

UC Berkeley

UC Berkeley Electronic Theses and Dissertations

Title

Innovation through Interpretation: How Judges Make Policy in China

Permalink

<https://escholarship.org/uc/item/4w71q2dq>

Author

Li, Zhiyu

Publication Date

2017

Peer reviewed|Thesis/dissertation

**INNOVATION THROUGH INTERPRETATION:
HOW JUDGES MAKE POLICY IN CHINA**

By

Zhiyu Li

A dissertation submitted in partial satisfaction of the

requirements for the degree of

Doctor of Juridical Science

in

School of Law

of the

University of California, Berkeley

Committee in charge:

Professor Laurent Mayali, Chair

Professor Martin M. Shapiro

Professor Lowell Dittmer

Spring 2017

© Copyright by Zhiyu Li, 2017

All Rights Reserved

Abstract

Innovation through Interpretation: How Judges Make Policy in China

by

Zhiyu Li

Doctor of Juridical Science

University of California, Berkeley

Professor Laurent Mayali, Chair

My dissertation explores the role of courts in making the law respond to the social and economic transformations that have defined contemporary China. In particular, I find that Chinese judges working in the civil law tradition are nevertheless able to effect incremental changes in existing law without having to resort to the formal legislative process.

Part I reviews the theory and practice of Chinese statutory interpretation, paying special attention to the use of sources and methodology. I demonstrate that despite the sometimes overdrawn differences between civil law and common law jurisdictions, techniques of statutory interpretation can and are employed by Chinese judges to give the law a fluid and dynamic character, thereby facilitating its adaptation to emergent societal circumstances.

A legal innovation can spread as a court's novel reading of a statute is adopted by other courts and becomes mainstream. Part II describes and accounts for the diffusion of judicial innovations in Chinese courts since the 1980s. The confluence of two factors, the norm of judicial openness and the medium of the internet, have made prior judicial decisions readily accessible and a convenient resource for Chinese judges confronting hard cases. These prior judicial decisions serve as a form of political communication between courts that indicates the acceptability and feasibility of policy innovations in the law. Three case studies – the “guiding cases” issued by Chinese Supreme People's Court, and a series of provincial-level cases on driving under the influence (DUI) and ATM Theft – demonstrate how innovative statutory interpretations diffuse through the court system and eventually precipitate legislative amendment of outdated statutes. I supplement these case studies with surveys, survey experiment, and interviews.

Finally, Part III of my dissertation describes the law-making function of the judiciary in other civil law countries, such as Japan and Germany. Drawn from the convergence of judicial roles between common law and civil law systems, it further assesses the social, political, and legal conditions necessary for judicially initiated policy innovations to succeed in China. This chapter demonstrates that judicial innovations in China survive because of their silent and gradual character of their assimilation by the legal system. Some of these innovations fade, however, due to political reasons or the transience of the societal conditions that gave rise to them.

Overall, I conclude that despite their protestations to the contrary, Chinese courts balance the tension between the unchanging code and the changing social and economic conditions in Chinese society by engaging in experimentation through statutory interpretation. In this function, Chinese courts are not that different from their sisters in common law jurisdictions or, for that matter, from courts everywhere.

Table of Contents

INTRODUCTION	1
CHAPTER I. THE STATUTORY INTERPRETATION WITH CHINESE CHARACTERISTICS	4
I. THE TOUGH PATH OF LEGISLATION IN CHINA.....	5
<i>A. Early Legal Reform: The Influence of the Japanese, German and Soviet Legal Systems.....</i>	<i>5</i>
<i>B. Mid-stage of Legal Reform: The Inspiration of Taiwanese Legal Writings.....</i>	<i>7</i>
<i>C. Contemporary Legal Reform: The Impact of the Common Law System.....</i>	<i>8</i>
II. THE STATUTORY INTERPRETATION THEORY IN CHINA.....	10
<i>A. Interpretation Rule: the Promotion of Judicial Activism</i>	<i>10</i>
<i>B. Interpretation Sources: the Protection of Constitution Authority.....</i>	<i>13</i>
<i>C. Interpretation Methodology: the Impacts of Social Custom and Public Order</i>	<i>14</i>
<i>D. Interpretation Strategies: the Application of Interest Balancing.....</i>	<i>16</i>
CHAPTER II. THE CREATION AND ADOPTION OF LEGAL DOCTRINES IN CHINA	19
I. THE DEFINITION OF LEGAL DOCTRINE CREATION	19
<i>A. The Janus-faced of Precedents: Distinguish and Analogize</i>	<i>20</i>
<i>B. The Incrementalism of Legal Doctrine Creation Process: Stability with Change</i>	<i>24</i>
II. THE SILENT ASSIMILATION OF STARE DECISIS INTO CHINESE STATUTORY INTERPRETATION	28
<i>A. The Vertical Influence of Prior Judicial Decisions: The Promulgation of Guiding Cases.....</i>	<i>29</i>
<i>B. The Horizontal Influence of Previous Judicial Decisions: The Collaborative Innovation of Local Courts.....</i>	<i>35</i>
III. THE EMPIRICAL RESEARCH ON PRECEDENTIAL INFLUENCE OF PREVIOUS JUDICIAL DECISIONS	51
<i>A. Surveys of Judges' Views on Previous Judgments</i>	<i>51</i>
<i>B. Survey Experiment on Horizontal Influence of Sister Courts' Decisions.....</i>	<i>63</i>
<i>C. Interviews with Judges and Law Clerks</i>	<i>80</i>
CHAPTER III. THE FUTURE OF JUDICIAL INNOVATION IN CHINA	83
I. DOCTRINAL INNOVATION BY COURTS UNDER CIVIL LAW TRADITION: THE EXAMPLES OF EUROPE AND ASIA	84
<i>A. Europe.....</i>	<i>84</i>
<i>B. Asia</i>	<i>88</i>
II. THE INCENTIVES OF JUDICIAL INNOVATIONS IN CHINESE COURTS	90
III. WHEN JUDICIAL INNOVATIONS SUCCEED OR FAIL IN CHINA	92

CONCLUSION	94
APPENDIX A: CHINESE JUDGMENT SAMPLE	96
APPENDIX B: SURVEY INSTRUMENT	99
APPENDIX C: INTERVIEW GUIDE.....	103

Introduction

Can Chinese judges, like judges in common law countries, make policies through their decisions? The creation and transmission of policy through the use of precedent by the courts has been widely studied in common law countries.¹ Legal scholars in the United States have explored the spread of judicial innovations in the common law, such as the strict liability rule for manufacturing defects,² and in statutory interpretation, such as hostile work environment standards under a federal sexual harassment statute.³ Regrettably, there is scant attention to the latitude that courts have in creating and propagating legal doctrines in civil law countries such as China.

This disparity could be due to an oft-repeated distinction between common law and civil law jurisdictions. The former is generally uncodified, and is based on an accumulated body of precedent.⁴ In contrast, the latter is codified, and is founded on a legal code that dictates the rule to be applied by a court.⁵ Judicial opinions are not recognized as sources of law in civil law jurisdictions whereas judges in common law jurisdictions look to holdings in earlier cases, or

¹ Harris, Peter. 1985. "Ecology and Culture in the Communication of Precedent Among State Supreme Courts, 1879-1970." *Law and Society Review* 449-486; Harris, Peter. 1982. "Structural Change in the Communication of Precedent Among State Supreme Courts, 1870-1970." *Social Networks* 201-212; Canon, Bradley C., and Lawrence Baum. 1981. "Patterns of Adoption of Tort Law Innovations: An Application of Diffusion Theory to Judicial Doctrines." *American Political Science Review* 975-987; Caldeira, Gregory. 1988. "Legal Precedent: Structures of Communication Between State Supreme Courts." *Social Networks* 29-55; Caldeira, Gregory. 1985. "The Transmission of Legal Precedent: A Study of State Supreme Courts." *American Political Science Review* 178-194; Moyer, Laura P., and Holley Tankersley. 2012. "Judicial Innovation and Sexual Harassment Doctrine in the U.S. Courts of Appeals." *Political Research Quarterly* 784-798; Canon, Bradley C., and Lawrence Baum. 1981. "Patterns of Adoption of Tort Law Innovations: An Application of Diffusion Theory to Judicial Doctrines." *American Political Science Review* 975-987; Glick, Henry R. 1992. "Judicial Innovation and Policy Re-Invention: State Supreme Courts and the Right to Die." *Western Political Quarterly* 71-92; Hinkle, Rachel K, and Michael J. Nelson. 2016. "The Transmission of Legal Precedent among State Supreme Courts in the Twenty-First Century." *State Politics and Policy Quarterly* 1-21.

² Bird, R. C., & Smythe, D. J. (2012). Social Network Analysis and the Diffusion of the Strict Liability Rule for Manufacturing Defects, 1963-87. *Law and Social Inquiry*, 565-593. Bird, R. C., & Smythe, D. J. (2008). The Structure of American Legal Institutions and the Diffusion of Wrongful-Discharge Laws, 1978-1999. *Law and Society Review*, 833-864.

³ Moyer, L. P., & Tankersley, H. (2012). Judicial Innovation and Sexual Harassment Doctrine in the U.S. Courts of Appeals. *Political Research Quarterly*, 784-798.

⁴ "The common law is comprised of that body of court decisions in the nonstatutory field to which the doctrine of stare decisis applies." *Windust v. Department of Labor and Industries*, 52 Wash. 2d 33, 323 P.2d 241 (1958); Joseph Dainow, "The Civil Law and the Common Law: Some Points of Comparison," 15 *American Journal of Comparative Law* 419, 421-423 (1966-1967);

⁵ Dainow, "The Civil Law and the Common Law: Some Points of Comparison," 420-421; Thomas Mackay Cooper, "The Common and the Civil Law: A Scot's View," *Harvard Law Review* 468, 472-73 (1950); William Tetley, "Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)," 60 *Louisiana Law Review* 677, 681 (2000).

precedents, to find the law.⁶ Thus, it is frequently asserted that judges exert more influence over policy making in common law systems than in civil law ones.

In China, the research on statutory interpretation started in the 1980s.⁷ At the early stage of the study, Chinese scholars mainly relied on interpretation methods and deductive reasoning under civil law tradition to explain the techniques of statutory interpretation that judges applied in cases. However, as a result of the increasing accessibility of judicial decisions, the judgments of sister courts have become a convenient resource for Chinese judges confronting hard cases or novel situations. These prior judicial decisions serve as a form of political communication between courts that indicates the acceptability and feasibility of policy innovations in the law. Following this emerging norm of judicial openness, scholars have been increasingly drawing attention to the roles of courts and judges in response to the needs of society. Clarke in a book entitled “Judicial Innovations in Asia,” illustrated the way that courts, especially Chinese Supreme People’s Court, innovated Chinese corporate law both in defendant-friendly and plaintiff-friendly directions.⁸ Howson also reported that the creativity and power of Shanghai courts to stretch the application of law in order to provide justice.⁹ That said, Shanghai judges “‘make law’ based upon their autonomous conception of who or what the statutory framework is designed to serve, devise non-statutory legal standards for application of corporate law doctrine, and create remedies out of whole cloth.”¹⁰ To further research on the lawmaking functions of the Chinese judiciary, my dissertation examines the relationship between Supreme People’s Court and lower courts in innovating the law: the latter provides the raw material or inspiration for the former to prepare formal innovation in the form of normative documents.¹¹ It aims to explore the precedential values of prior judicial decisions and lay out the implications for both judges and practitioners in understanding the legal status of judicial decisions in China. The key questions to be studied are first, the techniques that Chinese judges employ to make policy innovations in a jurisdiction that is statute-based, and second, the social, political, and legal conditions necessary for judicially initiated policy innovations to succeed in China. I seek to elucidate these issues by tracing the creation and adoption of legal doctrines in Chinese courts.

To examine judicial diffusion in China, I begin by reviewing the theory and practice of Chinese statutory interpretation, in particular, the use of sources and methodology. Then I turn to describe and account for the silent and incremental assimilation of prior judicial decisions into Chinese

⁶ “Civil law differs from common law because judicial decisions are generally not a source of law and the doctrine of stare decisis does not formally exist.” Developing Global Transnational Harmonization Procedures for the Twenty-first Century: The Accelerating Pace of Common and Civil Law Convergence, 42 Tex. Int’l L.J. 625, 637 (2007); See also Peter de Cruz, Comparative Law in a Changing World (1995) 44, 46.

⁷ Dong Hao, Tang Wenfu, The Construction of Chinese Case Law (China University of Political Science and Law, 2009), at 4.

⁸ “Judicial innovation is usually thought of as something that expands the realm of causes of action, and is therefore plaintiff-friendly. But Chinese courts have innovated in some decidedly plaintiff-unfriendly ways, especially in the area of securities litigation.” Donald Clarke, Judicial Innovation in Chinese Corporate Law, in: Judicial Innovations in Asia: Judicial Lawmaking and the Influence of Comparative Law (John O. Haley, Toshiko Takenaka eds. 2014), at 259-272.

⁹ Nicholas Howson, Corporate Law in the Shanghai Peoples’ Courts, 1992-2008: Judicial Autonomy in a Contemporary Authoritarian State, 5 E. Asia L. Rev. 303, 303-442.

¹⁰ *Id.* at 349.

¹¹ Donald, at 272.

judicial decision-making. I employ a multi-faceted approach that encompasses case studies, interviews, and surveys. The cases studies I have selected involve driving under the influence (DUI) and ATM Theft. Both case studies have several elements in common: they involve the judicial interpretation of a statute that is no longer responsive to the broader social and cultural environment, the re-articulation of this interpretation by other courts, and finally, the legislative amendment of the statutes. The sequential adoption of a judicial decisions is not necessarily indicative of influence by sister courts. For example, the spurt in judicial policymaking activity that is exemplified in the two case studies may have been induced by common social trends: the popularization of cars and ATMs in China over the past decades. Hence, to supplement these case studies, I fielded surveys to approximately four hundred Chinese judges hailing from ten Chinese regions. The survey instrument collected information on 4 variables: gender, the length of judicial experience, academic background, and bar passage. In addition, judges were asked questions related to their exposure to, reliance on, and influence by, prior judicial opinions. The second part of the survey took causal inference approach to evaluating the influence of prior judicial decision on Chinese judges. A strand of the literature on judicial diffusion operationalizes the transmission of policy innovations through courts by collecting and analyzing case citations. However, this approach is not feasible in the Chinese context as Chinese judicial decisions are generally terse, lack detailed legal reasoning, and rarely, if ever, make reference to other judicial decisions. I therefore fielded survey experiment on Chinese judges to identify the extent and nature of the influence exerted by cases. I also interviewed several judges and law clerks on their views about the legal status of prior judicial decisions. Drawn on the findings of the convergence as to judicial decision-making between civil law and common law, I further identify the incentives of Chinese judges to innovate and assess the social, political, and legal conditions necessary for judicially initiated policy innovations to succeed in China.

Chapter I. The Statutory Interpretation with Chinese Characteristics

The value of law is reflected on, but not limited to, the rule of law. In the practical area, it is generated in the process of statutory interpretation. Thus, the legal realism scholars, like Jerome New Frank¹², alleged that real law is the final decisions held by judges.¹³ Also, Oliver Wendell Holmes's maxim stated, "[t]he life of the law has not been logic. It has been experience."¹⁴ Even though these controversial views were widely noticed as well as criticized, to some extent, they illustrated the essential function of statutory interpretation that vividly applies the static text of the law to regulate real life. In the process of implementing the law, statutory interpretation itself is an interpretation method. However, to pursue various values and social consequences, statutory interpretation was divided and classified into various interpretation methods by judges during judicial process.

Statutory interpretation has a long history in the Chinese judicial system, which started from the application of annotation¹⁵. The first Chinese written statute by Zhu Xingshu¹⁶ was codified during the Feudal Spring and Autumn Period (770-476BC), while the formal statutory interpretation officially issued by the state was recorded by the "Answers to Questions Concerning Qin Statutes"¹⁷ in the Qin Dynasty (221-206BC). Since then, it was widely recognized that law could only be applied and enforced by interpretation of Chinese feudal rulers¹⁸. Thus, a systematic and comprehensive statutory interpretation study, which included literal interpretation, restrictive interpretation, expanding interpretation, and analogical interpretation, was formed by the continuous development of statutory law. The statutory interpretation methodology applied by judges in ancient China almost reached a similar level with the judges in the current age¹⁹, especially the quality of the judges' logical deduction in the process of trial. However, compared with the democratic concepts about the rule of law promoted by the western countries, the major flow of ancient Chinese legal systems was that judges didn't have enough authorities to interpret the relationship between facts and law.²⁰ In other words, the judicial system didn't have the final and most authoritative power to solve social

¹² Jerome New Frank was an American legal philosopher and author who played a leading role in the legal realism movement, a chairman of the Securities and Exchange Commission, and a federal appellate judge of the United States Court of Appeals for the Second Circuit. See Federal Judicial Center, http://www.fjc.gov/history/home.nsf/page/tu_rosenberg_bio_judge_frank.html;

¹³ See Jerome New Frank, *Law and the Modern Mind*, published by Transaction Publishers (2008);

¹⁴ Holmes, Oliver Wendell, Jr. (1881). *The Common Law I*. Boston: Little, Brown and Company;

¹⁵ See Botao Lv and Wenrong Meng, *Suit and Judgment of Ancient China*, published by The Commercial Press (1997), p21;

¹⁶ On March of 536BC, Zichan enacted statutes on the mental tripod and made them public. It was recorded as the first statutory law, which was named by later generations as "Zhu Xingshu." See Qinhu He, *The History of Chinese Law*, published by Law Press China (2000), p377;

¹⁷ "Answers to Questions Concerning Qin Statutes," is a formal legal interpretation concerning the principles and legal terms of Qin statutes with the question and answer format. It has the similar authority with the relevant statutory law; See Rui Chen and Gao Yuan, *Plain Strategies: Legal Interpretation Methods in "Answer to Question Concerning Qin Statutes,"* published by Journal of Political Science and Law (the 6th phrase, 2011);

¹⁸ See Rui Chen and Gao Yuan, *Plain Strategies: Legal Interpretation Methods in "Answer to Question Concerning Qin Statutes,"* published by Journal of Political Science and Law (the 6th phrase, 2011).

¹⁹ See Xie Hui, *The Aim and Wisdom in the Explain of Chinese Classicality Law: Seek the Practicability of Law*, published by Legal Forum (the 4th, 2005).

²⁰ *Id.*

conflicts in ancient China, while the emperors of each dynasty could override the determined judicial judgments with ease. Due to the weak judicial power and colonial domination in the late Qing Dynasty²¹, modern China had started to comprehensively learn the legal and political systems of Western countries for almost a hundred years to pursue liberty and democracy.

I. The Tough Path of Legislation in China

Logically, there must be laws to abide by for legal construction. Therefore, governments considered legislation to be the top priority. However, the legislation of modern China experienced a tough path with many twists and turns, which made Chinese legal system distinguished and special.

A. Early Legal Reform: The Influence of the Japanese, German and Soviet Legal Systems

During the late Qing Dynasty (1901-1911)²², the modernization of law was closely related to the Westernization Movement, which is commonly considered as the starting point of modern Chinese society. Since the advocates of the Westernization Movement were also the supporters and promoters of legal modernization, their thoughts on “Chinese-style Westernization” constituted the guiding ideology of early legal reform. The popular practice of sending students abroad resulted in oversea returnees who brought back many foreign legal ideas. Many of these students became the torchbearers of legal reforms, such as Youwei Kang and Sitong Tan.²³ Deeply influenced by Western concepts and anxious for a change to the old legal system, they promoted legal reforms of the late Qing Dynasty, which started with the study, copy, and transplantation of Japanese and German legislation. As a result, most of the following legislation directly copied Japanese and German law, including legal concepts, norms, and institutions. Even many of the first statutes of various fields of law in China, such as the “New Criminal Law of Qing Dynasty,” the “Business Law of Qing Dynasty” and the “Draft of Civil Code of Qing Dynasty” drafted by Japanese scholars.²⁴

However, this period of early Chinese legal reform, which extended to Nanjing government (1927-1949)²⁵, was formed by the ideas and objectives of saving the nation rather than pursuing the modern rule of law. Once they were met with problems during the reform, some people turned to look for alternative sources or goals. Thus, after 1925, the Soviet political and legal system was generally considered to be the best solution to solve China’s social problems,

²¹ See Xiutao Han, *Judicial Independence and Modern China*, published by Tsinghua University Press (2003), p60.

²² Li Zhaojie, *Traditional Chinese World Order*, 1 *Chinese J. Int'l L.* 20 2002;

²³ See Lixin Jiang, *Westernization Movement and the Modernization of Law*, published by Journal of Anhui Institute of Education (5th phase, 2004);

²⁴ See Xinyi Hou, *The Review of Legal Reform of Modern China*, “*Jindai Zhongguo Fazhi Biange Huigu*,” published by Chinese Social Science Today, December 5th, (388th, 2012);

²⁵ From 1901 to 1911, Qing Dynasty established the first modern legal system of China; From 1927 to 1935, Nanjing government finished the construction of the second modern legal system of China. See Xinyi Hou, *The Review of Legal Reform of Modern China*, published by Chinese Social Science Weekly, December 5th, (388th, 2012);

resulting in the formation of new ideas regarding legal construction. There were some strong reasons pushing the Chinese Communist Party²⁶ to learn from the Soviet Union. America and the Soviet Union controlled respectively two opposing parties around that period, one represented capitalism, and the other represented Socialism. The Soviet Union is geographically closer to China, therefore the Chinese Communist Party tended to side in support of this powerful neighboring country to facilitate its combat with Kuomintang²⁷. Thus, the main figures of Chinese Communist Party were deeply influenced by Marxism-Leninism and tried to join Socialist Camp for closer ties to the Soviet Union.²⁸ On the other hand, in the early stages of the establishment of the People's Republic of China, the patterns of the Soviet Union set a good example for China to develop heavy industries and improve national strength.²⁹ During that period, the law was closely connected with public opinion and was used as a tool of political governance and social management, which emphasized social reconstruction. The regulations related to the unitary public ownership and planned economy was influenced by socialism.³⁰ "Although a judicial system had been created on the Soviet model in the 1950s, it had been politicized by the end of that decade after a brief period of liberalization, and then further wrecked by the Cultural Revolution."³¹

Following the gradually estranged relationship between China and the Soviet Union, it was widely regarded that the defects of Chinese traditional legal nihilism³² determined that the

²⁶ The Communist Party of China (CPC) is the founding and ruling political party of the China, which was founded in 1921, chiefly by Chen Duxiu and Li Dazhao. The CPC is organized on the basis of democratic centralism, a principle conceived by Russian Marxist theoretician Vladimir Lenin which entails democratic and open discussion on policy on the condition of unity in upholding the agreed upon policies; See Köllner, Patrick, *Informal Institutions in Autocracies: Analytical Perspectives and the Case of the Chinese Communist Party*, published by German Institute of Global and Area Studies (August 2013), p1-30;

²⁷ The predecessor of the Kuomintang, the Revolutionary Alliance, was one of the major advocates of the overthrow of the Qing Dynasty and the establishment of a republic. The KMT was founded by Song Jiaoren and Sun Yat-sen shortly after the Xinhai Revolution of 1911. Sun was the provisional president but he did not have military power and ceded the first presidency to the military leader Yuan Shikai. After Yuan's death, China was divided by warlords, while the KMT was able to control only part of the south. Later led by Chiang Kai-shek, the KMT formed a military and succeeded in its Northern Expedition to unify much of China. It was the ruling party from 1928 until its retreat to Taiwan in 1949 after being defeated by the Communist Party of China (CPC) during the Chinese Civil War. In Taiwan, the KMT continued as the single ruling party until reforms in the late 1970s through the 1990s loosened its grip on power. Since 1987, the Republic of China is no longer a single-party state, but the KMT remains one of the main political parties; See Kuomintang Official Website, available at <http://www.kmt.org.tw/english/page.aspx?type=para&mnum=105>;

²⁸ Shen Zhongwu, *The Reason, Process, Reflection and Outcomes of Formation of Socialism by Learning from Soviet Union in the Early Stage of Establishment of China*, "Xin Zhongguo Mofang Sulian Moshi Jianshe Shehui Zhuyi de Yuanyin Guocheng Biaoxian he Jieguo" published by Zhong Gong Yun Nan Sheng Wei Dang Xiao Xue Bao (the 2nd, 2003);

²⁹ *Id.*

³⁰ See Huixing Liang, *The Historical Review and Outlook for Chinese Civil Law Study*, "Zhongguo Minfaxue de Lishi Huigu yu Zhanwang," published by Chinalawinfo (May 15th, 2007), available at: http://article.chinalawinfo.com/Article_Detail.asp?ArticleID=39251;

³¹ Stanley Lubman, *Bird in a Cage: Chinese Law Reform After Twenty Years*, 20 Nw. J. Int'l L. & Bus. 383 1999-2000;

³² It is a weak belief that law is beneficial for the society. Law was simplified as an instrument of dictatorship in the primary stage of new China, the passion on class struggles and contempt of law made the legal transplantation of soviet system no longer continue. See Qinhu He and Xiuqing Li, *Foreign Law and Chinese Law: the Reflection on*

influence and legal transplantation from the Soviet system could not be comprehensive and sustainable.³³

B. Mid-stage of Legal Reform: The Inspiration of Taiwanese Legal Writings

As Stanley Lubman noted in his article, a new period of institution building, such as courts and law schools, began in 1979.³⁴ The Chinese political power started to “attempts to conceptualize and articulate notions of law as an objective set of rules and standards to protect rights.”³⁵ Compared to the earlier stage of Chinese legal reform when the law was regarded as a major instrument of governance, “a legal framework for a marketing economy had been created”³⁶ after the period of confusion and the Cultural Revolution. Some influential legal articles written by Taiwanese scholars, referred to the illustration of legal practical problems and research of the legal theory in certain areas of laws, provided inspiration for Chinese legal researchers who were faced with a shortage of legal materials in the 1980s. For example, “The Theory and Case Study on Criminal Law”³⁷ written by Zhaoji Xie and Ronghua Diao, and “Economic Crimes and Economic Criminal Law”³⁸ written by Shantian Lin, motivated Chinese scholars and presented them with a new research method: case studies. Taking a look at Zhongxie Mei³⁹ and Yubo Zheng’s⁴⁰ publication on civil law and Tze-chien Wang⁴¹’s book “The Theory and Case Study on Civil Law”, and comparing them with the writing of Huixin Liang under a similar title⁴² and “The Principle of Civil Law” authored by Junhao Zhang⁴³, their inner relations and connection can be easily found. Thus, it was said that some Chinese legal publications during that period

Chinese Transplantation from Foreign Legal System in the Twentieth Century, published by China University of Political Science and Law (1st version, 2003).

³³ See Shaoyuan Zhou, *The Chinese Legal Reform and Legal Transplant in the twentieth*, “Ershi Shiji Zhongguo Fazhi Biange yu Falv Yizhi,” published by Peking University Law Journal (the 2nd, 1999);

³⁴ Stanley Lubman, Bird in a Cage: Chinese Law Reform After Twenty Years, 20 Nw. J. Int’l L. & Bus. 383 1999-2000;

³⁵ Stanley B. Lubman, *New Developments in Law in the People’s Republic of China*, 1 NW. J. INT’L L. & Bus. 122, 127 (1979);

³⁶ Stanley Lubman, Bird in a Cage: Chinese Law Reform After Twenty Years, 20 Nw. J. Int’l L. & Bus. 383 1999-2000;

³⁷ See Xie Zhaoji and Diao Ronghua, *The Theory and Case Study on Criminal Law*, published by Hanlin Press (1976);

³⁸ See Shantian Lin, *Economic Crimes and Economic Criminal Law*, published by Sanmin Book Press (1981);

³⁹ Zhongxie Mei (1900-1971), was one of three major figures of Chinese civil law studies and a professor of National Taiwan University. “The Essentials of Civil Law” is one of his representative publications;

⁴⁰ Yubo Zheng (1916-1993), was a legal scholar and former grand justice of Judicial Yuan in Taiwan. “The Theory of Property Right of Civil Law” is his representative publication;

⁴¹ Tze-chien Wang is one of the major figures in the studies of civil law in Taiwan, graduated from University of Munich as a Ph.D. in law and currently teach at National Taiwan University. “The Theory and Case Study on Civil Law” has eight volumes, which is his most famous and influential academic works in the area of civil law;

⁴² See Liang Huixin, *The Theory, Case Study and Legislation of Civil Law*, “Minfa Xueshuo, Panli yu Lifa Yanjiu,” published by China University of Political Science and Law (1995);

⁴³ See Xu Zhangrun, *Multi-dimensional Modern Chinese Civilization and Legal Wisdom--The Influence of Taiwan’s Legal Research on Legal Scholars of Mainland China*, “Duoxiangdu de Xiandai Hanyu Wenming Falv Zhihui: Taiwan de Faxue Yanjiu Duiyu Zuguo Dalu Tonghang de Yingxiang,” published by Journal of Comparative Law (the 6th phase, 2003);

were Taiwanese materials simply transcribed from Taiwan's writing style (traditional and vertical character) to China's writing style (simplified and horizontal). Notwithstanding the joke, this comment highlights the fact that many academic writings and research from Taiwan had a deep impact on the process of Chinese legal reform, especially in the field of civil law.⁴⁴

Not only that, the legal transplantation from Taiwan also made a great contribution to the process of legislation and the development of the "General Principles of the Civil Law of the People's Republic of China".⁴⁵ Since there was little academic legal material and practical experience referring to the study of "Tort Liability Law" in China when the "General Principles of the Civil Law of the People's Republic of China" was being drafted, Chinese legislatures relied on studying and absorbing Taiwanese research findings in the area of tort liability rules and then selectively applied certain findings to fit the Chinese situation.⁴⁶ Based on similar historical culture and a common language between Taiwan and Mainland China, a large number of theories, ideas and practical judicial experiences from Taiwan were drawn to enrich Chinese legal study. However, for the construction of a national legal system, a study only focusing on civil law system is far from enough.

C. Contemporary Legal Reform: The Impact of the Common Law System

With the continuous policy of reform and opening up, the economic and cultural exchanges and communications between China and the Western countries have gradually deepened in the past thirty years. A judicial system has been constructed due to the growing activity of the courts and revival of the Chinese bar and legal education.⁴⁷ The increasing and comprehensive research and comparative studies of the common law system is one of the most glowing achievements post-1990. More and more Chinese law schools' students can study abroad to get a systematic and comprehensive understanding of the common law system through JD, L.L.M, and Ph.D. programs. Besides that, many foreign constitutions, statutes, legal publications, and their translated versions became much more accessible to Chinese scholars. In the field of Jurisprudence, "The Nature of the Judicial Process"⁴⁸ and "The Problems of Jurisprudence"⁴⁹ which were translated by Suli Zhu⁵⁰ gave rise to the study and exploration of Law and Sociology, Law and Economics, Legal Realism and Legal Reasoning in China. Naturally, the change of legal concepts brought more demand for improvements and modifications of outdated

⁴⁴ *Id.*

⁴⁵ "General Principles of the Civil Law of the People's Republic of China" adopted at the Fourth Session of the Sixth National People's Congress, and promulgated by Order No. 37 of the president of the People's Republic of China on April 12, 1986, and effective as of January 1, 1987 ;

⁴⁶ See Yang Lixin, From "General Principles of the Civil Law of the People's Republic of China" to "Tort Liability Law", "Cong Minfa Tongze dao Qinquan Zeren Fa," published by International Business Daily, (December 8th, 2009);

⁴⁷ Stanley Lubman, Bird in a Cage: Chinese Law Reform After Twenty Years, 20 Nw. J. Int'l L. & Bus. 383 1999-2000;

⁴⁸ Benjamin N. Cardozo, The Nature of the Judicial Process, translated by Suli Zhu, published by the Commercial Press (2000);

⁴⁹ Richard Allen Posner, The Problems of Jurisprudence, translated by Suli Zhu, published by China University of Political Science and Law (2002);

⁵⁰ Suli Zhu, professor of law, the dean of Peking University's Law School, studied at Arizona State University and Pacific McGeorge School of Law;

statutes and advancements in legislation technology. In the “Amendment of Criminal Procedure Law of the People’s Republic of China” (2012)⁵¹, the new rule on settlement agreements and efficiency, to some extent, was consistent with the purpose and practical procedure of the American plea bargain rule.⁵² In addition, the exclusion of illegal evidence stated in Article 53⁵³ and Article 54⁵⁴ was also influenced by the exclusionary rule stated in the Fourth Amendment to the United States Constitution.⁵⁵ The principle of presumption of innocence⁵⁶ and due process⁵⁷ shed remarkable light both on the statute amendment⁵⁸ and Chinese judicial process. Also of note, the legal consultation and transplantation from common legal systems can be found in the new principles embodied by amendments that convey respect and protection of human rights and the restriction of death penalty. The influence of the rule of law from common law countries on other legislation cannot be ignored as well. For example, China has also adopted a punitive damages system in economic law, deterrence against infringers in IP law, and the standard of causality identification in Tort Liability Law. Another phenomenon worth noting is that some

⁵¹ “Criminal Procedure Law of the People’s Republic of China” adopted at the 2nd Session of the Fifth National People’s Congress on July 1, 1979; amended for the first time in accordance with the Decision on Amending the Criminal Procedure Law of the People’s Republic of China adopted at the 4th Session of the Eighth National People’s Congress on March 17, 1996; and amended for the second time in accordance with the Decision on Amending the Criminal Procedure Law of the People’s Republic of China adopted at the 5th Session of the Eleventh National People’s Congress on March 14, 2012;

⁵² See Ran Yi, Ying Shuqiu, *The Analysis on Relations between the Plea Bargain and the Amendment of Criminal Procedure Law of the People’s Republic of China-- From the Perspectives of Efficiency and Human Rights’ Protection*, “Lun Biansu Jiaoyi yu Woguo Xingshi Susongfa de Xiugai—Yi Xiaolv ji Renquan Baozhang wei Shijiao,” published by Legal System and Society (June, 2009);

⁵³ states that, “In deciding each case, a people’s court shall focus on evidence, investigation, and research, and credence shall not be readily provided for confessions. A defendant shall not be convicted and sentenced to a criminal punishment merely based on the defendant’s confession without other evidence; a defendant may be convicted and sentenced to a criminal punishment based on hard and sufficient evidence even without his or her confession.”

⁵⁴ states that, “[a] confession of a criminal suspect or defendant extorted by torture or obtained by other illegal means and a witness or victim statement obtained by violence, threat, or other illegal means shall be excluded. If any physical or documentary evidence is not gathered under the statutory procedure, which may seriously affect justice, correction or justification shall be provided; otherwise, such evidence shall be excluded.”

⁵⁵ The Fourth Amendment of the United States Constitution states, “the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

⁵⁶ The principle states that one is considered innocent until proven guilty. In many nations, presumption of innocence is a legal right of the accused in a criminal trial. See Francois Quintard-Morenas. “The Presumption of Innocence in the French and Anglo-American Legal Traditions” *The American Journal of Comparative Law* 58.1 (2010): 107-149;

⁵⁷ Due process balances the power of law of the land and protects the individual person from it. When a government harms a person without following the exact course of the law, this constitutes a due-process violation, which offends against the rule of law. Various countries recognize it, for example, the principle of due process is illustrated in the clause 39 of the Magna Carta in England, also in the Fifth and Fourteenth Amendments of United States. See John V. Orth, *Due Process of Law: A Brief History*, published by University Press of Kansas (2003);

⁵⁸ The principle of presumption of innocence is revealed in Article 12 of Criminal Procedure Law of the People’s Republic of Law (2012 Amendment), which states, “no person shall be found guilty without being judged so by a people’s court in accordance with law.” The principle of due process can be found in Article 4 of Administrative License Law of the People’s Republic of China, which states, “The establishment and implementation of an administrative license shall tally with legal authority, scope, conditions and procedures.”

civil law countries started to pay more attention to precedents and case laws in accordance with the principle of *stare decisis* that is prevalent in common law systems. This article will further explain this tendency in the second chapter.

Along with the twisting and turning roads of legislation in the process of Chinese legal reforms, multiple legal transplantations, a unique historical culture and particular social condition were also factors that made the application and interpretation of law in Chinese courts distinguished from that of other countries.

II. The Statutory Interpretation Theory in China

Generally, Chinese legal scholars followed the major theories of the civil law system to classify the statutory interpretation methods, which mainly focus on the statutory text and take the intent of the drafter and sociology methods as mere supplements. One of the most representative and influential theories is from Huixin Liang, who illustrated statutory interpretation methods from four categories -- literal, logical, comparative, and sociological interpretation.⁵⁹ In contrast with civil law systems, the significance attached to precedents and societies are given more attention in common law countries. Through "The Nature of the Judicial Process," Benjamin N. Cardozo introduced the leading theories of statutory interpretation in four approaches, including philosophy, tradition, custom and sociology.⁶⁰ However, the real distinctions between Chinese statutory interpretation methodology, that of civil law countries, and that of the common law system are not fully reflected in the interpretation classification, but rather exposed in the judicial process and legal practice. The following section provides four specific dimensions to introduce the Chinese characteristics embodied in the process of statutory interpretation.

A. Interpretation Rule: the Promotion of Judicial Activism

The term "judicial activism"⁶¹ is derived from Arthur Schlesinger Jr.'s article titled "The Supreme Court: 1947"⁶² in January 1947. The phrase has been controversial since the beginning. Craig Green criticized the term "judicial activism" in his article titled "An Intellectual History of Judicial Activism" *stating* "Schlesinger's original introduction of judicial activism was doubly blurred: not only did he fail to explain what counts as activism, he also declined to say whether activism is good or bad."⁶³

⁵⁹ See Huixing Liang, *The Theory of Civil Law Interpretation*, published by China University of Political Science and Law (1995);

⁶⁰ See William N. Eskridge, Jr., Philip P. Frickey, Elizabeth Garrett, *Legislation and statutory interpretation*, published by Foundation Press (2000), Chapter 6, p211;

⁶¹ "Judicial activism" is defined by Black's Law Dictionary as a "philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions." As quoted in "Takings Clause Jurisprudence: Muddled, Perhaps; Judicial Activism, No" DF O'Scannlain, *Geo. JL & Pub. Pol'y*, 2002;

⁶² See Kmiec, Keenan D., *The Origin and Current Meanings of "Judicial Activism"*, *Cal. L. Rev.* 92: 1441, 1447 (2004);

⁶³ See Craig Green, *An Intellectual History of Judicial Activism*, August 2008, p4, available at: http://works.bepress.com/roger_craig_green/2;

Judicial activism was first drawn into Chinese judicial system by the former president of the Supreme People's Court in August 2009. It promoted Chinese judges to apply flexible and positive legal methods and interpret legal concepts and acts creatively.⁶⁴ In the pursuit of substantive justice, judicial activism in China emphasized on the social function of judicial power.⁶⁵ Even though the judicial activism in both China and America highlight the judicial decision-making function and public policy, the term of judicial activism as applied in the Chinese judicial system is very different from its original meaning,⁶⁶ so much in fact that it can even be treated as a mistranslation. During the period of transition both in the economy and society, Chinese judges had to deal with the increasingly new types of cases and solve the problems caused by the new facts of normal cases. To maintain social safety and facilitate economic development, Chinese politics urgently needed to steer sensitive political questions into “nonpolitical” judicial forums and implement state policies through solving conflicts.⁶⁷ Thus, judicial activism in China stimulated courts to investigate and solve social conflicts through various methods, and cultivated judges' attitudes for public service.⁶⁸ Rather than passively stay in the courtroom and strictly interpret the law, Chinese judges were encouraged to settle the contradictions effectively through trial in order to meet political, social, and legal demands.⁶⁹ This phenomenon was mainly designed for the people's lower courts in rural China, where the judgment associated with mediation and public opinions were integrated into judicial sentences. In case litigants don't accept the judicial outcomes for some reasons, judges are required to solve conflicts and reach mutual agreements through mediation after trial to achieve better social effects.⁷⁰ Following the experiences from Xiwu Ma and Yanping Chen adjudication⁷¹, “Big Mediation”⁷² and the “Field Land Circuits”⁷³ played the role of social service to bring the justice, efficiency, and conveniences to the people. In that sense, the concept of judicial activism is more similar to pragmatic problem-solving courts than American impact

⁶⁴ See Suli Zhu, *Active Judiciary*, “Guanyu Sifa Nengdong,” published by Journal of Law Application (Z1, 2010);

⁶⁵ *Id.*

⁶⁶ See Zhiming Zhang, The Function of Chinese Adjudication: Judicial Activity or Judicial Positivity?, “Zhongguo Sifa de Gongneng Xingtai: Nengdong Sifa Haishi Jiji Sifa?”, published by Journal of Renmin University of China, (6th phase, 2009);

⁶⁷ See Tamir Moustafa and Tom Ginsburg, *Rule by Law: The Politics of Courts in Authoritarian Regimes*, published by Cambridge University Press (2008), Introduction, p136;

⁶⁸ See Chen Jinzhao, Jiao Baoqian The Report on Research of Chinese Interpretation Methodology, published by Peking University Press (2012), Chapter 12, p211;

⁶⁹ See Tao Sun, Judicial Activity is the Nature of Judicial Process Rule, published by People's Court Daily (the 1st, September, 2009), Available at: <http://old.chinacourt.org/html/article/200909/04/372606.shtml>;

⁷⁰ Dongchuan Luo and Guangyu Ding, *The Theory and Practical Assessment of Chinese Active Judiciary*, published by Journal of Law Application (Z1, 2010);

⁷¹ See Jinzhao Chen, The Report on Research of Chinese Interpretation Methodology, published by Peking University Press (2012), Chapter 12, p209;

⁷² See Suli Zhu, Judicial Activity and Big Mediation, published by China Legal Science (the first phrase, 2010);

⁷³ Field Land Circuit is a policy that judges may regularly or unregularly try civil cases on the circuit spot under jurisdiction, which was promoted by courts for public's convenience of filing a suit, especially for the people from rural area. See Article 135 of Civil Procedure Law of the People's Republic of China (2012 Amendment), states “A people's court may, as needed, try civil cases in a circuit manner and on the spot.”

litigation. Judicial activism on Chinese practical grounds is more likely “positive judiciary” rather than “active judiciary.”⁷⁴

To some extent, factors of Chinese cultures and political wishes can explain why the Chinese courts’ new approaches relating to judicial activism mostly took place in the rural areas. In fact, people living in the countryside valued neighborhood relations, so they preferred to settle disputes in private rather than file a suit. This phenomenon can be traced back to the imperial China when the district magistrates were judges, administrators and representatives of the Emperor who was the “father of the people.”⁷⁵ According to a survey of imperial records, some villagers even committed suicide rather than go to trial.⁷⁶ Even they decided to sue in courts, they had to bear the high expenses and social pressure that being isolated by other villagers. Based on weak legal consciousness and deep influence of benign Confucian codes, people living in the rural area of China are thus not familiar with seeking legal means to solve their conflicts. Gradually and inevitably, their degree of satisfaction with the work of Chinese government and judicial system was minimized. As an active state that fully penetrates social life, Chinese politics valued judicial decisions as direct channels to accumulate support from citizens and implement political policy, instead of laissez-faire dispute settlement.⁷⁷ Thus, the major difference of judicial activism in America and China can be interpreted that, the former one is applied as insurance for the minority to challenge the political rulers, while the latter one is mainly served for political and state interests.⁷⁸ Under the Chinese context, “the efficiency and effectiveness of the judiciary in providing a accountable and accessible means of settling disputes”⁷⁹ do not threaten the political interests of the government. On the contrary, judicial activism promotes the implementation of political ideologies in the rural China through multiple dispute resolutions.

