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## JUDICIAL LEGITIMATION IN CHINA

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*China's judiciary is becoming increasingly professionalized, and its courts are enjoying a degree of autonomy they have not enjoyed since the Revolution. By promulgating abstract interpretations of the code and through the selective publication of cases, Chinese judicial institutions today function as policymaking bodies on both national and local scales. But are they able to legitimize social policy? This question has received little attention from legal scholars, but its answer is important for our understanding of the judicial role in the governance of modern China.*

*We field a survey experiment that seeks to measure the persuasiveness of courts vis-à-vis administrative and non-regulatory actors. We find that courts are sometimes able to induce support for the policies they endorse. We also find, however, that this ability is not unique to courts and is at least equaled by administrative bodies.*

*Our results have profound implications for the future of judicialization in China. They illuminate the potential of litigation as a tool for fostering social change. But they also explain why the regime does not rely on judicial institutions to convince the public of the rightness of government policy: other governmental entities are as persuasive as courts, if not more so. More broadly, the empirical findings presented here suggest that while the Chinese party-state might find it advantageous to operate through law, it does not necessarily have to govern through courts.*

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## I. INTRODUCTION

Courts have emerged as vital policymaking bodies of the People’s Republic. They do not only adjudicate individual cases; they also operate as quasi-legislative bodies by promulgating interpretations touching on a wide range of fields and subjects. These judicial interpretations—issued in the absence of a live case or controversy—have come to acquire the force of law despite their initial lack of a constitutional or statutory basis. In some instances, they do not merely elaborate the code but also supplement it.

Besides formulating abstract rules, courts also shape policy through the selective publication of cases. Although cases are not a formal source of law in China, those carrying the approbation of a superior court tend to be followed by the inferior tribunals in its jurisdiction. Because opinions speak in the specialized language of the law, the transmission of policy through cases shields judicial decisions from political interference.<sup>1</sup>

These developments have magnified the influence of courts over the Chinese administrative regulatory state, none more so than the Supreme People’s Court (SPC). The “transformation of the [SPC] from a state security agency into a relatively autonomous policy-making organization”<sup>2</sup> has kindled hopes that it can become an advocate for reform within the

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<sup>1</sup> Björn Ahl, *Judicialization in Authoritarian Regimes: The Expansion of Powers of the Chinese Supreme People’s Court*, INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW (forthcoming), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3118847](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3118847); Björn Ahl, *Retaining Judicial Professionalism: The New Guiding Cases Mechanism of the Supreme People’s Court*, 217 THE CHINA QUARTERLY 121 (2014).

<sup>2</sup> Eric C. Ip, *The Supreme People’s Court and the Political Economy of Judicial Empowerment in Contemporary China*, 24 COLUM. J. ASIAN. L. 367, 367 (2011).

Chinese state. The more extravagant of these hopes is that the SPC might become a vector for introducing liberal notions of rule of law and constitutional governance into China. But sober-eyed observers emphasize that the SPC is not independent of the government and is, ultimately, subordinate to the Chinese Communist Party (CCP). While the legislature may have acquiesced in the Court's interstitial law-making, ideas that undermine the Party's doctrine or its continued rule will not be countenanced.

Critical to assessing the institutional capacity of the judiciary is its sway over the masses. The persuasiveness of judicial institutions bears on the amount of support they can muster for their positions. It also matters for their standing vis-à-vis other state organs: the party-state is more likely to indulge judicial policymaking if doing so serves to legitimize the regime. This article offers some of the first causal evidence on the ability of courts to move public opinion in China. Part I of the article motivates the survey experiment by elucidating the policymaking function of courts, focusing in particular on the SPC. Part II provides some theoretical background on persuasion and discusses relevant findings from the comparative literature. Part III describes the design of the survey experiment and analyzes its results. Part IV draws out some of the implications of the empirical findings for judicialization in China, a theme that encompasses, for instance, the institutional design of constitutional review and the promise of public interest litigation as a tool for combatting harmful social practices. Part V concludes.

## II. JUDICIAL POLICYMAKING IN CHINA

Studies of authoritarian courts suggest that they do more than dispense justice between private citizens. They also legitimize official policy by lending them an aura of fairness and objectivity.<sup>3</sup> Judicial institutions are able to engender acquiescence, even agreement, because they are perceived as being fundamentally different from other state organs. Symbols articulate and reinforce this understanding of judicial authority.<sup>4</sup> The emblem of the SPC features the scales of justice. Similarly, the “monumentality” of

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<sup>3</sup> Pierre Landry, *The Institutional Diffusion of Courts in China: Evidence from Survey Data*, in *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES* 207, 207 (Tom Ginsburg & Tamir Moustafa eds. 2008). It is important to distinguish between legitimacy derived from the performance of a government function, the resolution of private disputes being one particular example, see Susan H. Whiting, *Authoritarian “Rule of Law” and Regime Legitimacy*, 50 *COMPARATIVE POLITICAL STUDIES* 1907 (2017), and the legitimization of policy through the courts. We refer here to the latter.

<sup>4</sup> James L. Gibson et al., *Losing, but Accepting: Legitimacy, Positivity Theory, and the Symbols of Judicial Authority*, 48 *LAW & SOC'Y REV.* 837 (2014).

provincial courthouses impresses on viewers the status of the judiciary and its mandate to act as a neutral arbiter and “check . . . other state organs.”<sup>5</sup>

The persuasiveness of judicial institutions is an especially interesting question in the Chinese context where courts exercise both adjudicative and quasi-legislative functions. The Constitution of the People’s Republic of China vests legislative power in the National People’s Congress (NPC) and NPC’s Standing Committee.<sup>6</sup> A law passed by the NPC may, however, be interpreted by several bodies. Legislative interpretations are promulgated by the Standing Committee of the NPC in order to elucidate the law “[i]n cases where the[ir] limits . . . need to be further defined or additional stipulations need to be made.”<sup>7</sup> Judicial interpretations are issued by the SPC in response to “questions involving the specific application of laws and decrees in court trials.”<sup>8</sup> The Chinese Supreme People’s Procuratorate also interprets questions of law arising in the course of its duties.<sup>9</sup> Finally, other issues regarding the application or implementation of laws are addressed by the State Council and the relevant ministries through administrative interpretations.<sup>10</sup>

A judicial interpretation by the SPC takes one of four forms: “interpretation,” “provision,” “reply,” and “decision.”<sup>11</sup> An “interpretation” addresses the specific application of a law for purposes of adjudication, and explains how the law should be applied to a particular type of case or issue. A “provision” formulates norms or opinions essential to the task of adjudication by drawing on the spirit of the law. A “reply” is furnished by the SPC in response to requests by a High People’s Court or a military court of the People’s Liberation Army for clarifications on a particular legal question. Finally the SPC amends or abrogates its prior judicial

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<sup>5</sup> Björn Ahl & Hendrik Tieben, *Modern Chinese Court Buildings, Regime Legitimacy and the Public*, 28 INTERNATIONAL JOURNAL FOR THE SEMIOTICS OF LAW 603, 629 (2015).

<sup>6</sup> *Zhonghua Renmin Gongheguo Xianfa* (1982) (中华人民共和国宪法) [Constitution of the People’s Republic of China] (promulgated by the National People’s Congress on Dec. 4, 1982, effective on Dec. 4, 1982), art. 58.

<sup>7</sup> *Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Jiaqiang Falv Jieshi Gongzuo de Jueyi* (全国人民代表大会常务委员会关于加强法律解释工作的决议) [Resolution of the Standing Committee of the National People’s Congress Providing an Improved Interpretation of the Law] (promulgated by the Standing Committee of the National People’s Congress, June 10, 1981, effective on June 10, 1981), art.1, available at <http://en.pkulaw.cn/display.aspx?cgid=1006&lib=law>.

<sup>8</sup> *Id.* art. 2.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* art. 3.

<sup>11</sup> *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 the Supreme People’s Court on Mar. 9, 2007, effective on Apr. 1, 2007), art. 6.

interpretations through “decisions.” The proliferation of judicial interpretations has elevated the SPC from an agency that merely implements the diktats of the state—and the Party—to a substantive policymaking body.<sup>12</sup>

One of the most notorious judicial interpretations in recent history issued in 2001, in *Qi Yuling v. Chen Xiaoqi*,<sup>13</sup> a case many commentators dubbed China’s *Marbury*.<sup>14</sup> Qi Yuling and Chen Xiaoqi graduated from the same middle school in 1990. Chen did not qualify to take the national entrance examination after failing the preliminary examination. Qi, on the other hand, sat for the national entrance examination and achieved a score that made her eligible for an employer-sponsored education. However, Qi never received her examination results. Her offer of admission from a commerce school was mistakenly delivered to Chen by the middle school. Chen appropriated Qi’s offer and procured fabricated documents to attend the commerce school under Qi’s name. Chen eventually secured employment at a bank. After the fraud came to light, Qi filed suit alleging violations of her right to her name as well as her right to education. A key issue in Qi’s claim for damages concerned the legal status of the latter right. If the right to education were not vindicable at law, then Qi could only be awarded damages for emotional distress and not for economic loss. Because the General Principles of the Civil Law did not expressly articulate a private right to education, the lower courts sought the SPC’s guidance on the issue. The SPC held that Qi had a constitutional right to education and that the violation of that right gave rise to civil liability. As Huang Songyou, then-Vice President of the SPC, later explained:

Previously the Supreme People’s Court issued very few replies concerning cases of indirect application of the Constitution. However the issues in *Qi Yuling* concerned violations of citizens’ constitutional rights, as well as rights provided in laws such as the

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<sup>12</sup> Ip, *supra* note 2.

<sup>13</sup> *Qi Yuling Su Chen Xiaoqi Deng Yi Qinfan Xingmingquan de Shouduan Qinfan Xianfa Baohu de Gongmin Shoujiaoyu de Jibenquanli Jiufen An* (齐玉苓诉陈晓琪等以侵犯姓名权的手段侵犯宪法保护的公民受教育的基本权利纠纷案) [*Qi Yuling v. Chen Xiaoqi et al.*(2001)].

<sup>14</sup> Huang Zhengdong, *Feizhi Qiyuling An Pifu yu Xianfa Shiyong zhi Guanlian* (废止齐玉苓案与宪法适用之关联) [The Connection between the Abolishment of the Reply of the Qiyuling Case and the Application of the Constitution], 4 *Faxue* [Legal Science] 3, 3-10 (2009); Robert J. Morris, *China’s Marbury: Qi Yuling v. Chen Xiaoqi—The Once and Future Trial of Both Education & Constitutionalization*, 2 *TSINGHUA CHINA L. REV.* 273 (2010); see also Tong Zhiwei, *Xianfa Shiyong ying Yixun Xianfa Benshen Guiding de Lujing* (宪法适用应依循宪法本身规定的路径) [The Constitutional Application Should Follow the Route Provided for by the Constitution], 6 *ZHONGGUO FAXUE* (中国法学) [CHINA LEGAL SCIENCE] 22, 22-48 (2008).

General Principles of the Civil Law. In the Reply to the principal case, Qi's right to receive education is a right difficult for civil law theory to cover and is obviously one of the fundamental rights provided by the Constitution. Had we not directly applied the Constitutional provisions, it would have been hard to provide judicial remedies. Apparently, the Reply established a precedent for the justiciability of the Constitution in China.<sup>15</sup>

The SPC's Reply excited controversy because constitutional disputes were generally understood to be beyond the court's jurisdiction. Article 62 of the Constitution grants the NPC the "power to supervise the enforcement of the Constitution" while Article 67 vests in the NPC's Standing Committee the "power to interpret the Constitution and supervise its enforcement" Some scholars thus perceived the Reply as an arrogation of the power to interpret the constitution or even exercise constitutional review.<sup>16</sup> Others, however, disagreed. Zhang Qianfan, a law professor at Peking University, suggested that the Reply should be read narrowly, and that the Constitution should be invoked only where no remedy is otherwise available or if the applicable laws conflict.<sup>17</sup> Wang Zhenmin of Tsinghua University went further, arguing that "[t]he Constitution itself contains no clause manifestly prohibiting its application in litigation."<sup>18</sup> While the Reply was short-lived—the SPC abolished it in 2007 as "no longer applicable"—*Qi Yuling* illustrates the potential for the SPC to assert itself institutionally through judicial interpretation.

The SPC also promulgates judicial interpretations to implement legislation or to adapt the code to social, economic, and technological change. Although there was initially no legal foundation for the SPC's authority to engage in abstract rule-making absent a controversy, the NPC silently acquiesced in SPC's practice of doing so and eventually authorized it.<sup>19</sup> "[T]he SPC has [consequently] become a third legislative actor on the

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<sup>15</sup> Huang Songyou, *Xianfa Sifahua Jiqi Yiyi* (宪法司法化及其意义) [The Justiciability of the Constitution and Its Meaning], *Renmin Fayuan Bao* (人民法院报) [China Court], Aug. 13, 2001.

