

Innovation Through Interpretation: How Judges Make Policy in China

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

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

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I. INTRODUCTION

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

1. Laura P. Moyer & Holley Tankersley, *Judicial Innovation and Sexual Harassment Doctrine in the U.S. Courts of Appeals*, 65 POL. RES. Q. 784, 785-86 (2011); Marsha Puro et al., *An Analysis of Judicial Diffusion: Adoption of the Missouri Plan in the American States*, 15 PUBLIUS 85, 85-86 (1985); Charles R. Shipan & Craig Volden, *The Mechanisms of Policy Diffusion*, 52 AM. J. POL. SCI. 840, 841-44 (2008); see also Jack L. Walker, *The Diffusion of Innovations Among the American States*, 63 AM. POL. SCI. REV. 880, 880-99 (1969).

2. Shipan & Volden, *supra* note 1, at 841.

“judicial diffusion” or “neighborhood effects.”³ The transmission and adoption of policy through the use of precedent by the courts has been widely studied in common law countries.⁴ Legal scholars, in the United States, have explored the spread of judicial innovations in the common law, such as the strict liability rule for manufacturing defects,⁵ and in statutory interpretation, like hostile work environment standards under a federal sexual harassment statute.⁶ Regrettably, scant attention has been paid to the latitude that courts have in creating and propagating legal doctrines in civil law countries, such as China.

This disparity is due to an oft-repeated distinction between common law and civil law jurisdictions. The former is generally uncodified and is based on an accumulated body of precedent.⁷ In contrast, the latter, codified, is founded on a legal code that dictates the rule to be applied by a court.⁸ Judicial opinions are not recognized as a source of law in civil law jurisdictions, whereas, in common law jurisdictions, judges look to

3. Moyer & Tankersley, *supra* note 1, at 785-86; see also Craig Volden, *States as Policy Laboratories: Emulating Success in the Children’s Health Insurance Program*, 50 AM. J. POL. SCI. 294, 294-312 (2006).

4. Bradley C. Canon & Lawrence Baum, *Patterns of Adoption of Tort Law Innovations: An Application of Diffusion Theory to Judicial Doctrines*, 75 AM. POL. SCI. REV. 975, 975-87 (1981); Gregory Caldeira, *Legal Precedent: Structures of Communication Between State Supreme Courts*, 10 SOC. NETWORKS 29, 29-55 (1988); Gregory Caldeira, *The Transmission of Legal Precedent: A Study of State Supreme Courts*, 79 AM. POL. SCI. REV. 178, 178-94 (1985); Peter Harris, *Ecology and Culture in the Communication of Precedent Among State Supreme Courts, 1879-1970*, 19 LAW & SOC’Y REV. 449, 449-86 (1985); Peter Harris, *Structural Change in the Communication of Precedent Among State Supreme Courts, 1870-1970*, SOC. NETWORKS 201, 201-212 (1982); Moyer & Tankersley, *supra* note 1, at 784-98; Bradley C. Canon & Lawrence Baum, *Patterns of Adoption of Tort Law Innovations: An Application of Diffusion Theory to Judicial Doctrines*, 75 AM. POL. SCI. REV. 975, 975-87 (1981); Henry R. Glick, *Judicial Innovation and Policy Re-Invention: State Supreme Courts and the Right to Die*, 45 W. POL. Q. 71, 71-92 (1992); Rachael K. Hinkle & Michael J. Nelson, *The Transmission of Legal Precedent Among State Supreme Courts in the 21st Century*, ST. POL. & POL’Y Q. (forthcoming) (manuscript at 1-21) (on file with author).

5. Robert C. Bird & Donald J. Smythe, *Social Network Analysis and the Diffusion of the Strict Liability Rule for Manufacturing Defects, 1963-87*, L. & SOC. INQUIRY (forthcoming) (manuscript at 565-93) (on file with author); Robert C. Bird & Donald J. Smythe, *The Structure of American Legal Institutions and the Diffusion of Wrongful-Discharge Laws, 1978-1999*, 42 LAW & SOC’Y REV. 833, 833-64 (2008).

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

7. *Windust v. Dep’t of Labor & Indus.*, 323 P.2d 241, 243 (1958) (“The common law is comprised of that body of court decisions in the nonstatutory field to which the doctrine of stare decisis applies.”); Joseph Dainow, *The Civil Law and the Common Law: Some Points of Comparison*, 15 AM. J. COMP. L. 419, 421-23 (1967).

8. Dainow, *supra* note 8, at 420-21; Thomas Mackay Cooper, *The Common and the Civil Law: A Scot’s View*, 63 HARV. L. REV. 468, 472-73 (1950); William Tetley, *Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)*, 60 LA. L. REV. 677, 681 (2000).

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

9. “Civil law differs from common law because judicial decisions are generally not a source of law and the doctrine of *stare decisis* does not formally exist.” Louis F. Del Duca, *Developing Global Transnational Harmonization Procedures for the Twenty-First Century: The Accelerating Pace of Common and Civil Law Convergence*, 42 TEX. INT’L L.J. 626, 646 (2007); see also PETER DE CRUZ, *COMPARATIVE LAW IN A CHANGING WORLD* 44, 46 (1995).

10. See G. ALAN TARR, *JUDICIAL PROCESS AND JUDICIAL POLICYMAKING* (1990); see also JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION* 22-23 (2d ed. 1985).

11. INTERPRETING PRECEDENTS: A COMPARATIVE STUDY (D. Neil MacCormick & Robert S. Summers eds., 1997).

12. John Bell, *Comparing Precedent*, 82 CORNELL L. REV. 1243, 1245 (1997).

13. *Id.* at 1248.

