Innovation Through Interpretation: How Judges Make Policy in China

Zhiyu Li*

This Article studies judicial innovation and diffusion in civil law jurisdictions, with a focus on China. It examines the lawmaking function of the Chinese judiciary, in particular, the interaction between the Chinese Supreme People’s Court and lower courts in innovating legal doctrines in response to social needs. The fruit of this inquiry should be of interest to researchers seeking a theoretical understanding of the development of Chinese law and to practitioners who are trying to predict legal and regulatory trends in China.

Since the 1980s, the confluence of two factors, the norm of judicial openness and the medium of the Internet, have made prior judicial decisions an accessible and convenient resource for Chinese judges, who are confronting hard cases or novel situations. The accessibility of decided cases provides judges with an avenue to consult their peers throughout the country on legal interpretation. These decisions serve as a forum for political communication between courts that indicate the acceptability and feasibility of policy innovations in the law. To elucidate the techniques that Chinese judges employ to make policy innovations in a jurisdiction that is statute-based, I deploy a multi-faceted approach that encompasses case studies, as well as surveys and interviews among Chinese judges and law clerks. This Article aims to demonstrate that judges operating in a jurisdiction rooted in the civil law tradition are, nevertheless, able to render the law more responsive to societal conditions through artful statutory interpretation. In addition, judicial innovations in China survive due to the silent and incremental assimilation of prior judicial decisions into Chinese judicial decision-making. Some of these innovations might, however, fade because of political pressure or the transience of the social conditions that gave rise to them.

I. INTRODUCTION ................................................................. 328
II. TRADITIONAL AND CREATIVE INTERPRETATION: STABILITY WITH CHANGES ......................................................... 334
   A. Interpretation in Chinese Law ........................................... 334
   B. The Incentives of Judicial Innovation in China .................. 339
III. THE CREATION AND ADOPTION OF LEGAL DOCTRINES IN CHINESE COURTS ....................................................... 342
   A. Maintaining Social Order: Changing Convictions to Reach a Harsher Punishment Against DUI Crime ............ 343

* © 2018 Zhiyu Li. Post-Doctoral Global Fellow, Hauser Global Law School Program, New York University School of Law, zl32@nyu.edu. The author is grateful to Ira Belkin, Benjamin Chen, Donald C. Clarke, Jerome A. Cohen, Liqiang Ding, Nuno Garoupa, Yandong Gao, Peter Lindseth, Cornell Mallory, Laurent Mayali, Martin M. Shapiro, Frank Upham, Rachel Stern, Vilija Vėlyvytė, Joseph H. H. Weiler, and Shangdong Yang for their insightful comments on this and earlier versions of this Article. This Article also benefited greatly from the stimulating discussions of the participants at the 2017 Annual Meeting of American Society of Comparative Law and the Global/Emile Noël Fellows Forum at NYU.
B. Handling New Situations: The Adjustment of Sentences in Entering a Lenient Ruling for ATM Theft

IV. When Judicial Innovations Survive or Fail in China
   A. Judicial Diffusion of Policy in China
      1. The Vertical and Horizontal Influence of Previous Judgments
      2. Empirical Studies on Transmission of Judicial Decisions
         a. Surveys of Judges’ Views on Previous Judgments
            i. Research Design
            ii. Results and Analysis
         b. Interviews with Judges and Law Clerks
            i. The Nature and Function of Guiding Cases
            ii. Choosing Among Prior Judicial Decisions for Reference
            iii. The Problem and Proposed Solutions of Implementing Guiding Cases

B. The Pitfall of Judicial Innovations in China

V. Conclusion

APPENDICES

I. Introduction

As a form of policy innovation, judicial innovation occurs whenever a jurisdiction adopts a new policy—more specifically, a new rule or doctrine.1 The impetus for judicial innovations is either given by internal forces within the jurisdiction, such as the lobbying efforts of interest groups and institutional forces of legislatures, or by the spread of innovations from one jurisdiction to another.2 The process by which jurisdictions learn from each other’s policies is often referred to as

---
2. Shapin & Volden, supra note 1, at 841.
“judicial diffusion” or “neighborhood effects.” The transmission and adoption of policy through the use of precedent by the courts has been widely studied in common law countries. Legal scholars, in the United States, have explored the spread of judicial innovations in the common law, such as the strict liability rule for manufacturing defects, and in statutory interpretation, like hostile work environment standards under a federal sexual harassment statute. Regrettably, scant attention has been paid to the latitude that courts have in creating and propagating legal doctrines in civil law countries, such as China.

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

---


6. Moyer & Tankersley, supra note 1, at 784-98.


holdings in earlier cases, or precedents, to find the law.\textsuperscript{9} Thus, it is frequently asserted that judges exert more influence over policy making in common law systems than in civil law ones.\textsuperscript{10} However, the significant convergence between common law and civil law systems in the use of previous judicial decisions since the late twentieth century has been widely recognized.\textsuperscript{11} One of the reasons for this convergence is that the “legal system has to accept that it makes mistakes in the formulations of rules and that it needs to adapt to changing conditions.”\textsuperscript{12} Although the power to make laws is still vested in the legislative body, the policies created and adopted by judges started playing a crucial, but unacknowledged, role in the development of law in many civil law countries.\textsuperscript{13} For example, creative interpretation of the code in France (création du droit) may occasionally go beyond the wording of the codified law and adapt its spirit to changing societal developments.\textsuperscript{14} In Germany, the influence of “unofficial judge-made law” (inoffizielles Richter-recht)\textsuperscript{15} on subsequent decisions has been recognized in cases arising under statutes that lack detailed regulations.\textsuperscript{16} Similarly, judges in Japan cannot only create and follow previous judicial decisions with

\textsuperscript{9} “Civil law differs from common law because judicial decisions are generally not a source of law and the doctrine of stare decisis does not formally exist.” Louis F. Del Duca, Developing Global Transnational Harmonization Procedures for the Twenty-First Century: The Accelerating Pace of Common and Civil Law Convergence, 42 TEX. INT’L L.J. 626, 646 (2007); see also Peter de Cruz, Comparative Law in a Changing World 44, 46 (1995).

\textsuperscript{10} See G. Alan Tarr, Judicial Process and Judicial Policymaking (1990); see also John Henry Merryman, The Civil Law Tradition 22-23 (2d ed. 1985).


\textsuperscript{12} John Bell, Comparing Precedent, 82 CORNELL L. REV. 1243, 1245 (1997).

\textsuperscript{13} Id. at 1248.

\textsuperscript{14} According to a study of judicial lawmaking on tort liability, “French judges do not struggle to extract holdings from prior cases, but to formulate as precisely as possible the applicable case-law rule.” Edward A. Tomlinson, Tort Liability in France for the Act of Things: A Study of Judicial Lawmaking, 48 L.A. L. REV. 1299, 1357 (1988); Jan Komarek, Precedent and Judicial Lawmaking in Supreme Courts: The Court of Justice Compared to the US Supreme Court and the French Cour de Cassation, 11 CAMBRIDGE Y.B. EUR. LEGAL STUD. 399, 399, 415 (2009); see, e.g., Pascale Deumier, Création du Droit et Rédaction des Arrêts par la Cour de Cassation, 50 ARCHIVES DE PHILOSOPHIE DU DROIT 49 (2007).

\textsuperscript{15} Franz Bydinski, Hauptpositionen zum Richterrecht, 40 JURISTENZEITUNG 149 (1985); see also Eduard Picker, Richterrecht oder Rechtsdogmatik—Alternativen der Rechtsgewinnung?, 43 JURISTENZEITUNG 1 (1988).

\textsuperscript{16} By examining the “settlements,” “resolved cases,” and “published decisions” handed down in nine German labor courts of appeal from 1980 to 1998, an empirical study reports that “[German] judges engage in law-making by interpreting the statute law in particular ways and by applying this interpretation consistently in future cases.” Martin R. Schneider, Judicial Career Incentives and Court Performance: An Empirical Study of the German Labour Courts of Appeal, 20 EUR. J.L. & ECON. 127, 130-31 (2005).
precedential value to fill the gaps left by codes and statutes but can also incorporate the “sense of society”\(^\text{17}\) into their statutory interpretation to innovate legal norms in response to changing societal conditions.\(^\text{18}\) These collective judicial innovations are mostly driven by the publication and transmission of prior judicial decisions in civil law countries.\(^\text{19}\) In France, for example, most decisions of the Cour de cassation are published in official bulletins, and the very important ones are often accompanied by the opinions of a reporting judge; in addition, French academic journals publish selected cases decided by courts at all levels and invite law professors to give commentaries, globally referred to as \textit{la doctrine}, on influential cases.\(^\text{20}\) German judges can also easily locate and read decisions given by other federal courts, through courts’ libraries, official series edited by court members, nonofficial digests, academic journals, and various legal databases (e.g., Juris).\(^\text{21}\) A culture of citing decided cases has been established and maintained in the German legal system.\(^\text{22}\) Similarly, in Japan, a dual structure of the case law system is formed by a

\(^{17}\) Mitsukuni found that judges in Japan often justified an interpretation or modified construction of a relevant code, statute, or constitution by using the phrase “the sense of society” (\textit{shakai tōsen}). Mitsukuni Yasaki, \textit{Law and Shakai-Tōsen as a Legal Form of Consensus Idea}, 29 Osaka L. Rev. 1, 1 (1981).


\(^{21}\) “Judgments by the lower courts are published less often than those by the federal courts or the highest courts of the federal states. Whether or not a lower court decision is published depends on many factors, such as deviation from precedent.” Kiel Robert Alexy & Gottingen Ralf Dreier, \textit{Precedent in the Federal Republic of Germany}, in \textit{Interpreting Precedents: A Comparative Study}, supra note 11, at 22.

\(^{22}\) Ninon Colneric, \textit{Guiding by Cases in a Legal System Without Binding Precedent: The German Example}, Stanford L. Sch.: China Guiding Cases Project (June 19, 2013), https://cgc.law.stanford.edu/commentaries/7-judge-colneric; see also Alexy & Dreier, supra note 21, at 23 (“It is not easy to find a decision in the official series edited by members of the highest courts that does not contain any reference to precedents. If one takes a look into the respective ten latest volumes, it will be recognized that a very high percentage of published decisions refers to precedents.”).
vast amount of precedent, some of which can be directly applied as “binding rules,” and the rest of which can be indirectly interpreted as decisive ratio decidendi to guide future judicial decisions. Relatedly, an emerging trend in China has mirrored the impetus for these judicial innovative activities carried out in other civil law countries—the publication and transmission of prior judicial decisions.