<sup>16</sup> Zhiwei Tong, *A Comment on the Rise and Fall of the Supreme People's Court's Reply to Qi Yuling's Case*, 43 *SUFFOLK U.L. REV.* 101 (2010).

<sup>17</sup> Zhang Qianfan, *Lun Xianfa Xiaoli De Jieding Jiqi Dui Sifa De Yingxiang* (论宪法效力的界定及其对司法的影响) [On the Demarcation of Legal Effects of the Constitution and Its Influence over Private Law]. 2 *Bijiaofa Yanjiu* [Journal of Comparative Law] 1, 17-18 (2004).

<sup>18</sup> Wang Zhenmin, *Woguo Xianfa Kefou Jinru Susong* (我国宪法可否进入诉讼) [Does Chinese Constitution Have Access to Litigation], 5 *Fashang Yanjiu* (法商研究) [Studies in Law and Business] 28, 28 (1999).

<sup>19</sup> The SPC in abstract rule-making eve before the NPC officially granted the SPC the power to issue judicial interpretations in 1981. *See* Quanguo Renmin Daibiao Dahui

national level in addition to the NPC and the State Council and its quasi-legislative acts, in general, take precedence over other legislation.”<sup>20</sup> An example of such quasi-legislation is an interpretation issued by the SPC in September 2013 regarding defamation and the disruption of social order through information networks (or, colloquially, fake news).<sup>21</sup> Several months before the interpretation was issued, the Chinese Administration of Public Security executed a national crackdown on internet-related crimes or *qingwang xingdong* (清网行动) and arrested several social media personalities. Article 246 of the Criminal Law states that:

Those openly insulting others using force or other methods or those fabricating stories to slander others, if the case is serious, are to be sentenced to three years or fewer in prison, put under criminal detention or surveillance, or deprived of their political rights.

Those committing crimes mentioned above are to be investigated only if they are sued, with the exception of cases that seriously undermine social order or the state’s interests.

The SPC clarified that the fabrication and dissemination of false information through the internet resulting in damage to another person’s reputation is punishable as defamation under Article 246. Furthermore, defamatory social media posts that have been clicked or viewed more than 5,000 times, or forwarded more than 500 times, are deemed serious enough

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Changwu Weiyuanhui Guanyu Jiaqiang Falv Jieshi Gongzuo de Jueyi, *supra* note 11; see also, Zuigao Renmin Fayuan 1955nian Yilai Jianyin Younv Anjian Jiancha Zongjie (最高人民法院 1955 年以来奸淫幼女案件检查总结) [Summary of the Inspection of Fornication with Underage Girls Cases Decided Since 1955] (promulgated by the SPC on Apr. 30, 1957, effective Apr. 30, 1957). Zhou Jue, Jianguo Chuqi Xingshi Shenpan Gongzuo De Huiyi (建国初期刑事审判工作的回忆) [Memories about Criminal Adjudication Work in the Early Days of the Establishment of the Country], Zhongguo Fayuan Wang (中国法院网) [China Court Net], Sep. 29, 2007, <https://www.chinacourt.org/article/detail/2007/09/id/268326.shtml> (last visited on Feb. 15, 2019).

<sup>20</sup> Ahl, *Judicialization in Authoritarian Regimes*, *supra* note 1, at 20.

<sup>21</sup> Zuigao Renmin Fayuan Zuigao Renmin Jianchayuan Guanyu Banli Liyong Xinxi Wangluo Shishi Feibang Deng Xingshi Anjian Shiyong Falv Ruogan Wenti De Jieshi (最高人民法院、最高人民检察院关于办理利用信息网络实施诽谤等刑事案件适用法律若干问题的解释) [Interpretation of the Supreme People’s Court and the Supreme People’s Procuratorate on Several Issues concerning the Specific Application of Law in the Handling of Defamation through Information Networks and Other Criminal Cases] (promulgated by the Supreme People’s Court and the Supreme People’s Procuratorate on Sep. 6, 2013, effective on Sep. 10, 2013).

to subject the offender to a maximum of three years imprisonment. These cases are to be taken up only on complaint, unless the social media publications at issue grievously injure social order or the national interest by, for example, inciting a mass incident or fomenting ethical or religious strife. The SPC also made Article 293 of the Criminal Law applicable to fake news. Article 293 prescribes a sentence of “not more than five years of fixed-term imprisonment, criminal detention, or control” for those whose “provocative and disturbing behavior . . . creat[e] a disturbance in a public place, causing serious disorder.” Posting or spreading false information online, the SPC declared, constituted such an offense.<sup>22</sup>

This interpretation became the subject of intense public debate in 2014 after a prominent Chinese blogger, Qin Zhihui, was sentenced to three years in jail for defamation and causing trouble by spreading rumors on Weibo between 2010 and 2013. Qin, a Weibo celebrity, was alleged to have published over 3,000 libelous tweets attacking public figures or governmental authorities.<sup>23</sup> These tweets were shared thousands of times by his followers and his followers’ followers.<sup>24</sup> One of Qin’s most contentious tweets accused the Railway Ministry of paying 30 million euros to a foreign passenger who died in a 23 July, 2011, Wenzhou train collision so as to mollify her bereaved family.<sup>25</sup> Another tweet claimed that the story of Lei Feng—a soldier lionized by the CCP as a paragon of modesty and selflessness—was purely apocryphal.<sup>26</sup> And yet another tweet suggested that Chinese civil servants were being forced to donate to the Red Cross in order to cultivate a charitable national image.<sup>27</sup> Qin’s case was the first to be tried publicly since China began its *qingwang xingdong*.<sup>28</sup> At trial, Qin

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<sup>22</sup> Article 293 of the Criminal Law provides that “Whoever undermines public order with any one of the following provocative and disturbing behaviors is to be sentenced to not more than five years of fixed-term imprisonment, criminal detention, or control: ... (4) creating a disturbance in a public place, causing serious disorder.” *Zhonghua Renmin Gongheguo Xingfa 1997 Xiuding* (中华人民共和国刑法(1997 修订)) [Criminal Law of the People’s Republic of China (97 Revision)] (promulgated by the National People’s Congress on Oct. 1, 1997, effective on Mar. 14, 1997), art. 293.

<sup>23</sup> Dong Jianing, *Qin Huohuo Feibang, Xunxin Zishi An Jiangyu 4yue 11ri Kaiting Beijing Chaoyang Fayuan Weibo Zhibo* (“秦火火”诽谤、寻衅滋事案将于 4 月 11 日开庭 北京朝阳法院微博直播) [Qin Huohuo Defamation and Causing Trouble Case Will Be Heard on Apr. 11 Beijing Caoyang People’s Court Streaming the Trial on Weibo], *Guan Cha Zhe* (观察 者) [Observer], Apr. 8, 2014, [https://www.guancha.cn/FaZhi/2014\\_04\\_08\\_220416.shtml](https://www.guancha.cn/FaZhi/2014_04_08_220416.shtml) (last visited on February 14, 2019).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> Liu Yang, *Qin Huohuo Xi Woguo Diyige Huoxing De Wangluo Zaoyao Zhe* (“秦火

apologized for his misdeeds and cautioned others against committing the same mistakes.<sup>29</sup>

The implications of the SPC's position for freedom of speech provoked consternation in some quarters of the Chinese legal community. Zhu Wei, a law don at the China University of Political Science and Law, praised the high court's interpretation for preventing the virtual space from becoming a hotbed for internet-related crimes.<sup>30</sup> In contrast, Ma Changshan of the East China University of Political Science and Law, questioned the legal definition and scope of the term "public places." He contended that the internet should not be treated like the physical spaces where people toil, study, socialize, and recreate.<sup>31</sup> A Beijing lawyer also criticized the interpretation. Pointing out that followers and retweets on social networks can be purchased from public relations firms, he said, "[f]rom now on, whenever anyone says anything bad about me, I will just get zombie followers to view their post 5,000 times or repost it 500 times and get them sent to prison."<sup>32</sup> While the SPC's September 2013 interpretation clamping down on fake news is especially salient, judicial interpretations are not a recent phenomenon. Between 1998 and 2009, the SPC issued 264 publicly accessible and legally binding judicial interpretations, touching on fields spanning corporate law to family law and subjects ranging from international trade to environmental pollution.<sup>33</sup> The SPC's judicial interpretations pervade Chinese law and policy, so much so that were they

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火”系我国第一个获刑的网络造谣者) [Qin Huohuo is China's First Defamer on the Internet Who Has Been Sentenced], Souhu Xinwen (搜狐新闻) [Sohu News], Apr. 18, 2014, news.sohu.com/20140418/n398427491.shtml, (last visited on Feb. 14, 2019)

<sup>29</sup> Ma Junqin, "Qin Huohuo" Dangting Xiang Yanglan Dengren Daoqian Ziyuan Renzui ["秦火火" 当庭向杨澜等人道歉 自愿认罪] ("Qin Huohuo" Apologized to Yang Lan and Others at Trial and Voluntarily Pleaded Guilty), Xinhua Wang (新华网) [Xinhua Net], Apr. 11, 2014, [http://www.xinhuanet.com/photo/2014-04/11/c\\_126382186.htm](http://www.xinhuanet.com/photo/2014-04/11/c_126382186.htm) (last visited on Feb. 13, 2019)

<sup>30</sup> Zhu Wei, *Qinhuohuo An Dailai De Qishi yu Fansi* (秦火火案带来的启示与反思) [The Implication and Reflection Brought by Qinhuohuo Case], Renmin Wang (人民网) [People.cn], Apr. 16, 2014, <http://legal.people.com.cn/n/2014/0416/c42510-24900204.html> (last visited on Feb. 11, 2019).

<sup>31</sup> Ma Changshan, Falv de Kongjian Chuanyue Jiqi Fengxian: Cong Lianggao Banli Wangluo Feibang Deng Xingshi Anjian De Sifa Jieshi Chufa (法律空间的穿越及其风险: 从两高办理网络诽谤等刑事案件的司法解释出发) [The Crossover and Risk of the Space of Law: From the Judicial Interpretation of the SPC and SPP handling Criminal Cases Concerning Internet-related Defamation]. *Suzhou Daxue Xuebao* (苏州大学学报) [Journal of Soochow University] 34, 34-41.

<sup>32</sup> C. Custer, *In China, Tweeting Rumors Can Now Land You Three Years in Jail... or Worse*, TECH IN ASIA (Sep. 9, 2013), <https://www.techinasia.com/china-tweeting-rumors-land-years-jailor-worse> (last visited on Feb. 15, 2019).

<sup>33</sup> Ip, *supra* note 2, at 394-97.

to be abolished, “the legal system would grind to a halt.”<sup>34</sup>

Besides judicial interpretations, the SPC also promulgates documents that are normative in nature. Exemplary cases comprise the majority of these documents. Since 1985, the Supreme People’s Court Gazette has published selected cases from courts at all levels. Chinese judicial opinions do not have precedential value and are not formally recognized as a source of law. Those approved by the SPC, however, bear its imprimatur and are generally followed by the lower courts.<sup>35</sup> Today, cases selected for inclusion in the Gazette reach a broader audience than judges. Since March 2017, the SPC has made those cases available to the public through its website.<sup>36</sup> In addition to Gazette, the SPC edits and compiles a series of “guiding cases” that lower court judges must consult (参照) when adjudicating similar matters.<sup>37</sup> These cases span the range of legal subjects<sup>38</sup> and they too are available for consultation by the public, in print and electronically.<sup>39</sup>

By selecting and editing cases for publication, the SPC influences the practical application of statutory law and thereby shapes public policy.<sup>40</sup> For example, after President Xi Jinping emphasized the “core values of socialism” in 2014 and urged comprehensive implementation of these moral

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<sup>34</sup> Randall Peerenboom, *Courts as Legislators: Supreme People’s Court Interpretations and Procedural Reforms* 3 (2007). Though the discussion thus far has focused exclusively on the high court, the same phenomenon has been observed at the sub-national level. In spite of official discouragement by the SPC, local courts, too, announce interpretations of law and regulations that they then apply as rules of decisions to cases pending before them (Xi, 2012).

<sup>35</sup> Nanping Liu, “Judicial Review” in *China: A Comparative Perspective*, 14 REV. SOCIALIST L. 241, 246–50 (1988).

<sup>36</sup> These cases may be consulted at <http://gongbao.court.gov.cn/>.

