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ORDER AND LAW IN CHINA

*Donald Clarke**

Aug. 25, 2020

I. Introduction

Does China have a legal system? The question might seem obtuse, even offensive. However one characterizes the institutions of the first thirty years of the People's Republic, the near half-century of the post-Mao era¹ has almost universally been called one of construction of China's legal system.² Certainly great changes have taken place in China's public order and dispute resolution institutions. At the same time, however, other things have changed little or not at all. Most commentary focuses on the changes; this article, by contrast, will look at what has *not* changed—the important continuities that have persisted for over four decades. These continuities and other important features of China's institutions of public order and dispute resolution suggest that legality is not the best paradigm for understanding them.

But this article is not just about a negative. Analyses of what China is *not* run the danger of missing the point. They are typically quite openly driven by a non-Chinese perspective. One could observe with perfect accuracy that the members of the Chicago Bulls were not especially good at putting a puck in a net, delivering babies, or explaining Heidegger, but that would not make one's analysis a good one. This article will make an affirmative argument about what China *has* been doing in the last forty years that is sometimes confused with legal construction. I argue, in short, that China has been building a system for the maintenance of order and the political primacy of the Chinese Communist Party (CCP), not for the delivery of justice.

This argument is not intended to be part of a China-bashing agenda. Nor is it intended to say that justice cannot be achieved. It is intended to urge that we should not make ethnocentric assumptions about how various institutions in China—or indeed in any society with which we are not familiar—do or should operate merely on the basis of similarity of (translated) name or apparent

* Professor of Law and David A. Weaver Research Professor, George Washington University Law School. I would like to thank Mary Gallagher and Nicholas Howson for organizing the conference at which this article was first presented. For very helpful comments and suggestions, I thank Bill Alford, Sarah Biddulph, Nick Cheesman, Rogier Creemers, Mike Dowdle, Matthew Erie, Mary Gallagher, Weifang He, Xiaoqian Hu, Jed Kroncke, Ke Li, Ling Li, Ben Liebman, Michael Palmer, Shitong Qiao, Teemu Ruskola, Samuli Seppanen, Sue Trevaskes, Frank Upham, Lynn White, and Qianfan Zhang. They are not, of course, responsible for the content.

¹ Although Mao Zedong died in August 1976, the December 1978 meeting of the Third Plenum of the 11th Central Committee of the Chinese Communist Party (henceforth CCP or Party) marked the true inauguration of China's post-Mao era.

² A Google search for the Chinese term 法制建设 *fazhi jianshe* ("legal system construction") yielded 28.8 million results on January 8, 2020. A search for 法治建设 *fazhi jianshe* ("construction of rule of law") yielded 35.5 million hits.

isomorphism. If too many observations don't fit the model, then it's time to change the model, not to dismiss the observations.

The particular observations that fuel this argument are not especially new. Even some of the interpretations of those observations are not especially new, except in the sense offered in this article. But this article will take those observations and interpretations quite seriously and think through their implications—even if it leads to conclusions that prompt responses of the “How can anyone possibly say *that?*” type.

Finally, a note about terminology. To speak of “the Chinese legal system” prejudices important issues before one has even begun discussing them. It assumes that there exists a single, unified “system” that can appropriately be called “legal,” and thus³ resembles the system the observer knows (or thinks they know) and can be analyzed in the same manner. But whether either assumption is true, and to what degree, is precisely what remains to be seen. To name a set of institutions a “system,” even before qualifying them with an adjective, already involves the assertion that the institutions are connected and that they *can* be described by an adjective. While an engine is a real and tangible system, a set of social institutions is a system only metaphorically, and to assert that that the metaphor of “system” is the right one involves a claim that must be examined and cannot be taken for granted before the investigation has even begun.⁴

Thus, I will back up to a higher level of generality and talk about Chinese institutions for the maintenance of order (“order maintenance institutions” or simply “order institutions”).⁵ Whether

³ I use this tiny word deliberately to indicate the way the characterization follows from the label, not the other way around.

⁴ See generally Bernard E. Harcourt, *The Systems Fallacy: A Genealogy and Critique of Public Policy and Cost-Benefit Analysis*, 47 J. LEGAL STUD. 419 (2018). Both Stanley Lubman and Perry Keller have questioned whether China's legal institutions and norms exhibit the kind of unity that would justify calling them a “system.” See Perry Keller, *Sources of Order in Chinese Law*, 42 AM. J. COMP. L. 711, 711 (1994); STANLEY B. LUBMAN, *BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO* 3 (1999).

⁵ To speak of institutions “for” the maintenance of order involves imputing a purpose to those institutions, and that is problematic. At some point a certain functionalism is unavoidable. But at the same time we must remember that institutions and other abstractions do not themselves *try* to do anything; trying is an act of human will, and so we must always think about what particular humans are trying to do. For example, one might think that the purpose of soccer teams is to win soccer games; that is what they try to do. But as we discovered in the group rounds of the 2018 World Cup, sometimes teams will be better off by losing. See Martin Rogers, *How to Stop World Cup Teams From Trying to Lose In the Group Stage*, CNBC, June. 29, 2018, <https://cnb.cx/30A0wIC> [<https://perma.cc/ER77-WYFN>]. And if we remember that it's all about human beings, we won't be surprised to hear that sometimes players may sacrifice the possible long-term benefit of winning for the definite short-term benefit of taking a bribe to throw a game. See Brian Palmer, *How Do You Fix a Soccer Game?*, SLATE, Dec. 9, 2011, <https://slate.com/culture/2011/12/soccer-match-fixing-scandal-how-do-you-rig-a-soccer-game.html> [<https://perma.cc/KYA6-TQ67>]. There are always human beings around who will sabotage the functions assigned by the analyst.

these institutions constitute a system, and whether they should be called “legal” (and why we think it matters), is something we should think about after looking at them, not before.

By the same token, to use terms such as “court” and “judge” takes for granted what needs to be demonstrated: that it is appropriate—that it illuminates more than it obscures—to call the institution and the official in question by that name.⁶ Thus, this article will simply use the Chinese term “*fayuan*” (法院) to describe institutions or settings that others might describe as courts.⁷ As for the persons staffing *fayuan*, instead of “judge” this article will use “adjudicator” as it seems to carry less baggage.⁸ When translating specific quotations from Chinese, this article will at times simply use the Chinese term. Other specific vocabulary choices will be made and explained as they arise.

Writing this way will be distracting, at least at first. But it is necessary if we are to free ourselves from the subtle but overwhelming power of conventional translations. We need something of a shock in order to look at Chinese order institutions with a fresh eye and decide, *after* a review of the evidence and not before, whether a set of ready-made English-language labels is appropriate.

Part II of this article sets out the background to the debate over Chinese order institutions and introduces some basic concepts. Part III introduces the idea of a paradigm and reviews alternative candidates. Part IV consists of case studies. It examines a number of Chinese order maintenance institutions using the order maintenance paradigm proposed here. Part V addresses possible objections and counterarguments. Part VI concludes.

II. Background and Basic Concepts

The debate in the scholarly community over changes in China’s order maintenance institutions over the past four decades generally takes for granted that at least until some time in the 2000s, China was moving in the direction of what could broadly be called the rule of law, or at least

⁶ Somewhat surprisingly, the organization known in English as the Chinese Communist Party has recently apparently decided that it no longer wishes to be thought of as a political party like the Republicans in the United States or Labour in the U.K. See Editorial, *What is the CPC? US Needs to Be Taught*, GLOBAL TIMES, July 17, 2020, <https://www.globaltimes.cn/content/1194854.shtml> [<https://perma.cc/DXH4-RTT9>] (the CCP “is substantially different to Western-style parties in scale, goals, operating mechanism and the role it plays in society. . . . No English word can really describe it.”). I would be the first to agree that using the same name to characterize these very different institutions is misleading, but am surprised to see the CCP agreeing, since claiming similarity has positive propaganda value.

⁷ I recognize that this will be distracting and possibly annoying for some readers. But I follow the anthropologist Paul Bohannon here, who argues that one cannot solve the problem of a possibly misleading English term by loading it down with caveats and qualifications, because “the power of the word is always greater than the power of the gloss.” Paul Bohannon, *Ethnography and Comparison in Legal Anthropology*, in *LAW IN CULTURE AND SOCIETY* 401, 402 (Laura Nader ed., 1997).

⁸ One commenter suggested “judicial officers,” and of course the general Chinese term, *faguan* (法官), is an option as well. No choice is going to be perfect.

a professional rule *by law*.⁹ It seemed broadly accepted within the Chinese leadership that more lawyers were better than fewer, that more rights protection was better than less, that more legal education among judges was better than less, that more fidelity to law in court judgments was better than less. Of course, this view acknowledges that there were disagreements about the pace of reforms and about specific details, but it perceives an overall consensus on the big picture.

Where the disagreement begins is over whether that consensus has disappeared, and whether that broad direction has changed. The most notable contribution to the affirmative position is Carl Minzner's aptly titled 2011 article, *China's Turn Against Law*.¹⁰ In Minzner's words,

The official Chinese turn against law, and back toward mediation, is thus tied to a politicized rejection of many legal reforms advanced in the 1980s and 1990s. It is a part of a broader reconsideration of role of law, lawyers, courts, and adjudication.¹¹

Others, however, dispute Minzner's claim, asserting that post-Mao China continues to move in the direction of some kind of recognizable legality. A classic example is the very title of Randall Peerenboom's 2002 book, *China's Long March Toward Rule of Law*.¹² While few assert—at least any longer—that full convergence is in the cards, those of this school nevertheless find it useful to analyze Chinese institutions within the broad paradigm of Weberian legal rationality.¹³

This article approaches the question from a different angle. Its basic argument is that the scholarly community has accumulated over the past four decades a number of observations about China's order maintenance institutions that are increasingly difficult to explain using the conventional vocabulary and concepts of legality. When we see inconsistencies, we tend to explain them as signs of the immaturity of the legal system, or as mistakes, or as unrepresentative aberrations. This kind of explanation is driven by a conscious or subconscious convergence theory.

⁹ See Rogier Creemers & Susan Trevaskes, *Ideology and Organisation in Chinese Law: Towards a New Paradigm for Legality*, in *LAW AND THE PARTY IN CHINA: IDEOLOGY AND ORGANIZATION* 1, 1 (Rogier Creemers & Susan Trevaskes eds., 2020). On the problems with the concept of "rule by law," see Kwai Hang Ng, *Is China a "Rule by Law" Regime?*, 67 *BUFF. L. REV.* 793 (2019), and Nick Cheesman, *Law and Order as Asymmetrical Opposite to the Rule of Law*, 6 *HAGUE J. ON RULE L.* 96 (2014).

¹⁰ Carl Minzner, *China's Turn Against Law*, 59 *AM. J. COMP. L.* 935 (2011).

¹¹ *Id.* at 937.

¹² RANDALL P. PEERENBOOM, *CHINA'S LONG MARCH TOWARD RULE OF LAW* (2002). While Professor Peerenboom's book appeared many years before Minzner's article and thus cannot be considered a response to it, Professor Peerenboom has maintained his view in a response to Minzner. See Randall Peerenboom, *The Battle Over Legal Reforms in China: Has There Been a Turn Against Law?*, 2 *CHINESE J. COMP. L.* 188 (2014).

¹³ See, for example, Peerenboom, *supra* note 12; Albert H.Y. Chen, *China's Long March Towards Rule of Law or China's Turn Against Law?*, 4 *CHINESE J. COMP. L.* 1 (2016); and Taisu Zhang & Tom Ginsburg, *China's Turn Toward Law*, 59 *VA. J. INT'L L.* 313 (2019); see also Ng, *supra* note 9, at 793-94 ("Certainly, scholars differ in prognosticating whether China is moving towards the rule of law or drifting further away from it. But they generally agree on the usefulness of the rule of law as a yardstick to evaluate the Chinese legal system.") (internal citations omitted). The debate is discussed in Creemers, *supra* note 9, at 31-33.

But we have to take these inconsistencies seriously and come up with a theory does not require us to treat them as inconsistencies; a theory that treats them as features, not bugs. And in doing so, we cannot commit ourselves in advance to the proposition that it is going to be a theory about law or jurisprudence; it might be a theory belonging to another sphere of inquiry: political science or sociology or anthropology or some combination of them. We must leave open the possibility that the vocabulary and concepts of legality are not the best way to understand the institutions and practices we are looking at.

To make a claim requires a definition of the terms of the claim. The following sets forth what this article means by legality. The definition is offered not as the *correct* one, such that those who define it differently are in some sense wrong. It is offered as a clarification of what this article means when it uses the term, and as an explanation of why this definition is *useful*—the touchstone of a definition’s merit. In particular, it is offered as an ideal type in the Weberian sense, just as alternative models are offered as ideal types.¹⁴

First, legality is about rules: rule-making, rule-application, and rule-following. This article’s premise is that institutions that are not about rules in this way are not usefully called legal institutions. Deciding disputes by coin-flipping is not, by this definition, a legal phenomenon.¹⁵ Coin-flipping could of course be called a “dispute resolution institution” if parties accepted the results as legitimate and it actually resolved disputes, but it is not useful to make that term a synonym for “legal institution.”

Second, these rules both define who regulated parties are and aim to affect their behavior: when certain facts are present, you must do this or you may not do that, and consequences follow if you violate the rule. In other words, legal institutions operate syllogistically. An institution could behave in a regular fashion, for example by executing all citizens on their 30th birthday in order to conserve resources,¹⁶ but that kind of “rule-following” is not what is meant here. Regulated parties must in principle have the ability to use the behavioral rules to affect the application of coercion to them.

¹⁴ On ideal types in general, see Sung Ho Kim, *Max Weber*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Winter 2017 ed.) (Edward N. Zalta ed., 2019) § 5.2, <https://plato.stanford.edu/entries/weber/> [<https://perma.cc/S6GC-KJ5X>].

¹⁵ This is so even if there are elaborate rules and ceremonies governing the coin-flipping, such as we see at the beginning of National Football League games to decide which side shall kick first. See Adam Schefter, *Sources: NFL May Simplify Coin Toss Rules for 2020 After Dak Prescott Near-gaffe vs. Rams*, ESPN, Dec. 22, 2019, https://www.espn.com/nfl/story/_/id/28350895/sources-nfl-simplify-coin-toss-rules-2020-dak-prescott-gaffe-vs-rams [<https://perma.cc/XX7R-C54E>]. Here I depart from Weber, who subsumed under the term “legal” dispute resolution by methods such as an oracle or trial by ordeal. See REINHARD BENDIX, MAX WEBER: AN INTELLECTUAL PORTRAIT 392 (1977).

¹⁶ See LOGAN’S RUN (Metro-Goldwyn-Mayer 1976).

Thus, in this article legality is not a synonym for whatever the state coercively does.¹⁷ If the term just means the system of state coercion then there is no value added by calling it “legal.” The military is a state institution that does things coercively, but we do not for that reason call it a legal institution. It exercises coercion according to certain principles and for certain ends, but those principles and ends are different from those that prevail in what we generally think of as legal systems.

If a term is defined narrowly enough, any claim about it can be made to be true by definition, and hence virtually meaningless. But this definition of legality is not particularly narrow; it is intended to be wide enough to make this article’s claim in principle falsifiable. Nevertheless, there is much about what is conventionally called the Chinese legal system that does not fit within even this expansive conception of legality. To say this will be taken by some as demeaning,¹⁸ but it is not meant that way. This article will not argue that Chinese institutions conventionally called “legal” operate in a random or arbitrary way—they do *not* make decisions by throwing dice or consulting the entrails of birds. It will suggest, however, that the animating principle behind them is not generally one that can usefully be called legality.

An important cognitive barrier to accepting an alternative paradigm to that of legality is that it simply does not currently exist in a well theorized form with prestige equal to that of the legal paradigm. Randall Peerenboom asserts that “there is no other credible theory that better describes the current system . . . In the absence of a better theoretical framework to describe China’s contemporary system than as a *legal* system, . . . the better approach would seem to be to describe what exists in China today as a *legal system*.”¹⁹ Yet consider this description by the scholar Benjamin Liebman of judicial decision-making, first in Mao-era China and then in present-day China:

Law [in the Mao era] became inseparable from politics and was designed to advance party policy. Law was practical and adaptable, not rigid or constraining. Legal institutions were neither independent nor specialized, and professionalism was explicitly rejected. Written law yielded to actual experiences; a correct decision was one that met the emotions of the masses. . . .²⁰

Judges [in the current era] facing populist pressures often take flexible approaches to legal rules, or ignore them altogether. . . . [But] courts that bend to accommodate the media or petitioners are not abandoning principle. They are doing exactly what their roles in the political-legal system require:

¹⁷ I use the term “state” in the Weberian sense: “a human community that (successfully) claims the *monopoly of the legitimate use of physical force* within a given territory.” Max Weber, *Politics as a Vocation*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 77, 78 (Hans Heinrich Gerth et al. eds., 1946) (emphasis in original).

¹⁸ See Part III below on the cognitive and emotional difficulties of accepting an alternative paradigm.

¹⁹ Randall Peerenboom, *The X-Files: Past and Present Portrayals of China's Alien “Legal System”*, 2 WASH. U. GLOBAL STUD. L. REV. 37, 63-65 (2003).

²⁰ Benjamin L. Liebman, *A Return to Populist Legality? Historical Legacies and Legal Reform*, in MAO'S INVISIBLE HAND: THE POLITICAL FOUNDATIONS OF ADAPTIVE GOVERNANCE IN CHINA 165, 174 (Sebastian Heilmann et al. eds., 2011).

adapting in a practical fashion to popular demands and ensuring that legal rules do not diverge too greatly from popular conceptions of right and wrong.²¹

If “legality” is indeed the best theoretical framework through which to view and understand these observations—most of which must, according to that framework, be deemed errors and outliers, not normal phenomena—surely that says more about the lack of good alternatives than it does about the suitability of legality in absolute terms.

Yet whether or not Peerenboom is correct about the absence of an alternative framework,²² it is true that whereas forests have been cleared to print analyses of *law* as a form of governance or order maintenance if you will, other ways of governance have received much less attention. Although more than one scholar has suggested that an alternative paradigm explains Chinese order institutions much better than the legal one, the fact is that such suggestions have remained by and large suggestions, with no sustained working out of the details.²³

There is also a barrier to accepting an alternative paradigm that takes the form of viewing the rule of law as a Good Thing, and concluding from that that the legal paradigm is the appropriate one both because one wants the best for China and because one does not want to be accused of Orientalism for asserting that China lacks something good that the West allegedly possesses.

Although few intellectuals admit to believing in end-of-history theories any more—indeed, the popularizer of the term, Francis Fukuyama,²⁴ has backed away from it²⁵—the idea that liberal democracy and its associated legal institutions are the normal end-state of development still resonates strongly in academia’s subconscious. This idea is reflected in research on China that is driven by the question of whether it is converging, if so how quickly, and what obstacles stand in the way. That this is the right paradigm has for many become a kind of common sense; a habit of thought or “collective ideas that come to seem obvious,” in Patrick Porter’s terms.²⁶

Thus, the English-language literature on Chinese law is suffused with a normative rhetoric that clearly views the rule of law—meaning here a legal system with the standard set of features

²¹ *Id.* at 177.

²² See, e.g., MIRJAN R. DAMASKA, *THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS* (1986).

²³ Excellent recent exceptions are Cheesman, *supra* note 9, and NICK CHEESMAN, *OPPOSING THE RULE OF LAW: HOW MYANMAR’S COURTS MAKE LAW AND ORDER* (2016).

²⁴ FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (1992).

²⁵ See, e.g., Ishan Tharoor, *The Man Who Declared the “End of History” Fears for Democracy’s Future*, WASHINGTON POST, Feb. 9, 2017, <https://www.washingtonpost.com/news/worldviews/wp/2017/02/09/the-man-who-declared-the-end-of-history-fears-for-democracys-future> [<https://perma.cc/3H8D-2Z5X>], and Louis Menand, *Francis Fukuyama Postpones the End of History*, THE NEW YORKER, Sept. 3, 2018, <https://www.newyorker.com/magazine/2018/09/03/francis-fukuyama-postpones-the-end-of-history> [<https://perma.cc/W55N-2LMS>].