The legal system of contemporary China is rooted in continental legal tradition and its lawmaking power is solely vested in the legislative branch. As judicial decisions are not considered a source of law in China, decided cases were, for a long time, not available to the public including those in the legal profession. In the early stage of research on statutory interpretation, Chinese scholars mainly focused on interpretation methods and deductive reasoning under civil law tradition to explain the techniques of statutory interpretation that judges applied in cases. The judicial role in Chinese policymaking was, therefore, rarely studied. However, the norm of judicial transparency and rise of the Internet, since the 1980s, have resulted in prior judicial decisions being made easily accessible both in print and online. These decisions became an avenue for judges, who are confronting hard cases or novel situations, to consult each other on the interpretation of law. This recent development has also shifted scholars’ attention to the role that judicial agents play in response to the needs of society. For example, Liming Wang argued the active role that judges play in judicial decision-making is inevitable during the transitional period of Chinese society. Similarly, Nicholas Howson elucidated the creativity and power of Shanghai courts to stretch the application of law in order to provide justice. That said, Shanghai judges “make law” based upon their autonomous conception of who or what the statutory framework is designed to serve, devise non-statutory legal standards for application of corporate law doctrine, and

create remedies out of whole cloth.”

Donald Clarke, in *Legal Innovations in Asia*, illustrated the way that courts, especially the Chinese Supreme People’s Court, innovated Chinese corporate law both in defendant-friendly and plaintiff-friendly directions. Furthermore, by looking at the ways in which Chinese legal professionals use non-guiding cases as a source of reference, Susan Finder gauged the value of those cases in shaping the development of Chinese law. Based on her findings, lawyers in China not only search prior judicial decisions to determine where to file the case but also frequently submit or mention a relevant, decided case at the hearing. In light of the findings of previous scholarly work, this Article examines the relationship between the Chinese Supreme People’s Court and lower courts in innovating the law: the latter providing the raw material or inspiration that the former uses to prepare formal innovation in the form of normative documents. The key questions of this Article are, first, the techniques that Chinese judges employ to make policy innovations in a statute-based jurisdiction, and, second, the conditions necessary for judicially initiated policy innovations to survive in China.

To elucidate these issues, I begin by reviewing the theory and practice of Chinese statutory interpretation, the use of sources and methodology, in particular. I, then, describe and account for the silent and incremental assimilation of prior judicial decisions into Chinese judicial decision-making in Part II. The case studies selected involve driving under the influence (DUI) and ATM theft. Both case studies have several elements in common: they involve the judicial interpretation of a

30. Id. at 349.
31. Clarke took the piercing of the corporate veil as an example. As the first Chinese company law promulgated in 1994 contained no exceptions to the limited liability of corporate investors, fraud perpetrated through the vehicle of undercapitalized companies became widespread and gave rise to a social issue that the courts could not evade. The Chinese courts gradually formulated a rule that made certain investors liable for corporate debt. This regime received official affirmance through codification in the 2015 amendment to the Chinese company law. Donald Clarke, *Judicial Innovation in Chinese Corporate Law, in Legal Innovations in Asia: Judicial Lawmaking and the Influence of Comparative Law*, supra note 18, at 259-72.
32. Non-guiding cases refer to cases that have not been published as guiding cases by the Chinese Supreme People’s Court. Those cases are not required to be cited and do not have any binding force. Finder described those cases in her article as a type of soft precedent. Susan Finder, *China’s Evolving Case Law System in Practice*, 9 *Tsinghua China L. Rev.* 247, 247-58 (2017).
33. Id.
34. Id. at 254-55.
statute that is no longer responsive to the broader social and cultural environment, the re-articulation of this interpretation by other courts, and, finally, the legislative amendment of the statutes. The sequential adoption of a judicial decisions is, however, not necessarily indicative of the influence of sister courts. For example, the spurt in judicial policymaking activity that is exemplified in the two case studies may have been induced by common social trends: the popularization of cars and ATMs in China over the past decades. Hence, to supplement these case studies, I fielded surveys to approximately 400 Chinese judges hailing from ten Chinese regions and interviewed several judges and law clerks on their views about the legal status of prior judicial decisions. The final part of this Article reports the findings of these surveys and interviews and discusses both the conditions necessary for judicial innovations to survive in contemporary China and the problems those innovations may face during the process of transmission.

II. TRADITIONAL AND CREATIVE INTERPRETATION: STABILITY WITH CHANGES

A. Interpretation in Chinese Law

The Chinese legal system is built upon the study and transplantation of Japanese, German, and Taiwanese legal concepts, which follow civil law traditions. Unlike common law countries, where the principle of stare decisis requires judges to follow higher courts’ decisions as binding authority and consider sister courts’ judgments as persuasive, judicial decisions are not a source of law in civil law countries. In addition, China vests its legislative power in the National People’s Congress (NPC) and NPC’s Standing Committee. As such, the traditional key role of Chinese judges is in interpreting the law, rather than making the law.

In China, there are three types of official interpretation of the law: legislative interpretation, judicial interpretation, and administrative

---


interpretation. Legislative interpretation is issued by the Standing Committee of the NPC in order to further define “the specific meaning of any provisions of a law” or to clarify “the basis application of the law” when new circumstances arise. Judicial interpretation is undertaken by the Chinese Supreme People’s Court in response to “questions involving the specific application of laws and decrees in court trials.” Judicial interpretations normally take the form of interpretation, provision, reply, or decision. The Chinese Supreme People’s Procuratorate has a similar power to interpret questions about laws that arise in the work of procuratorates. As for any other issues regarding the application or implementation of laws, the State Council and the relevant departments provide administrative interpretation. Although both the Constitution and the Legislative Law only emphasize the interpretative powers of NPC’s Standing Committee, judicial interpretation by the Chinese Supreme People’s Court has full legal force and is required to be cited when used as the legal basis of judgments. This Article lays its main focus on statutory interpretation, which has a much wider range of interpretation than judicial interpretation. It includes the interpretation of law made by judges sitting at all levels of court from all regions of China, especially those interpretations that lack official legal force.

40. Id. art. 1.
41. Id. art. 2.
42. Judicial interpretations on the specific application of a certain law in trial work or the application of a law in the trial of cases of a certain category or a certain kind of problem shall be made in the form of “interpretation.” Judicial interpretations on the formulation of the norms or opinions that are necessary for trial work on the basis of the legislation’s spirit shall be made in the form of “provision.” Judicial interpretations on the requests for instructions on the specific application of law in trial work by the higher people’s courts or the Military Court of the PLA shall be made in the form of “reply.” The amendment or abolishment of judicial interpretations shall be made in the form of “decision.” Zuigao Renmin Fayuan Guanyu Sifa Jieshi Gongzuo de Guiding (最高人民法院关于司法解释工作的规定) [Provisions of the Supreme People’s Court on the Judicial Interpretation Work] (promulgated by Supreme People’s Court on Mar. 9, 2007, effective Apr. 1, 2007), art. 6, http://en.pkulaw.cn/display.aspx?cgid=89508&lib=law.
43. Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Jiaqiang Falv Jieshi Gongzuo de Jueyi, supra note 39, art. 2.
44. Id. art. 3.
45. Zuigao Renmin Fayuan Guanyu Sifa Jieshi Gongzuo de Guiding, supra note 42, art. 5.
Interpretation of the law in contemporary China focuses on the text of written statutes and takes extrinsic factors as supplementary. One of the mainstream theories of statutory interpretation illustrates interpretation methods in both the narrow and broad sense.\(^\text{46}\) The narrow sense of statutory interpretation refers to methods to determine the meaning of a statute that falls within the scope of the text.\(^\text{47}\) It applies when a pertinent statute exists for the case at issue.\(^\text{48}\) Three main methods of interpretation are included: literal, logical, and sociological.\(^\text{49}\) Literal interpretation emphasizes the definitions of words, the concepts, and the texts of the law,\(^\text{50}\) while logical interpretation deduces the meaning of the law from context, legislative intent, history, and analogy.\(^\text{51}\) In some particular circumstances, the social consequences that an interpretation of the law may incur are also taken into consideration.\(^\text{52}\) Statutory interpretation, in the broad sense, covers two additional methods, judgment by value and gap filling, which facilitate judges in handling cases when the law is vague, overly general, or silent.\(^\text{53}\)

In China, legal professionals and the public have increasingly acknowledged the importance of statutory interpretation in delivering justice in various cases. For example, in a product liability case, a professional anti-counterfeiting investigator, who knowingly bought counterfeit products, sued for punitive damages.\(^\text{54}\) According to the Law on the Protection of Consumer Rights and Interests (Consumer Law), punitive damages are, however, only awarded to consumers.\(^\text{55}\) In determining whether the investigator qualifies as a consumer, different interpretation methods give different answers. If a judge finds that the relevant consumer law provisions are clear, then statutory interpretation

\(^{46}\) See WANG LIMING & WANG YEGANG, FALV JIESHIXUE DUBEN [THE CONCISE BOOK OF LEGAL HERMENEUTICS] (2014).

\(^{47}\) Id. at 25.

\(^{48}\) Id.

\(^{49}\) Id. at 26-28, 44-45.

\(^{50}\) Id. at 26-27, 45-68.

\(^{51}\) Id. at 27-28, 68-150.

\(^{52}\) Id. at 28, 151-65.

\(^{53}\) Id. at 28-30, 167-262.


in the narrow sense leads.\textsuperscript{56} When literal interpretation applies, the investigator would not be deemed a consumer because he did not purchase the commodity for daily consumption.\textsuperscript{57} When logical interpretation applies, the investigator’s rights shall be protected because the intent of the promulgation of the Consumer Law is to serve the rights of commodity purchasers and to maintain the order of society and the commercial market.\textsuperscript{58} Protecting purchasers from receiving defective goods is one of the main purposes of the Consumer Law.\textsuperscript{59} Furthermore, the amendment to the Consumer Law issued in 2013 added a statement to article 23, making defects that violate the mandatory provisions of the law subject to liabilities under the law even when the consumer knew about defects at the time of purchase.\textsuperscript{60} This change can be interpreted as a reinforced remedy against defective products based on the mischief

\textsuperscript{56} Liming & Yegang, supra note 46, at 25.

