁸⁶ The sanctions were never announced publicly.⁸⁷ The message can be read several ways. One possibility was that authorities did want to protect Su, the driver of the BMW. But the clear message was that malfeasance will be handled internally, and that internet anger can not always be allowed to dictate Party or court decisions.

A similar story came in 2005, when web sites carried extensive discussion of the case of Wang Binyu.⁸⁸ Wang, a migrant worker, was sentenced to death for murdering four people, including his construction site foreman and three family members. Wang's case became famous nationwide following reports in the *Beijing News*.⁸⁹ He was a symbol of the hardship and exploitation faced by China's millions of migrant workers. Wang killed his boss after he repeatedly failed to pay him. Said Wang, "I want to die. When I am dead, nobody can exploit me anymore. Right?"⁹⁰

<http://www.thebeijingnews.com/news/2005/0905/11@011747.html> [LZ-BMW4] (describing the on-line discussion forums of the case as "a miracle").

⁸⁶ Interview 2005-45.

⁸⁷ The driver in the case, Su Xiuwen, was subject to punishment but was not jailed. But the investigation into the case apparently led to other misdeeds being uncovered. Thus press reports stated that as a result of the investigation into the BMW case, another woman, Han Guizhi, was removed from office and tried for corruption. *Yuan Heilongjiang Zhengxie Zhuyi Han Guizhi Bei Mianzhi Qianhou* [The Former Heilongjiang President of the Heilongjiang Political Consultative Conference Han Guizhi is Removed from Office], XIN JING BAO [THE BEIJING NEWS], June 24, 2004, <http://news.sina.com.cn/c/2004-06-24/03373503585.shtml> [LZ-BMW1]; *Han Guizhi Jiang Zai Beijing Di Yi Zhongyuan Shoushen Jiazhong Shu Ren Bei Shuanggui* [Han Guizhi Will be Tried in Beijing First Intermediate Court, Several Family Members Have Been "Double Specified"], FAZHI WANBAO [LEGAL EVENING NEWS], Mar. 24, 2005, <http://news.sina.com.cn/c/2005-03-24/14156183789.shtml> [LZ-BMW 3].

⁸⁸ For examples, see *Siqiu Zuihou Yuanwang: Guanzhu Nongmin Gong* [Last Wish of a Criminal Waiting for Execution: Paying Attention to Migrant Workers], XIN JING BAO [THE BEIJING NEWS], Sept. 5, 2005, <http://www.thebeijingnews.com/news/2005/0905/11@011747.html> [LZ-W1]; Yuan Xiaobing, *Shendu: Mingong Wang Binyu De Nu Yu Bei* [In Depth: Peasant Worker Wang Binyu's Anger and Sorrow], NANFANG DUSHI BAO [SOUTHERN METROPOLITAN DAILY], Sept. 11, 2005, <http://www.nanfangdaily.com.cn/southnews/tszk/nfdsb/sd/200509110183.asp> [LZ-W2].

⁸⁹ *Last Wish of a Criminal Waiting for Execution* [LZ-W1], *supra* note 88.

⁹⁰ Yuan Xiaobing [LZ-W2].

Many online postings and articles took Wang's side, and argued that he should be spared.⁹¹ As with the BMW case, however, online discussion largely stopped following a Central Propaganda Department instruction.⁹² Wang was then quietly executed. Although news of his execution was posted to the official *China Court News* website the day after his execution,⁹³ domestic media did not report on it. Only after the case received attention in the *New York Times* did the domestic media report on Wang's death.⁹⁴

* * *

From these leading cases, and from interviews with journalists, judges, and academics, we can describe a general pattern. First, the growth of the internet has made it more difficult for courts to conceal information about cases, and more likely that misdeeds will be noticed and reported. Judges state that courts find it hard to conceal information about cases, which increases pressure on courts to handle cases according to law. Courts and Party-state officials that oversee the courts cannot be assured of their ability to silence discussion of cases simply by issuing an instruction banning further reporting. As we've seen, the three most famous cases of internet influence -- the Sun Zhigang, Liu Yong, and BMW cases -- all demonstrate how online coverage or discussion can encourage Party officials to intervene. In all of the cases, reports in the print media, reposted to major internet portals, were enough to set off a chain-reaction

This, in turn, has led to a new type of Party-state intervention into the operations of the legal system. The interventions come in response to internet outrage, and are marked by a determination to resolve the matter quickly: in the Sun case, with the rapid arrest and trial of suspects and then a choreographed closed trial; in the Liu Yong case with the Supreme People's Court apparently being ordered to rehear the case; and in the BMW case with the investigation of the case by Party authorities.⁹⁵ At the same time, Party propaganda authorities curtail any further discussion of the cases other than by officially-approved sources -- generally by requiring that the media only use dispatches from the *Xinhua News Agency*.⁹⁶ Propaganda authorities also order web portals to remove or ban discussion of the cases: one list of terms automatically filtered by one

⁹¹ Fu Yingji [LZ-59], *supra* note 55.

⁹² *Id.* [LZ-59].

⁹³ Yang Chao, *Wang Binyu Guyi Sharen An Er Shen Xuanpan [The Appeal in Wang Binyu's Intentional Homicide Case is Decided]*, ZHONGGUO FAYUAN WANG [CHINA COURT WEB], Oct. 20, 2005, <http://www.chinacourt.org/public/detail.php?id=181959> [LZ-W3].

⁹⁴ Yuan Xiaobing, *Wang Binyu Sha Ren [Wang Binyu Killed People]*, NANFANG DUSHI BAO [SOUTHERN METROPOLITAN DAILY], Dec. 31, 2005, <http://www.nanfangdaily.com.cn/southnews/zt/rdzt/zgxwcd/200512310024.asp> (reporting on Wang's execution) [LZ-W4].

⁹⁵ "The Case of Nie Shubin Being Killed Wrongfully" is Pending, [LZ-57], *supra* note 51.

⁹⁶ *Cf.* Fu Yingji, [LZ-59], *supra* note 55, (discussing restrictions on reporting in the Nie Shubin and Wang Binyu cases).

Chinese blog service included both “Nie Shubin” and “Wang Binyu.”⁹⁷ In the final step, official media declare the interventions and resulting decisions to be successful examples of authorities responding to public opinion.

Given the possibility of public scrutiny leading to unstoppable pressure, political intervention, and even possible punishment for judges, courts are taking some preemptive action to better control information. In recent years courts have taken steps to restrict media coverage of cases, requiring reporters to obtain court approval prior to attending trials. Courts frequently either draft articles about cases in their court for the local media, or require that all such articles are screened by court officials prior to publication. Courts have also retaliated against negative coverage, with both courts and individual judges filing defamation lawsuits in response to critical media coverage. In addition, court propaganda or research departments monitor online discussions of cases involving individual courts,⁹⁸ sometimes via daily searches to locate discussions of the cases in the media or in discussion forums.⁹⁹ Finally, while it is hard to say for sure, courts may be more inclined to decide cases in ways that are less likely to inflame the public, which in the criminal context often means applying harsh sanctions.

The result is a strange, tense, and slightly rivalrous relationship among the courts and the media, major internet providers, and the Party-State. As we've seen, the courts fear media reports that might result in popular outrage and political intervention. The media, meanwhile, must balance the risk of punishment if they go too far in reporting on sensitive cases with their desire to maximize profit through aggressive or sensational reporting. Party-state officials are concerned with maintaining stability -- even at the cost of undermining their claims to be emphasizing rule of law. Unfortunately, this complex web of relationships cannot help but sometimes distract from resolving disputes fairly. The fears of media attention, public reaction, and Party-state intervention do make the legal system more accountable, just not necessarily to the parties before the court.

* * *

Until this point, the paper has focused on communications practices between the courts and other actors, including the media, public, and Party-state officials. We now turn to the results of interviews with Chinese judges, to see how their communications practices have been affected by the internet revolution.

⁹⁷ *Keywords Used to Filter Web Content*, WASH. POST, Feb. 18, 2006, available at <https://w8.bwanana.com/dmirror/http/www.washingtonpost.com/wp-dyn/content/article/2006/02/18/AR2006021800554.html>.

⁹⁸ Interview 2005-10.

⁹⁹ In other areas, however, judges say that they are not concerned about internet discussion of pending cases, Interview 2005-10 -- perhaps because there is little such discussion in the less developed areas of China's interior. *See, e.g.*, Interview 2005-12 (stating that there is little online discussion of cases in Xi'an).

B. Communications Practices within the Chinese Judiciary

1. Traditional Communications Practices. -- To understand how matters are changing, we must first describe the traditional communication practices within the Chinese judiciary. To generalize, Chinese judges have operated in a context in which they had limited access to *horizontal* information -- information about how other similarly-situated courts were doing their jobs. Instead their primary source of guidance for handling novel or difficult cases has been *vertical* -- consultation with superiors, either within the court hierarchy or in other Party-state institutions. Chinese judges have also operated in an environment in which their access to information is restricted in some respects and uninhibited in others. On the one hand, courts have often had limited access to legal materials and the decisions of other judges. Chinese judges not only knew very little about how judges elsewhere were handling cases; in impoverished rural areas they may also have lacked easy access to laws, regulations, SPC interpretations and other normative documents. On the other hand, judges have been relatively uninhibited in seeking advice on how to handle cases from colleagues, superiors, Party-state officials, or academics and experts outside the courts.

Since the start of the reform era in 1978, China's judges have worked in a historically unusual legal environment. During the Mao era, and particularly during the Cultural Revolution, many legal institutions were neglected, left to play minor roles or used primarily as political tools of the state. During the Cultural Revolution, the legal system ceased to function in any recognizable form. Since 1978, great efforts have been made to improve and reform the Chinese legal system. Much of the statutory law was either rewritten or drafted anew. Judges, consequently, have been called on to apply a huge number of new laws, which have often been vague or unclear. Yet despite reform, in many regions judges have continued to lack even the basic legal materials required to resolve cases. What might strike a foreign observer as the most important sources of guidance -- legal education, the laws themselves, and decisions of other courts -- have often been unavailable or at the least lacking in detail.

Limited access to information has not meant that judges confronting hard cases have had no other sources for guidance. First, within individual courts, adjudication committees provide guidance (or decide outright) difficult or sensitive cases.¹⁰⁰ These adjudication committees, which include high ranking judges from the court, and sometimes procurators (who participate in discussions in some criminal cases, but apparently do not have voting power on the committee),¹⁰¹ serve as a venue for discussing challenging or sensitive cases.

¹⁰⁰ The range of cases considered by adjudication committees varies substantially. In most courts adjudication committees consider any cases in which the three-judge panel responsible for the case can not agree on an outcome. In some courts adjudication committees consider all cases where a defendant has been sentenced to life in prison or death, as well as all cases in which the panel decided not to impose a prison sentence on a defendant.

¹⁰¹ In China, procurators serve both as the prosecution and as supervisors over the legal system. Technically the procuracy is a judicial branch of equal rank to the courts. They are not only the

This practice (which has both critics and supporters in China) results in cases that are decided in the first instance by judges who have played no role in hearing the case. It can be said to reflect the fact that the concept of judicial independence in China refers to courts, not individual judges. In any case, in addition to the formal adjudication committee, judges frequently consult informally with their peers and superiors within courts. Court presidents, who are the most powerful figures within individual courts (and who often lack formal legal training), play a particularly important role in guiding decisions in cases that are perceived to be sensitive or difficult.

Second, lower court judges have also traditionally sought guidance on difficult cases by seeking advice of the superior court through the process known as *qingshi*, or “requesting instruction.” Judges encountering a difficult or novel question can contact the higher-level court -- often by telephone or in person -- to discuss how the case should be handled in the court of first instance. The *qingshi* practice, which bears some resemblance to an informal interlocutory appeal, has been criticized for eliminating the point of an appeals process.¹⁰² However, it continues to be an important mechanism for judges seeking guidance in difficult or potentially sensitive cases.¹⁰³ Chinese judges are evaluated based in part on whether their decisions are affirmed or reversed on appeal; a judge who gets a decision “wrong” can be fined or, in serious cases, removed from office. It is thus easy to understand why judges might seek guidance from a higher-level court prior to issuing a decision.