Promotion of Chinese judicial activism has had some positive effects in dealing with some cases, such as the Yulin Qi case, which will be discussed below. However, the pattern of “judicial activism” is unlikely to be sustainable in a long run, as it not only failed to fulfill substantial justice due to ignorance of due procedure, but additionally the confusion between public and judicial opinions, along with the overlap between adjudication and mediation, will inevitably weaken the authority of judicial interpretation.

⁷⁴ Zhimin Zhang, *The Function of Chinese Judiciary: Active Judiciary or Positive Judiciary*, “Zhongguo Sifa de Gongneng Xingtai: Nengdong Sifa Haishi Jiji Sifa,” published by Journal of Renmin University of China (the 6th, 2009);

⁷⁵ Brady, James P. *Justice and Politics in People's China: Legal Order Or Continuing Revolution?*. Vol. 8. New York: Academic press, 1982;

⁷⁶ *Id.*

⁷⁷ See Mirjan R. Damaska, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process*, published by Yale University Press (1986), Chapter III, p 71,81;

⁷⁸ Zheng Chengliang and Wang Yi, *Defining and Rethinking Active Judiciary*, published by Jilin University Journal Social Sciences Edition (March 2012);

⁷⁹ Russell, Peter H., and Kate Malleson, eds. *Appointing judges in an age of judicial power: Critical perspectives from around the world*. University of Toronto Press, 2006.

B. Interpretation Sources: the Protection of Constitution Authority

In 2007, the authority of the constitution was codified in the “Three Supremacies,”⁸⁰ which Chinese politics and legal organizations were required to abide by. The protection of constitutional authority and strengthening of human rights were also highlighted at the third plenary session of the 18th CPC Central Committee in 2013.⁸¹ However, although both China and the West view their constitutions with high respect, China view the power and applicability of its constitution from a vastly different perspective. After many years of struggles for Chinese legal scholars, Chinese courts are still unable to apply the constitution in resolving cases.

However, the first case that applied the constitution in a Chinese court ---- Qi Yuling v. Chen Xiaoqi et al.(2001), brought some hope to Chinese constitutional scholars. In this case, the defendant Chen Xiaoqi was unable to enroll in a secondary technical school after failing to take the unified entrance examinations. Nevertheless, she still attended the school under the plaintiff’s name (Qi Yuling) based on the joint falsification of all the defendants. She used Qi Yuling’s test score to receive the necessary qualifications for entering a higher institution and securing future employment at a bank. The plaintiff Qi Yulin subsequently filed a suit claiming infringement of her identity right to receive an education after she discovered Chen Xiaoqi’s behavior. The High People’s Court of Shandong Province held that Chen Xiaoqi’s action “infringed Qi Yuling’s right of name on the face, but in its nature, it infringed her right to receive an education, a basic right entitled by our Constitution. Thus, all the appellees shall bear civil liabilities for the consequences resulted from their infringement.”⁸² On July 24, 2001, the Chinese Supreme Court promulgated a bulletin about the judgment of the Qi Yulin Case and confirmed the protection of education as a constitutional right.⁸³ Furthermore, in 2003, the Intermediate People’s Court of Luoyang in Henan province, following the constitution and “the Law on Legislation of the People’s Republic of China,” gave the judgment similar to the process of judicial review that a local regulation was invalid since it contravened the law of upper levels through the “Zhong Zi” case (2003)⁸⁴. However, good times don’t last long: the Chinese constitution had only been applied to interpret cases in these two instances, and subsequently has disappeared from all other

⁸⁰ Toward the end of the year 2007, General Party Secretary HU Jintao made an important speech when meeting with representatives from the national working meeting of politics and law, law chancellors and grand procurators. He said that politics and law organizations should stick to the “Three Supremacies”, which not only embody the deep implications of the socialist legal concept, highlight the natural difference between the socialist legal concept and other non-socialist legal concepts, but also reaffirm the legitimate and systematic elements of our constitution based socialist legal system. The “Three Supremacies” are the authority of party, constitution, peoples’ interest, respectively. See Jihong Mo, Three Supremacies and Socialist Legal Concept, published by Journal of Beijing University (Humanities and Social Sciences) (the 7th phase, 2009);

⁸¹ See the report of third plenary session of the 18th CPC Central Committee, available at: <http://gaokao.xdf.cn/201311/9801955.html>;

⁸² Qi Yuling v. Chen Xiaoqi et al.(2001): Dispute over Infringement of a Citizen’s Basic Right to receive Education Protected by Constitution Through infringement of Right of Name, available at: <http://vip.chinalawinfo.com/case/displaycontent.asp?Gid=117462464&Keyword=>;

⁸³ “Guanyu yi Qinfan Xingmingquan de Shouduan Qinfan Xianfa Baohu de Gongmin Shoujiaoyu de Jiben Quanli Shifou ying Chengdan Minshi Zeren de Pifu,” promulgated by Chinese Supreme People’s Court; See Liang Huixing, “Liang Huixing Wenxuan,” published by Law Press China (October, 2003);

⁸⁴ See Li Xiaobin, The Roles of Courts under Constitutional Regime, “Xianzheng Tizhi xia Fayuan de Jiaose,” published by People’s Press (2007), p101-p103;

written judgments. In 2007, Chinese Supreme Court abolished the former bulletin about the Qi Yulin Case's decision without explanation.

Unlike Western countries, China does not have judicial review or the concept of a constitutional court. Thus, although the Chinese constitution is granted deference both publicly and officially, in practice, it is an empty figurehead that is not applied or interpreted. The origin of this phenomenon can be traced back to one official reply from the Supreme Court in 1955, which stated that the "Constitution is the fundamental law of the states and has supreme legal authority... It doesn't include the regulation on how to convict and punish in the field of criminal law, Thus, ... constitution shall not be applied to be the legal basis of conviction and punishment in the criminal cases."⁸⁵

C. Interpretation Methodology: the Impacts of Social Custom and Public Order

Formal interpretation methods, such as logic, and history, are the fundamental steps in applying and interpreting the law in the Chinese judicial process, while custom and sociological methods also hold a deep influence on judgments, especially the consideration and evaluation of the "public order and good customs." The phrases of "social economic order," "public interest," and "social ethics" regulated in Article 7 of the "General Principles of the Civil Law of the People's Republic of China"⁸⁶ are commonly regarded as the statement of "public order and good custom" principle. Based on the long history of a human relationship society in China, custom and social moral codes naturally play an essential role in the field of legal reasoning. Cardozo described the status of custom in "the Nature of the Judicial Process," "if history and philosophy do not serve to fix the direction of a principle, custom may step in."⁸⁷ By contrast, Chinese judges tend to blur the sequence of different interpretation methods, resulting in instances where custom and social moral codes are even one step ahead of logical reasoning in the courts. An example can be found in Zhang Xueying v. Jiang Wenfang (2001), which was known as the first case of public order and good custom in China.

Defendant Jiang Lunfang was the legator Huang Yongbin's wife. Huang Yongbin had stayed in a cohabitation with his mistress, Plaintiff Zhang Xueying, since 1996 and promised to grant his properties, including his housing fund, housing subsidies, pension, half of his house sale income, and his phone to Zhang Xueying through a notarized written will. Following the death of Huang Yongbin, Zhang Xueying requested to be given the relevant properties by defendant Jiang Lunfang and upon being refused, this caused Zhang Xueying to file a suit to the court in 2001. The Intermediate People's Court of Lu Zhou Municipal of Sichuan Province held that, although the bequest of Huang Yongbin came from his true intention, his bequest was to be defined as a void civil act since the relevant content and purpose violated law, public order, and good custom,

⁸⁵ See The Official Reply of Supreme Court Regarding to the Statement that Constitution Shall Not be Applied to Be the Legal Basis of Conviction and Punishment in the Criminal Cases (expired), issue by the 20th July of 1955, available at: http://www.law-lib.com/law/law_view.asp?id=1012;

⁸⁶ Article 7 states, "civil activities shall have respect for social ethics and shall not harm the public interest, undermine state economic plans or disrupt social economic order." See General Principles of the Civil Law of the People's Republic of China, issued by National People's Congress on 12 April 1986;

⁸⁷ See Benjamin N. Cardozo, *The Nature of the Judicial Process*, published by Oxford University Press (1921), Chapter 2, p22;

harmed social ethics, and disrupted social order.⁸⁸ The judicial verdict of the Zhang Xueying case reaped great praise and support from the public based on people's plain sense of justice. Notwithstanding, most Chinese legal scholars criticized the decision and were frustrated by a ruling that confused the boundaries between law and a moral code. In the Zhang Xueying case, Huang Yongbin's notarized written will was based on his true intention, which fulfilled all the required factors of a civil legal act. Under the principle of autonomy of will, the civil legal act shall not be deemed as void due to moral condemnation of the inappropriate relationship between Zhang Xueying and Huang Yongbin.⁸⁹ Instead of interpreting the specific rules on bequest of "Law of Succession of the People's Republic of China,"⁹⁰ the Intermediate People's Court of Lu Zhou applied the general principle of "General Principles of the Civil Law of the People's Republic of China" to judge the validity of the bequest act.

In the explorative process of definition and evaluation of public order and good custom among civil law courts, it is hard to precisely decide to what extent social customs should influence judicial verdicts. Even in German courts, the definition and application of public order and good custom changed over time.⁹¹ Ten years ago, the German Federal Supreme Court tried a bequest dispute case with similar facts to the Zhang Xueying case in that the testator was cohabiting with his longtime mistress and the only legatee of his will was the mistress. The court concluded that because there was no necessary link between the act and legal act, the inappropriate relationship between testator and mistress might be condemned by moral codes, but could not render illegal and invalid an otherwise legal act. Therefore, the validity of the bequest was affirmed.⁹² The deep influence of custom and social factors on Chinese courts can be observed from the divergent judgments in cases with similar fact patterns.

The Zhang Xueying case was not the only case to be deeply influenced by public order and the good custom principle; in fact, the custom and social reason was not only applied to define the validity of legal acts, but also to directly verify the establishment of tort in some "hard cases", such as *Fu Manyun v. Lai Fuqing* (2007)⁹³. Indeed, the consideration of public order and good custom principle can provide alternative approaches and remedies in some hard cases. However, a gap remains between the uncertain custom and sociological interpretation methods and certain logical reasoning. In China, social custom varies in different areas. Chinese research of the public order and good custom principle started late, which affects the proper application of this principle. In addition, compare with common law countries, a Chinese citizen can become a judge at earlier age by passing the bar exam and civil servants exam, making it riskier to let

⁸⁸ Zhang Xueying v. Jiang Wenfang (2001): Dispute over Bequest;

⁸⁹ Zheng Yongliu, *The Moral Standard and Legal Technology: the Comparative Analysis of the Bequest Dispute Between China and German*, published by China Legal Science (the 4th phrase, 2008);

⁹⁰ "Law of Succession of the People's Republic of China," issued by National People's Congress on Apr 10th of 1985, available at: <http://en.pkulaw.cn/display.aspx?cgid=2368&lib=law>;

⁹¹ Huang Hui, Lun Faxue Tongshuo (The Language of Law), available at: http://article.chinalawinfo.com/ArticleHtml/Article_68929.shtml.

⁹² *Id.*

⁹³ *Fu Manyun v. Lai Fuqing* (2007), cited by Chen Jisheng, Jin Jincheng, *The Research of Uncertainty of Public Orders and the certainty of Judicial Verdicts*, "Gongxu Liangsu de Feiqueding Xing yu Caipan Jieguo de Queding Xing Tanxi," published by *Journal of Law Application* (the 5th phrase, 2008);

younger judges evaluate public order and good custom in China based on their comparatively poor life experience and field surveys.⁹⁴

D. Interpretation Strategies: the Application of Interest Balancing

In general, different legal interpretation methods may possibly differ case outcomes. Legal interpretation methodology is an integrated subject, closely related to sociology. As an interpretation strategy, interest balancing builds a bridge between law and certain social conditions to help judges choose which interpretation results should prevail. Reflecting back on the Zhang Xueying case discussed prior, the judge also balanced the interests between the mistress' legal rights and good social effects.⁹⁵ Some Chinese scholars believe that, in contrast to the Western countries, China's legal system did not experience the process of moving from judicial restraint to judicial activism. Instead, Chinese judicial activism was formed through multiple factors including traditional culture, political influence, economic growth, and current social conditions.⁹⁶ Therefore, in breaking through the strict interpretation of existing statutes under the flag of Chinese judicial activism, the most justifiable reason provided is that judges need to identify and protect more important and valuable interests than consistency of current law. The issues that interests balancing tries to solve, such as the conflicts between legal affects and social affects or the construction of a "harmonious society," conform to the general purpose of current Chinese society. That is why this interpretation strategy is increasingly applied in Chinese judicial practice and has made headway in the administrative cases and civil disputes related to "Limited Property Rights Housing."⁹⁷

Nonetheless, the application of interest balancing in China still meets some problems and flaws. The external influence of political policies, media, and public opinion in closely watched and controversial cases inevitably causes some Chinese judges to fail to balance the subjective and objective factors in the hopes of meeting public opinions and fulfilling political wills. Take the case of Qiang Li⁹⁸ for example. The Qiang Li case is one of the major actions taken by the

⁹⁴ See Chen Jisheng, Jin Jincheng, *The Research of Uncertainty of Public Orders and the certainty of Judicial Verdicts*, "Gongxu Liangsu de Feiqueding Xing yu Caipan Jieguo de Queding Xing Tanxi," published by *Journal of Law Application* (the 5th phrase, 2008);

⁹⁵ See Zheng Yongliu, *The Moral Standard and Legal Technology: the Comparative Analysis of the Bequest Dispute Between China and German*, published by *China Legal Science* (the 4th phrase, 2008);

⁹⁶ See Chen Jinzhao, Jiao Baoqian *The Report on Research of Chinese Interpretation Methodology*, published by *Peking University Press* (2012), Chapter 12, p174;

⁹⁷ Limited Property Rights Housing is built on the rural collective land in China, the owner of which is not required to pay land-transferring fees. The real estate contracts related to Limited Property Rights Housing are generally deemed as void contracts, as the title deeds of ownership are issued by township government rather than state housing authority. During the judicial process, Chinese judges have to balance between the authority of law and private interests. See Hui Ren, *The research on the solution of "Limited Property Rights Housing" problem from the perspective of interest balance*, "Liyi Hengliang xia 'Xiaochanquan Fang'" de Chulu Tanjiu," published by *Journal of Southwest University of Political Science and Law* (the 5th, 2013);

⁹⁸ Li Qiang, a wealthy businessman and former deputy to the Chongqing Municipal People's Congress, who was alleged to be the gang leader, faces nine charges, including organizing and leading criminal gangs, disrupting public transportation, disturbing public order, concealing account books, bribery and tax evasion. See *Thirty One in Gang Crime Trial in Southwest China*, available at: http://news.xinhuanet.com/english/2009-10/26/content_12328005.htm;

former Chongqing party chief, Bo Xilai⁹⁹, to “[undertake] a series of feverish crackdowns on organized crime” through criminal trials.”¹⁰⁰ The defendant, Qiang Li, ran a big transport corporation in Chongqing from 2000 to 2009. Through various illegal maneuvers and unjustifiable approaches, he was able to expel business competitors in order to occupy more market share for his corporation.¹⁰¹ However, there was no evidence to prove that Li Qiang organized and lead criminal gangs, and the crimes he had committed were aimed more towards earning profits than harassing and harming the general public. During the trial, Li Qiang’s defender¹⁰² repeatedly emphasized that carrying out criminal activities in an organized manner was vastly different from conducting illegal acts for a business organization.¹⁰³ However, the objective and fundamental difference between Qiang Li’s illegal conducts and the gang’s criminal activities described by the statute¹⁰⁴ was blatantly disregarded by the Fifth Intermediate People’s court of Chongqing. Thus, Li Qiang was charged of organizing and leading an organization with characteristics of a criminal syndicate¹⁰⁵ based on subjective factors, including his culpability of criminal intention, tyrant reputation within the local community, and his potential threat to social safety.¹⁰⁶ Similar judgments were also levied in the Qihang Fan case¹⁰⁷

⁹⁹ Bo Xilai, the dismissed Chongqing party chief, native of Dingxiang, Shanxi Province, born in July 1949. Joined the CPC in October 1980 and began working in January 1968. He became immersed in an ever-more tangled scandal, disturbing details are emerging about one of his best-known initiatives, a crusade against organized crime on which he built a national reputation. He has been expelled from the Communist Party, parliament and is to face prosecution. On 22 September 2013, He was found guilty on all charges and sentenced to life by Intermediate People's Court in Jinan. His wife was given a suspended death sentence for the murder of British businessman Neil Heywood; *See* Bo Xilai Scandal: Timeline, available at: <http://www.bbc.com/news/world-asia-china-17673505>;

¹⁰⁰ LaFraniere(n18);TaniaBranigan, ‘ChineseLawyerJailedforDefenceofAllegedMafiaBoss’The Guardian (8 January 2010) 5<http://www.guardian.co.uk/world/2010/jan/08/chinese-lawyer-jailed-defence-mafia4>accessed 10 October 2012, cited by Vincent R. Johnson and Stephen C. Loomis, *The rule of Law in China and the Prosecution of Li Zhuang*, published by the Chinese Journal of Comparative Law (2013), pp. 1-18;

¹⁰¹ Chongqing Municipal Intermediate People’s Procuratorate v. Qiang Li (2009); *See* Qiang Li was sentenced to twenty years imprisonment in a 200 pages written judgment, available at: <http://old.chinacourt.org/html/article/200912/29/388444.shtml>.

¹⁰² Changqing Zhao, defense counsel of Qiang Li, was born in 1934, and a law professor at Southwest University of Political Science and Law.

¹⁰³ The Pleadings of the Defense Counsel Changqing Zhao in the case of Qiang Li, available at: <http://bbs.chinacourt.org/index.php?showtopic=366813>;

¹⁰⁴ Article 294 of the Criminal Law of the People’s Republic of China (97 Revision) states, “whoever organizes, leads, or actively participates in an organization with characteristics of a criminal syndicate, which carries out lawless and criminal activities in an organized manner through violence, threat, or other means, with the aim of playing the tyrant in a locality, committing all sorts of crimes, bullying and harming the masses, and doing what has seriously undermined economic and social order is to be sentenced to not less than three years but not more than 10 years of fixed-term imprisonment. Other participants are to be sentenced to not more than three years of fixed-term imprisonment, criminal detention, control, or deprivation of political rights.” Available at: <http://en.pkulaw.cn/display.aspx?cgid=17010&lib=law>;

¹⁰⁵ *Id.*

¹⁰⁶ Chongqing Municipal Intermediate People’s Procuratorate v. Qiang Li (2009); *See* Qiang Li was sentenced to twenty years imprisonment in the 200 pages written judgment, available at: <http://old.chinacourt.org/html/article/200912/29/388444.shtml>;

¹⁰⁷ Chongqing Municipal Intermediate People’s Procuratorate v. Qiang Li (2012); *See* the Supreme Court Reviewed the Death Penalty of Gang Leader, Qihang Fan, available at: <http://www.cqjcy.gov.cn/qfwy/infos/InfoDisplay.asp?NewsID=14584>;

and the Zhuang Li case.¹⁰⁸ In fulfilling the value of good social effects and implementing political policies, statutory authority is weakened during the process of interest balancing in the courts. The proper and prudent application of interest balancing in China calls for further intensive research and exploration of interpretation strategies both in the academic and professional fields.

¹⁰⁸ Jiangbei District People's Procuratorate v. Zhuang Li (2009); *See* Vincent R. Johnson and Stephen C. Loomis, The rule of Law in China and the Prosecution of Li Zhuang, published by the Chinese Journal of Comparative Law (2013), pp. 1-18;

Chapter II. The Creation and Adoption of Legal Doctrines in China

Like the old saying “all roads lead to Rome,” even though there are many differences in statutory interpretation between China and common law countries, the norms of judicial openness and transparency enabled Chinese judges to adapt legal doctrines to the changing social and legal environment.

Influenced by civil law tradition, Chinese judgments are generally terse and lack detailed legal reasoning. Chinese judges barely cite or quote decided cases in their decisions. For a long period of time, the difficulty in accessing legal information was one of the major obstacles that Chinese judges and legal practitioners face in conducting legal research. Since the 1980s, the norms of judicial openness and development of technology has been gradually building up a modern legal information system. Today, Chinese judges can read judicial opinions from selective collections of cases in print and comprehensive online databases. Decided cases with similar facts became available resources for Chinese judges to consider, especially when they are trying hard cases. In December 2011, the Chinese Supreme People’s Court (“SPC”) even strengthened such precedential function by issuing Guiding Cases. As of March 2017, 87 such cases have been promulgated. These cases are selected by SPC from decisions of provincial-level courts at all levels and have to be adhered to by courts on future adjudications. In addition, Chinese local people’s courts have begun to experiment with intra-court systems of precedent. These recent developments allow Chinese judges to influence and be influenced by the decisions of other judges. Before exploring the precedential influence by tracing the creation and adoption of new legal doctrines, this chapter starts with the basic ideas of creating legal doctrine in the United States.

I. The Definition of Legal Doctrine Creation

Legal doctrine is a framework, set of rules, procedural steps, or test, often established through precedent in the common law, through which judgments can be determined in any given case. “In many respects, doctrine, or precedent, is the law, at least as it comes from courts. Judicial opinions create the rules or standards that comprise legal doctrine.”¹⁰⁹ A doctrine comes about when a judge makes a ruling where a process is outlined and applied, and it is allowed to be equally applied to like cases. When enough judges make use of the process, it eventually becomes established as the *de facto* method for deciding like situations.

Either in accordance with statutes or precedents, judges are not allowed to freely make their own judicial decisions which are dramatically different from the existing law. Because the authority of a country’s judicial system necessitates the predictability of law and the consistency of judicial interpretation. The changes to the law are thus mostly left to the enactment of legislatures. The task of the court in cases that follow is to determine whether the current statutes or previous judicial decisions are the right ones. For example, in the common law countries, the court will not change the interpretation of law once established until the previous decision can be shown to be in error. Therefore, creating legal doctrine is an ongoing “work and saving” process.

¹⁰⁹ Tiller, Emerson H., and Frank B. Cross. “What is legal doctrine.” *Nw. UL Rev.* 100 (2006): 517.

Once someone shows you that you are wrong or that there is an even better alternative, stick with your original answer every time the same problem arises, then it is time to work out a better solution and save it as a new rule. The law is fixed and the way of judicial interpretation is relatively consistent, while the social conditions are changing all the time. It motivates judges to work out a better solution to approach justice in certain cases when they identify that the existing law does not fit the current situations. However, even in U.S. courts, where judges are given more room for discretion and judicial lawmaking, they still cannot dramatically make or change the law through one case. Instead, they gradually build and accumulate support by the collaborative process with other colleagues affiliated in multiple levels of courts, and then a new doctrine is established when the change to the law is commonly accepted among judicial agents and citizens under the test of time and skeptical voices. Facing the challenges of legal formalists and the aggravation of losing parties, how do judges make changes to the law in a quiet and gradual way? How big can the change be made in each judicial decision? The next two sections will present the mechanism and tactics of judicial behaviors in United States courts where the theory of creating legal doctrine originated.

A. The Janus-faced of Precedents: Distinguish and Analogize

In most bureaucracies, acting on precedents is their “Standard Operational Procedure.” When the bureaucrats are asked about the reason of decisions they made, they always answer, “we always do it this way.” It is simple and infuriating. While in courts, adhering to precedents is “stare decisis.” Unlike other bureaucrats, judges often need to provide more concrete reasons that explain why the case is decided in this way to convince the losing party to accept the judgment.

The doctrine of precedent is Janus-faced with two heads, which means each precedent has two wild-diverging values. For the same precedent, interpreters can distinguish it from the current case and establish a new rule (Distinguish) or embrace it and stay with the old rule (Analogize). In the light of the nature of precedents, judges can interpret the law by distinguishing the unfavorable precedents and welcoming the favorable ones. One benefit of this nature is that it allows judges to make some quiet changes to flawed old doctrines in a timely fashion. There are a series of family violence cases to examine how American judges create legal doctrines by subtly interpreting the precedents. In these cases, family violence law was gradually changed through various judicial decisions and eventually, a new legal consensus formed on the protection of woman and culminated in the enactment of Violence Against Woman Act.¹¹⁰

In *Joyner v. Joyner* (1862),¹¹¹ the wife allegedly antagonized her husband by stating that she was well-bred and from a respectable family, and that her husband was not a fair match for her. Thoroughly provoked, the husband stuck her with a horse-whip on one occasion, and with a switch on another, leaving several bruises on her person. Furthermore, on several occasions, the husband also used abusive and insulting language towards his wife. The court cited an old doctrine that gave the husband the power to use such a degree of force as is necessary to make

¹¹⁰ The Violence Against Women Act of 1994 (VAWA), 42. U.S.C.A § 13981.

¹¹¹ *Joyner v. Joyner* 59 N.C. 322 (1862).

the wife behave herself and know her place. It also concluded that there may be circumstances that mitigate, excuse, and so far justify the husband in striking the wife “with a horse-whip on one occasion and with a switch on another, leaving several bruises on the person,” when his purpose was to prevent his wife from abandoning him and claim to be divorced, and that these acts did not furnish sufficient grounds for a divorce. (Rule: moderate use of force is permitted if it might have been provoked.)

In *State v. Black* (1864)¹¹², the wife commenced the quarrel. The husband, in a passion provoked by excessive abuse, pulled the wife to the floor by the hair. However, he restrained himself and did not strike a blow, while his wife continued to abuse him after she got up. In light of the foregoing facts, the jury found in favor of the defendant.¹¹³ The court cited *Joyner v. Joyner* (1862) and held that despite the fact that they were living apart, the marriage relation and its incidents remain unaffected. The state of the law at that time stated that a husband was responsible for the acts of his wife and was required to govern his household. For those purposes, the law permitted the husband to use towards his wife such a degree of force as is necessary to control an unruly temper and make her behave herself; and unless some permanent injury be inflicted, or there be an excess of violence, or such a degree of cruelty as shows that it is inflicted to gratify his own bad passions, the law did not invade the domestic forum or go behind the curtain. (Rule: Moderate use of force is permitted if provoked.)

In *State v. Rhodes* (1868)¹¹⁴, the husband struck the wife three blows with a switch about the size of one of his fingers without any provocation except some words which no witnesses recalled. The court’s conclusion was that the law recognized family government as being as complete in itself as the state government is in itself and yet subordinate to it. Additionally, the court stated that it would not interfere with or attempt to control the family government in favor of either husband or wife, except in cases where a permanent or malicious injury was inflicted or threatened, or the condition of the party was intolerable. The husband won the case, not because he had the right to whip his wife, but rather that we will not interfere with family government in trifling cases. The jury was told that the husband had the right to whip his wife with a switch no larger than his thumb. To combat that error, the court stated that a light blow, or many light blows, with a stick larger than the thumb, might not injure; but a switch half that size could be used to kill. The standard is the effect produced, and not the manner of producing it or instrument used. (Rule: moderate use of force is permitted in all family matters.)

In *State v. Mabrey* (1870),¹¹⁵ the husband was a man of violent character who threatened to leave his wife. After some improper language from the husband, the wife started to walk away when he caught her by the arm and threatened to kill her. He also drew his knife and struck her with it, but did not strike her. When the husband drew back as if to strike again, his arm was

¹¹² *State v. Black* 60 N.C. 262 (1864).

¹¹³ *Id.*

¹¹⁴ *State v. Rhodes* 61 N.C. 453 (1868);

¹¹⁵*State v. Mabrey* 64 N.C. 592 (1870);

caught by a bystander, whereupon the wife got away. The defendant did not pursue her. He, however, told her not to return, otherwise he would kill her. He did not strike her or inflict any personal injury. The court rigidly adhered to the decision in *State v. Rhodes* that courts will not invade the domestic forum to interfere with trifling cases of violence in family government. Regardless of what weapon was used or what motive or intent was, courts would not interfere unless permanent injuries were inflicted. (Rule: immoderate use of force is not permitted.)

In *State v. Oliver* (1874)¹¹⁶, the husband came home intoxicated one morning. He struck his wife five licks with two switches, which were about four feet long, with the branches on them about half way and some leaves. One of the switches was about half as large as a man's little finger; the other not so large as a man's little finger; the other not so large. He had them in both hands, and inflicted bruises on her arm which remained for two weeks, but did not prevent her from working. Upon finding the husband's behavior showed both malice and cruelty, the court found the defendant guilty and fined him \$10. The prosecution called the attention of the court to the case of *State v. Black*,¹¹⁷ *State v. Mabrey*,¹¹⁸ *State v. Rhodes*,¹¹⁹ *State v. Hussey*,¹²⁰ and *State v. Pendergrass*.¹²¹ The court found that the old doctrine that a husband had a right to whip his wife, provided the husband used a switch no larger than his thumb, was not the law in North Carolina. Indeed, since then, courts have advanced the position that the husband has no right to abuse his wife under any circumstances. (Rule: no general rule is possible. But the old doctrine that a husband has a right to whip his wife is not the law in North Carolina.)

From the above five cases of North Carolina, it can be seen that the judicial opinions on the family violence gradually changed during the period between 1862 and 1874. Law evolves through court-made decisions. Each judgment reflects and makes contributions to every tiny change on legal doctrines over time. These cases all exhibit similar facts in that the husband threatened, whipped his wife. In 1862, the court stated that the husband has the right to moderately correct his wife's behavior (*Joyner v. Joyner*), but some restrictions were made on the power and discretion of husband two years later. However, family violence matters were still excluded from the courts unless there was a permanent injury, excessive violence or cruelty indicating malignity and vindictiveness (*State v. Black*). In *State v. Rhodes* and *State v. Mabrey*, without deciding how much a husband could whip his wife, the court explained that the defendant prevailed because the court would not interfere with family government unless a permanent injury was inflicted. Finally, in 1874, a new consensus was formed through *State v. Oliver*, holding that a husband has no right to chastise his wife under any circumstances.

¹¹⁶*State v. Oliver* 70 N.C. 60 (1874);

¹¹⁷ *State v. Black* 60 N.C. 262 (1864).

¹¹⁸ *State v. Mabrey* 64 N.C. 592 (1870).

¹¹⁹ *State v. Rhodes* 61 N.C. 453 (1868).

¹²⁰ *State v. Hussey*, 44 N.C. 123 (N.C. 1852).

¹²¹ *State v. Pendergrass* 2 Dev. &B., N.C. 365 (1837). In this case, the teacher whipped her student and left masks. All masks disappeared in a few days. The court held that, "the authority of the teacher is a delegation of parental authority. The teacher has the power for moderate correction of behavior. Teachers have the power of moderate correction to their students. Immoderate punishment must have a permanent injury. The main purpose of permitting pain is the welfare of the child. The power must be used without malice or personal gratification. No abuse of authority is permitted. If moderate punishment is used, its legality turns on the intention of the teacher."

Although the courts firmly established this principle in practice, and subsequent judges cited *Oliver* and other similar cases as precedents, Congress did not pass a corresponding statute until well over a century later.¹²² This demonstrates how the judiciary can unilaterally shape legal policy, which is especially important when the legislature lacks the will to act or amend the out of date preexisting law timely, as was the case here.

Drawn from Llewellyn's illustration on the doctrine of stare decisis, there are two types of judges: the skillful judge who tends to decide cases strictly in accordance with the law and lawyers' arguments while whittling precedents away, and the less skilled judges who welcome precedents to influence their judgments.¹²³ Thus, the predictability of these cases' outcomes depends on the characters of individual judges, the trends in specific courts and the situations during a certain time.¹²⁴ It is not always pragmatic to require the legislatures to make the law that fits for every circumstance, as legislatures cannot anticipate every situation that will happen in the future at the time of drafting the law. Courts thus function as examiners to figure out the flaws of the law through adjudications and establish a new principle to tackle new situations. In common law system, precedent governs how cases are decided but this does not mean change is excluded. Especially in controversial cases, precedents must speak ambiguously until the court has made up its mind, and the job of persuasion falls upon the parties.¹²⁵ Take the case of *State v. Black* (1864) for instance, the wife's attorney cited *Joyner v. Joyner* and attempted to persuade court to distinguish it from the *Black* case by arguing that the couple had "agreed to be separated" at the time of the incident and therefore the wife was no longer subject to the husband's authority. However, the court refused to acknowledge the separation as relevant as the husband is still liable for his wife's behavior. Judges and lawyers in courts are like accordion players that can stretch a doctrine broadly or squeeze it narrowly to fit their arguments.¹²⁶ The reasons why judges preserve their discretions in interpreting the law and precedents, either narrowly or broadly, is that they need reasons to support their decisions and persuade the losing party to accept the judgment. In practice, judges can refuse to make a similar judicial verdict as prior precedents by making a simple excuse that the facts of precedents are different from the case before us. For example, *State v. Rhodes* (1868) cited the judicial decision of *State v. Hussy* and *State v. Black* as precedent to reach a different conclusion. The judge explained in *State v. Rhodes* (1868) that "neither of those cases is like the one before us. The first case turned upon the competency of the wife as a witness, and in the second there was a slight battery upon a strong provocation."¹²⁷

¹²² The Violence Against Women Act of 1994 (VAWA), 42. U.S.C.A § 13981;

¹²³ Karl N. Llewellyn, *The Bramble Bush: on Our Law and Its Study*, Quid Pro Books (2002), at 68-71.

¹²⁴ *Id* at 70.

¹²⁵ See Karl N. Llewellyn, *The Bramble Bush: On Our Law and Its Study*, published by Oceana Publication (1930), p19;

¹²⁶ *Id.* at 5-19;

¹²⁷ *State v. Rhodes*, 61 N.C. 453 (1868);

B. The Incrementalism of Legal Doctrine Creation Process: Stability with Change

“As precedent developed over time, however, it did not exercise an increased constraint on judges. Indeed, the expansion of precedents appeared to have some effects of liberating judges to be more ideological.”¹²⁸ Robin and Feeley (1996) have explored that the creation of new doctrine is a product of both judicial ideology and the preexisting legal principles upon which the judges must build.¹²⁹ In the aforementioned cases on family violence, the courts started from the old doctrine that the husband had a right to whip his wife as long as the switch was no larger than his thumb. Then the courts experienced and coordinated with the idea that the standard is the effect produced, and not the manner of producing it or instrument used, which eventually gave rise to a new legal doctrine protecting women from crimes of violence based on gender.

Now we know judges can distinguish unfavorable precedents and welcome favorable ones to make some quiet changes to statutes, and gradually establish a new legal doctrine through the coordinative process. But how big changes can judges make? Shapiro profoundly applied the notion of incrementalism to explain the phenomena of stability and gradual change in law.¹³⁰ The theory of incrementalism was originally developed by Lindblom¹³¹ and was mostly utilized in the process of political and economic decision-making.¹³² Instead of taking a few large jumps, incrementalism implies to make many small and incremental changes from status quo to work out a better solution.¹³³ The relatively slow tempo of new decisions can obtain new information and updated feedback which allows decision makers to pull back without excessive loss if unexpected trouble is indicated.¹³⁴ For example, the approaches to integrate became a common puzzle of administrators and judges after *Brown v. Board of Education* (1954)¹³⁵. Judges issued successive decisions to promote integration in public schools with “all deliberate speed”¹³⁶. They pulled back the implementing alternative in later decisions when its adverse feedback has been strong enough.¹³⁷ Having found the freedom of choice plan¹³⁸ not sufficient to achieve

¹²⁸ Tiller, Emerson H., and Frank B. Cross. "What is legal doctrine." *Nw. UL Rev.* 100 (2006): 517.

¹²⁹ Edward L. Rubin and Malcolm Feeley, *Creating Legal Doctrine*, 69 *S. Cal. L. Rev.* 1989 (1996), Available at: <http://scholarship.law.berkeley.edu/facpubs/2067>.

¹³⁰ Shapiro, Martin. "Stability and change in judicial decision-making: Incrementalism or stare decisis." *Law Transition Q.* 2 (1965): 134. P141-p157

¹³¹ Braybrooke, David, and Charles E. Lindblom. *A Strategy of Decision. Policy Evaluation as a Social Process*, David Braybrooke and Charles E. Lindblom. Free P. of Glencoe, 1963.

¹³² *Id.* Also see Cyert, Richard M., and James G. March. "A behavioral theory of the firm." Englewood Cliffs, NJ 2 (1963).

¹³³ *Id.*

¹³⁴ Shapiro, Martin. "Stability and change in judicial decision-making: Incrementalism or stare decisis." *Law Transition Q.* 2 (1965): 134. P140.

¹³⁵ *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

¹³⁶ “The judgments below (except that in the Delaware case) are reversed and the cases are remanded to the District Courts to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit the parties to these cases to public schools on a racially nondiscriminatory basis with all deliberate speed.” *Brown v. Board of Education of Topeka* 349 U.S. 294 (1955).

¹³⁷ See Shapiro, p146.

¹³⁸ See *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968). Also see Allen, Jody and Daugherty, Brian. “Recovering a ‘Lost’ Story Using Oral History: The United States Supreme Court’s Historic *Green v. New Kent County, Virginia, Decision*,” *Oral History Review*, vol. 3, issue 2, 25-45 (June 2006).

integration, the court stopped it in *Green v. County School Board of New Kent County (1968)*¹³⁹ and adopted desegregation busing of students¹⁴⁰ in *Swann v. Charlotte (1970)*¹⁴¹. Then the court adjusted the application conditions of school bussing in *Milliken v. Bradley (1974)*¹⁴² when long-distant commute was complained about being contrary to the wishes of many black communities which were more interested in obtaining quality schools than integrated ones.¹⁴³ In short, as other policy makers, judges want to be free to change their minds.¹⁴⁴ The principle of stare decisis serves as a shield allowing judges to explain that they are also bound by the decision so as to avoid the pressure of conflicting outside groups.¹⁴⁵ On the other hand, making incremental changes leaving judges enough flexibility to quickly adjust their own decisions based on feedback and new information.¹⁴⁶ As Shapiro illustrated in his remarkable retreat from political jurisprudence, judges incorporate a form of stability with change into judicial decision-making process to make the law change while law stays the stay.¹⁴⁷

In the process of creating legal doctrines, each judicial decision with a marginal change represents a new doctrinal step. Shapiro thus summarized “the basic lore of common law is, of course, one of multiple decision-making under the label of ‘case by case’ development of the law.”¹⁴⁸ Judges create potential legal doctrines all the time as a regular part of their jobs.¹⁴⁹ However, not all the judicial decisions that applied the statutes into new situations can be developed into new legal doctrine in the long run. In other words, incrementalism can only be found in the long-standing practice doctrine.¹⁵⁰ The every tiny change to the existing statutes or doctrines that the first judge made will not become a doctrine until more and more subsequent judges started to follow what the first judge said. Those recorded as legal doctrines have been checked and adjusted by judges through hundreds, even thousands of cases over time. The judges are “often confronted with two rival interpretations of a statute which may be said to have no status quo since it is vague enough to admit the rival interpretations.”¹⁵¹ They choose the

¹³⁹ *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968).

¹⁴⁰ It is the practice of assigning and transporting students to schools in such a manner as to redress prior racial segregation of schools, or to overcome the effects of residential segregation on local school demographics. Jost, Kenneth (April 23, 2004). "School Desegregation". *CQ Researcher* 14 (15): 345–372.

¹⁴¹ *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1970).

¹⁴² *Milliken v. Bradley*, 418 U.S. 717 (1974)

¹⁴³ Derrick A. Bell, Jr., 1976. “Serving Two Masters: Integration Ideals and Clients Interests in School Desegregation Litigation” *The Yale Law Journal*, New York, pages 470-516.

¹⁴⁴ See Shapiro, Martin. "Stability and change in judicial decision-making: Incrementalism or stare decisis." *Law Transition Q. 2* (1965): 134. P141.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ Shapiro, Martin. "Stability and change in judicial decision-making: Incrementalism or stare decisis." *Law Transition Q. 2* (1965): 134. P155.

¹⁴⁸ *Id.* at 154.

¹⁴⁹ Edward L. Rubin and Malcolm Feeley, *Creating Legal Doctrine*, 69 *S. Cal. L. Rev.* 1989 (1996), Available at: <http://scholarship.law.berkeley.edu/facpubs/2067>;

¹⁵⁰ Shapiro, Martin. "Stability and change in judicial decision-making: Incrementalism or stare decisis." *Law Transition Q. 2* (1965): 134. P148.

¹⁵¹ Shapiro, Martin. "Stability and change in judicial decision-making: Incrementalism or stare decisis." *Law Transition Q. 2* (1965): 134. P147.

interpretation that changes the statutes only when making change yields better solutions than maintaining the status quo.¹⁵² Llewellyn viewed “the lines of precedent as the record of a series of marginal adjustments designed to meet changing circumstance.”¹⁵³ The subsequent judges incrementally adjust the judgments or the remedies what the first judges made until the new doctrine are commonly acknowledged and are proved to be better solutions for the current situation. The school segregation cases set good examples for us to identify this process. In the case of *Brown v. Board of Education (1954)*¹⁵⁴, judges overturned the old doctrine of “separate but equal” established by *Plessy v. Ferguson (1896)*¹⁵⁵. In fact, judges have already accumulated enough support and consensus on racial desegregation from previous cases while making the landmark ruling in Brown case. When the fourteenth amendment of the United States Constitution¹⁵⁶ spoke ambiguously, there were two distinctive ways to interpret the de jure racial segregation before the Brown case. One way of interpretation is to argue the de jure racial segregation does not violate the equal protection clause of the fourteenth amendment. Such as, judges in *Cumming v. Richmond County Board of Education (1899)* ruled that the Richmond County tax that only supported high schools open to white students was not illegal. Federal interference could only be justified if local authorities disregarded rights guaranteed by the constitution;¹⁵⁷ the court held that separating schools for Chinese pupils from white schoolchildren was within the discretion of the state, did not conflict with the fourteenth amendment in *Lum v. Rice (1927)*.¹⁵⁸ However, on the other side, some judges quietly built up support and consensus against racial segregation through their own judicial decisions since *Plessy v. Ferguson (1896)*¹⁵⁹. This trend can be clearly demonstrated by the rulings of *Missouri ex rel Gaines v. Canada (1938)*¹⁶⁰, *Mendez, et al v. Westminster [sic] School District of Orange Country (1947)*¹⁶¹, *Sweatt v. Painter (1950)*¹⁶², *McLaurin v. Oklahoma State Regents (1950)*¹⁶³ and *Gebhart v. Belton (1952)*¹⁶⁴. Those cases, to some extent, challenged the “separate but equal” doctrine of racial segregation and paved the way for the Brown case to promote integration and civil rights movement.