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

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

16. By examining the “settlements,” “resolved cases,” and “published decisions” handed down in nine German labor courts of appeal from 1980 to 1998, an empirical study reports that “[German] judges engage in law-making by interpreting the statute law in particular ways and by applying this interpretation consistently in future cases.” Martin R. Schneider, *Judicial Career Incentives and Court Performance: An Empirical Study of the German Labour Courts of Appeal*, 20 EUR. J.L. & ECON. 127, 130-31 (2005).

precedential value to fill the gaps left by codes and statutes but can also incorporate the “sense of society”¹⁷ into their statutory interpretation to innovate legal norms in response to changing societal conditions.¹⁸ These collective judicial innovations are mostly driven by the publication and transmission of prior judicial decisions in civil law countries.¹⁹ In France, for example, most decisions of the Cour de cassation are published in official bulletins, and the very important ones are often accompanied by the opinions of a reporting judge; in addition, French academic journals publish selected cases decided by courts at all levels and invite law professors to give commentaries, globally referred to as *la doctrine*, on influential cases.²⁰ German judges can also easily locate and read decisions given by other federal courts, through courts’ libraries, official series edited by court members, nonofficial digests, academic journals, and various legal databases (e.g., Juris).²¹ A culture of citing decided cases has been established and maintained in the German legal system.²² Similarly, in Japan, a dual structure of the case law system is formed by a

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

18. Daniel H. Foote, *Judicial Lawmaking and the Creation of Legal Norms in Japan*, in LEGAL INNOVATIONS IN ASIA: JUDICIAL LAWMAKING AND THE INFLUENCE OF COMPARATIVE LAW 121-22 (John O. Haley & Toshiko Takenaka eds., 2014); John O. Haley, *The Role of Courts in “Making” Law in Japan: The Communitarian Conservatism of Japanese Judges*, 22 PAC. RIM L. & POL’Y J. 491, 491 (2013); see also Frank K. Upham, *Stealth Activism: Norm Formation by Japanese Courts*, 88 WASH. U. L. REV. 1493, 1493-98 (2011).

19. See INTERPRETING PRECEDENTS: A COMPARATIVE STUDY, *supra* note 11, at 22, 108-09, 112-13, 154, 236; Takashi Ishida, *Case Law in Japan*, 7 IJLL 133, 135-39 (1979); Clark B. Lombardi, *The Role of Courts in “Making” Islamic Law: South and Southeast Asia*, in LEGAL INNOVATIONS IN ASIA: JUDICIAL LAWMAKING AND THE INFLUENCE OF COMPARATIVE LAW, *supra* note 18, at 180.

20. Michel Troper & Christophe Grzegorzcyk, *Precedent in France*, in INTERPRETING PRECEDENTS: A COMPARATIVE STUDY, *supra* note 11, at 108-09; GABRIEL MARTY, LA DISTINCTION DU FAIT ET DU DROIT, ESSAI SUR LE POUVOIR DE CONTROLE DE LA COUR DE CASSATION SUR LES JUGES DU FAIT. PRÉFACE DE M. CH. CÉZAR-BRU 256 (1929).

21. “Judgments by the lower courts are published less often than those by the federal courts or the highest courts of the federal states. Whether or not a lower court decision is published depends on many factors, such as deviation from precedent.” Kiel Robert Alexy & Gottingen Ralf Dreier, *Precedent in the Federal Republic of Germany*, in INTERPRETING PRECEDENTS: A COMPARATIVE STUDY, *supra* note 11, at 22.

22. Ninon Colneric, *Guiding by Cases in a Legal System Without Binding Precedent: The German Example*, STANFORD L. SCH.: CHINA GUIDING CASES PROJECT (June 19, 2013), <https://cgc.law.stanford.edu/commentaries/7-judge-colneric>; see also Alexy & Dreier, *supra* note 21, at 23 (“It is not easy to find a decision in the official series edited by members of the highest courts that does not contain any reference to precedents. If one takes a look into the respective ten latest volumes, it will be recognized that a very high percentage of published decisions refers to precedents.”).

vast amount of precedent, some of which can be directly applied as “binding rules,” and the rest of which can be indirectly interpreted as decisive *ratio decidendi* to guide future judicial decisions.²³ Relatedly, an emerging trend in China has mirrored the impetus for these judicial innovative activities carried out in other civil law countries—the publication and transmission of prior judicial decisions.

The legal system of contemporary China is rooted in continental legal tradition and its lawmaking power is solely vested in the legislative branch.²⁴ As judicial decisions are not considered a source of law in China, decided cases were, for a long time, not available to the public including those in the legal profession.²⁵ In the early stage of research on statutory interpretation, Chinese scholars mainly focused on interpretation methods and deductive reasoning under civil law tradition to explain the techniques of statutory interpretation that judges applied in cases.²⁶ The judicial role in Chinese policymaking was, therefore, rarely studied. However, the norm of judicial transparency and rise of the Internet, since the 1980s, have resulted in prior judicial decisions being made easily accessible both in print and online.²⁷ These decisions became an avenue for judges, who are confronting hard cases or novel situations, to consult each other on the interpretation of law. This recent development has also shifted scholars’ attention to the role that judicial agents play in response to the needs of society. For example, Liming Wang argued the active role that judges play in judicial decision-making is inevitable during the transitional period of Chinese society.²⁸ Similarly, Nicholas Howson elucidated the creativity and power of Shanghai courts to stretch the application of law in order to provide justice.²⁹ That said, Shanghai judges “‘make law’ based upon their autonomous conception of who or what the statutory framework is designed to serve, devise non-statutory legal standards for application of corporate law doctrine, and

23. Ishida, *supra* note 19, at 135-39.

24. Chenguang Wang, *Law-Making Functions of the Chinese Courts: Judicial Activism in a Country of Rapid Social Changes*, 1 FRONTIERS L. CHINA 524, 528-29 (2006).