\textsuperscript{57} “The rights and interests of consumers purchasing and using commodities or receiving services for daily consumption shall be protected by this Law; or be protected by other applicable laws and regulations if this Law is silent.” Zhongguo Renmin Gongheguo Xiaofeizhe Quanyi Baohufa (2013 Xiuzheng) [Law of the People’s Republic of China on the Protection of Consumer Rights and Interests (2013 Amendment)] (promulgated by Standing Committee of the National People’s Congress, Oct. 25, 2013, effective Mar. 15, 2014), art. 2, http://en.pkulaw.cn/display.aspx?cgid=211792&lib=law.

\textsuperscript{58} “This Law is developed for the purposes of protecting the lawful rights and interests of consumers, maintaining the order of society and economy, and promoting the sound development of the socialist market economy.” Id. art. 1.

\textsuperscript{59} Id.

rule. In addition, from a sociological perspective, denying the rights of a private investigator, who purchased defective goods, provides commercial suppliers with a strong defense to avoid liability. Preclusion of an investigator from the protected group of consumers may cause adverse social effects that delay the improvement of the quality of goods. Through logical or sociological interpretation, the investigator is likely to win the case. Lastly, if a judge determines the consumer law to be ambiguous or silent as to whether investigators are protected consumers, the judge would have the discretion to fill the statutory gap and enter a judgment accordingly. Under this circumstance, one may find the result of this case hard to predict.

Theoretically, one may expect judges to have little discretion under a system in which all laws are codified. In practice, the interpretations of an identical statute by different judges or under different interpretation methods frequently lead to vastly distinct legal outcomes. The phenomenon in which judgments are split in cases of the same nature commonly exists in China and has triggered massive concern as to the fairness and consistency of judgments. Take the judicial outcome of cases against female defendants, who were long-term victims of domestic violence, as an example. Before the Opinion on Handling Criminal Cases of Domestic Violence in Accordance with Law was promulgated, the sentences that judges imposed on defendants, who fatally retaliated against their domestic abusers, ranged from the death penalty to three or even fewer years' imprisonment with suspension.

The split of judgments in like cases decided in different trials, courts, or

62 Id. at 28-30, 167-262.
66 Xu, supra note 64, at 42.
regions demonstrates a common phenomenon in the Chinese judicial system: when the law is no longer suited to the current societal conditions, some judges still strictly applied the law while some did not. A statute-based jurisdiction that does not grant judges any lawmaking power may give them even more discretion, because those judges are not required to follow case law when the pertinent statute is silent. Therefore, a close examination of the role of Chinese judges would have important implications for legal researchers and practitioners in understanding and predicting the development and future trends of Chinese law.

B. The Incentives of Judicial Innovation in China

Civil law tradition requires judges to strictly interpret written statutes. However, this concept is not ideal because “the meaning of a word or phrase in a statute is not a matter of definitional possibilities but of statutory context.” 67 Although “a judge might commend himself to the most rigid principle of adherence to” the law, the language of statutes or even the judge’s own decisions will have materially different meanings with the passage of time, a change in context, or choice of geographical jurisdictions. 68

As Sam Jones said, “There was never a more sterile controversy than that upon the question whether a judge makes law. Of course, he does. How can he help it?” 69 Since “the best of draftsmanship leaves both gaps to be judicially filled and hidden ambiguities and uncertainties to be judicially resolved,” 70 judges are bound to incorporate their own social and economic philosophy into statutory interpretation to fill those gaps and clarify the uncertainties. 71 In addition, the uncertainty of written statutes is, to some extent, desirable: if law can provide an automatic and predictable outcome, then the disputing parties neither need lawyers to pursue cases based on their professional skills and experience, nor judges to apply and interpret the pertinent law to cases and enter just rulings. If the potential losing party knew the judicial outcome in advance, he or she would not waste time and money on litigation. 72

sometimes intentionally leave ambiguities in statutes at the time of drafting for the interpreters or enforcers of the law to fill in based on their expertise and experience. Courts at all levels, then, act as “fire alarms” that draw the attention of legislatures to the most troublesome statues and legal issues. Judicial decisions can, thus, function as a tool for judges to gather information about the social consequences of a judicially created innovation and, in the meantime, to gauge public support for future legislative amendments. These decisions and their public feedback indicate to legislatures when they should step in and issue a new law.

Due to rapid changes in China’s social, economic, and legal environment, many statutes drafted and promulgated during the early days of the People’s Republic of China are no longer suited to the circumstances of contemporary China. Courts, unlike legislatures, frequently confront statutory vagueness or imperfections in the course of adjudication. In a hierarchical judicial system, the higher the level of the court for which a judge is serving, the more difficult the legal questions the judge may encounter in daily adjudication. Because legislatures cannot predict every situation that will happen in the future, judges sometimes are allowed to or even meant to fill gaps and fix flaws in statutes through interpretation on a case by case basis. For example, a local court in Nantong City, in determining whether a worker injured by an electric bicycle was entitled to certain welfare benefits, relied on a non-binding administrative document to broaden the definition of “motor vehicle” in the Road and Transportation Law. A more recent example spurring questions of statutory interpretation is the legal definition of a firearm. In December 2016, a game-stall operator was sentenced to

---

73. See id.
three and a half years in prison by a local court due to her private ownership of balloon-popping guns, which were determined to be “firearms” within the meaning of the statute.  

This prominent case decision has drawn immense public attention and calls for an amendment to the firearm law of China. According to China’s gun identification standard, which took effect in 2010, any nonstandard gun with a muzzle energy greater than 1.8 joules per square centimeter shall be considered a real firearm.

“The energy of 1.8 joules per square centimeter is like throwing a handful of beans across a table at someone,” according to a defense lawyer, whose client, in a similar case, had received a life sentence for smuggling restricted guns bought online from a Taiwanese seller. Having realized the firearm standard was too stringent, the appeal court suspended the sentence, based on the fact that the defendant had no criminal intent.

“Distant water cannot put out a nearby fire” is an old Chinese saying quoted by Dong and Tang to describe the significance of judicial innovations in China. They imply that expecting a legislative amendment to fix the ambiguity and flaws in statutes would not allow judges to solve problems raised by hard cases in a timely manner. As Donald Clarke argued in his article,
Chinese Courts do innovate . . . because courts have to resolve the disputes that come before them. The applicable law will not always be clear. In that case, courts are left with no choice but to innovate. We even see courts innovating to reach a result unambiguously contrary to that called for by existing law.84

Moreover, compared to legislative amendments, innovative solutions reached by judges in one case are more flexible and easier to adjust based on public feedback in another like case. This function of judicial decisions confirms the political theory of incrementalism that Martin Shapiro introduced into the law in the 1960s.85 Instead of making a few dramatic changes, incrementalism endorses many small and incremental changes to the status quo in order to work out a better solution.86 The mixed application of traditional and creative statutory interpretation by Chinese judges yields gradual changes to written statutes through adjudications in response to social needs. The silent and incremental assimilation of prior judicial decisions into judicial decision-making allows subsequent judges to either adopt judicially initiated policy innovations or to retract those innovations without excessive loss if unexpected trouble is indicated.87

III. THE CREATION AND ADOPTION OF LEGAL DOCTRINES IN CHINESE COURTS

The following Part discusses cases in which the judicially created policies were first precipitated by individual judges, then adopted by other judges in similar cases, and finally affirmed by official judicial interpretations or legislations.88 Because written statutes constitute the

84. Clarke, supra note 31, at 271.
85. The theory of incrementalism was originally developed by Lindblom and was mostly utilized in the process of political and economic decision-making. David Baybrooke & Charles E. Lindblom, A Strategy of Decision: Policy Evaluation As a Social Process (1963); see also Richard M. Cyert & James G. March, A Behavioral Theory of the Firm (1963).
86. Baybrooke & Lindblom, supra note 85.
major legal sources in China, this Part illustrates how judges interpret within and beyond the bounds of statutes and how subsequent judges follow those innovative interpretations in later, similar cases. Influenced by civil law tradition, Chinese judgments are generally terse, lack detailed legal reasoning, and rarely cite any cases. As such, it is hard to identify the connections between decisions by analyzing the citation pattern of judicial decisions. To demonstrate the relationship between local courts and the Supreme People’s Court, I have selected a series of cases in which the Chinese Supreme People’s Court either published local court cases as typical cases or promulgated an official judicial interpretation based on those local courts’ decisions. The policy innovations developed by courts in DUI and ATM cases, following the popularization of cars and ATMs in China since the 1990s, demonstrate a bottom-up lawmaking process that starts in local courts and moves all the way up to the Supreme People’s Court and even to legislators. Taken a closer examination among these case decisions, one may find that the subsequent courts silently adopted the early courts’ decisions without reference by including similar statements in their judgments.

A. Maintaining Social Order: Changing Convictions to Reach a Harsher Punishment Against DUI Crime

With the increasing accessibility of judicial decisions, judges in China started to expand their roles to collectively fill the gaps between the law and new situations encountered in their daily judicial work. The following series of DUI cases from 1998 to 2009 serves as an example to elaborate on this change. Facing the serious social issues that drunk drivers trigger, judges in DUI cases started to adjust their convictions of DUI offenders by applying a different provision in the criminal law to deliver a harsher sentence. In addition, by showing how subsequent judges from different Chinese regions followed the interpretation of early judges, these DUI cases demonstrate how Chinese courts incorporate an incremental form of stare decisis into their approach to statutory interpretation in response to the ever-changing legal challenges facing contemporary China.

In Zhengzhou Municipal People’s Procuratorate v. Zhang Jinzhu (1998), defendant Zhang Jinzhu was driving under the influence and hit Su Donghai and his son, Su Lei. Both were riding bicycles. The impact killed Su Lei instantly. Zhang Jinzhu, however, did not stop the car and, so Su Donghai and his bike were dragged for over 1500 meters, resulting in serious injury. The Henan Provincial Intermediate People’s Court held that Zhang Jinzhu was able to identify and control himself at the time of the accident, as he, attempting to flee, was forced to stop the car after being intercepted by several police cars. The court found that defendant, Zhang Jinzhu, violated traffic laws, resulting in Su Lei’s death, and intentionally injured Su Donghai with particularly ruthless means. The criminal circumstances were flagrant, and their consequences were extremely serious. In accordance with articles 133 and 234 of the Criminal Law of the People’s Republic of China (criminal law), the court, therefore, sentenced the defendant to death on account of traffic crime, compounded by intentional injury.


91. Id.
92. Id.
93. Id.
94. Id. Article 133 states:
Whoever violates traffic and transportation laws and regulations thereby giving rise to major accidents involving severe injuries, deaths, or great losses of public and private properties is to be sentenced to not more than three years of fixed-term imprisonment; when fleeing the scene after an traffic and transportation accident or under other particularly odious circumstances, to not less than three years and not more than seven years of fixed-term imprisonment; when running away causes a person's death, to not less than seven years of fixed-term imprisonment.