Third, China is officially a civil law system, and has no binding system of precedent as such. However, official advice as to how cases should be handled is disseminated through public normative documents issued by the Supreme People's Court -- ranging from official interpretations of laws to replies to questions or explanations concerning decisions in specific cases -- or by non-public instructions issued by the SPC or by provincial high courts. Judges also learn of new legal information and of representative cases through official publications. These include the *People's Court News*, the official newspaper of the court system, which frequently highlights interesting or noteworthy cases handled by lower courts, and the *Gazette of the Supreme People's Court*, which publishes official decisions and cases from the SPC. Numerous collections of cases have also been published, some under the guidance of the SPC that are designed to highlight “representative cases” that courts should follow, and others by academics or individual courts. A few for-profit websites now also provide

prosecution, but also have the power to force courts to retry cases where the procuracy thinks the courts got it wrong. Renmin Fayuan Zuzhi Fa [Organization Law of the People's Courts] arts. 12, 14, 15 (effective Jan. 1, 1980, as amended Sept. 2, 1983, and October 31, 2006).

¹⁰² See, e.g., “*Faguan Chule Falü Jiu Meiyou Bie De Shangsi*” [“*The Judges Have No Boss Other Than Law*”], XIN JING BAO [THE BEIJING NEWS] (Dec. 3, 2003), available at http://news.xinhuanet.com/comments/2003-12/03/content_1210980.htm [LZ-19].

¹⁰³ Some courts in China have taken recent steps to restrict the use of *qingshi* procedures, requiring that all such requests for guidance come in writing, or come from lower court adjudication committees (rather than individual judges).

collections of cases.¹⁰⁴ There is no formal system for publication of cases in China, however, or mechanism for searching the cases that are made publicly available. Thus with the exception of information in the *People's Court News* (which prior to the internet was not searchable), other similar publications, or the occasional published collection of cases, judges had little information about how to handle cases other than that passed down to them from superior courts.

Finally, senior judges in courts may also discuss cases with the local Party Political-Legal Committee, or with representatives from local people's congresses or government. This is particularly true in serious criminal cases, in cases that have aroused widespread public attention, or in cases that touch on important local interests.

This model, which depends heavily on vertical consultation with superior courts or political officials, continues to predominate. However today the internet is changing how many Chinese judges do their job. In this first section we canvass how at least some judges use the internet in deciding cases, including some of the uses that may seem unusual from the perspective of practice in other nations.

2. *New Communications Practices.* -- Within China the use of the internet by individual judges is beginning to transform communications practices within the judiciary, and consequently how law is both used and applied in China. Judges who once worked in isolation, without either easy access to national laws or information about how similar cases were handled elsewhere, now are able to access not only the law on the books, but also how such laws are being applied and debated elsewhere.

The Chinese judges interviewed for this article overwhelmingly commented that they use the internet to conduct research to assist them in handling cases -- especially in hard or novel cases. Perhaps the most interesting outcome of such usage is the slow development of what resembles a non-binding system of precedent in the Chinese legal system. Judges state that they are developing "unwritten precedent" regarding how to handle cases.¹⁰⁵ They note that doing so helps to reduce their workload when they encounter new legal issues.¹⁰⁶ Judges explain that they do not look to other courts' decisions as "precedent," but rather only for the purposes of reference, or *cankao*.¹⁰⁷ But even this non-binding "precedent" may strongly influence decision-making.

The reported use of informal precedent dovetails with a rise in the interest in using precedent in the Chinese legal system. Since early 2002, the Zhengzhou Zhongyuan District Court has experimented with a "precedent decision" system whereby the court selects important cases as "models."¹⁰⁸ Similarly, the Supreme

¹⁰⁴ Some of these sites claim to have tens of thousands of cases. In our interviews, however, not a single judge mentioned ever having consulted such commercial websites to research cases.

¹⁰⁵ Interview 2005-85.

¹⁰⁶ Interview 2005-12.

¹⁰⁷ Interview 2005-12.

¹⁰⁸ See *Constructing a Case-Law System with Chinese Characteristic? A Precedent-Decision System Emerges from Zhengzhou*, CHINA NEWSWEEK, Sept. 6, 2002, available at

People's Court has within recent years begun referring to its model decisions as "legal precedent." However, the internet-driven use of informal precedent exceeds the scope of these experiments.

Some of the greatest consequences of these developments may be for the more remote parts of China. For example, judges from places like Qinghai Province, in western China, explained that they frequently consult court web sites in more developed areas of China to see how they have handled particular legal issues.¹⁰⁹

This is a break from traditional practice. Judges encountering new legal questions have traditionally sought assistance from their superiors, either in their own court, or in higher-ranking courts. The growth of the internet suggests that courts may increasingly be able to look horizontally, to courts elsewhere in China, whereas in the past they would have sought assistance from those above them.

Over the long-term, the development of an informal system of precedent may significantly change the Chinese legal system. It may lead to a greater confidence born of national consistency, and the authority of acting in concert. That may in turn lead to greater institutional security and autonomy, as judges rely on the strength of the judgment of others, as opposed to mere personal judgment.

Yet the internet is not only permitting the development of horizontal interactions among judges. The internet is also a mechanism for strengthening existing vertical relationships in the courts, and perhaps even control over individual judges by superiors within the courts. Numerous courts in China have established internal court networks, designed to facilitate court work, improve efficiency, and also strengthen oversight over individual judges. In sum, internal networks show how the internet may also serve the Party-state's interests in control.

We first explore ways in which judges are using the external web, and then turn to the impact of internal court networks.

i. Finding Cases. -- The best place for Chinese judges to find useful cases is, ironically, sometimes outside of the courthouse. Few judges in China have access to the external internet (the internet as it exists in China) from work, as many courts do not permit judges other than those in court propaganda departments to access the external web from work.¹¹⁰ In other courts only the

<http://www.chinanewsweek.com.cn/2002-09-06/1/357.html> (Center for Chinese Legal Studies translation).

¹⁰⁹ See, e.g., Interview 2005-9.

¹¹⁰ Interview 2005-10, Interview 2005-13; Interview 2005-18; see also Interview 2005-51 (stating that at a district court in Beijing judges are not allowed to go online from their offices, but that there is a computer at the court that judges can use to go online if they need to do so); Interview 2005-58 (stating that judges at the Beijing High People's Court do not have access to the external web from their offices, but that they can go to the court library if they want to go online). In economically well-off areas of Jiangsu Province, some offices have two computers -- one for the internal network and one for the external network. Interview 2005-63.

court president has access to the external web.¹¹¹ Such restrictions may derive both from concerns that judges will waste time online, and from concerns that judges will use the internet to reveal confidential or secret information.¹¹² But in some courts access to the internet also appears to be a sign of status -- akin to having a car and driver -- with only the highest ranking judges being permitted to go online from work.

Despite these restrictions, a great many judges say that they use the external network to aid their decision-making, particularly to research legal questions and to see how other courts have handled cases similar to those before them.¹¹³ In the central Chinese city of Xi'an, judges use the internet to consult cases decided by the Supreme People's Court, and by the Shaanxi Provincial High People's Court, as well as decisions from other courts.¹¹⁴ In Shenyang, judges note that they consult both the web sites of other courts and media reports for information on cases.¹¹⁵ Even in areas in which courts lack computers judges state that they frequently conduct online research when they encounter difficult cases.¹¹⁶ Some judges have access to the internet at home; others go to web cafes.¹¹⁷

As one judge put it, "the effect is huge."¹¹⁸ A judge working in a rural county court in central China (which lacks both an internal network and access to the external web) gave the example of determining how to apportion blame in traffic accidents when both sides share liability. Going online, judges "found that in Guangdong there is a standard for the whole province for this."¹¹⁹ Although not in Guangdong and thus not obligated to use the standard, the court decided to use the Guangdong rule. "In the past we only looked at cases in our court" for guidance, commented the judge. Now the court looks elsewhere.¹²⁰

On the external internet, judges rely on the same tools that other participants in the legal system use to build legal arguments. Summaries of cases on China Court Web and the websites of individual courts, media reports, and other sources give judges an idea as to how cases have been decided. Judges also frequent prominent academic web sites, including the Civil and Commercial Law Website of Renmin University.¹²¹ Judges say that it is often easier to locate legal

¹¹¹ Interview 2005-64. In other locales vice presidents also have access.

¹¹² Interview 2005-10; Interview 2005-77.

¹¹³ Interview 2005-9; Interview 2005-13; Interview 2005-85; Interview 2006-36; Interview 2006-76; *see also* Interview 2005-12 (stating that when judges encounter new types of cases they will sometimes go online at home to see how other courts have handled the issue); Interview 2005-51 (judge stating that he will sometimes search online for information regarding how other courts have handled similar cases).

¹¹⁴ Interview 2005-10; Interview 2005-12.

¹¹⁵ Interview 2005-64; Interview 2005-65; Interview 2005-70; Interview 2005-85.

¹¹⁶ Interview 2005-95; Interview 2005-96.

¹¹⁷ Interview 2005-95; Interview 2006-49.

¹¹⁸ Interview 2006-34.

¹¹⁹ Interview 2006-35.

¹²⁰ *Id.*

¹²¹ Interview 2005-65; Interview 2005-70.

materials on the web that on internal court networks, which they say are often incomplete or are infrequently updated.¹²² Simply making it easier for judges to locate binding law is an important development: in the past, judges often had no easy way to locate relevant laws and other materials. As one judge explained, courts often have one book for hundreds of people, making it difficult for individual judges to actually locate materials.¹²³

The most significant examples of internet research are in cases where the law is uncertain, or in which judges face difficult legal questions.¹²⁴ Judges state they routinely search web sites of other courts for examples of cases similar to those before them.¹²⁵ For example, a judge specializing in intellectual property cases in Beijing stated that judges hearing such cases will often look online to see how similar cases have been handled elsewhere, including overseas.¹²⁶

Judges are not the only ones using the internet in this way. Lawyers also say they use the internet to conduct research, and that they often will provide judges with printouts of materials they locate online, including information about similar cases elsewhere.¹²⁷ One lawyer recounted how, in a case in which his client had been sentenced to death in the first instance, he located a newspaper report regarding a case from the same city in which a defendant in a similar case had been sentenced to fifteen years in prison, not death. The appellate court then reduced the sentence.¹²⁸ Public interest lawyers say that they have used web sites to link plaintiffs and lawyers who are bringing similar cases nationwide.¹²⁹ Lawyers say that law firm websites can also be useful for gathering information about prior cases -- and that they sometimes will print out materials from such sites to provide to judges.¹³⁰ Likewise procurators say that they frequently use the internet to conduct research where the law is unclear, in particular in determining the appropriate crime with which to charge a defendant.

Some courts appear to be particularly important sources of precedent. Thus, for example, intellectual property divisions at the intermediate courts in Beijing, or in Beijing's Haidian District (home to many technology companies), are seen as being influential.¹³¹ Likewise, judges in the interior say that they often

¹²² Interview 2005-55.

¹²³ Interview 2005-54.

¹²⁴ Interview 2005-65 (stating that judges in Liaoning routinely look online when confronted with new cases); Interview 2005-78 (stating that judges frequently use the internet when they encounter issues that existing law do not clearly govern); Interview 2005-84 (same); Interview 2005-82 (stating that judges will look online for cases, news reports, and academic articles when they encounter new legal issues).

¹²⁵ Interview 2005-17.

¹²⁶ Interview 2005-49; Interview 2005-104; *see also* Interview 2005-58 (stating that Beijing High People's Court judges frequently use the internet to look for cases from overseas); Interview 2005-70 (stating that judges in Changchun will use the internet to research developments overseas)

¹²⁷ Interview 2006-31; Interview 2006-45.

¹²⁸ Interview 2006-17.

¹²⁹ Interview 2006-25.

¹³⁰ Interview 2006-37.