25. Vai Io Lo, *Towards the Rule of Law: Judicial Lawmaking in China*, 28 BOND L. REV. 149, 158 (2016).

26. DONG HAO & TANG WENFU, ZHONGGUO PANLI JIESHI GOUJIAN ZHILU [THE CONSTRUCTION OF CHINESE CASE LAW] 4 (2009).

27. Benjamin Liebman & Tim Wu, *China’s Network Justice*, 8 CHI. J. INT’L L. 257, 257, 261-62 (2007).

28. Wang, *supra* note 24, at 524-49.

29. Nicholas Howson, *Corporate Law in the Shanghai Peoples’ Courts, 1992-2008: Judicial Autonomy in a Contemporary Authoritarian State*, 5 E. ASIA L. REV. 303, 303-442 (2010).

create remedies out of whole cloth.”³⁰ Donald Clarke, in *Legal Innovations in Asia*, illustrated the way that courts, especially the Chinese Supreme People’s Court, innovated Chinese corporate law both in defendant-friendly and plaintiff-friendly directions.³¹ Furthermore, by looking at the ways in which Chinese legal professionals use non-guiding cases³² as a source of reference, Susan Finder gauged the value of those cases in shaping the development of Chinese law.³³ Based on her findings, lawyers in China not only search prior judicial decisions to determine where to file the case but also frequently submit or mention a relevant, decided case at the hearing.³⁴ In light of the findings of previous scholarly work, this Article examines the relationship between the Chinese Supreme People’s Court and lower courts in innovating the law: the latter providing the raw material or inspiration that the former uses to prepare formal innovation in the form of normative documents.³⁵ The key questions of this Article are, first, the techniques that Chinese judges employ to make policy innovations in a statute-based jurisdiction, and, second, the conditions necessary for judicially initiated policy innovations to survive in China.

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

30. *Id.* at 349.

31. Clarke took the piercing of the corporate veil as an example. As the first Chinese company law promulgated in 1994 contained no exceptions to the limited liability of corporate investors, fraud perpetrated through the vehicle of undercapitalized companies became widespread and gave rise to a social issue that the courts could not evade. The Chinese courts gradually formulated a rule that made certain investors liable for corporate debt. This regime received official affirmance through codification in the 2015 amendment to the Chinese company law. Donald Clarke, *Judicial Innovation in Chinese Corporate Law*, in *LEGAL INNOVATIONS IN ASIA: JUDICIAL LAWMAKING AND THE INFLUENCE OF COMPARATIVE LAW*, *supra* note 18, at 259-72.

32. Non-guiding cases refer to cases that have not been published as guiding cases by the Chinese Supreme People’s Court. Those cases are not required to be cited and do not have any binding force. Finder described those cases in her article as a type of soft precedent. Susan Finder, *China’s Evolving Case Law System in Practice*, 9 *TSINGHUA CHINA L. REV.* 247, 247-58 (2017).

33. *Id.*

34. *Id.* at 254-55.

35. *See* Clarke, *supra* note 31, at 272.

statute that is no longer responsive to the broader social and cultural environment, the re-articulation of this interpretation by other courts, and, finally, the legislative amendment of the statutes. The sequential adoption of a judicial decisions is, however, not necessarily indicative of the influence of sister courts. For example, the spurt in judicial policymaking activity that is exemplified in the two case studies may have been induced by common social trends: the popularization of cars and ATMs in China over the past decades. Hence, to supplement these case studies, I fielded surveys to approximately 400 Chinese judges hailing from ten Chinese regions and interviewed several judges and law clerks on their views about the legal status of prior judicial decisions. The final part of this Article reports the findings of these surveys and interviews and discusses both the conditions necessary for judicial innovations to survive in contemporary China and the problems those innovations may face during the process of transmission.

II. TRADITIONAL AND CREATIVE INTERPRETATION: STABILITY WITH CHANGES

A. *Interpretation in Chinese Law*

The Chinese legal system is built upon the study and transplantation of Japanese, German, and Taiwanese legal concepts, which follow civil law traditions.³⁶ Unlike common law countries, where the principle of *stare decisis* requires judges to follow higher courts' decisions as binding authority and consider sister courts' judgments as persuasive, judicial decisions are not a source of law in civil law countries.³⁷ In addition, China vests its legislative power in the National People's Congress (NPC) and NPC's Standing Committee.³⁸ As such, the traditional key role of Chinese judges is in interpreting the law, rather than making the law.

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

36. Xinyi Hou, *Jindai Zhongguo Fazhi Biange Huigu* [The Review of Legal Reform of Modern China], CHINESE SOC. SCI. TODAY (Dec. 5, 2012).

37. See XIUTAO HAN, SIFA DULI YU JINDAI ZHONGGUO [JUDICIAL INDEPENDENCE AND MODERN CHINA] (2003).

38. Zhonghua Renmin Gongheguo Lifa Fa (2015 Xiuzheng) (中华人民共和国立法法 (2015 修正)) [Legislation Law of the People's Republic of China (2015 Amendment)] (promulgated by National People's Congress, Mar. 15, 2015, effective July 1, 2000), art. 7, <http://en.pkulaw.cn/Display.aspx?Lib=law&Id=19023&keyword=>.

interpretation.³⁹ Legislative interpretation is issued by the Standing Committee of the NPC in order to further define “the specific meaning of any provisions of a law” or to clarify “the basis application of the law” when new circumstances arise.⁴⁰ Judicial interpretation is undertaken by the Chinese Supreme People’s Court in response to “questions involving the specific application of laws and decrees in court trials.”⁴¹ Judicial interpretations normally take the form of interpretation, provision, reply, or decision.⁴² The Chinese Supreme People’s Procuratorate has a similar power to interpret questions about laws that arise in the work of procuratorates.⁴³ As for any other issues regarding the application or implementation of laws, the State Council and the relevant departments provide administrative interpretation.⁴⁴ Although both the Constitution and the Legislative Law only emphasize the interpretative powers of NPC’s Standing Committee, judicial interpretation by the Chinese Supreme People’s Court has full legal force and is required to be cited when used as the legal basis of judgments.⁴⁵ This Article lays its main focus on statutory interpretation, which has a much wider range of interpretation than judicial interpretation. It includes the interpretation of law made by judges sitting at all levels of court from all regions of China, especially those interpretations that lack official legal force.

39. 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 Standing Committee of the National People’s Congress, June 10, 1981, effective June 10, 1981), <http://en.pkulaw.cn/display.aspx?cgid=1006&lib=law>.

40. *Id.* art. 1.

41. *Id.* art. 2.

42. Judicial interpretations on the specific application of a certain law in trial work or the application of a law in the trial of cases of a certain category or a certain kind of problem shall be made in the form of “interpretation.” Judicial interpretations on the formulation of the norms or opinions that are necessary for trial work on the basis of the legislation’s spirit shall be made in the form of “provision.” Judicial interpretations on the requests for instructions on the specific application of law in trial work by the higher people’s courts or the Military Court of the PLA shall be made in the form of “reply.” The amendment or abolishment of judicial interpretations shall be made in the form of “decision.” Zuigao Renmin Fayuan Guanyu Sifa Jieshi Gongzuo de Guiding (最高人民法院关于司法解释工作的规定) [Provisions of the Supreme People’s Court on the Judicial Interpretation Work] (promulgated by Supreme People’s Court on Mar. 9, 2007, effective Apr. 1, 2007), art. 6, <http://en.pkulaw.cn/display.aspx?cgid=89508&lib=law>.

43. Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Jiaqiang Falv Jieshi Gongzuo de Jueyi, *supra* note 39, art. 2.

44. *Id.* art. 3.

45. Zuigao Renmin Fayuan Guanyu Sifa Jieshi Gongzuo de Guiding, *supra* note 42, art.

Interpretation of the law in contemporary China focuses on the text of written statutes and takes extrinsic factors as supplementary. One of the mainstream theories of statutory interpretation illustrates interpretation methods in both the narrow and broad sense.⁴⁶ The narrow sense of statutory interpretation refers to methods to determine the meaning of a statute that falls within the scope of the text.⁴⁷ It applies when a pertinent statute exists for the case at issue.⁴⁸ Three main methods of interpretation are included: literal, logical, and sociological.⁴⁹ Literal interpretation emphasizes the definitions of words, the concepts, and the texts of the law,⁵⁰ while logical interpretation deduces the meaning of the law from context, legislative intent, history, and analogy.⁵¹ In some particular circumstances, the social consequences that an interpretation of the law may incur are also taken into consideration.⁵² Statutory interpretation, in the broad sense, covers two additional methods, judgment by value and gap filling, which facilitate judges in handling cases when the law is vague, overly general, or silent.⁵³

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

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

47. *Id.* at 25.

48. *Id.*

49. *Id.* at 26-28, 44-45.

50. *Id.* at 26-27, 45-68.

51. *Id.* at 27-28, 68-150.

52. *Id.* at 28, 151-65.

53. *Id.* at 28-30, 167-262.

54. See Winnie Won Yin Wong, *The Panda Man and the Anti-Counterfeiting Hero: Art, Activism, and Appropriation in Contemporary China*, 11 J. VISUAL CULTURE 20, 20-37 (2012).

55. *Zhongguo Renmin Gongheguo Xiaofeizhe Quanyi Baohufa* (2013 Xiuzheng) (中华人民共和国消费者权益保护法 (2103 修正)) [Law of the People's Republic of China on the Protection of Consumer Rights and Interests (2013 Amendment)] (promulgated by Standing Committee of the National People's Congress, Oct. 25, 2013, effective Mar.15, 2014), arts. 2, 55, <http://en.pkulaw.cn/display.aspx?cgid=211792&lib=law>.

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

56. LIMING & YEGANG, *supra* note 46, at 25.

57. "The rights and interests of consumers purchasing and using commodities or receiving services for daily consumption shall be protected by this Law; or be protected by other applicable laws and regulations if this Law is silent." Zhongguo Renmin Gongheguo Xiaofeizhe Quanyi Baohufa (2013 Xiuzheng) (中华人民共和国消费者权益保护法 (2013 修正)) [Law of the People's Republic of China on the Protection of Consumer Rights and Interests (2013 Amendment)] (promulgated by Standing Committee of the National People's Congress, Oct. 25, 2013, effective Mar. 15, 2014), art. 2, <http://en.pkulaw.cn/display.aspx?cgid=211792&lib=law>.

58. "This Law is developed for the purposes of protecting the lawful rights and interests of consumers, maintaining the order of society and economy, and promoting the sound development of the socialist market economy." *Id.* art. 1.

59. *Id.*

60.

Article 22 is renumbered as Article 23, and, in paragraph 1, "except that consumers have known the existence of defects before purchasing the commodities or receiving the services" is replaced with "except that consumers have known the existence of defects before purchasing the commodities or receiving the services and the existence of defects does not violate the mandatory provisions of law."

Quanguo Renda Changweihui Guanyu Xiugai "Zhonghua Renmin Gongheguo Xiaofeizhe Quanyi Baohufa" de Jueding (2013) (全国人大常委会关于修正《中华人民共和国消费者权益保护法》的决定 (2013)) [Decision of the Standing Committee of the National People's Congress on Amending "The Law of the People's Republic of China on the Protection of Consumer Rights and Interests" (2013)] (promulgated by Standing Committee of the National People's Congress, Oct. 25, 2013, effective Mar. 15, 2014), art. 7, <http://en.pkulaw.cn/display.aspx?cgid=211791&lib=law>; *see also* Zhonghua Renmin Gongheguo Xiaofeizhe Quanyi Baohufa (中华人民共和国消费者权益保护法) [Law of the People's Republic of China on Protection of Consumer Rights and Interests] (promulgated by Standing Committee of the National People's Congress, Oct. 31, 1993, effective Jan. 1, 1994), <http://en.pkulaw.cn/display.aspx?cgid=6384&lib=law>; Zhonghua Renmin Gongheguo Xiaofeizhe Quanyi Baohufa (2009 Xiuzheng) (中华人民共和国消费者权益保护法 (2009 修正)) [Law of the People's Republic of China on Protection of Consumer Rights and Interests] (promulgated by Standing Committee of the National People's Congress, Aug. 27, 2009, effective Aug. 27, 2009), <http://en.pkulaw.cn/display.aspx?cgid=167118&lib=law>.

rule. In addition, from a sociological perspective, denying the rights of a private investigator, who purchased defective goods, provides commercial suppliers with a strong defense to avoid liability.⁶¹ Preclusion of an investigator from the protected group of consumers may cause adverse social effects that delay the improvement of the quality of goods. Through logical or sociological interpretation, the investigator is likely to win the case. Lastly, if a judge determines the consumer law to be ambiguous or silent as to whether investigators are protected consumers, the judge would have the discretion to fill the statutory gap and enter a judgment accordingly.⁶² Under this circumstance, one may find the result of this case hard to predict.