²⁶ See Patrick Porter, *Why America’s Grand Strategy Has Not Changed*, 42 INT’L SECURITY 9, 11 (2018).

generally considered desirable by Western intellectuals—as a good thing, and movement toward it as therefore good as well.²⁷ To take just two recent examples, one scholar writes, “Prospects for law’s roles arguably are *brightened* because top officials with responsibility for the economy (Premier Li Keqiang) and legal institutions (Supreme People’s Court President Zhou Qiang) were educated in law, unlike their immediate predecessors.”²⁸ And another writes, “China’s legal reforms have made significant *progress* since the 1970s.”²⁹ Because of the prestige of law, to say that some society does not have a legal system is viewed not as a neutral observation but as an insult. Nobody wants to be rude.

To quote is not to criticize; similar statements by other analysts, no doubt including the present author, can readily be found. It is utterly commonplace to talk about whether some allegedly legal institution counts as a “legitimate” one or “deserves” to be called by the name of some legal institution. But the question of whether some institution should be called a *legal* institution should, as a matter of analysis, be no more a value-laden question than the question of whether a particular animal should be called a giraffe. We don’t say that a moose does or does not “deserve” to be called a giraffe, and don’t imagine it demeans Canada to claim that it is a country without giraffes.

These examples are offered only because they reflect the incredible difficulty of dispensing with the legal paradigm when talking about Chinese order institutions. Even when these institutions manifestly do not match the ideal model, we still interpret them through the same lens by seeing them as *on the way there*—hence the title of Randall Peerenboom’s book, *China’s Long March Toward Rule of Law*,³⁰ and the teleology expressed in Yuhua Wang’s statements in *Tying the Autocrat’s Hands* that “Chinese rule of law is still in its *premature* stage” and that “[e]ven though China is gradually moving away from a rule-of-man regime, the current rule-of-law regime is incomplete.”³¹

Because of the prestige of legal ordering in Western societies, to assert that some non-Western society does not have these institutions—at least, not in some important sense—will inevitably invite accusations of Orientalism, and so few are willing even to entertain the possibility. I have addressed this issue in a separate article,³² and will not therefore say more here, other than to note that to assert difference is not necessarily to assert superiority or inferiority. As legal historian Li Chen remarks, “It is worth emphasising that real or perceived differences between two cultures,

²⁷ Judith Shklar describes this as the ideology of legalism. See JUDITH N. SHKLAR, *LEGALISM* (1964).

²⁸ Jacques deLisle, *Law in the China Model 2.0: Legality, Developmentalism and Leninism Under Xi Jinping*, 26 J. CONTEMP. CHINA 68, 70 (2017) (emphasis added).

²⁹ YUHUA WANG, *TYING THE AUTOCRAT’S HANDS: THE RISE OF THE RULE OF LAW IN CHINA* 85 (2015) (emphasis added).

³⁰ PEERENBOOM, *supra* note 12.

³¹ WANG, *supra* note 29, at 85 (emphasis added).

³² Donald Clarke, *Anti Anti-Orientalism*, 68 AM. J. COMP. L. ____ (forthcoming 2020).

civilisations or legal systems do not and should not mean incommensurability or a hierarchy between them unless people choose to endow such differences with normative, ideological implications.”³³

At the same time, scholars, like anyone else, are entitled to make normative judgments about the relative value of various institutions. But the description and the value judgment are two different things, and should be addressed separately by critics.

The lack of a well theorized alternative paradigm interacts with the notion of law as prestigious to multiply the difficulties of accepting an alternative paradigm. Imagine basketball as a high-prestige sport. Now envision a group of people on skates, passing a puck, and scoring when it goes into a net. And suppose further that we lack any paradigm other than the prestigious basketball paradigm for thinking about this. There is an overwhelming temptation to say, “Yes, they’re playing basketball, but it’s the *Canadian version* of basketball, and the puck is basically a basketball with some non-essential tweaks, and the net is just a repositioned and reshaped basket, and anyway who are we to impose on Canadians our ethnocentric view of what counts as ‘genuine’ basketball?”

People fight over the meaning of terms such as “democracy” or “rule of law” not because humankind is divided up into many mutually incomprehensible cultures, but because those are *prestigious* terms.³⁴ We do not see the same fights over what “kilometer” means, even though it is an

³³ Li Chen, *Traditionalizing Chinese Law: Symbolic Epistemic Violence in the Discourse of Legal Reform and Modernity in Late Qing China*, in CHINESE LEGAL REFORM AND THE GLOBAL LEGAL ORDER: ADOPTION AND ADAPTATION 181, 183 (Yun Zhao et al. eds., 2017).

³⁴ Martin Krygier calls these “hurrah terms.” See Martin Krygier, *The Rule of Law: Pasts, Presents, and Two Possible Futures*, 12 ANN. REV. L. AND SOC. SCI. 199, 211 (2016). Some scholars (e.g., PEERENBOOM, *supra* note 12, at 2; MATTHIEU BURNAY, CHINESE PERSPECTIVES ON THE INTERNATIONAL RULE OF LAW 23 n.59 (2018)) view terms such as “rule of law” as “essentially contested concepts” in the sense of the term developed by philosopher W.B. Gallie (W.B. Gallie, *Essentially Contested Concepts*, 56 PROCEEDINGS ARISTOTELIAN SOC’Y, NEW SERIES 167 (1956)). I disagree on the grounds that Gallie’s conception is itself incoherent.

Gallie defines essentially contested concepts as “concepts the proper use of which inevitably involves endless disputes about their proper uses on the part of their users.” (*id.* at 169) A key question, however, is why people feel it is worthwhile to engage in the dispute. Instead of debating whether the concept X means A, B, and C or instead D, E, and F, why not just say, “All right; you can have X as a concept meaning A, B, and C, and I’ll create a concept Y to mean D, E, and F”? Why does each side insist on its right to define X? The answer, I would argue, is that X is a value-laden term—either positive or negative—and each side seeks to take advantage of that value in applying its definition. Nobody thinks it worthwhile to argue about the meaning of “kilogram” or “year.”

But that means that what is being contested is not a *concept*, but rather merely a *verbal formulation*—a string of letters on the page. Gallie does not show how there could be a single thing identifiable as a *concept* whose meaning is nevertheless essentially contested. A word or phrase in a given language is identifiable as a single thing, but to identify a *concept* as a single thing requires an identifiable meaning, and that is not available if the whole premise is that there is no agreement on the meaning. Consider what happens when we try to bring speakers of other languages into a debate about the meaning of an essentially contested concept. If we are truly talking about a *concept* and not just a verbal formulation, the discussion should be able to

important concept used by humans all over the world. People of many different cultures and languages can easily settle on a definition because the stakes are low.

If we can rid ourselves of the notion of law as prestigious, a number of problems disappear immediately. The stakes of the question of what counts as “law” and “legal” go down considerably. We can define law in whatever way seems appropriate to what we are trying to do, without worrying about being offensive. We can also stop arguing about whether various definitions are right or wrong. When law stops being prestigious, it becomes much more obvious that the sole criterion of a definition should be its usefulness for the purpose to which it is being put.

III. Which Paradigm?

If legality is not the best paradigm for understanding Chinese order institutions, what is? The question itself may be misconceived: even the attempt alone to apply a single paradigm to replace that of legality involves some of the same possibly unjustified assumptions that applying the paradigm of legality did. It assumes, like the paradigm of legality, that the institutions in question form a coherent whole and operate in a distinct manner. Yet this may not be true.

We need first to back up and to characterize the state within which these institutions operate. Analyses of Chinese order maintenance institutions must come to grips with the fundamental reality that China is a Leninist one-party state.³⁵ It does not, either in theory or to the extent of its ability in reality, tolerate independent power centers. Its official ideology denounces

transcend language. The European Space Station was not derailed because of the inability of German and French scientists to agree on the concept of a kilogram. Yet how are we going to identify the relevant words to express the concept in the foreign language without an *uncontested* idea of the essence of the concept? How would we know the translation was correct?

Put another way, Gallie does not show why a debate about whether a country exhibits the rule of law cannot be settled to the satisfaction of everyone simply by saying, “By definition X it does, and by definition Y it doesn't.” The right approach is to recognize why people *want* to have the debate: it is because they think the term “rule of law” has a positive valence. It is one of Krygier’s hurrah terms. That being so, the way to settle—or at least to rationally discuss—whose definition is better is first to ask why “rule of law” has a positive valence, and then to ask whose definition is more deserving of that positive valence. Is one party claiming falsely to meet the definition of the other party, or are they redefining it, while at the same time hoping to free-ride off the positive valence of the other party's definition, hoping nobody will notice the different definition?

I discuss the issue at greater length in Donald Clarke, *The “Rule of Law” and the Concept of an “Essentially Contested Concept”*, THE CHINA COLLECTION, Aug. 21, 2019, <https://perma.cc/79LX-T24>.

³⁵ The propositions of this paragraph must, for the purposes of this article, be taken as given. To undertake a fully documented account of the entire Chinese political system would go well beyond the scope of this paper. See, among many possible sources, Nick Frisch, *The Bolsheviks in Beijing*, FOREIGN AFFAIRS, Oct. 18, 2017, <https://www.foreignaffairs.com/articles/china/2017-10-18/bolsheviks-beijing>, and Steve Tsang, *Consultative Leninism: China’s New Political Framework*, 18 J. CONTEMP. CHINA 865 (2009).

separation of powers and the independence of the judiciary,³⁶ and pronounces that “east, west, south, north, and center, in the Party, the state, the military, civil society, and education, the Party leads everything.”³⁷

The practical consequence of this is that an important and intended function of all institutions—not necessarily, of course, their sole function, outside of the security services—is simply to maintain the Party’s political primacy:³⁸ what one scholar describes as “leadership maintenance.”³⁹ But simply to state continued Party primacy as a goal does not provide much analytical leverage. Indeed, it barely meets (if it meets it at all) the Popperian criterion of falsifiability.⁴⁰

³⁶ In 2017, Zhou Qiang, the head of China’s Supreme People’s *Fayuan*, stated, “[China’s *fayuan*] must firmly resist the western idea of ‘constitutional democracy’, ‘separation of powers’ and ‘judicial independence’.” Zhang Ziyang (张子扬), *Zhou Qiang: Yao Ganyu Xiang Xifang Cuowu Sichao Liangjian* (周强：要敢于向西方错误思潮亮剑) [*Zhou Qiang: We Must Dare to Bare Our Sword to Erroneous Western Ideological Trends*], ZHONGGUO XINWEN WANG (中国新闻网) [CHINA NEWS ONLINE], Jan. 14, 2017, <http://www.chinanews.com/gn/2017/01-14/8124300.shtml> [<https://perma.cc/BX56-KPPP>].

³⁷ Chinese Communist Party, *Zhongguo Gongchandang Zhangcheng* (中国共产党章程) [Charter of the Chinese Communist Party] (2017) pmbl., available at <https://perma.cc/H662-NAJP>; see also Nis Grünberg & Katja Drinhausen, *The Party Leads on Everything* (Mercator Institute for Chinese Studies), Sept. 24, 2019, available at <https://perma.cc/5TET-W5AV>.

³⁸ In 1979, Deng Xiaoping laid out what he called the “Four Cardinal Principles” that China must never abandon: keeping to the socialist road, upholding the dictatorship of the proletariat, upholding the leadership of the Communist Party, and upholding Marxism-Leninism and Mao Zedong Thought. See Deng Xiaoping, *Uphold the Four Cardinal Principles*, available at <https://perma.cc/K78W-38RH> (English and Chinese texts); <https://perma.cc/RC4X-A9A3> (official English translation) (speech of March 30, 1979). But it has always been clear that of those four principles, the most important one is upholding Party leadership. See Xianzhi Pang, *Deng Xiaoping and the Destiny of Chinese Socialism* 7 QIUSHI JOURNAL (English ed.), no. 1, 2015, available at <https://perma.cc/8ZBE-VFAG>. It could be argued that the Cultural Revolution falsifies this theory insofar as it represented an effort by Mao Zedong to cripple the CCP because its other leaders had sidelined him, but that argument supports the point here: Mao needed to encourage bottom-up action precisely because the existing Party and state institutions supported the continued primacy of the Party, the body that was sidelining him. In any event, all Party leaders since Mao have emphatically rejected bottom-up initiatives that could threaten the Party.

³⁹ Xin He, *(Non)legality as Governmentality in China* (U. Hong Kong Fac. of Law Research Paper No. 2020/035, May 28, 2020), <https://ssrn.com/abstract=3612483>.

⁴⁰ See KARL R. POPPER, *THE LOGIC OF SCIENTIFIC DISCOVERY* 315 (1992) (“[S]tatements . . . convey information about the empirical world only if they are capable of clashing with experience[.]”); 2 KARL R. POPPER, *THE OPEN SOCIETY AND ITS ENEMIES* 13 (1966). (“In so far as scientific statements refer to the world of experience, they must be refutable; and, in so far as they are irrefutable, they do not refer to the world or experience.”).

Nevertheless, bearing this fundamental fact in mind makes it easier to understand why a single paradigm—at least one that is specific enough to have real analytical bite—may not be useful. Chinese state institutions operate in a number of ways to accomplish various tasks. This means there is diversity not only across institutions, but also within institutions: the same institution might operate in quite different ways, depending on the context. Although there is a general division of labor among Chinese governmental institutions—there is no separation of powers—that division of labor exists for purely practical ends. Any institution can be put in the service of any goal if those in charge feel at any time that it is appropriate. Adjudicators in *fayuan* might be asked to decide disputes, but when local government manpower is short they may also be put to work helping with birth control, tax collecting, urban beautification, and the physical expulsion of beggars.⁴¹

The close enmeshing of institutions conventionally called “legal” with the rest of the state apparatus means not only that an overarching label of “legal” attaching only to those institutions is misleading, but that any overarching label could be misleading. “Legal” institutions have operated over time, and operate today, in different ways in order to achieve different goals. But in that they are not distinct from other state institutions. All state institutions operate ultimately in service of—or at least, may never be permitted to operate in way inimical to—the political primacy of the Party and the implementation of its policies. More specifically, as Jacques deLisle writes,

Much of the reform era legal project has seemed consistent with a broadly Leninist vision, in which laws and legal institutions are among a set of coordinated means to achieve substantive ends, such as rapid economic development and durable authoritarian rule, and are embraced to the extent they advance those ends.⁴²

That different paradigms may be appropriate in different contexts does not mean that they are equally important. One key paradigm through which to view the operation of China’s institutions conventionally called “legal” is that of *order maintenance*. In the post-Mao era there is even a particular term of art for it—*weiwén* 维稳—and it means the preservation of a social and political order conducive to the continued rule of the CCP. This may seem banal—*of course* China’s state institutions are designed to promote and protect the rule of the Communist Party. But my contention is that if we take this seriously, things that might have looked like puzzling anomalies begin to look much more normal, and we are less likely to make wrong predictions about the future.

⁴¹ See KWAI HANG NG & XIN HE, EMBEDDED COURTS: JUDICIAL DECISION-MAKING IN CHINA 124 (2017); WANG LIMING (王利明), SIFA GAIGE YANJIU (司法改革研究) [A STUDY OF JUDICIAL REFORM] 421 (2000). In the early 1990s, an official newspaper on legal affairs carried a report in which the author said that he could not find anyone he was looking for at a local court because they had all been dispatched to the streets to tear down unsightly advertisements touting cures for sexually transmitted diseases. See He Haijian, *Faguan, Xingbing Guanggao ji Qita* (法官, 性病, 广告及其他) [Judges, Venereal Disease Advertisements, and Other Matters], RENMIN FAYUAN BAO (人民法院报) [PEOPLE’S COURT NEWS], Oct. 8, 1993.

⁴² Jacques deLisle, *China’s Legal System*, in POLITICS IN CHINA: AN INTRODUCTION 224, 243 (William A. Joseph ed., 2014).

Order maintenance is not necessarily inconsistent with rule-following as defined here, but it is not the same thing, and it can lead to different results when it is applied as a principle to decision-making and action by state institutions. The usefulness of order maintenance as a central theme is borne out by its ability to explain a number of phenomena that otherwise look aberrational.

Let us be clear about this article's claim. It is not that order maintenance is the animating principle behind the Chinese *legal system*. It is that we should think about order maintenance as the animating political goal behind Chinese institutions now often *mischaracterized* as legal, because it is not their purpose to engage in legal activity.

We have to take seriously the question, "What is the basis for saying that this or that Chinese institution is a legal institution?" It has to be about rule enforcement, and not just incidentally; that needs to be its major purpose. The claim here is that while we can certainly get a certain distance by interpreting Chinese order institutions as if their purpose was legal (*i.e.*, rule enforcement), we can get further by interpreting them through a different lens: viewing their purpose as that of order maintenance. Once we do that, bugs become features, errors become normal behavior, and regression and setbacks become just change, or possibly progress toward a different goal from the one imagined or wished for by the analyst.

To theorize a concept such as "order maintenance" as the foundation of a principle of order so different from legality that it should not be called by the same name is not entirely new. The opposite of "rule of law" is not simply less rule of law or no rule of law; there is no single axis along which all societies are usefully measured. Nick Cheesman's recent study of Myanmar proposes "Law and Order" (LAO), which shares many important features of the stability maintenance paradigm, as an alternative paradigm. He describes how it differs from the rule of law paradigm:

The rule of law relies on general rules to maintain order, whereas law and order rests on particularistic commands and directives in response to exigencies. The former emphasises the role of juridical institutions, whereas the latter privileges administrative ones. Under the rule-of-law ideal, public adjudication according to general rules guides conduct so that people can make decisions of their own accord. To maintain law and order, authoritative institutions act on specific injunctions to intervene directly in people's lives. Lastly, law and order entails the exogenous imposition of discipline, which requires a superordinate-subordinate political relationship, whereas under the rule of law, discipline is an endogenous feature of political relations: it is characteristic of those relations, not imposed on them.⁴³

Most importantly, LAO is not simply the absence of ROL. It possesses its own affirmative model:

The two concepts are asymmetrically opposed because law and order is not a negative of the rule of law, the way that rule of men is. Law and order has its own virtues, its own contents that are disagreeable to the rule-of-law ideal.⁴⁴

⁴³ CHEESMAN, *supra* note 23, at 34.

⁴⁴ *Id.*

In other words, the goal here is not to show the degree to which the rule of law is absent, but instead to postulate an alternative, more useful paradigm for understanding Chinese order institutions. There is not a single scale, with some countries on the high end and others on the low end. “Order maintenance” (or LAO) does not put a country on the low end of the ROL scale; to do that would be simply to revert to a unidimensional understanding of order institutions.

Order maintenance is just one of a number of possible alternative paradigms. Thomas Stephens, for example, claims that we should understand the traditional Chinese legal system — although he would not want to use the term “legal” to characterize the “system” in question — through what he calls the “disciplinary model.” A disciplinary system is one that follows the model of order that prevails in the army, the family, and the traditional schoolroom. The key values of a disciplinary system are the maintenance of hierarchy, group cohesion, and authority, not fidelity to abstract rules or individualized justice. The primary duty of obedience is to one's immediate superior. Most importantly, individuals do not have rights—certainly not the kind of rights that could be exercised against superiors. They may have *interests* to which the system is sympathetic, but whether those interests will be fulfilled is a matter for their superiors to decide. Thus, practices such as collective punishment, a presumption of guilt, and the non-accountability of authorities to any external body not under their control are not mistakes or errors or signs of immaturity in the order system; they are inherent, necessary parts of it. They are features, not bugs.⁴⁵

For all these reasons, Stephens claims that the entire vocabulary of Western jurisprudence—courts, judges, rights, legislatures, etc.—is inapposite to traditional China, and that to use such terms to describe what we see is to miss the point entirely. Although Stephens did not fully work out his model, was not writing about modern China, and in his idealization of the West and oversimplification of the East is not immune from the charge of Orientalism,⁴⁶ his disciplinary model is still potentially useful for all that, provided we bear in mind that it is a model, not a description of reality.

In a similar vein, Alice Erh-Soon Tay in a series of articles⁴⁷ advanced that claim that the Chinese system of order was essentially “parental” and therefore fundamentally different from what she called the “adjudicative” approach of Western legal systems.