<sup>37</sup> Zhidao Anli (指导案例) [Guiding Cases], Zhonghua Renmin Gongheguo Zuigao Renmin Fayuan (中华人民共和国最高人民法院) [The Supreme People’s Court of the People’s Republic of China], <http://www.court.gov.cn/fabu-gengduo-77.html> (last visited on February, 2019); Zuigao Renmin Fayuan Guanyu Anli Zhidao Gongzuo De Guiding Shishi Xize (最高人民法院关于案例指导工作的规定) 实施细则 [Detailed Implementing Rules on the “Provisions of the Supreme People’s Court Concerning Work on Case Guidance”] (promulgated by the SPC on Apr. 27, 2015, effective on May 13, 2015); Zuigao Renmin Fayuan Guanyu Anli Zhidao Gongzuo de Guiding (最高人民法院关于案例指导工作的规定) [Provisions of the Supreme People’s Court Concerning Work on Case Guidance] (promulgated by the Supreme People’s Court on Nov. 26, 2010, effective on Nov. 26, 2010).

<sup>38</sup> Zhidao Anli, *supra* note 37.

<sup>39</sup> Zuigao Renmin Fayuan Guanyu Anli Zhidao Gongzuo De Guiding Shishi Xize, *supra* note 37, arts. 9, 10; Mo Zhang, *Pushing the Envelope: Application of Guiding Cases in Chinese Courts and Development of Case Law in China*, 26 PAC. RIM L. & POL’Y J. 269, 272-73 (2017).

<sup>40</sup> Ahl, *Retaining Judicial Professionalism*, *supra* note 1.

doctrines nationwide, the SPC designated twenty local judicial decisions as exemplary cases upholding such values as honesty and trustworthiness, public order and good custom, and family virtues.<sup>41</sup>

In sum, by issuing judicial interpretations and designating selected cases as models to be emulated by the lower courts, the SPC refines and even revises statutory law. As a de facto, if not de jure, policymaking body, the SPC exercises its quasi-legislative powers broadly and not merely interstitially. “[I]t competes with other state organs in legislating directly vis-à-vis legal subjects.”<sup>42</sup> At the same time, it is legally and politically subordinate to the NPC and, ultimately, the Party. While the SPC strives to promote its own agenda and interests,<sup>43</sup> it also serves the party-state, employing its expertise to develop and advance national objectives.<sup>44</sup> The tension between these two pursuits is not an irreconcilable one: the autonomy enjoyed by the SPC depends, in part, on its ability to legitimize policy.<sup>45</sup> The greater its influence on public opinion in China, the more useful the SPC becomes to the party-state, and the likelier it is for other political actors to indulge or at least tolerate its assertiveness in domains removed from the regime’s core interests.<sup>46</sup> The persuasiveness of the SPC

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<sup>41</sup> Zuigao Renmin Fayuan Gongbu 10qi Hongyang Shehui Zhuyi Hexin Jiazhi Guan Dianxing Anli (最高人民法院公布十起弘扬社会主义核心价值观典型案例) [Ten Model Cases regarding Upholding the Socialist Core Values Issued by the Supreme People’s Court] (promulgated by the Supreme People’s Court on Aug. 22, 2016, effective on Aug. 22, 2016); Zuigao Renmin Fayuan Gongbu 10qi Hongyang Shehui Zhuyi Hexin Jiazhi Guan Dianxing Anli (最高人民法院公布 10 起弘扬社会主义核心价值观典型案例) [Ten Model Cases regarding Upholding the Socialist Core Values Issued by the Supreme People’s Court] (promulgated by the Supreme People’s Court on Mar. 8, 2016, effective on Mar. 8, 2016).

<sup>42</sup> Ahl, *Judicialization in Authoritarian Regimes*, *supra* note 1, at 20; *see also* Yanrong Zhao, *The Way to Understand the Nature and Extent of Judicial Independence in China*, ASIAN J.L. & SOC’Y 20 (forthcoming) (describing as an insight of the “strategic interaction” school of understanding judicial independence in China that “by interpreting the law creatively and strategically, the courts can advance their own institutional interests and compete in the struggle for power and legitimacy with other political actors”).

<sup>43</sup> Ip, *supra* note 2; Taisu Zhang, *The Pragmatic Court: Reinterpreting the Supreme People’s Court of China*, 25 COLUM. J. ASIAN L. 1 (2012).

<sup>44</sup> Ling Li, *The Chinese Communist Party and People’s Courts: Judicial Dependence in China*, 64 AM. J. COMP. L. 37 (2016).

<sup>45</sup> *See* Jean-Pierre Cabestan, *The Political and Practical Obstacles to the Reform of the Judiciary and the Establishment of a Rule of Law in China*, 10 JOURNAL OF CHINESE POLITICAL SCIENCE 43, 48 (2005) (“[T]he Chinese authorities are keen to push forward the establishment of a ‘rule by law’ and a professional and autonomous court system, albeit of ‘socialist’ texture, aimed both at enhancing the regime’s political legitimacy and at stabilizing society and relations between state and society by opening new avenues for the presumably more reliable settlement of disputes.”).

<sup>46</sup> For an example from Egypt, *see* Tamir Moustafa, *Law versus the State: The Judicialization of Politics in Egypt*, 28 LAW & SOCIAL INQUIRY 883 (2003).

is therefore critical to our understanding of its institutional strength and the future of judicially-initiated change in China.

The discussion up to now has focused exclusively on the SPC. But lower courts also make rules through the same channels as those employed by the SPC, albeit on a more modest scale. Despite official disapproval of the practice, high courts in Beijing, Shanghai, Jiangsu, and Zhejiang have formulated abstract opinions to address burgeoning issues in corporate law and governance.<sup>47</sup> Some of these provisions are interstitial in character, providing for remedies where none were specified in the Company Law.<sup>48</sup> Others—such as the rules for piercing of the corporate veil and instituting a derivative lawsuit—appear to lack any foundation in statutory authority, being justified only by expedience.<sup>49</sup> Local courts have also introduced the notion of *stare decisis* into adjudication by designating cases as having precedential value in their own jurisdictions. For example, as early as 2002, a basic people’s court in Zhongyuan, Zhengzhou, implemented “a process whereby a holding shall be recognized as a ‘precedent’ with a certain degree of binding effect in the adjudication of similar cases in the future, which other panels and individual judges should refer to in handling similar cases.”<sup>50</sup> Till today, the Tianjin City High People’s Court operates on a similar model.<sup>51</sup> Elsewhere, the Guangdong and Jiangsu High People’s Court regularly designate “typical cases” for consultation by judges in their

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<sup>47</sup> In 1987, the SPC issued a reply which disapproved of the Guangxi High People’s Court articulation of policies governing real estate legal issues. The SPC found such a practice inappropriate as local courts did not have the authority to make abstract policies. However, this reply was abolished by the SPC in 2013. *Zuigao renmin fayuan guanyu difang geji fayuan buyi zhiding sifa jieshi xingzhi wenjian wenti de pifu* (最高人民法院关于地方各级法院不宜制定司法解释性质文件问题的批复) [SPC Reply Concerning the Inappropriateness for Local Courts at Various Levels to Adopt Documents of the Nature of Judicial Interpretation] (promulgated by the SPC on Mar. 31, 1987, effective on Mar. 31, 1987). *Zuigao Renmin Fayuan Guanyu Feizhi 1980nian 1yue 1ri zhi 1997nian 6yue 30ri qijian fabu de bufen sifa jieshi he sifajieshi xingzhi wenjian de jue ding* (最高人民法院关于废止 1980 年 1 月 1 日至 1997 年 6 月 30 日期间发布的部分司法解释和司法解释性质文件的决定) [Decision of the Supreme People’s Court on Abolishing Some Judicial Interpretations and Similar Documents Issued during the Period from January 1, 1980 to June 30, 1997] (promulgated by the SPC on Jan. 14, 2013, effective on Jan. 18, 2013). See Chao Xi, *Local Courts as Legislators? Judicial Lawmaking by Subnational Courts in China*, 34 *Statute Law Review* 39, 49.

<sup>48</sup> Chao Xi, *Local Courts as Legislators? Judicial Lawmaking by Subnational Courts in China*, 34 *STATUTE LAW REVIEW* 39, 46 (2013).

<sup>49</sup> *Id.* at 46–48, 48–50.

<sup>50</sup> Chris X. Lin, *A Quiet Revolution: An Overview of China’s Judicial Reform*, 4 *ASIAN-PAC. L. & POL’Y J.* 255, 300–01 (2003); Benjamin Liebman & Tim Wu, *China’s Network Justice*, 8 *CHI. J. INT’L L.* 257, 290 (2007).

<sup>51</sup> Lin, *supra* note 50, at 302.

respective jurisdictions.<sup>52</sup>

Because they exercise systematic influence over the behavior of legal subjects, these courts, like the SPC, are able to formulate and implement policies to advance their interests and those of the party-state as articulated by local governments. And as with the SPC, the institutional autonomy and strength of the lower courts vis-à-vis other government organs at the same level depends in no small measure on their contribution to national objectives, including the maintenance of stability and order.<sup>53</sup>

### III. THE PERSUASIVENESS OF CHINESE INSTITUTIONS

#### A. *Theoretical Background*

How does legitimation happen? It might occur through acceptance or persuasion.<sup>54</sup> The former involves conformance to a decision thought to be dubious or even wrong. The latter, on the other hand, implies a revision in attitude. That is, the judicial imprimatur convinces citizens of the correctness or rightness of the policy being endorsed. This second notion of legitimation—persuasion—is the subject of our study. The question that interests us here is whether the courts' status as a judicial rather than administrative body makes it more persuasive than other organs of state. The persuasiveness of American courts has been the subject of extensive research.<sup>55</sup> Although the evidence is mixed, several studies have concluded

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<sup>52</sup> See, e.g., Guangdong Gaoyuan Fabu Goujian Hexie Laodong Guanxi Shida Dianxing Anli (广东高院发布构建和谐劳动关系十大典型案例) [Guangdong High People's Court Published Ten Typical Cases concerning Harmonious Labor Relations], Guangdong Fayuan Wang (广东法院网) [Guangdong Court], <http://www.gdcourts.gov.cn/web/content/42887-?lmdm=2002> (last visited on Feb. 12, 2019); Jiangsu Gaoyuan Fabu Dianxing Anli 800 Yujian (江苏高院发布典型案例 800 余件) [Jiangsu High People's Court Issued Over 800 Typical Cases], Renmin Fayuan Bao (人民法院报) [People's Court], <http://www.court.gov.cn/zixun-xiangqing-13941.html> (last visited on Feb. 12, 2019).

<sup>53</sup> Xin He, *Why did they not take on the disputes? Law, power and politics in the decision-making of Chinese Courts*, 3 INTERNATIONAL JOURNAL OF LAW IN CONTEXT 203, 222 (2007) (arguing that for local courts to cultivate a degree of autonomy, they "must . . . first rely on, and co-operate with, administrative power in fulfilling the social control function required by the party-state.").

<sup>54</sup> Moustafa, *supra* note 46. For an articulation of this distinction, see for example Jeffrey J. Mondak, *Policy Legitimation and the Supreme Court: The Sources and Contexts of Legitimation*, 47 POLITICAL RESEARCH QUARTERLY 675, 676-679 (1994) and James L. Gibson & Michael J. Nelson, *The Legitimacy of the US Supreme Court: Conventional Wisdoms and Recent Challenges Thereto*, 10 ANNUAL REVIEW OF LAW AND SOCIAL SCIENCE 201, 204 (2014).

<sup>55</sup> Mondak, *supra* note 54, at 676–79; Gibson & Nelson, *supra* note 54, at 204.

that the United States Supreme Court can sway public opinion.<sup>56</sup> For example, Brandon Bartels and Diana Mutz find that “the [United States Supreme Court] is more influential than Congress in using its institutional credibility to move opinion, and it can do so fairly unconditionally, regardless of people’s sophistication levels, levels of issue relevant thinking, or the presence of issue relevant arguments.”<sup>57</sup> At the state-level, courts are also sometimes “more effective than other institutions at increasing public support for government policies.”<sup>58</sup> But little attention has hitherto been paid to the persuasiveness of courts in authoritarian regimes like China’s.<sup>59</sup> This neglect is regrettable because courts in one-party dominated states are also sites of political contestation and may function both as instruments of repression and agents of reform.