¹³¹ Interview 2006-4.

look for guidance to courts in Beijing and Shanghai -- where judges are widely regarded as being better qualified than in many other areas of China.¹³²

The practice of using the internet to look for useful precedent or other guidance is among the most potentially significant developments in judicial communications. However, for the most part, what it does is mimic what we see in other legal systems, both civil and common law. In the next section we discuss more novel ways in which Chinese courts are using the internet.

ii. Innovations. -- Some of the ways courts use the internet in China may strike a Western observer as surprising or unusual. Here we discuss several examples where judges have used the network in ways that appear distinct from the rest of the world. The first examples involve using court web sites for public relations purposes.

In 2004, the Shiquan County Court in Shaanxi Province came under fire from local media when it dismissed the case of migrant worker Xu Dengkai for being eight minutes late for a hearing. Xu contracted silicosis from work at a local factory and sued to challenge a labor arbitration award. The labor arbitration committee had ordered that the defendant factory pay him 6,200 yuan (about \$775), while Xu argued that he was entitled to 217,206 yuan (about \$27,000).¹³³ On the date of the hearing, however, Xu arrived slightly late.¹³⁴ By the time he arrived, the court had already dismissed his case for failure to appear, forcing Xu to forfeit 14,000 yuan (\$1750) in court filing fees that he had already paid.¹³⁵

The *Huashang News*, a leading commercial newspaper in the provincial capital, Xi'an, wrote an editorial entitled "The Legal System Should Not Be Frozen." The newspaper argued that dropping the case was an unduly harsh punishment for a litigant who was five minutes late.¹³⁶ It pointed out that the plaintiff had to travel by train from outside the mountainous county to arrive at

¹³² Interview 2006-67.

¹³³ *Da Yao Anjian Tongbao 2005 (Di Yi Qi)* [Notice of Big and Important Cases 2005 (no. 1)], Feb. 24, 2005, <http://www.aaawww.net/select/selectl.php3?id=372207&userid=24245> [LP-32].

¹³⁴ *Mingong Dagong Huan Xifei Suopei Chesu, Zhengfu Guanyuan Shexian Cangu?* [Peasant Worker who Got Silicosis Through Working Withdraws Suit for Compensation, are Government Officials Suspected of Owning Stocks?], HUASHANG BAO [HUASHANG NEWS], Sept. 18, 2005, available at http://news.huash.com/gb/news/2005-09/18/content_2222951.htm [LP-34]; "Fazhi" *Buying Leng Bing Bing* ["The Legal System" Should Not be Frozen], HUASHANG BAO [HUASHANG NEWS], Jan. 12, 2005, available at http://news.huash.com/gb/news/2005-01/12/content_1564512.htm [LP-43].

¹³⁵ *Zhi Yin Kaiting 5 Fenzhong Nei Wei Dao, Hanyin Mingong Suopei Zao Chesu* [Because of Five Minutes Late for Court, Hanyin Peasant Worker is Ruled to Have Withdrawn His Claim for Compensation], HUASHANG WANG [HUASHANG WEB], available at http://news.huash.com/gb/news/2005-01/12/content_1564511.htm [LP-44]; *Notice of Big and Important Cases in 2005* [LP-32], *supra* note 133. In most civil cases in China plaintiffs are required to pay a filing fee that is a specified percentage of the amount in controversy.

¹³⁶ *Legal System" Should Not be Frozen* [LP-43], *supra* note 134; *Peasant Worker Withdraws Suit* [LP-34], *supra* note 134.

the court by 8:30 a.m. It also wrote that the worker was in poor health as a result of the injuries he had suffered at work.¹³⁷

The court, slighted, turned to the internet to defend itself online. Its first act was to release a report that argued that it had handled the case fully in compliance with the law.¹³⁸ Next, court judges responded to and debated with critics on the court's public internet message board.¹³⁹ One comment posted to the court's electronic bulletin board urged the court to admit that its handling of the case had been incorrect. In response, a court official wrote that because the case was still on appeal it could not be said to have been incorrectly decided. In another exchange, a posting complained that the case was "not readable." The court thanked the poster of the message for the criticism, and stated that the court needed to continue to strengthen its ability "to serve social stability and development."¹⁴⁰ Some of the court's postings were identified as coming from the court president, while others appeared to come from other court officials.

Later on, the court backed down, and permitted the plaintiff to refile the case without having to pay the court fees a second time. Without mentioning the controversy or criticism, the court posted a report on the case on its website as an example of how the court was working to further the "advanced education" policy of the Communist Party. The court posted a picture of Xu to the court's homepage, with a caption stating, "Our Court Carries out Judicial Assistance in the Case of Xu Dengkui."¹⁴¹ The court noted that it had taken account of the plaintiff's status as a worker from outside the county, and had therefore decided to waive the court fee and schedule an afternoon hearing so that Xu would be able to attend. The report also stated that the court had been praised by the parties to the case and the media.¹⁴²

The Xu case is just one example of how courts use their websites for public relations purposes. Hundreds of Chinese courts -- ranging from the Supreme People's Court to rural county courts -- have created public websites.¹⁴³

¹³⁷ *Notice of Big and Important Cases in 2005* [LP-32], *supra* note 133; "Legal System" Should Not be Frozen [LP-43], *supra* note 134.

¹³⁸ *Kan Ankang Shiquan Fayuan Zenyang Lueduo Nongmingong* [See How Ankang Shiquan County Court Plunders Peasant Worker], <http://bbs.sxtvs.com/printpage.asp?BoardID=34&ID=48266> (last visited Sept. 27, 2005) [LP-45] (bbs chatroom). The court argued that the plaintiff had failed to provide an excuse for being late, and thus the court's action was justified under China's Civil Procedure Law. *Id.*

¹³⁹ Interview 2005-16; Shanxi Shiquan County Court Message Board, <http://www.aaawww.net/bbs/index2.php?userid=24245&c=> [LZ-18].

¹⁴⁰ *See id.*

¹⁴¹ <http://www.sqfy.com/index.php3?file=4>.

¹⁴² *Shiquan Xian Renmin Fayuan Zai Baochi Gongchan Dangyuan Xianjin Xing Jiaoyu* [Shiquan County People's Court Maintains the Advanced Teaching of the Communist Party], <http://www.aaawww.net/select/select1.php3?id=378962&userid=24245> (last visited Oct. 13, 2005) [LP-31].

¹⁴³ As of August 2006, the official China Court Web site included links to 110 other court websites in 22 provinces. *Fayuan Zaixian* [Courts Online], ZHONGGUO FAYUAN WANG [CHINA COURT WEB], <http://www.chinacourt.org/fyzz/> (last visited Aug. 25, 2006) [LZ-4]. The list, however, is not comprehensive. *Zhongguo Fayuan Wang Jianjie Ji Jianwang Xuzhi* [Brief Introduction of

Court public websites frequently include information such as an overview of court work and personnel, news from the court, and discussion forums.¹⁴⁴ Although urban courts were first to establish web sites, even courts in some rural areas have sites that provide information about the court, judges, and cases.¹⁴⁵

Court websites focus on providing information about the court, largely to educate the public about such work, and to achieve other propaganda goals. The Supreme People's Court's web site, for example, includes news on the court, primarily focused on the activities of court leaders; an introduction to each branch of the court and to each judge on the court; explanations, interpretations, replies and other normative documents issued by the court; selected decisions of the court (but none from the past two years); model decisions from lower courts; and the court's annual work reports to the National People's Congress.¹⁴⁶ The website makes it easier to access the same type of information that the court already makes publicly available through the *People's Court News*, the Court's Gazette, and regularly published books of selected decisions from lower courts.

Another important and widely read site is the China Court Web, which we discussed above.¹⁴⁷ The China Court Web carries news articles regarding the courts, laws and regulations, academic legal materials, and online discussion forums and chatrooms regarding legal matters. The China Court Web is a particularly important place for judges to read about what other courts are doing -- and to help find the informal precedent discussed above. The site is run by the *People's Court News*, the official newspaper of the Supreme People's Court, and thus is directly under the supervision of the Supreme People's Court.¹⁴⁸ The site includes both content in the paper, and also a wide range of material that does not make it into the print version.

Lower court web sites are similar. They focus on highlighting court work and educating the public about such work, either through selected opinions from cases or summaries of cases, and articles written by judges.¹⁴⁹ Cases included on

China Court Web and Notice of Web Construction], Zhongguo Fayuan Wang [China Court Web], <http://www.chinacourt.org/other/detail.php> (last visited Feb. 21, 2006) [LZ-5]. For example, although an internet search found that five courts in Shanghai had public web sites, only one was listed on the SPC website.

¹⁴⁴ See, e.g., *Ankang Shi Zhongji Renmin Fayuan* [Ankang Intermediate Court], <http://www.akfy.org.cn> (web site of Ankang Municipal Intermediate Court) [LP-30].

¹⁴⁵ *Shaanxi Sheng Shiquan Xian Renmin Fayuan* [Shaanxi Province Shiquan County People's Court], <http://www.sqfy.com/index.php3?file=4.php> [LP-33]; Interview 2005-14; see also *Xingguo Xian Renmin Fayuan* [Xingguo County People's Court], <http://xgxfy.chinacourt.org/> (Jiangxi Province Xingguo County Court); *Hebei Sheng Gu'an Xian Renmin Fayuan* [Hebei Province Gu'an County People's Court], <http://gaxfy.chinacourt.org/>; *Shangdong Sheng Kenli Xian Renmin Fayuan* [Shangdong Province Kenli County People's Court] <http://klfy.chinacourt.org/>.

¹⁴⁶ The website also includes links to pages covering court history and an online video, but both links are empty. The site appears to be under construction, which may also explain the small number of cases included on the site.

¹⁴⁷ <http://www.chinacourt.org/>.

¹⁴⁸ See *Guanyu Women* [About Us], at <http://www.chinacourt.org/other/aboutus.php>.

¹⁴⁹ See, e.g., <http://www.jsfy.gov.cn/aljx/index.asp>.

web sites are generally selected by court propaganda officials with a view to highlighting noteworthy or new cases.¹⁵⁰

Few courts post all or even many of their decisions online. Indeed, only one court is known to have done so: in 2000, the Guangzhou Maritime Court announced that all of its decisions would be made available online.¹⁵¹ The court website now includes 777 cases decided between 2001 and 2005.¹⁵² Other courts have similarly pledged to make all cases available online, or all intellectual property cases,¹⁵³ but such promises appear to have gone unfulfilled.¹⁵⁴ Most courts continue to post only a small number of selected decisions or case descriptions.

¹⁵⁰ Interview 2005-63.

¹⁵¹ *Guangzhou Haishi Fayuan Panjueshu Shangwang* [Guangzhou Maritime Court Posts Decisions Online], ZHONGXINSHE WANGZHAN [CHINA NEWS AGENCY WEBSITE], Oct. 12, 2000, available at <http://dailynews.sina.com.cn/society/2000-10-12/134098.html> [LZ-7].

¹⁵² *Guangzhou Haishi Fayuan Caipan Wenshu* [Guangzhou Maritime Court Judgment Documents], <http://www.gzhsfy.net/writ/index.php> (last visited Feb. 22, 2006) [LZ-8]. In a 2005 article the court stated that it posts “announcements of cases, decisions and introductions to judges” online. *Guangzhou Haishi Fayuan* [Guangzhou Maritime Court], *Yunyong Xiandai Xinxu Jishu, Jiaqiang Haishi Sifa Nengli Jianshe* [Using Modern Information Technology, Enhancing the Construction of Maritime Judicial Ability], ZHONGGUO SHEWAI SHANGSHI SHENPAN WANG [CHINA FOREIGN-RELATED COMMERCIAL TRIAL WEB], Nov. 23, 2005, <http://www.ccmt.org.cn/ss/news/show.php?cId=6356> [LZ-9].