Legislatures cannot anticipate every situation, neither do judges. In courts, judges not only avoid dramatic changes from the statutes that would possibly threaten the predictability of the law, but

¹⁵² *Id.*

¹⁵³ Llewellyn, Karl N. "The Common Law Tradition: Deciding Appeals (1960)." *Boston: Little, Brown (1985)*.

¹⁵⁴ *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

¹⁵⁵ *Plessy v. Ferguson*, 163 U.S. 537 (1896).

¹⁵⁶ *See* U.S. Const. amend. XIV, § 2.

¹⁵⁷ *Cumming v. Richmond County Board of Education* 175 U.S. 528 (1899).

¹⁵⁸ *Lum v. Rice*, 275 U.S. 78 (1927)

¹⁵⁹ *Supra* note 127.

¹⁶⁰ The court held, states that provide only one educational institution must allow blacks and whites to attend if there is no separate school for blacks. *See Missouri ex rel Gaines v. Canada* 305 U.S. 337 (1938).

¹⁶¹ The court held that the segregation of Mexican and Mexican American students into separate “Mexican schools” was unconstitutional. *See Mendez v. Westminster* 64 *F. Supp.* 544 (1946).

¹⁶² The court held that the equal protection clause of the fourteenth amendment requires that petitioner be admitted to the University of Texas Law School. *See Sweatt v. Painter*, 339 U.S. 629 (1950).

¹⁶³ The court held that different treatment of students in public institutions of higher learning solely on the basis of race violates the Equal Protection Clause of the fourteenth Amendment. *McLaurin v. Oklahoma State Regents* 339 U.S. 637 (1950).

¹⁶⁴ *Gebhart v. Belton* 87 A.2d 862 (Del. Ch. 1952).

also face the limitation that any changes they make should be related to the issues arose by the cases before them. We cannot expect judges to provide the best solution for all the situations related to a certain statute through one case. For example, the due process clause of the fourteenth amendment¹⁶⁵, and the right to counsel of the sixth amendment¹⁶⁶ were so vague that some defendants could not be given access to attorneys in the capital trail until *Powell v. Alabama* (1932)¹⁶⁷. However, the justices in *Powell* case could only identify the rights of defendants who are facing the possibility of a death sentence, even though they might have already made up their minds on guaranteeing the assistance of counsel for every defendant, no matter what sentences or convictions he/she may face. It cannot be denied that the issues and the involving parties restrict the range of change that a judicial decision can reach in a certain case. No judge can decide a case that is not before him or her. The tiny doctrinal step taken by the *Powell* case inspired the later judges to ensure the assistance of counsel available for a variety of defendants who are subject to federal felony,¹⁶⁸ state felony,¹⁶⁹ actual imprisonment¹⁷⁰ and suspended prison sentence.¹⁷¹ The doctrine of guaranteeing the assistance of counsel in trials experienced several decades to be established from the first case *Powell v. Alabama* (1932) to the latest case *Alabama v. Shelton* (2002). Judges, who are regarded as decision makers in the United States, cannot overturn the law or previous precedents to make a dramatic change in an old doctrine because of consistency that a universal value appreciated by all courts. The authority of law and the accountability of judicial system could be sharply diminished if judges are given too much freedom to establish a new rule. Only when consistency is maintained can the law's deterrent and educational functions be effective and efficient.

In "*Legislation and Statutory Interpretation*," Professor Eskridge, Frickey and Garrett summarized and classified American theories of statutory interpretation into three basic approaches: legislative intent, textual meaning and a more dynamic, pragmatic assessment of institutional, textual, and contextual factors.¹⁷² Creating legal doctrine is a reflection of the latter approach. As a tool for serving society, laws should be interpreted under the influence of new legal doctrines in such a way that provides the best results for society. Kagan, in his introduction

¹⁶⁵ "Nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 2.

¹⁶⁶ In all criminal prosecutions, the accused shall enjoy the right, . . . , to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense." U.S. Const. amend. VI, § 1.

¹⁶⁷ *Powell v. Alabama* 287 U.S. 45 (1932).

¹⁶⁸ The court held that, "since the Sixth Amendment constitutionally entitles one charged with crime to the assistance of counsel, compliance with this constitutional mandate is an essential jurisdictional prerequisite to a federal court's authority to deprive an accused of his life or liberty." *Johnson v. Zerbst*, 304 U.S. 458 (1938).

¹⁶⁹ The court held that, "the Sixth Amendment right to counsel is a fundamental right applied to the states via the Fourteenth Amendment to the United States Constitution's due process clause, and requires that indigent criminal defendants be provided counsel at trial. Supreme Court of Florida reversed." *Gideon v. Wainwright*, 372 U.S. 335 (1963).

¹⁷⁰ The court held that, "A criminal defendant may not be actually imprisoned unless provided with counsel." *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

¹⁷¹ The court held that, "A suspended sentence that may result in incarceration may not be imposed if defendant did not have counsel at trial." *Alabama v. Shelton*, 535 U.S. 654 (2002)

¹⁷² See William N. Eskridge, Jr., Philip P. Frickey and Elizabeth Garrett, *Legislation and Statutory Interpretation*, published by Foundation Press (2000), p6.

for “Towards Responsive Law: Law and Society in Transition,”¹⁷³ characterized the American legal system as a responsive legal system with some features of autonomous law, “in which judges are expected to adapt legal principles to new realities, consulting the usages and values of the community, treating law as ‘more emergent than imposed.’”¹⁷⁴ By distinguishing unfavorable precedents and welcoming favorable ones, American judges make incremental and tiny changes to the existing law and gradually create legal doctrines to respond the changing social conditions. Overall, American legal system provides us a remarkable and practical example about judicial decision-making in the continuous development of statutory interpretation theory.

II. The Silent Assimilation of Stare Decisis into Chinese Statutory Interpretation

Considering the characters of the current Chinese legal system, which include lack of judicial independence, the subordinate function of law and limited legal constraints against the politically powerful, most legal analysts would classify China as a repressive law system.¹⁷⁵ It means Chinese judges have less judicial independence under political intervention while adjudicating cases than common law judges, or even other civil law judges. However, there are some changes recently happened in Chinese courts trying to reverse the past situation and leave judges more space and independence to make their judicial decisions, For example, in the third plenary session of the 18th CPC Central Committee in 2013, the promotion of judicial independence among the local courts under the level of provincial government provided grass root courts independence from local government in terms of their financial budget. To some extent, it gave local courts more room to adapt legal principles to new realities and fix the gap between law and novel situations without the external influence of local authority. In addition, some justices have gradually and incrementally fixed the flawed or outdated statutes by their rulings before any legislative amendment is promulgated. Most Chinese legal scholars credited this trend to the influence and construction of the stare decisis doctrine in China. Put it in a more pragmatic way, it is a reflection of the creation of legal doctrine. It appears that the statutory interpretation theory of civil law systems is beginning to form increasing connections with the common law system through the judicial process. These increasing signs are pointing to a transition from repressive law toward responsive law¹⁷⁶ in China. This emerging transition not only identifies the expanding Chinese judicial power, but also breaks the common presumption that judges working

¹⁷³ See Robert A. Kagan, Introduction to Transaction Edition, Philippe Nonet & Philip Selznick, *Towards Responsive Law: Law & Society in Transition*, published by Transaction Publishers, New Brunswick (U.S.A.) and London (U.K.), second edition, (2008), p7-27.

¹⁷⁴ See Philippe Nonet, Philip Selznick, *Law and Society in Transition: Toward Responsive Law*, published by Transaction Publishers, Forth printing (2008), original published by Harper Torch Books (1978).

¹⁷⁵ In a repressive law regime, law and politics are closely integrated into the form of a direct subordination of legal institutions to public and private governing elites. Law is pliable to serve rampant official discretion. Nonet, Phillippe, and Philip Selznick. *Law and society in transition: Toward responsive law*. Transaction Publishers, 1978, p 51.

¹⁷⁶ In a responsive regime, legal institutions were to give up the insular safety of autonomous law and become more dynamic instruments of social ordering and social change. Responsive law envisions a union of law and government. It implies government should act as a political and legal actor to decide what ends are to be pursued and establish the agencies and mechanisms by which public ends will be furthered. See Nonet, Phillippe, and Philip Selznick. *Law and society in transition: Toward responsive law*. Transaction Publishers, 1978, p 74-p113.

in civil law traditions may only strictly apply and interpret written statutes to make their rulings. Under the constraint posed by the inherent dynamic of the law, Robin and Feely defined judicial creation of a new doctrine in American courts as a coordinative process that requires judges to operate either horizontally or vertically as they combine their various integrative efforts.¹⁷⁷ “Vertical” refers to instances where lower courts follow the new doctrines or integrative efforts to form new doctrines stemming from the mandatory command of the Supreme Court. On the other hand, “horizontal” refers to instances when courts coordinate to adopt an idea from their colleagues inside the institution or voluntarily adopt new doctrines formed in other lower courts. The new doctrine is based on coordinating ideas that are fully realized, delimited and generally reflective of the directionality of current doctrine.¹⁷⁸ After a series of thorough changes happened in Chinese judicial system, Chinese judges started to create legal doctrines, as American judges do, in response to the ever-changing legal challenges facing contemporary China. I examined the way Chinese courts incorporate an incremental form of stare decisis into their approach to statutory interpretation. This method requires judges to interpret statutes dynamically by mandatorily or voluntarily following precedents to fix flawed statutes in a timely fashion. The “guiding cases” issued by the Supreme People’s Court and various provincial cases on driving under the influence (DUI) and ATM theft can identify the vertical and horizontal influences that previous judgments exert on Chinese courts.

A. The Vertical Influence of Prior Judicial Decisions: The Promulgation of Guiding Cases

The influence of vertical precedent has waxed and waned over the course of Chinese history. Although statutes have constituted the dominant source of law since imperial times, the legal significance of precedent dates back at least to the Qin dynasty (221 B.C. - 206 A.D.).¹⁷⁹ In Qin China, binding precedents are used as a legal basis in adjudications when there is no enacted law, or the enacted law is erroneous or vague.¹⁸⁰ In Han China, decided cases that received the approval of the emperor filled in the interstices of the law.¹⁸¹ In Song China, precedent bearing

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ Nanping Liu, "'Legal Precedents' with Chinese Characteristics: Published Cases in the Gazette of the Supreme People's Court," 5 *Journal of Chinese Law* 107 (1991), 109-10.

¹⁸⁰ The precedent system officially established in the Qin Dynasty had its roots in the practices of the Xia Shang dynasty (2100 B.C.-1100 B.C.) and Xi Zhou dynasty (1046 B.C.-771 B.C.). Before Qin, given the absence of rules for conviction and punishment, emperors decided a case according to previous judgments or "stories." Stories formed the basis for judgments and were later recorded and compiled in "The Spring and Autumn Annals." In addition, six major rules for the use of stories were formulated: 1) follow previous stories; 2) prudently select the stories to be applied; stories without general guidance should not be used; 3) a case should be decided by more than one person; 4) sort and record typical stories for further modification in light of contemporary situations and facts; 5) create new precedent if necessary; 6) illegal stories should not be precedents. Dong Hao, Panli Jieshi Zhi Bianqian Yu Chonggou: Zhongguo Panli Jieshi Fazhan Yu Goujian Zhilu [The Revolution and Reconstruction of Precedent Interpretation: The Road of Development and Construction of Chinese Precedent Interpretation] (2015), 19-22; Wu Shuchen, Guizu Jingshen Yu Panlifa Chuantong [Nobility Spirit and Case Law Tradition], 5 *Zhongwai Faxue* [Peking University Law Journal] 25, 25-30 (1998).

¹⁸¹ In Han China, there are four forms of law including "Lv," "Ling," "Ke" and "Bi." "Bi" refers to precedents approved to be the basis for deciding cases. Cui Min, "Panlifa" Shi Wanbei Fazhi de Zhongyao Tujin ["Precedent" is an Important Way to Perfect the Legal System], 8 *Faxue* [Law Science] 8, 11(1988).

the authority of the emperor could trump statutory provisions to the contrary.¹⁸² The Ming Emperor Zhu Yuanzhang personally selected cases for inclusion in the “dagao,” ordering judges to take reference from these precedents in rendering their decisions.¹⁸³ By the time of the Qing Dynasty, precedent had become “indispensable to legal reasoning,” and reasoning by analogy, a “universally accepted [method] in Qing decision-making.”¹⁸⁴ As the law of late Qing dynasty was abolished and only a few new statutes had been issued.¹⁸⁵ The cases compiled by the Cassation Court (named “Daliyuan,” the highest court during Beiyang Government period)¹⁸⁶ thus functioned as binding precedents. The use of precedent in Qing can also be demonstrated by Article 45 of “*The Law of the Organization of the Judiciary of the Chinese Republic*,” courts at all levels should adhere to them when adjudicating similar cases.¹⁸⁷ Qing judges deduced abstract rules from the prior cases and distinguished precedent based on factual and statutory considerations.¹⁸⁸ But the ascension of Mao's communist government in 1949 ended this practice.¹⁸⁹ Despite that, the compilations of influential and typical cases, including the “*Summary of the Inspection of Fornication with Underage Girls Cases Decided Since 1955*,”¹⁹⁰ “*Summary of Criminal Charges, Punishment Types, and Sentencing Ranges (First Draft)*,”¹⁹¹ continued to be produced by Supreme People’s Court for guiding the adjudication work or training judicial officers.¹⁹² Those internally circulated materials were, however, not made

¹⁸² Nanping Liu, “Legal Precedents’ with Chinese Characteristics: Published Cases in the Gazette of the Supreme People’s Court,” 5 *Journal of Chinese Law* 107 (1991), 110-11.

¹⁸³ *Id.* at 111.

¹⁸⁴ Zhiqiang Wang, “Case Precedent in Qing China,” 19 *Columbia Journal of Asian Law* 323 (2005), 344.

¹⁸⁵ *Id.*

¹⁸⁶ See Article 33 of “*The Law of the Organization of the Judiciary of the Chinese Republic*,” which states, “the Court of Cassation is the highest court and the number of its civil and criminal divisions shall be determined by the volume of business to be transacted.” “*The Law of the Organization of the Judiciary of the Chinese Republic*” was originally promulgated in 1910, and then amended in 1915. It was translated by The Law Codification Commission and published by The Ministry of Justice. Available at:

<http://babel.hathitrust.org/cgi/pt?id=mdp.35112104728920;view=1up;seq=14>.

¹⁸⁷ See Article 45 of “*The Law of the Organization of the Judiciary of the Chinese Republic*,” which states, “when the Court of Cassation or any of its branch court sends down a case to a lower court, the lower court may not in its decision controvert any point of law stated by the Court of Cassation or such branch court.” Available at:

<http://babel.hathitrust.org/cgi/pt?id=mdp.35112104728920;view=1up;seq=16>.

¹⁸⁸ *Id.* at 334-40.

¹⁸⁹ “In administering justice the people's courts are independent, subject only to the law.” *Zhongguo Ren-min Gongheguo Xianfa* (1954) [Constitution of the People's Republic of China (1954)], art. 78, available at: <http://en.pkulaw.cn/display.aspx?cgid=52993&lib=law>. “This change of government also swept away all elements of the system of legal precedents that had developed thus far.” *Supra* note 20 at 112.

¹⁹⁰ See 1955 年以来奸淫幼女案件检查总结 (Summary of the Inspection of Fornication with Underage Girls Cases Decided Since 1955), released by the SPC on April 30, 1957, 法律法规资料库 (DATABASE OF LAWS AND REGULATIONS), available at: <http://law.people.com.cn/showdetail.action?id=2676963>.

¹⁹¹ See 周珏 (ZHOU Jue), 建国初期刑事审判工作的回忆 (Memories about Criminal Adjudication Work in the Early Days of the Establishment of the Country), 中国法院网 (CHINA COURT NET), Sept. 29, 2007, available at: <http://www.chinacourt.org/article/detail/2007/09/id/268326.shtml>

¹⁹² See 王立峰 (WANG Lifeng), 中国案例指导制度的必要性和功能 (The Necessity and Function of China’s Necessity and Function of 中国指导性案例项目 (China Guiding Cases Project), Oct. 15, 2013, available at <https://cgc.law.stanford.edu/commentary/9-professor-wang>.

available to the public.¹⁹³ The “Gazette of the Supreme People's Court” only started regularly publishing selected cases in 1985 to “provide better guidance to local courts for correctly applying laws and decrees.”¹⁹⁴ The decisions reported in the Gazette do not always issue from the apex court itself: many of them come from the lower courts, with the SPC adopting or modifying the original opinions.¹⁹⁵

In recent years, beginning on December 20, 2011, the Chinese Supreme People’s Court (“SPC”) has strengthened such vertical precedential function by issuing “Guiding Cases.”¹⁹⁶ In fact, the judiciary’s demand for such “guiding cases” has lasted for several years. A study carried out in 2004 surveyed 130 judges from courts at various levels in Guangdong Province (Dong 2009, 98-99). 9.8% of respondents deemed cases as having no influence on their decision-making process whereas 52.3% of respondents perceived cases as “barely influenc[ing] their decisions,” referring to them only “when there is any unsolved problem.” For 25% of the respondents, however, “prior judgments have significant influence” and “[t]hey will check if their opinions are consistent with prior judgments before making final decisions.”¹⁹⁷ A second study conducted by the same researcher in Zhuhai Municipality of Guangdong Province in 2007 found that more than 90% of the judges surveyed paid attention to prior judgments.¹⁹⁸ In the absence of a relevant statute or an official interpretation by the Chinese Supreme People’s Court, approximately 80% of respondents would search for prior judgments while 20% would seek advice from legal scholars.¹⁹⁹ “It is impossible for legislators to anticipate or exhaust all different situations that should be regulated by law in a future society. Therefore, one of the effective ways to address legal loopholes and deficiencies is to ‘explain with examples’.”²⁰⁰ As the adjudication committee office of High People’s Court of Jiangsu Province Qi Gengsheng stated, “Guiding Cases focus on new problems and new situations emerged during practice. They have positive impacts on the application of law in general, especially, judges’ reference and application of the same kind of cases.”²⁰¹

The Supreme People’s Court did not officially launch or propagandize the concept of “Guiding Cases” until it announced the “Second Five-Year Reform Plan of the People’s Court (2004–2008)

¹⁹³ Nanping Liu, “Legal Precedents’ with Chinese Characteristics: Published Cases in the Gazette of the Supreme People's Court,” 5 *Journal of Chinese Law* 107 (1991), 112-13.

¹⁹⁴ *Id.* at 114.

¹⁹⁵ *Id.* at 115-16.

¹⁹⁶ Guiding Cases, Stanford Law School China Guiding Cases Project, available at: <https://cgc.law.stanford.edu/guiding-cases/>

¹⁹⁷ Dong Hao, Tang Wenfu, *The Construction Process of Chinese Case Law*, published by China University of Political Science and Law Press 1, Mar. 2009, at 92-94;

¹⁹⁸ *Id.* at 99.

¹⁹⁹ *Id.*

²⁰⁰ Why Guiding Cases Matter, Available at: <http://cgc.law.stanford.edu/why-guiding-cases-matter/>;

²⁰¹ See Why Guiding Cases Matter, Available at: <http://cgc.law.stanford.edu/why-guiding-cases-matter/>;

in 2005.”²⁰² The “*Notice of the Supreme People’s Court on Issuing the Provision on Cases Guidance*”²⁰³ promulgated by SPC in 2010 further paved the way to introduce “Guiding Cases.”²⁰⁴ In deliberately keeping a distance from a “judge-made law” system, the SPC did not pursue the binding force of these judgments; instead, it highlighted prior judicial decisions’ guidance function on future adjudications. That said, the objectives of publishing these cases are to “summarize experience in adjudication work in a timely manner, guide the adjudication work of courts at various levels, unify the scales of justice and standards of adjudication, regulate judges’ discretionary power, and fully realize the guiding function of typical cases in adjudication work.”²⁰⁵ As of March 2017, 87 Guiding Cases have been promulgated. These cases are selected by the Guiding Cases Work Office affiliated in SPC from decisions of provincial-level courts at all levels and have to be adhered to by courts on future adjudications.²⁰⁶ Once the Adjudication Committee of SPC approved the selected Guiding Cases, the *Gazette of the Supreme People’s Court*²⁰⁷, the website of the Supreme People’s Court and the *People’s Court Daily* shall be uniformly released them in the form of notices.²⁰⁸ Any effective judgments made by courts at all levels can be recommended to the Guiding Cases Work Office. They “have the effect of guiding adjudication and enforcement work in courts throughout the country.”²⁰⁹ The selected cases shall be either 1) typical, 2) widespread concerned in society, 3) related to the statutes that are relatively general, 4) difficult, complicated, new types, 5) or other cases with a guiding effect.²¹⁰ Among the seventy-seven issued Guiding Cases since December 2016, civil (30 cases), criminal (14 cases) and administrative disputes (14 cases) account for three major subject matters.²¹¹

²⁰² 王立峰 (WANG Lifeng), 中国案例指导制度的必要性和功能 (The Necessity and Function of China’s Guiding Cases System), 中国指导性案例项目 (China Guiding Cases Project), Oct. 15, 2013, available at: <https://cgc.law.stanford.edu/commentary/9-professor-wang>.

²⁰³ *Notice of the Supreme People’s Court on Issuing the Provision on Cases Guidance*, promulgated by Supreme People’s Court on Nov. 26th, 2010. Available at: <http://vip.chinalawinfo.com/newlaw2002/slc/slc.asp?gid=143870>.

²⁰⁴ WANG Chenguang, System Construction and Technique Innovation: Challenges Our Guiding Cases System Is Facing, CHINA GUIDING CASES PROJECT, Feb. 1, 2012 (Adrian LECESNE ed., 2012), available at <https://cgc.law.stanford.edu/commentary/2-professor-wang>.

²⁰⁵ 王立峰 (WANG Lifeng), 中国案例指导制度的必要性和功能 (The Necessity and Function of Chinese Guiding Cases System 中国指导性案例项目 (China Guiding Cases Project), Oct. 15, 2013, available at: <https://cgc.law.stanford.edu/commentary/9-professor-wang>.

²⁰⁶ Article 3 of Provisions of the Supreme People’s Court Concerning Work on Guiding Cases, available at: <http://cgc.law.stanford.edu/supreme-peoples-court-concerning-work-on-guiding-cases/>

²⁰⁷ This official publication has been regularly published by the Supreme People’s Court of the People’s Republic of China four times each year since 1985. It carries the important national legislation, official documents, judicial interpretation and typical cases involving civil, criminal, economic, marine and administrative ones discussed and adopted by the Judicial Committee of the Supreme People’s Court. *See* *Gazette of the Supreme People’s Court of the People’s Republic of China*, Available at: <http://www.court.gov.cn/qwfb/zgrmfygb/>;

²⁰⁸ Article 6 of Provisions of the Supreme People’s Court Concerning Work on Guiding Cases, available at: <http://cgc.law.stanford.edu/supreme-peoples-court-concerning-work-on-guiding-cases/>

²⁰⁹ Article 1 of Provisions of the Supreme People’s Court Concerning Work on Guiding Cases, available at: <http://cgc.law.stanford.edu/supreme-peoples-court-concerning-work-on-guiding-cases/>

²¹⁰ Article 2 of Provisions of the Supreme People’s Court Concerning Work on Guiding Cases, available at: <http://cgc.law.stanford.edu/supreme-peoples-court-concerning-work-on-guiding-cases/>

²¹¹ *Zuigao Renmin Fayuan Zhidaoxing Anli Sifa Yingyong Nianudu Baogao* (Annual Report of the Application of Guiding Cases Issued by Supreme People’s Court) (2016). available at: <http://weekly.pkulaw.cn/Admin/Content/Static/28a11fc9-3f22-4d24-a34d-88e1faea781e.html>

According to Article 7 of “Provisions of the Supreme People’s Court Concerning Work on Guiding Cases” (“provisions”), judges are required to “refer to the Guiding Cases released by the SPC when adjudicating similar cases.”²¹² It implies the Guiding Cases are likely to “become a new source of law in the Chinese codified legal system” based on their de facto binding effects on future similar cases.²¹³ Put it another way, the publication of Guiding Cases started requiring lower courts’ judges to follow SPC’s opinions on typical legal issues. When trying a similar case, a people’s court at any level is required to refer to the relevant Guiding Case by quoting it as the judgment’s reasoning and pointing out its number and key points of the judgment.²¹⁴ The precedential values of “Guiding Cases” can also be demonstrated by recent surveys conducted by Stanford Law School China Guiding Cases Project. In the 2014 survey, 64 of judges have read the relevant provision on “Guiding Cases” while 57 have considered “Guiding Cases” in the course of adjudication.²¹⁵ This number increased 15.4 percentage points compared with the corresponding one in 2013 survey.²¹⁶

Some legal scholars have criticized the effectiveness of “Guiding Cases” in guiding future judicial decisions based on data which showed some lower courts’ judgments did not follow these cases.²¹⁷ While these findings were suggestive, they were subject to selection biases.²¹⁸

²¹² Article 7 of Provisions of the Supreme People’s Court Concerning Work on Guiding Cases, available at: <http://cgc.law.stanford.edu/supreme-peoples-court-concerning-work-on-guiding-cases/>.

²¹³ WANG Chenguang, System Construction and Technique Innovation: Challenges Our Guiding Cases System Is Facing, CHINA GUIDING CASES PROJECT, Feb. 1, 2012 (Adrian LECESNE ed., 2012), available at <https://cgc.law.stanford.edu/commentary/2-professor-wang>. For the Chinese version of the Commentary, see 王晨光 (WANG Chenguang), 制度构建与技术创新——我国案例指导制度面临的挑战 (System Construction and Technique Innovation: Challenges Our Guiding Cases System Is Facing), 中国指导性案例项目 (CHINA GUIDING CASES PROJECT), Feb. 1, 2012 (Ralph WANG ed., 2012), available at <https://cgc.law.stanford.edu/commentary/2-professor-wang>.

²¹⁴ Zuigao Renmin Fayuan Yinfa Guanyu Anli Zhidao Gongzuo de Guiding de Tongzhi [Notice of the Supreme People’s Court on Issuing the Provisions on Case Guidance], issued by SPC on Nov 26th, 2010, art. 7, available at: <http://en.pkulaw.cn/display.aspx?cgid=143870&lib=law>; See also Zuigao Renmin Fayuan Guanyu Anli Zhidao de Guiding Shishi Xize [Detailed Rules for the Implementation of the Provisions of the Supreme People’s Court on Case Guidance], issued by SPC on May 13th, 2015, art.9, 10, 11, available at: <http://en.pkulaw.cn/display.aspx?cgid=249447&lib=law>.

²¹⁵ Guiding Cases SurveysTM was issued in August 2014. It invites judges, lawyers, law professors, and law students to participate in surveys that analyze how Guiding Cases released by the Supreme People’s Court are perceived and used by legal actors. Results of these surveys and their comparisons tentatively show legal actors’ changing attitudes towards Guiding Cases identify areas for improvement. In July 2013, the China Guiding Cases Project (“CGCP”) invited judges from a city in Southern China to share their experiences with and views on Guiding Cases (“GCs”). Almost a hundred judges accepted, on condition of anonymity, and the CGCP launched its first survey (“2013 Survey”). In July 2014, to follow up, the CGCP conducted a similar survey in the same courts and over a hundred judges responded (“2014 Survey”). Chart 3: Percentages of Judges Who Have Considered Guiding Cases in Adjudicating Cases, Guiding Cases Surveys, Guiding Cases, Stanford Law School China Guiding Cases Project, available at: <http://cgc.law.stanford.edu/guiding-cases-surveys/>.

²¹⁶ *Id.*

²¹⁷ See Jinting Deng, An Empirical Research on High Courts in China-- Comparative Evaluation of Guiding Cases in Unifying Judicial Decisions of Intentional Murders, Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2348669; Wang Liming, “Woguo anli zhidao zhidu ruogan wenti yanjiu”(Research on Several Problems of the Guiding Case System in our Country), Faxue (Law Science), No.1(2012), p.72; Li Yougen, Why Guiding Cases Do Not Have Binding Force, “Zhidao xing Anli Weihe Meiyou Yuesu Li,” Law and Social Development, Fazhi yu Shehui Fazhan, 4th 2010, available at:

Second, they did not account for multiple ways of referring to Guiding Cases. For example, in Guiding Cases Surveys, the judges who pointed out that they have considered Guiding Cases were asked how they refer to Guiding Cases. Only one judge in 2013 survey and no judge in 2014 survey explicitly specified the Guiding Cases they considered in their written decisions.²¹⁹ Besides that, Approximately 65% of the 48 judges in 2014 survey who had not considered Guiding Cases attributed it to the proposition that there were “no Guiding Cases that considered the areas of law that they had adjudicated”.²²⁰ Only two of them chose the reason “Guiding Cases are not important.” In fact, “most of the judges surveyed 65 (73%) in 2013 and 79 (75%) in 2014 agreed or strongly agreed that the SPC should expand the coverage and scope of Guiding Cases.”²²¹

Although SPC used the words of “Guiding Cases” to intentionally distinguish them from the binding precedents in common law system, but the precedential values of Guiding Cases might be stronger than that of precedents. According to Provisions, Chinese courts should follow the Guiding Cases which were even decided by inferior courts. In practice, the first judge set a good example to creatively interpret the statutes in hard or novel cases. Once SPC selects and releases it as a Guiding Cases, the courts at all levels will mandatorily follow what the first judge said. Take the Guiding Case NO.4²²² and NO. 12²²³ for example. By releasing these two cases, the SPC added mitigating factors for intentional homicide criminals in the cases brought by heated marital, love conflict or civil conflict. The defendant who should be imposed death penalty may be sentenced to death with a two-year suspension and be restricted to any commutation of sentence if he fulfills the mitigating factors. It paved the way to the enforcement of regulation as to commutation stated in “*Amendment (VIII) to the Criminal Law of the People’s Republic of China*”.²²⁴ However, compared with enormous precedents of common law system, there are

<http://www.cnki.net/KCMS/detail/detail.aspx?QueryID=2&CurRec=6&recid=&filename=SFAS201004009&dbname=CJFD2010&dbcode=CJFQ&pr=&urlid=&yx=&v=MzI0MzkxRnJDVVJMNmVaZVJ2Rnl2aFc3N090aXZLZmJHNEg5SE1xNDIGYlISOGVYMUx1eFITN0RoMVQzcVRyV00=>.

²¹⁸ For example, Jinting Deng gave the conclusion only according to a series of cases concerning intentional murders. See Jinting Deng, An Empirical Research on High Courts in China-- Comparative Evaluation of Guiding Cases in Unifying Judicial Decisions of Intentional Murders, Available at:

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2348669; Li Yougen only collected a set of traffic accident cases to explain the reason why Guiding Cases do not have binding force, See Li Yougen, Why Guiding Cases Do Not Have Binding Force, “Zhidaoxing Anli Weihe Meiyou Yuesu Li,” Law and Social Development, Fazhi yu Shehui Fazhan, 4th 2010, available at:

<http://www.cnki.net/KCMS/detail/detail.aspx?QueryID=2&CurRec=6&recid=&filename=SFAS201004009&dbname=CJFD2010&dbcode=CJFQ&pr=&urlid=&yx=&v=MzI0MzkxRnJDVVJMNmVaZVJ2Rnl2aFc3N090aXZLZmJHNEg5SE1xNDIGYlISOGVYMUx1eFITN0RoMVQzcVRyV00=>.

²¹⁹ Chart 5: Different Ways of Referring to GCs in Decisions, Guiding Cases Surveys, Guiding Cases, Stanford Law School China Guiding Cases Project, available at: <http://cgc.law.stanford.edu/guiding-cases-surveys/>.

²²⁰ Chart 4: Reasons for Not Considering GCs in Adjudication, Guiding Cases Surveys, Guiding Cases, Stanford Law School China Guiding Cases Project, available at: <http://cgc.law.stanford.edu/guiding-cases-surveys/>.

²²¹ Chart 13: The SPC Should Expand the Coverage and Scope of GCs, Guiding Cases Surveys, Guiding Cases, Stanford Law School China Guiding Cases Project, available at: <http://cgc.law.stanford.edu/guiding-cases-surveys/>.

²²² Guiding Case No. 4: WANG Zhicai, An Intentional Homicide Case, available at: <https://cgc.law.stanford.edu/guiding-cases/guiding-case-4/>.

²²³ Guiding Case No. 12: LI Fei, An Intentional Homicide Case, <https://cgc.law.stanford.edu/guiding-case-12/>.

²²⁴ Article 4 of Amendment (VIII) to the Criminal Law of the People’s Republic of China, states that “For a recidivist or a convict of murder, rape, robbery, abduction, arson, explosion, dissemination of hazardous substances

only 87 Guiding Cases in China. It is noteworthy that those cases selected as Guiding Cases have to go through the process of being recommended, assessed and issued. It thus takes a long time to shape and generate a new integrative conception and coordinate to create a new doctrine even under a top-down influence. Guiding Cases are still far from enough to unify the judicial interpretation of similar cases. Therefore, despite salient de facto binding effects of each Guiding Case, their vertical influence as a whole is, to some extent, undermined by the narrow scope of subjects they covered. Nevertheless, there is no doubt that the impacts of Guiding Cases can be more and more noticeable as long as SPC keep expanding the coverage of the Guiding Cases. The future development of Guiding Cases is yet easy to predicate.

“The GC system is still young, and may become more prominent as time goes on, but already other more organic attempts to create a body of common law, like that of the Beijing IP court, seem to be moving forward more smoothly. What is more important is the need for continuing efforts towards greater transparency so that a reliable and clear picture of judicial practice can take shape. This includes not only ensuring that online case databases are complete and easily accessible, but also that judges feel comfortable fully explaining their reasoning and the basis of their opinions.”²²⁵

B. The Horizontal Influence of Previous Judicial Decisions: The Collaborative Innovation of Local Courts

Both the vertical and horizontal influence of precedent on Chinese adjudication is mostly driven by the increasing transparency and accessibility of judicial opinions within recent decades. For a long period of time, the difficulty in accessing legal information was one of the major obstacles that Chinese judges and legal practitioners face in conducting legal research.²²⁶ Since the 1980s, the norms of judicial openness²²⁷ and development of technology has been gradually building up

or organized violence who is sentenced to death with a reprieve, the people's court may, in sentencing, decide to put restrictions on commutation of his sentence in light of the circumstances of the crime committed.” *Amendment (VIII) to the Criminal Law of the People's Republic of China* is issued by Standing Committee of the National People's Congress on February 25 of 2011, available at: <http://en.pkulaw.cn/display.aspx?cgid=145719&lib=law>.

²²⁵ Jeremy Dum, *The Curious Case of China's Guiding Cases System*, available at: <http://www.chinalawtranslate.com/the-curious-case-of-chinas-guiding-cases-system/?lang=en>.

²²⁶ Benjamin Liebman and Tim Wu, *China's Network Justice*, 8 *Chi. J. Int'l L.* 257, 258, 262 (2007), see also Wei Luo & Joan Liu, *A Complete Research Guide to the Laws of the People's Republic of China (PRC)* (January 15, 2013), available at: <http://www.lawinfochina.com/Article/Article1.shtm>.

²²⁷ Judicial openness in China includes openness of case filing, court trials, enforcement, hearing, document and trial affairs. As for document openness, the Supreme People's Court announced that, “[t]he people's courts may, according to the needs of legal advocacy, law research, case guidance and unification of standards for judgment, compile, print and publish various judgment documents in a centralized way. The judgment documents of the people's courts may be published on the Internet, except for the cases involving state secrets, juvenile delinquency and personal privacy, cases inappropriate for disclosure, and cases closed through mediation.” *Zuigao Renmin Fayuan Yinfa “Guanyu Sifa Gongkai De Liuxiang Guiding” he “Guanyu Renmin Fayuan Jiesshou Xinwen Meiti Yulun Jiandu De Ruogan Guiding” de Tongzhi* [Notice of the Supreme Peoples' Court on Issuing the Six Provisions on Judicial Openness and Several Provisions on the People's Courts' Exposure to Public Supervision through Mass

an unprecedented modern legal information system.²²⁸ Today, Chinese judges can read judicial decisions from selective collections of cases in print, including Supreme People's Court Gazette,²²⁹ Chinese Guiding Cases,²³⁰ and Selective Compilation of People's Courts.²³¹ They can also access to prior judgments decided by courts of all levels judicial hierarchy from different Chinese jurisdictions through online resources.²³² One of the most comprehensive online databases is Chinalawinfo,²³³ which was developed by the Legal Information Center of Peking University in 1985.²³⁴ It contains the full texts of 2174 statutes and more than 14 million judicial decisions.²³⁵ Judges and legal professionals can search and locate various judicial decisions by subject matters, keywords, levels of courts, judges, convictions, sentences, disputed issues, case summaries and judgment dates.²³⁶ Not only that, judges can be informed of various cases from conversations with their colleges and social media. The accessibility of prior judicial decisions provides judges with a channel for consulting other judges' views on similar issues when they adjudicate hard cases.

a. Maintaining Social Order: The Change of Conviction in Reaching a Harsher Punishment against DUI Crime

Media], issued by Supreme People's Court on Dec. 08, 2009, available at: <http://www.lawinfochina.com/display.aspx?lib=law&id=7913&CGid=>.

²²⁸ Benjamin Liebman and Tim Wu, China's Network Justice, 8 Chi. J. Int'l L. 257, 262-263 (2007).

²²⁹ This official collection has been regularly published by the Supreme People's Court of the People's Republic of China since 1985 (at first, issued four times each year; between 1989 and 2004, issued one time each two months; after 2004, issued one time per month). It carries the important national legislation, official documents, judicial interpretation and typical cases involving civil, criminal, economic, marine and administrative ones discussed and adopted by the Judicial Committee of the Supreme People's Court. Pursuant to the provisions of the Supreme People's Court, this authoritative edition can be cited in the judicial documents and court decisions among all the judicial interpretations. However, only some influential and typical cases are reported in the Gazette of the Supreme People's Court of the People's Republic of China. Available at: <http://www.court.gov.cn/qwfb/zgrmfygb/>.

²³⁰ Since Dec. 21, 2011, the Chinese Supreme People's court has been publishing Guiding Cases to which courts at all level are required to refer. Until January 2016, there has been fifty-six Guiding Cases. These cases are available on both print and various online databases, e.g. <http://www.chinacourt.org/law/searchproc/keyword/指导性案例/page/1.shtml>; <http://www.pkulaw.cn/Case/>.

²³¹ Renmin Fayuan Anli Xuan, 4 issues annually, published by the China Institute of Applied Jurisprudence under the Supreme People's Court. The table of contents of each issue is available at: <http://www.court.gov.cn/yyfx/yyfxyj/alyj/rmfyalx/>.

²³² Since 2010, the Chinese Supreme People's Court has been publishing judicial opinions decided by courts across China on its own website. The selected cases can be archived at: <http://www.chinacourt.org/article/index/id/MzAwNDAwMiAOAAA%3D.shtml>. In addition, the Chinese Supreme People's Court developed an official website named "China Judgments Online." It contains more than 16,559,000 judicial decisions of five types of disputes, including criminal, civil, administrative, state compensation, and enforcement.

²³³ Until May 14, 2016, it published 11,133,813 civil cases, 2,833,353 criminal cases, 462,996 administrative cases, 208,123 IP cases, 9,206 state compensation cases, and 230,662 enforcement cases. Among these decisions, there are 14,059 cases handed down in the Supreme People's Court, 206,967 in the higher people's courts, 2,598,675 in the intermediate people's courts, 11,267,834 in the local people's courts, and 78,933 in the specialized courts. Many of them are available both in English and Chinese. Available at: <http://www.pkulaw.cn/Case/>.

²³⁴ *Id.*, available at: <http://www.pkulaw.cn/help/index.html?item>.

²³⁵ *Id.*

²³⁶ *Id.*

Following the increasing accessibility of judicial decisions, judges in China started to expand their roles to fix the gap between law and new situations at their daily judicial work. The following series of cases on the drunk driving serve as an example to elaborate this change.

In Zhengzhou Municipal People's procuratorate v. Zhang Jinzhu (1998),²³⁷ defendant Zhang Jinzhu who was driving under influence hit a man and his son who were riding bicycles on the road, causing the victim Su Lei died instantly.²³⁸ However, Zhang Jinzhu didn't stop the car and dragged the victim Su Donghai and his bike over 1,500 meters.²³⁹ The Henan Provincial Intermediate People's Court held that Zhang Jinzhu was able to identify and control himself at the time of the accident because he was forced to stop the car after being intercepted by several police cars.²⁴⁰ The criminal circumstances were flagrant and their consequences were extremely serious. The court, therefore, accused the defendant of intentionally causing a death by badly injuring the victim with particularly ruthless means and sentenced him to death, in accordance with article 234 of Criminal Law.²⁴¹

In Southern Qingdao Local People's Procuratorate of Shandong Province v. Han Wenliang (2006),²⁴² defendant Han Wenliang, who was driving a vehicle on a road while intoxicated, collided with a taxi.²⁴³ The taxi driver and two passengers were killed while the one other passenger was seriously injured.²⁴⁴ The Southern Qingdao Local People's Court held that Han Wenliang violated traffic and transportation laws and regulations thereby causing major accidents involving one severe injury and three deaths.²⁴⁵ Thus, the court held that defendant Han Wenliang's behavior violated Article 133 of the Criminal Law of the People's Republic of China,²⁴⁶ and he was sentenced to six years imprisonment.²⁴⁷

²³⁷ Zhengzhou Renmin Jianchayuan Su Zhang Jinzhu (郑州人民检察院诉张金柱) [Zhengzhou Municipal People's procuratorate of Henan Province v. Zhang Jinzhu (1998)], available at: http://www.360doc.com/content/14/0320/01/54666_362038428.shtml.

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ Article 234 of Criminal Law of the People's Republic of China (97 Revision) states that: Whoever intentionally injures the person of another is to be sentenced to not more than three years of fixed-term imprisonment, criminal detention, or control. Whoever commits the crime in the preceding paragraph and causes a person's serious injury is to be sentenced to not less than three years and not more than 10 years of fixed-term imprisonment; if he causes a person's death or causes a person's serious deformity by badly injuring him with particularly ruthless means, he is to be sentenced to not less than 10 years of fixed-term imprisonment, life imprisonment, or death. *Zhonghua Renmin Gongheguo Xingfa (97 Xiuding) (中华人民共和国刑法 (97 修订))* [Criminal Law of the People's Republic of China (97 Revision)], art. 234, available at: <http://en.pkulaw.cn/display.aspx?egid=17010&lib=law>.