Perhaps the most commonly invoked alternative paradigm to that of legality is “rule by law.” it appears frequently in the academic literature on authoritarian governments in general and on

⁴⁵ See Clarke, *supra* note 32, at 29.

⁴⁶ The case against Stephens is ably prosecuted by Teemu Ruskola in TEEMU RUSKOLA, *LEGAL ORIENTALISM: CHINA, THE UNITED STATES, AND MODERN LAW* 193-94 (2013). See also Clarke, *supra* note 32, at 8-9.

⁴⁷ Alice Erh-Soon Tay, *Law in Communist China—Part 1*, 6 SYDNEY L. REV. 153 (1969) [hereinafter Tay, *Law Part I*]; Alice Erh-Soon Tay, *Law in Communist China—Part 2*, 6 SYDNEY L. REV. 335 (1971) [hereinafter Tay, *Law Part II*]; Alice Erh-Soon Tay, “Smash Permanent Rules”: *China as a Model for the Future*, 7 SYDNEY L. REV. 400 (1976) [hereinafter Tay, *Smash Permanent Rules*]; see also Alice Erh-Soon Tay, *The Struggle for Law in China*, 21 U. BRIT. COLUMBIA L. REV. 561 (1987) [hereinafter Tay, *The Struggle*].

China in particular. Usually it derives its meaning from its contrast with the rule *of* law, and when so defined it is understood as somewhere along a continuum of law-based governance, with perfect rule of law on one end, the utter arbitrariness of Rule by Man (or something else, often unstated) on the other, and rule by law somewhere in between. As Cheesman writes, “Rule by law is based on an assumption that all political systems can be made legible by comparing specific criteria for the rule of law along a ‘continuum of legality’ extending downwards from the rule-of-law ideal.”⁴⁸ But what is the content of the in-between area? In Cheesman’s words again, it is a kind of

poor man’s rule of law, a step up from the rule of men Rule by law is in this usage a better-than-nothing option, premised on an assumption that whatever the contents of law, some attempt to rule by it must be better than the alternatives, even if we do not know what the alternatives are.⁴⁹

In discussions of China, it is common to see assertions that while China may not have the rule of law, it does have (and this is usually viewed as an achievement) rule *by* law, and that such a condition is a position along a continuum that has rule of law on one end: “Some commentators, emphasizing how far China’s legal system falls short of the ideal of rule of law and looking back to its rule-by-law past, will insist that China remains fundamentally rule by law.”⁵⁰

Remarkably, very little has been said about the actual content of rule by law by those who use the term.⁵¹ What goes on in this grey middle zone? What does it mean, specifically, to fall short of Rule of Law but to be on the same continuum? What *is* the better-than-nothing option?

Reading between the lines, we can infer that to most of those who use the term, it is a state that in many respects resembles the model rule-of-law state. It has laws, courts, and judges. It features “the regular and impartial administration of public rules[.]”⁵² But there is a key aspect to rule by law that in the eyes of those who use the term distinguish it from rule by law: the law is a tool used by the authorities, but it does not constrain the authorities. Rule by law “refers to the method of using legal rules and some institutional method of enforcing them . . . in the practice of government.”⁵³ State authorities may obey their own rules if, for reasons of policy, they believe it advantageous to do so, but there are no institutions that can make them obey, and they are strangers to the idea that any such institutions should exist.

⁴⁸ Cheesman, *supra* note 9, at 105.

⁴⁹ Cheesman, *supra* note 9, at 103-04.

⁵⁰ PEERENBOOM, *supra* note 12, at 8. Some commentators, on the other hand, while implicitly accepting the idea of a continuum, do dispute that China is even at the rule-by-law part of it. See, e.g., Jean-Pierre Cabestan, *The Political and Practical Obstacles to the Reform of the Judiciary and the Establishment of a Rule of Law in China*, 10 J. CHINESE POL. SCI 43 (2005).

⁵¹ One exception is Eric W. Orts, *The Rule of Law in China*, 34 VAND. J. TRANSNAT’L. L. 43, 91-101 (2001) (discussing the difference between rule by law and rule of law).

⁵² JOHN RAWLS, A THEORY OF JUSTICE 235 (1971).

⁵³ Orts, *supra* note 51, at 97.

Thus, in writing of the “rule-by-law regime of the Mao era,”⁵⁴ Peerenboom states that the classical socialist theory of law dominated, and that that theory holds that “law is to be used by the proletariat as a weapon in class struggles against the enemy.”⁵⁵ Pitman Potter echoes this assessment: “During the Maoist era, . . . [l]aw was used as a tool of policy administration. Law was not the basis for private rights, but rather served as an instrument through which the government implemented its policy choices.”⁵⁶ Describing China’s current government, George Chen writes, “the rule-by-law approach remains an instrument to control civil society.”⁵⁷

The corollary of the law-as-tool idea is that, unsurprisingly, the tool does not control the tool-wielder. Tamanaha characterizes rule by law as carrying “scant connotations of legal limits on government.”⁵⁸ Eric Orts writes that unlike rule by law, “[t]he rule of law instead refers primarily to a political theory of limited government.”⁵⁹ Peerenboom, having noted the use of law as a tool of government in the Mao era, adds that “at no time during the Mao period was the law meant to impose meaningful restraints on the [Communist Party].”⁶⁰ Law governs the ruled, not the rulers.

Rule by law can sometimes look like rule of law because, as noted above, many of the institutions look similar, and rules may be enforced with regularity. In *The Dual State*,⁶¹ Ernst Fraenkel described a case in which the unlawful administrative denial of a birth certificate was upheld by a court in Nazi Germany, despite the clear provisions of law to the contrary. As he wrote, “Hundreds of birth certificates are issued every day in Germany in accordance with the provisions of the law.”⁶² But the existence of regular behavior is not the sign of legality or rule of law; it is a factual regularity that Tom Ginsburg has in another context labeled “actuarial.”⁶³ In any given case, the authorities can decide to cast aside their self-imposed restraints. We must not mistake *regularity* in operations with *rule-governed* operations.

⁵⁴ PEERENBOOM, *supra* note 12, at 8-9.

⁵⁵ *Id.* at 44.

⁵⁶ PITMAN POTTER, CHINA'S LEGAL SYSTEM 24 (2013).

⁵⁷ George Ge Chen, *Le Droit, C'est Moi: Xi Jinping's New Rule-By-Law Approach*, OXFORD HUMAN RIGHTS HUB, July 26, 2017, <https://ohrh.law.ox.ac.uk/le-droit-cest-moi-xi-jinpings-new-rule-by-law-approach/> [<https://perma.cc/T5EZ-6BEQ>].

⁵⁸ BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 102 (2004).

⁵⁹ Orts, *supra* note 51, at 98.

⁶⁰ PEERENBOOM, *supra* note 12, at 45-46.

⁶¹ ERNST FRAENKEL, THE DUAL STATE: A CONTRIBUTION TO THE THEORY OF DICTATORSHIP (1941).

⁶² *Id.* at 57.

⁶³ Tom Ginsburg, *The "China Problem" Reconsidered: Property Rights and Economic Development in Northeast Asia* (University of Chicago Law School, June 2011), <https://home.uchicago.edu/~tginsburg/pdf/workingpapers/TheChinaProblemRevisited.pdf> [<https://perma.cc/T2NR-3Q3U>].

Despite its wide use, rule by law is something less than a true alternative paradigm because, while the observations of those who use the term may be quite correct, it does not in fact depart from the legality paradigm. Instead, it represents an attempt to understand and assess institutions *through* the legality paradigm.

Whether order maintenance as described here is the best alternative paradigm, or the degree to which it resembles Cheesman's LAO, or Thomas Stephens's disciplinary paradigm,⁶⁴ or Alice Erh-Soon Tay's parental paradigm,⁶⁵ or the rule by law paradigm, is ultimately less important than making the case that we should be *considering* alternative paradigms that do not force us to understand everything using the vocabulary and concepts of legality.

IV. Chinese Order Maintenance Institutions in the Order Maintenance Paradigm

This article asserts that if Chinese order institutions are viewed through an alternative paradigm—in particular, the order maintenance paradigm—then bugs become features, errors become normal behavior, and regression and setbacks become just change, or possibly progress toward a different goal from the one imagined or wished for by the analyst. It will now show that in a few issue areas.

This methodology could, of course, be criticized as cherry-picking. Because what the article proposes is an interpretation of data, not new data, its thesis is essentially impossible to prove rigorously and so any reference to data is vulnerable to that criticism. The question then becomes that of whether the cherries are sufficiently large and weighty to be persuasive. Once again, the purpose here is to discuss institutions and activities that seem to be deeply rooted in the system and are not the product of a period of just a few years, whether long ago or recently.

To recapitulate, the argument going forward is that China possesses a set of institutions whose main purpose is the maintenance of order as the Party sees it (whether or not that particular term is used) and the perpetuation of the Party's political primacy, and that we understand those institutions better if we simply accept that that is their purpose instead of imagining that they have some other purpose that has been illegitimately distorted or hijacked by the order maintenance imperative. It is simply the application of Occam's razor to Chinese order institutions.

A. The Political-Legal "system" (系统 *xitong*)

Perhaps the most obvious example of the orientation to order maintenance is the very existence of the concept of "political-legal" (政法 *zheng-fa*) and its bureaucratic instantiation in the political-legal *xitong* ("system"). A *xitong* is "a group of bureaucracies that together deal with a broad

⁶⁴ THOMAS B. STEPHENS, ORDER AND DISCIPLINE IN CHINA: THE SHANGHAI MIXED COURT, 1911-27 (1992).

⁶⁵ Tay, *Law Part I*, *supra* note 47; Tay, *Law Part II*, *supra* note 47.

task the top political leaders want performed.”⁶⁶ Since 1949—and indeed before then as well⁶⁷—the Party has seen all the civilian organs of state coercion as dealing with the same task, and hence appropriately subject to unified management by the Party-state.⁶⁸ As detailed below, originally this was done through a formally state body, but that body was soon superseded by a Party body that I will henceforth refer to generally as a political-legal committee (PLC) regardless of its actual name.

As early as October 1949, the Central People’s Government established a Political-Legal Committee (PLC) with forty-seven members from various state bodies, including the heads and vice heads of the Supreme People’s Court, the Supreme People’s Procuracy, the Interior Ministry, and Public Security Ministry, and the Justice Ministry.⁶⁹ The Chairman and Vice Chairman were Dong Biwu and Peng Zhen respectively, who were the CCP people in charge of the courts and the procuracy.⁷⁰ The following month, the CCP established its own Party committee within the state PLC. The PLC’s purpose was to guide the work of the bodies represented on it.⁷¹

In 1958, the CCP established a Central Political-Legal Small Group,⁷² but that body ultimately disappeared in 1972 with the disorganization brought on by the Cultural Revolution.⁷³

In 1978 the CCP re-established the Central Political-Legal Small Group, reconstituting it in 1980 as the Central Political-Legal Committee. In 1988, it was changed into the Central Political-Legal Leading Small Group,⁷⁴ and in 1990 it was changed back into the Central Political-Legal Committee.⁷⁵

⁶⁶ KENNETH LIEBERTHAL, *GOVERNING CHINA: FROM REVOLUTION THROUGH REFORM* 218 (2004).

⁶⁷ Liu Quane (刘全娥), *Shan-Gan-Ning Bianqu Sifa Gaige yu “Zheng-Fa Chuantong” de Xingcheng* (陕甘宁边区司法改革与“政法传统”的形成) [The Judicial Reform in Shaansi-Gansu-Ningxia Border Region and the Formation of the “Tradition of Politics-Law”] (Ph.D. dissertation, Faculty of Law, Jilin University, 2012).

⁶⁸ See generally Yu Yifu (于一夫), “*Yi Dang Zhi Guo*” *Mianmian Guan* (“以党治国”面面观) [*An All-Around Look at “Ruling the Country by the Party”*], 2010 YAN HUANG CHUNQIU 炎黄春秋 (ANNALS OF THE YELLOW EMPEROR), no. 7, <http://www.yhcqw.com/31/7662.html> [<https://perma.cc/5J7S-H8VY>].

⁶⁹ Liu Yong (刘勇), *Zheng-Fa Wei Zhidu de Lishi Yange* (政法委制度的历史沿革) [The Historical Evolution of the Political-Legal Committee System] 9 (M.A. thesis, Institute of Marxism, China University of Politics and Law, 2010).

⁷⁰ Hou Meng (侯猛), “*Dang yu Zheng-Fa*” *Guanxi de Zhankai* (“党与政法”关系的展开) [*The Development of the Relationship Between the Party and Political-Legal Institutions*], 2013 FAXUE JIA (法学家) [THE JURIST], no. 2, at 1, 2.

⁷¹ *Id.*

⁷² Liu, *supra* note 69, at 13.

⁷³ *Id.* at 15.

⁷⁴ *Id.* at 19.

⁷⁵ *Id.* at 20.

Throughout these vicissitudes, PLCs have generally governed the courts, the procuracy, the public security organs, the judicial administration (*sifa*) organs, and most recently the state security organs,⁷⁶ although at one time or another the political-legal *xitong* “has run the court system, the prosecutors, the labor camps, the prisons, the fire departments, the border guards, the uniformed police, the secret police, and the issuance of passports, among other things.”⁷⁷ This governance has often included the power to dictate specific actions and outcomes.⁷⁸

Although the power of PLCs has waxed and waned over time,⁷⁹ the existence of the political-legal *xitong* demonstrates a particular approach to order. First, as noted above, it is the institutional manifestation of a view that the Party-state has a number of coercive institutions that show at most a division of labor in pursuit of a common task. This view is clearly visible in the fact that adjudicators wore military-style uniforms right up until the early 2000s.⁸⁰ He Weifang, a prominent liberal law professor, argued in 1997 that this gave people the misimpression that adjudicators and police belonged to the same internally unified group.⁸¹ But this is not a *misimpression*. It is, as a descriptive matter, entirely accurate.

Another more significant consequence of this view is that there is much more mobility of personnel within a *xitong* than across *xitong*. Just as it is normal for a senior bank official (in the finance and economics *xitong*) to cross over to a post in the Ministry of Finance or the People’s Bank of China, so it is normal for officials to move among the police, procuracy, and court bureaucracies. On the basis of extensive fieldwork, two scholars write, “Moving in and out of the judiciary is rather common for those who move up the ladder. Many of the most senior judges in the system today have worked in other party-state organs before returning to, or simply landing in, a senior position.”⁸² A case in point is Wang Shengjun, who after a twenty-year career in the Party political-legal bureaucracy and a brief stretch as a provincial police chief was made President of the Supreme People’s Court despite his lack of any legal education.⁸³ In the paradigm of legality, that is anomalous. But in the order maintenance paradigm, it is utterly normal. *Of course* he came from a

⁷⁶ JING YUEJIN (景跃进) et al., DANGDAI ZHONGGUO ZHENGFU YU ZHENGZHI (当代中国政府与政治) [GOVERNMENT AND POLITICS IN CONTEMPORARY CHINA] 121-22 (2016).

⁷⁷ LIEBERTHAL, *supra* note 66, at 224.

⁷⁸ See generally Hou, *supra* note 70.

⁷⁹ See generally Yuhua Wang & Carl Minzner, *The Rise of the Chinese Security State*, 2015 CHINA Q. 339, 342-45 (2015).

⁸⁰ See Susan Trevaskes, *Propaganda Work in Chinese Courts*, 6 PUNISHMENT AND SOCIETY 5, 12 (2004).

⁸¹ He Weifang (贺卫方), *Zhengyi de Xingtou* (正义的行头) [*The Costume of Justice*], GONGREN RIBAO (工人日报) [WORKER’S DAILY], July 12, 1997; July 19, 1997; Aug. 23, 1997; Sept. 27, 1997; available at <https://perma.cc/6CAH-RTUK>.

⁸² NG & HE, *supra* note 41, at 88-89.

⁸³ Wang’s *curriculum vitae* up to the time of his appointment is available at <https://perma.cc/GCU5-GWHK>.

police background. What else would we expect? It is like remarking on the fact that the new football coach has a great deal of experience in coaching football.

Second, in the words of a textbook on China's political system, the concept of the political-legal has a particular logic of its own: it is a "unique judicial tradition that embraces a mission of liberation and stresses substantive disputes"; it is a work method that emphasizes the role of the Party and the "mass line." It has a "strong class nature" and instrumentalist nature.⁸⁴ The terms in quotation marks are all technical terms within the discourse of the Party that indicate an emphasis on political as opposed to professional standards, and an orientation to outcomes in preference to procedures.

This approach is not going away. The Fourth Plenum of the Party's 18th Central Committee in 2014, dedicated to legal matters, made it clear that the political-legal *xitong* governed by PLCs at various levels would be around for some time to come.⁸⁵ Even were PLCs to disappear, the principle of Party management of this particular class of institutions is to remain.⁸⁶

B. *The concept of the extra-legal*

A number of scholars of Chinese law have noted the existence of what I shall call the domain of the extra-legal, as elaborated by the examples to follow. Fu Hualing speaks of the "extra-legal" and the "extra-extra legal";⁸⁷ Teemu Ruskola speaks of the "*illegal*, or perhaps nonlegal or extralegal";⁸⁸ Flora Sapio speaks of "zones of lawlessness";⁸⁹ Juan Wang, Sida Liu, and Eva Pils have all suggested the applicability of Ernst Fraenkel's dual state analysis.⁹⁰ Rather than risk misusing their concepts, I shall set forth my own conception of the domain of the extra-legal.

By "extra-legal" I mean one of two things. First, I mean phenomena or practices that insiders are unwilling to characterize as either legal or illegal. I am not referring to *disagreements* over the legality of certain practices; what I am referring to is an unwillingness to view the matter in binary

⁸⁴ JING et al., *supra* note 76, at 122.

⁸⁵ See Chinese Communist Party Central Committee, Communiqué of the Fourth Plenary Session of the 18th Central Committee of the Communist Party of China, Oct. 23, 2014, available at <https://perma.cc/4VMM-JGQ7>.

⁸⁶ JING et al., *supra* note 76, at 123.

⁸⁷ Hualing Fu, *The Varieties of Law in China*, CHINA RIGHTS F., July 18, 2011, <https://www.hrichina.org/en/crf/article/5422> [<https://perma.cc/U4M4-J3FP>].

⁸⁸ RUSKOLA, *supra* note 46, at 220 (emphasis in original).

⁸⁹ FLORA SAPIO, SOVEREIGN POWER AND THE LAW IN CHINA (2010).

⁹⁰ Juan Wang & Sida Liu, *Ordering Power Under the Party: A Relational Approach to Law and Politics in China*, 6 ASIAN J. L. AND SOC'Y 1 (2019); Eva Pils, The Global Implications of China's Dual State Revival, July 7, 2019 (unpublished paper, on file with author). The reference is to FRAENKEL, *supra* note 61. For a brilliant update on Fraenkel, see JENS MEIERHENRICH, THE REMNANTS OF THE RECHTSSTAAT: AN ETHNOGRAPHY OF NAZI LAW (2018).

terms of whether it is legal or illegal. I focus on how insiders—lawyers, professors, officials—view the matter because I am concerned with the extra-legal as an aspect of Chinese legal culture. The fact that outside observers might have no trouble discussing the practice in binary terms is irrelevant for my purposes here. I am interested in the *emic*, not the *etic*.

This unwillingness to apply the legal/illegal distinction to certain practices is not a hypothetical phenomenon; it is something that one can occasionally observe when discussing certain practices with insiders in the Chinese legal system. The unwillingness does not stem from a lack of information about the practice or about the rules of Chinese law. Rather, it stems from a sense that the legal/illegal distinction is not a useful or relevant way to look at the issue. In other words, the issue may reside in a realm of extra-legality, where “extra-legal” does not simply mean “illegal,” but refers rather to a realm where concepts of legality and illegality simply do not apply, or are at least do not aid in understanding the practice in question.