Theoretically, one may expect judges to have little discretion under a system in which all laws are codified. In practice, the interpretations of an identical statute by different judges or under different interpretation methods frequently lead to vastly distinct legal outcomes. The phenomenon in which judgments are split in cases of the same nature (同案不同判) commonly exists in China and has triggered massive concern as to the fairness and consistency of judgments.⁶³ Take the judicial outcome of cases against female defendants, who were long-term victims of domestic violence, as an example.⁶⁴ Before the Opinion on Handling Criminal Cases of Domestic Violence in Accordance with Law⁶⁵ was promulgated, the sentences that judges imposed on defendants, who fatally retaliated against their domestic abusers, ranged from the death penalty to three or even fewer years' imprisonment with suspension.⁶⁶ The split of judgments in like cases decided in different trials, courts, or

61. See LIMING & YEGANG, *supra* note 46, at 28, 151-65.

62. *Id.* at 28-30, 167-262.

63. Lo, *supra* note 25, at 155-56; Chen Jinghui, *Anli Zhidao Zhidu yu Tongan Tongpan* [The System of Guiding Cases and Same Judgments for the Same Type of Cases], LILUN ZHOUKAN [THEORY WKLY.], Jan. 29, 2014; Wang Liming, *Woguo Anli Zhidao Zhidu Ruogan Wenti Yanjiu* [The Study of Several Questions About Our Country's System of Guiding Cases], 1 FAXUE 71, 72 (2016).

64. JINGHE XU, ZHONGGUO PANLI ZHIDU YANJIU [RESEARCH ON CHINESE CASE LAW SYSTEM] 42 (Zhongguo Jiancha Chubanshe trans., 2006).

65. Zuigao Renmin Fayuan Zuigao Renmin Jianchayuan Gonganbu Sifabu Yinfa "Guanyu Yifa Banli Jiating Baoli Fanzui Anjian De Yijian De Tongzhi (最高人民法院、最高人民检察院、公安部、司法部印发《关于依法办理家庭暴力犯罪案件的意见》的通知) [The Notice of Issuing the "Opinion on Handling Criminal Cases of Domestic Violence in Accordance with Law" by the Supreme People's Court, Supreme People's Procuratorate, Ministry of Public Security, and Ministry of Justice] (promulgated by the Supreme People's Court, Supreme People's Procuratorate, Ministry of Public Security, and Ministry of Justice, Mar. 2, 2015, effective Mar. 2, 2015), en.pkulaw.cn/display.aspx?cgid=244391&lib=law.

66. XU, *supra* note 64, at 42.

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

B. The Incentives of Judicial Innovation in China

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

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

67. *Gen. Dynamics Land Servs. v. Cline*, 540 U.S. 581, 596 (2004).

68. VISCOUNT RADCLIFFE, *THE LAWYER AND HIS TIMES, NOT IN FEATHER BEDS: SOME COLLECTED PAPERS* 265, 271 (1968).

69. Sam H. Jones, *Rival Law Reformers?*, 110 *SOL. J.* 733 (1966).

70. Sir Garfield Barwick, *Judiciary Law: Some Observations Thereon*, 33 *CONTEMP. LEGAL PROBS.* 239, 241 (1980).

71. MAURO CAPPELLETTI, *THE JUDICIAL PROCESS IN COMPARATIVE PERSPECTIVE* 3-4 (1989).

72. LIEF H. CARTER, *REASON IN LAW* 30 (4th ed. 1994).

sometimes intentionally leave ambiguities in statutes at the time of drafting for the interpreters or enforcers of the law to fill in based on their expertise and experience.⁷³ Courts at all levels, then, act as “fire alarms”⁷⁴ that draw the attention of legislatures to the most troublesome statutes and legal issues. Judicial decisions can, thus, function as a tool for judges to gather information about the social consequences of a judicially created innovation and, in the meantime, to gauge public support for future legislative amendments. These decisions and their public feedback indicate to legislatures when they should step in and issue a new law.

Due to rapid changes in China’s social, economic, and legal environment, many statutes drafted and promulgated during the early days of the People’s Republic of China are no longer suited to the circumstances of contemporary China. Courts, unlike legislatures, frequently confront statutory vagueness or imperfections in the course of adjudication. In a hierarchical judicial system, the higher the level of the court for which a judge is serving, the more difficult the legal questions the judge may encounter in daily adjudication. Because legislatures cannot predict every situation that will happen in the future, judges sometimes are allowed to or even meant to fill gaps and fix flaws in statutes through interpretation on a case by case basis. For example, a local court in Nantong City, in determining whether a worker injured by an electric bicycle was entitled to certain welfare benefits, relied on a non-binding administrative document to broaden the definition of “motor vehicle” in the Road and Transportation Law.⁷⁵ A more recent example spurring questions of statutory interpretation is the legal definition of a firearm.⁷⁶ In December 2016, a game-stall operator was sentenced to

73. See *id.*

74. Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 165-66 (1984).

75. Xin He, *Judicial Innovation and Local Politics: Judicialization of Administrative Governance in East China*, 69 CHINA J. 20, 20-42 (2013).

76. See *Tianjin Laotai Baiqiqiu Shejitan Beipan Sannianban* [An Old Female Balloon-Popping Game Owner Was Sentenced Three and a Half Year Imprisonment], NETEASE (Dec. 31, 2016), <http://news.163.com/16/1231/03/C9J8P6OA00018AOP.html>; Liu Yanhong, *Sifa Wu Liangzhi Yihuo Xingfa Wu Dixian* [Adjudication Without Moral Standards or Criminal Law Without Bottom Lines], 19(1) J. SOUTHEAST U. (NAT. SCI. EDITION), <http://d.wanfangdata.com.cn/periodical/dndxxb-zxsh201701011>; *After Game-Stall Operator Is Jailed, China Asks: What's A Gun?*, WALL ST. J. (Jan. 4, 2017), <http://blogs.wsj.com/chinarealtime/2017/01/04/after-game-stall-operator-is-jailed-china-asks-whats-a-gun/> [hereinafter *What's a Gun?*]; Alice Yan, *China's Gun Laws Attacked After Woman Jailed for Using Air Rifles at Fun Fair Booth*, SOUTH CHINA MORNING POST (Jan. 5, 2017), <http://www.scmp.com/news/china/policies-politics/article/2059380/gun-laws-china-attacked-after-jailing-air-rifle-owner> [hereinafter *China's Gun Laws Attacked*];

three and a half years in prison by a local court due to her private ownership of balloon-popping guns, which were determined to be “firearms” within the meaning of the statute.⁷⁷ This prominent case decision has drawn immense public attention and calls for an amendment to the firearm law of China.⁷⁸ According to China’s gun identification standard, which took effect in 2010, any nonstandard gun with a muzzle energy greater than 1.8 joules per square centimeter shall be considered a real firearm.⁷⁹ “The energy of 1.8 joules per square centimeter is like throwing a handful of beans across a table at someone,” according to a defense lawyer, whose client, in a similar case, had received a life sentence for smuggling restricted guns bought online from a Taiwanese seller.⁸⁰ Having realized the firearm standard was too stringent, the appeal court suspended the sentence, based on the fact that the defendant had no criminal intent.⁸¹