²⁴² Shandong Sheng Qingdao Shi Nanqu Renmin Jiancha Yuan Su Han Wenliang (2006) (山东省青岛市南区人民检察院诉韩文良 (2006)) [Southern Qingdao Local People's procuratorate v. Han Wenliang (2006)], Available at: <http://www.chinacourt.org/article/detail/2006/01/id/192772.shtml>;

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ "Whoever violates traffic and transportation laws and regulations thereby giving rise to major accidents involving severe injuries, deaths, or great losses of public and private properties are to be sentenced to not more than

In Foshan Municipal People’s Procuratorate of Guangdong Province v. Li Jingquan (2007),²⁴⁸ defendant Li Jingquan, who was driving under influence, hit the victim Li Jiexia who was riding a bike, and her son Chen Boyu who was on the back seat of the bike, causing Chen Boyu minor injury.²⁴⁹ Disregarding the safety of the victims and the villagers who were trying to stop him, Li Jingquan continued driving and caused two deaths and another one minor injury.²⁵⁰ The Guangdong Provincial Higher People's Court held that although the defendant Li Jingquan was driving drunk after hitting the victim Li Jiexia, he was still able to make a U-turn.²⁵¹ Additionally, although the wheels of the car were stuck in flower field by the roadside, he was able to drive the car back to the road.²⁵² It indicates that he still retained some of his faculties at the time of the incident.²⁵³ Ignoring the victim and villagers in front of the car who were trying to stop him and many of villager who came to the rescue, Li Jingquan still attempted to drive his car to escape the scene and charged toward Li Jiexia, who was already on the ground, and villager Li Xiquan, killing them both.²⁵⁴ This showed that the defendant was laissez-faire to the casualties and held indirect intent of endangering public safety.²⁵⁵ Therefore, his behavior constituted the crime of endangering public safety.²⁵⁶ The circumstances of the crime were flagrant and the consequences were serious.²⁵⁷ Nevertheless, as the defendant’s criminal intent was indirect, his subjective malice and person dangerousness were less serious than the ones in the cases of intentionally endangering public safety.²⁵⁸ He was in a serious state of intoxication at the time of the crime, which weakened his ability to identify and control and his attitude in confessing and repenting were considered “good” and he actively compensated the economic losses of the victims.²⁵⁹ This entitled him to a mitigated criminal punishment in accordance with

three years of fixed-term imprisonment; when fleeing the scene after an traffic and transportation accident or under other particularly odious circumstances, to not less than three years and not more than seven years of fixed-term imprisonment; when running away causes a person's death, to not less than seven years of fixed-term imprisonment.” Zhonghua Renmin Gongheguo Xingfa (97 Xiuding) (中华人民共和国刑法 (97 修订)) [Criminal Law of the People’s Republic of China (97 Revision)], art. 133, available at:

<http://en.pkulaw.cn/display.aspx?cgid=17010&lib=law;>

²⁴⁷ *Id.*; Shandong Sheng Qingdao Shi Nanqu Renmin Jiancha Yuan Su Han Wenliang (2006) (山东省青岛市南区人民检察院诉韩文良 (2006)) [Southern Qingdao Local People’s procuratorate v. Han Wenliang (2006)], Available at: <http://www.chinacourt.org/article/detail/2006/01/id/192772.shtml>;

²⁴⁸ Guangdong Sheng Foshan Shi Renmin Jianchayuan Su Li Jingquan (广东省佛山市人民检察院诉黎景全(2007)) [Foshan Municipal People’s Procuratorate of Guangdong Province v. Li Jingquan (2007)], Available at: http://www.pkulaw.cn/fulltext_form.aspx?Db=pfnl&Gid=117731113;

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.*

the law.²⁶⁰ Accordingly, the defendant Li Jingquan was found to commit the crime of endangering public safety²⁶¹ and sentenced to life imprisonment and deprived of political rights.²⁶²

In Shenyang Municipal People's procuratorate of Liaoning Province v. Wu Kai (2008)²⁶³, defendant Wu Kai who was driving a vehicle on a road while intoxicated, hit a cyclist after colliding with a bus.²⁶⁴ He continued to drive another 534 meters and hit victims Sun, Tong, Wang, Zhang, killing three of the five victims and seriously injuring the remaining two.²⁶⁵ The Shenyang Municipal Intermediate People's Court held that Wu Kai violated traffic and transportation laws and regulations thereby giving rise to major accidents involving two severe injuries and three deaths.²⁶⁶ Due to his reckless behavior of driving a vehicle while intoxicated, defendant Wu Kai was found guilty of endangering public safety and was sentenced to seven years imprisonment.²⁶⁷

In Chengdu Municipal People's Procuratorate of Sichuan Province v. Sun Weiming (2009)²⁶⁸, defendant Sun Weiming drove a car for a long time without obtaining a driver's license and repeatedly violated traffic regulations. On December 14 at noon, Sun Weiming and his parents celebrated their relative's birthday with heavy drinking. After a rear-end collision with other vehicles while under influence, Sun Weiming drove over the speed limit to escape and collided with four; four people were killed and one seriously injured. Sichuan Provincial Higher People's Court held that the defendant Sun Weiming disregarded traffic regulations and public safety and

²⁶⁰ *Id.*

²⁶¹ "Whoever sets fire, breaches dikes, causes explosions, and spreads poison; employs other dangerous means that lead to serious injuries or death; or causes public or private property major losses is to be sentenced to not less than 10 years of fixed-term imprisonment, life imprisonment, or death. Whoever commits the crimes in the preceding paragraph negligently is to be sentenced to not less than three years to not more than seven years of fixed-term imprisonment; or not more than three years of fixed-term imprisonment, or criminal detention, when circumstances are relatively minor." *Zhonghua Renmin Gongheguo Xingfa (97 Xiuding) (中华人民共和国刑法 (97 修订))* [Criminal Law of the People's Republic of China (97 Revision)], art. 115, available at: <http://en.pkulaw.cn/display.aspx?cgid=17010&lib=law>;

²⁶² *Id.*; *Guangdong Sheng Foshan Shi Renmin Jianchayuan Su Li Jingquan (广东省佛山市人民检察院诉黎景全 (2007))* [Foshan Municipal People's Procuratorate of Guangdong Province v. Li Jingquan (2007)], Available at: http://www.pkulaw.cn/fulltext_form.aspx?Db=pfnl&Gid=117731113;

²⁶³ *Liaoning Sheng Renmin Jianchayuan Su Wu Kai (辽宁省沈阳市人民检察院诉吴凯)* [Shenyang Municipal People's Procuratorate of Liaoning Province v. Wu Kai (2008)], available at: <http://www.chinacourt.org/article/detail/2009/05/id/356840.shtml>;

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Sichuan Sheng Chengdushi Renmin Jianchayuan Su Sun Weiming (四川省成都市人民检察院诉孙伟铭)* [Chengdu Municipal People's Procuratorate of Sichuan Province v. Sun Weiming (2009)], available at: http://www.pkulaw.cn/fulltext_form.aspx?Db=pfnl&Gid=117685580;

drove the car for a long time without obtaining a driver's license with repeated violation of traffic regulations. And after causing traffic accident while under the influence, he continued to drive over the speed limit and hit many vehicles, which caused the serious consequences of casualties, indicating that he was laissez-faire to the occurrence of harmful consequences with indirect intent of endangering public safety. His behavior constituted the crime of endangering public safety. The circumstances of the crime were flagrant and the consequences were serious. Nevertheless, Su Weiming's culpability was lessened by the fact that he did not wish or actively pursue the occurrence of such harmful consequences. Since he was in a serious state of intoxication at the time of the crime that weakened his ability to identify and control his behavior. His attitude in confessing and repenting showed remorse and he actively compensated the victims. Accordingly, the Sichuan Provincial Higher People's Court found the defendant Sun Weiming guilty endangering public safety and sentenced him to life imprisonment and deprivation of political rights for life.

Certainly the legislature could have reacted to the changed circumstances by amending the statute, but its drafters did not review their product as needing periodic updating. Even if some legislative updating is considered a good thing, its absence forced the court to play a dynamic role. From these five judicial decisions made by local, intermediate and higher courts from different provinces of China, the legal consequences of driving while intoxicated (DWI) crimes has been changed gradually and quietly by courts from 1998 to 2009. Driving a motor vehicle while intoxicated and causing several deaths or severe injuries could only be convicted of traffic accident crimes in the past, for which the maximum penalty is seven years imprisonment. Under several years of judicial efforts, this category of drunk drivers may be found guilty of endangering public safety and the scope of corresponding penalties includes death sentence. Even though there was no relevant statutory amendment regarding DWI crimes, Chinese judges accumulated the support of colleagues and the public, step by step, in preventing the reckless behavior of drunk driving, and then generated a new doctrine to severely punish drunk drivers in order to protect road safety. On September 8, 2009, Chinese Supreme Court held a news conference and put forward a guiding opinion on the application of law to the crime of DUI and announced Foshan Municipal People's procuratorate v. Li Jingquan (2007) and Chengdu Municipal People's procuratorate v. Sun Weiming (2009) as two typical cases of drunk driving offenses²⁶⁹ to guide the judicial decisions of similar cases in the future.²⁷⁰ Instead of applying

²⁶⁹ The Notice by the Chinese Supreme People's Court affirmed the judgments of Foshan Municipal People's procuratorate v. Li Jingquan (2007) and Chengdu Municipal People's procuratorate v. Sun Weiming (2009) as follows: "Under general circumstances, where any drunk driving constitutes this crime, but the doer neither expects nor pursues the occurrence of the harmful consequences subjectively, that shall belong to indirect intentional crimes, and the subjective malignancy of this conduct is different from that of a direct intentional crime in which a doer maliciously hits people with car for the purpose of creating troubles, and causes heavy casualties, therefore, the aforesaid crimes should be differentiated when the penalties are determined. In addition, when an actor drives while intoxicated, his ability of identification and control will be weakened actually, and it should be taken into consideration when the punishment is determined. For the crimes of DWI committed by the accused, Li Jingquan and Sun Weiming, the accused were not sentenced to death, but life imprisonment respectively. The courts considered that the two accused committed indirect intentional crimes, comparing with direct intentional crimes, the subjective malignancy was not so malicious, and the personal dangerousness was not so dangerous; when they committed the crimes, their abilities to control the motor vehicle were weakened; their attitudes of confession and repentance were good after they were brought to justice, and they

article 133 of Criminal Law regarding traffic crimes,²⁷¹ courts shall convict whoever driving while intoxicated causing heavy casualties of endangering the public safety in a dangerous way under section 1 of article 115 of Criminal Law.²⁷² In addition, the Chinese Supreme People's Court deliberately distinguished DUI crime from direct intentional crime "in which a person maliciously hits people with a car for the purpose of creating troubles and causes heavy casualties."²⁷³ As drunk drivers' abilities of identification and control are relatively weak at the time of their crime, the Chinese Supreme People's Court agreed with the court from Guangdong and Sichuan provinces on the ground that life sentence would be more appropriate than capital punishment for accused.²⁷⁴

Furthermore, driving while intoxicated may be subject to a legal sanction of criminal law, even without any damage caused. On February 25 of 2011, Amendment (VIII) to the Criminal Law of the People's Republic of China issued. One provision has been added after article 133 of Criminal Law of the People's Republic of China as follows: "Whoever ... drives a motor vehicle on a road while intoxicated shall be sentenced to criminal detention and a fine."²⁷⁵ Even though judicial decisions are not recognized as sources of law in China, they nevertheless precipitate and promote the promulgation of judicial interpretation by Chinese Supreme Court and new statutory amendment.

In fact, drunk driving related crimes had been shown to be rising in China until 2009, causing serious consequences and there were repeated occurrences of "one accident causing multiple deaths and injuries." According to police statistics, in 1998 there were 5075 cases of drunk driving accidents,²⁷⁶ resulting in 2363 deaths. In 2008, there were 7518 accidents, causing 3060

actively compensated the victims for their economic losses and obtained the forgiveness of the victims to a certain extent. The sentencing made in the final judgments by Guangdong Higher People's Court and Sichuan Higher People's Court on the two accused was appropriate." Zuigao Renmin Fayuan Guanyu Yinfa Zuijiu Jiache Fanzui Falv Shiyong Wenti Zhidao Yijian Ji Xiangguan Dianxing Anli De Tongzhi (最高人民法院于引发醉酒驾车犯罪法律适用问题指导意见及相关典型案例的通知) [Notice of the Supreme People's Court on Issuing the Guiding Opinions on Issues Concerning the Application of Law to the Crime of DWI and the Relevant Typical Cases], available at: <http://en.pkulaw.cn/display.aspx?cgid=124240&lib=law>;

²⁷⁰ Zuigao Renmin Fayuan Guanyu Yinfa Zuijiu Jiache Fanzui Falv Shiyong Wenti Zhidao Yijian Ji Xiangguan Dianxing Anli De Tongzhi (最高人民法院于引发醉酒驾车犯罪法律适用问题指导意见及相关典型案例的通知) [Notice of the Supreme People's Court on Issuing the Guiding Opinions on Issues Concerning the Application of Law to the Crime of DWI and the Relevant Typical Cases], available at: <http://en.pkulaw.cn/display.aspx?cgid=124240&lib=law>;

²⁷¹ Supra note 248.

²⁷² Supra note 263.

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ Zhonghua Renmin Gongheguo Xingfa Xiuzhengan (Ba) (中华人民共和国刑法修正案 (八)) [Amendment (VIII) to the Criminal Law of the People's Republic of China] (promulgated and effective on February 25 of 2011), art. 22, Available at: <http://en.pkulaw.cn/display.aspx?cgid=145719&lib=law>;

²⁷⁶ It includes driving under influence (DUI) and driving while intoxicated (DWI). Chinese Supreme Court distinguished DUI and DWI by the degree of alcohol influence in their notice. See Zuigao Renmin Fayuan Guanyu Yinfa Zuijiu Jiache Fanzui Falv Shiyong Wenti Zhidao Yijian Ji Xiangguan Dianxing Anli De Tongzhi (最高人民

deaths. Notwithstanding, neither Chinese legislature nor Chinese Supreme Court takes quick action to confront this situation. Noticing that some judges associated new facts with the statute to make some changes on the conviction of drunk driving crimes from various sources, other judges started to voluntarily follow the previous judgments. “The idea of incremental, step-by-step development, with each step being fully realized or complete, resembles punctuated evolution.”²⁷⁷ With more and more judicial decisions of similar cases moving towards the same direction, public attention and support against drunk driving were raised, and the new legal doctrine was eventually generated over time. Within the scope of criminal law, judges aggravated legal punishment against DWI offenders by turning to apply another provision of criminal law in terms of endangering public safety rather than article 133 related to traffic crime. From these cases, you can observe a new legal doctrine and a judicial consensus were seeded among multiple local courts, a judicial interpretation by Chinese Supreme Court and an amendment regarding DWI crimes did not come out until public support of raising drunk drivers’ legal liabilities had been significantly accumulated during two decades.

b. Handling New Situation: The Adjustment of Sentence in Entering a Lenient Ruling of ATM Theft

The cases discussed above are not the only examples to demonstrate the horizontal influence of previous judicial decisions handed down in Chinese local courts. A highly controversial case first tried in the Guangzhou Municipal Intermediate Peoples’ Court of Guangdong province²⁷⁸ also contributed to the lenient judgments of two sister courts²⁷⁹ as well as an amendment to the Criminal Law of the People’s Republic of China.²⁸⁰ In Chinese two-tier trial system,²⁸¹ this case

法院关于引发醉酒驾车犯罪法律适用问题指导意见及相关典型案例的通知) [Notice of the Supreme People's Court on Issuing the Guiding Opinions on Issues Concerning the Application of Law to the Crime of DWI and the Relevant Typical Cases], available at: <http://en.pkulaw.cn/display.aspx?cgid=124240&lib=law>;

²⁷⁷ See Steven Jay Gould, *Ontogeny&Phylogeny*, cited by Edward L. Rubin and Malcolm Feeley, *Creating Legal Doctrine*, 69 S. Cal. L. Rev. 1989 (1996), available at: <http://scholarship.law.berkeley.edu/facpubs/2067>.

²⁷⁸ Guangdongsheng Guangzhoushi Renmin Jianchayuan Su Xuting Daoqie An (2007) (广东省广州市人民检察院诉许霆盗窃案(2007))[Guangzhou Municipal Peoples’ Procuratorate of Guangdong Province v. Xu Ting (2007)], available at: http://www.pkulaw.cn/Case/pfnl_117531043.html?match=Exact.

²⁷⁹ Zhejiangsheng Ningboshi Renmin Jianchayuan Su Tang Fengjun Deng Daoqie Yanshi Yingman Fanzui Suode An (2008) (浙江省宁波市人民检察院诉唐风军等盗窃、掩饰、隐瞒犯罪所得案) [Ningbo Municipal People’s Procuratorate of Zhejiang Province v. Tang Fengjun etc. (2008)], available at: http://www.pkulaw.cn/Case/pfnl_119202516.html?match=Exact; Yunnan Sheng Qujing Shi Zhongji Renmin Fayuan (2009, Zaishen Caijue) (云南省曲靖市中级人民法院 (2009, (2009)云高刑再终字第 8 号) [Qujing Municipal People’s Procuratorate of Yunnan Province v. He Peng (2009, Trial Supervision)], available at: http://article.chinalawinfo.com/ArticleHtml/Article_53561.shtml.

²⁸⁰ “Article 246 is amended as: ‘Whoever steals a relatively large amount of public or private property, commits thefts many times, commits a burglary or carries a lethal weapon to steal or pick pockets shall be sentenced to imprisonment of not more than 3 years, criminal detention or control and/or a fine; if the amount involved is huge or there is any other serious circumstance, shall be sentenced to imprisonment of not less than 3 years but not more than 10 years and a fine; or if the amount involved is especially huge or there is any other especially serious circumstance, shall be sentenced to imprisonment of not less than 10 years or life imprisonment and a fine or forfeiture of property.’” *Zhonghua Renmin Gongheguo Xingfa Xiuzhengan (Ba)* (中华人民共和国刑法修正案 (八)) [Amendment (VIII) to the Criminal Law of the People’s Republic of China] (promulgated and effective on February 25 of 2011), art. 246, Available at: <http://en.pkulaw.cn/display.aspx?cgid=145719&lib=law>.

experienced five instances to reach the final conclusion.²⁸² Unlike DUI cases, the judges in this case even went beyond the scope of criminal law and gave the ATM larcener a sentence much more lenient than the penalty prescribed in criminal law at that time.

What makes this case stand out from millions of theft cases in China? It is because that this case made judges, as well as public, realize how harsh and unreasonable the provision of Criminal Law (1997) with respect to the ATM theft was. According to Article 264 of Criminal Law (1997),²⁸³ stealing money from the financial institutions can be subject to life in jail or even death penalty. A hot debate about the blurred definition of financial institutions and the aggravated circumstances in the theft crime has been boosted after the first instance of the case. In the case of Guangzhou Municipal People's Procuratorate of Guangdong Province v. Xu Ting (2007), the defendant, Xu Ting, accidentally found out an ATM went wrong when he withdrew his salaries from his debit card account which has balance of ¥170 (approximately, \$26). After having discovered that the ATM could give money which was not limited to his bank account

²⁸¹ "Two-tier Trial System" refers to that upon appeal, every case can be tried by two levels of courts under jurisdiction. Normally the judgments of the second instance are final and immediately come into effective. China is one of nations with "two-tier trial system." "After trial by a people's court of second instance, a case is closed." Zhonghua Renmin Gongheguo Xingshi Susong Fa (2012 Xiuzheng) (中华人民共和国刑事诉讼法(2012 修正) [Criminal Procedure Law of the People's Republic of China (2012 Amendment)] (promulgated and effective on Mar. 14, 2012), art. 10, available at: <http://en.pkulaw.cn/display.aspx?cgid=169667&lib=law>.

²⁸² This case was originally tried and judged by Guangzhou Municipal People's court of Guangdong province and then this case was accepted by Guangdong higher people's court for appeal and was remanded to Guangzhou Municipal People's court of Guangdong province. Guangzhou Municipal People's court of Guangdong province's second decision was again appealed to Guangdong higher people's court. The supreme people's court set a bench and affirmed the decision of the higher court. See Guangdongsheng Guangzhoushi Renmin Jianchayuan Su Xuting Daoqie An (2007, 2008) (广东省广州市人民检察院诉许霆盗窃案: (2007, 2008): (2007) 穗中法刑二初字第 196 号; (2008) 粤高法刑一终字第 5 号; (2008) 穗中法刑二重字第 2 号; (2008) 粤高法刑一终字第 170 号; (2008) 刑核字第 18 号) [Guangzhou Municipal Peoples' Procuratorate of Guangdong Province v. Xu Ting (2007, 2008)], available at: http://www.pkulaw.cn/case/pfnl_117531043.html?keywords=许霆&match=Exact; http://www.pkulaw.cn/case/pfnl_117531042.html?keywords=许霆&match=Exact; http://www.law-lib.com/flws/flws_view.asp?id=38211; http://pkulaw.com/case/pfnl_117544330.html?match=Exact; http://www.pkulaw.cn/case/pfnl_119202235.html?keywords=许霆&match=Exact.

²⁸³ "Those who steal relatively large amounts of public or private property and money or have committed several thefts are to be sentenced to three years or fewer in prison or put under criminal detention or surveillance, in addition to fines; or are to be fined. Those stealing large amounts of property and money or involving in other serious cases are to be sentenced to three to 10 years in prison, in addition to fines. Those stealing extraordinarily large amounts of property and money or involving in especially serious cases are to be sentenced to 10 years or more in prison or given life sentences, in addition to fines or confiscation of property. Those falling in one or more of the following cases are to be given life sentence or sentenced to death, in addition to confiscation of property: (1) Those stealing extraordinarily large amounts of money and property from financial institutions; (2) those committing serious thefts of precious cultural relics." Zhonghua Renmin Gongheguo Xingfa (97 Xiuding) (中华人民共和国刑法 (97 修订)) [Criminal Law of the People's Republic of China (97 Revision)], art. 264, available at: <http://en.pkulaw.cn/display.aspx?cgid=17010&lib=law>;

balance, he intentionally withdrew ¥170,000 (approximately \$26,560) from this ATM.²⁸⁴ Guangzhou Municipal People's Court first heard this case and found Xu Ting to intentionally steal extraordinarily large amounts of money²⁸⁵ from financial institutions²⁸⁶ for the purpose of illegal possession. The intermediate court sentenced Xu Ting to life imprisonment for violating the section 1 of article 264 of Criminal Law.²⁸⁷ It was not a surprise decision at that time. Because ATMs are operated by banks which are within the scope of financial institutions. Xu Ting's act of stealing money from ATM met the circumstances for giving him a life sentence or death penalty under the criminal law. Because the criminal provision regarding ATM theft is so regulated, Xu Ting is not the only person who was sentenced to life imprisonment due to ATM theft. However, he is the luckiest one after his case attracted the attention of mass media.

²⁸⁴ In this case, Xu Ting had a crime partner, Guo Anshan, who withdrew ¥1,800 (approximately, \$281) from the ATM and was sentenced in a local people's court due to the small amount of stealing money.

²⁸⁵ Under the "Provision of the Supreme People's Court, the Supreme People's Procuratorate and Ministry of Public Security on Issues Concerning the Determination Standards of Amount Prescribed in the Crime of Theft" (1998) which has been abolished in 2013, whoever steals public or private property of 500 yuan to 2,000 yuan and more, 5,000 yuan to 20,000 yuan and more, or 30,000 yuan to 100,000 yuan and more shall be deemed to respectively fall within the scope of "relatively large amount", "large amount" and "extraordinarily large amount" as prescribed in Article 264 of the Criminal Law. The higher people's courts and the people's procuratorates of all provinces, autonomous regions and municipalities directly under the Central Government may, in light of the economic development status of their respective regions, and in consideration of the social security situation, determine, within the scope of the amounts specified in the preceding paragraph, specific amount standards for their respective regions. Zuigao Renmin Fayuan Guanyu Shenli Daoqie Anjian Juti Yingyong Falv Ruogan Wenti De Jieshi (最高人民法院关于盗窃案件具体应用法律若干问题的解释) [Interpretation of Supreme People's Court on Several Issues Concerning the Application of Law in the Handling of Criminal Cases of Theft] (promulgated by Supreme People's Court on Mar. 17, 1998, effective on Mar. 17, 1998), art. 3, available at: <http://en.pkulaw.cn/display.aspx?cgid=198681&lib=law>; see also Zuigao Renmin Fayuan, Zuigao Renmin Jianchayuan, Gonganbu Guanyu Daoqiezui Shue Rending Biaozhun Wenti De Guiding (最高人民法院、最高人民检察院、公安部关于盗窃罪数额认定标准问题的规定) [Provision of the Supreme People's Court, the Supreme People's Procuratorate and Ministry of Public Security of Issues Concerning the Determination Standards of Amount Prescribed in the Crime of Theft] (promulgated by Supreme People's Court, Supreme People's Procuratorate and Ministry of Public Security on Mar. 26, 1998, effective on Mar. 26, 1998), art. 1, 2, 3, available at: [http://www.pkulaw.cn/fulltext_form.aspx?Db=chl&Gid=20227&keyword= 最高 人民 法院 %20 盗 窃 &EncodingName=&Search_Mode=accurate](http://www.pkulaw.cn/fulltext_form.aspx?Db=chl&Gid=20227&keyword=最高人民法院%20盗窃&EncodingName=&Search_Mode=accurate).

²⁸⁶ Under the "Provision of the Supreme People's Court, the Supreme People's Procuratorate and Ministry of Public Security on Issues Concerning the Determination Standards of Amount Prescribed in the Crime of Theft" (1998) which has been abolished in 2013, the "stealing financial institutions" in article 264 of the criminal law refers to stealing operating funds, negotiable securities and clients' funds, such as personal savings, bonds, and other properties, corporate expense funds and stocks. Zuigao Renmin Fayuan Guanyu Shenli Daoqie Anjian Juti Yingyong Falv Ruogan Wenti De Jieshi (最高人民法院关于盗窃案件具体应用法律若干问题的解释) [Interpretation of Supreme People's Court on Several Issues Concerning the Application of Law in the Handling of Criminal Cases of Theft] (promulgated by Supreme People's Court on Mar. 17, 1998, effective on Mar. 17, 1998), art. 8, available at: <http://en.pkulaw.cn/display.aspx?cgid=198681&lib=law>.

²⁸⁷ "Those falling in one or more of the following cases are to be given life sentence or sentenced to death, in addition to confiscation of property: (1) Those stealing extraordinarily large amounts of money and property from financial institutions;" Zhonghua Renmin Gongheguo Xingfa (97 Xiuding) (中华人民共和国刑法 (97 修订)) [Criminal Law of the People's Republic of China (97 Revision)], art. 264, available at: <http://en.pkulaw.cn/display.aspx?cgid=17010&lib=law>;

After the decision of the first instance was made, Xu Ting appealed the case to the Guangzhou Higher People's Court.²⁸⁸ The higher court deems that the facts found in the first instance of which determined Xu Ting to commit theft were unclear and the findings lacked legal basis.²⁸⁹ The higher court thereby remanded the case to the original court for retrial.²⁹⁰ The intermediate court reheard the case and sentenced Xu Ting to five-year imprisonment which was below the legally prescribed punishment based on his relatively slight subjective malevolence and contingency of his criminal act followed by ATM breakdown.²⁹¹ Upon Xu Ting's appeal, the higher court affirmed the intermediate court's second decision as to five-year imprisonment on May 23 of 2008 with the further approval of Chinese Supreme People's Court on August 20 of 2008.²⁹²

The case of Xu Ting actually brought hope to ATM larceners. The influence of the decisions made by an intermediate court and a higher court of Guangdong province was not limited within the jurisdiction of Guangdong province. It immensely extended to courts under other jurisdictions. One of the cases before sister courts even changed its effective decision based on the case of Xu Ting—Qujing Municipal People's Procuratorate of Yunan Province v. He Peng (2002).²⁹³ In 2001, Defendant, He Peng, realized the technical problems of Agricultural Bank of China when he was checking his account balance in an ATM.²⁹⁴ He then used the same debit card of Agricultural Bank of China in which only has, in fact, only ¥10 (equivalent approximately \$1.56) to withdraw ¥429700 (equivalent approximately \$67140.63) from multiples ATMs.²⁹⁵ On his way home to hide these illegally attained money, he threw his debit card into a sewer and called his mum asking her to report Agricultural Bank of China about his lost debit card.²⁹⁶ After he returned home, he spent these money on shopping including purchasing a cell phone, and deposited the rest of money into two of his classmates' bank

²⁸⁸ Guangdongsheng Guangzhoushi Renmin Jianchayuan Su Xuting Daoqie An (2007, 2008) (广东省广州市人民检察院诉许霆盗窃罪: (2008), (2008) 粤高法刑一终字第 5 号 [Guangzhou Municipal Peoples' Procuratorate of Guangdong Province v. Xu Ting (2008)], available at: http://www.pkulaw.cn/case/pfnl_119202235.html?keywords=许霆&match=Exact.

²⁸⁹ *Id.*

²⁹⁰ *Id.*

²⁹¹ Guangdongsheng Guangzhoushi Renmin Jianchayuan Su Xuting Daoqie An (2007, 2008) (广东省广州市人民检察院诉许霆盗窃罪 (2008), (2008) 穗中法刑二重字第 2 号) [Guangzhou Municipal Peoples' Procuratorate of Guangdong Province v. Xu Ting (2008)], available at: http://www.pkulaw.cn/case/pfnl_119202235.html?keywords=许霆&match=Exact.

²⁹² Guangdongsheng Guangzhoushi Renmin Jianchayuan Su Xuting Daoqie An (2007, 2008) (广东省广州市人民检察院诉许霆盗窃罪 (2008), (2008) 粤高法刑一终字第 170 号; (2008) 刑核字第 18 号) [Guangzhou Municipal Peoples' Procuratorate of Guangdong Province v. Xu Ting (2008)], available at: http://www.pkulaw.cn/case/pfnl_119202235.html?keywords=许霆&match=Exact.

²⁹³ Henansheng Qujingshi Renmin Jiancha yuan Su Hepeng Daoqie An (2002) (云南省曲靖市人民检察院诉何鹏盗窃罪 (2002), (2002) 曲刑初字第 66 号, (2002) 云高刑终字第 1397 号, (2009) 云高刑再终字第 8 号) [Qujing Municipal Peoples' Procuratorate of Yunan Province v. He Peng (2002)], available at: http://www.pkulaw.cn/case/pfnl_117486374.html?keywords=何鹏盗窃罪&match=Exact.

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ *Id.*

accounts.²⁹⁷ The Qujing Municipal People's Court first tried this case.²⁹⁸ During the trial, He Peng's attorney urged that his client's over-withdrawal was an act under the bank's authorization given the technical problems of Agricultural Bank of China. He Peng's act thus should be recognized as unjust enrichment under General Principles of the Civil Law of the People's Republic of China rather than theft under criminal law.²⁹⁹ While disregarding this argument, the court determined that Xu Peng had intentions of secretly stealing money from the bank considering the fact that he discarded his debit card and called his mum to report the card lost. He Peng was found to steal extraordinarily large amounts of money from financial institutions and sentenced to life imprisonment pursuant to section 1 of article 264 of criminal law. The appeal court further affirmed on the trial court's decision.³⁰⁰ When Xu Ting was given a lenient five-year sentence, He Peng had been serving in jail for almost six years. He Peng's application for retrial seemed futile until ATM theft cases had received much public attention following Xu Ting case's retrial. News media then reported about He Peng case and named He Peng as "Yunnan version of Xu Ting."³⁰¹ The head of news center of the Higher People's Court of Yunnan Province voiced, in his interview with media, that "the procedure of retrial of He Peng case will not start unless Xu Ting case comes out a final result."³⁰² After the Higher People's Court of Guangdong Province's retrial decision of Xu Ting case has been affirmed by Supreme People's Court of China in August of 2008, the Higher People's Court of Yunnan Province finally accepted He Peng's application for retrial and entered a ruling modifying He Peng's original life sentence to eight and a half years imprisonment on 18 November 2009.³⁰³ The retrial ruling of He Peng case was based on the concerns that He Peng's criminal intent was not premeditated, but accidentally triggered by the technical problems of Agricultural Bank of China; that the circumstances of his crime were relatively minor and his subjective malevolence was slight; that He Peng's act caused no actual damages as he returned all the stolen money to the bank after being arrested.³⁰⁴ Under Article 63 of criminal law, the retrial court thereby sentenced him eight and a half years in jail which was below legally prescribed punishment.³⁰⁵ Besides

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ Henansheng Qujingshi Renmin Jiancha yuan Su Hepeng Daoqie An (2002) (云南省曲靖市人民检察院诉何鹏盗窃案 (2002), (2002) 云高刑终字第 1397 号) [Qujing Municipal People's Procuratorate of Yunan Province v. He Peng (2002)], available at: http://www.pkulaw.cn/case/pfnl_117486374.html?keywords=何鹏盗窃案&match=Exact.

³⁰¹ Yunan "Xuting" Wuqi Tuxing Zhoujian Wei Banian Jiangyu Xiayue Huoshi (云南"许霆"无期徒刑骤减为 8 年将于下月获释) [The Sentence of "Xuting of Yunnan Version" Immediately Dropped to Eight Years He Will Be Released Next Month], available at: <http://news.sohu.com/20091215/n268947762.shtml>; see also Yunan "Xuting An" Gaipan Wuqi Tuxing Jianxing Wei Banian Ban (云南"许霆案"改判 无期徒刑减刑为 8 年半) [The Modification of the Final Judgment of the Case of "Xu Ting of Yunnan Version" The Life Sentence was Reduced to Eight and A Half Years], available at: <http://news.qq.com/a/20091215/000075.htm>.

³⁰² Yunansheng Gaoyuan: Guangzhou Xuting An Bujie "Yunan Xuting An" Bu Chongshen (云南省高院: 广州许霆案不结"云南许霆案"不重审) [The Higher People's Court of Yunnan Province: The Case of "Xuting of Yunnan Version" Will Not Be Retried Until The Xu Ting Case Is Closed], available at: http://news.xinhuanet.com/legal/2008-04/17/content_7995230.htm.

³⁰³ Henansheng Qujingshi Renmin Jiancha yuan Su Hepeng Daoqie An (2002) (云南省曲靖市人民检察院诉何鹏盗窃案 (2002), (2009) 云高刑再终字第 8 号) [Qujing Municipal People's Procuratorate of Yunan Province v. He Peng (2002)], available at: <http://www.chinanews.com/sh/news/2009/12-15/2018010.shtml>.

³⁰⁴ *Id.*

³⁰⁵ "Where the circumstances of a criminal element are such as to give him a mitigated punishment under the

“Xu Ting of Yunnan version,” there was “Xu Ting of Ningbo version” sued in Ningbo Municipal People’s Procuratorate of Zhejiang Province v. Tang Feng Guang etc. (2008)³⁰⁶ also brought lots of public attentions. The defendant, Tang Fengguang, intentionally transferred ¥589,500 (equivalent approximately \$92,109.38) to his bank account from his sibling’s debit card account which only had ¥4.49 (equivalent approximately \$0.70) after accidentally discovered the ATM’s technical problem.³⁰⁷ Even though this case was accepted by court earlier than the acceptance date of Xu Ting case, the Ningbo Municipal Peoples’ Court gave the defendant a lenient sentence of seven-year imprisonment based on his relatively slight subjective malevolence and contingency of his criminal act on July 15, 2008 which was almost two months after the final judgments of Xu Ting case was made.³⁰⁸ During the period of the first instance, Ningbo Municipal People’s Procuratorate remanded the case to the public security office twice for supplementary investigation.³⁰⁹ The procurator handling this case told a report that they were paying close attention to this case as well as the progress of Xu Ting case.³¹⁰

Scholars, in China where legal system was funded under civil law tradition, have mixed feeling about the fact that the modification of He Peng case’s judgment followed Xu Ting case’s decision rather than an amendment to Chinese criminal law.³¹¹ Some of them criticized that the

stipulations of this law, he shall be sentenced to a punishment below the legally prescribed punishment. Although the circumstances of a criminal element do not warrant giving him a mitigated punishment under the stipulations of this law, he too may be sentenced to a punishment below the legally prescribed punishment based on the special situation of the case and with the approval of the Supreme People’s Court.” Zhongguo Renmin Gongheguo Xingfa (1997 Xiuding) (《中华人民共和国刑法(1997修订)》) [Criminal Law of the People’s Republic of China (97 Revision)], art. 63, available at: <http://en.pkulaw.cn/Display.aspx?lib=law&Cgid=17010#264>.

³⁰⁶ Ningbo Shi Renmin Jianchayuan Su Tang Fengjun Daoqie Deng (2008) (宁波市人民检察院诉唐风军等 (2008)): (2008)甬刑初字第 86 号; (2008) 浙刑一终字第 185 号; (2008) 刑核字第 64 号 [Ningbo Municipal People’s Procuratorate v. Tang Jun Feng etc. (2008)], Available at: [http://www.pkulaw.cn/case/pfnl_118615430.html?keywords=\(2008\)甬刑初字第86号&match=Exact%2C%20Piece](http://www.pkulaw.cn/case/pfnl_118615430.html?keywords=(2008)甬刑初字第86号&match=Exact%2C%20Piece).

³⁰⁷ *Id.*

³⁰⁸ *Id.*

³⁰⁹ News CN, Ningbo Xuting An Jiang Kaiting Tangshi Xiongdi Shexian Daoqie Zui Jiang Gongsu (宁波许霆案将开庭 唐氏兄弟涉嫌盗窃罪将公诉) [The case of Xu Ting of Ningbo Version Will Hold A Trial The Tang Siblings Suspected of Theft Will Be Sued], Apr. 10, 2008, available at: http://news.xinhuanet.com/legal/2008-04/10/content_7950008.htm.

³¹⁰ *Id.*

³¹¹ Zhao Binzhi, Zhang Xinxiang, Xingshi Caipan Buqueding Xing Xianxiang Jiedu: Dui “Xuting An” De Chongxin Jiedu (刑事裁判不确定性现象解读——对“许霆案”的重新解读) [The Instability of Criminal Judgment: A Refresh Interpretation of Xuting Case], 8 Faxue (法学) [Law Science] 36, 36-52; Chen Ruihua, Tuojiang De Yema: Cong Xuting An Kan Fayuan De Ziyou Cailiangquan (脱缰的野马: 从许霆案看法院的自由裁量权) [The Wild Horse: The Review of Courts’ Discretion Based on the Case of Xuting], 1 Zhongwai Faxue (中外法学) [Peking University Law Journal] 67, 67-81; Lv Jianqing, Jia Hongli, Qiantan Bianzheng Siwei Zai Falv Shijian Zhongde Yunyong: You Xuting An Hepeng An Zuizhong Panjue De Quehan Yinfa De Sikao (浅谈辩证思维在法律实践中的运用——由许霆案、何鹏案最终判决的缺憾引发的思考) [The Application of dialectical thinking during legal practice: Rethinking the Flaws of the Final Judgments of the Cases of Xuting and He Peng], 11 Jinri Zhongguo Luntan (今日中国论坛) [China-Today Forum] 177, 178 (2012); Xie Enzhi, Goujian Zhongguo De Sifa Panli Zhidu (构建中国的司法判例制度) [Building Up Chinese Case Law System], 2 Renmin Luntan (Renmin Luntan) [People’s Tribune] 135, 135 (2014).

Xu Ting case and He Peng case are decided by public opinions instead of law.³¹² Some suspected that the modification of He Peng case's original judgment was to prepare the promulgation of "Interpretation of the Supreme People's Court and the Supreme People's Procuratorate of Several Issues concerning the Specific Application of Law in the Handling of Cases of Crimes Disturbing the Administration of Credit Cards"³¹³ ("12.16 interpretation").³¹⁴ It is noteworthy of the dates of the following events: On October 12, 2009, the 12.16 interpretation was adopted at the 1475th meeting of Chinese Supreme People's Court; On November 12, 2009, the 12.16 interpretation was adopted at the 22nd meeting of Chinese Supreme People's Procuratorate; On November 18, 2009, He Peng case's retrial was decided; On December 3, 2009, the 12.16 interpretation was issued; On December 16, 2009, the 12.16 interpretation came into effect and He Peng case's retrial decision was publicly announced by the Higher People's Court of Henan Province.³¹⁵ From the above dates, it can be seen that He Peng case's trial decision was made 6 days after the 12.16 interpretation was ready to be promulgated. In addition, it was announced on the same day of the effective date of the 12.16 interpretation.³¹⁶ Because giving a sentence below legally prescribed punishment needs the approval of Supreme Peoples' Court, the retrial of He Peng Case was recognized as a rehearsal of the implementing the 12.16 interpretation.³¹⁷ Nevertheless, scholars barely could ignore the influence of Xu Ting case over future ATM theft cases,³¹⁸ the increasing wills of Supreme People's Court and

³¹² Pan Shuyu, Cong Yulun Jiandu Yu Minyi Caijue Kan Sifa Gongxinli: Dui Xuting An De Lixing Fansi (从舆论监督与民意裁决看司法公信力: 对于许霆案理性反思) [The Review of the Judicial Accountability Based on the Monitoring of Public Opinions and Judgment of Public Opinions: Rethinking Xu Ting Case], 17 *Fazhi Yu Shehui* (法治与社会) [Legal System and Society] 157, 157-158 (2009); Zhang Lu, Minyi Yu Xingshi Sifa: You Xuting An Yu Hepeng An Yinqi De Sikao (民意与刑事司法——由许霆案与何鹏案引起的思考) [Public Opinion and Criminal Tribunals: Rethinking Xu Ting Case and He Peng Case], 3 *Shanxi Meitan Guanli Ganbu Xueyuan Xuebao* (山西煤炭管理干部学院学报) [Journal of Shanxi Coal-Mining Administrators College] 203, 203 (2010).

³¹³ Zuigao Renmin Fayuan, Zuigao Renmin Jianchayuan Guanyu Banli Fanghai Xinyongka Guanli Xingshi Anjian Juti Yingyong Falv Ruogan Wenti De Jieshi (最高人民法院、最高人民检察院关于办理妨害信用卡管理刑事案件具体应用法律若干问题的解释) [Interpretation of the Supreme People's Court and the Supreme People's Procuratorate of Several Issues concerning the Specific Application of Law in the Handling of Cases of Crimes Disturbing the Administration of Credit Cards] (promulgated by Supreme People's Court and Supreme People's Procuratorate on Dec. 3, 2009, effective on Dec. 16, 2009), available at: <http://en.pkulaw.cn/display.aspx?cgid=124750&lib=law>.