¹⁵³ For example, the Beijing High People's Court reported in 2003 that all intellectual property cases from all courts in Beijing would be published online. *Beijing Gaoji Renmin Fayuan* [Beijing People's High Court], *Nili Jiang Beijing Fayuan Wang Bancheng Tese Jingpin Wangzhan* [Endeavoring to Make the Beijing Court Net A Unique and Excellent Website], ZHONGGUO FAYUAN WANG [CHINA COURT WEB], Nov. 28, 2003, <http://www.chinacourt.org/public/detail.php?id=92553> [LZ-12]. As of February 2006, the web site included 863 decisions -- although it is not clear whether that number reflects all intellectual property cases in the municipality. *Zhishi Chanquan Anjian* [Intellectual Property Cases], BEIJING FAYUAN WANG [BEIJING COURT WEB] (last visited Feb. 22, 2006), <http://bjgy.chinacourt.org/cpws/?sub=2> [LZ-13].

¹⁵⁴ A 2003 report stated that Beijing courts would begin publishing all decisions from all three levels of Beijing courts online, and would thus become the “first courts in the world” to do so. *11 Yue Beijing Fayuan Caipanshu Quanbu Shangwang, Cheng Shijie Shang Shouli* [All Beijing Court Decisions To Be Posted On-line from November, the First In the World to Do So], BEIJING YULE XINBAO [BEIJING ENTERTAINMENT NEWS], Nov. 3, 2003, available at <http://www.edisc.com.cn/bike/viewnews.html?id=16230> [LZ-14]. Yet as of February 2006 the court's web site listed only fifteen cases other than intellectual property cases. *Qita Anjian* [Other Cases], Beijing Fayuan Wang [Beijing Court Web] (last visited Feb. 22, 2006), <http://bjgy.chinacourt.org/cpws/?sub=8> [LZ-15]; see also *Guangdong Foshan Fayuan Panjueshu Shangwang* [Guangdong Foshan Court Putting Decisions Online], NANFANG DUSHI BAO [SOUTHERN METROPOLITAN DAILY], July 1, 2003, available at <http://tech.sina.com.cn/i/c/2003-07-01/1059204196.shtml> (statement by Guangdong Foshan Intermediate court stating the types of cases that will and will not be posted online) [LZ-16]. In an online essay, Peking University professor He Weifang commented that he had found no court in China that made all decisions available without modification online. See *He Weifang, Panjueshu Shangwang Nan Zai He Chu?* [What's the Difficulty of Putting Decisions On-line?], FAZHI RIBAO [LEGAL DAILY], Dec. 15, 2005, available at <http://law-thinker.com/show.asp?id=3025>.

Finally, as is common in the West, court sites also provide information to potential litigants -- ranging from court rules and regulations, to explanations of litigation procedures, to instructions on how to file cases and the risks and costs involved in bringing lawsuits.¹⁵⁵ Other courts include hearing times,¹⁵⁶ selected laws and regulations,¹⁵⁷ instructions regarding the formulation of legal documents and examples of such documents,¹⁵⁸ and court legal notices.¹⁵⁹ The Shenzhen Intermediate Court includes a link to live broadcasts of selected court hearings, although the system does not yet appear to be functional.¹⁶⁰ Some court websites also provide online mechanisms for citizens to file complaints about the court¹⁶¹ -- although judges say few such complaints are filed.¹⁶²

The growth of court websites reflects greater emphasis on public relations and media management by China's courts.¹⁶³ Courts have increasingly found themselves coming under criticism, in particular from China's newly commercialized media. Courts are also coming into conflict with other Party-state institutions, including People's Congresses, Procuratorates, and administrative actors. Web sites provide a mechanism for improving the reputations and images of courts, and perhaps thus for raising courts' status in their interactions with other official actors. Both the courts generally and individual judges -- and in particular court presidents -- have an interest in raising their profiles with higher-ranking leaders and with the public. The development of public websites also reflects rhetorical commitment by the courts to the importance of boosting transparency as a means for raising popular confidence in the legal system, and to boosting legal knowledge among ordinary people so as to make the courts more accessible. Internet sites, and in particular court news sites such as the official China Court Web, do make an enormous amount of information available, both to other judges and to the public. Yet like the embrace of the internet by the Chinese Party-state more generally, the content on

¹⁵⁵ Interview 2005-70; *See also* Beijing Fayuan Wang [Beijing Court Web], <http://bjgy.chinacourt.org/bjfy/> (introducing the basic functioning of courts in Beijing); <http://www.jsfy.gov.cn/sszn/sscx.htm> (explaining litigation procedures on the Jiangsu Court Network).

¹⁵⁶ *See, e.g.*, <http://www.shezfz.com/OpenJudge.asp?show=week>.

¹⁵⁷ *See, e.g.*, <http://www.jsfy.gov.cn/sszn/cyfl.htm>.

¹⁵⁸ *See, e.g.*, <http://www.jsfy.gov.cn/sszn/szgs.htm>.

¹⁵⁹ *See, e.g.*, <http://www.shezfz.com/BulletDetail.asp?id=586>.

¹⁶⁰ Shenzhen Shi Zhongji Renmin Fayuan [Shenzhen Intermediate People's Court], *Wang Shang Kai Ting [Live Broadcasts of Court Hearings Online]*, <http://www.szcourt.gov.cn/tszj.php>.

¹⁶¹ *See, e.g.*, *Hainan Gaoyuan Xieshou Sike Gongzhu Ban'an Xin Pingtai [Hainan High Court Constructs New Working Platform Hand in Hand with Cisco]*, <http://www.enet.com.cn/article/2004/1015/A20041015352752.shtml>, Oct. 15, 2004 (reporting that courts in Hainan Province have established an online web page through which citizens may report on misconduct by court officials) [LP-6].

¹⁶² *See, e.g.*, Interview 2005-70 (stating that a court a court in Changchun receives few complaints via its web site).

¹⁶³ Liebman, *Watchdog or Demagogue?*, *supra* note 20.

courts' public websites also suggest a greater emphasis on managing information than on making such information publicly available.

iii. Judges Online. -- In 2006, in the Shiquan County People's Court in Shaanxi, an anonymous user posted a message advising the court to ignore a case brought by an elderly woman against her granddaughter for financial support. The message was posted to the court's bbs chatroom, where court officials and sometimes the court president respond to postings from the public (and where the same court had previously defended itself in the Xu Denkai case). The poster argued that the plaintiff's daughter, an alternative source of support, was alive and in another town.¹⁶⁴ The poster suggested that the grandmother was treating the court president like her grandson -- expecting him to provide assistance simply because she was elderly.

In a posted reply, a court official stated that the court would do their best to handle the case (and would not ignore it). Later, the court president himself responded. He stated that he had resolved the case by contacting the local civil affairs bureau, and asked the bureau to provide financial support. The court president acknowledged that it was not the court's role to take such actions, but stated that he had done so because the plaintiff was old, and because the plaintiff recognized the importance of the courts.¹⁶⁵

As this example shows, Chinese judges sometimes venture onto public web sites to handle cases or discuss legal issues with members of the public.¹⁶⁶ Judges even frequent discussions on public chatrooms, such as those on China Court Web.¹⁶⁷ Most judges state that they will not discuss actual cases before them in online forums before such cases are decided. But there are also examples of judges using such discussion boards to help determine how to best decide a case.¹⁶⁸ In one example, a judge reported how a colleague had used online discussions with legal scholars and ordinary people to "obtain consensus" as to

¹⁶⁴ Shanxin Shiquan County Court Message Board,
<http://www.aaawww.net/bbs/index2.php?userid=24245&c=&infotype=&page=4> (last visited Feb. 27, 2006) [LZ-27].

<http://www.aaawww.net/bbs/index.php3?userid=24245&c=&infotype=&page=4;>

[http://www.aaawww.net/bbs/index2.php?userid=24245&c=.](http://www.aaawww.net/bbs/index2.php?userid=24245&c=)

¹⁶⁵ Shanxin Shiquan County Court Message Board,
<http://www.aaawww.net/bbs/index2.php?userid=24245&c=&infotype=&page=4> (last visited Feb. 27, 2006) [LZ-27].

¹⁶⁶ See, e.g., *Shanghai: Yangpu Fayuan De Juyuwang BBS Tigao Gongzuo Xiaoli* [Shanghai: Yangpu Court Internal Network Enhances Efficiency], XINWEN CHENBAO [NEWS MORNING], Nov. 17, 2004, available at <http://news.chinabyte.com/396/1876896.shtml> (noting online meeting between judges and "internet friends") [LP-20].

¹⁶⁷ Interview 2005-65. Judges sometimes self-identify as judges in their postings on bulletin boards and in discussion forums. See, e.g., Yang Fan, *Dui Yiqi Zhiwu Qinzhan Zui De Zhiyi* [Doubts on an Official Embezzlement Criminal Case], FAZHI LUNTAN [CHINA COURT WEB BBS], Feb. 8, 2006, <http://bbs.chinacourt.org/index.php?showtopic=139693> [LZ-20].

¹⁶⁸ See, e.g., *Wo Chengban Yijian Xingzheng Anjian* [An Administrative Case that I'm Adjudicating], FAZHI LUNTAN [CHINA COURT WEB BBS], Feb. 21, 2006, <http://bbs.chinacourt.org/index.php?showtopic=141739> (discussion by judge of case after decision, requesting comments from other participants in a web discussion forum) [LZ-30].

how a case should be handled.¹⁶⁹ He praised the use of online forums for facilitating interactions between judges and the masses. And even judges who are cautious about participating in online discussions regarding cases themselves said that they nevertheless will sometimes consult such discussions when deciding cases.¹⁷⁰

Judges also use email to help decide cases. Judges in relatively remote areas say that they sometimes email leading academics to ask their views of particular legal issues.¹⁷¹ This already the practice in major cities like Beijing, where judges frequently consult with academics when they encounter new or difficult legal issues. The growth of the internet makes it easier for judges in less developed areas to do the same.¹⁷² As an extension of the informal precedent system we described earlier, judges say that they also sometimes use the internet to locate courts that have encountered similar legal issues in the past, and then telephone the judges who handled the cases to discuss how they reached their decisions.¹⁷³

Finally, in recent years, some judges have taken to blogging. Web sites such as the China Court Web include blogging sections, where judges discuss a variety of issues, including general views of their work and also sometimes particular legal issues.¹⁷⁴ Some judges appear to be using blogs to advance their own careers -- writing in ways that highlight their own work (and how they advance the Party-state's goals for the legal system). Many of the blogs appear to serve a mixture of education and propaganda goals. Thus, for example, Judge Wu Jinpeng, a judge on the Henan Province High People's court, used his blog to describe the court proceedings in a capital case -- describing how the court held a public hearing on appeal, and how such proceedings received praise from all parties, including the defendant, who thanked the court for its fair handling of his case.¹⁷⁵ Another judge, identified as Lan Cai, discussed cases ranging from a dispute over an insurance contract, to a claim brought by local residents challenging an administrative regulation.¹⁷⁶ A judge writing under the name Judge Song Zhumei, used a blog to discuss criminal cases, asking, in one case, whether particular facts should be treated as an accident or as giving rise to a

¹⁶⁹ Interview 2005-82.

¹⁷⁰ Interview 2006-34.

¹⁷¹ Interview 2005-65.

¹⁷² In Shenyang, the largest city in northeast China, an official document from the intermediate court stated that consultations with experts should be done by telephone, letter, fax, email, orally, through seminars and lectures, or through other appropriate means. *Shenyang Shi Zhongji Renmin Fayuan Zhuanjia Zixuntuan Gongzuo Banfa* [Shenyang Municipality Intermediate People's Court Expert Consultation Group Working Methods], Nov. 17, 2004, available at <http://cdfy.chinacourt.org/public/detail.php?id=1386> [LZ-26]. The document, however, only refers to cases in which an official decision has been taken by the court to request the views of an expert; in reality judges in China also consult informally with outside experts.

¹⁷³ Interview 2005-49; Interview 2005-51; Interview 2005-77.

¹⁷⁴ See <http://blog.chinacourt.org/> (homepage for blogs on the official China Court Web site).

¹⁷⁵ <http://blog.chinacourt.org/wp-profile1.php?p=34042&author=130>.