“Distant water cannot put out a nearby fire” is an old Chinese saying quoted by Dong and Tang to describe the significance of judicial innovations in China.⁸² They imply that expecting a legislative amendment to fix the ambiguity and flaws in statutes would not allow judges to solve problems raised by hard cases in a timely manner.⁸³ As Donald Clarke argued in his article,

Chinese Woman Jailed over Balloon-Popping Guns Set Free, REUTERS (Jan. 26, 2017), <http://www.reuters.com/article/us-china-crime-guns-idUSKBN15A15U> [hereinafter *Chinese Woman Jailed*].

77. *Tianjin Laotai Baiqiqiu Shejitan Beipan Sannianban*, *supra* note 76.

78. Yanhong, *supra* note 76; *What’s a Gun?*, *supra* note 76; *China’s Gun Laws Attacked*, *supra* note 76; *Chinese Woman Jailed*, *supra* note 76.

79. A nonstandard gun that cannot fire standard issue ammunition shall be considered as a real gun if it can fire with muzzle energy in excess of 1.8 joules per square centimeter. Gong’an Jiguan Shean Qiangzhi Danyao Xingneng Jianding Gongzuo Guiding (公安机关涉案枪支弹药性能鉴定工作规定) [Regulations on Identification of Firearms and Ammunition in Public Security Organizations] (promulgated by Ministry of Public Security, Dec. 7, 2010, effective Dec. 7, 2010), art.3(3), http://www.pkulaw.cn/fulltext_form.aspx?Db=chl&Gid=144563&keyword=公安机关涉案枪支弹药性能鉴定工作规定&EncodingName=&Search_Mode=accurate.

80. Natalie Mu, *Chinese Boy, 18, Gets Life in Jail After Fake Guns He Buys Online Turn Out to Be Real*, SOUTH CHINA MORNING POST (Aug. 11, 2016), <http://www.scmp.com/news/china/society/article/2002298/chinese-boy-18-gets-life-jail-after-fake-guns-he-buys-online-turn>.

81. *Id.*

82. HAO & WENFU, *supra* note 26.

83. *Id.*; see also FINDER, *supra* note 32, at 258 (“Given the rapid pace of social and economic change in China, long delays in promulgating or amending legislation, and considered tempo for drafting judicial interpretations, the use of prior cases as a form of soft precedent can be expected to increase in the foreseeable future.”).

Chinese Courts do innovate . . . because courts have to resolve the disputes that come before them. The applicable law will not always be clear. In that case, courts are left with no choice but to innovate. We even see courts innovating to reach a result unambiguously contrary to that called for by existing law.⁸⁴

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

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

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

84. Clarke, *supra* note 31, at 271.

85. The theory of incrementalism was originally developed by Lindblom and was mostly utilized in the process of political and economic decision-making. DAVID BAYBROOKE & CHARLES E. LINDBLOM, *A STRATEGY OF DECISION: POLICY EVALUATION AS A SOCIAL PROCESS* (1963); see also RICHARD M. CYERT & JAMES G. MARCH, *A BEHAVIORAL THEORY OF THE FIRM* (1963).

86. BAYBROOK & LINDBLOM, *supra* note 85.

87. Martin M. Shapiro, *Stability and Change in Judicial Decision-Making: Incrementalism or Stare Decisis*, 2 L. TRANSITION Q. 134, 140 (1965).

88. See Zhengzhou Renmin Jianchayuan Su Zhang Jinzhu (郑州人民检察院诉张金柱) [Zhengzhou Municipal People's Procuratorate of Henan Province v. Zhang Jinzhu (1998)], Zhang Jinzhu: Zhongguo Jiaotong Zhaoshi Sixing Diyiren, Mar. 20, 2014, http://www.360doc.com/content/14/0320/01/54666_362038428.shtml; Guangdong Sheng Foshan Shi Renmin Jianchayuan Su Li Jingquan (广东省佛山市人民检察院诉黎景全(2007)) [Foshan Municipal People's Procuratorate of Guangdong Province v. Li Jingquan (2007)], http://www.pkulaw.cn/fulltext_form.aspx?Db=pfnl&Gid=117731113; Liaoning Sheng Renmin Jianchayuan Su Wu Kai (辽宁省沈阳市人民检察院诉吴凯) [Shenyang Municipal People's Procuratorate of Liaoning

major legal sources in China, this Part illustrates how judges interpret within and beyond the bounds of statutes and how subsequent judges follow those innovative interpretations in later, similar cases. Influenced by civil law tradition, Chinese judgments are generally terse, lack detailed legal reasoning, and rarely cite any cases. As such, it is hard to identify the connections between decisions by analyzing the citation pattern of judicial decisions. To demonstrate the relationship between local courts and the Supreme People's Court, I have selected a series of cases in which the Chinese Supreme People's Court either published local court cases as typical cases or promulgated an official judicial interpretation based on those local courts' decisions. The policy innovations developed by courts in DUI and ATM cases, following the popularization of cars and ATMs in China since the 1990s, demonstrate a bottom-up lawmaking process that starts in local courts and moves all the way up to the Supreme People's Court and even to legislators. Taken a closer examination among these case decisions, one may find that the subsequent courts silently adopted the early courts' decisions without reference by including similar statements in their judgments.