Article 234 states:
Whoever intentionally injures the person of another is to be sentenced to not more than three years of fixed-term imprisonment, criminal detention, or control. Whoever commits the crime in the preceding paragraph and causes a person’s serious injury is to be sentenced to not less than three years and not more than 10 years of fixed-term imprisonment; if he causes a person’s death or causes a person’s serious deformity by badly injuring him with particularly ruthless means, he is to be sentenced to not less than 10 years of fixed-term imprisonment, life imprisonment, or death.
In *Qingdao Southern District People’s Procuratorate of Shandong Province v. Han Wenliang (2006)*, defendant Han Wenliang, who was driving a vehicle while intoxicated, collided with a taxi. The taxi driver and two passengers were killed, and a third passenger was seriously injured. The Qingdao Southern District Basic People’s Court held that Han Wenliang violated traffic and transportation laws and regulations, thereby causing major accidents involving one severe injury and three deaths. Thus, the court held that the defendant’s behavior violated article 133 of the criminal law, and he was sentenced to six years’ imprisonment.

In *Foshan Municipal People’s Procuratorate of Guangdong Province v. Li Jingquan (2007)*, defendant Li Jingquan was driving under the influence and hit Li Jie Xia while riding her bike, and her son Chen Boyu, in her backseat, causing Chen Boyu minor injury. Disregarding the safety of the victims and the villagers, who were trying to stop him, Li Jingquan continued driving resulting in two deaths and another minor injury. The Guangdong Provincial High People’s Court held that although the defendant was driving drunk after hitting the victim, Jingquan was still able to make a U-turn. Additionally, although the wheels of the car were stuck in a flower field by the roadside, he was able to drive the car back to the road. These actions indicated that he still...
retained some of his faculties at the time of the incident.\textsuperscript{106} The fact that he attempted to flee the scene and drove toward Li Jiexia, who was already on the ground, and villager Li Xiquan, killing them both, showed that the defendant was indifferent to the casualties and held indirect intent of endangering public safety.\textsuperscript{107} Therefore, his behavior constituted the crime of endangering public safety.\textsuperscript{108} The circumstances of the crime were flagrant and the consequences were serious.\textsuperscript{109} Nevertheless, because the defendant's criminal intent was indirect, his subjective malice and person dangerousness were determined to be less serious than in cases of intentionally endangering public safety.\textsuperscript{110} The defendant shall be entitled to a mitigated sentence because of his remorse and willingness to compensate the victims' economic losses.\textsuperscript{111} Accordingly, defendant Li Jingquan was found guilty of committing the crime of endangering public safety\textsuperscript{112} and was sentenced to life imprisonment and deprived of political rights.\textsuperscript{113}

In \textit{Shenyang Municipal People's Procuratorate of Liaoning Province v. Wu Kai (2008)},\textsuperscript{114} defendant Wu Kai was driving a vehicle while intoxicated, hit a cyclist, after colliding with a bus.\textsuperscript{115} He continued to drive another 534 meters and hit victims Sun, Tong, Wang, and Zhang, killing three of the five victims and seriously injuring the remaining

\begin{itemize}
\item[106.] Id.
\item[107.] Id.
\item[108.] Id.
\item[109.] Id.
\item[110.] Id.
\item[111.] Id.
\item[112.] Id.
\end{itemize}

Whoever sets fire, breaches dikes, causes explosions, and spreads poison; employs other dangerous means that lead to serious injuries or death; or causes public or private property major losses is to be sentenced to not less than 10 years of fixed-term imprisonment, life imprisonment, or death. Whoever commits the crimes in the preceding paragraph negligently is to be sentenced to not less than three years to not more than seven years of fixed-term imprisonment; or not more than three years of fixed-term imprisonment, or criminal detention, when circumstances are relatively minor.


\textsuperscript{113} Id.


\textsuperscript{115} Id.
The Shenyang Municipal Intermediate People’s Court held that Wu Kai violated traffic and transportation laws and regulations, thereby causing major accidents, involving two severe injuries and three deaths. Due to his reckless behavior of driving a vehicle while intoxicated, defendant Wu Kai was found guilty of endangering public safety and was sentenced to seven years in prison.

In *Chengdu Municipal People's Procuratorate of Sichuan Province v. Sun Weiming (2009)*, defendant Sun Weiming drove a car without obtaining a driver’s license and repeatedly violated traffic regulations. At noon on December 14, 2008, Sun Weiming and his parents drank heavily at a relative’s birthday party. After a rear-end collision with other vehicles, while driving under the influence, Sun Weiming drove over the speed limit to escape the scene and collided with four cars. Four people were killed and one was seriously injured. The Sichuan Provincial High People’s Court held that defendant Sun Weiming had disregarded traffic regulations and public safety by driving a car for an extended period without obtaining a driver’s license and repeatedly violated traffic regulations. Furthermore, after causing traffic accidents while under the influence, he continued to drive over the speed limit and hit many vehicles, causing several casualties, thus indicating that he was inconsiderate of the occurrence of harmful consequences and harbored indirect intent of endangering public safety. His behavior constituted the crime of endangering public safety. The circumstances of the crime were flagrant and the consequences were serious. Nevertheless, Su Weiming’s culpability was lessened by the fact that he did not wish or actively pursue the occurrence of such harmful consequences. He was in a serious state of intoxication at the time of the crime, which weakened

---

116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*
his ability to reason and control his behavior.129 His attitude in confessing and repenting showed remorse, and he actively compensated the victims.130 Accordingly, the Sichuan Provincial High People’s Court found defendant Sun Weiming guilty of endangering public safety and sentenced him to life imprisonment and deprivation of political rights for life.131

Certainly, the legislatures could have reacted to changed circumstances by amending the statute, but these drafters did not see their work as needing periodic updating. The absence of a timely amendment to an outdated law often requires courts to undertake a more active role in adapting legal doctrines to changing situations. With the increasing number of cars owned by individuals from 1998 to 2008, the adverse social consequences caused by drunk-driving related crimes become more salient.132 According to police statistics, there were 5075 cases of drunk driving accidents in 1998, resulting in 2363 deaths.133 In 2008, there were 7518 accidents, causing 3060 deaths.134 There were repeated occurrences of “one accident causing multiple deaths and injuries.”135 However, the maximum penalty for drunk drivers, who caused deaths or severe injuries, remained seven years’ imprisonment under the traffic crime provision stated in the criminal law.136 Neither the Chinese legislature nor the Supreme People’s Court took quick actions to confront this situation. Facing the lacuna of the statute regarding DUI

129. Id.
130. Id.
131. Id.
133. Id.
134. Id.
135. Id.
crimes, these high-profile, provincial-level judicial decisions reached by basic, intermediate, and high courts show local judges experimenting through their decisions to test and form new policies. The early and subsequent judges, who handled DUI cases with dreadful consequences, accumulated the support of their colleagues and the public, step by step, to strengthen legal deterrence against the reckless behavior of drunk driving. Then they collectively generated a new legal doctrine that severely punishes drunk drivers in order to protect road safety. On September 8, 2009, the Chinese Supreme People’s Court held a news conference and put forward a guiding opinion on the application of law to the crime of DUI and noted *Foshan Municipal People’s Procuratorate v. Li Jingquan (2007)* and *Chengdu Municipal People’s Procuratorate v. Sun Weiming (2009)* as two typical cases of drunk driving offenses that should be used to guide judicial decisions in future similar cases. Instead of applying article 133 of the criminal law regarding traffic crimes, courts shall convict those who cause multiple causalities or

137. The Notice by the Chinese Supreme People’s Court affirmed the judgments of *Foshan Municipal People’s Procuratorate v. Li Jingquan (2007)* and *Chengdu Municipal People’s Procuratorate v. Sun Weiming (2009)* as follows:

Under general circumstances, where any drunk driving constitutes this crime, but the doer neither expects nor pursues the occurrence of the harmful consequences subjectively, that shall belong to indirect intentional crimes, and the subjective malignancy of this conduct is different from that of a direct intentional crime in which a doer maliciously hits people with a car for the purpose of creating troubles, and causes heavy casualties; therefore, the aforesaid crimes should be differentiated when the penalties are determined. In addition, when an actor drives while intoxicated, his ability of identification and control will be weakened actually, and it should be taken into consideration when the punishment is determined. For the crimes of DWI committed by the accused, Li Jingquan and Sun Weiming, the accused were not sentenced to death, but life imprisonment respectively. The courts considered that the two accused committed indirect intentional crimes. Compared with direct intentional crimes, the subjective malignancy was not so malicious, and the personal dangerousness was not so dangerous; when they committed the crimes, their abilities to control the motor vehicle were weakened; their attitudes of confession and repentance were good after they were brought to justice, and they actively compensated the victims for their economic losses and obtained the forgiveness of the victims to a certain extent. The sentencing made in the final judgments by Guangdong High People’s Court and Sichuan High People’s Court on the two accused was appropriate.

138. Id.

139. *Zhonghua Renmin Gongheguo Xingfa (97 Xiuding)* (中华人民共和国刑法 (97修
serious injuries when driving while intoxicated of endangering the public safety in a dangerous way under section 1 of article 115 of the criminal law. In addition, the Chinese Supreme People’s Court deliberately distinguished DUI crimes from direct intentional crimes “in which a person maliciously hits people with a car for the purpose of creating troubles and causes heavy causalities.” Given that drunk driver’s ability to reason and exercise self-control is relatively weak at the time of their crime, the Chinese Supreme People’s Court agreed with the courts from Guangdong and Sichuan provinces on the grounds that a life sentence would be more appropriate than capital punishment for the accused. Furthermore, driving while intoxicated shall be subject to the legal sanction of the criminal law, even without any damage caused. On February 25, 2011, Amendment (VIII) to the criminal law was issued. One provision was added after article 133: “Whoever . . . drives a motor vehicle on a road while intoxicated shall be sentenced to criminal detention and a fine.”

Although judicial decisions are not recognized as a source of law in China, they nevertheless precipitate and promote the promulgation of judicial interpretations by the Chinese Supreme People’s Court and even legislative amendments. Informed of prior DUI case decisions that took the adverse social consequences incurred by DUI crimes into consideration and made changes in offenders’ convictions, subsequent judges started to voluntarily follow what the first judge had done.