It is possible, however, to formulate some hypotheses about the persuasiveness of Chinese courts based on general theories and established facts. Persuasion, according to the mainstream models in psychology, can occur through elaborative or non-elaborative processing of information.<sup>60</sup>

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<sup>56</sup> Valerie J. Hoekstra, *The Supreme Court and Opinion Change: An Experimental Study of the Court’s Ability to Change Opinion*, 23 AMERICAN POLITICS RESEARCH 109 (1995); Rosalee A. Clawson et al., *The Legitimacy-conferring Authority of the U.S. Supreme Court: An Experimental Design*, 29 AMERICAN POLITICS RESEARCH 566 (2001); Brandon L. Bartels & Diana C. Mutz, *Explaining Processes of Institutional Opinion Leadership*, 71 THE JOURNAL OF POLITICS 249 (2009); Katerina Linos & Kimberly Twist, *The Supreme Court, the Media, and Public Opinion: Comparing Experimental and Observational Methods*, 45 J. LEGAL STUD. 223 (2016); but see Larry R. Baas & Dan Thomas, *The Supreme Court and Policy Legitimation: Experimental Tests*, 12 AMERICAN POLITICS RESEARCH 335 (1984); Patrick J. Egan & Jack Citrin, *The Limits of Judicial Persuasion and the Fragility of Judicial Legitimacy* (Institute of Governmental Studies Working Paper, 2011), available at <https://escholarship.org/uc/item/2gh262w3> (claiming that “even among the Court’s strongest supporters ... its power to shift mass opinion towards accepting its rulings [is] essentially nil.”).

<sup>57</sup> Bartel & Mutz, *supra* note 56, at 259.

<sup>58</sup> Robert J. Humes, *State Courts and Policy Legitimation: An Experimental Study of the Ability of State Courts to Change Opinion*, 42 PUBLIUS 211, 226 (2012).

<sup>59</sup> A notable exception to this lacuna in the literature, though not framed in these exact terms, is a study conducted in Russia. Vanessa A. Baird & Debra Javeline, *The Persuasive Power of Russian Courts*, 60 POLITICAL RESEARCH QUARTERLY 429 (2007). Although the Russian courts have been timid in the face of an overbearing executive, Vanessa Baird and Debra Javeline find that the Russian Supreme Court and the Russian Constitutional Court, like the Duma, are able to persuade the public, and all the more so if their rulings have an intolerant, rather than tolerant, valence.

<sup>60</sup> RICHARD E. PETTY & JOHN T. CACIOPPO, COMMUNICATION AND PERSUASION: CENTRAL AND PERIPHERAL ROUTES TO ATTITUDE CHANGE (1986); Shelly Chaiken, *Heuristic versus systematic information processing and the use of source versus message cues in persuasion*, 39 JOURNAL OF PERSONALITY & SOCIAL PSYCHOLOGY 752 (1980); Shelly Chaiken, *The Heuristic Model of Persuasion*, in SOCIAL INFLUENCE: THE ONTARIO SYMPOSIUM VOLUME 5 3 (Mark P. Zanna et al. eds. 1987); Serena Chen & Shelly Chaiken,

An individual may come to hold a certain attitude after systematically considering all the arguments presented for and against it (elaborative) or by relying on heuristics such as source credibility (non-elaborative). But source credibility can also affect the individual's motivation to think about the issue under discussion, thus activating the elaborative mode of attitudinal change. Credibility is therefore an important aspect of persuasiveness.

Credibility, in this context, may be understood as a combination of expertise and trustworthiness.<sup>61</sup> Research on Chinese state institutions has not drawn this precise distinction, focusing instead on a more capacious understanding of trust. Trust has been operationalized differently in the literature. Sometimes, citizens are asked how much they “trust” various government institutions.<sup>62</sup> Other times, the question is phrased as one of confidence in,<sup>63</sup> support for,<sup>64</sup> or satisfaction with<sup>65</sup> these institutions. Trust, however, is a contested concept, and is, moreover, “seldom unconditional; it is given to specific individuals or institutions over specific domains.”<sup>66</sup> These survey results are therefore difficult to interpret. For example, “global and generic measures” are apt to mislead if respondents “sound confident about central leaders in general while they only trust a small number of leaders.”<sup>67</sup>

Nevertheless, there are two “stylized facts” that surface from these disparate studies.<sup>68</sup> The first is that while liberal democracies have been experiencing a general trend of declining institutional trust since the 1960s, the Chinese state has historically enjoyed a relatively elevated level of trust

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*The Heuristic-Systematic Model in Its Broader Context*, in DUAL-PROCESS THEORIES IN SOCIAL PSYCHOLOGY 73 (Shelly Chaiken & Taacov Trope eds. 1999).

<sup>61</sup> Chanthika Pornpitakpan, *The Persuasiveness of Source Credibility: A Critical Review of Five Decades' Evidence*, 34 JOURNAL OF APPLIED SOCIAL PSYCHOLOGY 243 (2004).

<sup>62</sup> Huaxing Liu & John Watson Raine, *Why is There Less Public Trust in Local Government than in Central Government in China?*, 39 INTERNATIONAL JOURNAL OF PUBLIC ADMINISTRATION 258 (2015); Wenfang Tang & Yang Zhang, *Political Trust: An Experimental Study*, in WENFANG TANG, CHINESE POLITICAL CULTURE AND REGIME SUSTAINABILITY 134 (2016).

<sup>63</sup> World Values Survey Wave 6, 2010–14.

<sup>64</sup> Bruce J. Dickson et al., *Generating Regime Support in Contemporary China: Legitimation and the Local Legitimacy Deficit*, 43 MODERN CHINA 123 (2017).

<sup>65</sup> Ethan Michelson & Benjamin L. Read, *Public Attitudes toward Official Justice in Beijing and Rural China*, in CHINESE JUSTICE: CIVIL DISPUTE RESOLUTION IN CONTEMPORARY CHINA 169, 199 (Margaret Y.K. Woo & Mary E. Gallagher eds. 2011).

<sup>66</sup> Margaret Levi & Laura Stoker, *Political Trust and Trustworthiness*, 3 ANNUAL REVIEW OF POLITICAL SCIENCE 475, 476 (2000).

<sup>67</sup> Lianjiang Li, *The Magnitude and Resilience of Trust in the Center: Evidence from Interviews with Petitioners in Beijing and a Local Survey in Rural China*, 39 MODERN CHINA 3, 26 (2013).

<sup>68</sup> Dickson et al., *supra* note 64, at 131.

from its citizenry, a phenomenon that has usually been ascribed to a confluence of factors: its ability to deliver results, especially in relation to the economy, nationalist sentiment, and fears of instability.<sup>69</sup> The second is that central institutions are more trusted than local ones.<sup>70</sup>

The first generalization applies equally to judicial institutions. For example, 8.9% of American respondents in the World Values Survey Wave 6 had “a great deal” of confidence in the courts. In contrast, the same statistic for Chinese respondents registers at 21.1% (Tables 1 and 2). As Jeffrey Mondak noted, however, “[t]he legitimacy-conferring ability of a political institution does not exist in a vacuum, because legitimacy is inherently comparative.”<sup>71</sup> Although Chinese citizens trust their legal and political institutions more than American citizens do, the former have more confidence in the national government and the national legislature<sup>72</sup> whereas the latter maintain greater confidence in the courts.<sup>73</sup> This difference could, perhaps, be explained by the subordination of Chinese courts to the overriding interests of the party-state. Although instances of “telephone justice” are increasingly rare, courts remain under the formal supervision of the political-legal committees of the CCP.<sup>74</sup> Courts that are perceived as political stooges “mask nothing, legitimize nothing.”<sup>75</sup> Furthermore, the Chinese court system has been described as one characterized by informality and discretion,<sup>76</sup> a state of affairs that breeds

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<sup>69</sup> JIE CHEN, *POPULAR POLITICAL SUPPORT IN URBAN CHINA* (2004); Qing Yang & Wenfang Tang, *Exploring the Sources of Institutional Trust in China: Culture, Mobilization, or Performance*, 2 *ASIAN POLITICS & POLICY* 415 (2010); Andrew J. Nathan, *China's Changing of the Guard: Authoritarian Resilience*, 14 *JOURNAL OF DEMOCRACY* 6 (2003).

<sup>70</sup> Liu & Raine, *supra* note 62; Dickson et al., *supra* note 64.

<sup>71</sup> Jeffrey J. Mondak, *Perceived legitimacy of Supreme Court decisions: Three functions of source credibility*, 12 *POLITICAL BEHAVIOR* 363, 365 (1990).

<sup>72</sup> World Values Survey, 2010-2014.

<sup>73</sup> Qing Yang & Wenfang Tang, *Exploring the Sources of Institutional Trust in China: Culture, Mobilization, or Performance*, 2 *ASIAN POLITICS & POLICY* 415, 421 (2010). According to Yang and Tang, the Chinese Communist Party enjoys the most amount of trust out of all institutions compared, with 60% of respondents trusting it “a great deal”. The government, public security forces, and courts register 32%, 37%, and 37% respectively.

<sup>74</sup> Li, *supra* note 44.

<sup>75</sup> E.P. Thompson, *Whigs and Hunters: The Origin of the Black Act* 263 (1975); see Martin Shapiro, *Courts in Authoritarian Regimes*, in *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES* 326, 334–335 (2008). For instance, Pereira (1998, p. 44) observed that “military justice in Brazil was not a simple ‘extension of the military-police repressive apparatus’ for “[if] that had been the case, the usefulness of military justice as a legitimating device for the regime would have been negligible . . . .”

<sup>76</sup> Margaret Y.K. Woo, *Adjudication Supervision and Judicial Independence in the P.R.C.*, 39 *AM. J. COMP. L.* 95 (1991); Margaret Y.K. Woo, *Law and Discretion in the*

unaccountability and corruption.<sup>77</sup>

	Courts	Government in Beijing	Parliament
A great deal	21.1%	37.7%	28.8%
Quite a lot	50.0%	46.9%	48.6%
Not very much	15.4%	6.2%	10.4%
None at all	2.2%	1.0%	1.2%
No answer	5.4%	5.3%	5.4%
Don't know	5.9%	3.0%	5.6%
(N)	(2,300)	(2,300)	(2,300)

**Table 1: Confidence in Chinese Institutions World Values Survey (2012)**

	Courts	Government in D.C.	Parliament
A great deal	8.9%	3.7%	1.7%
Quite a lot	44.9%	28.9%	18.5%
Not very much	37.6%	51.2%	57.1%
None at all	6.5%	14.1%	19.6%
No answer	2.1%	2.1%	3.1%
(N)	(2,232)	(2,232)	(2,232)

**Table 2: Confidence in United States Institutions World Values Survey (2011)**

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*Contemporary Chinese Courts*, 8 PAC. RIM. L. & POL'Y J. 581 (1999).

<sup>77</sup> Ting Gong, *Dependent Judiciary and Unaccountable Judges: Judicial Corruption in Contemporary China*, 4 THE CHINA REVIEW 2, 33 (2004); Ling Li, *The "Production" of Corruption in China's Courts: Judicial Politics and Decision Making in a One-Party State*, 37 L. & SOC. INQUIRY 848 (2012).

While the theoretical and empirical relationship between trust and persuasiveness remains nebulous, these observations, distilled from the vast bodies of work on Chinese institutions, imply that while courts may have the ability to change attitudes, they are unlikely to be more successful than other governmental entities in doing so.

## *B. The Survey Experiment*

### 1. Design

To test these hypotheses, the survey experiment canvassed opinions on two scenarios – the criminalization of marital rape and a restriction on speech – after presenting respondents with arguments against and for the policies respectively. It has three factors. The first factor is the type of institution being identified as the source of the arguments: judicial or administrative.<sup>78</sup> The second factor is the level of the relevant institution: national or municipal. This factor permits us to distinguish the SPC from its less visible judicial subordinates and, in so doing, to separate persuasion engendered by the prestige of the apex court from persuasion induced by the judicial character of courts more generally. The third factor is the presence of a counter-argument. Research in political psychology has demonstrated that individuals exposed to a one-sided frame of an issue, rather than a two-sided frame, display reduced amounts of attitudinal change,<sup>79</sup> and the robustness of any treatment effect in the face of counterargument from other actors deepens our understanding of the relative persuasiveness of the compared institutions.<sup>80</sup> Together, these factors comprise a 2 (Judicial or Administrative) × 2 (Municipal or National) × 2 (No Counterargument or Counterargument) factorial design. In addition, the experiment has two control conditions. The policy arguments in these conditions are attributed to a non-regulatory entity; one condition features a counterargument while the other does not. These control conditions enable us to compare the persuasiveness of Chinese judicial and administrative entities vis-à-vis other actors.

In the first scenario, respondents are informed of the prevalence of

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<sup>78</sup> Mondak, *supra* note 71, at 365 (“The legitimacy-conferring ability of a political institution does not exist in a vacuum, because legitimacy is inherently comparative.”).