The second meaning of “extra-legal” is more easily explained. Here it refers to a phenomenon or practice that insiders—perhaps virtually unanimously—may have no difficulty in describing as illegal, but that nevertheless persists with more or less open government sanction. As with the first meaning of “extra-legal,” it is not a question of disagreements between observers over whether a practice is legal. The government that openly sanctions the practice may make no serious attempt to defend its legality. Implicit in this silence is the idea, as in the first meaning, that the question of legality is simply not relevant, and that concepts of legality and illegality do not aid in understanding the practice in question.⁹¹

Finally, by “extra-legality” I do not mean the phenomenon of a state official’s going rogue. Going rogue can be and is understood using the legal/illegal distinction, so it is not extra-legal in the first sense. And if it rises to the level of a systematically state-sanctioned practice, then while it may be extra-legal in the second sense, it can no longer usefully be called going rogue.

What the existence of the domain of the extra-legal reveals is a different way of thinking about legality. Moreover, this difference is rooted not in mysterious cultural differences, but rather in the actual political structure of China. Thus, it is not going to disappear with the “maturing” of order maintenance institutions, or with a passage from “rule by law” to “rule of law.” The extra-legal has been part of the Party-state’s order maintenance institutions since 1949,⁹² and remains so today. A few examples are discussed below.

⁹¹ The two senses of “extra-legal” set forth here do not have a strict boundary. In the first sense, most insiders feel that the legal/illegal distinction is not helpful. In the second, even if most insiders feel that the distinction applies and that the action is illegal, the government doesn’t care.

⁹² The extra-legal was also part of the Party’s order maintenance institutions prior to its 1949 victory in the civil war, but that is beyond the scope of this article. The Party developed considerable experience in civil government in various base areas before its final nationwide victory, and developed order maintenance institutions conventionally called “legal.” See, e.g., XIAOPING CONG, *MARRIAGE, LAW, AND GENDER IN REVOLUTIONARY CHINA, 1940-1960* (2016); POTTER, *supra* note 56, at 12-13; TRYGVE LOTVEIT, *CHINESE COMMUNISM, 1931-1934: EXPERIENCE IN CIVIL GOVERNMENT* (1979); THE LEGAL SYSTEM OF

1. Shuanggui and Supervisory Commissions

Shuanggui (“double designation”) refers to a practice whereby Party disciplinary authorities—not state authorities—coercively detained⁹³ Party members (and sometimes non-Party members) for investigation, typically on suspicion of corruption.⁹⁴ The detention could last for months, and could involve very harsh treatment.⁹⁵

As a matter of formal law, there seems to be no question that *shuanggui* was illegal, even criminal. Under Chinese law, any coercive restriction of personal liberty must be authorized by a statute passed by the National People’s Congress or its Standing Committee.⁹⁶ The NPC and its Standing Committee have passed laws authorizing the restriction of personal freedom under various circumstances and subject to various safeguards—most notably, the Criminal Procedure Law. But *shuanggui* did not take place under the conditions set forth in the Criminal Procedure Law and therefore could not be justified by it. Nor was there any other law that justified it. Thus, it is hard to see how *shuanggui* did not constitute the crime of unlawful detention under Art. 238 of the Criminal Law. It was not even carried out by state officials.

THE CHINESE SOVIET REPUBLIC, 1931-1934 (William Elliott Butler ed., 1983). At the same time, however, it was involved in a ruthless civil war, and thus the existence of extra-legal institutions is not surprising or especially noteworthy.

⁹³ I am using the past tense here because the measure has been in a sense superseded by the institution of Supervisory Commissions. Because it was never lawful, however, reports of its death may be exaggerated. My use of the past tense should not be understood as an affirmation that the practice, in name or substance, has actually disappeared.

⁹⁴ See generally Flora Sapio, *Shuanggui and Extralegal Detention in China*, 22 CHINA INFO., no. 1, at 7 (2008). “Double designation” comes from the idea that the person investigated was instructed to present himself for questioning at a designated time and place. *Shuanggui* could in theory involve questioning without coercive detention, and perhaps at times was like that. In this paper, however, by *shuanggui* I mean coercive *shuanggui*.

⁹⁵ See, e.g., HUMAN RIGHTS WATCH, “SPECIAL MEASURES”: DETENTION AND TORTURE IN CHINESE COMMUNIST PARTY’S SHUANGGUI SYSTEM (2016), https://www.hrw.org/sites/default/files/report_pdf/china1216_web.pdf [<https://perma.cc/28DQ-2J9E>]; Nathan VanderKlippe, *Shuanggui: The Harsh, Hidden Side of China’s War on Graft, and How One Man Disappeared into It*, THE GLOBE AND MAIL, Mar. 24, 2017, <https://www.theglobeandmail.com/news/world/shuanggui-and-wilson-wang-in-china/article34400855/> [<https://perma.cc/KR28-TQZW>].

⁹⁶ Zhonghua Renmin Gongheguo Lifa Fa (中华人民共和国立法法) [People’s Republic of China Law on Legislation], as amended March 15, 2015, art. 8, available at <https://perma.cc/4ZVN-CLY9>.

Insider analyses of *shuanggui* generally agreed that it was unlawful,⁹⁷ although the harshness of their verdict ranged from “unlawful” (违法)⁹⁸ to “to a certain degree it challenges the authority of the constitution” (在某种程度上是挑战了宪法的权威).⁹⁹ Indeed, as one scholar has noted,

The official position on this measure has never denied the existence of serious legislative conflicts between regulations on *shuanggui* and the Constitution of the CCP, the Constitution of the PRC, the Criminal Procedure Law, and the Law on Legislation.¹⁰⁰

In general, however, the analyses that found it unlawful also found it permissible. In this view, deviations from legality or constitutionality are permissible if they are necessary to resolve pressing social problems.¹⁰¹ This larger justifying idea was formally developed in the 1990s as the theory of “benign violations of the constitution” (良性违宪),¹⁰² and more recently as the theory of

⁹⁷ For a review of Chinese analyses, see Larry Catá Backer & Keren Wang, *The Emerging Structures of Constitutionalism with Chinese Characteristics: Extra-Judicial Detention and the Chinese Constitutional Order*, 23 PACIFIC RIM L. & POL’Y J. 251, 292-300 (2014).

⁹⁸ Liu Hui (刘辉) & Wei Xiaoxiao (魏潇潇), *Guanyu “Shuanggui” de Falixue Sikao* (关于“双规”的法理学思考 [A Jurisprudential Consideration of “Shuanggui”], 2007 FAZHI YU SHEHUI (法制与社会) [L. & SOC’Y], no.1, at 665, 665.

⁹⁹ Wang Jingui (王金贵), “*Shuanggui*” *yu* Zishou: *Hexianxing Wenti Yanjiu* (“双规”与自首：合宪性问题研究) [*“Shuanggui” and Voluntary Surrender: Research into Issues of Constitutionality*], 2005 FAXUE (法学) [JURISPRUDENCE], no.9, at 60, 62. Ironically, finding it unconstitutional is less challenging to the Party-state than finding it unlawful. Everyone understands that the constitution is not a legally binding document even in form, let alone in practice, whereas alleging that Party authorities are actually committing a crime raises the stakes considerably.

¹⁰⁰ SAPIO, *supra* note 89, at 96.

¹⁰¹ Backer and Wang write:

Taken together, most scholarship suggests discomfort with the institutional structures and practices of *shuanggui*. This scholarship advances the proposition that *shuanggui* is illegitimate or unconstitutional, flawed but necessary, a transitional vehicle in post-Revolutionary times, or that it is exceptional, but still a legitimate expression of power.

Backer & Wang, *supra* note 97, at 299.

¹⁰² According to this school of thought, given the persistent and inevitable tensions between the rules of the constitution and the great changes taking place in China, certain constitutional violations should be countenanced where certain conditions are present: it promotes the development of the productive forces, or it is in the basic interests of the state and the people. See Hao Tiechuan (郝铁川), *Lun Liangxing Weixian* (论良性违宪) [*On Benign Violations of the Constitution*], 1996 FAXUE YANJIU (法学研究) [LEGAL STUD.], no. 4, at 89.

the reform constitution,¹⁰³ under which certain violations of law and the constitution are acceptable.¹⁰⁴

How should one talk about a domain where violation of the law is essentially admitted but deemed acceptable by the very state authorities that make the law? Journalists and students of Chinese law seemed instinctively to reach for the term “extra-legal” in describing the *shuanggui* system,¹⁰⁵ no doubt because they felt—correctly, in my view—that simply to call it “illegal” would misrepresent something important about the system in which it existed. There was a notion that this system somehow stood outside the law, and ordinary legal standards did not apply to it. At the very least, the *shuanggui* system was not accountable to China’s *fayuan*. And why should it have been?

In March 2018, the Law on Supervision came into effect, establishing organs called “Supervisory Commissions” at each main level of state administration. The content of the law and the surrounding publicity make it clear that the activities of Supervisory Commissions are intended

¹⁰³ See Yong Xia, *Several Fundamental Theoretical Issues Regarding China's Constitutional Reform*, in DEMOCRACY AND THE RULE OF LAW IN CHINA (Keping Yu ed., 2010).

¹⁰⁴ The view that *shuanggui* is lawful seems to be held by a minority. Its lawfulness is justified by some under a 19th-century German administrative law doctrine of “special power relationship” (besonderes Gewaltverhältnis) (特殊/特别权力关系). A number of articles discussing this doctrine began appearing in China in the early 2000s; see, for example, Li Jun (黎军), *Cong Tebie Quanli Guanxi Lilun de Bianqian Tan Woguo dui Dongwuyuan Jiuji Zhidu de Wanshan* (从特别权力关系理论的变迁谈我国对公务员救济制度的完善) [A Discussion of the Improvement of China's System of Remedies for Public Servants from the Standpoint of Changes in the Theory of the Special Power Relationship], 2000 XINGSHENG FAXUE YANJIU (行政法学研究) [STUD. ADMIN. L.], no. 1, at 4, and the sources cited in Liu Heng (刘恒), *Shilun “shuanggui” de Xianshi Zhengdangxing* (试论“双规”的现实正当性) [A Tentative Discussion of the Practical Legitimacy of “Shuanggui”], 2006 ZHONG GONG SHANXI SHENGWEI DANGXIAO SHENGZHI FENXIAO XUEBAO (中共山西省委党校省直分校学报) [BULL. BRANCH SCH. PARTY SCH. SHANXI PROVINCE COMMUNIST PARTY COMMITTEE], no. 5, at 33. The latter author invokes the doctrine vaguely. The basic idea is that constitutional and legal standards apply only to ordinary legal relationships, and that some citizens (for example, government officials and prisoners, and by extension Party members in China) are in a special relationship with the state that justifies the non-application of ordinary constitutional and legal standards. (The theory does not depend on Party members being presumed to have done some voluntary act that brings them into this special relationship.) What the Chinese discussions fail to note is that the doctrine has lost favor in the countries that originally adopted it. See, e.g., Florian Becker, *The Development of German Administrative Law*, 24 GEORGE MASON L. REV. 453, 466 (2017) (Germany) and Chien-Chih Lin, *Autocracy, Democracy, and Juristocracy: The Wax and Wane of Judicial Power in the Four Asian Tigers*, 48 GEO. J. INT’L L. 1063, 1124 (2017) (Taiwan).

¹⁰⁵ See, e.g., Sapio, *supra* note 94 (Italian scholar); Maureen Fan, *Chinese Official Is Dismissed in Pension Scandal*, WASHINGTON POST, Sept. 26, 2006, available at <https://perma.cc/H69Z-5XN2> (American journalist); Qiyan Li, *CNTIEC Official Held for Nuclear Bid Leaks*, CAIJING, Oct. 14, 2008, available at <https://perma.cc/9WRL-Q7CN> (Chinese journalist).

to be a replacement for the *shuanggui* system,¹⁰⁶ although neither this nor any other law formally abolished coercive *shuanggui*.¹⁰⁷

In effect, the Law on Supervision both legalizes and broadens *shuanggui*. It broadens *shuanggui* by giving the Supervisory Commissions jurisdiction over everyone, not just Party members. In theory, coercive *shuanggui* was supposed to be limited to Party members. Despite occasional exceptions, by and large that principle seems to have been followed. But the Supervisory Commissions have jurisdiction over “all public employees exercising public power.” (This includes officials at so-called “autonomous mass organizations,” revealing just how autonomous these organizations really are.)

How about legalization? The Law on Supervision legalizes the Supervisory Commission system only in the most formal sense of the term. It is a document passed by the National People’s Congress (NPC) with the clear intention of giving the system an appropriate legislative basis. But what exactly is the system that now has a legislative basis? Essentially, it means anything done by the Supervisory Commission system is now lawful as long as it is a Supervisory Commission that is doing it. But the law says little that limits the Supervisory Commissions’ powers, and they are effectively unaccountable.

First of all, their powers: They can investigate not just corruption, but anything that might be called “abuse of public office,” including dereliction of duty. There is evidence that they have been used for political offenses. They can seize assets and engage in electronic eavesdropping. They can conduct searches with a warrant, but they issue their own warrants. And they can detain. There is even a special term for detention when done by a Supervisory Commission (留置 *liuzhi*) to ensure that nobody will mistake it for another kind of detention governed by different rules. The period of detention cannot exceed six months, but presumably as with just about all other kinds of investigative detention in China, the authorities will find ways to extend it indefinitely if they deem it necessary.

Second, their accountability: The Supervisory Commissions at a given administrative level are responsible to their superior Supervisory Commissions. There is some ambiguity in the law (Articles 9 and 10) about whether local Supervisory Commissions are primarily responsible to the

¹⁰⁶ See, e.g., Xi Jinping, Secure a Decisive Victory in Building a Moderately Prosperous Society in All Respects and Strive for the Great Success of Socialism with Chinese Characteristics for a New Era, Speech Before the 19th National Congress of the Communist Party of China (Oct. 18, 2017), *available at* <https://perma.cc/8R8L-NV93> (English); <https://perma.cc/QKW9-W6WT> (Chinese) (stating that *shuanggui* will be replaced by the Supervisory Commissions).

¹⁰⁷ It is hard to abolish something that is already, strictly speaking, unlawful. In a similar way, the coercive but legally unsound measure of “custody and investigation” (收容审查) was popularly reported to have been abolished by the 1996 revisions to the Criminal Procedure Law. Even though the revisions never mentioned custody and investigation, to say nothing of abolishing it, they did establish a similar procedure that was widely understood to be intended as a replacement. But because custody and investigation had never been properly legal in the first place, it could not be abolished in the ordinary way.

local political authorities or to the superior Supervisory Commission, but in order to function as intended they need to be responsible to the superior Supervisory Commission; we will see what happens in practice.¹⁰⁸ The central Supervisory Commission exists in parallel to the State Council, the Supreme People's Court, and the Supreme People's Procuratorate, not under them. It is formally accountable directly to the NPC.

The Supervisory Commissions are not otherwise accountable. Article 49 of the Supervisory Commission Law says that a person who is dissatisfied with the measures taken against them by a Supervisory Commission may appeal, but only within the Supervisory Commission system. There is no external appeal—for example, to a court (for whatever that might be worth). And there is no place for lawyers in the system.¹⁰⁹ This makes Supervisory Commission detention different from any other kind of lawful detention in China (the Xinjiang detentions are not lawful under Chinese law).¹¹⁰ All other kinds are at least in theory subject to court review. And while most courts will go along with the authorities, having that possibility is a weapon, even if a modest one, in the hands of a detained person.

In other words, all the rules we see in the Supervisory Commission Law describing what Supervisory Commissions can and cannot do, and how they can do it, are not even in theory enforceable by any outside body. It is entirely up to the Supervisory Commissions themselves as to whether they want to follow those rules. The only possible exception is via Article 67, which states that state compensation is to be paid to those whose lawful rights and interests are infringed by Supervisory Commissions and their staff, but even in theory this is a remedy for harm already done, not a way of stopping ongoing harm.

One measure of whether the Supervisory Commissions are subject to effective checks is a list offered by a defender of the system in a 2018 article.¹¹¹

- *People's Congresses*: This is not a plausible check. People's Congresses have no history of effective supervision of the coercive organs of the Party-state and are unlikely to start now.
- *"The law"*: As we have seen, the law does not contain any effective checks.

¹⁰⁸ See Shuyu Chu, *Revealing the Puzzle of China's New Supervision Mechanism: An Agency-Cost Analysis* (July 28, 2019) (unpublished conference paper on file with author) and Meng Ye & Junyang Wang, *Anti-Corruption and Judicial Disempowerment: An Institutional Analysis of China's New Supervision Commission* (July 28, 2019) (unpublished conference paper on file with author).

¹⁰⁹ Georg Gesk, *Plea Bargain in Anti-Corruption Procedure* (July 28, 2019) (unpublished conference paper on file with author).

¹¹⁰ See Donald Clarke, *No, New Xinjiang Legislation Does Not Legalize Detention Centers*, LAWFARE, Oct. 11, 2018, <https://www.lawfareblog.com/no-new-xinjiang-legislation-does-not-legalize-detention-centers> [<https://perma.cc/NE3P-TLCH>].

¹¹¹ See Deshui Zhuang, *A Powerful Weapon Against Corruption*, INKSTONE, Mar. 20, 2018, <https://www.inkstonenews.com/opinion/zhuang-deshui-supervision-law-paves-way-strong-anti-corruption-system/article/2137303> [<http://bit.ly/scdefense>].

- “*Society*”: This cannot be taken seriously as an argument. The writer does not identify any mechanism whereby “society” could impose checks.

And that is the best a *defender* of the system could come up with. He sums it up as “political oversight with Chinese characteristics.”

In a recent article, Taisu Zhang and Tom Ginsburg argue that Supervisory Commissions are “legally regulated” and that “the creation of the Supervisory Commission . . . promises to make anti-corruption investigations more frequent, predictable, and procedurally transparent[.]”¹¹² It is certainly possible that such investigations will be more frequent. And while there may be more transparency in the sense that Supervisory Commissions will have a website and must make annual reports to People’s Congresses at the same administrative level (for what those are worth), to be more transparent than the utterly opaque *shuanggui* system clears a very low bar. Whether the investigations will be more predictable remains to be seen. But in any case, frequency, transparency, and predictability do not mean “legally regulated.”

In summary, although *shuanggui* as a formally lawless exercise of Party-state coercion is apparently in the past, its successor is law-governed only in the most formal sense: there is now a statute about it. But the statute governing it imposes no standards or accountability mechanisms. In particular, the Supervisory Commissions are not accountable to courts; like the court hierarchy, the Supervisory Commission hierarchy is as a formal matter directly under the People’s Congresses at various levels. It runs parallel to the courts, not under them. But as with *shuanggui*, the real question is: why would anyone think such a body *would* be answerable to courts?

Shuanggui is just one example of numerous kinds of extrajudicial coercive institutions that have existed in China since 1949, and with which the Party-state has always maintained a delicate and often ambivalent relationship. In principle, one can imagine a distinction between state coercion, Party coercion, and non-state, non-Party coercion. But in practice, the line constantly fades out of focus just when one thinks one has found it. We see actors of all three kinds exercising coercion (for example, physical detention of the body) with the approval of at least part of the state or part of the Party, even though in the Chinese legal system only state actors are allowed to apply coercion. And the Party-state disavows them on the one hand while allowing them on the other.