---

140. Id. art. 115.
141. Id.
142. Id.
143. Id. art. 115.
idea of incremental, step-by-step development, with each step being fully realized or complete, resembles punctuated evolution.” With more and more judicial decisions in similar cases moving in the same direction, public attention and support against drunk driving were raised and a new legal doctrine was generated over time. Within the scope of the criminal law, judges intensified the legal punishment of DUI offenders by applying another provision of the criminal law, endangering public safety, rather than following article 133 as related to traffic crime. From these DUI cases, one may observe that a judicial consensus on a new doctrine was seeded among multiple local courts. A judicial interpretation by the Chinese Supreme People’s Court and a legislative amendment regarding DUI crimes did not occur until public support for increasing drunk drivers’ legal liabilities had accumulated significantly over a decade.

B. Handling New Situations: The Adjustment of Sentences in Entering a Lenient Ruling for ATM Theft

The cases discussed are not the only examples that can be used to demonstrate the judicial creativity of Chinese local judges. Unlike DUI cases, judges handling ATM theft cases went beyond the scope of the criminal law and warranted ATM thieves a sentence much more lenient than the penalty prescribed under the criminal law. A highly controversial case first tried in the Guangzhou Municipal Intermediate People’s Court of Guangdong Province not only contributed to the lenient judgments of two sister courts but also catalyzed an amendment to the criminal law. In the Chinese two-tier trial system, this case

---

149. Article 246 is amended as follows:

Whoever steals a relatively large amount of public or private property, commits thefts many times, commits a burglary or carries a lethal weapon to steal or pick pockets shall be sentenced to imprisonment of not more than 3 years, criminal detention or control
experienced five instances until it reached a final conclusion. The case made judges, as well as the public, realize how harsh and unreasonable the relevant provision of the criminal law was. According to article 264 of the criminal law, stealing money from financial institutions can yield

and/or a fine; if the amount involved is huge or there is any other serious circumstance, shall be sentenced to imprisonment of not less than 3 years but not more than 10 years and a fine; or if the amount involved is especially huge or there is any other especially serious circumstance, shall be sentenced to imprisonment of not less than 10 years or life imprisonment and a fine or forfeiture of property.


152. Those who steal relatively large amounts of public or private property and money or have committed several thefts are to be sentenced to three years or fewer in prison or put under criminal detention or surveillance, in addition to fines; or are to be fined. Those stealing large amounts of property and money or involving other serious cases are to be sentenced to three to 10 years in prison, in addition to fines. Those stealing extraordinarily large amounts of property and money or involving especially serious cases are to be sentenced to 10 years or more in prison or given life sentences, in addition to fines or confiscation of property. Those falling in one or more of the following cases are to be given a life sentence or sentenced to death, in addition to confiscation of property: (1) Those stealing extraordinarily large amounts of money and property from financial institutions; (2) those committing serious thefts of precious cultural relics.
a sentence of life in jail or even the death penalty. Debates as to how to define “financial institutions” and how much money shall qualify as “extraordinarily large amounts” were boosted after this case came out.

In Guangzhou Municipal People’s Procuratorate of Guangdong Province v. Xu Ting (2007), defendant Xu Ting inadvertently discovered that an ATM was malfunctioning when he withdrew his salary from his debit card account, which had a balance of ¥170 (approximately $26). After discovering that the ATM could dispense money that was not limited to his bank account balance, he intentionally withdrew ¥170,000 (approximately $26,560) from the ATM. Guangzhou Municipal People’s Court first tried this case and found Xu Ting guilty of intentionally stealing extraordinarily large amounts of money from

---


153. Id.


156. Id (holding that Xu Ting had an accomplice, Guo Anshan, who withdrew ¥1800 (approximately $281) from the ATM and was sentenced in a local people’s court due to the small amount of money stolen).

157. Noting that the “Provision of the Supreme People’s Court, the Supreme People’s Procuratorate and Ministry of Public Security on Issues Concerning the Determination Standards of Amount Prescribed in the Crime of Theft” (1998), which was abolished in 2013, states that whoever steals public or private property of ¥500 to ¥2000 and more; ¥5000 to ¥20,000 and more; or ¥30,000 to ¥100,000 and more shall be deemed to respectively fall within the scope of “relatively large amount,” “large amount,” and “extraordinarily large amount,” respectively, as prescribed in article 264 of the Criminal Law. The high people’s courts and the people’s procuratorates of all provinces, autonomous regions, and municipalities directly under the Central Government may, in light of the economic development status of their respective regions, and in consideration of the social security situation, determine, within the scope of the amounts specified in the preceding paragraph, specific amount standards for their respective regions.

Zuigao Renmin Fayuan Guanyu Shenli Daoqie Anjian Juti Yingyong Falv Ruogan Wenti De Jieshi (最高人民法院关于盗窃案件具体应用法律若干问题的解释) [Interpretation of Supreme People’s Court on Several Issues Concerning the Application of Law in the Handling of Criminal Cases of Theft] (promulgated by Supreme People’s Court, Mar. 17, 1998, effective Mar.
financial institutions\textsuperscript{158} for the purpose of illegal possession. The intermediate court sentenced Xu Ting to life imprisonment for violating section 1 of article 264 of the criminal law.\textsuperscript{159} This result was not unexpected because ATMs are operated by banks, which fall within the scope of financial institutions, and stealing money from an ATM met the circumstances for a life sentence or the death penalty under the criminal law.\textsuperscript{160} Because the criminal provision regarding ATM theft is so tightly regulated, Xu Ting was not the only person to be sentenced to life imprisonment for ATM theft.\textsuperscript{161} However, he was the luckiest because his case attracted the attention of mass media.

After the decision of the first instance was made, Xu Ting appealed the case to the Guangdong Provincial High People’s Court.\textsuperscript{162} The
appellate court deemed that the facts found in the first instance, which determined that Xu Ting had committed theft, were unclear and that the findings lacked legal basis. The appellate court thereby remanded the case to the original court for retrial. The intermediate court reheard the case and sentenced Xu Ting to five years’ imprisonment, which was below the legally prescribed punishment. This mitigated sentence was given based on his relatively slight subjective malevolence, because Xu Ting’s criminal act was contingent upon the ATM malfunction. Upon Xu Ting’s second-time appeal, the Guangdong Provincial High People’s Court affirmed the intermediate court’s second decision of five years’ imprisonment on May 23, 2008, with the further approval of the Chinese Supreme People’s Court on August 20, 2008.

The Xu Ting case offered hope to ATM thieves. The influence of this decision was not limited to the jurisdiction of Guangdong province: it extended to courts from other jurisdictions straightaway. A similar case decided by a sister court even reversed its effective decision based on Xu Ting’s case—Qujing Municipal People’s Procuratorate of Yunnan Province v. He Peng (2002). In 2001, defendant He Peng uncovered the technical problems at the Agricultural Bank of China, while checking his account balance at an ATM. He then used the same debit card from the Agricultural Bank of China, which only had ¥10 (equivalent to approximately $1.56), to withdraw ¥429,700 (equivalent to approximately $67,140.63) from multiple ATMs. On his way home, to hide the illegally obtained money, he threw his debit card into a sewer and called his mother to ask her to report his lost debit card to the Agricultural Bank of China. After he returned home, he spent the money on purchases, including a cell phone, and deposited the rest of the money into two of his classmates’ bank accounts.

163. Id.
164. Id.
165. Id.
166. Id.
167. Id.
169. Id.
170. Id.
171. Id.
172. Id.
The Qujing Municipal Intermediate People’s Court first tried this case. During the trial, He Peng’s attorney argued that his client’s over-withdrawal was done under the bank’s authorization given the bank’s technical problems. He Peng’s criminal acts, thus, should be recognized as unjust enrichment under the General Principles of the Civil Law of the People’s Republic of China, rather than theft under the criminal law. The court, nonetheless, disregarded this argument, and determined that He Peng had intended to secretly steal money from the bank because he had discarded his debit card and called his mother to report the card lost. He Peng was found to have stolen extraordinarily large amounts of money from financial institutions and was sentenced to life imprisonment pursuant to section 1 of article 264 of the criminal law. The appeal court further affirmed the trial court’s decision.

When Xu Ting received a lenient five-year sentence, He Peng had been in jail for almost six years. He Peng’s request for retrial seemed futile, until ATM theft cases received a lot of public attention following Xu Ting’s retrial. The news media then reported on He Peng’s case and dubbed him the “Xu Ting of Yunnan.” The head of the news center of the High People’s Court of Yunnan Province stated, in his interview with the media, that the process of retrying the He Peng case would not begin, unless Xu Ting’s case yielded a final result. After the judgment given

173. Id.
174. Id.
175. Id.
176. Id.
177. Id.
178. Id.
180. Yunnan “Xuting” Wuqi Tuxing Zhoujian Wei Banian Jiangyu Xiayue Huoshi (云南“许霆”无期徒刑骤减为8年将于下月获释) [The Sentence of “Xuting of Yunnan Version” Immediately Dropped to Eight Years He Will Be Released Next Month], SOHU (Dec. 15, 2009), http://news.sohu.com/20091215/n268947762.shtml; see also Yunnan “Xuting An” Gaipan Wuqi Tuxing Jianxing Wei Banian Ban (云南“许霆案”改判 无期徒刑减刑为8年半) [The Modification of the Final Judgment of the Case of “Xu Ting of Yunnan Version” The Life Sentence was Reduced to Eight and A Half Years], TENCENT (Dec. 15, 2009), http://news.qq.com/a/20091215/000075.htm.
in Xu Ting’s retrial was affirmed by the Chinese Supreme People’s Court in August 2008, the High People’s Court of Yunnan Province finally accepted He Peng’s application for retrial and entered a ruling modifying his original life sentence to eight and a half years’ imprisonment on November 18, 2009.\textsuperscript{182} The retrial ruling in this case was based on the concerns that He Peng’s criminal intent was not premeditated but was accidentally triggered by the bank’s technical problems; that the circumstances of his crime were relatively minor and his subjective malevolence was slight; and that He Peng’s actions caused no actual damages because he returned all the stolen money to the bank after being arrested.\textsuperscript{183} Under article 63 of the criminal law, the retrial court thereby sentenced him to eight and a half years in jail, which was below the legally prescribed punishment.\textsuperscript{184}

In addition to “Xu Ting of Yunnan,” “Xu Ting of Ningbo” was also sued in \textit{Ningbo Municipal People’s Procuratorate of Zhejiang Province v. Tang Feng Guang etc. (2008)}.\textsuperscript{185} The case gathered much public attention. Defendant Tang Fengguang intentionally transferred ¥589,500 (equivalent to approximately $92,109.38) to his bank account from his sibling’s debit card account, which only had ¥4.49 (equivalent to approximately $0.70) after accidentally discovering a technical problem.
This case was accepted by the court earlier than the Xu Ting case, but on July 15, 2008—almost two months after the final judgments in the Xu Ting case was reached—the Ningbo Municipal Peoples’ Court warranted the defendant a lenient sentence of seven years’ imprisonment. Similar to the Xu Ting case, the court also found Tang Fengguang’s subjective malevolence relatively slight given that his stealing act was contingent on an ATM malfunction. In the first instance of the Tang Fengguang case, Ningbo Municipal People’s Procuratorate remanded the case to the public security office twice for additional investigation. The procurator handling this case told a reporter that they were paying close attention to the progress of the Xu Ting case.