<sup>79</sup> Dennis Chong & James N. Druckman, *A Theory of Framing and Opinion Formation in Competitive Elite Environments*, 57 JOURNAL OF COMMUNICATION 99 (2007); Dennis Chong & James N. Druckman, *Counterframing Effects*, 75 JOURNAL OF POLITICS 1 (2012). Similar findings were also reported by a recent study on the effect of media coverage of the decisions of the United States Supreme Court on public opinion. See Linos & Twist, *supra* note 56.

<sup>80</sup> Bartel & Mutz, *supra* note 56.

marital rape in Chinese society. Depending on their random assignment to one condition or the other, this introduction is followed either by an appeal in favor of the criminalization of marital rape made by the Chinese Women's Federation or no appeal at all. The respondents are then exposed to arguments against the criminalization of marital rape, viz. that:

marital rape should, under usual circumstances, not be charged as a crime. This is because a husband and wife in a normal marriage have a right and a duty to cohabit, and marriage itself is generally deemed to be a form of generalized consent to sexual activity. In consideration of the need to build a harmonious society, the evidentiary difficulties that many cases of marital rape encounter, and litigants' regret over having filed a case, the criminalization of marital rape is not currently recommended.

In the treatment conditions, these arguments are attributed to either a court or a public security agency, and to either the national or municipal level of these authorities. In contrast, the control conditions attribute the arguments to a "prominent" lawyer. Finally, respondents are asked (1) if they support, oppose, or neither support nor oppose the criminalization of marital rape, and (2) the degree of their support for or opposition to the policy as registered on a 1 to 4 scale.

The second scenario follows the same format. In the second scenario, respondents are told of a recent controversy over an essay that challenged the veracity of the courageous deeds of a revolutionary hero.<sup>81</sup> The issue is whether the author of the essays should be subject to legal liability for

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<sup>81</sup> In May 2018, the NPC enacted a statute for the avowed purpose of "strengthening the protection of heroes and martyrs, safeguarding the public interest, upholding and passing on the spirit of heroes and martyrs and the spirit of patriotism, fostering and practicing the core values of socialism and unleashing the strong spiritual power to realize the Chinese Dream of the great rejuvenation of the Chinese nation." This statute forbids individuals or organizations from distorting, smearing, desecrating or denying the deeds and spirit of heroes and martyrs, and subjects violators to civil or criminal liability. *Zuigao Renmin Fayuan Gongbu Siqu Baohu Yingxiong Renwu Renge Quanyi Dianxing Anli* (最高人民法院公布四起保护英雄人物人格权益典型案例) [Four Model Cases regarding the Protection of Heroic Figures' Personal Rights and Interests Published by the Supreme People's Court] (promulgated by the SPC on Oct. 19, 2016, effective on Oct. 19, 2016). *Zhonghua Renmin Gongheguo Yingxiong Lieshi Baohufa* (中华人民共和国英雄烈士保护法) [Law of the People's Republic of China on the Protection of Heroes and Martyrs] (promulgated by the NPC on Apr. 27, 2018, effective on May 1, 2018). See also, Peng Bo, *Baohu Yinglie, Yi Falv De Mingyi* (保护英烈, 以法律的名义) [Protect Heroes and Martyrs on the Name of Law], *Renmin Wang* (人民网) [People.cn], June 13, 2018, <http://legal.people.com.cn/n1/2018/0613/c42510-30053577.html> (last visited on Feb. 14, 2019). The survey experiment was conducted before the passage of this law.

defamation. The respondents are then given arguments in favor of legal liability, viz. that:

heroes such as Huang Jiguang partially embody the collective memory of the nation, national spirit, and socialist values, and are an element of the social public interest; a premise of academic freedom and freedom of speech is that they should not harm the social public interest.

In the treatment conditions, these arguments are attributed to either a court or a Press, Publication, Radio, Film and Television (PPRFT) agency, and to either the national or municipal level of these authorities. The control conditions attribute the arguments to Xinhua News Agency. The scenario concludes with either a counterargument made by a professor of humanities or no counterargument at all. Similar to before, respondents are asked (1) if they support, oppose, or neither support nor oppose legal liability for essays that doubt the veracity of heroic deeds, and (2) the degree of their support for or opposition to the policy as registered on a 1 to 4 scale.<sup>82</sup>

The two scenarios share one similarity. The themes addressed by them—marital rape and freedom of speech—were selected because of their interest and salience to our targeted respondents, university students. This feature of the scenarios and the articulation of reasons for the endorsements mean that any attitudinal change is likely to be the result of more elaborative cognitive processes.<sup>83</sup> Any attitudinal change should therefore be resistant to counterargument.

The contrast between the two scenarios lies in the type of issue under consideration, the direction of the endorsement, and the control condition. Unlike the first scenario, the second scenario has ideological freight. In addition, the endorsement in the first scenario counsels against the policy while the endorsement in the second scenario favors it. There is some evidence that the former kind of endorsement is more persuasive than the latter.<sup>84</sup> Finally, the sourced quoted in the control for the second scenario has official ties to the party-state. The source quoted in the control for the first scenario does not. The second scenario therefore presents a more severe test of the persuasiveness of courts and other governmental agencies than the first scenario.

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<sup>82</sup> Though we will refer to the marital rape scenario as the “first” scenario and the freedom of speech scenario as the “second” scenario, the scenarios were not necessarily presented in that order on the survey questionnaire. The ordering of the two scenarios was randomized across respondents.

<sup>83</sup> Mondak, *supra* note 71; Bartel & Mutz, *supra* note 56.

<sup>84</sup> Michael D. Cobb & James H. Kuklinski, *Changing Minds: Political Arguments and Political Persuasion*, 41 AMERICAN JOURNAL OF POLITICAL SCIENCE 88, 103–04 (1997).

The second scenario also serves as a rough and ready check on the validity of the survey experiment. There is a pervasive anxiety among researchers about the truthfulness of responses collected in authoritarian states, especially if the questions being asked are of a politically sensitive nature. Although recent experimental evidence from China suggests that these concerns are, perhaps, overblown,<sup>85</sup> one could interpret any treatment effect as the product of fear. For example, greater opposition to the criminalization of marital rape after exposure to arguments from the Ministry of Public Security, as compared to the same arguments from a prominent lawyer, could be caused by a wariness of contradicting an official, authoritative, stance, rather than any true attitudinal change. The second scenario thus doubles as a safeguard against this alternative explanation. Suspicion is warranted if there is a large difference in agreement scores between the conditions in the second scenario despite the overtly ideological nature of the endorsed arguments.

## 2. Sample Characteristics

The instrument was fielded to 806 university students residing in two major cities. This sample is unrepresentative of the general populace. Under normal circumstances, a population sample would be ideal. But the risk of governmental interference in academic surveys is non-negligible, especially if the surveys are perceived to touch on political subjects.<sup>86</sup> The pursuit of a

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<sup>85</sup> Tang & Zhang, *supra* note 62; Xuchuan Leu & Jie Lu, *Revisiting Political Wariness in China's Public Opinion Surveys: Experimental Evidence on Responses to Politically Sensitive Questions*, 26 JOURNAL OF CONTEMPORARY CHINA 213 (2016).

<sup>86</sup> WENFANG TANG, PUBLIC OPINION AND POLITICAL CHANGE IN CHINA 39–41 (2005); Melanie Manion, *A Survey of Survey Research on Chinese Politics: What Have We Learned?*, in CONTEMPORARY CHINESE POLITICS: NEW SOURCES, METHODS, AND FIELD STRATEGIES 181, 185 (Allen Carlson et al. eds 2010); Xiaobo Lü, *Ethical Challenges in Comparative Politics Experiments in China*, in ETHICS AND EXPERIMENTS: PROBLEMS AND SOLUTIONS FOR SOCIAL SCIENTISTS AND POLICY PROFESSIONALS 113, 113 (Scott Desposato ed. 2015) (“On many occasions, scholars face ethical dilemmas between satisfying the scientific standards in their studies and ensuring the safety of local collaborators, respondents, and even scholars themselves. These issues are particularly salient when studying topics that are considered politically sensitive to the Chinese government.”); Marie-Eve Reny, *Authoritarianism as a Research Constraint: Political Scientists in China*, 97 SOC. SCI. Q. 909, 911 (2016) (“Furthermore, opinion surveys by foreign investigators continue to be the object of government wariness as they can be used to analyze the performance of local governments. The government does not prohibit foreign investigators from conducting opinion surveys, provided that they cover subjects situated within acceptable boundaries of inquiry, but it monitors closely the process through which those surveys are conducted.”; *see also* Sheena Chestnut Greitens & Rory Truex, *Repressive Experiences among China Scholars: New Evidence from Survey Data*, Li Cheng, *The China Paradox and American Misperception*, in THE UNITED STATES AND

nationally representative subject pool could require researchers to subordinate their inquiries to governmental or other quasi-official priorities. We therefore eschewed the population sample. This decision renders the experimental results less generalizable than they might otherwise be. At the same time, however, it enables us to offer some insight into the legitimacy of authoritarian courts as policymaking institutions.

The survey experiments were administered in person. Demographic questions were posed at the end of these surveys. Respondents were also quizzed on their knowledge of Chinese political and legal institutions. This quiz comprised of six multiple-choice questions of varying difficulty levels. Three questions tested respondents' knowledge of political institutions: (1) "Which agency in China exercises the legislative power of the State?"; (2) "What is the maximum number of consecutive terms that a President of the People's Republic of China may serve?"; and (3) "How many incumbent members does the Politburo Standing Committee of the CPC Central Committee have?". Three other questions assessed respondents' knowledge of legal institutions: (1) "What type of organ appoints and removes the adjudicative personnel of the local people's court at each level?"; (2) "Among the following criminal sentences, which one has to be reported to the Supreme People's Court for examination and approval (expecting those that should be adjudicated by the Supreme People's Court according to the law)?"; and (3) "Who is the incumbent president of the Supreme People's Court?".

Data on respondents' gender and their level of legal and political knowledge was recorded for two reasons. First, the criminalization of marital rape is a gendered issue, and people's susceptibility to persuasion might depend on the strength of their existing convictions. Second, prior research has uncovered a significant correlation between trust in Chinese institutions, on the one hand, and gender and "legal and political information" on the other.<sup>87</sup> Specifically, Qing Yang and Wenfang Tang report that "males are less trustful of legal institutions," and that the "more legal and political information people have, the less likely they are to trust institutions."<sup>88</sup>

We therefore define two indicator variables—"Male" and "Sophistication"—for our subsequent analyses. There are 490 females and

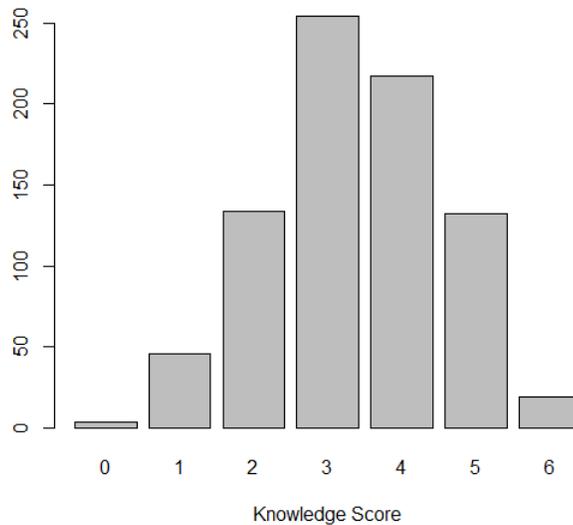
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CHINA: MUTUAL PUBLIC PERCEPTIONS 26, 29–30 (Douglas G. Spelman ed. 2011) ("[T]ighter political controls on the part of the Chinese government . . . remain serious constraining factors that risk severely damaging international academic collaboration and China's image in the world.").

<sup>87</sup> Yang & Tang, *supra* note 73, at 426. Although Yang and Tang report other variables being significantly correlated with trust in institutions, such as urban experience and education (beyond the primary level), we are unable to test these hypotheses here.

<sup>88</sup> *Id.*

316 males in the pool of respondents. The gender indicator, “Male”, is constructed by assigning females a value of 0 and males a value of 1. In addition, the number of correct answers given by each respondent to the six political and legal questions is summed to produce a knowledge score. The median of this sum is 3 and the mean, 3.3722. The distribution of knowledge scores is plotted in Table 3.



**Table 3: Distribution of Political and Legal Knowledge Scores**

To conserve statistical power, the indicator variable, “Sophistication,” is constructed by assigning a value of 1 to respondents who have attained a score of four or higher and 0 otherwise.