¹⁷⁶ <http://blog.chinacourt.org/wp-profile1.php?cat=3&author=1494>.

charge of criminal negligence.¹⁷⁷ And a judge writing under the name Jia Mu used a blog to discuss a range of civil cases, including a claim of harassment via a cell phone message and a medical malpractice case.¹⁷⁸

All of these cases appeared to be examples of already decided cases -- judges do not appear to blog about pending cases. Moreover, none of the judges interviewed for this article mentioned blogs as an important source of information in deciding cases. This is not surprising: the use of blogs in China has exploded during the period in which we conducted our research. But it does appear that blogs are emerging as another important mechanism through which judges both share information about cases before them, and perhaps also interact with the public and the legal community regarding interesting or novel cases.

In sum, Chinese judges are experimenting with a variety of new ways of using the internet to either handle their legal duties or conduct public relations. The long-term implications of these activities are not clear. Nevertheless, China may serve as an interesting case study for the rest of the world.

3. *Internal Networks.* -- Use of the external internet and the development of court public websites represent just one aspect of how internet technology is changing China's courts. One reason most judges are not able to go on the external internet from work is that many Chinese courts have constructed internal court networks (another is that many basic level courts lack computers).

The developments we describe above regarding how judges use the internet have gone largely unnoticed in academic and media writings in China.¹⁷⁹ The Chinese media have, however, covered in detail the development of internal court networks -- networks that can be accessed only by court personnel. These networks, known in Chinese as *juyu wang*, generally link judges within a particular court; in some more developed areas they link lower courts with higher courts. In some respects internal networks provide similar types of information and opportunities for interaction that are provided on the external internet: judges have easier access to laws and regulations and some selected cases than in the past, and in some courts can share their views about cases with other judges in chatrooms. Internal networks, like the external web, make it easier for judges to do their jobs.

Yet the information on such sites is limited to that selected by court officials, and thus is often far less comprehensive than what is available on the external internet. Judges using internal networks are limited to seeing those materials that their superiors want them to see. In addition, internal networks are also an important mechanism for monitoring work by individual judges. In this

¹⁷⁷ <http://blog.chinacourt.org/wp-profile1.php?cat=3&author=5008>.

¹⁷⁸ <http://blog.chinacourt.org/wp-profile1.php?cat=3&author=529>.

¹⁷⁹ One exception is an interview with us about our research in *Procuratorate Daily*, one of China's leading legal newspapers. Liu Hui, *Meiguo "Zhongguo Fa Yanjiu" Xuezhe Tan -- Hulian Wang Dui Faguan Ji Fazhi De Yingxiang* [American "Chinese Legal Research" Scholars Discuss -- The Impact of the Internet on Judges and the Rule of Law], JIANCHA RIBAO [PROCURATORATE DAILY], July 24, 2006, available at <http://www.jcrb.com/n1/jcrb1004/ca530254.htm>.

respect courts' use of the internet may be seen as a parable for China's embrace of the internet more generally: more information is available, and judges are able to do their jobs more efficiently (and, one hopes, more fairly), but the internet is also serving the state's interests in imposing oversight and control.

In a 2002 notice, the SPC instructed all courts in China to set up networks or individual computers with software allowing judges to search laws and other legal materials.¹⁸⁰ Courts have gradually complied with the notice. Reports in 2003 and 2004 on the development of the internet in China's courts stated that 500-600 of China's approximately 4,000 courts had established internal networks.¹⁸¹ Many more courts appear to have set up internal networks since then, or are in the process of doing so.

Discussions of the role of internal networks focus on their role in making courts more efficient. Thus, for example, reports have noted that developing internal networks raises court efficiency by strengthening information management and "leadership methods" in the courts.¹⁸² Reports have also noted the importance of court networks in facilitating supervision of lower courts by higher courts.¹⁸³

¹⁸⁰ *Zuigao Renmin Fayuan Guanyu Yinfa "Renmin Fayuan Jisuanji Xinxi Wangluo Xitong Jianshe Guanli Guiding" He "Renmin Fayuan Jisuanji Xinxi Wangluo Xitong Jianshe Guihua" De Tongzhi* [The Supreme People's Court Notice on Printing and Circulating the "Regulation on the Administration of the Establishment of the People's Court Computer Information Network System" and the "Plan for Establishing the People's Court Computer Information Network System"], Jan. 29, 2002, available at <http://www.yfzs.gov.cn/gb/info/LawData/flfg2002/gfsfjs/2003-02/19/1518560846.html> [LZ-6] (stating that all courts should establish internal court networks in order to improve management of cases and case statistics; in theory the networks should connect provincial courts to the SPC). In 2002, the SPC instructed all provincial high courts and intermediate courts to establish court networks by 2003 and to link such networks to the SPC's network, and instructed all local courts generally to establish court networks by 2005. *Id.* [LZ-6] The SPC does not appear to have made public more recent data on progress toward meeting such goals.

¹⁸¹ *Renmin Fayuan Xinxi Wangluo Xitong Jianshe Jishu Guifan Tushu Neirong Jianjie* [Brief Introduction to Technology Criteria for the Establishment of the People's Court Information Network System], available at http://www.law-lib.com/shopping/shopview_p.asp?id=11349 (last visited Sept. 26, 2005) [LP-48]; *Quanguo Fayuan Xitong Yiji Zhuanwang Shipin Huiyi Xitong De Guihua Yu Jianshe* [Plan and Construction of the National Courts' First Level Special Network Video Conference System], ZHONGGUO DUOMEITI SHIXUN [CHINA MULTIMEDIA VIDEO COMMUNICATIONS], March 5, 2004, <http://www.cmvc.com.cn/list.asp?id=338> [LP-50].

¹⁸² *Brief Introduction to the Technical Criteria for the Establishment of the People's Court Information Network System* [LP-48], *supra* note 181; *Plan and Construction of the National Courts' First Level Special Network Video Conference System* [LP-50], *supra* note 181; *see also Hanbin Fayuan Jiancheng Jisuanji Juyuan Wang* [Hanbin Court Establishes Internal Network], RENMIN FAYUAN BAO [PEOPLE'S COURT NEWS], May 10, 2003, <http://rmfyb.chinacourt.org/public/detail.php?id=49783> (stating that the presence of a court network improves efficiency and quality of the court) [LP-16]; *Laishan Juyuan Wang Wei Shenpan Tisu* [Laishan Internal Network Expedites Trials], RENMIN FAYUAN BAO [PEOPLE'S COURT NEWS], Mar. 27, 2002, <http://rmfyb.chinacourt.org/public/detail.php?id=35107> (noting how a court network has improved efficiency) [LP-18].

¹⁸³ *See, e.g., Pei Cong, Lasa Shi Chengguan Qu Renmin Fayuan Juyuan Wang Jianshe Tongguo Yanshou* [Lhasa Chengguan District People's Court Internal Network Construction Passes

Not surprisingly, courts in economically developed areas have taken the lead in developing such networks.¹⁸⁴ In Jiangsu Province -- one of China's richest -- a 2006 report noted that computer networks had been established in 116 of the province's 123 courts.¹⁸⁵ Yet courts in less developed areas -- ranging from Heilongjiang in the northeast to Tibet -- have also developed court networks and have publicized their use in increasing both efficiency in and supervision over local courts.¹⁸⁶

Many basic level courts, in particular in rural areas or county towns, lack networks -- or computers.¹⁸⁷ Judges at a rural county court in Jilin Province reported that the only people in the court with web access are the court president and the vice-presidents; judges have no access to either an internal network or to the external web.¹⁸⁸ Only court leaders have computers.¹⁸⁹ Judges at both a county and an intermediate court in the central province of Hubei commented that they lack any web access, and that many courts lack computers.

Inspection], ZHONGGUO XIZANG FAYUAN WANG [CHINA TIBET COURT WEB], Aug. 15, 2005, <http://tibet.chinacourt.org/public/detail.php?id=506> [LP-5] (noting the important role internal networks play in facilitating lower courts' reporting to higher courts).

¹⁸⁴ The 2003 SPC notice instructing courts to provide networks or computers on which judges could search for laws and other relevant materials stated that the costs of such infrastructure should be borne by individual courts. *See Zuigao Renmin Fayuan Bangong Ting Guayu Tuiguang Peibei "Zhongguo Shenpan Falü Yingyong Zhichi Xitong" De Tongzhi* [SPC Office Notice on Promoting and Furnishing the "China Adjudication Law Application Support System"], Nov. 4, 2003, available at <http://www.courtpress.com/subject/s1.php> [LP 3].

¹⁸⁵ *Fenli Tuidong Quansheng Fayuan Gongzuo Xin Fazhan* [Pushing for the New Development of All Courts in the Province], JIANGSU FAZHI BAO [JIANGSU LEGAL NEWS], Feb. 15, 2006, available at http://www.jsfy.gov.cn/fydt/fyyw/fyyw_esw1.htm [LZ-1]; *Sheng Fayuan Jianjie* [Brief Introduction to the Courts in the Province], JIANGSU FAYUAN WANG [JIANGSU COURT WEB], www.jscourt.gov.cn/fyjj/index.htm (last visited Feb. 21, 2006) [LZ-2].

¹⁸⁶ *Xinxihua Jigou* [Informationized Institutions], Heilongjiang Sheng Xixi Zhongxin [Heilongjiang Province Information Center], <http://www.hljjc.gov.cn/xxhsd/xxhjg27.asp> (last visited Aug. 25, 2005) [LP-4] (discussing the establishment of internal court networks in sixty courts in Heilongjiang Province, and noting the role of the provincial high court in inspecting and overseeing internal networks in lower courts); Pei Cong [LP-5], *supra* note 183 (discussing the establishment of an internal network at a district court in Lhasa, the first in the Tibet Autonomous Region, and emphasizing the importance of the network in managing the acceptance, adjudication, and enforcement of court opinions); *see also Hainan High Court Constructs New Working Platform Hand in Hand with Cisco* [LP-6], *supra* note 161 (stating that all courts in Hainan Province have been equipped with internal networks). In some areas court networks connect higher courts with lower courts under their jurisdiction, although this appears to be primarily the case in more developed areas. In Changchun, for example, the intermediate court is linked via an internal network to both the provincial high court and to lower courts. Interview 2005-70; Interview 2005-84. In Xi'an, however, as of mid-2005 the intermediate court's network was separate from and not connected to the internal networks at lower courts. Interview 2005-10.

¹⁸⁷ Interview 2005-9.

¹⁸⁸ Interview 2005-95.

¹⁸⁹ Interview 2005-95; *see also* Interview 2005-83 (stating that in many rural courts in Jilin there is only one computer for each court, and there is often no internal network); *see also* Interview 2005-18 (stating that some local courts in Xi'an lack the resources to provide computers for all judges).

In general, internal networks have four primary functions. First, they provide searchable databases of laws, regulations, some cases, and other binding normative documents. Many courts include a database of national and local laws developed by conjunction with the Supreme People's Court, the People's Court Press, and the Chinalawinfo Center at Peking University.¹⁹⁰ The database includes SPC interpretations, replies, and other documents, as well as some cases.¹⁹¹ Internal networks thus provide judges with electronic forms of the types of materials they have traditionally consulted in deciding cases, making it easier for judges to access such materials.¹⁹² Judges also receive information about new laws, regulations, and interpretations via notices on their internal court networks.¹⁹³ Over time, how, why, and by whom the information included in internal webs is collected may have a major impact on how courts function and apply the law. Controlling information on internal networks -- which the SPC is doing by requiring all courts to use standardized software -- is also a mechanism for controlling how judges decide cases.