As Wu Guo writes of the Cultural Revolution era,

[T]he Maoist acquiescence in mass-based immediate punishment justified all illegal detentions and tortures, and effectively nullified any attempts to regulate the arbitrary arrest and incarceration operations. Even the Party’s own documents contained contradictory provisions. An article in the “Directive of the Central Committee on the Great Proletarian Culture Revolution in Rural District (Draft)” issued in December 1966 attempted to protect dissident views, stipulating that anyone labelled “counter-revolutionary” or “saboteur” for expressing such views should be vindicated; but the document, at the same time, listed five personality types that were targets of mass dictatorship: landlords, rich peasants, counterrevolutionaries, bad elements and rightists. The two provisions

¹¹² Zhang & Ginsburg, *supra* note 13, at 368 (2019).

contradicted each other to the extent that any dissidents could be easily purged and labelled as one of the five undesirable elements for expressing dissident views.¹¹³

With the end of the Cultural Revolution, the death of Mao, and the birth of the era of economic reform, it is tempting to think that the past is past. And indeed, the widespread outsourcing beyond the confines of the Party-state of the power to investigate and punish has generally ceased.¹¹⁴ But as Wu notes, although

the state no longer delegated penalising and investigative powers to the people[. . .] the Party's extrajudicial and pretrial arrests, segregations and investigations did not die out. . . . It seems that this disciplinary and extrajudicial censure through incarceration and coerced confession was a modern, though more institutionalised and centralised, resurgence of the extrajudicial confinement during the Cultural Revolution, continuing to demonstrate the Party's paramount status over the state legal apparatus.¹¹⁵

2. Interception of petitioners (*jiefang* 截访)

Petitioning in the Chinese context refers to an activity in which citizens who feel they have been treated unjustly by government officials—typically at low levels of government—can bring grievances to higher-level bodies through specifically designated channels outside of the court system.¹¹⁶ The central government's view of petitioning is ambivalent. On the one hand, petitioning can serve as a fire alarm method of monitoring local officials: it is a signal that something is wrong down in the provinces, and serves to counteract the center's problem of information asymmetry.¹¹⁷ On the other hand, large numbers of petitioners milling around in the streets of Beijing is unsightly and, in the view of the authorities, a sign of instability.¹¹⁸ Thus, the central government began to

¹¹³ Guo Wu, *Outsourcing the State Power: Extrajudicial Incarceration During the Cultural Revolution*, 15 CHINA: AN INT'L J. 58, 73 (2017).

¹¹⁴ But not completely, at least in some respects. See Lynette H. Ong, "Thugs-for-Hire": *Subcontracting of State Coercion and State Capacity in China*, 16 PERSPECTIVES ON POL. 1 (2018); William Hurst & Mingxing Liu, *Bosses, Businessmen, and Bureaucrats: The "Southeast Asian-ization" of Local Politics in Rural China*, 2016 J. CHINESE GOVERNANCE 457 (2016); William Hurst et al., *Reassessing Collective Petitioning in Rural China: Civic Engagement, Extra-State Violence, and Regional Variation*, 2014 COMP. POL. 459 (2014).

¹¹⁵ Wu, *supra* note 113, at 76.

¹¹⁶ This is of course much too simple a description of an important institution that has been extensively studied. See, *inter alia*, Lei Guang & Yang Su, *Collective Petition and Local State Responses in Rural China*, in HANDBOOK OF PROTEST AND RESISTANCE IN CHINA (Teresa Wright ed., 2019); Hurst, *supra* note 114; Lianjiang Li et al., *Petitioning Beijing: The High Tide of 2003-2006*, 2012 CHINA Q. 313 (2012); Carl F. Minzner, *Xinfang: An Alternative to the Formal Chinese Legal System*, 42 STAN. J. INT'L. L. 103 (2006); and Laura Luehrmann, *Facing Citizen Complaints in China, 1951-1996*, 43 ASIAN SURVEY 845 (2003).

¹¹⁷ See Xin He, *Administrative Law as a Mechanism for Political Control in Contemporary China*, in BUILDING CONSTITUTIONALISM IN CHINA 148 (Stéphanie Balme et al. eds., 2009); Minzner, *supra* note 116, at 107, 141.

¹¹⁸ See Li et al., *supra* note 116, at 320-23.

crack down on petitioners in the capital, and more importantly, to penalize local officials when petitioners from their area reached the capital, regardless of the merits of the petitioners' cases.¹¹⁹

Local officials have responded to these incentives predictably. On the one hand, they may attempt to buy off would-be petitioners, even when their cases are meritless.¹²⁰ On the other hand, they may simply attempt to suppress the petitioners, either by preventing them from going to higher levels or by dispatching people to bring them back, by force if necessary. The latter activity is known as intercepting petitioners (*jiefang*).¹²¹

Interception may involve a term of detention and beatings in an unofficial facility popularly called a black jail.¹²² It may then involve, if the petitioner refuses to cooperate, the forcible repatriation of the petitioner to their original residence. It is here that the extra-legality occurs. As discussed in the previous section, forcible detention of the person must, to be lawful, find its justification in a statute passed by the National People's Congress or its Standing Committee.¹²³ No such statute justifies the detention or forcible repatriation of petitioners merely for petitioning.

That the authorities tolerate and even approve of it is clear. The existence of black jails and forcible repatriation is well known to the authorities both at the center and subcentral levels. A magazine published by China's official Xinhua News Agency even ran a story on black jails.¹²⁴ Nevertheless, official denials that a problem even exists suggests that the government is not terribly

¹¹⁹ Minzner, *supra* note 116, at 151-58 (discussing responsibility systems for local officials).

¹²⁰ See Yuqing Feng & Xin He, *From Law to Politics: Petitioners' Framing of Disputes in Chinese Courts*, 2018 CHINA J. 130, 142-43. A local official in a suburban Wuhan county recounted to this author the story of a man who caused problems for the official by incessant petitioning to Beijing. The man was aggrieved because his son had been jailed for murder and could no longer help out with the family business. Eventually the official induced the man to stop petitioning by getting him a low-interest government-sponsored small business loan.

¹²¹ On intercepting generally, see Dali Yang, *China's Troubled Quest for Order: Leadership, Organization and the Contradictions of the Stability Maintenance Regime*, 26 J. CONTEMP. CHINA 35, 45 (2017).

¹²² See generally HUMAN RIGHTS WATCH, "AN ALLEYWAY IN HELL": CHINA'S ABUSIVE "BLACK JAILS" (Nov. 12, 2009), <https://www.hrw.org/report/2009/11/12/alleyway-hell/chinas-abusive-black-jails> [<https://perma.cc/UK3Q-6JQA>]; an early report is Melissa Chan, *China's "Black Jails" Uncovered*, AL JAZEERA, Apr. 27, 2009, <https://www.aljazeera.com/news/asia-pacific/2009/04/200942715494521278.html>. See also Paulina Hartono, *Video: China's 'Black Jails' Uncovered*, CHINA DIGITAL TIMES, Apr. 27, 2009, <https://chinadigitaltimes.net/2009/04/chinas-black-jails-uncovered/>. For a first-person account of the work of interceptors, see Li Ya (李崖), *Yige Jiefang Ganbu de Chanhui Lu* (一个截访干部的忏悔录) [*Confessions of a Petitioner-Intercepting Cadre*], CHUANQI RENWU WANG (传奇人物网) [LEGENDARY FIGURES NETWORK], May 26, 2015, <http://www.renwuwang.org/node/4517> [<https://perma.cc/4C4S-LCD4>].

¹²³ See *supra* note 96 and accompanying text.

¹²⁴ See Jaime FlorCruz, *Chinese State Media Reveal Secret, Illegal Jails*, CNN, Nov. 30, 2009, <http://edition.cnn.com/2009/WORLD/asiapcf/11/30/china.black.jails/index.html> [<https://perma.cc/YL72-LFP4>].

concerned.¹²⁵ Detention for petitioning and forcible repatriation can even be shown in Chinese films;¹²⁶ it is not considered too embarrassing or discreditable to let foreigners see.

At the same time, however, unlike with *shuanggui*, a review of the academic and periodical literature suggests there is no significant debate over its legality. It is universally deemed unlawful, although with varying degrees of specificity, perhaps indicating continuing ambivalence. A number of writers argue that interfering with petitioning is unconstitutional.¹²⁷ But the constitution is not justiciable law in China, and the argument carries no practical legal consequences. A stronger argument is that forcibly detaining petitioners constitutes unlawful detention under China's Criminal Law, but this specific argument is made only rarely.¹²⁸

The rarity in the literature matches the rarity in cases. A search of a major case database turns up only two cases (both from 2015) that are both about unlawful detention and mention the term “*jiefang*” (petition interception). And only one of those cases involved a conviction;¹²⁹ the other involved a self-initiated prosecution because the local police had refused to bring a case, and was rejected by the court because the plaintiff had improperly named as defendant a quasi-governmental entity, the local neighborhood committee, instead of actual individuals.¹³⁰

¹²⁵ Despite the existence of a story in official media, a Ministry of Foreign Affairs spokesperson denied the existence of black jails after the story came out. *See id.*

¹²⁶ This is what happens to the protagonist in *I Am Not Madame Bovary* (我不是潘金莲) (Huayi Brothers Company 2018). For a discussion of the role petitioning plays in the film, see Zhang Fan et al., *Chongsu Sifa Quanwei, Rang Li Xuelianmen Bu Zai "Xingfang Bu Xin Fa"* (重塑司法权威, 让李雪莲们不再“信访不信法”) [*Rebuild Judicial Authority So That the Li Xuelians No Longer Believe in Petitioning but Not the Law*], 2017 RENMIN ZHI YOU (人民之友) [PEOPLE'S FRIEND], no. 11, at 58.

¹²⁷ *See, e.g.*, Zhan Zhengfa, *Cong "Xinfang" dao Xin "Fa", Shixian Weiquan he Weiwen de Shuangying* (从“信访”到信“法”, 实现维权和维稳的双赢) [*From Petitioning to Believing in the Law, Realize the Win-Win of Upholding Rights and Maintaining Stability*], 34 YUNYANG SHIFAN GAODENG ZHUANKE XUEXIAO XUEBAO (邵阳师范高等专科学校学报) [J. YUNYANG TEACHER'S COLLEGE], no. 4, at 82, 83.; Min Jie, *Jiaoting "jiefang"? (叫停“截访”?)* [*Putting a Stop to Petitioner-Intercepting?*], ZHONGGUO XINWEN ZHOUKAN (中国新闻周刊) [CHINA NEWS WEEKLY], Jan. 21, 2013, at 40, 41; Jiang Tingting, *Qianxi Woguo Xinfangnan ji qi Duice* (浅析我国信访难及其对策) [*A Brief Analysis of Why Petitioning Is Difficult in China and Solutions*], 2015 FAZHI YU SHEHUI (法制与社会) [LEGAL SYS. & SOC'Y], no. 7, at 147, 147.

¹²⁸ *See Min, supra* note 127, at 41.

¹²⁹ Yan Mou, Liang Mou Deng Feifa Jujin An (闫某、梁某等非法拘禁案) [False Imprisonment Case of Yan, Liang and Others] (Shanxi Province, Shuozhou City, Shuocheng Dist. People's Ct., Dec. 19, 2015), available at pkulaw.cn, Case No. CLI.C.24804399, <https://bit.ly/339tTGF> [<https://perma.cc/MFL8-A7TX>].

¹³⁰ Shangsuren Wang Moumou Su Taizhou Shi Hailing Qu Chengdong Jiedao Banshichu Feifa Jujin Yi An Buyu Shouli (上诉人王某某诉泰州市海陵区城东街道办事处非法拘禁一案不予受理案) [Denial of Case Acceptance in the Appeal filed by Wang Against Taizhou City Hailing District Eastern City Street Office in the Case of False Imprisonment] (Jiangsu Province Taizhou City Interim. People's Ct., May 20,

The incident perhaps most revealing of the extra-legal character of *jiefang* is that of the Anyuanding Security Service Company, a private security firm that contracted with local governments to intercept and return petitioners. In September 2010, the Beijing authorities, responding to domestic press reports about Anyuanding,¹³¹ in effect pronounced themselves shocked—*shocked*—that unlawful detentions had been occurring under their noses, and detained the company’s chairman and its general manager on charges of unlawful imprisonment and illegal business operations.¹³² Writing over two years later, however, a Chinese journalist remarked that no local government officials had been punished for forcible interceptions.¹³³ As far as the Anyuanding case is concerned, a full decade later there is no evidence that anyone—not the local governments that hired Anyuanding, nor Anyuanding employees or management—was ever actually punished.¹³⁴

Thus, although there is general agreement that interception as actually practiced—with its violence and forcible detention—is at least unconstitutional and possibly a specific violation of the Criminal Law as well, it continues to occur. It is instigated by local governments and evidently tolerated by the central government.

3. Local experimentation

Local policy experimentation offers another example of a zone of lawlessness. And as with the other examples, it is both a major feature of Chinese governance and one that has been around since the beginning of the People’s Republic and shows no sign of disappearing.

By “local experimentation” I mean the system whereby local governments are permitted, sometimes officially but usually unofficially, to derogate from national law and/or policy in some area in order to try something different, with the expectation that the learning from the experiment

2015), available at pkulaw.cn, Case No. CLI.C.16503521, <https://bit.ly/33feN23> [<https://perma.cc/RE29-94TT>].

¹³¹ See, *inter alia*, Long Zhi (龙志), *Anyuanding: Beijing Jiefang "Hei Jianyu" Diaocha* (安元鼎: 北京截访“黑监狱”调查) [*Anyuanding: An Investigation into the "Black Jails" for Intercepting Petitioners in Beijing*], NANFANG DUSHI BAO (南方都市报) [SOUTHERN METROPOLITAN NEWS], Sept. 25, 2010, http://nd.oooo.com/comments/focus/201009/t20100925_1150785.shtml.

¹³² See “Black Jails” Investigated for Illegally Holding Petitioners, CHINA DAILY, Sept. 27, 2010, https://www.chinadaily.com.cn/china/2010-09/27/content_11351127.htm; Andrew Jacobs, *China Investigates Company Linked to “Black Jails”*, N.Y. TIMES, Sept. 27, 2010, <https://www.nytimes.com/2010/09/28/world/asia/28china.html>.

¹³³ See Tan Yifei (谭翊飞), “Hei Jianyu Ditu” Beihou de Gushi (“黑监狱地图”背后的故事) [*The Story Behind the “Black Jail Map”*], XIN JING BAO (新京报) [NEW BEIJING NEWS], Dec. 22, 2012, <http://www.bjnews.com.cn/opinion/2012/12/22/240813.html> [<https://perma.cc/6N5N-YB7B>].

¹³⁴ A July 2020 search of the China Judgment Documents Online (中国裁判文书网) database, a major state-operated database that should contain all judgments of this kind (no state secrets or other exceptions apply), failed to turn up a single conviction for unlawful detention involving the term “Anyuanding.”

can be incorporated into subsequent national legislation. In the words of Sebastian Heilmann, a student of the process,

Policy experimentation is not equivalent to freewheeling trial and error or spontaneous policy diffusion. It is a purposeful and coordinated activity geared to producing novel policy options that are injected into official policymaking and then replicated on a larger scale, or even formally incorporated into national law.¹³⁵

And as Heilmann has shown, this type of policy experimentation is an important part of the policy-making process in China with a long history.¹³⁶ What makes policy experimentation particularly interesting to the legal scholar is the fact that so much of it can easily be shown, if analyzed under ordinary principles of Chinese law, to be unlawful within the Chinese legal system. The unlawful kind thus differs from the local experimentation championed by United States Supreme Court Justice Louis Brandeis when he famously observed that “[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”¹³⁷ It is unquestioned that the states must conduct their social experiments within the limits of the law. A state could experiment with a six-month school year, since that would fall pretty clearly within the state’s traditionally recognized jurisdiction over education. A state could clearly not experiment with slavery.

But while local experimentation may be unlawful, at the same time it clearly represents an important and quasi-regular part of the way China is governed, and so it is not helpful or enlightening just to criticize it or to dismiss it as a temporary aberration that will disappear as the legal system “matures.”

A number of examples could be mentioned.

(a) **Land leasing.** At a time when land leasing was prohibited not only in the Land Administration Law but also in the Constitution, it was carried out experimentally (and with central government acquiescence¹³⁸) in Shenzhen. As early as 1986, official sources explicitly praised the “leasing” of rural land by local farmers to more productive outsiders.¹³⁹ In 1987, the city of

¹³⁵ Sebastian Heilmann, *Policy Experimentation in China’s Economic Rise*, 42 *STUD. IN COMP. INT’L. DEV.* 1 (2008).

¹³⁶ Sebastian Heilmann, *From Local Experiments to National Policy: The Origins of China’s Distinctive Policy Process*, 59 *CHINA J.* 1 (2008).

¹³⁷ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

¹³⁸ I am grateful to Shitong Qiao for suggesting this term. It captures the ambiguous and non-monolithicity of the central government’s attitude. There were enough reform-minded leaders at the central level to encourage this local experiment, but probably not enough to guarantee that its instigators would not be punished if things went wrong.

¹³⁹ See *Farmers Create New Form in Rural Reform*, Xinhua General Overseas News Service, Item No. 1106037, Nov. 6, 1986.

Shenzhen auctioned off the “right to use” plots of land for fifty years.¹⁴⁰ The constitutional amendment permitting leasing was not passed until April 1988.

(b) **Creditor’s rights.** In 1994 and 1997, the State Council promulgated two Notices that effectively nullified certain creditors’ rights under both the Bankruptcy Law and the Security Law, even though in China’s legal order laws passed by the National People’s Congress or its Standing Committee rank higher than any State Council pronouncements, and even though no other such laws authorized the nullification. A State Council official conceded that the conflict existed, but defended the State Council Notices on the grounds that (a) certain members of the National People’s Congress had been consulted, (b) the Bankruptcy Law was being revised and would shortly reflect the content of the Notices, and (c) the Notices were experimental and were being implemented only in certain cities.¹⁴¹

(c) **Limited partnerships.** At a time when the national Partnership Law, promulgated by the National People’s Congress, made no provision for limited partnerships—a proposal to include them was discussed and specifically rejected—the Beijing Municipal People’s Congress in 2000 issued the “Regulations on the Zhongguancun Science and Technology Park,” which purported to allow the establishment of limited partnerships in the Zhongguancun district of Beijing.¹⁴²

(d) **Individual investment in Sino-foreign joint ventures.** In 2004, the Beijing municipal government proudly announced that it had broken into a “forbidden zone” and decided to allow Chinese individuals, and not just corporate entities as required under the Equity Joint Venture Law, to be investors in Chinese-foreign equity joint ventures.¹⁴³ The forbidding had been done, however, by the National People’s Congress, China’s highest legislative body, when it passed the Equity Joint

¹⁴⁰ See Shenzhen to Reform Land Management System, Xinhua News Agency, July 7, 1987, *translated in* BRITISH BROADCASTING CORPORATION, SUMMARY OF WORLD BROADCASTS, PART 3: THE FAR EAST, July 11, 1987, at BII/1.

¹⁴¹ This is a very big “only.” The Notices were implemented in 111 cities, including all major industrial and coastal cities. For a fuller analysis, see Donald Clarke, *State Council Notice Nullifies Statutory Rights of Creditors*, 19 EAST ASIAN EXECUTIVE REP. 9 (1997).

¹⁴² See Beijing Municipal People’s Congress, Zhongguancun Keji Yuanqu Tiaoli (中关村科技园区条例) [Regulations on the Zhongguancun Science and Technology Park], issued and effective Dec. 13, 2000.

¹⁴³ See Yu Jingbo, Zhongguancun Kaiqi “Xin Hezi Yundong” Yunxu Waiqi yu Geren Hezi (中关村开启“新合资运动”, 允许外企与个人合资) [Zhongguancun Starts “New Joint Venture Movement,” Permits Foreign Enterprises to Joint Venture with Individuals], SINA.COM, Mar. 25, 2004, <http://finance.sina.com.cn/g/20040325/0952687214.shtml> [<https://perma.cc/AZ5Z-884K>].

Venture Law in 1979.¹⁴⁴ Although China's law is very clear that local law cannot trump national law,¹⁴⁵ this apparently did not trouble the Beijing municipal government.¹⁴⁶

Although these examples may not be compelling demonstrations of the order maintenance imperative, they nevertheless demonstrate the way in which the optionality of legal compliance by government is an important *feature* of the system, not a bug or a sign of immaturity. They reinforce the notion of statutes as a kind of internal administrative policy guideline, to be followed when convenient and overridden when prudential considerations point the other way.

4. Xinjiang detentions

Looming over any discussion of China's order maintenance institutions is the issue of mass detentions in Xinjiang. As of summer 2019, there is compelling evidence that well over one million and possibly up to 1.5 million persons, mostly Muslims of Uyghur ethnicity, have been detained in camps in Xinjiang and (more recently) other provinces.¹⁴⁷

There can be no serious doubt that the vast majority of these detentions take place entirely outside of China's legal system.¹⁴⁸ As discussed in the section on *shuanggui*, Chinese law requires that the physical detention of the person be authorized under a statute passed by the NPC or the NPC Standing Committee. No such statute justifying the Xinjiang detentions is known to exist—it is clear that they are not being carried out under the Criminal Law and the Criminal Procedure Law—and official and unofficial representatives of the Chinese government have been unable to cite one when pressed. In short, nobody can give you a list of the acts that will get you sent to a detention camp.¹⁴⁹ Nobody can tell you who has the authority to make the decision and according to what procedures. Nobody can tell you how, even in theory, let alone in utterly unimaginable practice, you might lodge a protest or appeal against a detention decision.