### 3. Results and Analysis

All responses to the two scenarios are coded from a 1 to 9 scale: 1 corresponds to “completely oppose,” 5 corresponds to “neither support nor oppose,” while 9 corresponds to “completely support.” Averages of these agreement scores for the control and treatment conditions in the marital rape scenario are summarized in Table 4 and the main and interaction effects between treatment conditions are estimated through an ordinary least squares (OLS) regression, presented in Table 5.<sup>89</sup>

<sup>89</sup> The main and interaction effects in a factorial design are straightforwardly defined by the Neyman-Rubin potential outcomes model. Tirthankar Dasgupta et al., *Causal inference from  $2^K$  factorial designs by using potential outcomes*, 77 JOURNAL OF THE ROYAL STATISTICAL SOCIETY STATISTICAL METHODOLOGY SERIES B 727 (2014). For the

Institution	Level	Counterargument	Average Score
Lawyer		No	6.8395
Lawyer		Yes	7.2750
Governmental Agency	National	No	6.3210
Governmental Agency	National	Yes	6.7778
Governmental Agency	Local	No	6.4625
Governmental Agency	Local	Yes	6.5823
Court	National	No	6.4634
Court	National	Yes	6.9877
Court	Local	No	6.6667
Court	Local	Yes	6.8125

**Table 4: Average Agreement Score for Conditions in Scenario One**

The regression analysis reveals no evidence of judicial organs being more persuasive than administrative ones, or of national entities being more persuasive than local ones. As can be seen from Table 5, the differences in

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equivalence between regression-based and randomization based inference of these effects, see Jiannan Lu, *On randomization-based and regression-based inferences for  $2^k$  factorial designs*, 112 STATISTICS & PROBABILITY LETTERS 72 (2016). A proof of the finite population asymptotic normality of the OLS estimator of these effects is given in Jiannan Lu, *Covariate adjustment in randomization-based causal inference for  $2^k$  factorial designs*, 119 STATISTICS & PROBABILITY LETTERS 11 (2016). The standard errors are estimated using the Huber-White sandwich estimator.

agreement scores between the factors, or combination of factors, are small and quite possibly the result of random variation.<sup>90</sup> It appears that courts and public security agencies are not appreciably different in their ability to persuade.

	Agreement Score
Constant	6.667*** (0.198)
Administrative	-0.204 (0.280)
National	-0.203 (0.279)
Counterargument	0.146 (0.280)
Administrative:National	0.062 (0.395)
Administrative:Counterargument	-0.026 (0.398)
National:Counterargument	0.378 (0.395)
Administrative:National:Counterargument	-0.041 (0.560)
Observations	645
R <sup>2</sup>	0.013
Adjusted R <sup>2</sup>	0.003

<sup>90</sup> The significance tests rely on the asymptotic normality of the OLS estimator. As a robustness check, we have also performed nonparametric ANOVA on aligned rank transformed data, and obtained similar qualitative results.

Note:

\* $p < 0.05$  \*\* $p < 0.01$  \*\*\* $p < 0.001$

**Table 5: OLS Regression of Agreement Score in Scenario One on Factors, Excluding Controls. Robust Standard Error in Parentheses.**

To examine whether courts and agencies are in fact more persuasive than non-judicial or administrative actors, we compare them against the lawyer quoted in the control conditions (Table 6). Relative to the lawyer, courts and, especially, public security agencies are able to induce a greater amount of attitudinal change.<sup>91</sup> Specifically, the baseline model (which does not take into account any of the covariates) estimates that attributing the argument opposing the criminalization of marital rape to a court or an agency, rather than a legal practitioner, reduces the average support for the reform by 0.324 and 0.520 respectively on a 9-point scale. These results remain largely true<sup>92</sup> even after we make covariate adjustments for gender and knowledge.<sup>93</sup> Although greater legal and political knowledge does not appear to vitiate the influence of an institutional endorsement, there is some support for Yang & Tang’s finding that “males are less trustful of legal institutions.”<sup>94</sup>

	Agreement Score			
Constant	7.056***	7.056***	7.388***	7.381***
	(0.138)	(0.158)	(0.170)	(0.188)
Judicial	-0.324*	-0.292	-0.497**	-0.548**
	(0.169)	(0.191)	(0.210)	(0.230)

<sup>91</sup> As a robustness check, we performed the Kruskal-Wallis rank sum test, and reject the null hypothesis of identical means across lawyer, courts, and public security agencies conditions at conventional levels of significance ( $p$ -value=0.007127). A follow-on pair-wise Wilcoxon rank sum test that uses the Holm-Bonferroni correction for multiple hypothesis testing yields the same qualitative results, except that the difference in means between the lawyer and the courts no longer attains conventional levels of significance ( $p$ =0.0915).

<sup>92</sup> In one specification, the coefficient for the court indicator does not reach conventional levels of significance ( $p$ -value=0.1061). However, this specification is unlikely to be a good fit for the data because the knowledge covariate seems to contribute very little to an explanation of the variance in the dependent variable. In any case, it is fairest to say, given the outcomes of the non-parametric tests, that our conclusions as to public security agencies are more robust than our findings as to courts.

<sup>93</sup> As might perhaps be expected, male respondents were more likely to oppose the criminalization of marital rape than female respondents independent of their assignment to any of the treatment or control conditions.

<sup>94</sup> Yang & Tang, *supra* note 73, at 426.

Administrative	-0.520***	-0.475**	-0.565***	-0.552**
	(0.169)	(0.191)	(0.211)	(0.230)
Sophistication		-0.002		0.040
		(0.329)		(0.439)
Judicial:Sophistication		-0.191		0.527
		(0.418)		(0.599)
Administrative:Sophistication		-0.252		-0.087
		(0.416)		(0.583)
Male			-0.923***	-1.006***
			(0.283)	(0.332)
Judicial:Male			0.523	0.811**
			(0.344)	(0.399)
Administrative:Male			0.201	0.306
			(0.345)	(0.400)
Sophistication:Male				0.252
				(0.658)
Judicial: Sophistication:Male				-1.345
				(0.845)
Administrative: Sophistication:Male				-0.305
				(0.835)
Observations	806	806	806	806
R <sup>2</sup>	0.012	0.014	0.045	0.051
Adjusted R <sup>2</sup>	0.009	0.007	0.039	0.038
<i>Note:</i>	* $p < 0.05$ ** $p < 0.01$ *** $p < 0.001$			

**Table 6: OLS Regression of Agreement Score in Scenario One on Factors and Covariates , Including Controls. Robust Standard Errors in Parentheses.**

We repeat the same analyses for the freedom of speech scenario. Averages of the agreement scores for the control and treatment conditions in this second scenario are summarized in Table 7 and the main and interaction effects between treatment conditions are estimated through an OLS regression, presented in Table 8.

Institution	Level	Counterargument	Average Score
State Media		No	5.4735
State Media		Yes	5.0500
Governmental Agency	National	No	5.3086
Governmental Agency	National	Yes	5.6830
Governmental Agency	Local	No	5.3951
Governmental Agency	Local	Yes	5.5732
Court	National	No	5.4198
Court	National	Yes	5.4375
Court	Local	No	5.5000
Court	Local	Yes	5.6296

**Table 7: Average Agreement Score for Conditions in Scenario Two**

Like in the first scenario, there is no evidence that judicial organs are more persuasive than administrative ones. There is also no evidence that national entities are more persuasive than local ones. Overall, no significant differences in agreement score were detected between any factor—or combination of factors—across the treatment conditions (Table 8).<sup>95</sup> The null hypothesis that courts and governmental agencies are similar in their ability to persuade cannot be rejected.

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Agreement Score

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<sup>95</sup> As before, we performed nonparametric ANOVA on aligned rank transformed data, and obtained similar qualitative results.

Constant	6.705*** (0.197)
Judicial	-0.372 (0.276)
National	0.171 (0.276)
Counterargument	-0.199 (0.276)
Judicial:National	0.125 (0.388)
National:Counterargument	0.756 (0.388)
National:Counterargument	0.122 (0.389)
Judicial:National:Counterargument	-0.394 (0.547)
Observations	646
R <sup>2</sup>	0.012
Adjusted R <sup>2</sup>	0.002

Note: \* $p < 0.05$  \*\* $p < 0.01$  \*\*\* $p < 0.001$

**Table 8: OLS Regression of Agreement Score in Scenario Two on Factors, Excluding Controls. Robust Standard Errors in Parentheses.**

To see if these institutions are in fact more persuasive than non-regulatory actors, we once again compare courts and PPRFT agencies to Xinhua News Agency whose editorial is used in the control conditions. True to our expectations, the former do not have a noticeable edge over the latter in inducing attitudinal change (Table 9).<sup>96</sup> There are no indications that treatment effects might vary by knowledge or gender.

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Agreement Score

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<sup>96</sup> The Kruskal-Wallis rank sum test is unable to reject the null hypothesis of identical means across lawyer, courts, and PPRFT agencies conditions at conventional levels of significance ( $p$ -value=0.3655).

Constant	5.244***	5.271***	5.362***	5.319***
	(0.139)	(0.155)	(0.172)	(0.185)
Judicial	0.253	0.262	0.064	0.150
	(0.171)	(0.190)	(0.213)	(0.231)
Administrative	0.247	0.193	0.022	0.058
	(0.170)	(0.189)	(0.214)	(0.228)
Sophistication		-0.142		0.324
		(0.353)		(0.507)
Judicial:Sophistication		-0.046		-0.581
		(0.433)		(0.609)
Administrative:Sophistication		0.288		-0.235
		(0.435)		(0.695)
Male			-0.344	-0.161
			(0.293)	(0.341)
Judicial:Male			0.526	0.331
			(0.356)	(0.410)
Administrative:Male			(0.354)	(0.410)
				-0.776
Sophistication:Male				(0.723)
				0.894
Judicial:Sophistication:Male				(0.884)

				0.715
Administrative:Sophistication:Male				(0.924)
Observations	806	806	806	806
R <sup>2</sup>	0.003	0.005	0.008	0.010
Adjusted R <sup>2</sup>	0.001	-0.002	0.002	-0.003
<i>Note:</i>	* $p < 0.05$	** $p < 0.01$	*** $p < 0.001$	

**Table 9: OLS Regression of Agreement Score in Scenario Two on Factors and Covariates, Including Controls. Robust Standard Errors in Parentheses.**

Taking the two experimental scenarios together, it appears that Chinese judicial and administrative institutions are able to legitimize policy, but only if the issues or arguments are non-ideological in nature. Moreover, courts do not seem to be more persuasive than governmental agencies. Care must be exercised in generalizing these findings since our subject pool is comprised entirely of university students. Nevertheless, the qualitative conclusions reached here might well extend to the Chinese population despite the unrepresentativeness of the sample. Citizens who are younger and more educated are likely to be more skeptical of governmental institutions.<sup>97</sup> To the extent that trust moderates the persuasiveness of state institutions, the phenomena documented by the survey experiment should be amplified in the overall population. To the best of our knowledge, there is no theoretical or empirical basis for believing that compared to the average citizen, university students systemically repose more trust in judicial rather than administrative institutions, or vice versa. It is therefore not unreasonable to extrapolate our findings to the population as a whole—at least until better data comes along.

#### IV. THE FUTURE OF JUDICIALIZATION IN CHINA

##### A. *The Political Economy of Chinese Institutions*

<sup>97</sup> Dahai Zhao & Wei Hu, *Determinants of public trust in government: empirical evidence from urban China*, 83 INTERNATIONAL REVIEW OF ADMINISTRATIVE SCIENCES 358, 366 (2017) (reporting results from a digit-dialled telephone survey of adult respondents in 34 Chinese metropolitan cities); Lianjiang Li, *Political Trust in Rural China*, 30 MODERN CHINA 228, 236 (2004) (reporting results from face-to-face interviews with adult respondents in four counties).

As Benjamin Liebman mused,

Many in the West and in China have looked to China's courts in the hope that they may play a transformative role in the Chinese political system. But the more pertinent question may be what role courts can play within the current system. Can they serve as fair adjudicators of private disputes, and as checks on some forms of official action, without political change? And if they do, will they legitimize Party rule, or will the development of a more professionalized judiciary inevitably lead to courts that challenge Party authority?<sup>98</sup>

Taking the inquiry in this direction requires an empirical assessment of the persuasiveness of courts relative to other state organs. The hold that judicial institutions have on mass opinion influences the degree of public support courts might expect were they to confront rival institutions.<sup>99</sup> Moreover, the better courts are at legitimizing national or party directives, the more latitude they are likely to receive from their governmental and political overseers.