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

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

Province v. Wu Kai (2008)], <http://www.chinacourt.org/article/detail/2009/05/id/356840.shtml>; Sichuan Sheng Chengdushi Renmin Jianchayuan Su Sun Weiming (四川省成都市人民检察院诉孙伟铭) [Chengdu Municipal People's Procuratorate of Sichuan Province v. Sun Weiming (2009)], http://www.pkulaw.cn/fulltext_form.aspx?Db=pfnl&Gid=117685580.

In *Zhengzhou Municipal People's Procuratorate v. Zhang Jinzhu* (1998),⁸⁹ defendant Zhang Jinzhu was driving under the influence and hit Su Donghai and his son, Su Lei. Both were riding bicycles. The impact killed Su Lei instantly.⁹⁰ Zhang Jinzhu, however, did not stop the car and, so Su Donghai and his bike were dragged for over 1500 meters, resulting in serious injury.⁹¹ The Henan Provincial Intermediate People's Court held that Zhang Jinzhu was able to identify and control himself at the time of the accident, as he, attempting to flee, was forced to stop the car after being intercepted by several police cars.⁹² The court found that defendant, Zhang Jinzhu, violated traffic laws, resulting in Su Lei's death, and intentionally injured Su Donghai with particularly ruthless means.⁹³ The criminal circumstances were flagrant, and their consequences were extremely serious. In accordance with articles 133 and 234 of the Criminal Law of the People's Republic of China (criminal law), the court, therefore, sentenced the defendant to death on account of traffic crime, compounded by intentional injury.⁹⁴

89. Zhengzhou Renmin Jianchayuan Su Zhang Jinzhu (郑州人民检察院诉张金柱) [Zhengzhou Municipal People's procuratorate of Henan Province v. Zhang Jinzhu (1998)], Zhang Jinzhu: Zhongguo Jiaotong Zhaoshi Sixing Diyiren, Mar. 20, 2014, http://www.360doc.com/content/14/0320/01/54666_362038428.shtml; see also Ira Belkin, *Justice in the PRC: How the Chinese Communist Party Has Struggled with Managing Public Opinion and the Administration of Criminal Justice in the Internet Age*, in JUSTICE: THE CHINESE EXPERIENCE 200-01 (Flora Sapio, Susan Trevaskes, Sarah Biddulph & Elisa Nesossi eds., 2017).

90. Zhengzhou Renmin Jianchayuan Su Zhang Jinzhu (郑州人民检察院诉张金柱) [Zhengzhou Municipal People's procuratorate of Henan Province v. Zhang Jinzhu (1998)], Zhang Jinzhu: Zhongguo Jiaotong Zhaoshi Sixing Diyiren, Mar. 20, 2014, http://www.360doc.com/content/14/0320/01/54666_362038428.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* Article 133 states:

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

Article 234 states:

Whoever intentionally injures the person of another is to be sentenced to not more than three years of fixed-term imprisonment, criminal detention, or control. Whoever commits the crime in the preceding paragraph and causes a person's serious injury is to be sentenced to not less than three years and not more than 10 years of fixed-term imprisonment; if he causes a person's death or causes a person's serious deformity by badly injuring him with particularly ruthless means, he is to be sentenced to not less than 10 years of fixed-term imprisonment, life imprisonment, or death.

In *Qingdao Southern District People's Procuratorate of Shandong Province v. Han Wenliang (2006)*,⁹⁵ defendant Han Wenliang, who was driving a vehicle while intoxicated, collided with a taxi.⁹⁶ The taxi driver and two passengers were killed, and a third passenger was seriously injured.⁹⁷ The Qingdao Southern District Basic People's Court held that Han Wenliang violated traffic and transportation laws and regulations, thereby causing major accidents involving one severe injury and three deaths.⁹⁸ Thus, the court held that the defendant's behavior violated article 133 of the criminal law,⁹⁹ and he was sentenced to six years' imprisonment.¹⁰⁰

In *Foshan Municipal People's Procuratorate of Guangdong Province v. Li Jingquan (2007)*,¹⁰¹ defendant Li Jingquan was driving under the influence and hit Li Jiexia while riding her bike, and her son Chen Boyu, in her backseat, causing Chen Boyu minor injury.¹⁰² Disregarding the safety of the victims and the villagers, who were trying to stop him, Li Jingquan continued driving resulting in two deaths and another minor injury.¹⁰³ The Guangdong Provincial High People's Court held that although the defendant was driving drunk after hitting the victim, Jingquan was still able to make a U-turn.¹⁰⁴ Additionally, although the wheels of the car were stuck in a flower field by the roadside, he was able to drive the car back to the road.¹⁰⁵ These actions indicated that he still

Zhonghua Renmin Gongheguo Xingfa (97 Xiuding) (中华人民共和国刑法 (97 修订)) [Criminal Law of the People's Republic of China (97 Revision)] (promulgated by National People's Congress, Mar. 14, 1997, effective Oct. 1, 1997), arts. 133, 234, <http://en.pkulaw.cn/display.aspx?cgid=17010&lib=law>.

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

96. *Id.*

97. *Id.*

98. *Id.*

99. Zhonghua Renmin Gongheguo Xingfa, *supra* note 94, art.133.

100. Shandong Sheng Qingdao Shi Nanqu Renmin Jiancha Yuan Su Han Wenliang, *supra* note 95.

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

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

retained some of his faculties at the time of the incident.¹⁰⁶ The fact that he attempted to flee the scene and drove toward Li Jiexia, who was already on the ground, and villager Li Xiquan, killing them both, showed that the defendant was indifferent to the casualties and held indirect intent of endangering public safety.¹⁰⁷ Therefore, his behavior constituted the crime of endangering public safety.¹⁰⁸ The circumstances of the crime were flagrant and the consequences were serious.¹⁰⁹ Nevertheless, because the defendant's criminal intent was indirect, his subjective malice and person dangerousness were determined to be less serious than in cases of intentionally endangering public safety.¹¹⁰ The defendant shall be entitled to a mitigated sentence because of his remorse and willingness to compensate the victims' economic losses.¹¹¹ Accordingly, defendant Li Jingquan was found guilty of committing the crime of endangering public safety¹¹² and was sentenced to life imprisonment and deprived of political rights.¹¹³

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

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

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

Zhonghua Renmin Gongheguo Xingfa (97 Xiuding) (中华人民共和国刑法 (97 修订)) [Criminal Law of the People's Republic of China (97 Revision)] (promulgated by National People's Congress, Mar. 14, 1997, effective Oct. 1, 1997), art. 115, <http://en.pkulaw.cn/display.aspx?cgid=17010&lib=law>.