¹⁴⁴ Zhongwai Hezi Jingying Qiyefa (中外合资经营企业法) [Equity Joint Venture Law] (promulgated by the Standing Comm. Nat'l People's Cong., July 1, 1979), available at http://www.law-lib.com/law/law_view.asp?id=99135 [<https://perma.cc/H5RE-5NKE>] (China).

¹⁴⁵ Lifa Fa (立法法) [People's Republic of China Law on Legislation], as amended March 15, 2015, art. 73, available at http://www.law-lib.com/law/law_view.asp?id=490890 [<https://perma.cc/396E-52Z2>] (China).

¹⁴⁶ The official holding the press conference did advise against trying to set up joint ventures with individual investors outside of Zhongguancun, noting that for legal reasons, "if problems came up they would be relatively difficult to solve." Yu, *supra* note 143.

¹⁴⁷ Adrian Zenz, *Brainwashing, Police Guards and Coercive Internment: Evidence from Chinese Government Documents about the Nature and Extent of Xinjiang's "Vocational Training Internment Camps"*, 7 J. POL. RISK (2019), <https://perma.cc/3GU2-X2T9>. A continuously updated online bibliography of sources on the Xinjiang detentions is available at <http://bit.ly/xinjiangdetentions>.

¹⁴⁸ See Clarke, *supra* note 110.

¹⁴⁹ Tanner Greer has tried. See Tanner Greer, *48 Ways to Get Sent to a Chinese Concentration Camp*, FOREIGN POL'Y, Sept. 13, 2018, <https://foreignpolicy.com/2018/09/13/48-ways-to-get-sent-to-a-chinese-concentration-camp/> [<https://perma.cc/A6S4-K8VL>].

Even in a country of China's size, one to 1.5 million detentions—ten to fifteen percent of an entire ethnic group, and possibly one sixth of its adult population—cannot be dismissed as an aberration or a sign of the immaturity of the legal system. It must be considered as a normal feature of the system, and therefore factor into our understanding of that system. Like *shuanggui* and like local policy experimentation, it shows that legislated rules are simply not that important when there are other policy considerations at stake. What we see on the part of the state is a pure utilitarian calculation in which legal rights have no special role to play.

5. Concluding remarks on extra-legality

To speak of a domain of the extra-legal is in a sense to fall into the very trap I am trying to avoid: that of viewing Chinese order maintenance institutions through the lens of legality, and grouping a set of phenomena together on the basis of what they are not rather than on the basis of what they are. If the paradigm of legality is indeed irrelevant, then why identify a concept with reference to a thing that does not exist?

I do so here simply to serve the limited purpose of showing a number of domains in which law does not govern; this section serves my negative argument but not my more important affirmative argument. The domains I identify as extra-legal are not instances of a single phenomenon, but rather distinct phenomena that have nothing in common beyond what they are not.

The fact that the examples have little in common other than their extra-legality is the proof (or at least evidence) that legality is not important. Extra-legality is not confined to particular issue areas; it can crop up in any issue area once it becomes convenient for that issue area to be handled in that way.

C. Guiding ideology of state

Let us start with a fundamental feature of the Chinese state that has a profound effect on its order maintenance institutions: the way in which the existence of a guiding ideology means that while interests may be recognized, rights are not.

Mirjan Damaška in *The Faces of Justice and State Authority* posited opposing ideal types of state dispositions: the “activist state” aims to manage society, while the “reactive state” aims merely to provide a framework for social interaction. The government in the activist state regards itself not as a neutral conflict resolver, but rather as the manager of a joint pursuit, and it bristles with optimism about its ability to manage successfully.¹⁵⁰

Whether any true reactive states exist in the modern world is debatable,¹⁵¹ but there can be little doubt that both Mao-era China and post-Mao China fit comfortably within the ideal type of

¹⁵⁰ DAMAŠKA. *supra* note 22, at 71, 81.

¹⁵¹ Hayek, for example, saw the liberal democracies of the West as moving in a dangerously activist direction, warning of an increasing tendency among legislatures to think of themselves as a body “that not merely

the activist state. Although the object of the joint pursuit has shifted gradually from socialist utopia in the Mao era to the Great National Rejuvenation of the Xi Jinping era, the idea that the Party leads the nation toward a goal has not changed.

And the consequences for China's order maintenance institutions have not changed. As in the Mao era, there is a *goal* and it is a *collective* one. Both of these considerations militate strongly in favor of a strict utilitarianism and against a concept of rights. In Xi Jinping's words, "Only when the state does well and the nation does well can everybody (*dajia* 大家) do well."¹⁵² That being the case, there can no true conflict of interest between individuals and the state; by sacrificing so that the state and nation can "do well," the individual is ultimately acting in his own interest. Nor can there even be legitimate conflicts of interest between individuals: the existence of the goal means that

in the end, all values are reducible to a singular, intelligible, and harmonious conception of the good[, meaning that] legitimate conflicts of values and interests are impossible[, and that where] they arise, someone [has] inevitably made a deliberate or unintended mistake.¹⁵³

The way to resolve conflicts is thus, in principle, simply to weigh the various interests at stake and choose the resolution that maximizes social utility, as defined by the Party in the pursuit of its mission.¹⁵⁴ In an activist state such as China, rights are always trumped by state interests. In a key passage, Damaška writes:

Strictly speaking, then, personal claims based on activist law *are mislabeled if characterized as rights*. To underscore the contrast with personal entitlements in an extreme reactive state, it would be better to invent new terms—to say that activist decrees accord conditional privileges, create roles, assign tasks, give each their just share, and the like.¹⁵⁵

In other words, the claims at issue are so different from rights that it is misleading to apply the same word to them. They are not simply the activist state's *version* of rights. Whatever we call them, scholars with otherwise widely differing views agree that rights as they are understood in liberal legal orders are weak or absent in China. Rogier Creemers echoes Damaška in finding that it would be more accurate to see rights as "conditional privileges, informed by decades of stability preservation and social management practice."¹⁵⁶ Randall Peerenboom writes that "rights tend to be

provides some services for an independently functioning order but 'runs the country' as one runs a factory or any other organization." FRIEDRICH A. VON HAYEK, *RULES AND ORDER* 143 (1973).

¹⁵² Xi Jinping Zong Shuji Zai Canguan "Fuxing zhi Lu" Zhanlan Shi de Jianghua (习近平总书记在参观《复兴之路》展览时的讲话) [Speech by General Secretary Xi Jinping Upon Visiting the "Road to Rejuvenation" Exhibit, China Central Television, Nov. 29, 2012, available at <https://perma.cc/Y96B-L2BE>].

¹⁵³ Rogier Creemers, *Party Ideology and Chinese Law*, in *LAW AND THE PARTY IN CHINA: IDEOLOGY AND ORGANIZATION* 24 (Rogier Creemers & Susan Trevaskes eds., 2020).

¹⁵⁴ A cynical analysis would posit the Party's mission to be its self-preservation, but the point is that there is no need to resort to cynical analyses.

¹⁵⁵ DAMAŠKA, *supra* note 22, at 83-84 (emphasis added).

¹⁵⁶ Creemers, *supra* note 153, at 25.

conceived of (at least implicitly) as interests in China and that few appreciate the distinction between rights as interests and rights as antimajoritarian moral principles that trump interests.”¹⁵⁷ And an order maintenance system that in principle recognizes interests but not rights is fundamentally different from one that recognizes rights.

D. *The Rule of Mandates*

Mayling Birney characterized the Chinese political system as one of “rule of mandates.”¹⁵⁸ The key to the rule of mandates is that “[i]nstead of directing officials to implement the regime’s laws and policies unconditionally, the party directs them to implement a subset of ‘mandates’ according to their relative prioritization.”¹⁵⁹ Unlike laws, mandates are hierarchically ranked; the implementation of particular laws becomes just another mandate, and it must take a back seat to higher-priority mandates. If achieving a higher-priority mandate requires sacrificing a lower-priority mandate—for example, violating a law—that is not only an expected feature of the system; it is a *desired* feature of the system. It is outcomes, not processes, that matter.

Mandates, quotas, targets—these are solidly entrenched features of China’s contemporary political system¹⁶⁰ and have been so since the founding of the People’s Republic. In many cases the mandates have been about subjects handled by the order maintenance system, and the key features of such mandates is, again, that those issuing them care about outcomes, not processes. Whether it is Mao in the 1950s setting execution targets of one in one thousand in order to spur laggard cadres,¹⁶¹ or today’s leaders denying promotions to subordinates who allow petitioners to get to Beijing,¹⁶² the merits of the individual case are not important.¹⁶³

¹⁵⁷ Randall P. Peerenboom, *Rights, Interests, and the Interest in Rights in China*, 31 STAN. J. INT’L. L. 359, 365 (1995).

¹⁵⁸ Mayling Birney, *Decentralization and Veiled Corruption Under China’s “Rule of Mandates”*, 55 WORLD DEV. 55 (2014).

¹⁵⁹ *Id.* at 55.

¹⁶⁰ Pierre Landry, *The Institutional Diffusion of Courts in China: Evidence from Survey Data*, in RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES (Tom Ginsburg & Tamir Moustafa eds., 2008).

¹⁶¹ See Ning Zhang, *Crimes of Counterrevolution and Politicized Use of the Death Penalty During the Mao Era*, in THE DEATH PENALTY IN CHINA: POLICY, PRACTICE, AND REFORM 62, 67-69 (Bin Liang & Hong Lu eds., 2015).

¹⁶² See Ling Xiao (肖灵), Xinfang “Yi Piao Foujue” Juele Shei de Xin? (信访“一票否决”，绝了谁的心?) [Whom Did the “One-Vote Veto” over Petitioning Cause to Lose All Hope?], ZHONGGUO CHENGSHI FAZHAN WANG 中国城市发展网 [CHINA URBAN DEVELOPMENT NET], April 29, 2016, available at <https://perma.cc/TWY8-FT8S>.

¹⁶³ For a recent fictional example of superiors punishing subordinates simply for allowing petitions to occur, but without any interest in the merits of the case, see the film *I Am Not Madame Bovary* (我不是潘金莲) *supra* note 126.

Of course, the mandate system operates in the *fayuan* as well. Adjudicators are evaluated by a number of criteria that have often been criticized as too rigid.¹⁶⁴ A bigger issue is that the targets measure what *can* be measured instead of what (by the standards of the legality paradigm) ought to be measured; of twelve performance indices on a judicial evaluation form from 2010, only two purported to measure the actual quality of the adjudication.¹⁶⁵ The others included such matters as number of appeals, which—since appeals in China are available as of right—could simply indicate obstreperous parties and not an incorrect judgment. For this and other reasons the adjudicators' incentives are to rule in favor of the most potentially obstreperous party, not the one who is right on the merits: as documented by Liebman, "protesting, petitioning, or simply threatening to do either often is a successful means for litigants to pressure courts to rule in their favor or to alter decided cases[.]"¹⁶⁶ and He reports on the basis of extensive fieldwork and interviews that some judges "would never grant a divorce if the defendant is suicidal or homicidal, no matter how many times the plaintiff might file a divorce petition."¹⁶⁷ But perhaps that is not a failing of the assessment system; perhaps that is exactly what the system wants.

Whether or not the mandate system operates in Chinese *fayuan*, the more important point is that the mandate system, which converts what purport to be absolute legal rules into relative priorities at best, has been in place at least since the beginning of the post-Mao era and still prevails over forty years later. Because it has its origins in a system of goal-oriented politics and top-down appointment of officials, it cannot be expected to change until those two features of the Chinese political system change.

¹⁶⁴ On judicial performance assessments, see generally Jonathan J. Kinkel & William Hurst, *The Judicial Cadre Evaluation System in China: From Quantification to Intra-State Legibility*, 2015 CHINA Q. 933; Rachel E. Stern, *On the Frontlines: Making Decisions in Chinese Civil Environmental Lawsuits*, 32 L. & POL'Y 79, 87-88 (2010); Ai Jiahui (艾佳慧), *Zhongguo de Fayuan Zuidahua Shenme?* (中国法官最大化什么) [What Do Chinese Judges Maximize?], 2008 FALÜ YU SHEHUI KEXUE (法律和社会科学) [L. AND SOC. SCI.], no. 3, at 98. For a domestic critique, see Huang Xiangqing (黄祥青), *Gai bu Gai Kaohe Fayuan? Zenme Cai Heli?* (该不该考核法官? 怎么才合理?) [Should Judges Be Tested? What Way Is Reasonable?], RENMIN FAYUAN BAO (人民法院报) [PEOPLE'S CT. NEWS], Jan. 17, 2019, available at <https://perma.cc/9KGL-S5VT>. The author is the president of the Shanghai No. 1 Intermediate People's Court.

¹⁶⁵ See WANG, *supra* note 29, at 72. The two indices in question were "Quality (*zhiliang*) of adjudication" and "Correction rate (*gaipan lǜ*)."¹⁶⁶ It is not clear how quality of adjudication was measured, but it appears at least to be attempting to assess quality.

¹⁶⁶ Benjamin L. Liebman, *A Populist Threat to China's Courts?*, in CHINESE JUSTICE: CIVIL DISPUTE RESOLUTION IN CONTEMPORARY CHINA 269, 269 (Margaret Y. K. Woo et al. eds., 2011).

¹⁶⁷ Xin He, *Routinization of Divorce Law Practice in China: Institutional Constraints' Influence on Judicial Behaviour*, 23 INT'L J. L., POL'Y AND FAMILY 83, 102 (2009) [hereinafter Xin, *Routinization*]; see generally Xin He, *No Malicious Incidents: The Concern for Stability in China's Divorce Law Practice*, 2017 SOCIAL & LEGAL STUDIES 1 (2017) [hereinafter Xin, *No Malicious Incidents*]; NG & HE, *supra* note 41.

E. *Persistence of friend/enemy distinction*

In 1926, Mao Zedong wrote, “Who are our enemies? Who are our friends? This is a question of the first importance for the revolution.”¹⁶⁸ A Schmittian before Schmitt, Mao stuck to this outlook for his entire life. To Michael Dutton, “[t]he lived revolutionary line of Mao Zedong . . . constituted the abstract theoretical line drawn by one Carl Schmitt.”¹⁶⁹

The friend/enemy dichotomy dominated Chinese politics and governance in the Mao era.¹⁷⁰ Friends were a shifting set of groups categorized as allies against an enemy, and therefore those groups moved in and out of the category of “friend” as the enemy changed.¹⁷¹ In the war against Japan, friends included anti-Japanese landlords. In the land reform that followed the CCP’s victory in 1949, landlords became the enemy. Friends were within the category of “the people” (人民), a concept opposed to that of enemy (敌人) and by no means synonymous with that of citizen (公民).

In the Mao era and at least into the early to mid-1980s, Chinese order maintenance institutions were suffused with a set of matched dichotomies: enemy/friend, dictatorship/democracy, coercion/persuasion & education, antagonistic/non-antagonistic contradictions, and law/administration.¹⁷² “Law” in this model of governance was not an overarching set of rules governing society and the state, or even governing society only; law was something the dictatorship did to the objects of dictatorship,¹⁷³ and it wasn’t very pleasant. Contradictions “among the people,” in Mao’s terms, were to be handled through means labeled “administrative,” not legal. Persuasion and not coercion was to be used.¹⁷⁴

Starting in the 1980s, this began to change. As Sarah Biddulph has written, the “mapping of administrative with non-antagonistic contradictions and criminal law with antagonistic

¹⁶⁸ Mao Zedong, *Analysis of the Classes in Chinese Society* (March 1926), available at <https://perma.cc/YVM4-3QVQ>.

¹⁶⁹ MICHAEL ROBERT DUTTON, *POLICING CHINESE POLITICS: A HISTORY* 303 (2005).

¹⁷⁰ See generally *id.*

¹⁷¹ See Mao Zedong, *On the People's Democratic Dictatorship* (June 30, 1949), available at <https://perma.cc/Y3QL-J4CS>.

¹⁷² See Donald Clarke, *Concepts of Law in the Chinese Anti-Crime Campaign*, 98 HARV. L. REV. 1890 (1985).

¹⁷³ In 1955, for example, Liu Shaoqi (then a senior Party official and Chairman of the Standing Committee of the National People’s Congress) stated, “Our law is not for constraining us, but for constraining the enemy, for striking at the enemy and wiping him out.” See Yu, *supra* note 68. The often-heard call to deal with criminals “according to law” emphatically did not mean to engage in the Chinese equivalent of reading them their Miranda rights.

¹⁷⁴ See generally Mao Zedong, *On the Correct Handling of Contradictions Among the People*, translated in THE POLITICAL THOUGHT OF MAO TSE-TUNG 236 (Stuart R. Schram ed., 1969) (speech of Feb. 27, 1957).

contradictions has eroded with the progress of economic reform,” and “criminal justice arguably now spans both antagonistic and non-antagonistic contradictions.”¹⁷⁵

Biddulph is undoubtedly correct to note that the formal criminal law now includes contradictions both antagonistic (between the people and the enemy) and non-antagonistic (among the people). But as she also notes, that does not mean that the friend/enemy distinction has disappeared. Indeed, we seem to be witnessing a revitalization of the friend/enemy distinction, of the idea that it is important to identify and distinguish non-antagonistic contradictions from antagonistic ones.¹⁷⁶ One might ask: to what end? Where in the law does it matter any more?

The answer is that it does not really matter in *the law* any more, but at the same time, just as in Maoist theory, the law is not all there is. There is a great deal of room for the exercise of Party-state coercive power outside the law, and the friend/enemy distinction gives power to that idea.

F. *Subordination of rights to politics and order maintenance*

The essentially administrative character of order maintenance institutions is shown by their subordination of individual rights to collective interests, as defined by the Party. This occurs not just in practice but in rhetoric as well. Consider a recent speech by Liu Guixiang, a senior official at the Supreme People’s Court.¹⁷⁷ In that speech, Liu characterized the mission of the *fayuan* as the defusing (化解, literally “melting away”) of contradictions (矛盾). This is different from an approach that sees their role as that of deciding disputes. The former approach values making the conflict go away and leaving both parties reasonably satisfied. The latter approach values the making of a decision one way or the other, ideally in a way that will provide predictability to future parties. It is not especially concerned with whether the parties are satisfied or not, and does not consider a party’s dissatisfaction with the result as a sign of failure.¹⁷⁸

¹⁷⁵ Sarah Biddulph, Institutional Transformation in Policing Minor Crime in China (Feb. 2019) (unpublished paper on file with author). See also DUTTON, *supra* note 169, at 19 (“the friend/enemy binary, which had completely dominated Party thinking from 1927 onward, began to fade after 1978 as other distinctions emerged”).

¹⁷⁶ This proposition is clearly stated in Chinese Communist Party Central Committee, Zheng-Fa Gongzuo Tiaoli (政法工作条例) [Regulations on Political-Legal Work], issued Jan. 18, 2019, effective Jan. 13, 2019, available at <https://perma.cc/5HUV-JU3B>. See also Ling Li, *Ling Li Analysis of Chinese Communist Party’s Political-Legal Work Directive*, CHINALAWTRANSLATE, Jan. 22, 2019, <https://perma.cc/Z8JS-KBEK>.

¹⁷⁷ Liu Guixiang (刘贵祥), Zai Quanguo Fayuan Minshangshi Shenpan Gongzuo Huiyi Shang de Jianghua (在全国法院民商事审判工作会议上的讲话) [Speech at the National Conference on Civil and Commercial Adjudication] (July 3, 2019), available at <https://perma.cc/F3PW-X25Q>. To avoid confusion, but perhaps creating it at the same time, I am using the standard English translation of the name of the institution in question. It is at the top of the *fayuan* hierarchy.

¹⁷⁸ The mere fact that a decision is appealed counts as a negative when assessing a judge’s performance. See *supra* text accompanying notes 165-167.