The evidence here suggests that despite their recent ascendance, Chinese courts are unlikely to openly defy other state organs, nor are they likely to assert themselves against the ruling party. Though they are sometimes able to induce agreement to controversial policies, they are not the only entities capable of doing so. Administrative bodies too can produce attitudinal change, perhaps to a greater extent than judicial ones. The party-state might well cultivate a professional judiciary to police the excesses of local governments or to forestall social unrest through the satisfactory, if not always principled, resolution of large-scale disputes.<sup>100</sup> But it does not rely on courts to convince the public of the rightness of its decisions. For matters that do not implicate party doctrine or orthodoxy, non-judicial endorsements seem to be as effective as judicial ones. And for issues that carry ideological freight, state organs, including courts, appear powerless to

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<sup>98</sup> Benjamin L. Liebman, *China's Courts: Restricted Reform*, in CHINA'S LEGAL SYSTEM: NEW DEVELOPMENTS, NEW CHALLENGES 66, 82 (Donald C. Clarke ed. 2008)

<sup>99</sup> See also Lee Epstein, Jack Knight, & Olga Shvetsova, *The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government*, 35 LAW & SOC'Y REV. 117 (2001) (elaborating a theory of how constitutional courts build up legitimacy by confining their decisions to the "tolerance interval," that is the range of outcomes that are acceptable to the political branches).

<sup>100</sup> See Xin He, *Administrative Law as a Mechanism for Political Control in Contemporary China*, in BUILDING CONSTITUTIONALISM IN CHINA (Stéphanie Balme & Michael W. Dowdle eds., 2009) (arguing that political and socioeconomic conditions explain the use or non-use of administrative law as a mechanism for monitoring and controlling lower-level governments).

change minds.

These facts might help explain, among other things, the institutional design of constitutional review in China. As previously mentioned, the Chinese constitution provides for the NPC and its Standing Committee “to supervise [its] enforcement.”<sup>101</sup> The Standing Committee has, in addition, the authority “to interpret the Constitution.”<sup>102</sup> These provisions have been read to preclude judicial review of the constitutionality of legislative and administrative acts. Indeed, it has long been understood that courts are not permitted to resolve a conflict between the constitution and ordinary laws or other official documents by disregarding the latter.<sup>103</sup> This is a task for the national legislature. Since 2000, constitutional regularity has been assured—at least nominally—through a system of “recording and review.”<sup>104</sup> Under this regime, regulations and interpretations issued by governmental bodies other than the NPC or its Standing Committee are sent to the Secretariat of the NPC Standing Committee’s General Office to be recorded. A small number of these documents are subject to active review by the NPC Standing Committee’s Legislative Affairs Commission. The vast majority are not given any scrutiny at all unless a concern is surfaced to the Commission’s attention. In theory, any citizen could submit suggestions for review. In practice, “private individuals have never been able to trigger the seemingly well-designed, albeit convoluted, review process . . . and no public institution has ever even bothered to try.”<sup>105</sup> The result is the proliferation of unconstitutional rules and a chaotic lack of uniformity in the

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<sup>101</sup> Zhonghua Renmin Gongheguo Xianfa, *supra* note 6, arts. 62, 67.

<sup>102</sup> *Id.*

<sup>103</sup> He Haibo, *How Much Progress Can Legislation Bring? The 2014 Amendment of the Administrative Litigation Law of PRC*, 13 U. PA. ASIAN L. REV. 137, 174 (2018) (“It is completely out of the question in China for courts to review the constitutionality of laws . . .”).

<sup>104</sup> The 2000 amendment to the Legislation Law prescribes substantive and procedural rules regarding constitutional review. In 2004, the standing committee of the NPC set up an office responsible for recording and review of the constitutionality and legality of statutes and regulations. Xingzheng Fagui, Difangxing Fagui, Zizhi Tiaoli he Danxing Tiaoli, Jingji Tequ Fagui Beian Shencha Gongzuo Chengxu (The Procedure of the Work of Record and Review of Administrative Regulations, Local Regulations, Autonomy Rules, and Special Economic Zone Regulations) [行政法规、地方性法规、自治条例和单行条例、经济特区法规备案审查工作程序] (promulgated by the National People’s Congress on Oct. 16, 2000, effective on Oct. 16, 2000); Hu Jinguang, *Lun Hexianxing Shencha de Guolv Jizhi*, 19 *China Law Review* 64, 65 (2018); Qianfan Zhang, *Establishing Judicial Review in China*, in *CONSTITUTIONAL COURTS IN ASIA* 320–22 (Albert H.Y. Chen & Andrew Harding eds., 2018); *see also* Shen Kui, *Administrative “Self-Regulation” and the Rule of Administrative Law in China*, 13 U. PA. ASIAN L. REV. 72, 88–92 (2018) (describing the “filing and check” system for reviewing the constitutionality of administrative regulations and local regulations.”).

<sup>105</sup> Zhang, *supra* note 104, at 322.

law. This state of affairs probably spurred President Xi Jinping to announce at the 19th National People's Congress in October 2017 the imperative to “strengthen oversight to ensure compliance with the Constitution, advance constitutional review, and safeguard the authority of the Constitution.”<sup>106</sup>

Now, operating through law may legitimize the party-state by giving it the veneer of procedural regularity. But legalization does not always entail *judicialization*, i.e. “the reliance on courts and judicial means for addressing core moral predicaments, public policy questions, and political controversies.”<sup>107</sup> To implement President Xi's directive at the 19th National People's Congress, the Chinese constitution was amended to reorganize the Law Committee of the NPC as the Constitution and Law Committee.<sup>108</sup> This committee—not the courts—is responsible for ensuring that local legislation does not run afoul of the constitution. Academics did propose alternatives that contemplated greater judicial participation. A professor at the China Youth Institute of Political Studies, for instance, argued for the establishment of a special tribunal of the SPC to adjudicate

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<sup>106</sup> *Full Text of Xi Jinping's Report at 19th CPC National Congress*, China Daily, Nov. 4, 2017, [http://www.chinadaily.com.cn/china/19thcpcnationalcongress/2017-11/04/content\\_34115212.htm](http://www.chinadaily.com.cn/china/19thcpcnationalcongress/2017-11/04/content_34115212.htm) (last visited on Feb. 13, 2019). Zhu Jie, *Lun Hexianxing Shencha de Zhengzhi Jueduan he Zhidu Tuijin – Jiyu Dang de Shijiuda Baogao de Jiedu* (论合宪性审查的政治决断和制度推进—基于党的十九大报告的解读) [The Political Determination and System Promotion of Constitutional Review: Based on the Interpretation of the 19th CCP's National Congress], 12 *Faxue Zazhi* (法学杂志) [Law Science Magazine] 26, 26 (2017).

<sup>107</sup> Ran Hirschl, *The Judicialization of Politics*, in THE OXFORD HANDBOOK OF POLITICAL SCIENCE 253, 253 (Robert E. Goodin ed. 2011); Albert H Y Chen, *The Reform and Renewal of China's Constitutional System* (Zhongguo xianzhi zhi weixin 中国宪制之维新), 16 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 728, 729 (2018) (book review) (“[A]lthough Xi Jinping's report at the 19th National Congress in October 2017 legitimizes . . . the idea of “constitutional review” . . . , there is no suggestion or intention to alter the existing relationship between the CPP and the constitutional and legal systems of the state . . . .”); cf. Taisu Zhang & Tom Ginsburg, *Legality in Contemporary Chinese Politics*, VA. J. INT'L L. 64 (forthcoming) (arguing that the trend towards legality augurs an “increasingly professional, independent, and powerful” judiciary); Mark Jia, *China's Constitutional Entrepreneurs*, 64 AM. J. COMP. L. 619, 625 (2016).

<sup>108</sup> *Zhonghua Renmin Gongheguo Xianfa* (2018 Xiuzhengan) [中华人民共和国宪法 (2018 修正案)] The Constitution of the People's Republic of China (2018 Amendment) (promulgated by the National People's Congress on Mar. 11, 2018, effective on Mar. 11, 2018), art. 70; Fan Jinxue, *Quanguo Renda Xianfa he Falv Weiyuanhui de Gongneng he Shiming* (全国人大宪法和法律委员的功能与使命) [The Function and Mission of the Constitution and Law Committee of the National People's Congress], 4 *Huadong Zhengfa Daxue Xuebao* (华东政法大学学报) [ECUPL Journal] 13, 13-21 (2018); Han Dayuan, *Cong Falv Weiyuanhui dao Xianfa he Falv Weiyuanhui: Tizhi yu Gongneng de Zhuanxing* (从法律委员会到宪法和法律委员会：体制与功能的转型), 19 *Huadong Zhengfa Daxue Xuebao* (华东政法大学学报) [EUCPL Journal] 6, 6-12 (2018).

the constitutionality of local legislation. Such a system, she claimed, would strengthen the authority of both the central government and the judiciary.<sup>109</sup> But the political calculus tells against such an idea. For the party-state, the benefits of having the SPC perform constitutional review are meager. The SPC is no more effective than other organs of state in inducing policy agreement and quelling social dissent. On the cost side of things, however, authorizing the SPC to set aside lower laws as contrary to higher ones loosens the grip of the NPC on subordinate legislatures. More dangerously, it gives the court occasion to elaborate a constitutional jurisprudence that, through accretion, might eventually come to regulate the party-state's exercise of its powers. It is therefore not surprising that President Xi, though advocating conformance to the constitution, never contemplated judicializing constitutional review. The task of arbitrating between contradictory legal norms remains to this day a legislative, not judicial, prerogative.

### *B. Public Interest Litigation in China and its Possibilities*

The persuasiveness of the Chinese courts also bears on the promise of public interest litigation in achieving social change.<sup>110</sup> As others have observed, many plaintiffs broadcast their grievances in order to marshal the public behind their own causes. But many plaintiffs, especially those bringing claims implicating gender or the environment, also seek to challenge pernicious practices, beliefs, and norms.<sup>111</sup> As Titi Liu describes it, “[t]he central motivation of [such] plaintiffs is the struggle to define abusive practices that had previously been tolerated by the Chinese public as both a legal harm and harmful to a collective public interest.”<sup>112</sup> They

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<sup>109</sup> Ma Ling, *Woguo Weixian Shencha Jigou de Moshi Xuanze* (我国违宪审查机构的模式选择) [The Choice of Models of China's Constitutional Review Authority] 6 *Henan Caijing Zhengfa Daxue Xuebao* (河南财经政法大学学报) [Journal of Henan University of Economics and Law] 27, 27-31 (2014).

<sup>110</sup> See Hualing Fu & Richard Cullen, *Wei quan (Rights Protection) Lawyering in an Authoritarian State: Building a Culture of Public-Interest Lawyering*, 59 *THE CHINA JOURNAL* 111, 112—16 (2008) (defining the concept of *wei quan* lawyering). We recognize our experimental scenarios addressed judicial interpretations, not judicial opinions. But there is little reason to believe that this distinction makes a difference for persuasion.

<sup>111</sup> Liebman, *China's Courts* at 34.

<sup>112</sup> Titi M. Liu, *Transmission of Public Interest Law: A Chinese Case Study*, 13 *UCLA J. INT'L L. & FOREIGN AFF.* 263, 292 (2008); see also Liebman, *China's Courts: Restricted Reform* at 34 (“[A]lthough China's courts are not fora for adjudicating public rights, they have become fora for airing a range of grievances. Over the past decade, litigants have brought a widening array of what might be thought of as public grievances into the courts - including class actions, public interest lawsuits on such issues as women's and environmental rights, and constitutional claims.”).

carry on this struggle by publicizing the particular injury they suffered, thereby demonstrating the systemic injustice being perpetrated on others like them. They also hope that a legal victory will inspire victims to stand up for themselves and persuade victimizers of the error of their ways.