³¹⁴ Huasheng Zaixian, Yunnan Xuting Chuyu He Peng An Gaipan Shi Sifa Jieshi De Shengli (云南“许霆”出狱: 何鹏案改判是司法解释的胜利) [The Release of “Xuting” of Yunnan Version: The Modification of Judgment of He Peng Case is the Victory of Judicial Interpretation], available at: <http://www.voc.com.cn/article/201001/201001180836558931.html>

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ *Id.*

³¹⁸ *Id.*; Zuigao Renmin Fayuan, Zuigao Renmin Jianchayuan Guanyu Banli Fanghai Xinyongka Guanli Xingshi Anjian Juti Yingyong Falv Ruogan Wenti De Jieshi (最高人民法院、最高人民检察院关于办理妨害信用卡管理刑事案件具体应用法律若干问题的解释) [Interpretation of the Supreme People's Court and the Supreme People's Procuratorate of Several Issues concerning the Specific Application of Law in the Handling of Cases of Crimes Disturbing the Administration of Credit Cards] (promulgated by Supreme People's Court and Supreme People's Procuratorate on Dec. 3, 2009, effective on Dec. 16, 2009), available at: <http://en.pkulaw.cn/display.aspx?cgid=124750&lib=law>.

legislatures in adjusting the legal sanctions of criminal cases involving financial institutions,³¹⁹ and the removal of section 1 and 2 of article 264 of the criminal law that prescribe two types of theft cases for a heavier punishment, by the “Amendment VIII to the Criminal Law of the People’s Republic of China.”³²⁰ There are many situations and new technologies that the legislatures might not face or could not imagine when they were drafting statutes. In 1979 when the criminal law came into effects, there was no ATM in China.³²¹ The money stored in financial institutions has to be withdrawn from banks in person and was nearly impossible to be stolen by someone without premeditation. In addition, given the inflation and economic growth of decades, the amount of money that could be determined as “extraordinarily large amount” at that time is no long extraordinarily large amount of money from people’s perspective nowadays. Claimants, lawyers and procurators are bringing cases with diverse facts everyday, which makes courts witness the first hand of new situations and the provisions of statutes that may be out of date. When it comes to controversial cases, different interpretations of law by judges may lead to distinctive conclusions. Some of judges choose to follow the written statutes strictly as what a civil law judge should do. These judges may sentence ATM larceners that stole extraordinarily large amount of money from ATMs to life imprisonments accordingly, because their criminal acts met the circumstances of heavier punishment prescribed in Article 264 of criminal law. This was what judges of He Peng case did in the first instance. However, some of them, like the judges in Xu Ting case, under the pressure of public opinions or their commitments of pursuing justice, are willing to be the early judges to come to a different conclusion in a controversial case. Then other judges from sister courts can look at the prior judicial decisions and decide whether to follow how those earlier judges interpret and decide in similar cases.

Drawn from Xu Ting case and its aftermath, statutory interpretation can be found to be an essential element in directing judges’ conclusions. Take the ATM theft crime as an example. Given the definition of financial institutions, do ATMs fall in the scope of financial institutions under the originally legislative intent? How will the drafters of criminal law (1997) define the amount of “extraordinarily large money?” There are alternatives for judges to give ATM thieves a lenient sentence: either handling these cases as civil disputes or treating ATM theft as a regular theft crime based on Article 264 of criminal law without meeting the threshold for heavier punishment. The selected two case studies revealed the plaintiff-friendly and defendant-friendly

³¹⁹ Zhao Binzhi, Peng Xinlin, Guanyu Xuting Anjian De Fali Wenti Sikao (关于许霆案件的法理问题思考) [The Jurisprudence Issues in Xu Ting Case], 2 Xingfa Luncong (刑法论丛) [Criminal law Review] 236, 285-287 (2008).

³²⁰ The Amendment (VIII) removed the section 1 and 2 of Article 264 of criminal law (97 revision) regulating two types of theft cases in which defendants shall be given life sentence or death penalty in addition to confiscation of property. Zhonghua Renmin Gongheguo Xingfa Xiuzhengan (Ba) (中华人民共和国刑法修正案 (八)) [Amendment (VIII) to the Criminal Law of the People’s Republic of China] (promulgated and effective on February 25 of 2011), art. 246, Available at: <http://en.pkulaw.cn/display.aspx?cgid=145719&lib=law>.

³²¹ The Bank of China introduced ATMs to China. The first ATM appeared in Zhuhai Municipal City of Guangdong Province in February of 1987. Lu Shaoping, Zidong Guiyuanji De Jizhong Guanli Moshi (自动柜员机的几种管理模式) [Several Management Patterns of ATMs], 10 Diannao Yu Xinyongka (电脑与信用卡) [Computer and Credit Card] 46, 46 (1999), available at: <http://www.cqvip.com/QK/81321X/199910/1004437097.html>.

judicial innovations, respectively.³²² In the DUI cases, judges adjusted their conviction by applying Article 115 (endangering public safety) rather than Article 133 (traffic crimes) in order to raise the legal liabilities of drunk driving offenders. While in these ATM theft cases, judges reached lenient judgments by sentencing defendants below the legally prescribed punishments to lay mercy on non-premeditated ATM larceners. Before the official judicial interpretation by the Supreme People's Court was issued, the courts from Liaoning province and Sichuan province voluntarily followed the judgment of Foshan Municipal People's procuratorate of Guangdong Province v. Li Jingquan (2007). Before the amendment to article 264 of criminal law (1997) was issued by legislature, the courts under jurisdictions of Yunan and Zhejiang province voluntarily followed the decisions of Guangzhou Municipal People's Procuratorate of Guangdong Province v. Xu Ting (2007). It is hard to determine the casual inference between these judicial creativities and corresponding legislative amendments. However, one may observe a collaborative process between legislatures and judges from the case studies. In particular, the extent to which and in which way local court judges provide raw materials or inspirations to their hierarchical supervisors and legislatures in the course of policy making.³²³

Influenced by civil law tradition, written statutes are the major legal sources in Chinese courts. The task of Chinese judges on adjudication is statutory interpretation. Most Chinese jurists believe that courts should limit themselves to the rigorous interpretation of written statutes. However, statutes drafted by legislature cannot cover every detail or address to every particular situation that would occur in the future. A legislative amendment regarding certain issues requires formal procedures, including introduction,³²⁴ deliberation by a specialized committee,³²⁵ voting by the plenary meeting of National People's Congress,³²⁶ signing and promulgation by President of a bill.³²⁷ It normally takes a long period of time to complete the process. Compare to legislature, courts can be aware of vagueness or flaws in statutes timely as litigants and lawyers are bringing various cases to judges everyday. More importantly, in order to win the case, the potential losing party will always make every possible effort to identify and point out the ambiguity of the relevant statutes. Judicial decisions can function as experiments run by judges to gather information in terms of the success and failure of new legal doctrines and accumulate public support for the relevant legislative amendments. The series of cases described in this chapter related to drunk driving and ATM theft are not the only examples that demonstrate the lawmaking function of Chinese court system. The identification of the validity of "Valuation Adjustment Mechanism" through Haifu Investment Co., Ltd. v. Gansu Zhongxing Zinc Industry Co., Ltd. & Hong Kong Diya Co., Ltd. (2012)³²⁸, and the justification of legal

³²² See Donald Clarke, *Judicial Innovation in Chinese Corporate Law*, in: *Judicial Innovations in Asia: Judicial Lawmaking and the Influence of Comparative Law* (John O. Haley, Toshiko Takenaka eds. 2014), at 259-72.

³²³ *Id.*

³²⁴ *Zhonghua Renmin Gongheguo Lifafa (2015 Xiuzheng)* [Legislation Law of the People's Republic of China (2015 Amendment)] art. 17, issued by National People's Congress on Mar. 15, 2015, available at: <http://en.pkulaw.cn/display.aspx?cgid=245693&lib=law>.

³²⁵ *Id.* art. 18-21.

³²⁶ *Id.* art. 24.

³²⁷ *Id.* art. 25.

³²⁸ *Haifu Investment Co., Ltd. v. Gansu Zhongxing Zinc Industry Co., Ltd. & Hong Kong Diya Co., Ltd.*(2012), available at: http://www.pkulaw.cn/fulltext_form.aspx?Db=pfnl&Gid=118610908;

penalty of “Illegal Fund-Raising” through Jinhua Municipal People’s Procuratorate v. Wu Ying (2012)³²⁹ also indicated that Chinese courts were sometimes one step ahead the legislators to make remarkable contributions to the evolving legal doctrines. Nonetheless, creating legal doctrines in Chinese courts does not mean freely applying or interpreting statutes because the power of Chinese individual judges is largely constrained by political monitoring and the courts they belong to. Rather, it refers to the incremental style of stare decisis³³⁰ that judges use statutory interpretation with dynamic features to mandatorily or voluntarily follow the earlier courts’ decisions and fix the flaws of statutes in a timely manner.

III. The Empirical Research on Precedential Influence of Previous Judicial Decisions

To study both vertical and horizontal effects of previous judicial decisions, I conducted surveys and interviews of Chinese judges and law clerks between July and August of 2015.

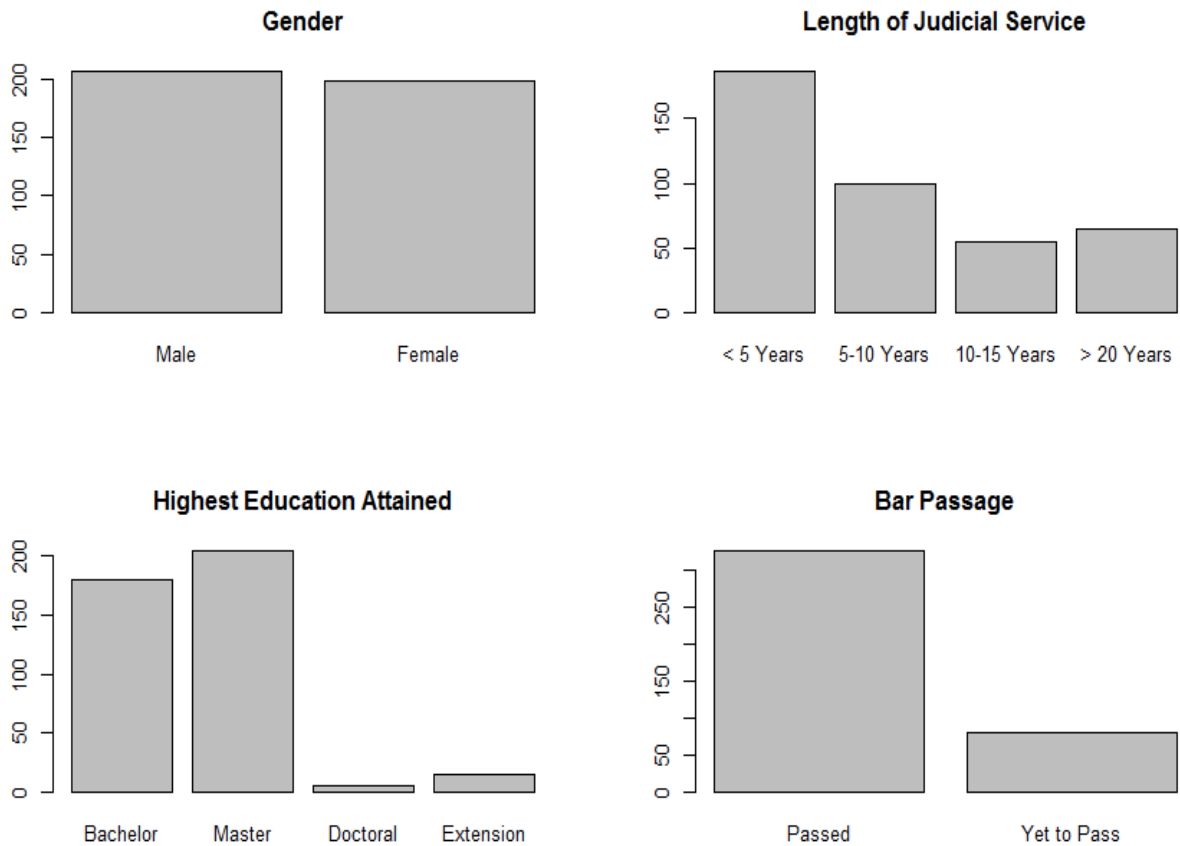
A. Surveys of Judges’ Views on Previous Judgments

a. Research Design

Approximately 500 judges from 10 Chinese regions who serve at all levels of the judicial hierarchy were given the survey. There were 407 judges responded to my survey. I also collected information on 4 judge-level variables: gender, length of judicial experience, academic background, and bar passage. As can be seen, the sample consists of roughly equal number of male and female judges. A plurality of responding judges had less than 5 years of judicial experience while a majority held at least a bachelor’s degree and had passed the Chinese bar exam.

³²⁹ Jinhua Municipal People’s procuratorate v. Wu Ying (2012), available at: http://www.pkulaw.cn/fulltext_form.aspx?Db=pfnl&Gid=119235620;

³³⁰ “Incrementalism is a theory of freedom and limitation. Incrementalism provides a middle and common ground for those who revel in the new found freedom of judges and those who fear the excesses of that freedom.” *See* Martin Shapiro, *Stability and Change in Judicial Decision-Making: Incrementalism or Stare Decisis*, 2 *Law Transition Q.* 134 (1965), Available at: <http://scholarship.law.berkeley.edu/facpubs/2154>;

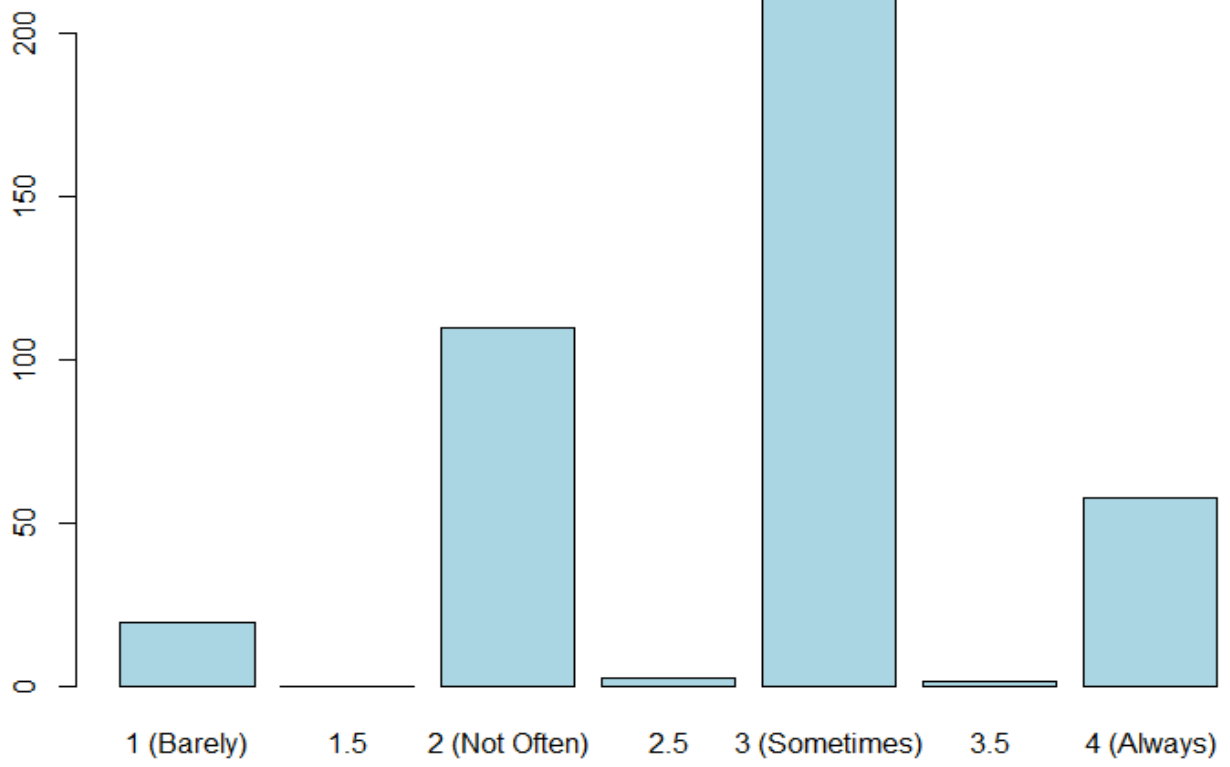


207 of responding judges are male, 199 are female, and one respondent did not answer the gender question. In addition, 187 judges have less than 5 years of experience, 100 judges have between 5 and 10 years of experience, 55 judges have between 10 and 20 years of experience, and 64 judges have more than 20 years of experience, and one respondent did not answer the length of judicial experience. In terms of their highest education qualification, 180 judges hold a bachelor's degree, 205 judges hold a master's degree, 5 judges hold a doctorate, 14 judges have received some form of adult education, and one respondent did not answer the academic background question. Finally, 326 judges had passed Chinese bar while 79 judges yet had passed the bar, and 2 responding judges did not answer the bar passage question.

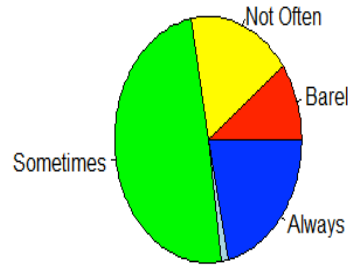
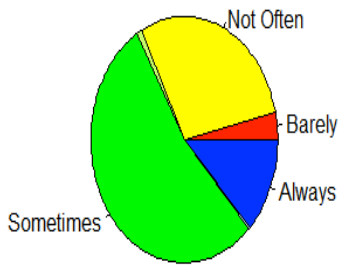
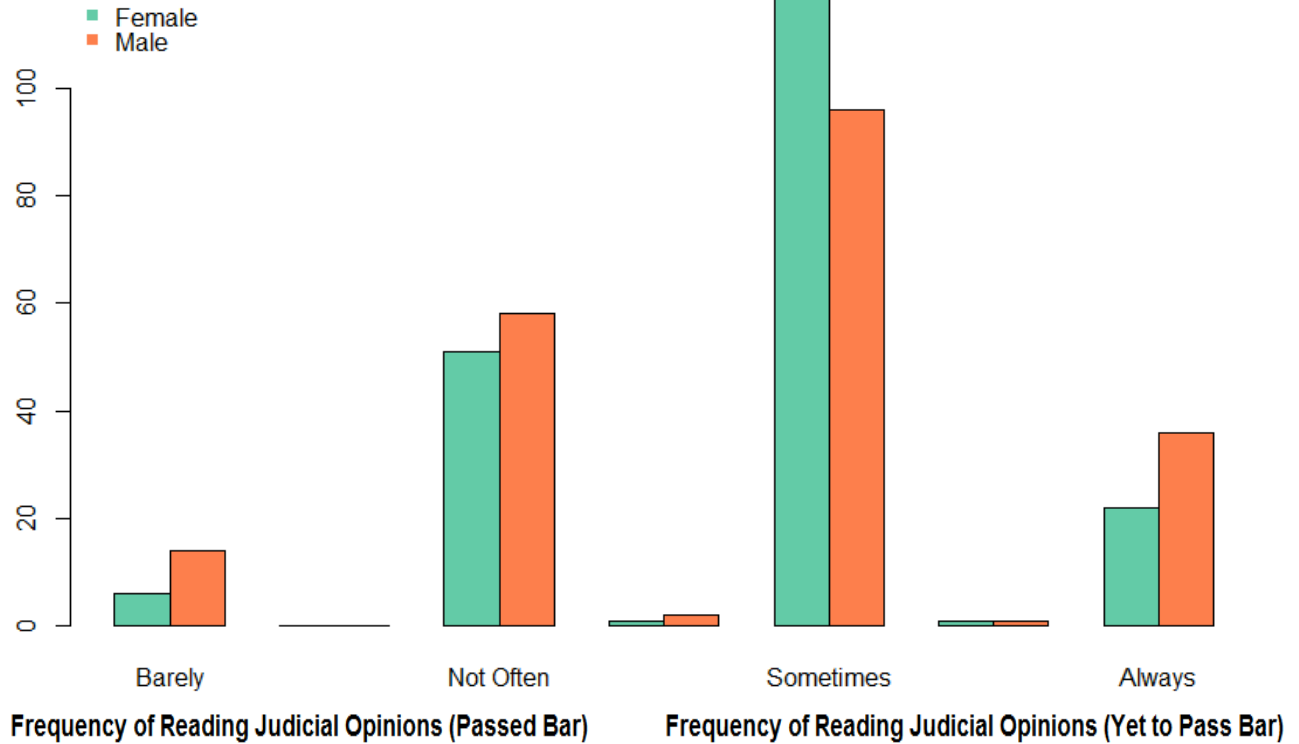
b. Results and Analysis

Among the respondent judges, 4.9% of judges (20 out of 407) barely read prior judicial decisions, 27% judges (110 out of 407) did not often read, 52.6% of judges (214 out of 407) sometimes read, and 14.3% of judges (58 out of 407) judges always read previous judgments. From this bar plot, you may find judges' answer to the frequency of reading previous judicial decisions.

How Often Do You Read Prior Judicial Decisions?



Frequency of Reading Judicial Opinions by Gender

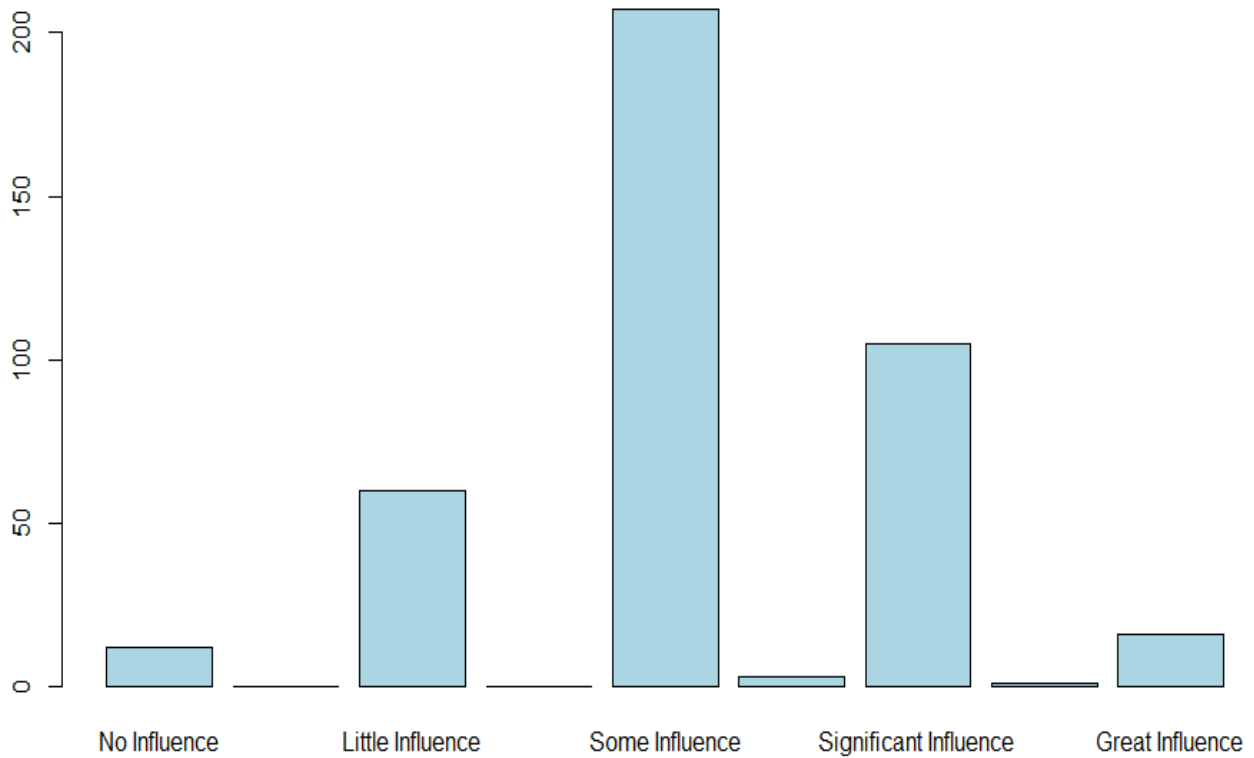


I further examine whether judge-level variables affect the frequency that judges read previous judicial decisions. The above pie charts do not show big difference of answers between male and female judges. However, it is noteworthy that judges who had not passed the bar were less likely to read prior judicial decisions than judges who had passed the bar.

When being asked how much prior judicial decisions would influence their decisions in similar cases, 3% of judges (12 out of 404) were not influenced by prior judicial decisions when adjudicating similar cases, 14.9% of (60 out of 404) judges and 26% (105 out of 404) of them

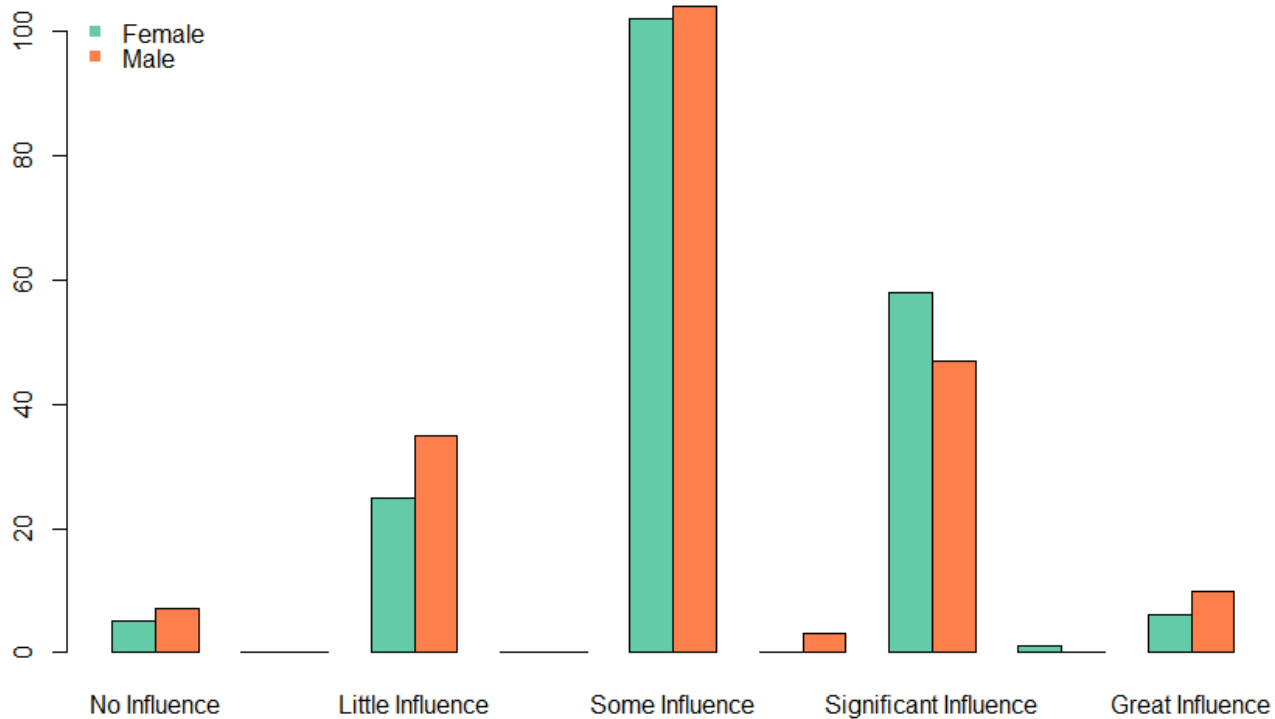
reported that prior judicial decisions had little and significant influence over their judgments in like cases, respectively. The majority of responding judges (207 out of 404) stated that previous decisions had some influence, while only 4% of judges (16 out of 404) indicated they were greatly influenced by prior judicial decisions when adjudicating similar cases. There were three judges who did not respond to this question. Judges' response are shown in the bar plot as follows.

Do Prior Judicial Decisions Inform Your Decision in Similar Cases?



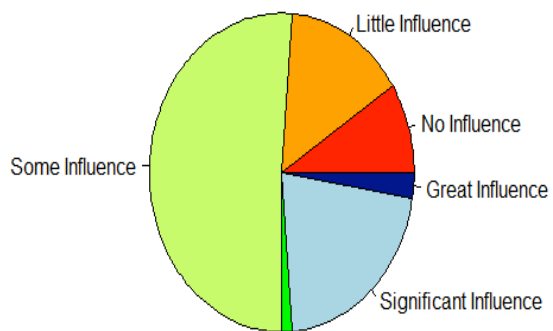
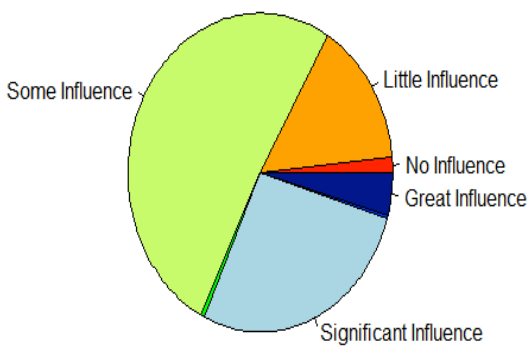
When analyzing the effects of judge-level variables, I find that while gender did not significantly impact judges' answers, judges who had not passed the bar were less likely to be greatly influenced by previous judicial decisions, and more likely not to be influenced by them than judges who had passed the bar.

Influence by Gender

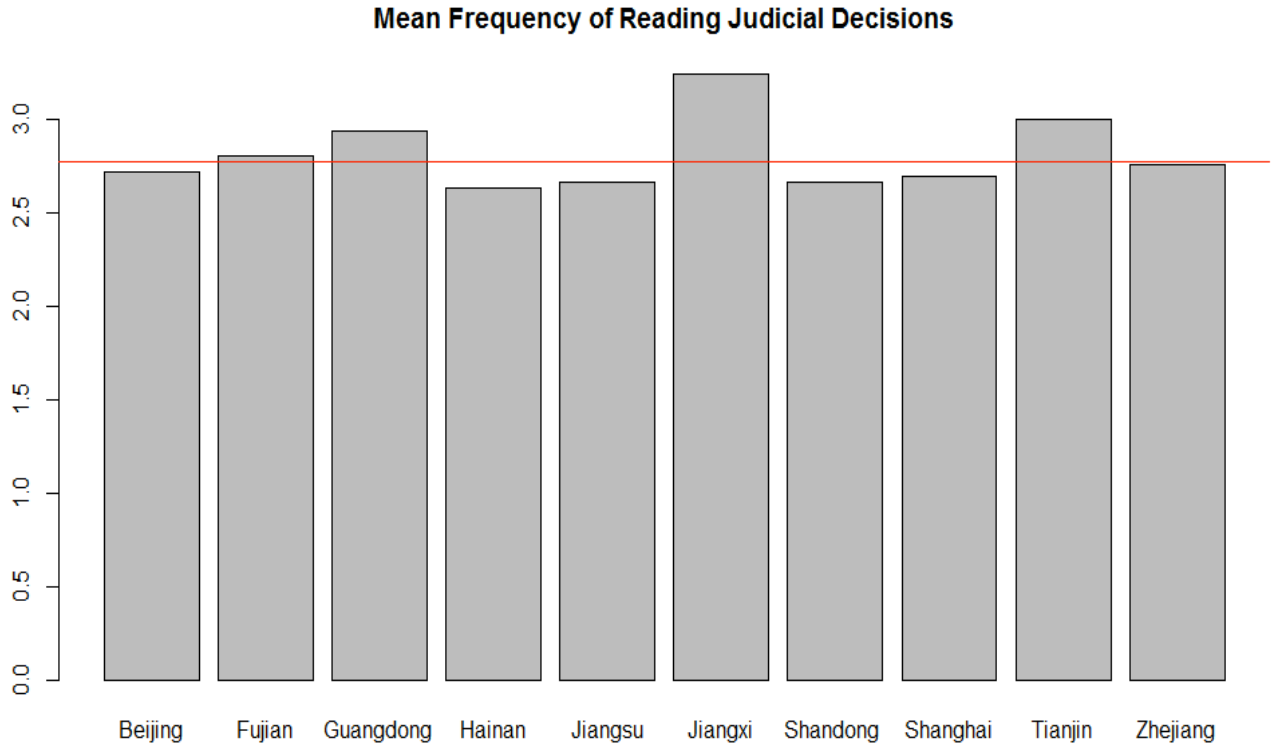


Influence Among Judges Who Have Passed the Bar

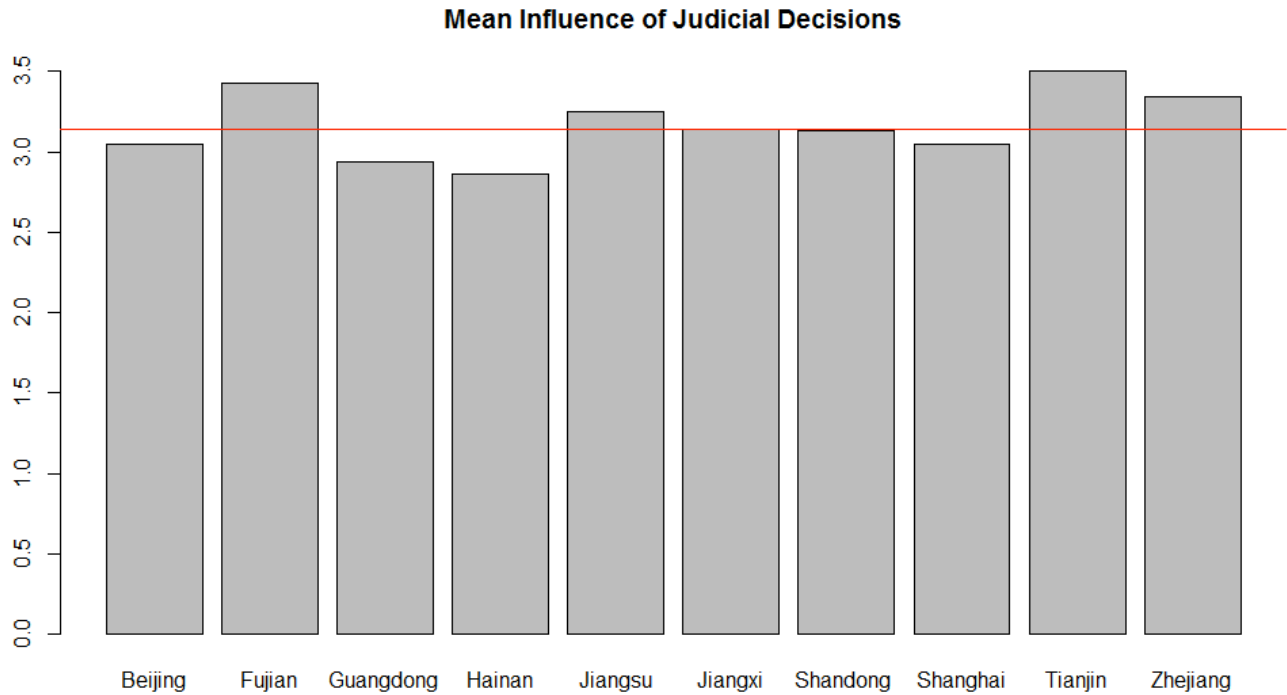
Influence Among Judges Who Have Not Passed the Bar



Among ten regions I surveyed, judges in Fujian, Guangdong, Jiangxi, and Tianjin tend to read prior judicial decisions more often, while judges in Fujian, Jiangsu, Tianjin, and Zhejiang tend to be more influenced by previous judicial decision when adjudicating similar cases.³³¹

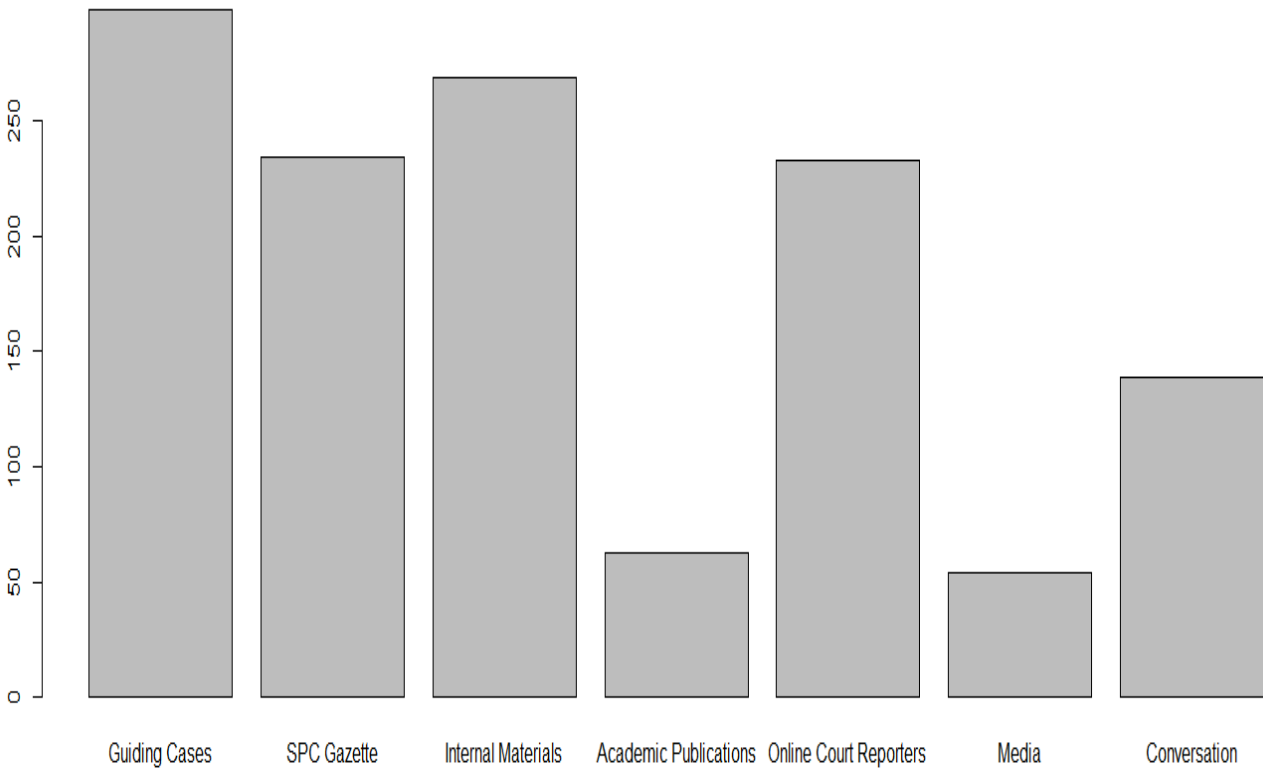


³³¹ Among ten regions in which I conducted my surveys, courts from Tianjin and Fujian slightly show either more exposure to or reliance on previous judicial decisions. The regional difference observed may be driven by institutional distinctions between samples (i.e., degrees of accessibility of decided cases within the court, trainings for conducting legal research), internal consensus of using prior judicial decisions as an informative resource, and local policies as to selected cases as exemplar following the national judicial reform. Here, as the power limited by the sample size of each court, I hesitate to draw any conclusive implications regarding this regional difference of judges' views on previous judicial decisions. In determining whether and in which way judges' deference to previous judicial decisions varies by regions, further study on a more focused group is needed.



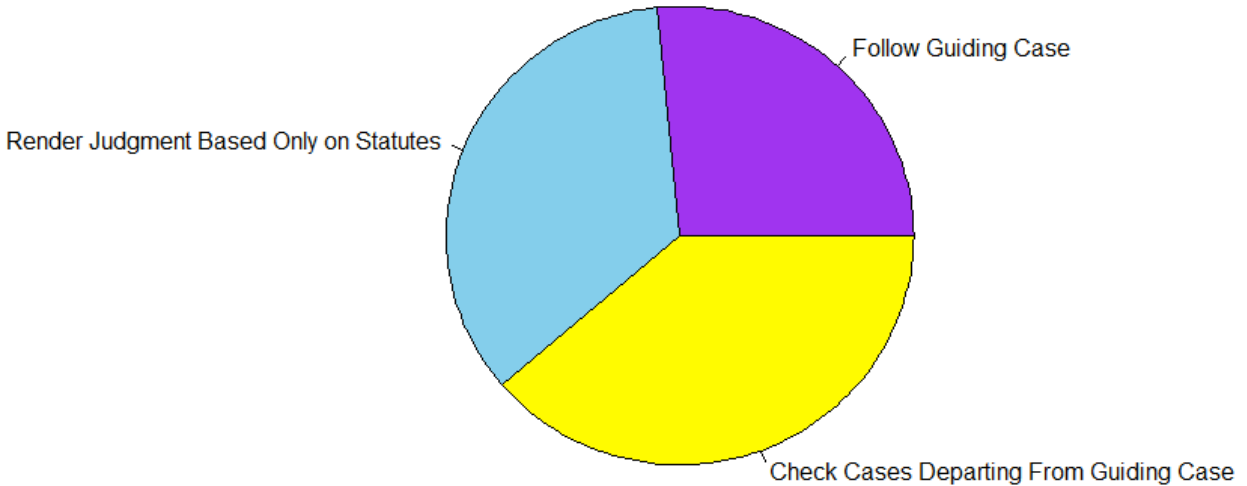
When being asked where they kept informed of judicial decisions, the four major sources that the responding judges obtained relevant information were Guiding Cases (298 out of 407), Internal Materials (269 out of 407), Chinese Supreme People’s Court Gazette (234 out of 407), and Online Court Reporters (233 out of 407). A few respondents also heard about decided cases from conversation with judges, attorneys or other legal professionals (139 out of 407), academic publications (63 out of 407), and media (54 out of 407).