It would of course be a mistake to put too much weight on a few words, and they are not offered here as conclusive proof of anything. But the language fits well into a broader message about the role of the *fayuan*. *Fayuan* are, in Liu's words, "first and foremost a political institution." They must "uphold the absolute¹⁷⁹ leadership of the Party." The message is clear that *fayuan* should pay attention to matters other than simply what they think the relevant law requires:

In civil and commercial adjudication, [*fayuan*] must have a firm political stance, have a correct grasp of the political direction, stress political effects, [and] consider political influence[.]

Liu acknowledges the tension between "handling cases according to law" (依法办案) and "serving the big picture" (服务大局): in normal circumstances they can be reconciled (二者是辩证统一的, "the two are in a relationship of dialectical unity"), but in many cases

we must fully take into consideration the big picture (*daju* 大局) of social and economic development, political effects, and social effects. In handling important and sensitive cases, [*fayuan*] must pay attention to the views of financial regulators, state asset management departments and other departments, as well as social organizations such as medium and small enterprise associations, and precisely grasp the big picture of social stability, social effects, and political effects.

The message here seems unmistakable, the more so because it is not new. A decade earlier, the head of the Supreme People's *Fayuan* had called for adjudicators to take into account "the feelings of the masses" when deliberating on death sentences.¹⁸⁰

The message of these official pronouncements is confirmed by empirical research. First, adjudicators themselves report that they must take into account many factors other than what the law or the parties' rights might require. Finding that "[m]ost [adjudicators] believe that the law is

¹⁷⁹ The addition of the word "absolute" to the common phrase "the leadership of the Party" is new and not common. A search of major Chinese newspapers in the CNKI database for the phrase, "Courts must uphold the leadership of the Party" yielded 17 hits, whereas adding the term "absolute" resulted in only one hit, from 2018. A search for the former phrase on Google yields 8,350 hits; for the latter phrase, only two hits (from 2017 and 2019). For a discussion of the issue with links to relevant sources, see the blog post and comments at Donald Clarke, *Courts and the "Absolute Leadership" of the Party*, THE CHINA COLLECTION, July 13, 2019, <https://thechinacollection.org/courts-absolute-leadership-party/> [<https://perma.cc/Y8FB-5YDC>].

¹⁸⁰ See Zuigao Fayuan Yuanzhang Tan Sixing Yiju Yinfa Zhengyi (最高法院院长谈死刑依据引发争议) [*Supreme People's Court President's Remarks on the Basis for the Death Penalty Provoke Controversy*], CAIXIN (财新), April 11, 2008, <http://china.caixin.com/2008-04-11/100058781.html> [<https://perma.cc/6Z6Q-W63J>]. In the same year, Peking University law professor He Weifang imagined a client asking their attorney, "Do you mean to say that *fayuan* don't make judgments according to law?", to which the world-weary lawyer replies, "In addition to the law, the *fayuan* have to take into account policies, the security situation, and also the big picture. So when it comes to what they will ultimately decide, even though I'm a lawyer, I have no way to predict it." He Weifang, *Sifa Shenmihua Ruhe Quchu* (司法神秘化该如何祛除) [*How to Demystify Justice*], NANFANG ZHOUMO (南方周末) (SOUTHERN WEEKEND), Sept. 25, 2008, available at <https://perma.cc/Z37U-64VY>.

just one among many factors that their superiors consider when making decisions[.]”¹⁸¹ He and Ng write that

[s]trict adherence to legal rules is not an end in itself. Law lacks the kind of institutional integrity that insulates it from immediate political considerations on a day-to-day basis. The embrace of law is conditional on the benefits of following the law outweighing the risk of escalating instability.¹⁸²

Second, the nature of the review system confirms the administrative, result-oriented nature of the process. Consider the appeal process in the United States.¹⁸³ At the trial level, almost everything can be taken into consideration—all kinds of facts and all kinds of arguments. By the time a case gets up to the Supreme Court, the issues have been narrowed down to a bare sliver of what they began as. There are no factual issues at all, at least in theory, and Supreme Court cases typically focus on a single legal issue among the many with which the case may have started.

By contrast, consider the process of review within the Chinese *fayuan* hierarchy:

as a case is kicked up, the context of consideration expands from one that is predominantly (and narrowly) legal to one that is increasingly (and broadeningly) social and political. As it goes up the administrative hierarchy, legal issues become embedded within a larger and larger social and political context of consideration.¹⁸⁴

What determines whether a case will be reviewed in the first instance revolves around the political repercussions of the decision, not the complexity of the legal issues.¹⁸⁵ What we see here is the logic of administration, not adjudication.

The point here is not that this conception of the role of *fayuan* is irrational, misguided, or wrong, but that it is unquestionably *different*, and not just trivially so, from a notion of courts as neutral third parties that enforce rights in disputes between parties. Their job is different. As He and Ng argue, “In fact, the Chinese judiciary cannot even be described as being subservient to the executive, in the way that some European courts are *It is part of the executive.*”¹⁸⁶

V. Counterarguments

There are, of course, counterarguments to the position I have advanced here. I shall try to set them forth fairly and without caricature and then address them. Space considerations preclude a full canvassing of possible objections as well as a full answer to each.

¹⁸¹ NG & HE, *supra* note 41, at 118.

¹⁸² *Id.* at 122.

¹⁸³ I cannot emphasize enough that I do not offer the United States as a model for some one right way of doing things. I offer it here simply to show that China’s way of doing things is very different.

¹⁸⁴ NG & HE, *supra* note 41, at 17 (internal citations omitted).

¹⁸⁵ *Id.* at 92-93.

¹⁸⁶ *Id.* at 168 (emphasis added).

A. *Respected “Rule of Law” indices show China on the way up*

Prof. Jacques deLisle, in the course of testifying to the adequacy of the Chinese legal system to hear an environmental case,¹⁸⁷ wrote:

China receives comparatively high marks in the prominent and widely cited World Bank “Rule of Law” index. In the most recent ratings, China scores above the 40th percentile globally, not far below the international median. And China ranks at the median (48.5th percentile) for countries in its “upper middle income” group even though China’s per capita income places it almost at the very bottom of the wide “upper middle income” range and even though rule of law rankings correlate strongly with levels of development.¹⁸⁸

This argument is frequently heard but has some serious flaws. First, however “prominent and widely cited” the index may be, there is considerable scholarly controversy over its ability to measure anything useful.¹⁸⁹ Second, and more important, even if the Rule of Law index did accurately measure something useful, what it measures cannot be uncritically equated to the “Rule of Law” as it is commonly understood. The Rule of Law index aggregates scores on a variety of sub-indices: it “captur[es] perceptions of the extent to which agents have confidence in and abide by the rules of society, and in particular the quality of contract enforcement, property rights, the police, and the courts, as well as the likelihood of crime and violence.”¹⁹⁰ Thus, a low score in indices related to, say, police and the courts could be offset by high scores in indices related to the likelihood of crime and violence. By all accounts, for example, crime and violence—at least of the non-state variety—is way down in Xinjiang now that an extremely high percentage (probably well over one sixth) of its young male Uyghur population is in detention camps.¹⁹¹ That would increase Xinjiang’s Rule of Law score.

¹⁸⁷ In the case in question, the Chinese *fayuan* had already sat on the plaintiff’s complaint for over a year, in spite of the requirement of the Civil Procedure Law that they make a decision to accept or reject within seven days. The plaintiffs then tried to sue in a U.S. court. The defendants moved to dismiss on *forum non conveniens* grounds, arguing implicitly that China *had* a legal system, and explicitly that that legal system provided an adequate forum for the fair and impartial hearing of the dispute.

¹⁸⁸ Declaration of Professor Jacques deLisle, Peiqing Cong v. ConocoPhillips, Civil Action No. 4:12-CV-01976 (S.D. Tex.), Sept. 24, 2012.

¹⁸⁹ See, e.g., Kevin Davis, *What Can the Rule of Law Variable Tell Us About Rule of Law Reforms*, 26 MICH. J. INT’L L. 141 (2004).

¹⁹⁰ Daniel Kaufmann et al., *The Worldwide Governance Indicators: Methodology and Analytical Issues* (World Bank Policy Research Working Paper, No. 5430, Sept. 2010), *available at* <http://ssrn.com/abstract=1682130>. This paper is an official explanation of the methodology behind the Rule of Law index.

¹⁹¹ Adrian Zenz, who has researched the issue extensively, estimates that approximately one sixth of the adult Uyghur population is detained in the camps. See Zenz, *supra* note 147. It seems likely that young men are overrepresented relative to women and old men. I am not, of course, suggesting that young Uyghur males are particularly prone to criminality relative to young males of other ethnicities. The link between age, gender, and crime is fairly well established. See Jeffrey T. Ulmer & Darrell Steffensmeier, *The Age and Crime Relationship: Social Variation, Social Explanations*, in *THE NURTURE VERSUS BIOSOCIAL DEBATE IN*

B. *Number of cases*

The number of cases heard by Chinese *fayuan* has risen dramatically over the years, and courts are widely used at present. Again in the words of Prof. deLisle,

Each year around six to seven million complainants—both Chinese and foreigners—rely on the Chinese judiciary for redress, seeking, and obtaining, resolution of their civil claims in Chinese courts.¹⁹²

Does this not show that Chinese citizens—arguably in a good position to know—believe that there is something appropriately called a legal system functioning in China?

The raw numbers are not, however, especially informative. First, *they tell us nothing about how the institutions to which complaints are brought operate*. Consider a parallel claim: that six or seven million Chinese every year bring their complaints about various matters to neighborhood committees, or their employers, or their parents. Obviously such a claim would tell us nothing about the *procedures* whereby neighborhood committees or employers or parents deal with the complaints. The deLisle claim assumes precisely that which must be proven: that the institutions translated as “courts”—the *fayuan*—actually operate in a particular way, and that therefore the resort to them proves that that particular way of operation is widely used.

Second, let us assume that Chinese *fayuan* do in fact operate as we expect courts in a legal system to operate. Is six or seven million plaintiffs in a country of 1.4 billion people a large number or a small number? What is the criterion for answering this question? Does the number indicate a well-functioning legal system or a malfunctioning one? The numbers need to be backed up by a plausible theory of their significance. For example, a perfectly just as well as a perfectly unjust court system could both generate low numbers of cases, provided only that they were predictable. That predictability would induce almost all parties to settle out of court. High numbers of cases—assuming we have figured out what ought to count as “high”—would indicate decreased predictability, meaning (perhaps) less legality.

The picture gets even more complicated when we realize that even the apparently straightforward assumption that greater predictability will lead to more settlements and fewer cases¹⁹³ might be wrong in the Chinese context. There are incentives to sue and get a judgment *even when both parties know with certainty what the outcome will be and they would gain by settling*.

CRIMINOLOGY: ON THE ORIGINS OF CRIMINAL BEHAVIOR AND CRIMINALITY 377 (Kevin M. Beaver et al. eds., 2015).

¹⁹² deLisle, *supra* note 188.

¹⁹³ The American legal literature seems to simply take for granted the “well-understood principle” that “[i]f two parties to a litigation are largely in agreement about the likely outcome of any trial and both are well informed (i.e., each party has a good sense of what the other knows), full settlement is extremely likely.” J.J. Prescott & Kathryn E. Spier, *A Comprehensive Theory of Civil Settlement*, 91 N.Y.U. L. REV. 59, 60-61 (2016). But perhaps the Chinese exceptions should make us look harder for instances where the assumption might be false in other jurisdictions as well.

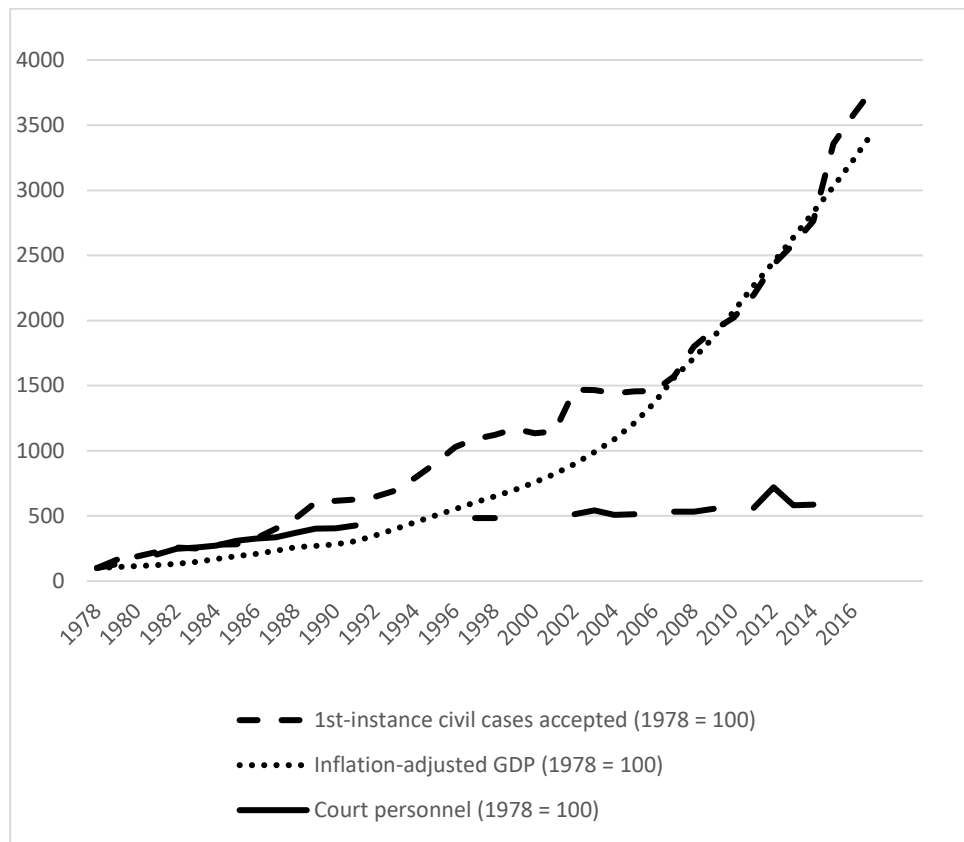
Despite highly predictable outcomes and a court system that encourages mediation of civil disputes, insurance companies in Hubei rarely settle traffic accident cases that enter the courts, even when doing so might reduce payouts. Instead, insurance companies use litigation to delay payment on policies and to reduce the possibility of fraud by their own personnel. Litigants sue even when there appears to be little chance that a defendant will be able to pay a judgment. Litigants use litigation not just to obtain compensation from defendants but also to obtain payments from the state, regardless of whether the state has a legal obligation to pay compensation. Local governments rely on courts to identify those in need and assign liability to parties with deep pockets in order to reduce the potential financial burden of the state in a system with very limited social insurance.¹⁹⁴

One way of thinking about the significance of case numbers is to examine the relationship between civil litigation and GDP. The assumption behind the numbers-based challenge is that more cases indicate a better *fayuan* system—*i.e.*, that a better *fayuan* system, all other things equal, generates more cases than a worse *fayuan* system—and that “better” means “more like ours.”¹⁹⁵ Let us consider, then, what makes all other things equal: here, it is plausible to postulate a constant population and a constant level of economic activity, on the assumption that more economic activity generates more disputes. The measure that combines population and economic activity is, of course, GDP. If the *fayuan* system maintained a constant quality, therefore, we would expect to see litigation track GDP. And this in fact is what we observe. At the same time, however, we see that the number of people working in *fayuan* has grown much more slowly than the caseload.

In short, if we accept the premise of the numbers-based challenge—that more cases necessarily indicate better *fayuan*—then the data are consistent with that challenge. But the important point is that the data are also consistent with a completely different story: one in which the role of the civil *fayuan* has not increased any more than can be explained simply by GDP growth, and in which the state contributes less by way of personnel to the *fayuan*, relative to GDP, than it did in 1978.

¹⁹⁴ Benjamin L. Liebman, *Ordinary Tort Litigation in China: Law Versus Practical Justice?*, J. TORT L. 1, 4-5 (online preprint June 22, 2020), <https://doi.org/10.1515/jtl-2019-0033>.

¹⁹⁵ As noted earlier, the quoted statement comes from an expert declaration in *forum non conveniens* proceedings in support of the proposition that Chinese *fayuan* provide an adequate alternative to the U.S. court system.

Table 1: Litigation and GDP¹⁹⁶

C. Strengthening of *fayuan*

Taisu Zhang and Tom Ginsburg have recently argued that their thesis of a turn *toward* legality in China is supported by various indications that *fayuan* are being strengthened.¹⁹⁷ The facts

¹⁹⁶ Sources: *Yearbook of Chinese Law* (中国法律年鉴), various years; *All-China Court Statistical Bulletin* (全国法院司法统计公报), various years; National Bureau of Statistics (国家统计局) website at <https://perma.cc/7K83-Z>; Gao Kui (高魁), *Zhongguo Fayuan Renshu Kao* (中国法院人数考) [A Study of the Numbers of Personnel in Chinese Courts] (March 25, 2015), available at <https://perma.cc/V3ES-BWYR>; Wang Shengjun (王胜俊), *Zuigao Renmin Fayuan Guanyu Jiaqiang Renmin Fayuan Jiceng Jianshe Cujin Gongzheng Sifa Gongzuo Qingkuang de Baogao* (最高人民法院关于加强人民法院基层建设促进公正司法工作情况的报告) [Report of the Supreme People's Court on the Situation of the Work of Strengthening Construction of the Basic Levels of People's Courts and Promoting Judicial Justice] (Oct. 25, 2011), available at <https://perma.cc/9R4S-49M>. The actual number of 1st-instance civil cases rose from 300,787 in 1978 to over 11 million in 2017; inflation-adjusted GDP went from 368 billion yuan to 12.7 trillion yuan; court personnel went from 58,000 in 1978 to 340,000 in 2014, the latest year for which I found statistics.

¹⁹⁷ See Zhang & Ginsburg, *supra* note 13, at 330-52.

they adduce, however, do not tell us anything about the internal functioning of *fayuan*. To their credit, they acknowledge this point:

[I]f the [*fayuan*] themselves are insufficiently committed to legality, then strengthening them may not amount to a strengthening of law. That is, if [*fayuan*] become stronger and more effective, it is possible that they are becoming more effective at something other than applying the law.¹⁹⁸

They term such skepticism “severely overblown,” but their refutation is not entirely convincing. It is not self-evident that a heavy caseload must, as they assert without elaboration, discourage rather than encourage extra-legal behavior. And it seems a little too pat to assert, without addressing the persistent reports of corruption in the Chinese *fayuan* or the literature about that corruption,¹⁹⁹ that the rich and powerful do well simply for the same reasons that the rich and powerful do well in non-corrupt court systems—that is, superior resources.²⁰⁰

D. Case databases and “case law”

There exist in China commercial databases containing case reports. Access to these databases is purchased on a market basis by law firms. Evidently the law firms find them to be of value. Does this tell against the order maintenance paradigm and in favor of the legal paradigm?

It would if attorneys looked for cases to find grounds for making arguments about rules. But arguments about cases do not seem to find their way into attorneys’ arguments. Instead, it seems that attorneys use case databases largely for two reasons. First, they can economize on research efforts. A prior case on the same issue will likely cite applicable laws and regulations.²⁰¹ Second, attorneys going before a specific adjudicator can see how that adjudicator (or the *fayuan* immediately above) ruled in similar prior cases or what positions they took on relevant issues. This helps the attorney formulate an effective litigation strategy.²⁰² In other words, they look up cases for clues on what to expect and perhaps how to frame an argument, in much the same way that a U.S. lawyer might wish to check out a judge’s Twitter feed or Facebook page. They do not look up cases in order to distill a

¹⁹⁸ *Id.* at 349. The original text, of course, uses the term “court” where I have substituted the term “[*fayuan*].”

¹⁹⁹ See, e.g., Ling Li, *The “Production” of Corruption in China’s Courts: Judicial Politics and Decision Making in a One-Party State*, 37 L. & SOC. INQUIRY 848 (2012).

²⁰⁰ On this point in general, the classic article is Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC’Y REV. 95 (1974). For China, see Xin He & Yang Su, *Do the “Haves” Come Out Ahead in Shanghai Courts?*, 10 J. OF EMPIRICAL LEGAL STUD. 120 (2013).