Second, some court internal networks include discussion forums in which judges discuss topics ranging from new cases to the quality of food in the court cafeteria.¹⁹⁴ These forums are similar to those that exist on the external web, but are accessible only to judges from a particular court or courts. In some courts judges comment that such discussion forums are rarely used to discuss substantive matters.¹⁹⁵ In others, however, such as in Jiangsu Province, judges say that such internal discussion forums -- which are accessible to most judges in the province -

¹⁹⁰ "Zhongguo Shenpan Falü Yingyong Zhichi Xitong" Zhengding Dan ["China Judicial Law Application Support System" Order Invitation Form], Renmin Fayuan Chubanshe [The People's Court Press], http://www.courtpress.com/subject/index_5.php (last visited Sept. 26, 2005) [LP 49]; Interview 2005-18; *see also* Interview 2005-55 (stating that the legal materials available on internal sites is purchased from the SPC). In 2003 the SPC issued a notice instructing all courts to purchase a database of laws produced by the People's Court Press. *Zuigao Renmin Fayuan Bangong Ting Guayu Tuiguang Peibei "Zhongguo Shenpan Falü Yingyong Zhichi Xitong" De Tongzhi* [SPC Office Notice on Promoting and Furnishing the "China Judicial Law Application Support System"], Nov. 4, 2003, available at <http://www.courtpress.com/subject/s1.php> (last visited Aug. 25, 2005) [LP-3]. It is not clear, however, what percentage of courts have actually done so. According to one report, the database is in use in all courts in Beijing, Shanghai, Fujian, and Guangxi; in another fourteen provinces it is used by some courts. *Relie Zhuhe "Zhongguo Shenpan Falü Yingyong Zhichi Xitong" Ronghuo "Di San Jie Guojia Dianzi Chubanwu Jiang"* [Warm Congratulations for the "China Adjudication Law Application Support System" Winning the "Third National Electronic Publications Awards"], <http://chinalawinfo.com/ad/courtpress/index.htm> (last visited Feb. 28, 2006) [LZ-28].

¹⁹¹ Interview 2005-10; Interview 2005-12; Interview 2005-13; Interview 2005-18.

¹⁹² Interview 2005-63.

¹⁹³ Interview 2005-70.

¹⁹⁴ *See, e.g., Yuhuan Renda Zong Di 194 Qi* [Yuhuan People's Congress Issue General No. 194], Aug. 9, 2005, http://www.yuhuanrd.gov.cn/news_show.php?show_id=986 (emphasizing the use of an internal court network for judges to exchange views with each other and with the court vice presidents responsible for their division of the court) [LP-2].

¹⁹⁵ *See, e.g.,* Interview 2005-79 (stating that court chatroom is rarely used); Interview 2005-65 (stating that judges in Shenyang rarely use the internal BBS); Interview 2005-102 (stating that Beijing judges rarely use their discussion forums to discuss cases).

- have become important forums for discussing new legal issues and, in some cases, pending cases.¹⁹⁶ The system includes numerous discussion forums, moderated by individual judges, where judges can discuss cases (and other issues) anonymously.¹⁹⁷ One judge noted that the forums allow judges to learn about new developments, both in China and overseas.¹⁹⁸ Likewise, all judges in Shanghai can participate anonymously in discussions on the Shanghai court web, which links all courts in the city.¹⁹⁹ In addition, the Shanghai Second Intermediate People's Court's internal network includes a section in which judges can discuss "difficult legal questions" that they encounter in cases. The discussion is also accessible to judges in lower courts under the intermediate court's jurisdiction. A report on the court's website stated that court officers can discuss abstract legal issues encountered in individual cases. The court also organized a team of experienced judges to provide information in response to such abstract questions.²⁰⁰

As we have noted, Chinese judges frequently discuss cases that are under consideration with their peers and superiors, including superiors in higher courts. Discussing pending cases on discussion forums is thus an electronic version of the forums of vertical consultation that already exist. Yet such discussion forums may also facilitate debate that judges might be less willing to engage in face to face with other judges or with their superiors. For example, one report on the Liu Yong case²⁰¹ recounted how judges on the Liaoning Province High People's Court had discussed the case on their internet network while it was under consideration -- but did so anonymously out of concern for retribution.²⁰² Yet such discussion nevertheless takes place in a controlled environment, one in which only court personnel participate, and one that is monitored by court superiors. It may be that judges are more willing to participate in such

¹⁹⁶ Interview 2005-63.

¹⁹⁷ Interview 2005-58; *see also* Interview 2005-70 (stating that judges in Changchun will sometimes discuss difficult cases on discussion forums on their internal network, but generally only after the case has been decided).

¹⁹⁸ Interview 2005-58; Interview 2005-77.

¹⁹⁹ Interview 2006-57; Interview 2006-76

²⁰⁰ *Faguan Shenpan Anjian Yudao Nanti, Fayuan Wangzhan Tigong Yantao Kongjian [When Judges Encounter Difficult Questions in Adjudicating Cases: Court Website Offers Discussion Space]*, SHANGHAI QINGNIAN BAO [SHANGHAI YOUTH DAILY], Apr. 7, 2005, available at <http://legal.people.com.cn/GB/42734/43194/3302092.html> [LP-22]. All responses must be approved by the intermediate court's research office; the intermediate court will not respond to questions that reveal facts relating to individual cases. Interview 2006-45. Judges in other areas likewise state that they will sometimes use the internal web to discuss pending cases, in particular in courts where every judge has his or her own computer. Interview 2005-83.

²⁰¹ *See supra*.

²⁰² Zhang Yue, *Panjueshu Gaige Licu Touming Shenpan, Faguan Dulixing Youdai Tigao [Court Opinion Reform Advances Judicial Transparency, Independence of Judges Needs to be Enhanced]*, LIAOWANG DONGFANG ZHOUKAN, [ORIENTAL OUTLOOK], July 6, 2005, available at <http://www.china-judge.com/ReadNews.asp?NewsID=3267&BigClassID=17&SmallClassID=25&SpecialID=0> [LP-7].

discussions when they know they are not open to the public. Yet judges may also be wary of speaking too freely in a system run by the courts with an explicit goal of boosting oversight over judges.

Third, internal networks serve to disseminate information to judges, in particular about recent court developments. Internal web sites sometimes include representative cases from provincial or municipal high courts, as well as notices and interpretations from such courts.²⁰³ Local court leaders also sometimes include specific materials or cases from their own court on their internal web sites.²⁰⁴ These materials are designed to inform and educate judges; such cases are often selected because they either are particularly good examples, and are thus worthy of study, or carry a particular message.²⁰⁵ Thus, for example, in Beijing, courts can view interpretations from the Beijing High People's Court, as well as those from the Supreme People's Court. The Beijing High Court posts descriptions of important decisions (but not court decisions themselves) on its internal web site for judges in the city to review.²⁰⁶

Fourth, and arguably most importantly, internal networks facilitate oversight over individual judges and even courts. In many cases it appears that the networks have become a significant mechanism for higher-ranking judges to monitor the work of those below them. In so doing, internal networks reinforce the hierarchical and bureaucratic structure of China's courts. Many internal court networks provide information regarding the status of cases, such as party names, dates on which cases were filed or dates of scheduled hearings, and whether a case has been resolved. In most cases, such information is available only to judges handling such cases and their superiors,²⁰⁷ although in some courts all judges can view such information.²⁰⁸ In others, however, such information is available only to court superiors: judges complain of being required to enter extensive administrative information regarding cases into the computer system, but note that they themselves cannot access such information. The monitoring function is backed-up by other technology. In some courts in Beijing and Shanghai, court presidents, vice-presidents, and heads of individual divisions can

²⁰³ Interview 2005-70 (stating that in Changchun, the internal network at the intermediate court includes internal notices and announcements to judges, as well as a database of laws); *see also* Interview 2005-104 (stating that court networks are used to distribute notices and other information to all judges in Beijing); *Luzhou Zhongyuan Juyuwang Shang Kai Luntan* [*Luzhou Intermediate Court Opens Forum on Internal Network*], RENMIN FAYUAN BAO [PEOPLE'S COURT NEWS], June 21, 2004, <http://rmfyb.chinacourt.org/public/detail.php?id=70984> [LP-14] (noting the usefulness of a court internal network for disseminating notices and other information to judges).

²⁰⁴ Interview 2005-10.

²⁰⁵ Interview 2005-77 (stating that internal web sites also sometimes include descriptions of cases or opinions in selected cases that court education and propaganda officials have decided to post).

²⁰⁶ Interview 2005-58.

²⁰⁷ Interview 2005-12; Interview 2005-63.

²⁰⁸ Interview 2005-49; *see Fayuan Ban'an Liucheng Guanli Xitong* [*Administrative System for Court Proceedings*], http://www.spsp.com.cn/chinese/products/chanpcx_dzzw_fy01.htm (last visited Aug. 25, 2005) (noting the use of court networks to improve management of case information) [LP-10].

watch live video streams of the proceedings in any courtroom under their jurisdiction.²⁰⁹ At the Supreme People's Court, all judges are required to log in to the court network as soon as they get to the court, so that superiors can monitor who has arrived at work.²¹⁰

Court judgments are likewise usually available only to a limited number of judges and court officials. In a few courts it appears that all judges with access to the internal network can view all or most decisions from their own courts,²¹¹ but most networks only allow court leaders to view decisions (other than those selected by court propaganda officials as worthy of posting on the network).²¹² As one court president explained, decisions are not made generally available on the internal web site because they are "secret."²¹³ Thus court presidents and vice presidents often can view all cases in their courts, and heads of divisions within courts can view decisions in their division, but ordinary judges have access only to only those cases they have decided.²¹⁴ As one judge in an intermediate court put it, each judge in the court is allowed to view different information depending on his or her status.²¹⁵ In addition, in some jurisdictions in which networks connect lower and higher courts, some higher court judges are able to view decisions in lower courts in their jurisdiction.²¹⁶

In Beijing, for example, only high-ranking judges can view decisions. The situation in Beijing is noteworthy in part because it marks a departure from the more open system that was in place when the Beijing courts first created an internal court network. At the time, judges could view all cases decided by any court in Beijing.²¹⁷ Judges could also view cases in their own courts in which they were not involved.²¹⁸ The Beijing High People's Court altered the system, creating instead a system that permits only higher-ranking judges to access such

²⁰⁹ Interview 2005-48; Interview 2005-58; Interview 2006-36; Interview 2006-76; *see also Luzhou Intermediate Court Opens Forum on its Internal Network* [LP-14].

²¹⁰ Interview 2005-103; *see also Yuhuan People's Congress Issue General No. 194* [LP-2].

²¹¹ Interview 2005-9 (stating that at one intermediate court in Qinghai judges at the court can use the court's internal network to view all cases decided at the court); Interview 2005-65 (stating that judges in one court in Shenyang may view judgments in already decided cases on the court's internal web site).

²¹² Interview 2005-49 (stating that although individual judges may be able to access certain information regarding cases not before them in their court or division within the court -- such as the date of such cases and the names of parties -- they do not have the ability to access opinions); Interview 2006-76 (stating that only senior judges can view decisions).

²¹³ Interview 2005-12; *see also* Interview 2005-18 (stating that the internal website of an intermediate case in Shaanxi includes no cases).

²¹⁴ Interview 2005-70; Interview 2005-47; Interview 2005-48. In practice, this may not be a significant bar to judges obtaining information: judges seeking information about previously decided cases can also obtain information by asking their colleagues. *Id.*; Interview 2005-102 (stating that judges can ask their division heads if they want to see additional materials).

²¹⁵ Interview 2006-76.

²¹⁶ Interview 2005-47 (stating that in some courts in Beijing the court network allows both higher-ranking judges and judges at the Beijing High People's Court to view decisions from lower courts).

²¹⁷ Interview 2005-49.

²¹⁸ Interview 2005-47.

information.²¹⁹ The progression in Beijing appears to represent a more general trend. As court networks have developed, courts have become more sophisticated about both the type information provided, and the degree to which higher-ranking judges are able to use the system as a tool for oversight.

It would be wrong to view efforts to use technology to improve oversight over judges as entirely pernicious. As we have noted, there are many problems in China's courts -- including corruption, incompetence, and other forms of malfeasance. If internal networks are able to ensure that cases are heard and decided on time -- within the time limits stipulated in law -- that would be a major step forward for the fairness of the Chinese system. The same is true with having live images of court proceedings available to court superiors: the fact proceedings are on camera may reduce incentives to engage in obvious misconduct. In this regard, however, the development of court internal networks reflects the development of the internet in China more generally. Restricted access to the internet serves the state's interests in oversight and control. But restricted access may be better than no access, and in the legal system it may mean courts that function more fairly, more efficiently, and more consistently.