Scholars in China, where the legal system was developed under civil law tradition, had mixed feelings about the fact that the reversal of the He Peng case’s effective judgment followed the decision of the Xu Ting case rather than a legislative amendment to the criminal law. Some criticized the Xu Ting case and He Peng case as having been decided by public opinion instead of by law. Some suspected that the
The retrial of the He Peng case was intended to prepare the promulgation of the “Interpretation of the Supreme People’s Court and the Supreme People’s Procuratorate of Several Issues Concerning the Specific Application of Law in the Handling of Cases of Crimes Disturbing the Administration of Credit Cards” (12.16 interpretation). The dates of the following events are noteworthy: On October 12, 2009, the 12.16 interpretation was adopted at the 1475th meeting of the Chinese Supreme People’s Court; on November 12, 2009, the 12.16 interpretation was adopted at the 22nd meeting of the Chinese Supreme People’s Procuratorate; on November 18, 2009, the retrial request of the He Peng case was approved; on December 3, 2009, the 12.16 interpretation was issued; on December 16, 2009, the 12.16 interpretation came into effect, and the judgment of the He Peng case was publicly announced by the High People’s Court of Yunnan Province. From these dates, it can be seen that the decision to retry the He Peng case decision was made six days after the 12.16 interpretation was ready to be promulgated. In addition, the modification of the He Peng case decision was announced on the same day as the effective date of the 12.16 interpretation. Because giving a sentence below the legally prescribed punishment needs the approval of the Chinese Supreme People’s Court, the retrial of the He Peng case was recognized as a rehearsal for the implementation of the 12.16 interpretation.
Drawn from the Xu Ting case and its aftermath, one may find that statutory interpretation undertook an essential role in directing judges’ legal conclusions in these ATM theft cases. What is the literal meaning of financial institution? Do ATM thieves fall within the scope of the criminals whom the drafters of section 1 of article 264 of the criminal law intended to severely penalize? What was the legislators’ original purpose in enumerating “stealing from financial institution” as one type of theft crimes that shall be subject to a harsher punishment? How would the Chinese Supreme People’s Court determine the standard of “extraordinarily large money” in 2007? There are situations and technologies that the legislators might not have encountered when drafting statutes. ATM crime was one of those unexpected legal issues. The Bank of China introduced the first ATM to China in 1987.\footnote{Showing that the first ATM appeared in Zhuhai Municipal City of Guangdong Province in February 1987. Lu Shaoping, *Zidong Guiyuanji De Jizhong Guanli Moshi* ([Several Management Patterns of ATMs], 10 *DIANNAO YU XINYONGKA* [COMPUTER & CREDIT CARD] 46, 46 (1999), http://www.cqvip.com/QK/81321X/199910/1004437097.html.)} Most of those teller machines were located inside the banks and were not commonly utilized by the general public for cash deposit and withdrawal purposes until 2001.\footnote{Id.} The money stored in financial institutions had to be withdrawn from banks in person and was nearly impossible to steal without premeditation when the criminal law came into effect in 1997. Furthermore, given the inflation and economic growth between 1997 and 2007, the amount of money that was deemed an “extraordinarily large amount” at the time of legislation is no longer an extraordinarily large amount of money from a modern perspective. The transmission of the Xu Ting case decision through the media served as an avenue for other courts to re-articulate the interpretation of “financial institution” and “extraordinarily large amount,”\footnote{Id. Zuigao Renmin Fayuan, Zuigao Renmin Jianchayuan Guanyu Banli Xinyongka Guandi Xingshi Anjian Juti Yingyong Falv Ruogan Wenti De Jieshi ([Interpretation of the Supreme People’s Court and the Supreme People’s Procuratorate of Several Issues Concerning the Specific Application of Law in the Handling of Cases of Crimes Disturbing the Administration of Credit Cards] (promulgated by Supreme People’s Court and Supreme People’s Procuratorate, Dec. 3, 2009, effective Dec. 16, 2009), http://en.pkulaw.cn/display.aspx?cgid=124750&lib=law.)} and further prepared for the legislative
amendment of the criminal law. In February 2011, the “Amendment VIII to the Criminal Law of the People’s Republic of China” removed section 1 and 2, which prescribe a heavier punishment for two types of theft cases, from article 264 of the criminal law.

Litigants, lawyers, and procurators are bringing cases with difficult legal issues every day, which gives courts an opportunity to witness firsthand new situations and identify flawed, vague, or outdated portions of statutes. When it comes to controversial cases, different interpretations of the law by different judges may lead to distinctive conclusions. Some judges choose to follow the written statutes strictly, believing that is what a civil law judge should do. These judges are more likely to sentence ATM larceners to life imprisonment, given that their criminal acts meet the circumstances of heavier punishment prescribed in article 264 of the criminal law. This is what the judges, who decided the He Peng case, did in the first instance. However, some judges, like the ones in the Xu Ting case, are willing to be the first to reach a different conclusion in a controversial case. Subsequent judges from sister courts then can look to prior judicial decisions and determine whether to follow the first judges and decide an ATM theft case in a similar way. The innovative interpretation adopted by judges might be driven by their judicial role perception of justice, internal or external pressure, or even their intention of simply seeking a just solution to solve the cases before them.

The selected two case studies revealed plaintiff-friendly and defendant-friendly judicial innovations, respectively. In the DUI cases,
judges adjusted their convictions by applying article 115, endangering public safety, rather than article 133, traffic crimes, to raise the legal liabilities of drunk-driving offenders. In contrast, in the ATM theft cases, judges reached lenient sentences below the legally prescribed punishments to show mercy to non-premeditated ATM larceners. Before the official judicial interpretation by the Chinese Supreme People’s Court was announced, the courts from Liaoning and Sichuan provinces voluntarily followed the judgment of Foshan Municipal People’s Procuratorate of Guangdong Province v. Li Jingquan (2007). Before the amendment to article 264 of the criminal law was issued by the legislature, the courts under the jurisdictions of Yunnan and Zhejiang provinces voluntarily followed the decision of Guangzhou Municipal People’s Procuratorate of Guangdong Province v. Xu Ting (2007). With a closer examination of the case decisions, one may find that the DUI cases decided by Sichuan province in 2009 imitated the judgment of Foshan Municipal People’s Procuratorate of Guangdong Province v. Li Jingquan (2007), without citing it, by including very similar statements regarding the defendant’s limited ability to reason and exercise self-control, active compensation of victims, and good attitude in confessing. In contrast, in ATM theft cases, the decisions handed down in Yunnan and Zhejiang provinces copied Guangzhou Municipal People’s Procuratorate of Guangdong Province v. Xu Ting (2007) without reference by similarly stating that the defendant’s subjective malevolence was relatively slight given that his act of stealing was contingent upon an ATM malfunction.

Local courts in the cases described above provided their hierarchical supervisors and legislatures with raw materials to establish responsive legal doctrines through their judgments. Influenced by civil law tradition, written statutes are the major source of law in China. The task of Chinese judges in adjudication is statutory interpretation and most


Chinese jurists believe that courts should limit themselves to the rigorous interpretation of written statutes. However, statutes drafted by the legislature cannot cover every detail or address every particular situation that will occur in the future. Compared to the legislature, courts have a more timely awareness of vagueness or flaws in statutes because litigants and lawyers bring various cases and legal issues to judges every day. More importantly, to win the case, the potential losing party will make every possible effort to identify the ambiguities and point out the problems in the relevant statutes. Taking this information into consideration, local judges are able to run massive experiments on new policies that are used to fix flaws in statutes, adjust policies based on public feedback, and accumulate support for future legislative amendments. However, creating legal doctrines in Chinese courts does not mean freely applying or interpreting statutes because the power of individual judges is constrained by political monitoring and the courts to which they belong. Rather, it refers to the incremental style of stare decisis in which judges use statutory interpretation with dynamic features to mandatorily or voluntarily follow earlier courts’ decisions and adapt statutes to changing social conditions in a timely manner.

IV. WHEN JUDICIAL INNOVATIONS SURVIVE OR FAIL IN CHINA

A. Judicial Diffusion of Policy in China

Similar to other civil law countries, judicial lawmaking activities of Chinese courts are mostly driven by the publication and transmission of prior judicial decisions. For a long period of time, the difficulties in accessing legal information were one of the major obstacles that Chinese judges and legal practitioners face in conducting legal research. Since the 1980s, the norm of judicial openness and the development of technology have been gradually building up an unprecedented modern legal information system. Today, Chinese judges can read judicial decisions from selective collections of cases in print and comprehensive online database. These recent developments in the Chinese legal landscape allow judges to consult each other on statutory interpretation techniques. The influence of prior judicial decisions in future

209. “Incrementalism is a theory of freedom and limitation. . . . The principal advantage of incrementalism to the legal fraternity may well be that it provides a middle and common ground for those who revel in the new found freedom of judges and those who fear the excesses of that freedom.” Shapiro, supra note 87, at 157.

210. Liebman & Wu, supra note 27, at 262-64.
adjudication may be vertical or horizontal. The former is exercised by higher courts on lower courts, whereas the latter is exerted by sister courts on each other. Through such influence of decided cases, innovative policies diffuse across hierarchical and jurisdictional boundaries and steadily generate a national consensus on solutions that can be used to handle difficult legal issues and novel situations in contemporary China.

1. The Vertical and Horizontal Influence of Previous Judgments

Civil law judges tend to follow the judicial decisions of higher courts, because they have been traditionally evaluated by their hierarchical superiors. The influence of rulings from higher courts has waxed and waned over the course of Chinese history. Although statutes have constituted the dominant source of law since imperial times, the legal significance of judicial decisions dates back at least to the Qin dynasty (221 B.C.-206 A.D.). During the time of the Qing Dynasty (1644-1912), judicial decisions had become “indispensable to legal reasoning” and reasoning by analogy, a “universally accepted [method] in Qing decision-making.”