The employment discrimination cases are an area where the strictures of the law brush up against diffuse and entrenched stereotypes. Formally, the Women’s Rights Law states that “[w]omen shall enjoy equal rights with men in all aspects of political, economic, cultural, social, and family life” and declares “[e]quality between men and women [to be] a basic State Policy.”<sup>113</sup> “The State,” the statute continues, “takes the necessary measures to gradually improve the systems for protecting the rights and interests of women, in order to eliminate all forms of discrimination against women.”<sup>114</sup> This law harkens back “[o]ne of the promises made by the revolutionaries who established the People’s Republic in 1949”: “to raise the status of women.”<sup>115</sup> “The entry of women into the labor force was deemed especially important because of the belief of Chinese and other Marxists that women’s participation was the key to the liberation of women.”<sup>116</sup> “Women,” according to Mao Zedong, “hold up half the sky” and “[w]hatever men comrades can do, woman comrades can do.”<sup>117</sup> The reality, however, falls woefully short of the rhetoric.<sup>118</sup> Even today, women tend to be “perceived as fragile and more deserving to work at home, rather than getting advancement toward managerial positions.”<sup>119</sup> They are paid

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<sup>113</sup> China enacted the Women’s Rights Law in April 1992. In 2005, the NPC amended the law, adding the quoted statements to the statute. These statements survive the 2018 amendment. *Zhonghua Renmin Gongheguo Funv Quanyi Baozhangfa (2018 Xiuzheng)* (中华人民共和国妇女权益保障法 (2018 修正)) [Law of the People’s Republic of China on the Protection of Women’s Rights and Interests (2018 Amendment)] (promulgated by the National People’s Congress on Oct. 26, 2018, effective on Oct. 26, 2018), art. 2; *Zhonghua Renmin Gongheguo Funv Quanyi Baozhangfa (2005 Xiuzheng)* (中华人民共和国妇女权益保障法 (2005 修正)) [Law of the People’s Republic of China on the Protection of Women’s Rights and Interests (2005 Amendment)] (promulgated by the NPC on Aug. 28, 2005, effective on Dec. 1, 2005), art. 2; *Zhonghua Renmin Gongheguo Funv Quanyi Baozhangfa* (中华人民共和国妇女权益保障法) [Law of the People’s Republic of China on the Protection of Rights and Interest of Women] (promulgated by the NPC on Apr. 3, 1992, effective on Oct. 1, 1992), art. 2.

<sup>114</sup> *Id.*

<sup>115</sup> John Bauer et al., *Gender Inequality in Urban China: Education and Employment*, 18 *MODERN CHINA* 333, 333 (1992).

<sup>116</sup> *Id.*

<sup>117</sup> Gail Hershatter, *State of the Field: Women in China’s Long Twentieth Century*, 63 *THE JOURNAL OF ASIAN STUDIES* 991, 1013 (2004).

<sup>118</sup> Jamie Burnett, *Women’s Employment Rights in China: Creating Harmony for Women in the Workforce*, 17 *IND. J. GLOBAL LEGAL STUD.* 289, 293–94 (2010).

<sup>119</sup> Rangita de Silva de Alwis, *Opportunities and Challenges for Gender-Based Legal Reform in China*, 5 *E. ASIA L. REV.* 197, 220 (2010).

less than men, and tend to be the last to be hired and the first to be fired. And job advertisements continue to perpetuate stereotypes that cast women as physically and intellectually inferior.<sup>120</sup>

*Cao Ju v. Juren Academy*,<sup>121</sup> for instance, was a suit initiated in July 2012 in Beijing's Haidian District by a plaintiff who had been rejected for a position as an executive assistant because she was female. Plaintiff Cao alleged a violation of her right to obtain employment on an equal basis. The court temporized, establishing the case after a wait of fourteen months. At trial, the principal of Juren Academy formally apologized for the school's policy of recruiting only men and offered Cao ¥30,000 in compensation. Cao accepted the offer and her case—dubbed “the first gender discrimination lawsuit in China”—was settled on December 18, 2013.<sup>122</sup> At the affair drew to a close, Juren Academy's principal reflected on the case's “great influence in China.”<sup>123</sup> According to him, the controversy highlighted the need to overhaul human resource practices and, also, for supplementary regulation defining and promoting gender equality in the workplace.<sup>124</sup> For her part, Cao hoped that her case “will inspire other women like [her] to stand up for their rights.”<sup>125</sup>

Indeed, *Juren Academy* spawned similar litigation attacking gender discrimination in China.<sup>126</sup> *Gao Xiao vs. Guangdong Huishijia Economic*

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<sup>120</sup> Carol Woodhams et al., *The persistence of gender discrimination in China—evidence from recruitment advertisements*, 20 THE INTERNATIONAL JOURNAL OF HUMAN RESOURCE MANAGEMENT 2084 (2009).

<sup>121</sup> Caoju Su Juren Jiaoyu Xingbie Jiuye Qishi An (曹菊诉巨人教育性别就业歧视案) [Caoju v. Juren Academy (2013)].

<sup>122</sup> Liu Minghui, *Shouli Jiuye Jihui Xingbie Qishian Zeshe de Lifa Queshi* [首例就业机会性别歧视案折射的立法缺失] (The Gap of Legislation Reflected in the First Case of Gender Discrimination to Employment), 122 Funv Yanjiu Luncong [妇女研究论丛] (Collection of Women's Studies) 44, 44-48 (2014).

<sup>123</sup> *Nvxing Su Danwei Xingbie Qishian: Shuangfang Hejie Huopei 3 Wanyuan* [女生诉单位性别就业歧视案：双方和解获赔3万元] (Women Sued A Hiring Company against Gender Discrimination to Employment: The Parties Settled with a 30,000 Yuan), Beijing Chenbao [北京晨报] (Beijing Morning Post), December 19, 2013, <http://news.sina.com.cn/s/2013-12-19/040429022586.shtml> (last accessed on February 11, 2019).

<sup>124</sup> *Id.*

<sup>125</sup> *Plaintiff Obtains 30,000 yuan in China's First Gender Discrimination Lawsuit*, Zhongguo Laogong Tongxu (China Labour Bulletin), Jan. 9, 2014, <https://clb.org.hk/content/plaintiff-obtains-30000-yuan-china%E2%80%99s-first-gender-discrimination-lawsuit> (last visited on Feb. 15, 2019).

<sup>126</sup> For example, inspired by the highly publicized Cao Ju case, Huang Rong, a newly college graduate, filed a lawsuit against the New Oriental Cooking School which refused to consider her application for a clerk position based on gender. Over a phone conversation with Huang Rong, the New Oriental Cooking School cited one of the common stereotypes about women in China to explain why its clerk position only welcome male to apply,

*Development Co.* is illustrative. Plaintiff Gao applied for a role as a trainee cook at defendant's restaurant and was told that the opening had been filled.<sup>127</sup> As she later discovered, that statement was false: the position was subsequently re-advertised as being for "male applicants only."<sup>128</sup> The restaurant then explained that the job was more suited to men because it was physically demanding.<sup>129</sup> Dissatisfied, Gao sued the restaurant's owner in Guangdong's Haizhu District, demanding a formal apology and ¥40,800 in damages.<sup>130</sup> Though the court hesitated in accepting the case, it eventually held that the restaurant's hiring policies unlawful and awarded Gao for ¥2,000 for the mental distress she suffered.<sup>131</sup> On appeal, the Guangdong Intermediate People's Court denied Gao's request for higher damages.<sup>132</sup> It did, however, order the defendant to publish an apology in a local newspaper.<sup>133</sup> Interviewed at the conclusion of her lawsuit, Gao said that "[she] was hoping for a legal breakthrough, to send the message to everyone, to women, that there is such a thing as gender discrimination in today's society. Recruitment should be done on the basis of ability, not gender."<sup>134</sup>

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"women are not suited to travel or they are too weak to carry a suitcase." Although Huang Rong told the recruiter that she did not mind traveling and was physically strong, her application was rejected nonetheless. The court in Zhejiang Province found the defendant had violated Huang Rong's right to equal employment and had committed employment discrimination by restricting job applications to men only and thus ordered the defendant to compensate the plaintiff ¥2,000 for mental distress. This is the first judgment that awarded compensation against gender discrimination in employment since China adopted the Law on the Protection of Women's Rights and Interests of the People's Republic of China in 1992. See Huang Rong Su Hangzhou Xindongfang Pengren Zhiye Jineng Peixun Xuexiao (黄蓉诉杭州新东方烹饪职业技能培训学校) [*Cooking School Huang Rong vs. New Oriental Cooking School* (2014)]; See also, *Plaintiff Obtains 30,000 yuan in China's First Gender Discrimination Lawsuit*, *supra* note 125.

<sup>127</sup> Gaoxiao Su Guangdong Huishijia Jingji Fazhan Youxian Gongsi (高晓诉广东惠食佳经济发展有限公司) Gao Xiao vs. Guangdong Huishijia Economic Development Co. (2014). Huang Yizhi, *Kuokuan Xingbie Jiuye Qishi Anjian de Sifa Jiuji: Cong Guangzhou Huishijia Xingbie Jiuye Qishian Tanqi* [拓宽性别就业歧视案件的司法救济——从广州惠食佳性别就业歧视案谈起] (Broaden the Judicial Remedy to Gender Discrimination to Employment Cases: Discussion from Guangdong Huishijia Economic Development Co. Case involving Discrimination to Employment), Fanqishi Pinglun [反歧视评论] (Anti-Discrimination Law Review).

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> Ding Wenqi, *Guangzhou Jiuye Xingbie Qishi Diyian Fayuan Teling Qiye Daoqian* (广州就业性别歧视第一案 法院勒令企业道歉) [The First Gender Discrimination to Employment Case in Guangdong: The Court Orders The Company to Make an Apology],

Plaintiffs in *Juren Academy* and *Guangdong Hushijia Economic Development Co.* sought more than just compensation; they sought also to deploy the law—in ways tolerated if not encouraged by the party-state—to improve the condition of women. Such plaintiffs hope, though litigation, to broadcast the plight of others like themselves and, more ambitiously, to reform traditional values, attitudes, and beliefs. The empirical data presented here suggests that such litigation may produce the desired impression on the populace. This conclusion depends, of course, on people hearing about judicial decisions. Because cases revolve around personal stories, they are more concrete and palpable than abstract statements of law. Lawsuits therefore have the potential to captivate public interest. Insofar as they do, they are a promising medium for social change.

## V. CONCLUSION

This Article presented evidence that administrative bodies in China are at least as persuasive as the courts and that both types of entities can occasionally be more effective than other actors in producing attitudinal change. The generality of these conclusions has to be qualified by the narrow range of topics addressed in the two experimental scenarios and the unrepresentativeness of the student respondents. Still, the results of the survey experiment are broadly consistent with the literature on trust in Chinese institutions<sup>135</sup> and echo research demonstrating that “persuasive powers are not the exclusive preserve of courts.”<sup>136</sup> Though scant, the accumulated evidence on the persuasiveness of judicial institutions in authoritarian states indicates that courts can sometimes change minds. Yet, they are manifestly not the only institutions capable of doing so, casting doubt on the American thesis that courts are unique in their capacity to legitimize policy.

Our findings also imply that the prevalence of judicial policymaking in China does not lie in the ability of courts to persuade. The quasi-legislative function of courts may, instead, be attributable to their technical and informational superiority over legislatures and the flexibility of judicial as opposed to legislative policymaking.<sup>137</sup> The pace of social, economic, and

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Ziyou Yazhou Diantai Putonghua (自由亚洲电台普通话) [Radio Free Asia], Mar. 31, 2017, <https://www.rfa.org/mandarin/yataibaodao/renquanfazhi/ml2-03312017103943.html> (last visited on Feb. 13, 2019).

<sup>135</sup> Although as remarked previously, it is not obvious that trust, as operationalized by these surveys, necessarily translates into persuasiveness.

<sup>136</sup> Baird & Javeline, *supra* note 59, at 439.

<sup>137</sup> See Ahl, *Judicial in Authoritarian Regimes*, *supra* note 1, at 36; see Ling Li, *Political-legal order and the curious double character of China's courts*, 6 *ASIAN JOURNAL OF LAW & SOCIETY* (forthcoming 2019) (“Since judicial policy-making is not

technological change therefore contributes to the “attractiveness of [courts] as a flexible and fast parallel lawmaker.”<sup>138</sup> For these reasons, the judiciary will remain important to the articulation and implementation of governmental policy. But one should be slow to infer from the China’s turn towards legality<sup>139</sup> that courts might in short order acquire the de factor or de jure power to subject the party-state itself to the demands of law. The judicial influence on public opinion is limited, and courts lack the institutional strength to challenge, much less defy, more powerful state organs. We should therefore expect courts in China to proceed as they have always done: cautiously, clandestinely, and incrementally.<sup>140</sup>

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bound by the deliberation, public participation and voting procedures that are mandatory for the legislative process, judicial policies are issued with more flexibility.”).

<sup>138</sup> Ahl, *Judicial in Authoritarian Regimes*, *supra* note 1, at 36.

<sup>139</sup> See Zhang & Ginsburg, *supra* note 107.

<sup>140</sup> Ahl, *Retaining Judicial Professionalism*, *supra* note 1; Ronald C. Keith & Zhiqiu Lin, *Judicial Interpretation of China’s Supreme People’s Court as “Secondary Law” with Special Reference to Criminal Law*, 23 CHINA INFORMATION 223, 247 (2009).