III. JUDICIAL COMMUNICATIONS AND JUDICIAL POWER

What is the relationship between how a judiciary communicates and its position in society? What can we learn from the Chinese example about the relationship between judicial communications, judicial power, and the rule of law?

We suggest a central and important tradeoff for the Chinese or any legal system in a cheap speech environment. First, in a country with a weak judiciary, the ease of criticism made possible by cheap communications technology can pose a serious threat to the legitimacy and power of the courts, and threaten progress toward the rule of law. In more developed legal systems, where the judiciary is stronger, such effects may be weaker, and the salutary aspects of criticism more obvious. However, in countries with less developed legal institutions, the power of mass, directed, and cheap criticism to weaken judicial institutions is much clearer.

The criticism born of greater informational freedom can correct injustice, prevent corruption, and otherwise ensure a more fair legal system. But at the same time it can also destroy what little power and autonomy weak courts may have. Where the courts lack authority, the media and courts may become rival institutions, set on a course of repeated conflict. That is what we have seen in China, where courts and the media each contend that their view of the law and the facts is the correct one, and where each claims that the other is beset by corruption and incompetence.

But the same cheap communications can also be used to build judicial power. The easier it is for judges to communicate, the easier to develop a

²¹⁹ Interview 2005-47; Interview 2005-58 (stating that the heads of court divisions can view case details of cases in lower courts).

consistent set of rules across the country. Cheaper communications make it easier for courts to apply the law consistently -- a major and often (at least in western writing on Chinese law) overlooked problem.²²⁰ That, in turn, gives judges the power to appeal to the potent principle that similar cases should be decided similarly. Stated differently, we suggest here that judicial "herding," while considered dangerous by some of the American literature,²²¹ may be a key component of constructing judicial power.

Horizontal networking among judges also makes it easier for judges to cumulatively improve the law -- by passing on best practices to others. It also facilitates the development of professional identity, which may be key to developing the ability to resist external pressure. Those improvements will further strengthen judicial claims to legitimate resolution of cases.

A. Judicial Power

The source of judicial legitimacy and power presents one of the oldest questions in law and political science. What gives courts their political power? The question is not easy to answer. The judiciary, whether in China or other countries, typically lacks either the legitimacy of an elected body,²²² or command of coercive physical force (an army) to enforce its will. The judiciary's power to make others obey must derive from an appeal to some other source of authority and legitimacy. Invariably judges lay claim to be enforcing some higher principle that transcends the case before the judge.²²³ The exact principle may vary across cases, legal systems, and eras. A judge may claim to be effectuating the commands of the legislature, deciding the case the same as a similar case, enforcing basic principles of morality, or perhaps implementing a divine will. The strength of those claims will vary across time and among places. But what these claims have in common is an appeal to an authority beyond the personal discretion of the judge, and a hope that, thanks to the claim, the judge's decision will be obeyed.

From this perspective, a judiciary's power can be said to stem from several social facts. The first is how broadly any given principle the judiciary

²²⁰ For discussions of inconsistent application of law, *see, e.g.*, Zhang Weiping, *Minshi Susong Falü Shen De Gongneng Ji Gouzao* [*The Function and Structure of Legal Hearings in Civil Litigation*], 5 FAXUE YANJIU [CHINESE JOURNAL OF LAW] (2005), available at <http://www.civillaw.com.cn/weizhang/default.asp?id=22910> [LZ-22]; Yu Dongai, *Panli Fa Zhidu? Panli Zhidu?: Yige Si Shi Er Fei de Sifa Wenti* [*Precedent Legal System? Precedent System?: A Specious Judicial Question*], GONGFA PINGLUN [PUBLIC LAW FORUM], <http://www.gongfa.com/yudapanlifa.htm> (last visited Feb. 22, 2006) [LZ-23].

²²¹ *See supra*, text accompanying notes __-__.

²²² In the United States the majority of judges are elected. However, most powerful judges, including all federal judges, are generally appointed.

²²³ This argument is made in many forms in many places. *See, e.g.*, James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959); ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* (1962).

might rely upon is accepted, both by other parts of government, who may have to enforce the ruling, and by the public at large, who comply voluntarily. A second consideration is, even granting the existence of accepted principles, the capacity of the judiciary to assert the claims in the first place, a question that may depend on access to resources. For example, a judge who lacks the relevant statute books will have trouble claiming, as a matter of principle, that she is faithfully implementing the will of the legislature.

Let us turn to the Chinese example, where the courts are weak, both constitutionally and in actual practice, and discuss what makes their claims to higher principle difficult. Among the simplest claims of principle a court can make is that it is obeying the written law. Yet even that most basic claim is complicated by the vagueness and confusion in many Chinese laws, and by overlapping claims to authority by various Party-state institutions. Meanwhile, courts in poorer areas sometimes lack basic legal texts, let alone internet access. Similarly, judges, especially in rural areas, may lack the legal training necessary to articulate their claims to legitimacy.²²⁴

Second, as we've already discussed, courts in China have been isolated and largely unaware of what other, similar courts are doing. This deprives the courts of another of the most obvious principles from which they can claim legitimacy: doing what other courts have done. The decisions made by Chinese courts, consequently, have lacked the consistency that might form the basis for a claim to legitimacy and fairness.

Without recourse to these more obvious claims to legitimacy, a popular default, as other Chinese scholars have noted, is for Chinese courts to make the claim to be effectuating the will of the Party.²²⁵ However, the relatively unclear legitimacy of the Party itself, along with the Party's control over the courts, means that the authority that may be derived from such claims may be weak. In practice, it appears that injustice in individual cases, and inconsistent application of the law, are widely viewed as undermining popular confidence in the courts.

What our study adds to this discussion of judicial power is a new appreciation of how judicial communications may affect the claims to authority that judges may make. Cheaper communications can both weaken and strengthen judicial power.

B. Net Justice

²²⁴ See Yao Xiang *Jiejue Tuoqian Jiaoyu Jingfei Nayang Jiejue Hao Faguan Gongzi Zu'e Fafang Wenti* [Resolve the Problem of Full Payment of Judge's Salary in the Way that Late Payment of Education Funding is Resolved], ZHONGGUO FAYUAN WANG [CHINA COURT WEB], July 1, 2004, <http://www.chinacourt.org/public/detail.php?id=121608> [LZ-21] (reporting official comments on the poor conditions and low salaries in local courts); Liebman, *Restricted Reform*, *supra* note 35 (discussing inequalities among courts in China).

²²⁵ See Liebman, *Restricted Reform*, *supra* note 35 (discussing court commitments to "socialist rule of law" theory and to maintaining social stability).

The blogger theory discussed in Part I makes the classic point that cheaper speech ought to improve government performance. Much of the argument is a high-tech version of the classic view of free speech presented by John Stuart Mill in *On Liberty*, suggesting the now seemingly obvious merits of having orthodoxy challenged by heretical opinion.²²⁶ In its high-tech manifestation, the idea is that the government will commit a given number of wrongful acts. Due to resource limits and agenda, traditional media will only expose a percentage of these errors. In theory, the sheer increase in the number of critics empowered by internet technology will lead to more government misdeeds being uncovered -- in the sense that a nation equipped with more fly-swatters will kill more flies.

Writers like Thomas Friedman and Nicolas Kristof rely on blogger theory and predict that in authoritarian regimes such as China, cheap speech ought similarly improve government performance -- or even lead to the downfall of such regimes. Whether that is actually happening or not is the subject of an ongoing debate. Both of us, in other work, have discussed this subject, emphasizing a loss of specific control yet a maintenance of overall control over political debate within China.²²⁷ More wrongs are being exposed in China, but this does not necessarily mean the Communist Party is any less in control than in the past.

What we have learned in this study sheds further light on this debate. Blogger theory prizes criticism as a remedy for bad governance, which means the cheaper it is to criticize the better. This study shows the limits of these views -- and urges a better understanding of the role of cheap internet criticism. We uncover the problems of directed criticism, in particular attacks on a weak judiciary in an environment where criticism of other government actors is more effectively barred.

An important assumption of the classic free speech theory discussed above is that the government actors in question are powerful enough that criticism will, in the end, improve performance. Yet matters may be different when some but not other forms of criticism are allowed, and when the criticized actors are weak and face ongoing legitimacy problems. In that context, the public criticism that cheaper speech makes possible can erode the ability of judges to act, in effect, as judges. It can weaken their capacity to act independent of public and political opinion, and weaken the courts relative to other political actors.

We have seen in this paper that criticism of the judiciary helps maintain the power of the Communist Party. Net-fueled rage provides new reasons and justifications for the Party-state to intervene in the operation of the legal system. While sometimes the Party-state will prop up, as oppose to reverse, a judge's decisions, either way, it is the Party-state, and not the courts, that has the final say. Whatever legal authority might have existed is replaced with a political decision made by the Party-state. This creates incentives for the public and the media to appeal to Party-state actors to intervene in cases with which they disagree. It also

²²⁶ See JOHN STUART MILL, *ON LIBERTY*, Ch. 2 (W.W. Norton & Co. 1975).

²²⁷ See Liebman, *Watchdog, supra*; Wu, *WHO CONTROLS THE INTERNET, supra*.

encourages courts to align their decisions with what they believe will be Party leaders' views.

For judges, political intervention can be embarrassing, and carries the risk of more serious sanctions if decisions are viewed as incorrect by court or Party superiors. In China, in politicized or sensitive cases, the threat of political intervention has always been a check on the power of the courts. Preordained outcomes and Party intervention have long been a feature of the Chinese legal system. The new concern, however, is a type of political pressure that is born not of the narrow political or financial concerns of the Party or of individual Party officials, but the broader set of issues likely to inflame public opinion. What's new is the possibility of intervention not only for politically sensitive cases, but for simply unpopular decisions.

At its worst, cheap mass criticism may lead to a legal system where Net reaction serves as a kind of alternative appellate review. The case of Liu Yong's execution comes closest to that extreme, one that Chinese commentators have compared to the court-free mass justice of the Cultural Revolution. But more ominous still are the cases like Liu Yong's that never come to light, because the courts do not dare practice leniency for fear of the public reaction.

Courts have several means of trying to avoid such interventions, but most lead in unfortunate directions. First, courts facing cheap mass criticism have every reason to try and prevent the media and internet sites from stirring up controversy. The result is the spread of false or controlled transparency in China's courts. The courts, as we are seeing, have used new technology and the commercialization of the media to spread positive reports about their own work.²²⁸ They are also making it harder for journalists to cover court proceedings. The emphasis China's courts have put on managing media relations and the flow of information to the media in recent years reflects both the power of the Chinese media and the internet, and judges' beliefs that media intervention in cases is often illegitimate and unhelpful. The courts thus are now trying to exert more influence on the media, much as the media have tried to influence the courts.

Second, given that courts cannot always control media coverage, courts have an incentive to try and decide cases in a manner least likely to inflame public opinion or attract media attention. As we've said, the real question is how often courts fail to decide cases like the Liu Yong case for fear of public outcry. It goes without saying that such self-conscious efforts to avoid unpopular decisions are a far cry from deciding cases fairly.²²⁹ Instead, the courts may engage (like the media itself) in a judicial version of a self-censorship -- or make a deliberate effort to guess what outcomes the media or ultimately the Party might prefer.

²²⁸ Cf. *Ni Shouming Jiyu Benwang Jiaqiang Guanli Jiji Fa Zhan* [*Ni Shouming Sends Words to Our Web: Enhance Management and Positively Develop*], Hebei Sheng Gu'an Xian Remin Fayuan [Hebei Province Gu'an County People's Court], Mar. 31, 2005, <http://gaxfy.chinacourt.org/public/detail.php?id=94> (court official discussing importance of the internet) [LZ-65].

²²⁹ Interview 2005-10.