Although Mao’s government ended this practice in 1949, compilations of influential and typical cases, including the Summary of the Inspection of Fornication with Underage Girls Cases Decided Since 1955 and the Summary of Criminal Charges,
Punishment Types, and Sentencing Ranges (First Draft), continued to be produced by the Chinese Supreme People’s Court to guide adjudications and train judicial agents. These internally circulated materials were, however, not made available to the public. The Gazette of the Supreme People’s Court started regularly publishing selected cases in 1985 to “provide better guidance to local courts for correctly applying laws and decrees.” The decisions reported in the Gazette do not always issue from the apex court itself: many selected and slightly modified by the Chinese Supreme People’s Court were originally decided by the lower courts.

In December 2011, the Chinese Supreme People’s Court strengthened its precedential function by issuing guiding cases. As of January 2018, ninety-two such cases have been promulgated. These cases were selected by the Supreme People’s Court from decisions made by provincial-level courts at all levels and must be followed by courts in future adjudications. According to article 7 of the Provisions of the Supreme People’s Court Concerning Work on Guiding Cases (Provisions), judges are required to “refer to (参照) the Guiding Cases released by the Chinese Supreme People’s Court when adjudicating similar cases.” In addition, when trying a similar case, a people’s court at any level is required to refer to the relevant guiding case by quoting it as the judgment’s reasoning and pointing out its number and the key points of the judgment. Furthermore, according to the Provisions,
Chinese courts should follow guiding cases that were decided even by inferior courts.\(^{223}\) This means that a court’s creative interpretation would be mandatorily followed by courts at all levels, regardless of that court’s hierarchical level, once the Chinese Supreme People’s Court selects and releases it as a guiding case.\(^{224}\) However, the influence of guiding cases is significantly constrained by the number and coverage of those cases.

In addition to the top-down impacts of higher courts over lower courts, the publication and transmission of decided cases may exert horizontal influence between sister courts from different Chinese regions. In my previous work, Benjamin Chen and I fielded a survey experiment on Chinese judges to test if the citation of a sister court’s decision influenced the judges’ interpretation of a vague legal standard and the sentences they meted out in a hypothetical case.\(^{225}\) We found that citation of the sister court’s decision had a substantial and statistically significant effect on judges’ interpretation of the vague legal standard. A second iteration of the survey experiment, this time administered to Chinese law students, indicated that the influence of prior judicial decision on Chinese judges is likely to be a generic one; that is, judges do not, by virtue of their background, training, or role, treat the decisions of sister courts as being more authoritative.

---

\(^{223}\) Zuigao Renmin Fayuan Yinfa Guanyu Anli Zhidao Gongzuo de Guiding de Tongzhi, supra note 221, art. 7; see also Zuigao Renmin Fayuan Guanyu Anli Zhidao de Guiding Shishi Xize, supra note 222, arts. 9, 10, 11.

\(^{224}\) Take Guiding Case No. 4 and No. 12 for example. By releasing these two cases, the SPC added mitigating factors for intentional homicide in cases brought about by heated marital, love, or civil conflict. A defendant who should receive the death penalty may be sentenced to death with a two-year suspension and be restricted to any commutation of sentence if he or she fulfills the mitigating factors. This paved the way to the enforcement of regulation regarding commutation. Amendment (VIII) to the Criminal Law of the People’s Republic of China. Guiding Case No. 4: WANG Zhicai, An Intentional Homicide Case, STANFORD L. SCH.: CHINA GUIDING CASES PROJECT (Jan. 9, 2012), https://cgc.law.stanford.edu/guiding-cases/guiding-case-4/. Article 4 of Amendment (VIII) to the Criminal Law of the People’s Republic of China states:

For a recidivist or a convict of murder, rape, robbery, abduction, arson, explosion, dissemination of hazardous substances or organized violence who is sentenced to death with a reprise, the people’s court may, in sentencing, decide to put restrictions on commutation of his sentence in light of the circumstances of the crime committed.


Today, guiding cases coupled with the large number of decisions available both in print and online, have become a convenient resource for Chinese judges to keep informed of or even consult other judges’ interpretations when handling hard cases or new situations. The silent and incremental assimilation of prior judicial decisions into Chinese judicial decision-making precipitates and maintains judicial innovations in China. The accessibility of decided cases is not only a managerial tool that reduces the costs of repetitive reversals and frivolous claims, but also a channel that promotes dialogues between courts.226 By following, departing from, or adjusting the solutions to difficult legal questions proposed in earlier judgments, judges gradually and collaboratively create, adopt, and establish legal doctrines through their statutory interpretations when the law is silent or vague.

2. Empirical Studies on Transmission of Judicial Decisions

To further study the legal status of previous judicial decisions, I conducted surveys and interviews of Chinese judges and law clerks between July and August of 2015.

a. Surveys of Judges’ Views on Previous Judgments

i. Research Design

Approximately 500 judges from ten Chinese regions who serve in different divisions at all levels of the judicial hierarchy were given the survey. Of these, 407 judges responded. I also collected information on four judge-level variables: gender, length of judicial experience, academic background, and bar passage. As can be seen, the sample consists of a roughly equal number of male and female judges. A plurality of responding judges had less than five years of judicial experience, while a majority held at least a bachelor’s degree and had passed the Chinese bar exam (see Appendix I).

Of the responding judges, 207 are male, 199 are female, while one respondent did not answer the gender question. In addition, 187 judges had less than five years of experience, 100 judges had between five and ten years of experience, fifty-five judges had between ten and twenty years of experience, sixty-four judges had more than twenty years of experience, and one respondent did not answer the question. In terms of

highest education qualification, 180 judges hold a bachelor’s degree, 205 judges hold a master’s degree, five judges hold a doctorate, fourteen judges have received some form of adult education, and three respondents did not answer the academic background question. Finally, 326 judges had passed the Chinese bar, while seventy-nine judges had yet to pass the bar, and two judges did not answer the question.  

ii. Results and Analysis

Among the responding judges, 4.9% of judges (twenty out of 407) barely read prior judicial decisions, 27% of judges (110 out of 407) did not often read, 52.6% of judges (214 out of 407) sometimes read, and 14.3% of judges (fifty-eight out of 407) judges always read previous judgments. The following bar plot reveals judges’ answers regarding their frequency of reading previous judicial decisions.
When asked how much prior judicial decisions would influence their decisions in similar cases, 3% of judges (twelve out of 404) said they were not influenced by prior judicial decisions when adjudicating similar cases, and 14.9% (sixty out of 404) and 26% (105 out of 404) reported that prior judicial decisions had little and significant influence over their judgments, respectively. The majority of responding judges (207 out of 404) stated that previous decisions had some influence, while 4% (sixteen out of 404) indicated they were greatly influenced by prior judicial decisions when adjudicating similar cases. Three judges did not respond to this question. Judges’ responses are shown in the following bar plot.

---

228. Respondents were provided with a 1-4 point scale, which represents “Barely,” “Not Often,” “Sometimes,” and “Always.” Higher scores represent higher levels of frequency. There were three respondents who chose 2.5 and two respondents who chose 3.5.
Among the ten regions I surveyed, judges in Fujian, Guangdong, Jiangxi, and Tianjin tended to read prior judicial decisions more often, while judges in Fujian, Jiangsu, Tianjin, and Zhejiang tended to be more influenced by previous judicial decision, when adjudicating similar cases (see Appendices II, III).\textsuperscript{229}

When asked how they kept informed of judicial decisions, the four major sources that the responding judges used to obtain relevant information were guiding cases (298 out of 407), internal materials (269 out of 407), the Supreme People’s Court Gazette (234 out of 407), and

\textsuperscript{229} Respondents were provided with a 1-5 point scale, which represents “No Influence,” “Little Influence,” “Some Influence,” “Significant Influence,” and “Great Influence.” Higher scores represent higher level of Influence. There were three respondents who chose 3.5, one respondent who chose 4.5, and three respondents who did not answer the question.

\textsuperscript{230} Among the ten regions in which I conducted my surveys, courts from Tianjin and Fujian showed either slightly more exposure to or reliance on previous judicial decisions. The regional difference observed may be driven by institutional distinctions between samples (i.e., the degree of accessibility of decided cases within the court, training in conducting legal research), internal consensus on using prior judicial decisions as an informative resource, and local policies regarding cases selected as exemplars following the national judicial reform. Here, as the statistical power limited by the sample size of each court, I hesitate to draw any conclusive implications regarding this regional difference in judges’ views on previous judicial decisions. Further study with a more focused sample group is needed to determine whether and in what way judges’ deference to previous judicial decisions varies by region.
online court reporters (233 out of 407). A few respondents also heard about decided cases from conversations with judges, attorneys, or other legal professionals (139 out of 407), academic publications (sixty-three out of 407), and media (fifty-four out of 407).

Figure III: Judges’ Sources of Information About Prior Judicial Decisions

In addition, judges were asked what they would do if they did not agree with the decision of a guiding case. According to article 7 of the Provisions, “People’s Court at all levels should refer to the guiding cases released by the Chinese Supreme People’s Court when adjudicating similar cases.” The bar plot below shows that 26.6% of responding judges (107 out of 403) would follow guiding cases, 34.7% (140 out of 403) would render judgment based only on statutes, and 38.7% (156 out of 403) would check for cases that departed from guiding cases.

231. Zuigao Renmin Fayuan Yinfu Guanyu Anli Zhidao Gongzu de Guiding de Tongzhi supra note 221, art. 7.
To conclude, among the approximately 400 Chinese judges who responded, only 4.9% barely read prior judicial decisions, while 67.3% at least sometimes read previous judgments. In addition, only 3% responded that prior judicial decisions had no influence over their judgments when adjudicating similar cases, while 82.2% stated that previous judgments had at least some influence over their judgments. Among the ten Chinese regions surveyed, judges in Tianjin seemed to place the most weight on prior judicial decisions. As for the vertical and horizontal influence of previous judicial decisions, judges kept closely informed about the decided cases published by the Chinese Supreme People’s Court (73.2% through guiding cases; 57.5% through the Chinese Supreme People’s Court Gazette). However, if judges did not agree with the decision of a guiding case when adjudicating a similar

---

232. There were two respondents who chose two answers, “I would render judgment based only on statutes” and “I would check if any decided cases departed from guiding cases.” Two respondents did not answer the question.
case, only 26.6% would follow guiding cases, while 38.7% would consult decisions handed down in sister courts. Drawn on the survey findings above, one could speculate that the receptiveness of Chinese judges to prior judicial decisions is driven by their solicitude for judicial legitimacy, which requires judges to apply the same legal rules and standards as others on the bench.

b. Interviews with Judges and Law Clerks

Between July and August of 2015, I interviewed two Chinese Supreme People's Court judges, a local court judge, and three local court law clerks about their views on the legal status of prior judicial decision.

i. The Nature and Function of Guiding Cases

I asked interviewees about their views on the issuance of Chinese guiding cases. Chinese academic scholars have suggested that implementing guiding cases is an early stage in establishing a Chinese case law system, and I asked if they agreed with these academic comments. Unsurprisingly, all the interviewees strongly disagreed and claimed that guiding cases in China were different from binding precedent in common law countries. They generally gave the following three reasons to support their disagreements: first, judges in China do not have legislative power; second, guiding cases are neither a legal source in China nor mandatorily cited by courts; third, China has no foundation for implementing a case law system. A judge from the Chinese Supreme People's Court argued that courts at all levels only have to refer to the key points of the guiding cases rather than the cases’ facts, so reasoning by analogy under common law tradition does not apply.