²⁰¹ Zhang Saisai (张赛赛) & Chen Yongxu (陈永旭), *Da Shuju Beijing Xia Anli Jiansuo Dui Lüshi Susong de Yingxiang* (大数据背景下案例检索对律师诉讼的影响) [*The Influence of Case Searching on Litigation by Lawyers with the Background of Big Data*], 2018 FAZHI BOLAN 法制博览 (LEGAL SYS. KNOWLEDGE), no. 6, at 215, 215.

²⁰² *Id.*

rule from them. Indeed, in some cases they may find that citing a case offends the adjudicator, who may consider it an indirect criticism of their professional competence.²⁰³

E. Evidence of fayuan handling cases according to law and using legal reasoning

In some areas such as intellectual property, it is possible to find Chinese *fayuan* operating to all appearances as legal institutions in the sense in which I have defined the term “legal,” not just as order maintenance institutions. And it is very possible that adjudicators in those cases see themselves as properly deciding questions of rights, not simply weighing interests and listening to their superiors.

This is a reasonable challenge. The answer is that the order maintenance model does not exclude *fayuan* acting in this way. In some domains, it may be conducive to order maintenance, broadly conceived, for the *fayuan* to act as legal institutions most of the time. The difference is that behind this action is a theory, perhaps less clearly articulated than dimly perceived, of a kind of rule-utilitarianism: the idea that simply following the rules without constantly subjecting the result to a *de novo* utilitarian analysis is in fact the utility-maximizing strategy. But rule-utilitarianism is still utilitarianism and inimical to rights; if it can in fact be shown that following the rules in a particular instance will reduce social utility, then there exists no reason to follow the rules.²⁰⁴

²⁰³ Susan Finder, *How China's Non-Guiding Cases Guide*, SUPREME PEOPLE'S COURT MONITOR, Aug. 1, 2016, <https://supremepeoplescourtmonitor.com/2016/08/01/how-chinas-non-guiding-cases-guide/> [<https://perma.cc/7ZKY-JRRC>]. As one Chinese article noted, “The degree to which adjudicators acknowledge past cases depends on the adjudicators themselves; the cases don’t have much binding force. If the attorney puts a lot of stress on past cases, it results in a high degree of uncertainty.” Zhang & Chen, *supra* note 201, at 215.

²⁰⁴ As one commentator on this paper pointed out, it is, of course, the premise of pure rule-utilitarianism that it is impossible or debilitatingly difficult to figure out in any particular situation whether a deviation from the rule will in fact increase social utility, and that therefore the optimal way to promote social utility is simply to follow the rule. But actual rule-utilitarians are unwilling to impose an unqualified prohibition against exceptions, thus necessarily indicating that they believe it is *not* in fact always impossible to make such a calculation. John Stuart Mill, for example, argued that although “justice is a name for certain moral requirements, which, regarded collectively, stand higher in the scale of social utility, and are therefore of more paramount obligation, than any others,” nevertheless “particular cases may occur in which some other social duty is so important, as to overrule any one of the general maxims of justice. Thus, to save a life, it may not only be allowable, but a duty, to steal, or take by force, the necessary food or medicine, or to kidnap, and compel to officiate, the only qualified medical practitioner.” JOHN STUART MILL, UTILITARIANISM Ch. 5 (1863), available at <https://www.utilitarianism.com/mill1.htm>. And modern rule-consequentialists endorse a rule requiring one to prevent disaster, even if that requires breaking the rule, thus again showing that the possibility and desirability of making the utilitarian calculation instead of blindly following the rule is accepted. See Brad Hooker, *Rule Consequentialism*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Winter 2016 ed.) (Edward N. Zalta ed., 2016), available at <https://perma.cc/CA7A-DSGR>, citing R.B. BRANDT, MORALITY, UTILITARIANISM, AND RIGHTS 87-88, 150-51, 156-57 (1992). Most importantly, actual adjudicators in actual *fayuan* are unlikely to feel themselves constrained by the requirements of a strict rule-utilitarianism.

F. Subordination of rights to politics and social interests happens everywhere

It could be argued that all order maintenance systems, even those that we are comfortable in calling “legal,” display moments where rule-following and the enforcement of rights are subordinated to politics or larger social goals;²⁰⁵ that therefore it is simply prejudice to excuse them as “bugs” in one system but to insist they are “features” in another. I take this objection seriously.

One way of getting at an answer is to ask how insider supporters of the system treat the phenomena in question. Do they themselves treat them as bugs, to be hidden and denied, or do they treat them as things that are either regrettably necessary or even affirmatively desirable?

To be sure, the Party-state and its agents will sometimes aggressively deny that China has anything other than a fully functioning legal system in the “rule of law” sense that protects rights according to law, or at least attempts to do so despite occasional problems. What is interesting, however, is that they do not always do so; at times, they are quite willing to openly commit acts or make statements that are inconsistent with such a system, but that make perfect sense within the order maintenance paradigm. Here again space constraints forbid more than a brief list that cannot possibly prove anything rigorously; I offer it merely as food for thought.

- **In politically sensitive trials, refusing to let defense witnesses testify,²⁰⁶ refusing to let the defendant be represented by an attorney of his or her choice,²⁰⁷ or persecuting the defendant’s lawyer²⁰⁸—all quite openly.**

Given that the Party-state controls both procedure and outcome in any *fayuan* proceeding in which it takes an interest, one might wonder why it takes these actions and does not prefer to hypocritically present at least a pretense of fairness, in the homage that vice pays to virtue.²⁰⁹ In what

²⁰⁵ While I reject the notion—seemingly common in the U.S.-centered world of China studies—that observations about the United States prove or disprove anything about concepts such as democracy or the rule of law, it is certainly true that the *reality* of the American legal system displays many features that are, to say the least, normatively unattractive, and could plausibly be considered features and not bugs. See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); PAUL BUTLER, *LET’S GET FREE: A HIP-HOP THEORY OF JUSTICE* (2009); see generally Radley Balko, *There’s Overwhelming Evidence That the Criminal Justice System Is Racist. Here’s the Proof.*, WASHINGTON POST, June 20, 2020, <https://wapo.st/3faLrUZ> (collecting studies on structural racism in the U.S. criminal justice system). But this article is ultimately about China and does not depend on claims about order maintenance systems in the United States or any other country.

²⁰⁶ See, e.g., Jim Yardley & Joseph Kahn, *China Gives Times Researcher 3 Years*, N.Y. TIMES, Aug. 25, 2006, <https://www.nytimes.com/2006/08/25/world/asia/25zhaobox.html> [<https://perma.cc/X2T5-M9ZC>].

²⁰⁷ See, e.g., Long Qiao et al., *Riot Police Raid Chinese Dissident’s Legal Team*, RADIO FREE ASIA, June 25, 2013, <https://www.rfa.org/english/news/china/raid-06252013105618.html> [<https://perma.cc/3VH9-FATE>].

²⁰⁸ See, e.g., Enshen Li, *The Li Zhuang Case: Examining the Challenges Facing Criminal Defense Lawyers in China*, 24 COLUM. J. ASIAN L. (2010).

²⁰⁹ FRANÇOIS DE LA ROCHEFOUCAULD, MAXIMS, no. 218.

appears to be a video posted in May 2010 by the Yinchuan Intermediate Level People's *Fayuan*, the adjudicator is shown angrily ejecting an attorney on the grounds of "disrupting courtroom order" because the attorney attempted to argue (calmly, as the video shows) that Falun Gong was not a cult.²¹⁰ This video was not shot secretly and posted by a dissident group trying to make the Chinese legal system look bad. Far from it: it was posted by the *fayuan* itself, evidently taking pride in not allowing unacceptable arguments even to be voiced, to say nothing of being accepted as valid. This is the straightforward logic of order maintenance, not a hypocritical pretense of legality.

- **"Don't use the law as a shield."**

In February of 2011, responding to a foreign journalist's question about which specific law journalists were being accused of violating, Ministry of Foreign Affairs spokesperson Jiang Yu famously said, "Don't use the law as a shield. The real problem is that there are people who want to see the world in chaos, and they want to make trouble in China. For people with these kinds of motives, I think no law can protect them."²¹¹ In other words, it is about motives, not actions, and individuals do not have rights that shield them from the state.²¹²

- **House arrest of Liu Xia.**

Liu Xia, the wife and then widow of Liu Xiaobo, was kept under house arrest in China for eight years, despite the fact that Chinese law contains no provisions allowing for such detention.²¹³ Yet the fact of her confinement (unlike that of, say, the 11th Panchen Lama²¹⁴) was hardly denied by the Chinese authorities.

²¹⁰ The video can be viewed at <http://bit.ly/lawyerejected>.

²¹¹ The full colloquy in English and Chinese, with commentary, is available at <https://perma.cc/U9CT-JSSH>.

²¹² Ironically, the notion that law *should* be available as a shield, using exactly the same terms in Chinese, was expressed just four months later in the Chinese magazine *Caijing*, see Xu Kai (徐凯) & Li Weiao (李微敖), *Weiwen Jiqi* (维稳机器) [*The Stability Maintenance Machine*], *CAIJING* (财经) [FINANCE AND ECONOMY], June 7, 2011, available at <https://perma.cc/Y5KM-L6XQ>.

²¹³ See Suyin Haynes, *Widow of Nobel Laureate Liu Xiaobo Leaves China After Eight Years Under House Arrest, Reports Say*, *TIME*, July 10, 2018, <https://time.com/5334264/liu-xia-liu-xiaobo-china-house-arrest-berlin> [<https://perma.cc/J9BU-SZQB>].

²¹⁴ Gedhun Choekyi Nyima, the 11th Panchen Lama, was abducted in 1995 by Chinese authorities a few days after being named as such at age six by the Dalai Lama. He has been in a state of presumably enforced disappearance ever since. See *As Panchen Lama Turns 30, China Must Release Him and Stop Interfering in Tibetan Religious Freedom*, INTERNATIONAL CAMPAIGN FOR TIBET, Apr. 24, 2019, <https://savetibet.org/as-panchen-lama-turns-30-china-must-release-him-and-stop-interfering-in-tibetan-religious-freedom/> [<https://perma.cc/9S3L-4N44>].

- ***Fayuan* decisions according to administrative and not legal standards.**

Throughout their book *Embedded Courts*,²¹⁵ Kwai Hang Ng and Xin He provide example after example of *fayuan* not only putting legal standards to one side when deciding, but doing so openly and unapologetically. Consider what counts as a difficult divorce case and how an adjudicator deals with it:

The determined wife indicated that she would commit suicide if her petition was denied. Yet the threat to resort to violence by the husband was realistic. After several interviews with both parties, the judge was still unsure about what they would do if the verdict did not go their way. She decided to stall.²¹⁶

The adjudicators knew exactly what they were doing and did not hide it:

Perhaps one of the most poignant findings of our study is that judges' self-assessment of the culture of their own courts is not strongly legal-oriented at all. Chinese judges do not see their courts as particularly legalistic. Most of them believe that the law is just one among many factors that their superiors consider when making decisions.²¹⁷

The point of all these examples is not that they necessarily happen frequently, but that they happen relatively openly. They show that to participants themselves, they are not mistakes or signs of immaturity in the system. They are normal, functioning features of the overall order maintenance system.

G. *The problem with court-centered objections*

Unless I have simply been too unimaginative, I think that most of the objections that might be made would center on the functioning of the *fayuan*. My overall answer would be that I am suggesting that we reconsider Chinese order maintenance institutions in a way that, unlike the rule of law model, is not *fayuan*-centric. The "order maintenance" model asks us to view *fayuan* as just one of a number of order maintenance institutions, all engaged in a similar pursuit; the phenomenon of "grand mediation" is an example of this.²¹⁸ To accept observations about *fayuan* as conclusively disproving the "order maintenance" model would be to concede the validity of precisely that model that the "order maintenance" model aims to displace.

To this, it could of course be objected that I have simply defined away the possibility of disproof: nothing anyone could say about *fayuan*, no matter how true, can invalidate the "order maintenance" model. In a sense this is a fair objection, but it highlights the very nature of paradigms: they cannot be conclusively proved or disproved. They offer different ways of understanding phenomena, and ultimately it comes down to the question of which way seems, for

²¹⁵ NG & HE, *supra* note 41.

²¹⁶ *Id.* at 131.

²¹⁷ *Id.* at 118.

²¹⁸ See generally Keith Hand, *Resolving Constitutional Disputes in Contemporary China*, 7 EAST ASIA L. REV. 51, 143-46 (2011).

whatever reason, to be more convincing. To the extent there is an objective standard, it is that of which model requires the fewest tweaks and adjustments to take care of what it sees as anomalies.

H. Who says that “legal” institutions have to be about rule enforcement?

I have noted above that central to the concept of “legal” in this paper is the notion of rule enforcement. It might be asked by what authority I proclaim that to be so. To ask about authority, however, mistakes the ground I am on. Propositions of law and perhaps religion are validated via their source in authority, but not propositions of many other kinds. The test of the validity of my concept of the legal is whether it serves a useful purpose and is reasonably consistent with the understandings of many people, if not necessarily everyone.

What counts as a useful purpose will, of course, be different to different people. Different disciplines and different fields of human activity have different aims and methodologies, so there is no need to come up with a single answer that will work for all. Anthropologists, for example, might have one thing in mind when they talk about “legal” institutions; they typically favor very wide definitions and criticize narrow definitions on the grounds that they exclude something or other that the critic wants to count as “legal” and wants to include in the set of comparable things.²¹⁹

But a court in country A trying to decide whether to enforce a document from country B saying that X should pay money to Y has to decide whether that document is a “legal” document or not. It cannot make that decision without having some notion of what “legal” ought to mean *for the purposes of making that decision*. And it should explicitly face a question that is typically not addressed in anthropology because anthropological knowledge does not value adversarial argument as its main means of advancing the goals of the field: who should bear the burden of proof? Is it up to those who say institution X is a legal institution to prove it is, or is it up to those who say it isn't to prove it is not?

We typically do not pay a lot of attention to this question in cross-border litigation because the answer seems obvious. If someone presents a U.S. court with a judgment from the Supreme Court of Canada, nobody is going to say that that person bears the burden of proving that the Supreme Court of Canada is a “judicial” organ. Unless the defendant presents a particularly compelling argument that it is *not*, then the U.S. court will treat it as if it is.

But should that be the case for all countries? Surely not; not least because they do not all speak English, and will refer to their institutions with non-English words. We then have to understand what that institution is really like in order to be sure we have translated its name correctly, and to do that we cannot avoid having a theory of what ought to count as “legal” for these

²¹⁹ See, e.g., NORBERT ROULAND, *LEGAL ANTHROPOLOGY* (1994), who critiques a number of definitions of “law” and “legal” for being underinclusive, but does not offer his own.

particular purposes.²²⁰ Yet courts do not seem to be asking this question, instead generally taking it for granted that any state institution conventionally translated as “court” should count as one.²²¹

What should count as “court” and “law” is more than a merely academic question. Consider this description of Chinese governmental authority provided by Shen Sibao, a distinguished Chinese law professor testifying on behalf of a Chinese company in U.S. antitrust litigation:

Many official requirements are also transmitted through communications that may consist of department documents or oral directions, even including telephone calls. *It is not the form of communication that creates its binding character, but the source and authority of the party giving the direction.* Regardless of form, to the extent that these directions come from people in superior authority they are no less binding and obligatory on subordinates and the companies than any other type of “law.”²²²

In other words, in Shen’s view Chinese law is essentially a set of possibly arbitrary commands within a hierarchy. This view of law—of what a legal system is all about—is very different from the one to which U.S. courts subscribe. Legal philosopher H.L.A. Hart, in discussing what makes law law, posited the existence of a rule of recognition: a secondary rule legitimating the primary rules.²²³ The difference between a command of religion and a command of law is that the command of law has been produced through a particular process. The rule of recognition allows us to distinguish legal rules from non-legal rules.

In the view of Chinese law urged by Shen, and presumably endorsed by the Chinese government, there is no process-based rule of recognition. The rule of recognition is simply, “Is the person giving this order my superior?” This picture of Chinese order institutions is consistent with

²²⁰ This seems to me to be a fatal objection to Brian Tamanaha’s attempt to finesse the question of how to define “law” by deferring to whatever people in a given culture consider “law”: “Law is whatever people identify and treat through their social practices as ‘law’ (or recht, or droit, and so on).” Brian Z. Tamanaha, *A Non-Essentialist Version of Legal Pluralism*, 27 J. L. AND SOC’Y 296, 313 (2000). The casual parenthetical conceals the fundamental problem: on what basis, if not his own conception of law, did Tamanaha decide that “recht” and “droit”—and not, for example, “Fußball” or “critique littéraire”—were the terms to which we should look in Germany and France? On what grounds could he object that the latter terms were incorrect translations? What would he do when confronted with a society in whose language “the terms ‘law’ and ‘judicial’ do not feature” (ROULAND, *supra* note 219, at 293)? The technique does not work with any society that does not speak English, since we have to apply our own understanding of “law” in order to determine which, if any, words in the foreign language are appropriately translated as “law.”

²²¹ I cannot of course say that this is always so. But I cannot find cases where the question of whether the foreign judgment-issuing body should count as a court was at issue.

²²² Report of Professor Shen Sibao, Feb. 19, 2009, *In re Vitamin C Antitrust Litig.*, 2009 WL 5133512 (E.D. N.Y.) (No. 06MD01738) (emphasis added). That case ultimately went to the Supreme Court as *Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co.*, 138 S. Ct. 1865 (2018).

²²³ See Scott J. Shapiro, *What Is the Rule of Recognition (and Does It Exist?)*, in *THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION* 235, 236–39 (Matthew Adler et al. ed., 2009).

the quasi-military model espoused by some scholars of Chinese law.²²⁴ But it is not clear we should call this a legal system.

VI. Conclusion

This article has argued that Chinese institutions conventionally described using the vocabulary of law are better understood through a different theoretical lens: that of order maintenance more broadly, or stability maintenance (in the specific Chinese sense of the term) more narrowly. Viewed through that lens, phenomena that appear anomalous when interpreted through a legal lens—for example, the lack of legal education of a Supreme People’s Court president—appear normal and expected. His lack of legal training becomes as remarkable in that position as his lack of musical or athletic training.

If this understanding is correct—or perhaps I should say, “if useful or persuasive,” since paradigms are not judged by their objective correctness—it constitutes a counter-narrative to the story of steady legal institution-building in the post-Mao era. It suggests that underneath the apparent reforms, there are significant continuities. The analysis rests not on ephemeral snapshots of the eternal cycling of *fang* (放) and *shou* (收)—liberalization and repression—but rather on features of Chinese order maintenance institutions that have existed for decades. And it should not be surprising that such features exist and are important; order maintenance institutions are closely tied into the overall political system, and the overall political system displays important and enduring features—to take an obvious example, the pervasive hegemony of the CCP—that have not changed since 1949.

To be sure, China has seen vast changes, both from 1949 and from 1979. The argument presented here does not deny these changes, but suggests interpreting them through a different lens. To measure them on a rule-of-law axis implies a goal that has never been there. What China has been building for the last forty years are order maintenance institutions.

The analysis presented here has implications for our understanding of authoritarian governance beyond just China. It is still customary to view authoritarian, non-democratic states as being on a spectrum from no rule of law at one end, perfect rule of law at the other, and “rule by law” in the middle. And to the extent they are reasonably stable and have institutions that look like familiar legal institutions, “rule by law” is how they tend to be characterized.

But “rule by law” turns out to be a thin and unsatisfactory concept: as Cheesman remarks, it is nothing more than a “poor man’s rule of law.”²²⁵ Applying this label amounts to saying not much more than that the institutions in question don’t measure up to the rule-of-law standard. That all may be accurate. But surely China cannot be the only jurisdiction for which alternative paradigms might be more helpful. We must learn to look for the apparent outliers, the errors and imperfections, and to ask ourselves whether they can be incorporated into a paradigm that treats

²²⁴ See, e.g., STEPHENS, *supra* note 64.

²²⁵ See *supra* note 49 and accompanying text.

them as normal and expected. We might well find that the variety of human institutions is far richer than we had imagined.