What we are saying can be misinterpreted as suggesting that a judiciary is better off absent any external criticism. First, none of this to suggest that there is no positive side to the new criticisms of China's courts. The optimistic face of Web justice is (half) of the Sun Zhigang case, where public attention demanded government reform, or the Nie and She cases, where internet coverage helped to pressure the SPC to revise procedures for capital cases. We do not advocate further restrictions on speech in China. The problem is not with the courts or the media, but rather lies in hypersensitivity to public opinion and concerns regarding "social stability" among Party officials, and a resulting unwillingness to refrain from intervening when law and public opinion conflict.

* * *

The points discussed here have obvious implications for other developing countries, as well as for legal systems with more robust courts. The blogger theories developed in the West have their limits, particularly when the development of the judiciary is at issue. In many developing countries with weak judiciaries, it must be understood that cheap mass criticism of the courts alone may hinder, rather than aid, the development of an independent judiciary. The case of China shows how important it is for media to respect a judiciary's role in society, and for courts and other state institutions to be able to resist the temptation to yield to public rage. The spectacle of the Internet manhunt as a kind of appellate court of public opinion may have reached an extreme form in China. Yet no legal system can afford to ignore similar dangers.

This discussion also highlights a crucial difference between *cheap* speech and *free* speech. Many observers of China mistake the present volume of speech (cheap speech) as reflecting an inevitable trend toward free speech, when the two are distinct. Speech may be cheaper in the new China but at the same time only modestly freer, for while the volume of criticism may be growing, much is in permitted directions. The media has some freedom to incite virulent public attacks on the judiciary (cheap speech), but not to question the legitimacy of Communist Party rule (free speech). Indeed, the very fact that there remain significant restrictions on speech may be what makes permitted forms of criticism so extreme. That is why when we warn of the dangers of cheap speech to the power of the Chinese judiciary, we are not discounting the value of free speech in the political system. We claim only that cheapening speech along one dimension -- mass criticism of an already weak judiciary -- may not be a healthy development.

C. Judicial Networks

Cheap speech may make it easier to ignite populist campaigns against the judiciary. But the flip side is that it also makes it easier for judges to learn about and rely on each other's decisions -- giving a new basis for claims to legitimacy

and authority. Judges who are aware of the decisions of others may make claim to a central principle: that like cases be decided alike. There is obviously far more to a legal system than the “like cases” principle. Nonetheless, the idea that if a case is not different in relevant particulars from a case already decided it should be decided in the same manner is an important starting point.²³⁰ It can be alternatively termed a matter of human liberty,²³¹ or the predictability of outcomes for parties who live under the system.

The recent American literature on judicial precedent cascades, discussed in Part I, has largely warned of the dangers of blind obedience to the decisions of other judges. Our study leads us to a conclusion that is nearly the opposite: imitative behavior may be a crucial route for the Chinese courts to develop their power and autonomy. We argue here that the rise of horizontal communications within the judiciary may slowly give individual judges and courts more confidence in their decisions, as they create more uniformity and consistency within their courts and across the country.

What happens when it gets easier and cheaper for judges to know what similarly situated judges are doing or have done?²³² A judge now has a new source of (external) information, namely, the decisions made by other judges who faced the same problem.²³³ This setting -- a set of sequential and similar decision makers facing a similar problem with imperfect information — contains the basic components of the main economic models of herding behavior.²³⁴ And given basic assumptions, the prediction is that judges, like any other actors, will rationally value the information on what other decision-makers did in similar circumstances, or at least count it in addition to local information.²³⁵ Even without a binding rule of *stare decisis*,²³⁶ we might expect the knowledge of what other judges have done to have an effect on judicial decision-making. This is a complex way of saying that judges will value the acts of other judges as a source of information as to the right decision.²³⁷ As Professor Eric Talley writes, as

²³⁰ See, e.g., RONALD DWORKIN, *LAW'S EMPIRE* 176-224 (1986); MELVIN EISENBERG, *THE NATURE OF THE COMMON LAW* 10-12 n.29 (1988); ROBIN WEST, *RE-IMAGINING JUSTICE: PROGRESSIVE INTERPRETATIONS OF FORMAL EQUALITY, RIGHTS, AND THE RULE OF LAW* 107 (2003).

²³¹ See JOHN RAWLS, *A THEORY A JUSTICE*, 55-56, 210-213 (1972).

²³² By assumption, the “other judges” are not superior courts or in any kind of vertical relationship, but equals or higher-ranking courts in other jurisdictions whose decisions are not formally binding in any way.

²³³ The idea of such a change in technology is not far-fetched -- as various historians have pointed out, the common-law system may have only begun to function well after the invention of the printing press, which offered, among other things, a cheaper means of finding out what other judges had done in similar circumstances.

²³⁴ See, e.g., Bikhchandani, Hirshleifer & Welch, *supra* note 31; A. Banerjee, *A Simple Model of Herd Behavior*, 107 Q. J. ECON. 797 (1992).

²³⁵ See Daughety & Reinganum, *supra* note 32; Talley, *supra* note 34, at 87.

²³⁶ Cf. Lewis Kornhauser, *An Economic Perspective on Stare Decisis*, 65 KENT CHICAGO L. REV. 63 (1989).

²³⁷ A number of writers in information economics discuss why decision-makers (usually in financial markets) will rationally place weight on the decisions made by others in similar

judges “learn information from previous holdings, they may rationally begin to treat such holdings as binding on them, *even if* not formally required to do so, and *even if* the case they actually hear suggests a contrary outcome.”²³⁸

Most of the American literature on herding and the judiciary presents the possibility of precedential cascades as a threat to the legal system. The argument is that judges may begin to blindly obey what others have done with little regard as to the correctness of the rule adopted. Yet whether this is really a problem depends on the legal system under study. Where consistency and a basic rule of law are taken for granted, herd behavior may be a problem. But where the judiciary is weak, and its decisions inconsistent, herding may be an important political strategy. Our theory suggests that information about similar cases -- even if not acknowledged as precedent -- may make it easier for courts elsewhere to reach similar decisions. The greater availability of information and debate may also make it more likely that courts in different areas of China will apply the law consistently. Courts are increasingly looking for guidance horizontally, to equal-level courts in other jurisdictions, rather than only looking to their vertical superiors. The fact that judges are increasingly looking horizontally to each other also suggests the possibility of ground up development of law and courts, greater expansion of court autonomy, and perhaps increased professional identity among judges. All of these may over time encourage courts to further develop their own ability to resist external pressure.

We can present this discussion a different way. As we discussed above, the legitimacy and power of courts stems in part from their adherence to higher or neutral principles.²³⁹ In a mature legal system, it can be easier to find such principles, whether they be the “rule of clear mistake” allowing the judiciary to correct obvious errors made by the legislature and executive, the principle that like cases be treated alike, or some other principle. Yet in a developing legal system the search for such rules may be more difficult. That is why the simplest principle of all -- acting as other courts or judges have done -- is so important. Lacking any other particular claim to legitimacy, the judge may at least say that the court is acting in a manner consistent with what other courts have done.

situations. One reason is the possibility that the earlier actors knew something -- among Choice A and B, they possessed private insight or information suggesting that Choice A was preferable. A second is simply a preference for conformity -- that most people prefer to do what others have done, either because it reduces mental strain, protects their reputation, or avoids the risk of being criticized. For these and other reasons, see Bikhchandani et al., *supra* note 31. An important point is that we might expect imitation both in the absence or presence of a formal precedent system. For one thing, production of rules is part of the business of the judiciary -- so that a judge who does what others have done might be a good judge. Another reason is that judicial power may also be maximized by consistency among judges -- a united front that deters political meddling. Third, and maybe the most important for most judges, following may just be easier. It is much easier for judges to do what others have done -- in jargon, it minimizes decision costs.

²³⁸ Talley, *supra* note 34, at 94. Talley goes on to specify some of the ways that a legal system can mitigate some of the negative side-effects of precedential cascades -- which we discuss below.

²³⁹ Along with, as Alexander Bickel argued, the power to avoid making decisions. See BICKEL, *supra* note 223, at 49-65, 111-199.

Courts and legal systems that treat like cases alike would appear both more deserving of and more likely to receive public trust.

A further component of the advantages of judicial networking for judges is the possibility of innovation toward better rules. In a world where judicial communication is difficult, an innovative decision -- either a novel resolution of an unclear legal issue, or a decision that appears to challenge existing laws or norms -- often went unnoticed. Today, some such cases become lively topics of debate online -- allowing both lawyers and judges elsewhere to become aware of such decisions.²⁴⁰ Courts may be more willing to innovate when they know that courts elsewhere in China have done the same. And to the extent judicial networks improve the law in ways that prove popular, judges may lay claim to greater authority and prestige.

The implications of this China-focused discussion for the rest of the world should be clear. Empirically, scholars like Anne-Marie Slaughter have documented the rise of cross-border contacts and networking among judges.²⁴¹ Slaughter's work on judicial networks describes the increasing practice of judges in different countries paying attention to each other, and each other's decisions, in a way that is influential despite being non-binding. What courts in both international and Chinese judicial networks are seeking is the same. They seek the additional power and legitimacy that is the product of judicial conformity. That judges in China and around the world should both seek the comfort of reliance on what other courts have done should be no surprise.

We close this discussion with three caveats. First, our findings are predictive rather than conclusive: we are suggesting that horizontal networking by Chinese judges presents one possible route to strengthening the position of China's courts within the existing political system. Second, the position of courts in Chinese society is the product of many factors, most importantly Party-state policy. Third, the interviews conducted for this article do not permit overly broad conclusions regarding how many judges use the internet, or the degree to which such use of the internet is fostering informal precedent. Certainly not all judges go online; those who do so tend to be younger, educated, and accustomed to using computers. Many judges in China's courts are older, and many older judges had no formal higher education prior to joining the courts. One judge noted that only those judges who are "responsible" will bother to conduct online research.²⁴² Another judge stated that those judges who do have internet access are more likely to use the internet to play online games than they are to conduct legal research.²⁴³ Despite these caveats, we are confident that changes in how judges communicate will, over the long-term, affect the operation of the Chinese legal system.

²⁴⁰ For a discussion of innovation in the Chinese system, see Liebman, *Innovation through Intimidation*, *supra* note 35; Liebman, *Restricted Reform*, *supra* note 35.

²⁴¹ SLAUGHTER, *supra* note 5, at ch. 2.

²⁴² Interview 2005-19.

²⁴³ Interview 2005-10.

IV. CONCLUSION

The dramatic drop in the costs of communications represented by the internet revolution has had effects on the world both predictable and unpredictable. In North America, Japan, and Europe, it is the media and entertainment industries that have faced the most radical challenges. But it stands to reason that not every country will change in the same ways. In China, this study shows that the legal system is one area where changing informational practices seem to be having long-term transformative effects, with important lessons for the rest of the world.

The perennial question is whether China's internet revolution is facilitating the "rule of law." We see mixed results. At its best, judicial networking may strengthen the confidence and autonomy of individual judges, as they network with their peers. Net justice may also be used as a corrective against judicial malfeasance and corruption. But as for the delicate issue of external, political scrutiny of judges, matters may be getting worse before they start getting better. As one of us has noted elsewhere, at the end of the day raising the status and authority of courts is not something courts can do on their own.²⁴⁴ The central Party-state does not appear interested in fundamental changes to the power of the courts. What is emerging, however, is a new and confusing dynamic between a commercial media, better trained judges who are beginning to aspire to the roles played by judges elsewhere, Party-state officials, and a reactive public. We do not claim to understand the full implications of that dynamic for the rule of law in China.

The case study of China yields important lessons for the legal systems in developing and developed countries. Every country has a *de facto* speech environment surrounding its judiciary -- a mixture of informal and formal rules that control how judges speak, and how people speak about judges. What we learn from the study of China is how vital these speech practices can be for a healthy and fair legal system. The speech norms by which a judiciary lives by may be vital to its power, and their erosion cannot be taken lightly.

²⁴⁴ Liebman, *Restricted Reform*, *supra* note 35.