Sources of Information about Judicial Decisions



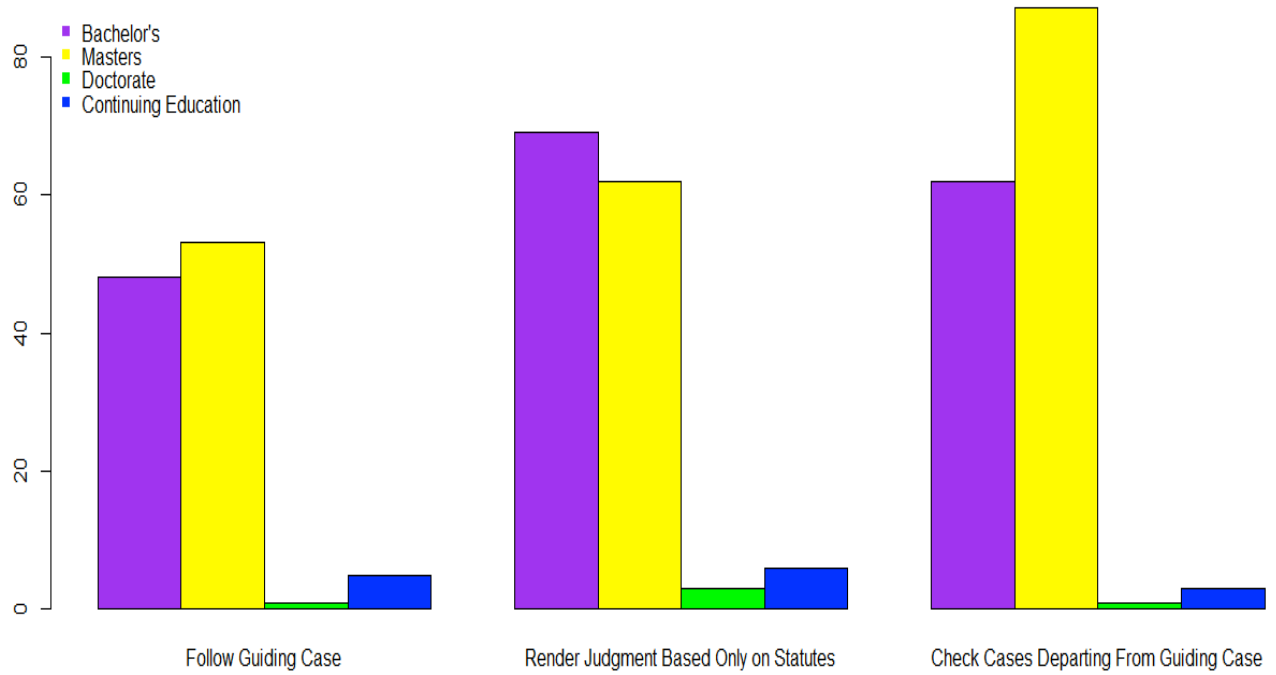
In addition, judges were asked how they would do if they do not agree with the decision of a Guiding Case. Because Article 7 of “Provisions of the Supreme People’s Court Concerning Work on Guiding Cases,” states that “People’s Court at all levels should refer to the Guiding Cases released by the Supreme People’s Court when adjudicating similar cases.” The pie chart below shows that 26.6% of responding judges (107 out of 403) would follow Guiding cases, 34.7% of them (140 out of 403) would render judgment based only on statutes, and 38.7% of respondents (156 out of 403) would check cases departing from Guiding Cases.

If judges disagree with the decision of a guiding case, they

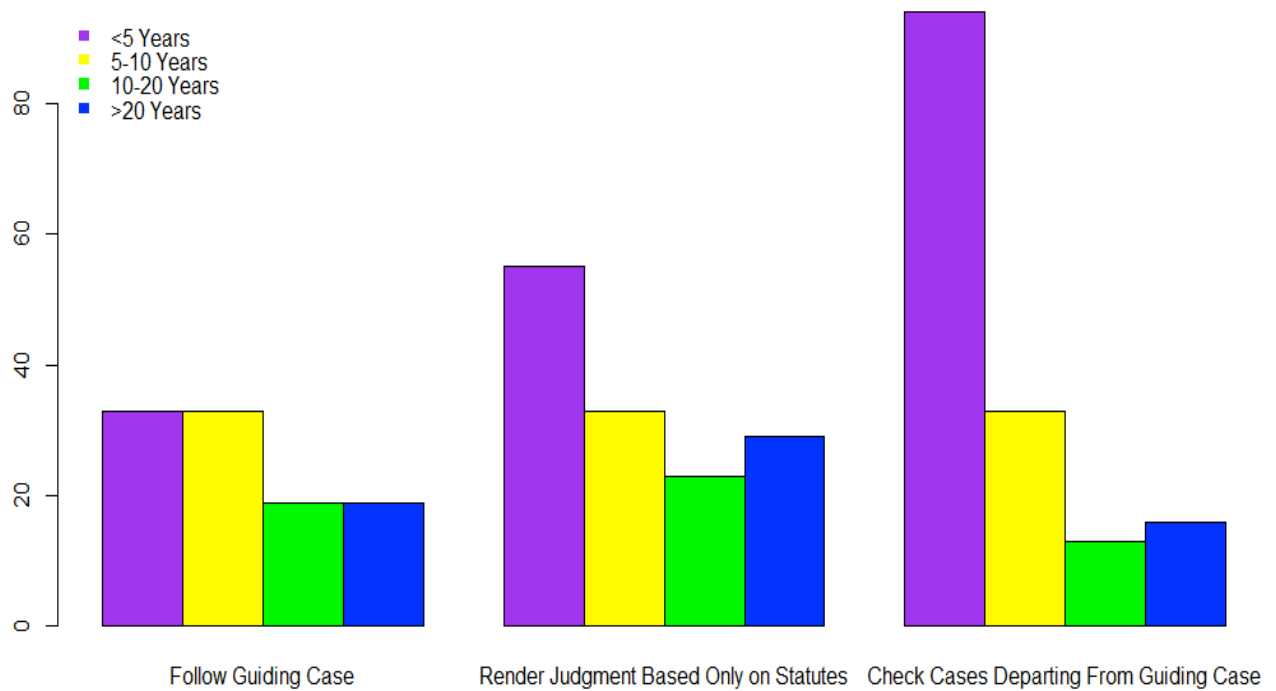


I further analyzed the effects of three variables on judge-level in terms of academic background, the length of judicial experience, and bar passage. It turns out that the responding judges who had master degree were more likely to check other cases in deciding whether to follow the Guiding Cases or not. Judges who had less than 5 years judicial experience tended to check other cases, while judges who had more than 20 years judicial experience tended to decide based only on statutes. More importantly, the responding judges who had yet passed the bar are more likely to only rely on statutes and resist considering other similar cases.

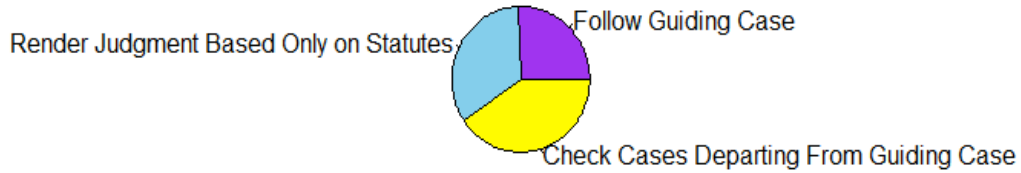
If judges disagree with the decision of a guiding case:



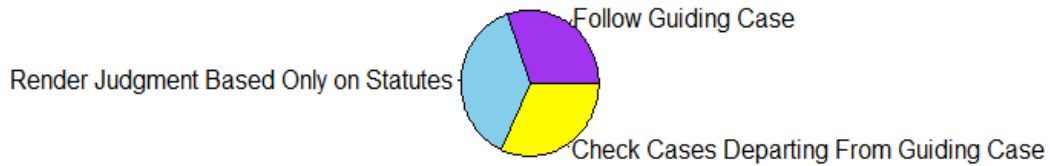
If judges disagree with the decision of a guiding case:



Passed Bar



Yet to Pass Bar



To conclude, among approximately 400 Chinese judges responded, only 4.9% judges barely read prior judicial decisions, while 66.9% of them at least sometimes read previous judgments. In addition, only 3% of judges responded that prior judicial decisions had no influence over their judgments when adjudicating similar cases, while 81.2% of them stated that previous judgments had at least some influence over their judgments. Among 10 Chinese regions surveyed, judges in Tianjin seemed to place more weight to prior judicial decisions. As for the vertical and horizontal influence of previous judicial decisions, judges kept closely informed about the decided cases published by the Chinese Supreme People's Court (73.2% through Guiding cases; 57.5% through Chinese Supreme People's Court Gazette). However, in the circumstance that judges did not agree with the decision of a Guiding case when adjudicating a very similar case, only 26.6% of judges would follow the vertical precedent, while 38.7% of them would consult decisions handed down in sister courts.

More interestingly, when analyzing judges' responses across different variables, I find that judges who had not passed the bar were less likely to read prior judicial decisions and these decisions tended to have no influence over their judgments than judges who had passed the bar.

B. Survey Experiment on Horizontal Influence of Sister Courts' Decisions³³²

Similar to other civil law countries, Chinese judges tend to follow the decisions of higher courts because they are professionally evaluated by their hierarchical superiors.³³³ Chinese supreme people's court has exerted such control by publishing selected cases on Supreme People's Court Gazette and Guiding Cases. However, the extent to which sister courts influence each other's interpretation of the law has been rarely discussed and empirical data on this issue remains scant. The very few surveys that have asked judges about their attention and deference to previous judicial decisions have failed to distinguish between vertical and horizontal precedent.³³⁴ A study carried out in 2004 surveyed 130 judges from courts at various levels in Guangdong Province and reported that only 9.8% of respondents viewed precedents as having no influence on their decision-making process.³³⁵ A second study conducted by the same researcher in 2007 found that more than 90% of the judges surveyed paid attention to precedent.³³⁶ Most literature from common law tradition has examined the transmission of precedent by analyzing citation patterns.³³⁷ For example, Caldeira has identified several factors that affect the number of references to a U.S. State Supreme Court by other U.S. State Supreme Courts in 1975 by looking at the total number of citations by those other state supreme courts.³³⁸ In 2011, Smyth and Mishra have similarly examined citation patterns across the six Australian state supreme courts

³³² This part is benefited from the assistance of my colleague, Benjamin Chen. He contributed to the design and statistical analysis of this experimental survey.

³³³ See Algero, "The Sources of Law and the Value of Precedent," at 787-88 ("Nevertheless, although many civil law jurisdictions have recognized some form of the restrained doctrine of jurisprudence constante, the prevalence and availability of reported decisions and the hierarchical nature of modern court systems has led to the recognition that even a single decision by a highly ranked court may carry great weight or even serve as a de facto binding authority.") In Spain, Article 1(6) of the *Codigo Civil* recognizes that "jurisprudence of the courts shall serve as a complement to the legal order with the doctrine that, in a constant manner, may be established by the Supreme Court, in its interpretation of legislation, customs, and the general principles of law." Thus, although the legislature has not recognized precedent as a formal source of law, it has recognized its value. In Mexico, the Supreme Court and collegial circuit tribunals can establish a binding precedent, known as *jurisprudencia*, by issuing five consecutive decisions on a certain point of law. *Codigo Civil* (the Civil Code of Spain), art. 1(6). See Alfonso Ruiz Miguel & Francisco J. Laporta, "Precedent in Spain" in *Interpreting Precedents: A Comparative Study* 259, 269 (D. Neil MacCormick & Robert S. Summers eds., 1997).

³³⁴ See Dong Hao, *The Road of the Construction of Chinese Case Law*, Zhongguo Panli Jieshi Goujie Zhilu (China University of Political Science and Law Press 2009), 98-99. See also, Luo Jun, *Zhongguo Minshi Panli Zhidu Goujian Yanjiu* [Research on the Development of Chinese Civil Case Law System], Law Press-China, 166, 176 (2012).

³³⁵ Dong Hao, *The Road of the Construction of Chinese Case Law*, Zhongguo Panli Jieshi Goujie Zhilu (China University of Political Science and Law Press 2009), 98-99.

³³⁶ *Id.* at 99-100.

³³⁷ Harris, Peter. 1985. "Ecology and Culture in the Communication of Precedent Among State Supreme Courts, 1879-1970." *Law and Society Review* 449-486; Harris, Peter. 1982. "Structural Change in the Communication of Precedent Among State Supreme Courts, 1870-1970." *Social Networks* 201-212; Canon, Bradley C., and Lawrence Baum. 1981. "Patterns of Adoption of Tort Law Innovations: An Application of Diffusion Theory to Judicial Doctrines." *American Political Science Review* 975-987; Caldeira, Gregory. 1988. "Legal Precedent: Structures of Communication Between State Supreme Courts." *Social Networks* 29-55; Caldeira, Gregory. 1985. "The Transmission of Legal Precedent: A Study of State Supreme Courts." *American Political Science Review* 178-194.

³³⁸ Caldeira, Gregory. 1985. "The Transmission of Legal Precedent: A Study of State Supreme Courts." *American Political Science Review* 178-194.

from 1905 to 2005.³³⁹ Generally speaking, Chinese judgments are terse and lack detailed legal reasoning.³⁴⁰ In addition, Chinese judges rarely refer to any judicial decisions in their judgments.³⁴¹ Thus, it is almost impossible to trace the diffusion of legal precedent by analyzing judicial opinions as has been done for state and federal courts in the United States. One of the solutions is to deploy an experimental survey on Chinese judges to evaluate the influence of a previous judicial decision handed down from a sister court in a different Chinese jurisdiction.

a. Research Design

Following demographic and multiple choices questions that directly asked judges about their opinions about precedent, the second part of my survey presented judges with two cases. In the first case, judges were asked if they would show leniency to a victim of domestic abuse who had murdered her boyfriend. Treatment consists of an additional line describing the outcome of a similar case from Henan province. In the second case, judges were asked if they agree with a controversial judicial opinion decided in Sichuan province invalidating the transfer of assets from a testator to his mistress. Treatment consists of an additional paragraph summarizing academic criticism of this decision. Judges were randomly assigned to treatment for both cases. The form of randomization used is complete randomization and assignment to treatment in the first case is independent of assignment to treatment in the second case. If Chinese judges are influenced by judicial decisions, one should expect to find outcomes in the first case to be responsive to treatment. Although not directly comparable to the first case,³⁴² the second case serves as a useful baseline for evaluating the importance of pedigree. If pedigree matters, one should expect to see stronger treatment effects when an opinion is attributed to a judicial, rather than non-judicial, actor.

A previous case has precedential value if it gives rise to a reason for resolving a later case in an identical fashion.³⁴³ The source of precedential value comes, in turn, from the fact that it is decided by a court. Under the Neyman-Rubin framework, the influence of horizontal precedent on judge i may be represented as

$$\tau_i = Y_i(1) - Y_i(0)$$

where $Y_i(1)$ is the outcome of interest (e.g. interpretation of a statute, length of sentence) under treatment, $Y_i(0)$ is the outcome of interest under control, and treatment is the citation of such a previous judicial decision to the judge. Fisher's null hypothesis is that

³³⁹ Smyth, Russell, and Vinod Mishra. 2011. "The Transmission of Legal Precedent Across the Australian State Supreme Courts Over the Twentieth Century." *Law and Society Review* 139-169.

³⁴⁰ Zhiqiang Wang, "Case Precedent in Qing China," 19 *Columbia Journal of Asian Law* 323 (2005), 334-40.

³⁴¹ *Id.* In one of its internal documents dated October 28, 1986, the SPC admonished that "[a]ll opinions and instructions given by the Supreme People's Court on the application of laws shall be followed, but it is not appropriate, however, to cite them directly."

³⁴² Our design is not the most ideal because of the different socio-legal issues raised in the first and the second cases. For example, people might have firmer views about the second case than the first case and therefore be more open to persuasion on the latter than the former. However, the cost and difficulty of approaching the target population, concerns about the response rate, and the lack of previous literature hinting at an expected effect size dissuaded us from pursuing a factorial design. We chose instead to strengthen the treatment in the second case by including arguments rather than just endorsements. See Bartels and Mutz (2009).

³⁴³ Frederick Schauer, "Precedent," 39 *Stanford Law Review* 571, 571 (1987) ("The bare skeleton of an appeal to precedent is easily stated: The previous treatment of occurrence X in manner Y constitutes, *solely because of its historical pedigree*, a reason for treating X in manner Y if and when X again occurs.")

$$Y_i(1) = Y_i(0)$$

for all i . In addition, the sample average treatment effect is defined by

$$\begin{aligned}\bar{\tau} &= \frac{1}{N} \sum_{i=1}^N (Y_i(1) - Y_i(0)) \\ &= \bar{Y}(1) - \bar{Y}(0)\end{aligned}$$

b. Results and Analysis

Recall that the first case, hypothetical, involved leniency for a defendant who had murdered her abuser. The facts that presented to all judges, states that “Hong Xiao and Ming Li lived together for three months. Throughout their cohabitation, Hong Xiao was often assaulted by Ming Li. Hong Xiao killed Ming Li by stabbing him to death while he was sleeping.” This case is based on Article 232 of the Chinese Criminal Law (1997) and Article 20 of the Opinion Regarding Family Violence Cases (2015) (“Article 20”) issued by the Chinese Supreme People’s Court.³⁴⁴

The former states:

whoever intentionally kills another is to be sentenced to death, life imprisonment, or not less than 10 years of fixed-term imprisonment; when the circumstances are relatively minor, he is to be sentenced to not less than three years and not more than 10 years of fixed-term imprisonment.³⁴⁵

The latter provides that “fatal retaliation by a *long-term* [emphasis added] victim of domestic abuse against the abuser may be eligible for sentence mitigation.”³⁴⁶ All judges were presented with these rules. The issue raising here is whether three month of cohabitation qualifies the defendant as a “long-term victim of domestic abuse.” Judges randomly assigned to treatment³⁴⁷ were given the following supplementary information:

A court in Henan Province recently heard a similar case (there, the girlfriend and boyfriend had cohabited for two months) and gave the female criminal a lenient sentence.

All judges were then asked if they would impose a lenient sentence on a victim of domestic abuse who had fatally retaliated against her boyfriend after three months of cohabitation, and the length of the sentence they would impose. Two outcome variables were recorded. The first one is

³⁴⁴ These interpretations carry “full legal force.” Zuigao Renmin Fayuan Guanyu Sifa Jieshi Gongzuo De Guiding [Provision of the Supreme People's Court on the Judicial Interpretation Work], art. 5, available at: <http://en.pkulaw.cn/display.aspx?cgid=89508&lib=law>.

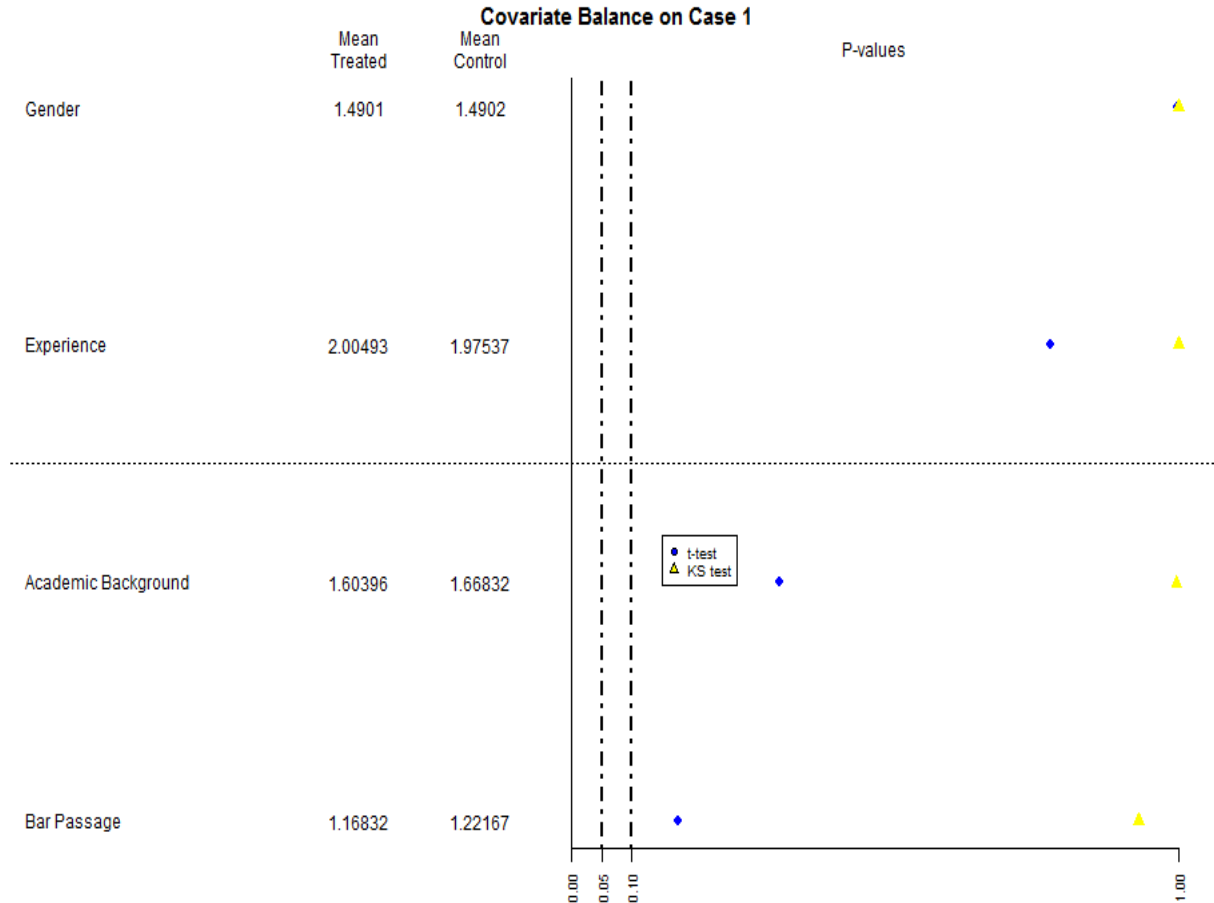
³⁴⁵ Zhonghua Renmin Gongheguo Xingfa [Criminal Law of the Peoples’ Republic of China (97 Revision)], issued by National People’s Congress on Mar. 14, 1997, effective Dec. 25, 1999, available at: <http://en.pkulaw.cn/display.aspx?cgid=17010&lib=law#menu38>.

³⁴⁶ Guanyu Yifa Banli Jiating Baoli Fanzui Anjian De Yijian [Opinions Regarding Family Violence Cases], issued by Chinese Supreme People’s Court, Chinese Supreme People’s Procuratorate, Ministry of Public Security, and Department of Justice on Mar. 02, 2015, effective on Mar. 02, 2015, available at: http://www.pkulaw.cn/fulltext_form.aspx?Db=chl&Gid=244391&keyword=家庭暴力&EncodingName=&Search_Mode=accurate.

³⁴⁷ The form of randomization used is complete randomization and assignment to treatment in the first case is independent of assignment to treatment in the second case. In regression models not presented here, assignment to treatment in the one case did not have a statistically significant effect on judges’ responses to the other case.

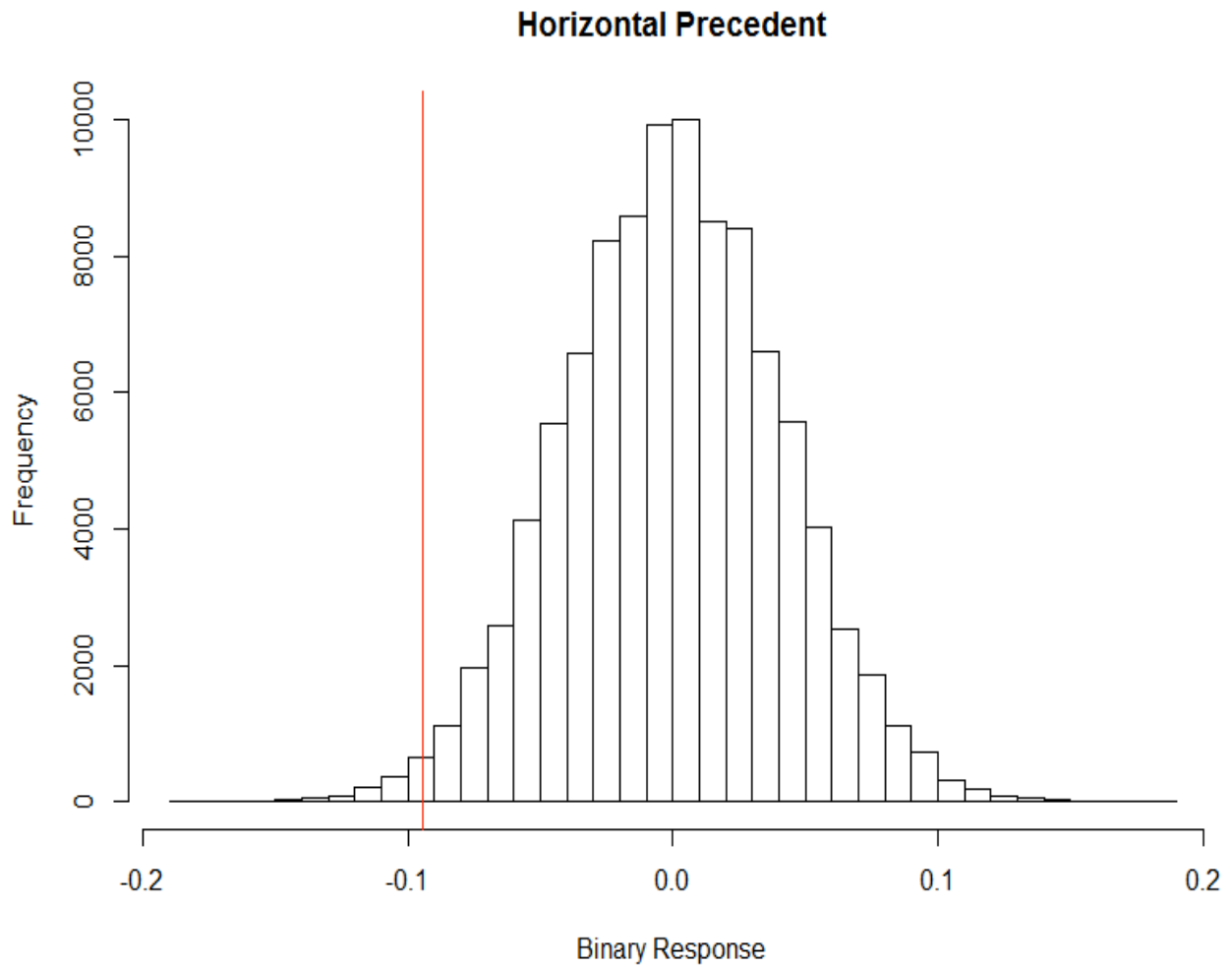
a binary variable measuring judges' views about whether leniency is warranted. The second one is an ordinal variable measure the sentence that judges would recommend.

There were 203 judges assigned to treatment and 204 to control. There is evidence that the randomization succeeded in achieving covariate balance between both groups. The least balanced covariate is Bar Passage.



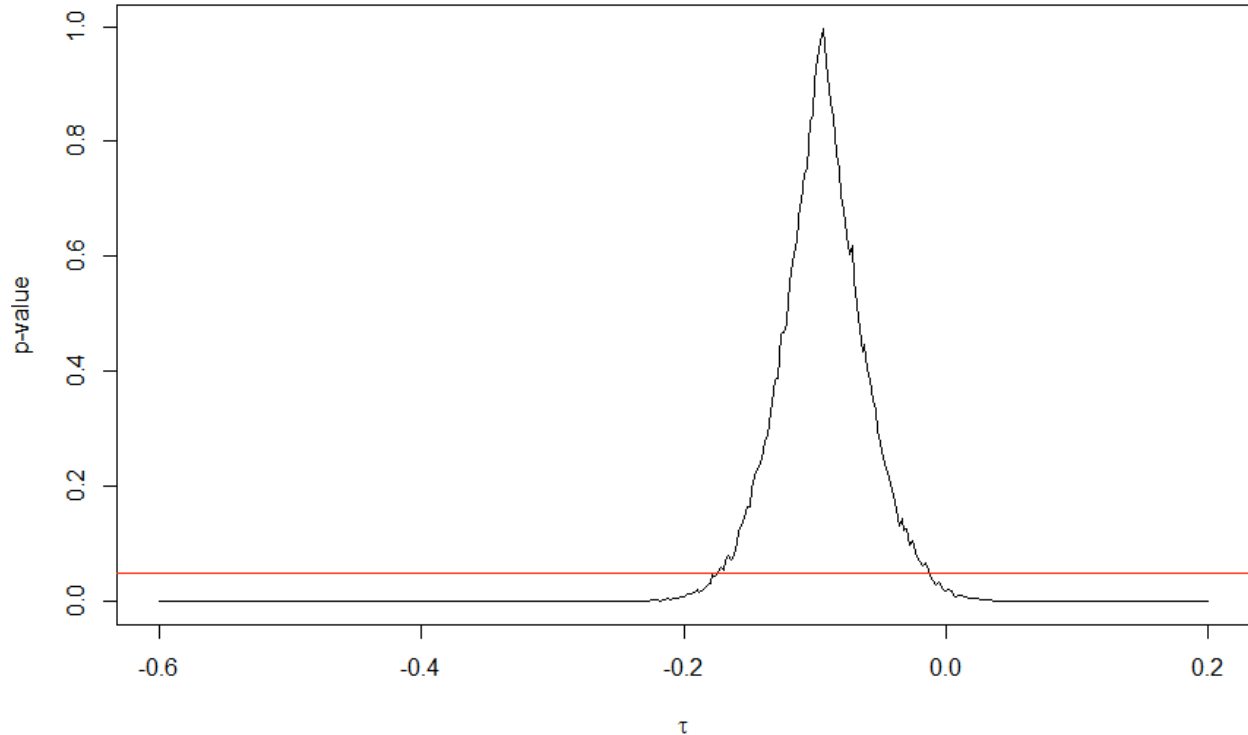
Among the 203 judges in the treated group, 161 agreed that a lenient sentence would be warranted pursuant to Article 232 of the Chinese Criminal Law (1997) and Article 20 of the Opinion Regarding Family Violence Cases (2015), 32 expressed a contrary view and 10 declined to respond. The corresponding numbers for the 204 judges in the control group are 145, 51, and 8. The Fisher null hypothesis of no effect for all judges may be rejected at conventional levels of significance: if $1^i(1) = 1^i(0)$ for all i , the probability of observing an outcome as extreme as the one observed here is 0.02.³⁴⁸

³⁴⁸ The test statistic used is difference in means, i.e. $\frac{\sum T_i Y_i}{\sum T_i} - \frac{\sum (1-T_i) Y_i}{\sum (1-T_i)}$ where Y_i is the observed outcome and T_i the treatment indicator. The p-value is estimated by Monte Carlo simulation using 100,000 trials.



Furthermore, one could obtain a confidence interval for the sample average treatment effect by assuming a constant treatment effect and inverting the permutation test. Here, the 95% confidence interval is (-0.174, -0.014).

Two-Sided Confidence Interval for Horizontal Precedent (Binary Response)



These results show that citation of the judgment of a sister court had a statistically significant effect on how judges interpreted the law. Judges who were apprised of the holding of the Henan court tended to apply the leniency provision of Article 20 to the facts before them.

In addition, one could obtain estimates of the sample average treatment effect by regressing the outcome variable on treatment and other variables.³⁴⁹ The regression estimates of the causal effect of treatment are given in the table below.

³⁴⁹ The OLS estimate is not an unbiased estimator for the average treatment effect once covariates are included in the regression. It is, however, still consistent. *See* Imbens and Rubin; Green and Aronow, “Analyzing Experimental Data Using Regression: When is Bias a Practical Concern?” (unpublished manuscript) (arguing that “bias tends” to be negligible when the sample size is greater than 20). *See* generally Gelman and Hill, *Data Analysis Using Regression and Multilevel/Hierarchical Models* (Cambridge University Press 2006), 167-181.

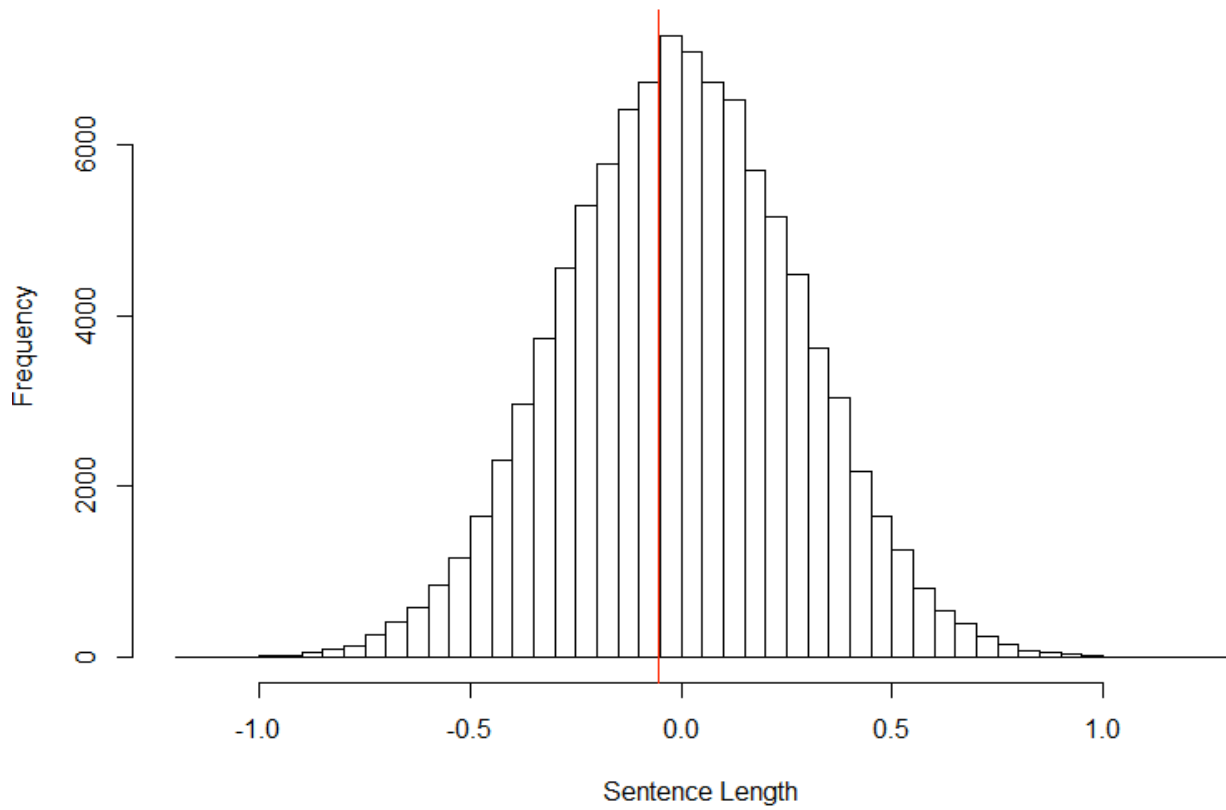
	Model 1 Estimate (S.E.)	Model 1.1 Estimate (S.E.)	Model 1.2 Estimate (S.E.)
(Intercept)	1.260*** (0.029)	1.311*** (0.052)	1.141*** (0.098)
Treatment	-0.094* (0.041)	-0.096* (0.042)	-0.102* (0.041)
Female	.	-0.004 (0.043)	-0.015 (0.043)
5-10 Years	.	-0.045 (0.053)	-0.034 (0.052)
10-20 Years	.	-0.122 (0.069)	-0.125 (0.070)
>20 Years	.	-0.086 (0.082)	-0.055 (0.085)
Masters	.	-0.028 (0.048)	-0.005 (0.051)
Doctorate	.	-0.229 (0.187)	-0.118 (0.185)
Continuing Education	.	0.137 (0.124)	0.128 (0.125)
Yet to Pass Bar	.	0.020 (0.077)	0.003 (0.079)
Court Fixed Effects	No	No	Yes
N	389	382	382
RMSE	0.408	0.408	0.396
R^2	0.013	0.031	0.132
adj R^2	0.011	0.007	0.066
F	5.21 df(1,387)*	1.3 df(9,372)	1.99 df(27,354)**

* $p \leq 0.05$ ** $p \leq 0.01$ *** $p \leq 0.001$

When analyzing the treatment effect across subgroups, I find that judges who had yet to pass the bar tend to resist the force of precedent while judges who had passed the bar tended to be swayed by it.

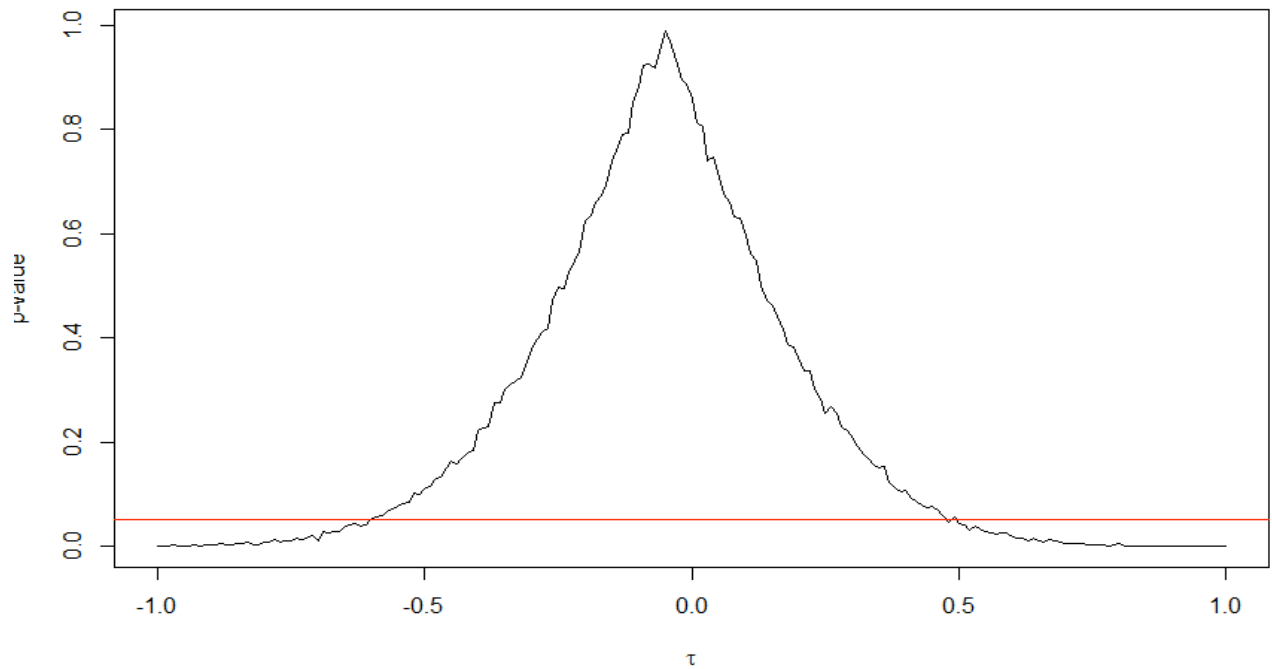
However, judges in the treated and control groups did not differ statistically in the length of sentences that they recommended. The Fisher null hypothesis cannot be rejected: the inference test yields a p-value of 0.851.

Horizontal Precedent



Assuming constant treatment effects and inverting the inference test returns a 95% confidence interval of (-0.6, 0.49).

Two-Sided Confidence Interval for Horizontal Precedent (Length of Sentence)



This result remains true even if the analysis is limited to subgroups. Unsurprisingly, the average effect of treatment on the length of sentences that judges recommended is also statistically indistinguishable from zero.

	Model 1 Estimate (S.E.)	Model 1.1 Estimate (S.E.)	Model 1.2 Estimate (S.E.)
(Intercept)	7.173*** (0.201)	7.438*** (0.352)	9.373*** (0.646)
Treatment	-0.053 (0.288)	-0.146 (0.293)	-0.202 (0.288)
Female	.	-0.594* (0.295)	-0.588* (0.297)
5-10 Years	.	0.750* (0.364)	0.451 (0.362)
10-20 Years	.	0.656 (0.465)	0.449 (0.470)
>20 Years	.	1.274* (0.555)	0.766 (0.584)
Masters	.	-0.447 (0.330)	-0.319 (0.349)
Doctorate	.	-0.892 (1.186)	-1.348 (1.182)
Continuing Education	.	-0.671 (0.763)	-0.235 (0.777)
Yet to Pass	.	-0.728 (0.532)	-0.662 (0.545)
Court Fixed Effects	No	No	Yes
N	327	322	322
RMSE	2.600	2.577	2.506
R^2	0.000	0.051	0.154
adj R^2	-0.003	0.023	0.077
F	0.0341 df(1,325)	1.86 df(9,312)	1.99 df(27,294)**

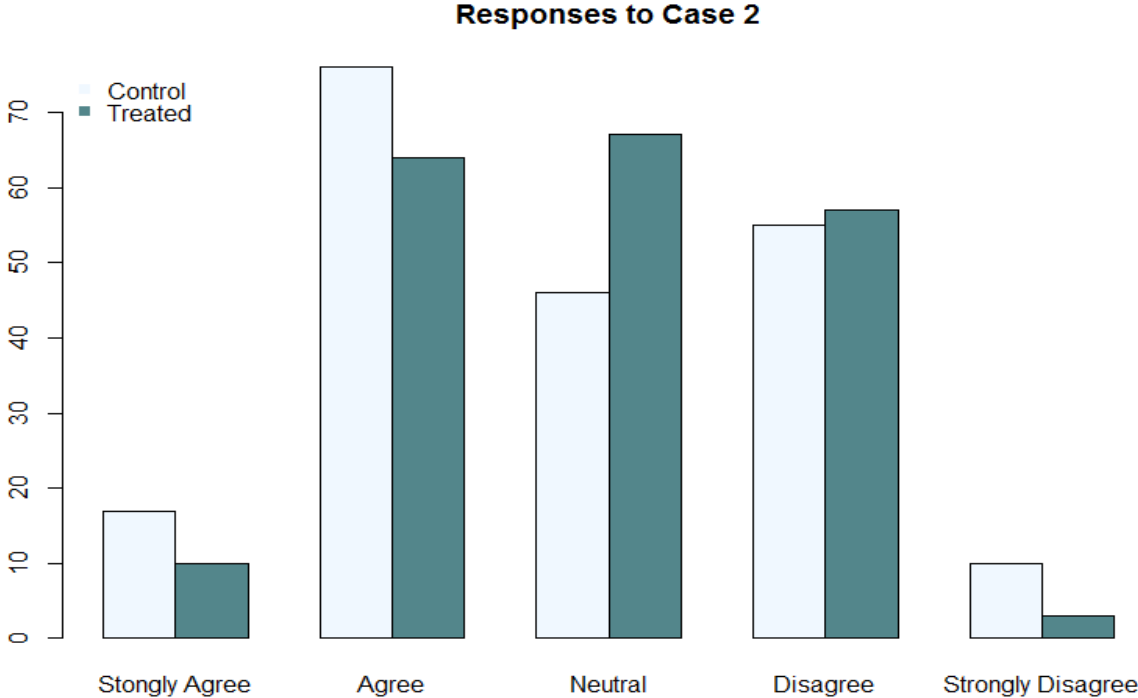
* $p \leq 0.05$ ** $p \leq 0.01$ *** $p \leq 0.001$

To summarize, these results show that the citation of the Henan court decision had statistically affect judges' views on whether the leniency provision of Article 20 should apply to the facts before them. However, it did not statistically differ the length of sentences that judges recommended.