Although the judges and law clerks interviewed took care to distinguish guiding cases from binding precedent, they, nonetheless, highlighted the utility of prior judicial decisions in filling statutory gaps and as a resource for adjudicating difficult cases. Compared to written statutes, guiding cases provided specific and vivid examples to guide lower courts on adjudication. A local court judge said that one of the advantages of guiding cases over legislative amendments was that the issuance of guiding cases could be much faster. She stated that lawyers sometimes attached guiding cases or even other judgments decided within or outside the jurisdiction in which the court sits as exhibits in their briefs. A few lawyers have claimed the trial court did not follow the

233. See HAO & WEI, supra note 26.
relevant guiding case during an appeal. Once the court received these case decisions, judges would conduct relevant research on their internal database, the C2J, and then decide whether to take those cases into consideration or not. The three law clerks I interviewed all indicated that the judges for whom they were serving had assigned them to search for similar decided cases, especially when adjudicating controversial or hard cases.

ii. Choosing Among Prior Judicial Decisions for Reference

Given that most guiding cases were decided by local court judges, I asked Supreme People’s Court judges if they would follow the relevant guiding case if it was in conflict with their earlier decision in a very similar case. Both of them said yes without any hesitation. One of the Supreme People’s Court judges explained that once guiding cases have been published, they have broad applicability to which judges sitting in courts at all levels should refer. The degree of persuasiveness of published cases should be ordered as guiding cases, cases in the Chinese Supreme People’s Court Gazette, and cases published by high people’s courts at the provincial level. He said that neither the cases decided by himself earlier nor the unpublished case decisions of courts at the provincial level have any binding effect.

On the contrary, the judge and law clerks in local courts gave different answers to the question regarding choosing between a guiding case handed down in another province and a conflicting case decision recently made by the higher-level court in their own provinces. The local court judge said she would be very conflicted and more likely to follow the higher-level court decision. All the law clerks interviewed held the same belief that their courts would follow the higher people’s court’s decisions if these decisions were in conflict with relevant guiding cases.

iii. The Problem and Proposed Solutions of Implementing Guiding Cases

One of the Chinese Supreme People’s Court judges interviewed described some problems faced in the process of implementing guiding cases, which included difficulties in selecting guiding cases, slow progress, and lack of systematic organization. More problematically, he said that many local people’s court judges were not familiar with guiding cases and rarely cited them. These statements seemed to be confirmed by the local court judge and law clerks interviewed. The local court judge said that many judges in her court did not have enough time to be
kept informed of guiding cases due to their heavy caseload. They conducted legal research on guiding cases and other previous judicial decisions only when dealing with hard cases. The C2J contained statutes, regulations, and prior judicial decisions across the country. It, however, did not cover all of the guiding cases and was not updated in a timely manner. She had to pay out of pocket to purchase materials on guiding cases to study. In addition, the court in which she is working had been annually evaluating the number of cases decided by judges that were appealed or reversed and classified the appeal reasons into the categories of no errors, reasonable errors, and serious errors. The fact that judges did not follow guiding cases was generally treated as no error or reasonable error, thus giving judges less motivation to learn about guiding cases themselves when the internal database and materials were not frequently updated. For the same reason, even if the guiding cases had been referred to, judges working at her court rarely cited it in their judgments. Instead, they parroted the legal reasoning paragraph of the guiding case in their judgments. One of the local court clerks interviewed told me that the shorter a judgment is, the fewer mistakes the judge would make.  

To confront the problems that occurred in implementing guiding cases, interviewees both from the Supreme People’s Court and local courts proposed launching a comprehensive training program to address how to properly refer to or cite these cases. However, a law clerk questioned the effectiveness of the training because judges might not take time to attend the training on site or watch the training online after work. The local court judge who purchased materials on guiding cases suggested that these kinds of materials should be distributed in print to every judge working in courts at all levels. In addition, a Supreme Court judge interviewed suggested that lower court judges should closely comply with article 11 of “Detailed Rules for the Implementation of the Provisions of the Supreme People’s Court on Case Guidance,” which requires the relevant guiding cases to be consulted and the number and key points of the guiding case to be quoted. He further suggested that

---

234. Also note, Ahl and Sprick argued that the publication of court decisions subjects judges to checks of their professional performance and competence by the public. On the other hand, it may increase the usage of vague and unspecific language by judges in their decisions “in order to play safe and avoid possible criticism, or to conceal the true reasons for a certain decision.” Björn Ahl & Daniel Sprick, Towards Judicial Transparency in China: The New Public Access Database for Court Decisions, 32 CHINA INFO. 3, 32-33 (2017).

235.
the Supreme People’s Court should strongly encourage lower courts to send their decisions for selection as guiding cases.

In sum, judges in China intentionally distinguished guiding cases from binding precedent. They, nonetheless, highlighted the function of publishing selected cases in filling statute gaps and setting specific examples especially when adjudicating hard cases. Lawyers presenting previous judicial decisions to argue a case have drawn judges’ attentions to prior case decisions. However, judges were not satisfied with the coverage their internal database provided in supporting effective research on cases. They proposed the distribution of hard-copy materials on guiding cases and intra-court training in how to properly consider, cite, or quote guiding cases. Interestingly, when choosing between guiding cases and higher-level court decisions, the Chinese Supreme People’s Court expected lower court judges to follow guiding cases. However, some lower court judges might end up choosing higher-level court decisions in their own jurisdictions over guiding cases based on the concerns about the number of cases that would be appealed or reversed by their higher courts.

B. The Pitfall of Judicial Innovations in China

Aside from the problems faced in implementing the case law system identified in the interviews, some judicial innovations might fade because of the transience of the social conditions or political pressure that gave rise to them. For example, judicially created rules in response to emergency events, such as policies that lowered the threshold for the proclamation of death of a missing person after the 5.12 Wenchuan Earthquake, disappear after those situations have been controlled.236

---

Furthermore, Chinese central and local governments can easily call off or intervene in judicial lawmaking activities through the adjudication committee within the court or even with a phone call to the supervisory body of the court.\textsuperscript{237} Creative interpretation by judges can be replaced with legislation, such as how the “Fellow Servant Rule” established by state courts in the United States after \textit{Farwell v. Boston & Worcester Railroad Corp. (1842)} was superseded by federal and state worker’s compensation laws.\textsuperscript{238} In China, legislation trumps judicially created policies, as judicial decisions are not an official legal source. Howson’s findings also indicate that the extensive innovations of the Shanghai courts have declined after the amendment to the company law came into effect in China.\textsuperscript{239} In addition, due to the limited judicial resources and less professional training that judges working in rural China receive, the absence of active communications between courts may cause some innovations introduced by judges in urban cities to fade away during the process of transmissions.\textsuperscript{240} This concern was exemplified by one of the law clerks I interviewed, who told me that the coverage of her court’s C2J was not as comprehensive as courts located in first and second tier cities and only the decisions made within the province where her court sits could be located. The disparity between urban and rural regions in terms of the degree of the influence of prior judicial decisions may delay the adoption of innovations from sister jurisdictions in China.

V. CONCLUSION

China is experiencing a period of rapid change in its social, economic, and legal environment. Many statutes drafted and promulgated during the early days of the People’s Republic are no longer suited to the circumstances of contemporary China. Yet, legislative amendment is a laborious undertaking that is mired in procedure: introduction to the legislature,\textsuperscript{241} deliberation,\textsuperscript{242} voting,\textsuperscript{243} signing, and

\begin{itemize}
\item \textsuperscript{237} Xin He, \textit{Black Hole of Responsibility: The Adjudication Committee’s Role in a Chinese Court}, 46 LAW & SOC’Y REV. 681, 681-712 (2012).
\item \textsuperscript{239} Howson, \textit{supra} note 29, at 303-442.
\item \textsuperscript{241} Zhonghua Renmin Gongheguo Lifa Fa, \textit{supra} note 38, art. 17.
\end{itemize}
promulgation. These steps may take years to complete. Moreover, statutes, once amended, are unlikely to be modified or annulled due to concerns about the stability and authority of the law. Unlike the legislature, courts frequently confront statutory vagueness or imperfections in the course of adjudication. Judicial decisions can, therefore, function as a tool for judges to gather information about the consequences of a particular policy innovation and to gauge public support for future legislative amendments. Moreover, judicial decisions can serve as a form of political communication between courts that indicate the acceptability and feasibility of the policy innovation. Indeed, the increasing accessibility of judicial decisions, since the 1980s, has facilitated such communication and the judgments handed down by other courts in factually similar controversies have evolved into a convenient resource for Chinese judges confronting hard cases or novel situations.

“Absolute discretion” and “no discretion” are the two ends on the spectrum of judicial autonomy. Although civil law tradition requires judges to be rigorously bound by written statutes, the confluence of statutory gaps, institutional incentives, and the de facto discretion of judges can create the conditions for the diffusion of judicial innovations across jurisdictional boundaries. Despite their protestations to the contrary, Chinese courts balance the tension between the unchanging code and the changing social and economic conditions in Chinese society by engaging in experimentation through artful statutory interpretation. In this function, Chinese courts are not that different from their sisters in common law jurisdictions or, for that matter, from courts all over.

242. Id. arts. 18-21.
243. Id. art. 24.
244. Id. art. 25.
APPENDICES

Appendix I:
Distribution of Judge-Level Covariates

Appendix II:
Mean Frequency of Reading Judicial Decisions Among Ten Regions
Appendix III:
Mean Influence of Judicial Decisions
Among Ten Regions