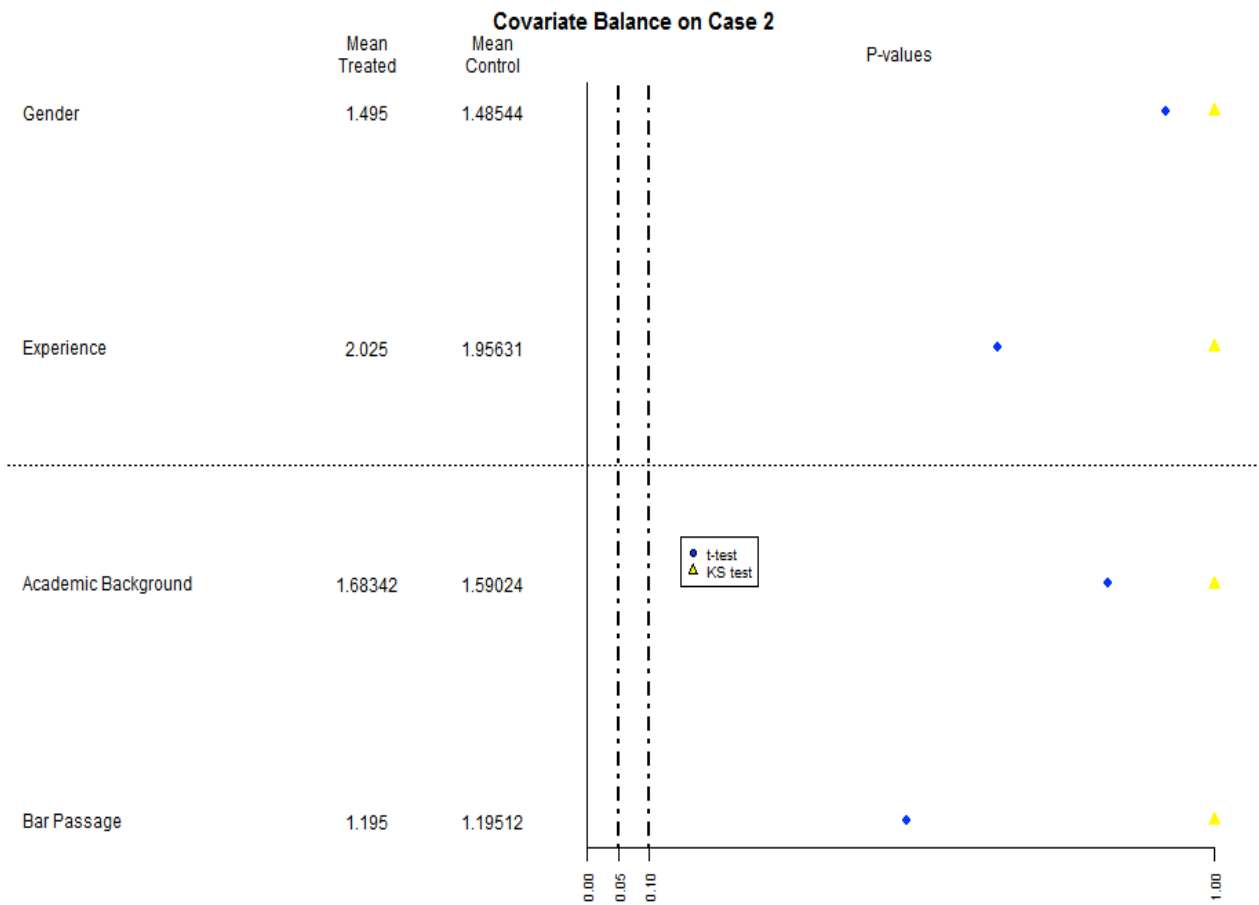
The second case is based on a controversial judgment involving a testamentary transfer. In December of 2001, Naxi District People's Court of Luzhou Municipality in Sichuan province tried a case regarding "Mistress Testamentary Succession." The court held that, even though the testamentary succession of Yongbin Huang that left his assets to his mistress, Xueying Zhang, had been legally notarized, such transfer was invalid on the grounds that it contravened public order and morality. The relief of the mistress, Xueying Zhang, had been denied. These facts of this case were recounted to all judges. In addition, Judges randomly assigned to treatment were given an argument criticizing the holding of the Sichuan court as follows:

Many legal scholars have criticized this judgment online. They pointed out that this judicial decision replaced statutes by legal principles and made the moral standard overrule the law.

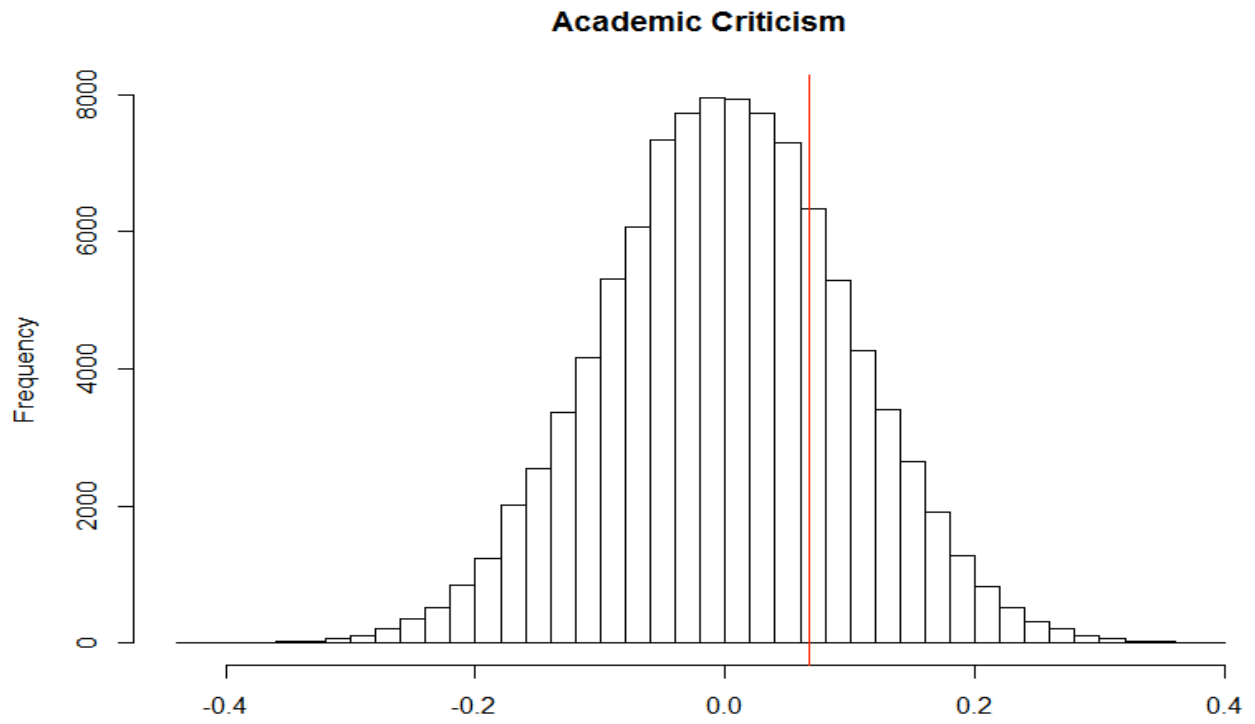
The judges were then queried on the extent to which they agreed with the judgment of the Nazi People’s Court on a scale that ranged from 1 (strongly agree) to 5 (strongly disagree). An ordinal variable measuring judges’ agreement with the decision of the Sichuan court was recorded. There were 2 judges from control group did not respond to the question. The bar plot below depicts the responses of the remaining 405 judges to the second case.



201 judges were assigned to treatment and 206 to control in the second case. There is evidence that the randomization succeeded in achieving covariate balance between both groups, and the least balanced covariate is bar passage.

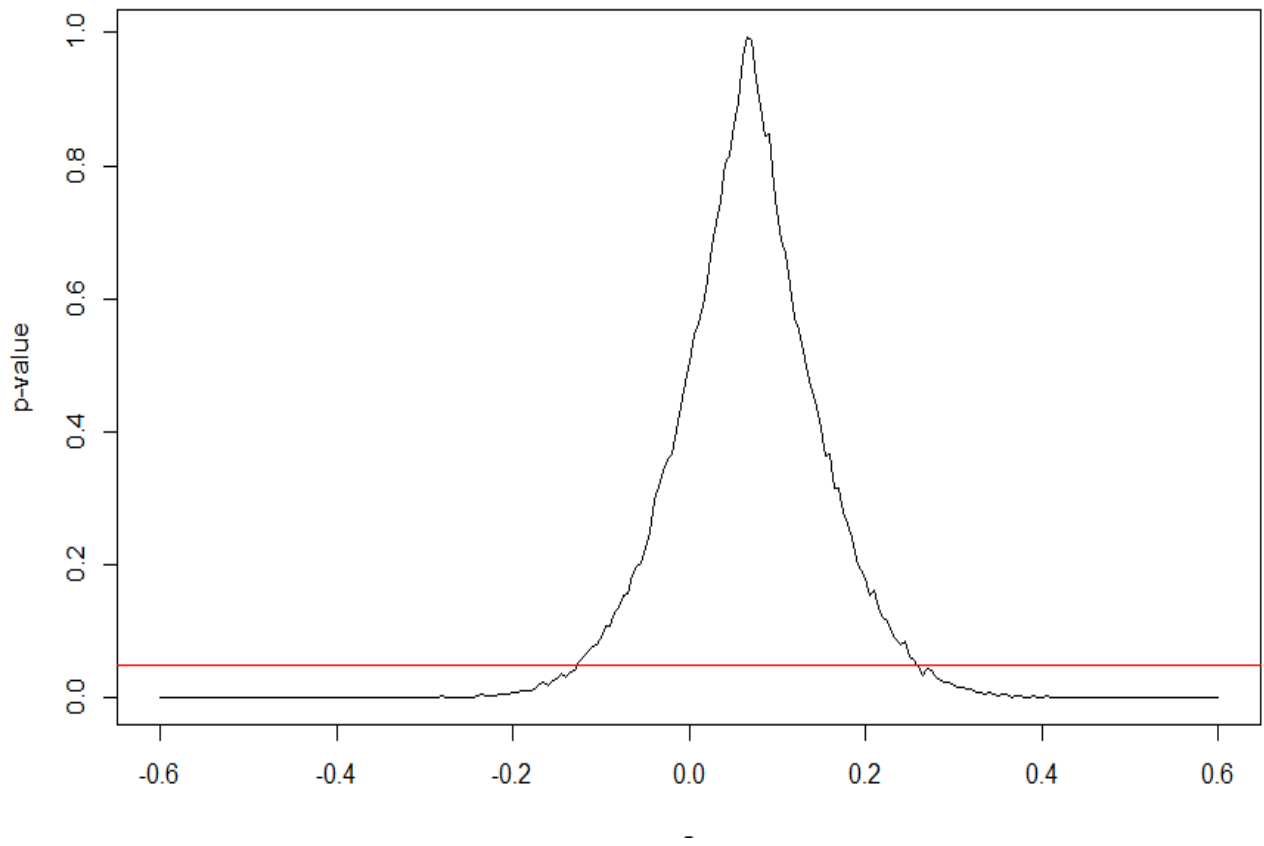


The results indicate that academic arguments against a judicial decision did not have a statistically significant effect on the views that judges expressed about the second case. The Fisher Null hypothesis of no effect for all judges cannot be rejected. The inference test yields a p-value of 0.496.



Assuming constant treatment effects and inverting the inference test returns a 95% confidence interval of (-0.125, 0.255).

Two-Sided Confidence Interval for Academic Criticism



This finding is robust across specifications of the OLS model. The sample average treatment effect estimated is not significantly different from zero.

	Model 1 Estimate (S.E.)	Model 1.1 Estimate (S.E.)	Model 1.2 Estimate (S.E.)
(Intercept)	2.828*** (0.070)	2.874*** (0.123)	2.921*** (0.243)
Treatment	0.067 (0.099)	0.066 (0.101)	0.067 (0.101)
Female	.	-0.022 (0.103)	-0.031 (0.105)
5-10 Years	.	-0.017 (0.127)	-0.030 (0.128)
10-20 Years	.	0.064 (0.165)	0.069 (0.171)
>20 Years	.	-0.192 (0.199)	-0.176 (0.212)
Masters	.	0.000 (0.116)	-0.084 (0.125)
Doctorate	.	-1.102* (0.461)	-1.289** (0.466)
Continuing Education	.	-0.019 (0.286)	0.147 (0.296)
Yet to Pass Bar	.	0.078 (0.186)	-0.089 (0.193)
Court Fixed Effects	No	No	Yes
N	405	398	398
RMSE	1.001	1.007	0.997
R^2	0.001	0.020	0.082
adj R^2	-0.001	-0.003	0.015
F	0.455 df(1,403)	0.861 df(9,388)	1.23 df(27,370)

* $p \leq 0.05$ ** $p \leq 0.01$ *** $p \leq 0.001$

In sum, it is shown that the first treatment, the citation of a sister court decision, had a statistically effect on whether judges believed that a lenient sentence should be warranted to a criminal defendant in a similar situation. In contrast, the second treatment, the academic criticism of a court decision, did not statistically affect judges views' on that case. These results tentatively suggest that horizontal precedent can influence judges, even in a civil law jurisdiction, like China.

More interestingly, coherent with the results of the first part of my survey, this experimental survey also indicates that judges who had passed the bar were more likely to be swayed by the precedent than judges who had not passed the bar. This phenomenon could be driven by the revolution of Chinese bar exam, trainings of judges, and the relative solicitude of judges for judicial legitimacy.

Chinese bar exam is a national and uniform qualification examination annually organized by the Ministry of Justice for those who plan to engage in a certain legal profession.³⁵⁰ Its contents cover theoretical jurisprudence, applied jurisprudence, current legal provisions, legal practice, and legal professional ethics.³⁵¹ It generally includes three tests with one hundred multiple choices for each and one essay test with seven essay questions. Many questions consist of hypothetical cases described by a few lines.³⁵² Anyone who is to be a judge for the first time must pass Chinese bar exam pursuant to Article II of “Measures for the Implementation of the National Judicial Examination.”³⁵³ Its processors, “Lawyer Qualification Examination,” “Judge Qualification Examination,” and “Procuratorate Qualification Examination” were replaced by Chinese bar exam in 2002.³⁵⁴ Unlike “Lawyer Qualification Examination,”³⁵⁵ “Judge Qualification Examination” was not nationally uniformed. It was designed and marked by the higher People’s courts of each jurisdiction. According to some judges,³⁵⁶ “Judge Qualification Examination” was referred to, but much easier than “Lawyer Qualification Examination.” Given this exam was not nationwide uniform, there was not many bar review courses available to participants. To prepare this exam, most examinees practiced on past exams.

³⁵⁰ Zuigao Renmin Fayuan Zuigao Renmin Jianchayuan Sifabu Guanyu Guojia Sifa Kaoshi Shishi Banfa (Shixing) [Measures for the Implementation of State Judicial Examination (for Trial Implementation)], art. 2, 5, available at: <http://en.pkulaw.cn/display.aspx?cgid=37758&lib=law>; Guojia Sifa Kaoshi Shishi Banfa (2008 Xiuding) [Measures for the Implementation of the National Judicial Examination (2008 Revision)], art. 2, 5, available at: <http://en.pkulaw.cn/display.aspx?cgid=107491&lib=law>.

³⁵¹ *Id.*, art. 8.

³⁵² For example, test II 2015, question XI states, “A intentionally released a snake to bite B. A then regretted after seeing B suffering from unbearable pain, and drove B to hospital. When they were in a intersection waiting for traffic lights, B jumped out of the car, because B had been thinking of committing a suicide. B died in three hours. It was ascertained that B would not have died if B had been successfully sent to a hospital at that time. Which of the following statements is right? 1. A is not liable for B’s death. A’s act constitutes the discontinuation of a crime. 2. A did not effectively avoid the negative effects of the crime happen. A’s act constitutes the completion of a crime. 3. A is not liable for B’s death. A’s act constitutes the attempted crime. 4. A did not stop successfully B from running out of the car. A’s act constitutes a crime of inaction.

³⁵³ “Anyone who is to be a judge or public procurator for the first time or who is to be a lawyer or notary must first of all pass the national judicial examination and get the legal professional qualification, unless otherwise provided for by laws and administrative regulations.” Guojia Sifa Kaoshi Shishi Banfa (2008 Xiuding) [Measures for the Implementation of the National Judicial Examination (2008 Revision)], art. 2, available at: <http://en.pkulaw.cn/display.aspx?cgid=107491&lib=law>. See also “anyone who is to be a judge or public procurator for the first time or who is to obtain a lawyer qualification certificate must first of all pass the State judicial examination.” Zuigao Renmin Fayuan Zuigao Renmin Jianchayuan Sifabu Guanyu Guojia Sifa Kaoshi Shishi Banfa (Shixing) [Measures for the Implementation of State Judicial Examination (for Trial Implementation)], art. 2, available at: <http://en.pkulaw.cn/display.aspx?cgid=37758&lib=law>.

³⁵⁴ “Lawyer Qualification Examination” starts 1986. See Lvshi Zige Kaoshi Banfa [Method of Qualification Test for Lawyers], issued by Ministry of Justice on July 26, 2000, effective on July 12, 2001, available at: <http://en.pkulaw.cn/display.aspx?cgid=31085&lib=law>;

³⁵⁵ Qualification test for lawyers is organized by the Ministry of Justice and held once each year. The Ministry of Justice sets up an examining body for the qualification test for lawyers that will undertake the test affairs. Lvshi Zige Kaoshi Banfa [Method of Qualification Test for Lawyers], issued by Ministry of Justice on July 26, 2000, effective on July 12, 2001, art. 3, 4, available at: <http://en.pkulaw.cn/display.aspx?cgid=31085&lib=law>.

³⁵⁶ I inquired one judge and two clerks about “Judge Qualification Examination” in May of 2016.

Prior to Chinese bar exam, one had to pass the “Lawyer Qualification Examination” to become a lawyer.³⁵⁷ However, neither “Judge Law of the People’s Republic of China”³⁵⁸ or “Method of Qualification Test for Lawyers”³⁵⁹ required a person to pass the “Judge Qualification Examination” to become a judge. The eligibility of judges varies from regions to regions. Prior to 2002, many judges in China were retired military officials or government cadres and lacked significant legal training.³⁶⁰ They were elected or removed by the local People’s Congresses.³⁶¹ Thus, even after Chinese bar exam came out, judges, who passed “Judge Qualification Examination” or did not take any relevant exam, rarely were required to pass Chinese bar exam to continue to hear cases. The local courts or local government do not have authority to do so, because the requirement stated in “Measures for the Implementation of the National Judicial Examination” only applies to new judges.³⁶² It thus explains why there was a group of responding judges who do not hold a Chinese bar in the survey. Lack of significant legal trainings or bar exam preparation, to some extent, justifies the result observed that judges who had not passed bar tended to resist the force of precedent. On the one hand, these judges might not get used to analyze cases with a few lines of facts through preparing bar exam. On the other hand, these judges, especially who were retired government officials or government cadres, might not have enough confidence to resort to other resources outside statutes, when they

³⁵⁷ The qualification test for lawyers is a national professional qualification test. Examinees whose test scores have reached matriculation level and who are qualified after checkup will be conferred with the qualification of lawyers by the Ministry of Justice. Lvshi Zige Kaoshi Banfa [Method of Qualification Test for Lawyers], issued by Ministry of Justice on July 26, 2000, effective on July 12, 2001, art. 2, available at: <http://en.pkulaw.cn/display.aspx?cgid=31085&lib=law>.

³⁵⁸ Article 9 states, that “a judge must possess the following qualifications: (1) to be of the nationality of the People’s Republic of China; (2) to have reached the age of 23; (3) to endorse the Constitution of the People’s Republic of China; (4) to have fine political and professional quality and to be good in conduct; (5) to be in good health; and (6) to have worked for at least two years in the case of graduates from law specialties of colleges or universities or from non-law specialties of colleges or universities but possessing the professional knowledge of law; or to have worked for at least one year in the case of Bachelors of Law; those who have Master’s Degree of Law or Doctor’s Degree of Law may be not subject to the above mentioned requirements for the number of years set for work. The judicial personnel who do not possess the qualifications as provided by sub-paragraph (6) of the preceding paragraph prior to the implementation of this Law shall receive training so as to meet the qualifications as provided by this Law within a prescribed time limit. The specific measures shall be laid down by the Supreme People’s Court.” Zhonghua Renmin Gongheguo Faguan Fa [Judges Law of the People’s Republic of China], issued by Standing Committee of the National People’s Congress on Feb. 28, 1995, effective on Jan. 1, 2002, art. 9, available at: <http://en.pkulaw.cn/display.aspx?cgid=10943&lib=law#menu3>; see also Zhonghua Renmin Gongheguo Faguanfa (2001 Xiuzheng) [Judges Law of the People’s Republic of China (2001 Amendment)], issued by Standing Committee of the National People’s Congress on June 30, 2001, effective on Jan. 1, 2002, available at: <http://en.pkulaw.cn/Display.aspx?Lib=law&Id=1861&keyword=#menu3>.

³⁵⁹ See Lvshi Zige Kaoshi Banfa [Method of Qualification Test for Lawyers], issued by Ministry of Justice on July 26, 2000, effective on July 12, 2001, available at: <http://en.pkulaw.cn/display.aspx?cgid=31085&lib=law>.

³⁶⁰ Benjamin Liebman and Tim Wu, China’s Network Justice, 8 Chi. J. Int’l L. 257, 268 (2007).

³⁶¹ However, many local courts or governments require old assistant judges to take Chinese bar after 2002, if they want to become judges or continue to hear cases, because assistant judges of the People’s Courts are appointed by the presidents of the courts where they work. Zhonghua Renmin Gongheguo Faguan Fa [Judges Law of the People’s Republic of China], issued by Standing Committee of the National People’s Congress on Feb. 28, 1995, effective on Jan. 1, 2002, art.11, available at: <http://en.pkulaw.cn/display.aspx?cgid=10943&lib=law#menu3>;

³⁶² Guojia Sifa Kaoshi Shishi Banfa (2008 Xiuding) [Measures for the Implementation of the National Judicial Examination (2008 Revision)], art. 2, available at: <http://en.pkulaw.cn/display.aspx?cgid=107491&lib=law>.

confront with lawyers who passed bar and have more formal legal education and trainings. These speculations seemed to be proven by my further interviews of judges and law clerks in China.

C. Interviews with Judges and Law Clerks

Between July and August of 2015, I have interviewed two Chinese Supreme People's Court judges, a local court judge, and three local court law clerks. Each interview lasted around an hour. Some of the questions I asked judges from Chinese Supreme People's Court were different from the ones I asked judges and law clerks from local people's courts. During each interview, I slightly adjusted questions and the ways I framed them according to judges' responses.

a. The Nature and Function of Guiding Cases

I have asked interviewees about their views on the emerging "Chinese Guiding Cases." Given Chinese academic scholars suggested that implementing Guiding Cases was an early stage of establishing Chinese case law system,³⁶³ I asked if they agreed with these academic comments. Unsurprisingly, all the interviewees strongly disagreed and claimed that Guiding Cases in China were greatly different from binding precedent in common law countries. They generally gave the following three reasons to explain: first, judges in China did not have legislative power; second, neither Guiding Cases were a legal source in China, nor mandatorily cited by courts; third, China had no foundation for implementing a case law system. One judge from Chinese Supreme People's Court even gave a dubious argument that courts at all level only had to refer to the key points of the Guiding Cases rather than their cases facts, so the reasoning by analogy under common law tradition did not apply. Despite of the emphasized distinction between Guiding Cases and binding precedent, interviewees foresaw a bright future of implementing Guiding Cases in China. They believed these cases would play an important role in filling the gap of statutes and standardizing the judgments of like cases. Compared to written statutes, Guiding Cases provided specific and vivid examples to guide lower courts on adjudication. The local court judge highlighted the advantage of Guiding Cases over legislative amendments in filling the statute gaps and trying complex cases or case dealing with new situations, because the issuance of Guiding Cases could be much faster. She stated that lawyers sometimes attached Guiding Cases or even other judgments decided within and outside the jurisdiction of the court in their briefs. A few lawyers had argued the trial court did not follow the Guiding Case during the appeal. Once the court received these case decisions, judges would check on their internal database, which was called C2J, and then decided whether to consider or not. The three law clerks I interviewed all indicated that the judges they were serving had assigned them to search decided similar cases, especially when adjudicating some controversial or hard cases.

b. The Problem and Proposed Solutions of Implementing Guiding Cases

One of Chinese Supreme People's Court judges I interviewed depicted some problems facing in the process of implementing Guiding Cases, which included difficulties of selecting Guiding Cases, slow progress, and lack of systematic organization. More problematically, he said that many local people's court judges were not familiar with Guiding Cases and rarely cited them. These statements seemed to be confirmed by local court judge and law clerks I interviewed. The local court judge said that many judges in her court did not have enough time to keep informed

³⁶³ See Dong Hao, *The Road of the Construction of Chinese Case Law*, Zhongguo Panli Jieshi Goujie Zhilu (China University of Political Science and Law Press (2009).

of Guiding Cases due to their heavy caseload. They conducted legal research on Guiding Cases and other previous judicial decisions only if dealing with hard cases. Their internal database, C2J, contained statutes, regulations, and prior judicial decisions across the country. It, however, did not cover all the Guiding Cases and were not updated timely. She had to pay out of pocket to purchase materials on Guiding Cases. In addition, her court had been annually evaluating the numbers of cases decided by judges got appealed, and classified the appeal reasons into no errors, reasonable errors, and serious errors. That judges did not follow Guiding Cases was generally treated as no error or reasonable error. It gave judges fewer motivations to learn Guiding Cases by themselves when the internal database and materials were not timely updated. Even if the Guiding Case had been referred to, judges working in her court rarely cited it in their judgments. Instead, they parroted the legal reasoning paragraph of the Guiding Case in their judgments. One of the local court clerks I interviewed told me that the shorter a judgment is, the fewer mistakes the judge would make.

Confronting these problems occurred in implementing Guiding Cases, interviewees both from Supreme Court and local courts proposed to launch a comprehensive training about how to properly refer to or cite these cases. However, a law clerk questioned the effectiveness of the training, because judges might not attend these trainings on site or watch them online after work. The local court judge who purchased materials on Guiding Cases suggested that this kind of materials in print should be distributed to every judge working in courts at all levels. In addition to systematic training and complimentary source, a supreme court judge I interviewed suggested that lower court judges should closely comply with article 11 of “Detailed Rules for the Implementation of the Provisions of the Supreme People’s Court on Case Guidance”: the relevant Guiding Cases shall be consulted, and the number and key points of the Guiding Case shall be quoted.³⁶⁴ He further suggested that Supreme People’s Court should strongly encourage lower courts to send their decisions for selection as Guiding Cases.

c. The Choice of Previous Judicial Decisions in Practice

Given that most Guiding Cases were decided by local court judges, I asked supreme court judges if they would follow the relevant Guiding Case if it was in conflict with their earlier decision in a very similar case. Both of them said yes without any hesitation. A supreme court judge explained once Guiding Cases had been published, they had broad applicability that judges sitting in courts at all level should refer to. He repeatedly emphasized that China did not have binding precedent, but guiding cases. The order of persuasiveness of guiding cases should be Guiding Cases, cases on Chinese Supreme People’s Court Gazette, and cases published by higher people’s courts at provincial-level. He said the case decided by himself and higher people’s court cases which were not published did not have any binding effect.

³⁶⁴ “In the process of handling a case, the case handling personnel shall consult relevant guiding cases. Where any relevant guiding case is quoted in the written judgment, the number of the guiding case and its key points of judgment shall be quoted in the judgment’s reasoning. Where a public prosecution authority, a party to a case, or a defender or litigation representative thereof quotes a guiding case as the ground for prosecution (or defense), the case handling personnel shall respond in the judgment’s reasoning as to whether the guiding case has been referred to, and explain the reasons.” “Zuigao Renmin Fayuan Guanyu Anli Zhidao Gongzuo De Guiding Shishi Xize” [Detailed Rules for the Implementation of the Provisions of the Supreme People’s Court on Case Guidance], art.11, issued by Supreme People’s Court on May 13, 2015, available at: <http://en.pkulaw.cn/display.aspx?cgid=249447&lib=law>.

Interestingly, judge and law clerks in local courts gave me different answers to the question regarding choosing between a Guiding Case decided by a local court in a different province and a conflicted case decision recently made by the higher-level court in their provinces. The local court judge said she would be very struggled and more likely to follow the higher-level court decision. The three law clerks told me judges in their courts would follow the higher people's court decisions if these decisions were in conflict with relevant Guiding Cases. More importantly, a law clerk revealed only the decisions made within the province of her court could be located through the internal database.

In conclusion, judges in China intentionally distinguished guiding cases from binding precedent. They, nonetheless, highlighted the function of publishing selected cases in filling statute gaps and setting specific examples especially when adjudicating hard cases. That lawyers presented previous judicial decisions to argue a case was one of the factors that drew judges' attentions to decided similar cases. However, judges were not satisfied with the coverage of their internal database in supporting them to conduct an effective research on cases. They proposed the distribution of hard copy materials on Guiding Cases and intra-court trainings as to how to properly consider, cite, or quote Guiding Cases. Interestingly, when choosing between Guiding Cases and higher-level court decisions, Chinese Supreme Court expected lower court judges to follow Guiding Cases. However, some lower court judges ended up choosing higher-level court decisions in their own jurisdictions over Guiding Cases, because they were subject to evaluations of their hierarchical superiors.

This chapter identifies how judges in China influence and are influenced by the decisions of other judges in creating and spreading judicial-created policies. The influence of judicial decisions may be vertical or horizontal. The former is exercised by higher courts on lower courts whereas the latter is exerted by sister courts on each other. Through cases studies and empirical data, it explains how Chinese judges innovate in courts through statutory interpretation and how they secretly follow previous judicial decisions in practice. Because written statutes are still the major legal sources in China, it examines how judges interpret within and beyond the bounds of statutes to adapt legal doctrines to the changing social and legal environment in China. I selected China as a case study because it presents us with some challenging issues, such as political restriction on judicial power and a history of limited judicial transparency. The common presumption that judges working in civil law traditions may only strictly apply and interpret written statutes is perhaps even stronger in the Chinese context. But in fact judicial agents in civil law countries must actively balance the tension between law and changeable social conditions to safeguard the common values of consistency and legal authority. What they end up doing, then, starts looking a lot like a form of implementing stare decisis.

Chapter III. The Future of Judicial Innovation in China

“There was never a more sterile controversy than that upon the question whether a judge makes law. Of course he does. How can he help it?”³⁶⁵ Since “the best of draftsmanship leaves both gaps to be judicially filled and hidden ambiguities and uncertainties to be judicially resolved,”³⁶⁶ judges are bound to incorporate their own social and economic philosophy into statutory interpretation so as to fill the gaps and clarify uncertainties of statutes.³⁶⁷ Although “a judge might commend himself to the most rigid principle of adherence to” the law, the words in his decisions mean something materially different along the passing of time and the change of context.³⁶⁸ The innovative power of time applies both to interpretation of case law and statutes, which is largely relied on semantic meaning of words.³⁶⁹

Legal scholars in the United States have explored the spread of judicial innovations in the common law, such as the strict liability rule for manufacturing defects,³⁷⁰ and in statutory interpretation, such as hostile work environment standards under a federal sexual harassment statute.³⁷¹ In contrast, there is scant attention to the latitude that courts have in creating and propagating legal doctrines in civil law countries. This disparity could be due to an oft-repeated distinction between common law and civil law jurisdictions. The former is generally un-codified, and is based on an accumulated body of precedent. In contrast, the latter is codified, and is founded on a legal code that dictates the rule to be applied by a court. Thus, it is frequently asserted that judges exert more influence over policy making in common law systems than in civil law ones. However, since the late twentieth century, the significant convergence in the use of previous judicial decisions between two legal systems has been widely recognized.³⁷² One of the reasons that cause this convergence is that “legal system has to accept that it makes mistakes in the formulations of rules and that it needs to adapt to changing conditions.”³⁷³ Yet, legislative amendment is a laborious undertaking that is mired in procedure and may take decades to complete. Unlike the legislature, courts frequently confront statutory vagueness or imperfections in the course of adjudication. Previous judicial decisions can function as an avenue for judges to consult when handling hard cases and legitimate an innovative judgment post factum.³⁷⁴ Furthermore, judicial decisions can serve as a form of political communication between courts

³⁶⁵ Sam H. Jones, “Rival Law Reformers?,” 110 Sol. J. 733 (1966).

³⁶⁶ Sir Garfield Barwick, “Judiciary Law: Some Observations Thereon,” 33 Contemp. Legal Probs. 239, 241 (1980).

³⁶⁷ Mauro Cappelletti, *The Judicial Process in Comparative Perspective*, Clarendon Press, Oxford (1989), at 3, 4.

³⁶⁸ Viscount Radcliffe, “The Lawyer and his Times,” *Not in Feather Beds: Some Collected Papers*, 265, 271 (1968).

³⁶⁹ Mauro, at 6.

³⁷⁰ Robert C. Bird & Donald J. Smythe, *Social Network Analysis and the Diffusion of the Strict Liability Rule for Manufacturing Defects*, *Law and Social Inquiry*, Vol. 37, no.3 (2011).

³⁷¹ Laura P. Moyer & Holley Tankersley, *Judicial Innovation and Sexual Harassment Doctrine in the U.S. Courts of Appeals*, *Political Research Quarterly*, Vol. 65, no. 4 (2012).

³⁷² D. Neil MacCormick & Robert S. Summers, *Interpreting Precedents: A Comparative Study* (Aldershot: Dartmouth Publishing Co. Ltd, 1997).

³⁷³ John Bell, *Comparing Precedent*, 82 *Cornell L. Rev.* 1243 (1997)

³⁷⁴ Maurice Adams, *The Rhetoric of Precedent and Comparative Legal Research*, *The Modern Law Review*, Vol. 62, No. 3, 464, 466 (1999).

that gathers information about the consequences of a particular policy innovation, and to gauge public support for the future legislative amendments. Despite that the lawmaking power still vest in legislatures, the *jurisprudence constante*³⁷⁵ of the courts has become an independent source of law in the practice of courts under civil law tradition. Like China, decided cases in many civil law countries plays a crucial, but unacknowledged role in the process of judicial decision-making and the development of law.³⁷⁶

I. Doctrinal Innovation by Courts under Civil Law Tradition: the Examples of Europe and Asia

A. Europe

In France, “[l]arge-scale law-making through general legislation has traditionally be reserved to the political branches; but this still left a great deal of room for day-to-day, routine interpretive and normative management by the courts.”³⁷⁷ In addition, statutes only play a role through the interpretation given by courts through judicial decisions.³⁷⁸ According to the primary author of the French Civil Code, the codified legislation in France does not “descend into the details that can arise on every issue,” but establish the general maxims, principles, and spirits of the law in broad outline.³⁷⁹ A creative interpretation of the code, judicial lawmaking (*création du droit*), may occasionally go beyond the wording of the codified law and adapt the application of its spirit to changing societal developments.³⁸⁰ Despite the absence of a uniform case-law technique, creative interpretations by courts play a crucial role in the development of law. Cour de cassation, the highest level of French courts, issues and imposes its interpretation of the law (*de la jurisprudence*) as de facto binding authority through its wide supervisory power over lower courts.³⁸¹ Its annual report also “became an instrument of diffusion of the jurisprudential innovations and the normative policy of the supreme court.”³⁸² In addition to the vertical level of

³⁷⁵ It refers to the “consistent case-law” of the courts. Konrad Zweigert, Hein Koetz, *An Introduction to Comparative Law* (Tony Weir trans., Clarendon Press, 3 Revised edition, 1998).

³⁷⁶ John Bell, *Comparing Precedent*, 82 *Cornell L. Rev.* 1243, 1249 (1997).

³⁷⁷ Mitchel De S-O-L’E Lasser, *Judicial Deliberations. A Comparative Analysis of Judicial Transparency and Legitimacy* (Oxford University Press, New York 2004), at 35.

³⁷⁸ Michel Troper & Christophe Grzegorzczak, *Precedent in France, Interpreting Precedents: A Comparative Study* (D. Neil MacCormick & Robert S. Summers eds., Aldershot: Dartmouth Publishing Co. Ltd, 1997), at 113.

³⁷⁹ Quoting Lasser at 35, Jean-Étienne-Marie Portalis, *Discours préliminaire, du premier projet de Code civil* (1801).

³⁸⁰ *création du droit* can exceed mere clarification, occasionally fill the gaps, and reconcile possible antinomies. Komarek, J. (2009) ‘Precedent and Judicial Lawmaking in Supreme Courts: The Court of Justice Compared to the US Supreme Court and the French Cour de Cassation’, *Cambridge Yearbook of European Legal Studies*, 11, 399, 415. See e.g., Pascale Deumier, *Création du droit et rédaction des arrêts par la Cour de cassation*, *Archives de Philosophie du Droit* 50:49-75 (2007).

³⁸¹ The binding authority of *jurisprudence* of Cour is limited, as the legislators can reverse or undo *jurisprudence* by enacting a new law. Jan Komarek, *Precedent and Judicial Lawmaking in Supreme Courts: The Court of Justice Compared to the US Supreme Court and the French Cour de Cassation*, 11 *Cambridge Yearbook of European Legal Studies* 399, 418-19 (2009). See John P. Dawson, *Oracles of the Law*, (William s Hein & Co, 1986), at 416-31 (summarizing an earlier French debate on the status of *La Jurisprudence* among the sources of the law).

³⁸² Quoting Komarek at 420, Frédéric Zénati, ‘La nature de la Cour de cassation’, *BICC* No 575, 15/04/2003.

judicial lawmaking, in the circumstance of a new and difficult legal issue arising frequently, lower court judges can request the Cour de cassation for advice on statutory interpretation.³⁸³ However, the advices are not legally binding: French lower courts are allowed to consider the situations presented in their day-to-day adjudications and depart from the Court of Cassation's *jurisprudence*.³⁸⁴ The rebellion of lower court judges can signal the Court of Cassation to re-examine or even overrule the jurisprudential rule it established.³⁸⁵ A study of judicial lawmaking on tort liability illustrated the roles that French courts play in diffusion of policy innovation. It found that,

Not only do French judges make law but they have created a working system of case law. What differentiates the French case-law system from the common law is primarily the formulaic method adopted in France for stating case-law rules. French judges do not struggle to extract holdings from prior cases, but to formulate as precisely as possible the applicable case-law rule.³⁸⁶

These innovative activities by French courts are contributed by the availability and transmission of previous judicial decisions. Although French judges rarely cite cases, one cannot deny the importance of decided cases in guiding the rulings of similar difficulties or situations arising in the future adjudications.³⁸⁷ Most decisions of Court of Cassation are published in official bulletins, and the very important ones of which are often accompanied by an opinions of a reporting judge. In addition, academic journals publish selected cases decided by all levels of courts. Since French decisions are generally terse and lack detailed legal reasoning, law professors are often invited by journals to give a commentary (note d'arrêt) to some influential cases relating to their expertise. These commentaries, globally referred to as "la doctrine," are heavily relied by practitioners and judges to interpret cases.³⁸⁸

³⁸³ Michel Troper & Christophe Grzegorzcyk, *Precedent in France, Interpreting Precedents: A Comparative Study* (D. Neil MacCormick & Robert S. Summers eds., Aldershot: Dartmouth Publishing Co. Ltd, 1997), at 111-112.

³⁸⁴ John Bell, *French Legal Cultures* (Cambridge University Press, 2001), 72-88; FRISON-ROCHE, Marie-Anne, *La jurisprudence massive, en collaboration avec Serge BORIES, D.* (1993); Jan Komarek, *Precedent and Judicial Lawmaking in Supreme Courts: The Court of Justice Compared to the US Supreme Court and the French Cour de Cassation*, 11 *Cambridge Yearbook of European Legal Studies* 399, 423 (2009).

³⁸⁵ Marianne Saluden, *La jurisprudence, phénomène sociologique*. 30 *Archives de philosophie du droit* 191, 196 (1985).

³⁸⁶ Edward A. Tomlinson, *Tort Liability in France for the Act of Things: A Study of Judicial Lawmaking*, 48 *La. L. Rev.* (1988), Available at: <http://digitalcommons.law.lsu.edu/lalrev/vol48/iss6/1>;

³⁸⁷ Michel Troper & Christophe Grzegorzcyk, *Precedent in France, Interpreting Precedents: A Comparative Study* (D. Neil MacCormick & Robert S. Summers eds., Aldershot: Dartmouth Publishing Co. Ltd, 1997), at 112-13. *See also*, Gabriel Marty, *La distinction du fait et du droit, Essai sur le pouvoir de contrôle de la Cour de cassation sur les juges du fait. Préface de M. Ch. Cézair-Bru* (1929), at 256.

³⁸⁸ Michel Troper & Christophe Grzegorzcyk, *Precedent in France*, In: *Interpreting Precedents: A Comparative Study* (D. Neil MacCormick & Robert S. Summers eds., Aldershot: Dartmouth Publishing Co. Ltd, 1997), at 108-09.

In Germany, the influence of “unofficial judge-made law” (“*inoffizielles Richterrecht*”)³⁸⁹ on subsequent decisions has been recognized in the case arising under the statutes that lack detailed regulations.³⁹⁰ Although the principle of “stare decisis” does not exist on paper, German judges are, nonetheless, guided by previous judicial decisions and tend to handle similar cases similarly with other judges.³⁹¹ Especially in societies where the courts enjoy a high level of autonomy, such as France and Germany, judicial creativity plays a significant role in evolving law that adapt to changing society.³⁹² Judges from continent countries have been permitted or even required to fill legal gap when the logic deduction based on facts and existing statutes is not enough to lead to a fair judgment.³⁹³ The detailed judge-made rules became an useful avenue for judges to consistently consult and for litigants to rely on to predict the judicial outcome of their cases in order to choose a favorable dispute resolution approach.³⁹⁴ Those rules established by judges unified the ways in which future same type of cases will be decided and “economizes on judges’ as well as litigants’ time and resources.”³⁹⁵ Martin Schneider stated, based on his empirical study on the German labor courts of appeal, that “[German] judges engage in law-making by interpreting the statute law in particular ways and by applying this interpretation consistently in future cases.” By examining the “settlements,” “resolved cases,” and “published decisions” handed down in nine labour courts of appeal from 1980 to 1998, Scheider found that judicial lawmaking was employed by courts to fill the statutory gap and respond to changes occurred in the employment relationship.³⁹⁶ Similar to what has been found in the labor law evolution, due to the limited statutory provisions, the development of German administrative law has immensely been contributed by work of judicial creation.³⁹⁷ In addition to labour law and administrative law, “precedents play a decisive role in constitution law” because the decisions of the Federal Constitutional Court are legally binding according to s.31 BVerfGG, and even have the status of statutes in some cases.³⁹⁸

³⁸⁹ Franz Bydliniski, Hauptpositionen zum Richterrecht. In: Juristenzeitung 40 (1985), at 149; see also, Eduard Picker, Richterrecht oder Rechtsdogmatik – Alternativen der Rechtsgewinnung? In: Juristenzeitung 43(1988).

³⁹⁰ Martin R. Schneider, Judicial Career Incentives and Court Performance: An Empirical Study of the German Labour Courts of Appeal, 20 European Journal of Law and Economics 127, 130-31.

³⁹¹ *Id.* See also, Louis Kaplow, Rules versus Standards: An Economic Analysis. 42 Duke Law Journal 557 (1992). Anthony Ogus, Information, Error Costs and Regulation. 12 International Review of Law and Economics 411 (1992). William M. Landes & Richard A. Posner, Legal Precedent: A Theoretical and Empirical Analysis, 19 Journal of Legal Studies 249 (1976). Franz Bydliniski, Hauptpositionen zum Richterrecht, 40. Jahrg., Nr. 4 149 (1985).

³⁹² “The problems faced by French or German judges, who had to develop principles of unfair competition, or strict liability from general Code formulas have not been very different than those faced by common law judges who developed the rule in *Rylands v. Fletcher*, the principles of manufacturers' liability to consumers, or new legal principles of matrimonial relations, out of scattered, ambiguous, conflicting or nonexisting precedent.” Wolfgang Friedmann, Legal Philosophy and Judicial Lawmaking, 61 Columbia Law Review 821, 829.

³⁹³ *Id.* at 825.

³⁹⁴ Martin R. Schneider, Judicial Career Incentives and Court Performance: An Empirical Study of the German Labor Courts of Appeal, 20 European Journal of Law and Economics 127, 130-31.

³⁹⁵ *Id.*

³⁹⁶ *Id.*

³⁹⁷ Wolfgang Friedmann, Legal Philosophy and Judicial Lawmaking, 61 Columbia Law Review 821, 821-45.

³⁹⁸ Robert Alexy and Ralf Dreier, Precedent in the Federal Republic of Germany, In: *Interpreting Precedents: A Comparative Study* (D. Neil MacCormick & Robert S. Summers eds., Aldershot: Dartmouth Publishing Co. Ltd, 1997), at 24-25.

Compare to France, the publication, citation, and discussion of prior judicial decision in Germany provide an even more solid environment for collective judicial lawmaking. The judgments of the Federal Constitutional Court are published officially and some of them are translated into other languages.³⁹⁹ German judges can also easily locate and read decisions given by other federal courts, higher courts as well as lower courts through courts' libraries, official series edited by court members, non-official digests, academic journals, and various legal databases (e.g. "Juris").⁴⁰⁰ More importantly, law reports of court judgments published in the official series are occasionally accompanied with headnotes.⁴⁰¹ These headnotes contain "the general rules which have been developed in applying the law and which are regarded as applicable to similar cases."⁴⁰² With the extensive accessibility of judicial decisions in German legal system, a culture of citing decided cases has been established and maintained⁴⁰³:

It is not easy to find a decision in the official series edited by members of the highest courts that does not contain any reference to precedents. If one takes a look into the respective ten latest volumes, it will be recognized that a very high percentage of published decisions refers to precedents...⁴⁰⁴

Furthermore,

When a supreme court adopts the same interpretation of a law again and again, judges dealing with that same issue tend to cite the first judgment where that supreme court adopted the interpretation concerned and then add more recent judgments or at least the most recent one upholding that interpretation.⁴⁰⁵

³⁹⁹ The decisions and their translations and citation guide are available at: http://www.bundesverfassungsgericht.de/SiteGlobals/Forms/Suche/EN/Entscheidungensuche_Formular.html?language=en. It is, however, noted that only the German versions of decisions by the Federal Constitutional Courts are authoritative and binding.

⁴⁰⁰ "Judgments by the lower courts are published less often than those by the federal courts or the highest courts of the federal states. Whether or not a low court decision is published depends on many factors, such as deviation from precedent." Kiel Robert Alexy and Gottingen Ralf Dreier, *Precedent in the Federal Republic of Germany*, In: *Interpreting Precedents: A Comparative Study* (D. Neil MacCormick & Robert S. Summers eds., Aldershot: Dartmouth Publishing Co. Ltd, 1997), at 22.

⁴⁰¹ Robert Alexy and Ralf Dreier, *Precedent in the Federal Republic of Germany*, In: *Interpreting Precedents: A Comparative Study* (D. Neil MacCormick & Robert S. Summers eds., Aldershot: Dartmouth Publishing Co. Ltd, 1997), at 22.

⁴⁰² *Id.*

⁴⁰³ Ninon Colneric, *Guiding by Cases in a Legal System Without Binding Precedent: The German Example*, China Guiding Cases Project, June 19, 2013, available at: <https://cgc.law.stanford.edu/commentaries/7-judge-colneric>.

⁴⁰⁴ Robert Alexy and Ralf Dreier, *Precedent in the Federal Republic of Germany*, In: *Interpreting Precedents: A Comparative Study* (D. Neil MacCormick & Robert S. Summers eds., Aldershot: Dartmouth Publishing Co. Ltd, 1997), at 23.

⁴⁰⁵ Ninon Colneric, *Guiding by Cases in a Legal System Without Binding Precedent: The German Example*, China Guiding Cases Project, June 19, 2013, available at: <https://cgc.law.stanford.edu/commentaries/7-judge-colneric>.

Because legislature cannot predicate every future situation at the time of drafting statutes, the lawmaking functions of the judiciary, as those in French and German legal system, has been commonly recognized in most European continent countries. For example, in Italy, judges are allowed to stress policy arguments based on case facts and relevant statutes in their decisions to fill the gaps of the existing law when identifying the novelty of a case or of an issue.⁴⁰⁶ In Poland, courts may create rules for civil matters unregulated by statutes through judicial decisions, which have been recognized as *praeter legem* precedents in Polish jurisdiction.⁴⁰⁷ Although courts tend to prevent themselves from openly making the law, they are de facto doing so in the circumstance that there are lacunae in the statutes.⁴⁰⁸

B. Asia

Although judicial decisions are not recognized as a legal source, “[c]ourts in Japan have long played a central role in the formation and development of law.”⁴⁰⁹ The extent to which judges make law and adhere to previous judicial decisions is surprising given the civil law tradition of Japan.⁴¹⁰ Japanese judges can not only create and follow previous judicial decisions with precedential values to fill the gap left by codes and statutes, but also incorporate the “sense of society”⁴¹¹ into their statutory interpretation to innovate legal norms in response to changing social conditions.⁴¹² Professor Frank Upham articulated the causal links between judicial decisions and the development of new legal doctrines by looking at the decisions of the first court and subsequent courts handling like cases in the areas of employment, divorce, and protection against discrimination.⁴¹³ He found that Japanese courts either “innovatively interpreted the language of a specific statutes,” or reply on extremely vague phrase in the general clauses of a statute, such as “‘good public order,’ ‘good faith,’ or ‘the common sense of society’ to effectively nullify legislation.”⁴¹⁴ Take the employment cases of gender discrimination for example. Because women have traditionally been playing a passive social role in Japan, they commonly received hostile treatments by employers.⁴¹⁵ Facing this historical social problem,

⁴⁰⁶ Michele Taruffo and Massimo La Torre, Precedent in Italy, In: *Interpreting Precedents: A Comparative Study* (D. Neil MacCormick & Robert S. Summers eds., Aldershot: Dartmouth Publishing Co. Ltd, 1997), at 154.

⁴⁰⁷ Lech Morawski and Marek Zirk-Sadowski, Precedent in Poland, In: *Interpreting Precedents: A Comparative Study* (D. Neil MacCormick & Robert S. Summers eds., Aldershot: Dartmouth Publishing Co. Ltd, 1997), at 236.

⁴⁰⁸ *Id.*

⁴⁰⁹ John O. Haley, The Role of Courts in “Making” Law in Japan: The Communitarian Conservatism of Japanese Judges, 22 PAC. RIM L. & POL’Y J. 491, 491 (2013).

⁴¹⁰ *Id.*

⁴¹¹ Professor Yasaki Mitsukuni found that, judges in Japan often justified interpretation or modified construction of relevant code, statute, or constitution by using the phrase of “the sense of society” (*shakai tsūnen*). Mitsukuni Yasaki, *Law and Shakai-Tsūnen as a Legal Form of Consensus Idea*, 29 OSAKA U. L. REV. 1 (1981).

⁴¹² John O. Haley and Daniel H. Foote, Judicial lawmaking and the creation of legal norms in Japan: A dialogue, in: *Judicial Innovations in Asia: Judicial Lawmaking and the Influence of Comparative Law* (John O. Haley, Toshiko Takenaka eds., 2014), at 121-122; See also, John O. Haley, The Role of Courts in “Making” Law in Japan: The Communitarian Conservatism of Japanese Judges, 22 PAC. RIM L. & POL’Y J. 491 (2013).

⁴¹³ Frank K. Upham, Stealth Activism: Norm Formation by Japanese Courts, 88 WASH. U. L. REV. 1493, 1493-98 (2011).

⁴¹⁴ *Id.*

⁴¹⁵ Frank K. Upham, Stealth Activism: Norm Formation by Japanese Courts, 88 WASH. U. L. REV. 1493, 1498 (2011).

judges intentionally interpret the “public order and good morals” requirement in Civil Code⁴¹⁶ to protect women from being discriminated by unfair employment terms, such as forced retirement upon marriage or childbirth.⁴¹⁷ The doctrines developed by courts against sex discrimination in the practice of employment had been further affirmed by the Equal Employment Opportunity Law twenty years later.⁴¹⁸ The phenomenon of judicial creation in Japan was also found in the areas of labor law (rejection of “at-will” labor contracts), antitrust law (interpretation of unfair methods of competition), company law (shareholder derivative actions), constitutional law (malapportionment of voters).⁴¹⁹ As Professor Takashi Ishida explained in his early publication, “Case Law in Japan,” that

[scholars] could not ignore an active role the courts in the formation of law. It is impossible for legislation to make a perfect rule that will meet all changes in the society. Statutes provide no more than a framework and must be made more precise in their practical application. The legal scholars could not refuse any more to admit the effect of judicial decisions on the interpretation of law in the light of rapid growth of Japanese industry.⁴²⁰

The dual structure of case law system in Japan is formed by a great amount of precedents, some of which can be directly applied as “binding rules” and the rest of them are indirectly interpreted as “decisive ratio decidendi” to guide future judicial decisions.⁴²¹ Judicial decisions of the Supreme Court of Japan are comprehensively compiled and published by Collection of Decisions of the Supreme Court for the use of judges and courts officials.⁴²² A limited number of these decisions with precedential values are selected by the Case Law Committee of the Supreme Court of Japan and published on Supreme Court Reports in a monthly basis.⁴²³ In addition to

⁴¹⁶ Article 1-2 of the Civil Code provides that the Code is to be interpreted “from the standpoint of the dignity of the individual and the essential equality of the sexes,” language added as part of Occupation reforms aimed at improving the legal status of women. Article 1-2 is supplemented by Article 90, which provides that any “juristic act whose object is such as to be contrary to public order or good morals is null and void.”

⁴¹⁷ Frank K. Upham, *Stealth Activism: Norm Formation by Japanese Courts*, 88 WASH. U. L. REV. 1493, 1498-1502 (2011).

⁴¹⁸ The official title of the Act is: Law concerning the Improvement of the Welfare of Women Workers, including the Guarantee of Equal Opportunity and Treatment between Men and Women in Employment (Koyō no bun'ya ni okeru danjo no kintō na kikai oyobi taigū no kakuho ni kansuru hōritsu), Law No. 113, 1972, as amended by Law No. 45, 1985. The Act prohibited discriminatory retirement ages and dismissal policies (Art. 11), but established only so-called endeavor obligations with respect to recruitment, hiring, assignments, and promotions (Arts. 7&8).

⁴¹⁹ John O. Haley, *The Role of Courts in “Making” Law in Japan: The Communitarian Conservatism of Japanese Judges*, 22 PAC. RIM L. & POL'Y J. 491, 497-500 (2013). Dan H. Foote, *Judicial Creation of Norms in Japanese Labor Law: Activism in the Service of—Stability*, 43 UCLA L. REV. 635, 642 (1996). Dan W. Puchniak & Masafumi Nakahigashi, *Case No. 21, Comment*, in BUSINESS LAW IN JAPAN—CASES AND COMMENTS 215, 215 (Moritz Bälz et al, eds., 2012). Lester N. Salwin, *The New Commercial Code of Japan: Symbol of Gradual Progress Toward Democratic Goals*, 50 GEO. L.J. 478 (1962). Thomas L. Blakemore & Makoto Yazawa, *Japanese Commercial Code Revisions*, 2 AM. J. COMP. L. 12, 23 (1954).

⁴²⁰ Takashi Ishida, *Case Law in Japan*, 7 IJLL 133, 135 (1979).

⁴²¹ *The Research of Operation of Chinese Case Law*, published by the Science of Law (6th edition, 2008).

⁴²² Takashi Ishida, *Case Law in Japan*, 7 IJLL 133, 138 (1979).

⁴²³ Takashi Ishida, *Case Law in Japan*, 7 IJLL 133, 139 (1979).

previous judgments of Supreme Court, judgments handed down in lower courts have been published by numerous official reports since 1947, including High Courts Reports, Reports of Judgments in Civil Labor Cases, Reports of Judgments on Administrative Affairs, Monthly Reports of Judgments on Criminal Relations, Reports of Civil Decisions of Inferior Courts, and Reports of Civil and Administrative Judgments in the Field of Incorporated Property.⁴²⁴

The similar pattern of judicial lawmaking activities has also been discovered in other civil law jurisdictions of Asia. For example, in South and Southeast Asia, such as Pakistan, Indonesia, and Malaysia, the power to interpret Islamic law has been exclusively rested in classically trained religious scholars known as the *fuqaha* for a long period of time.⁴²⁵ Some leading Arab judges, however, dismissed or went beyond the long-settled views by *fuqaha* when a controversial matter on Islamic law comes before the court.⁴²⁶ “Judges have an opportunity to enter debates about what Islam requires and to shape popular understandings of Islam.”⁴²⁷

II. The Incentives of Judicial Innovations in Chinese Courts

“Chinese Courts do innovate...because courts have to resolve the disputes that come before them. The applicable law will not always be clear. In that case, courts are left with no choice but to innovate. We even see courts innovating to reach a result unambiguously contrary to that called for by existing law.”⁴²⁸

Due to rapid change in its social, economic, and legal environment, many statutes drafted and promulgated during the early days of the People’s Republic are no longer suited to the circumstances of contemporary China. Courts, unlike legislatures, frequently confront statutory vagueness or imperfections in the course of adjudication. The higher level of the court for which a judge is serving, the more difficult legal questions the judge may encounter on daily adjudication. Because legislatures cannot predicate every situation that happen in the future, judges sometimes are allowed to or even ought to fill gaps and fix flaws in statutes through case by case adjudications. For example, a local court in Nantong City, in determining whether a worker injured by an electric bicycle was entitled to certain welfare benefits, relied on a non-binding administrative document to broaden the definition of “motor vehicle” in the Road and Transportation Law.⁴²⁹ A more recent example that sparks questions on statutory interpretation is related to the definition of a gun. A local court, which sentenced a game-stall operator for

⁴²⁴ *Id.* at 140.

⁴²⁵ Clark B. Lombardi, The Role of Courts in “Making” Islamic Law: South and Southeast Asia, in: *Judicial Innovations in Asia: Judicial Lawmaking and the Influence of Comparative Law* (John O. Haley, Toshiko Takenaka eds., 2014), at 180.

⁴²⁶ *Id.* at 185-195.

⁴²⁷ *Id.*

⁴²⁸ Donald Clarke, Judicial Innovation in Chinese Corporate Law, in: *Judicial Innovations in Asia: Judicial Lawmaking and the Influence of Comparative Law* (John O. Haley, Toshiko Takenaka eds. 2014), at 271.

⁴²⁹ Xin He, Judicial Innovation and Local Politics: Judicialization of Administrative Governance in East China, *The China Journal* (2013), 20-42.

three and a half years in jail for private ownership of balloon-popping guns which were deemed to be real firearms, called for reviewing the firearms law of China.⁴³⁰ According to China's gun identification standard that took effect in 2010, any non-standard gun with a muzzle energy greater than 1.8 joules per square centimeter shall be considered real.⁴³¹ "The energy of 1.8 joules per square centimeter is like throwing a handful of beans across a table at someone," described by a defense lawyer whose client had received life sentence for smuggling imitation guns that he bought from a Taiwanese seller through the internet.⁴³² Having realized the firearm standard was too stringent, the appeal court gave more weight to the fact that the defendant had no criminal intent and changed the sentence to a suspended one.⁴³³

Civil law tradition requires judges to strictly interpret written statutes which are made of words. However, this concept is still an ideal type as "the meaning of a word or phrase in a statute is not a matter of definitional possibilities but of statutory context."⁴³⁴ The interpretation of same words in a statute may vary based on judges, time period, and geographical jurisdictions. In addition, the uncertainty of written statutes is desirable: If law can provide an automatic and predictable outcome, then the disputed parties neither need a lawyer to make a convincing argument to help them win the case, nor a judge to analyze the case and interpret the law to give a just sentence. If the potential losing party knew the judicial outcome in advance, he would not waste time and money on litigation.⁴³⁵ Legislatures sometimes intentionally left ambiguities in statutes at the time of drafting in order to encourage parties to bring a case with complicated legal issues to the court and seek a fair opportunity to claim their rights. Courts at all levels then act as "fire alarms" that draw attention of legislatures to the most troublesome legal issues and statutes. Judicial decisions can function as a tool for judges to gather information about the consequences of a particular policy innovation, and to gauge public support for the future legislative amendments. Legislatures can be signaled by these decisions and public feedback in deciding when they should step in and issue a new law.

⁴³⁰ Liu Yanhong, Sifa Wu Liangzhi Yihuo Xingfa Wu Dixian (Adjudication without Moral Standards or Criminal Law without Bottom Lines), *Journal of Southeast University (Natural Science Edition)*, vol. 19, issue 1, available at: <http://d.wanfangdata.com.cn/periodical/dndxxb-zxsh201701011>. After Game-Stall Operator is Jailed, China Asks: What's A Gun? Available at: <http://blogs.wsj.com/chinarealtime/2017/01/04/after-game-stall-operator-is-jailed-china-asks-whats-a-gun/>. China's Gun Laws Attacked after Woman Jailed for Using Air Rifles at Fun Fair Booth, available at: <http://blogs.wsj.com/chinarealtime/2017/01/04/after-game-stall-operator-is-jailed-china-asks-whats-a-gun/>. Chinese Woman Jailed over Balloon-Popping Guns Set Free, available at: <http://www.reuters.com/article/us-china-crime-guns-idUSKBN15A15U>.

⁴³¹ A non-standard gun that cannot fire standard issue ammunition shall be considered as a real gun if it can fire with muzzle energy in excess of 1.8 joules per square centimeter. Regulations on Identification of Firearms and Ammunition in Public Security Organizations, art.3 (3), available at: http://www.pkulaw.cn/fulltext_form.aspx?Db=chl&Gid=144563&keyword=公安机关涉案枪支弹药性能鉴定工作规定&EncodingName=&Search_Mode=accurate.

⁴³² Chinese Boy, 18, Gets Life in Jail after Fake Guns He Buys Online Turn out to be Real, available at: <http://www.scmp.com/news/china/society/article/2002298/chinese-boy-18-gets-life-jail-after-fake-guns-he-buys-online-turn>.

⁴³³ *Id.*

⁴³⁴ *General Dynamics Land Services v. Cline* 540 U.S. 581 (2004).

⁴³⁵ Lief H. Carter, *Reason in Law*, Harper Collins College Publishers (the 4th edition, 1994), at 30.

Dong and Tang quoted a Chinese old saying, “distant water cannot put out a nearby fire,” to explain the importance of judicial innovations in his book. In other words, expecting a legislative amendment to fix the ambiguity and flaws in statutes would not help judges solve the problem raised by hard cases in a timely manner.⁴³⁶ Furthermore, innovative solutions provided by judges in one case are relatively flexible to be adjusted in another like case based on corresponding public feedback. Besides that, drawn from the findings of my survey and interview that judges who passed the bar tended to be swayed by the decision of a similar case, one may speculate that judicial innovations observed in China, to some extent, also are driven by judge’s solicitude of judicial legitimacy and personal pursuits of justice.

III. When Judicial Innovations Succeed or Fail in China

Chinese judicial opinions were, for a long time, not readily accessible even by the courts. But an emerging norm of judicial transparency, coupled with the technological advances of the last decade, has resulted in the accumulation of vast bodies of cases available for consultation by both the lay and the learned. These recent developments in the Chinese legal landscape allow judges to influence and be influenced by other judges through the transmission of judicial decisions across the country. Judicially created policies in response to social situations are often first precipitated by individual judges, then adopted by other judges when handling like cases, and finally affirmed by national consensus or even legislations.⁴³⁷ As illustrated in chapter II, previous judicial decisions not only vertically influence lower courts’ decisions within a hierarchical legal system like China, but also have a significant effect on sister courts’ judges’ interpretation of the law. Guiding Cases, coupled with a large amount of decisions available both in print and online, became a convenient resource for Chinese judges to keep informed of or even consult other judges’ interpretations in hard cases. Judicial innovations in China survive due to the silent and incremental assimilation of prior judicial decisions into Chinese judicial decision-making. Following, departing, or adjusting the solutions to difficult legal questions proposed in the earlier judgments, judges, step by step, collaboratively create, adopt, and establish legal doctrines through their statutory interpretations when law remains silent.

Some of these innovations might, however, fade because of the transience of the social conditions or political pressure that gave rise to them. For example, judicially created rules in response to emergency events, such as policies that lowered threshold for the proclamation of death of a missing person after “5.12 Wenchuan Earthquake,” vanished after situations have

⁴³⁶ Dong Hao, Tang Wenfu, *The Construction of Chinese Case Law* (China University of Political Science and Law, 2009).

⁴³⁷ Take the veil-piercing concept developed by courts for example. Because the first Chinese company law promulgated in 1994 contained no exceptions to limit the liability of corporation investors, the fraud conducted by many undercapitalized companies were widespread and presented a problem that the courts could not evade. The capitalization requirements that make disqualified investors liable for corporate debts had been gradually established by courts. This new legal norm created by courts over years was further affirmed by 2015 amendment to the Chinese company law. *See* Donald Clarke, *Judicial Innovation in Chinese Corporate Law*, in: *Judicial Innovations in Asia: Judicial Lawmaking and the Influence of Comparative Law* (John O. Haley, Toshiko Takenaka eds. 2014), at 261-266.

been controlled.⁴³⁸ Furthermore, Chinese central and local governments can easily call off or intervene judicial lawmaking activities through the adjudication committee within the court or even a phone call with the supervisory body of the court.⁴³⁹ Creative interpretation of judges can be replaced by legislation, like how the “Fellow Servant Rule” established by state courts in the United States since *Farwell v. Boston & Worcester Railroad Corp. (1842)* were superseded by federal and state worker’s compensation laws.⁴⁴⁰ In China, the authority of legislation is even stronger, as judicial decisions are not an official legal source despite of its de-facto precedential values. This has been ascertained in Howson’s finding that the extensive innovation that Shanghai courts engaged in declined to a lesser extent after the amendment of Company Law came into effect in China.⁴⁴¹ In addition, due to the limited judicial resources and less professional training that judges in rural China may face, the failure of communication between courts may cause some innovative rules introduced by judges to fade away before those rules are widely recognized.⁴⁴²

⁴³⁸ Minchuan Teda Dizhen Zhaihou Shefa Shiwu De Sifa Yingdui (The Strategies of Courts in Response to the Legal Related Affairs after Wenchuan Earthquake) (Haiping Wang ed. 2008).

⁴³⁹ Xin He, Black Hole of Responsibility: The Adjudication Committee's Role in a Chinese Court, 46 Law and Society Review 681, 681-712 (2012).

⁴⁴⁰ *Farwell v. Boston & Worcester R.R. Corp.*, 45 Mass. 49 (Mass. 1842); Caroline Mitchell, Products Liability, Workmen's Compensation and the Industrial Accident, 14 Duq. L. Rev. 349, 349-98 (1975-1976); See also, Jerrilyn G. Marston, The Creation of a Common Law Rule: The Fellow Servant Rule, 1837-1860, 132 U. PA. L. REV. 579-579 (1984).

⁴⁴¹ Nicholas Howson, Corporate Law in the Shanghai Peoples’ Courts, 1992-2008: Judicial Autonomy in a Contemporary Authoritarian State, 5 E. Asia L. Rev. 303, 303-442.

⁴⁴² See Su Li, Songfa Xiaxiang: Zhongguo Jiceng Sifa Zhidu Yanjiu (Bring the Law to the Rural Areas: A Study of China’s Grassroots Judicial System) (Beijing: Zhongguo Zhengfa Daxue Chubanshe, 2002); See also, Frank K. Upham, Who will Find the Defendant if He Stays with His Sheep? Justice in Rural China, 114 Yale L.J. 1675 (2005).

Conclusion

China is experiencing a period of rapid change in its social, economic, and legal environment. Many statutes drafted and promulgated during the early days of the People's Republic are no longer suited to the circumstances of contemporary China. Yet, legislative amendment is a laborious undertaking that is mired in procedure: introduction,⁴⁴³ deliberation,⁴⁴⁴ voting,⁴⁴⁵ and signing and promulgation.⁴⁴⁶ These steps may take decades to complete. Moreover, statutes, once amended, are unlikely to be modified or annulled due to concerns about the stability and authority of the law. Unlike the legislature, courts frequently confront statutory vagueness or imperfections in the course of adjudication. Judicial decisions can therefore function as a tool for judges to gather information about the consequences of a particular policy innovation, and to gauge public support for the future legislative amendments. Moreover, judicial decisions can serve as a form of political communication between courts that indicates the acceptability and feasibility of the policy innovation. Indeed, the increasing accessibility of judicial decisions since the 1980s has facilitated such communication and the judgments handed down by other courts in factually similar controversies have evolved into a convenient resource for Chinese judges confronting hard cases or novel situations.

Judges with absolute discretion and judges without discretion are two ideal types as to the level of judicial autonomy. Although civil law tradition requires judges to be rigorously bound by written statutes, statutory gaps, fluid incentives, and political ambiguity can combine to reserve to judges a certain measure of discretion in deciding cases.⁴⁴⁷ Case studies, survey, and interviews conducted in this research generally support the idea that prior judicial decisions can function as a vector for policy transmission between Chinese courts. Judges in China not only read previous judicial decisions, but also consider them on their adjudicative activities. Although the judges and law clerks interviewed took care to distinguish guiding cases from binding precedent, they nonetheless highlighted the utility of prior judicial decisions in filling statutory gaps and as a resource for adjudicating hard cases.

The results of the survey experiment suggest that judges who have yet to pass the bar tend to resist the force of prior judicial decisions while judges who have passed the bar tend to be swayed by it. More in-depth interviews with Chinese judges may thus explore the implication of judicial role perception for the theory and practice of statutory interpretation. In particular, whether and how judges' personal background, professional training, and life experiences shape their attitude and orientations to the task of judicial decision-making. Further research on Chinese courts and judges can also be carried out to examine the relative impacts of judgments

⁴⁴³ Zhonghua Renmin Gongheguo Lifafa (2015 Xiuzheng) [Legislation Law of the People's Republic of China (2015 Amendment)] art. 17, issued by National People's Congress on Mar. 15, 2015, available at: <http://en.pkulaw.cn/display.aspx?cgid=245693&lib=law>.

⁴⁴⁴ *Id.* art. 18-21.

⁴⁴⁵ *Id.* art. 24.

⁴⁴⁶ *Id.* art. 25.

⁴⁴⁷ Rachel E. Stern, On the Frontlines: Making Decisions in Chinese Civil Environmental Lawsuits, *Law & Policy* 79, 79-103 (2010).

handed down by courts from different Chinese regions, e.g. urban cities vs. rural towns, on future adjudication of similar cases.

Appendix A: Chinese Judgment Sample

An opinion from the Higher People's Court of Shanghai is reproduced in translation.

Case of Smuggling by William Ping Chen 威廉·平·陈走私案（（1997）沪高刑终字第 22 号）

Type of dispute: Criminal -->Undermining Order of Socialist Market Economy
Legal document: Judgment
Judgment date: 02-28-1997 Court: Higher People's Court of Shanghai Municipality
(Model Court for Judicial Openness)
Procedural status: Trial at Second Instance

BASIC FACTS

Defendant: William Ping Chen, male, 56 years of age, American. Originally, he was the chairman of board of Sino-American joint venture Shanghai Tongyi Paperwork Co. Ltd. Because of the present case, he was detained by Shanghai Bureau of Public Security on June 3, 1996, and was arrested on June 13.

Defense Counsel: Pan Feng and Yuan Jiyu, lawyers with Shanghai Jingjian Law Office.

PROCEDURAL HISTORY

The case of smuggling by defendant William Ping Chen was prosecuted by the No. 1 branch procuratorate of Shanghai People's Procuratorate in Shanghai No.1 Intermediate People's Court.

Shanghai No.1 Intermediate People's Court ascertained the following through public trial: From July 1 to December 30, 1995, defendant William Chen Ping ignored many times objections from Chinese administrators of Sino-American Joint Venture Shanghai Tongyi Paperwork Co. Ltd., and transported altogether 238 tons of 'waste paper' and 'mixed paper' in 16 containers 5 times respectively through Tuohe Steamer, President Roosevelt Steamer, President Washington Steamer and President Lincoln Steamer from the ports of Los Angeles and Oakland in the US to the ports of Wusong and Waigaoqiao of Shanghai, China. Among them, the 2 containers transported to the port of Wusong had applied to customs. However, they were not admitted because of the lack of certificate for admission issued by the State Environmental Protection Bureau. The 14 containers transported to the port of Waigaoqiao didn't apply to the customs because of the lack of certificate for admission issued by environmental protection organs. In May, 1996, when clearing the retained goods at various ports, Shanghai Customhouse, together with environmental protection organs and commodity inspection organs, opened the 16 retained containers for inspection, and found lots of environment-polluting daily rubbish and some medical rubbish, which didn't meet the environmental protection requirements of China. They were rubbish prohibited to be imported by China. After consulting with the 'receiving parties' Anhui Construction Company of China Export Commodity Base and China Zhejiang Livestock Products Import and Export Company, it was found out that William Ping Chen impersonated

the companies above to import rubbish. Subsequently the copies, facsimile copies and other related documents of 4 B/L for the above containers were found in William Ping Chen's possession. William Ping Chen also admitted the fact that the 16 containers were imported by him.

Shanghai No.1 Intermediate People's Court held after trial: in order to avoid the supervision by China customs authorities, defendant William Ping Chen, in violation of the stipulation of Article 18 of the Customs Law that 'the consignee for import goods ... shall make an accurate declaration and submit the import and export license and relevant papers to the customs for examination', imported 238 tons of rubbish prohibited by China by the means of using the names of Chinese companies and declaring false names of the goods. His acts violated Section 1, Paragraph 1, Article 4 of Supplementary Provisions of the Standing Committee of the National People's Congress Concerning the Punishment of the Crimes of Smuggling, and constituted the crime of smuggling. Although William Ping Chen was an American, he committed crime within China in violation of the laws of the People's Republic of China. According to Article 3 of the Criminal Law of People's Republic of China, he shall be punished in accordance with the criminal law of China. Accordingly, the court decided on January 13, 1997:

Defendant William Ping Chen committed the crime of smuggling. He was sentenced to 10 years' imprisonment and fined RMB 500,000 yuan, with the supplementary punishment of deportation.

After the first instance was handed down, defendant William Ping Chen wasn't satisfied, and appealed to Shanghai Higher People's Court on the ground that he was not the consignor and his acts didn't constitute the crime of smuggling. Defense counsel for William Ping Chen also asked for a more lenient punishment on the grounds that the importation was an act by the legal person, but the grounds were not enough for the original? to hold that the acts of William Ping Chen obviously had harmful social consequences when the total weight of the imported rubbish and the proportion of waste paper to rubbish were not made clear.

Shanghai Higher People's Court ascertained through trial: the original concerning the criminal facts of appellant William Ping Chen was supported by the following major evidence: the 16 containers retained at the ports had certificate from Shanghai Branch Company of American President Steamer (China) Co. Ltd., certifying that William Ping Chen was the representative of the American company consigning the containers. The B/Ls, invoices, container load plans and transport documents were found from William Ping Chen. The declaration from Anhui Construction Company of China Export Commodity Base and China Zhejiang Livestock Products Import and Export Company that they never consigned William Ping Chen to import 16 containers' waste, two letters from William Ping Chen in January and May 1996 to the said companies admitting that he impersonated the names of the companies above and the authentication of the handwriting in the letters all proved that William Ping Chen impersonated Chinese companies to import, and the consignee in China of the containers was William Ping Chen. As to the articles in the containers, Certificate of Inspection and Opinion on the Inspection of the 16 Containers' Waste issued by Shanghai Import and Export Commodity Inspection Bureau and Shanghai Environmental Protection Bureau of the People's Republic of China proved that the waste was prohibited to be imported by China.

JUDGMENT'S REASONING

Shanghai Higher People's Court held: the original judgment shall be sustained, since the facts were clear, the evidence was valid and sufficient, the application of the laws was right, the measurement of punishment was appropriate and the procedures were lawful in holding that William Ping Chen had committed the crime of smuggling. William Ping Chen ignored the opposition from the Chinese administrators and illegally imported 238 tons of waste for profit, which was prohibited by China. This was solely the act of William Ping Chen himself, and he shall shoulder the responsibility personally. In view of the fact that William Ping Chen illegally imported 238 tons of waste that was prohibited by China and in accordance with Supplementary Provisions Concerning the Punishment of the Crimes of Smuggling the original trial sentence that put William Ping Chen to ten years' imprisonment, a fine of RMB 500,000 yuan and the additional punishment of banishment was already lenient. The grounds on which William Ping Chen appealed and the opinion by defense counsels for a more lenient punishment shall not be adopted. Accordingly, this court ruled:

JUDGMENT

The appeal shall be dismissed and the original shall be sustained.⁴⁴⁸

© Copyright Chinalawinfo Co., Ltd
database@chinalawinfo.com

⁴⁴⁸ Translated by Li Guoqing, the bilingual version of this case decision is available at: <http://en.pkulaw.cn/Display.aspx?Lib=case&Id=42&keyword=#>.

Appendix B: Survey Instrument

This appendix reproduces, in translation, questions from the survey instrument.

Surveys on the Emerging Chinese “Case Law System”

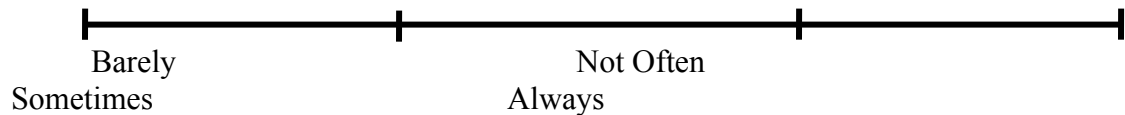
Investigator: *Zhiyu Li*
J.S.D. (Doctor of the Science of Law) candidate,
Law School, University of California Berkeley

Advisor: Professor *Laurent Mayali*
Director, Comparative Legal Studies Program
Law School, University of California Berkeley

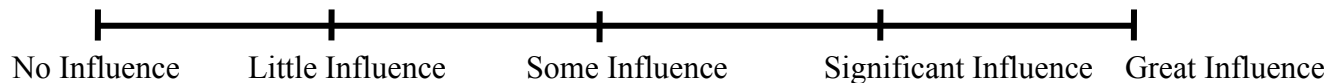
Issue NO. 1 (August 2015)

Survey For Local Courts:

1. Gender: Male/ Female
2. Length of judicial employment (since serving as assistant judge):
A. Less than 5 years; B. 5-10 years; C. 10-20 years; D over 20 years.
3. Academic background in law: Bachelor/ Master/ PhD/ Extension
4. Bar certificate: Passed / Not Yet Passed
5. How often do you read prior judicial decisions?



6. Do prior judicial decisions inform your decision in the similar cases?



7. Article 7 of “Provisions of the Supreme People’s Court Concerning Work on Guiding Cases,” states that “People’s Courts at all levels should refer to the Guiding Cases released by the Supreme People’s Court when adjudicating similar cases.”

If you do not agree with the decision of a Guiding Case, how would you adjudicate a very similar case?

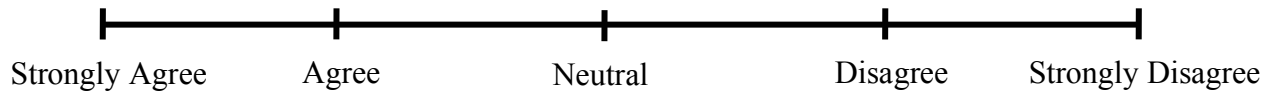
- 1) I will follow the guiding case.
- 2) I will render judgment based only on the relevant statutes and case facts.
- 3) I will check if the Guiding Case has been published and if other judges have rendered judgments departing from the Guiding Case.

8. How do you keep informed about the judicial decisions?

- 1) Guiding Cases
- 2) Supreme People’s Court Gazette
- 3) Materials circulated internally in China’s court system
- 4) Legal scholarly publications
- 5) Online court reports, including chinalawinfo, judicial opinions of China
- 6) News, media and newspapers
- 7) Conversation with judges, attorneys or other legal professionals
- 8) Other approaches, describe _____

9. In December of 2001, Naxi District People’s Court of Luzhou Municipality in Sichuan province tried a case involving “mistress testamentary succession.” The court held that even though the testamentary succession of Yongbin Huang that left his assets to his mistress, Xueying Zhang had been legally notarized, the transfer could not be invalid because it contravened public order and morality.

[Many legal scholars have criticized this judgment, pointing out that this judicial decision placed principles above statutes and moral standards above the law.] Do you agree with the judgment rendered in this case?



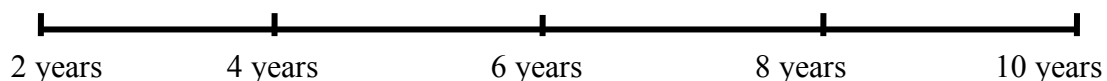
10. Chinese Criminal Law (1997) article 232 states, “whoever intentionally kills another is to be sentenced to death, life imprisonment, or not less than 10 years of fixed-term imprisonment; when the circumstances are relatively minor, he is to be sentenced to not less than three years and not more than 10 years of fixed-term imprisonment.” The Opinions Regarding Family Violence Cases (2015), Article 20 states, “fatal retaliation by a long-term victim of domestic abuse against the abuser may be eligible for sentence mitigation.”

Hong Xiao (girlfriend) and Ming Li (boyfriend) had lived together for three months. During the period of cohabitation, Hong Xiao was often assaulted by Ming Li. In response, Hong Xiao murdered Ming Li by stabbing him to death while he was sleeping.

[Recently, a court of Henan province heard a similar case (the girlfriend and boyfriend had cohabited for two months) and gave the female criminal a lenient sentence.] If you were the judge of this case, would you give Hong Xiao a lenient sentence?

- 1) Yes; 2) No.

The length of imprisonment:



11. Chinese Criminal Law (1997) article 236 states, “whoever, by violence, coercion or other means, rapes a woman is to be sentenced to not less than three years and not more than 10 years of fixed-term imprisonment.” Chinese Marriage Law (2001) article 32 allows divorce to be granted if there is family violence [both parties have lived separately due to lack of mutual affection for up to two years.]

Two courts in Sichuan and Henan have disagreed on the outcome of the following case:

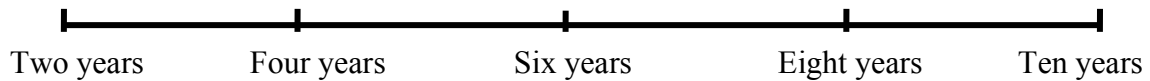
A wife filed for divorce on grounds of family violence by her husband [that she and her husband have lived separately due to lack of mutual affection for three years]. Before divorce has been granted, husband visited his wife, and despite her resistance, forced her to have sex with him. The wife then accused her husband of rape.

If you were the judge of this case, how would you decide?

Guilty

Not Guilty

If the defendant is found to be guilty, how long of the imprisonment he will be sentenced?



Appendix C: Interview Guide

This appendix reproduces, in translation, questions from the interview guide.

Interviews on the Emerging Chinese “Case Law System”

Investigator: *Zhiyu Li*
J.S.D. (Doctor of the Science of Law) candidate,
Law School, University of California Berkeley

Advisor: Professor *Laurent Mayali*
Director, Comparative Legal Studies Program
Law School, University of California Berkeley

Issue NO. 1 (August 2015)

Interviews with Supreme People's Court Judges:

1. The standards of selecting "Guiding Cases"; Should selected Guiding Cases meet all the four standards regulated in the *provisions of the Supreme People's Court Concerning Work on Guiding Cases* ("provisions")? Which type of future cases do you think need to be guided by Guiding Cases? Why do you think Guiding Cases can bring more benefits than statute amendments or official judicial interpretation?
2. Do you think Guiding Cases are different from binding precedents? Why? Some scholars suggest that implementing guiding cases is likely to be an early stage of Chinese case law system. What is your opinion on those scholarly comments? From your perspectives, what kinds of problems that China may face while implementing Guiding Cases? How to fix those problems?
3. Article 7 of the Provisions:
"People's courts at all levels should refer to the Guiding Cases released by the Supreme People's Court when adjudicating similar cases."

Considering most Supreme Court judges have much more skills and experience than some lower court judges, do you think Guiding Cases should still bind your decisions, even for those Guiding Cases judged by lower court judges? Do you think the phrase, "refer to," is appropriate in the Provisions? If there are some mistakes found in Guiding Cases after being issued, will it prevent judges from sending their judgments to select as Guiding Cases?

4. Are you bound by your previous decisions? What if they conflict with the new Guiding Cases?
5. What do you expect how the lower courts treat Guiding Cases? In which ways lower court judges should refer to Guiding Cases in their decisions? Can they explicitly specify, quote or paraphrase any Guiding Cases or any part of Guiding Cases they considered?
6. Hypothetical cases (marital rape): There were some actions taken by lower courts, do you think a change to statutes regarding "marital rape" is ought to be made? If yes, in which ways? Guiding Cases or a statute amendment.
7. How do you think about overruling old Guiding Cases? Do you think you will absolutely follow the existing Guiding Cases? If you have the existing Guiding Case handle a particular type of cases in one way, are you willing to overrule it by a new Guiding Case interpreting the same legal issue in another way?
8. [Open question] The proposes of issuing Guiding Cases:
The hints and examples I can provide:
 - 1) Making the law more certain and clear;
 - 2) Making the system more efficient; reduce higher courts' caseload.

Interviews with Local People's Court Judges and Law Clerks:

1. What do you think about the emergence of Chinese Guiding Cases? Do you think they are different from binding precedents existing in common law system? Why?
2. Do you think local court judges should get more training regarding how to search or refer to the Guiding Cases when adjudicating similar cases? Why?
3. If a Guiding Case, which was judged by a local court in a different province, conflicts with a case decided by a higher-level court in your province recently, which judgment you think you would follow to decide a similar case before you?
4. There are some mistakes found in some Guiding Cases after being issued. Given Chinese judges are responsible for the mistakes made in their judgments, will it prevent judges in your court from sending their judgments to be selected as Guiding Cases (because it may draw a lot of public attention to the decisions they made; unnecessary stress to judicial decision-making)?