113. *Id.*

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

115. *Id.*

two.¹¹⁶ The Shenyang Municipal Intermediate People's Court held that Wu Kai violated traffic and transportation laws and regulations, thereby causing major accidents, involving two severe injuries and three deaths.¹¹⁷ Due to his reckless behavior of driving a vehicle while intoxicated, defendant Wu Kai was found guilty of endangering public safety and was sentenced to seven years in prison.¹¹⁸

In *Chengdu Municipal People's Procuratorate of Sichuan Province v. Sun Weiming (2009)*,¹¹⁹ defendant Sun Weiming drove a car without obtaining a driver's license and repeatedly violated traffic regulations.¹²⁰ At noon on December 14, 2008, Sun Weiming and his parents drank heavily at a relative's birthday party.¹²¹ After a rear-end collision with other vehicles, while driving under the influence, Sun Weiming drove over the speed limit to escape the scene and collided with four cars.¹²² Four people were killed and one was seriously injured.¹²³ The Sichuan Provincial High People's Court held that defendant Sun Weiming had disregarded traffic regulations and public safety by driving a car for an extended period without obtaining a driver's license and repeatedly violated traffic regulations.¹²⁴ Furthermore, after causing traffic accidents while under the influence, he continued to drive over the speed limit and hit many vehicles, causing several casualties, thus indicating that he was inconsiderate of the occurrence of harmful consequences and harbored indirect intent of endangering public safety.¹²⁵ His behavior constituted the crime of endangering public safety.¹²⁶ The circumstances of the crime were flagrant and the consequences were serious.¹²⁷ Nevertheless, Su Weiming's culpability was lessened by the fact that he did not wish or actively pursue the occurrence of such harmful consequences.¹²⁸ He was in a serious state of intoxication at the time of the crime, which weakened

116. *Id.*

117. *Id.*

118. *Id.*

119. Sichuan Sheng Chengdushi Renmin Jianchayuan Su Sun Weiming (四川省成都市人民检察院诉孙伟铭) [Chengdu Municipal People's Procuratorate of Sichuan Province v. Sun Weiming (2009)], <https://bit.ly/2DNI5oi>.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

his ability to reason and control his behavior.¹²⁹ His attitude in confessing and repenting showed remorse, and he actively compensated the victims.¹³⁰ Accordingly, the Sichuan Provincial High People's Court found defendant Sun Weiming guilty of endangering public safety and sentenced him to life imprisonment and deprivation of political rights for life.¹³¹

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

129. *Id.*

130. *Id.*

131. *Id.*

132. See Zuigao Renmin Fayuan Guanyu Yinfa Zuijiu Jiache Fanzui Falv Shiyong Wenti Zhidao Yijian Ji Xiangguan Dianxing Anli De Tongzhi (最高人民法院关于引发醉酒驾车犯罪法律适用问题指导意见及相关典型案例的通知) [Notice of the Supreme People's Court on Issuing the Guiding Opinions on Issues Concerning the Application of Law to the Crime of DUI and the Relevant Typical Cases] (promulgated by Supreme People's Court, Sep. 9, 2011, effective Sep. 9, 2011), <http://bit.ly/2HVsQfj>.

133. *Id.*

134. *Id.*

135. *Id.*

136. Zhonghua Renmin Gongheguo Xingfa (97 Xiuding) (中华人民共和国刑法 (97 修订)) [Criminal Law of the People's Republic of China (97 Revision)] (promulgated by National People's Congress, Mar. 14, 1997, effective Oct. 1, 1997), art. 115, <http://en.pkulaw.cn/display.aspx?cgid=17010&lib=law>; Zuigao Renmin Fayuan Guanyu Shenli Jiaotong Zhaoshi Xingshi Anjian Juti Yingyong Falv Ruogan Wenti de Jieshi (最高人民法院关于审理交通肇事刑事案件具体应用法律若干问题的解释) [The Interpretation of the Supreme People's Court on Several Issues concerning the Application of Law When Trying Traffic Crime Cases] (promulgated by Supreme People's Court, Nov. 15, 2000, effective Nov. 21, 2000), arts. 2, 4, <https://bit.ly/2IRM5Yk>.

crimes, these high-profile, provincial-level judicial decisions reached by basic, intermediate, and high courts show local judges experimenting through their decisions to test and form new policies.. The early and subsequent judges, who handled DUI cases with dreadful consequences, accumulated the support of their colleagues and the public, step by step, to strengthen legal deterrence against the reckless behavior of drunk driving. Then they collectively generated a new legal doctrine that severely punishes drunk drivers in order to protect road safety. On September 8, 2009, the Chinese Supreme People's Court held a news conference and put forward a guiding opinion on the application of law to the crime of DUI and noted *Foshan Municipal People's Procuratorate v. Li Jingquan (2007)* and *Chengdu Municipal People's Procuratorate v. Sun Weiming (2009)* as two typical cases of drunk driving offenses¹³⁷ that should be used to guide judicial decisions in future similar cases.¹³⁸ Instead of applying article 133 of the criminal law regarding traffic crimes,¹³⁹ courts shall convict those who cause multiple causalities or

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

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

Zuigao Renmin Fayuan Guanyu Yinfa Zuijiu Jiache Fanzui Falv Shiyong Wenti Zhidao Yijian Ji Xiangguan Dianxing Anli De Tongzhi (最高人民法院关于依法醉酒驾车犯罪法律适用问题指导意见及相关典型案例的通知) [Notice of the Supreme People's Court on Issuing the Guiding Opinions on Issues Concerning the Application of Law to the Crime of DUI and the Relevant Typical Cases], <http://bit.ly/2HVsQff>.

138. *Id.*

139. Zhonghua Renmin Gongheguo Xingfa (97 Xiuding) (中华人民共和国刑法 (97修

serious injuries when driving while intoxicated of endangering the public safety in a dangerous way under section 1 of article 115 of the criminal law.¹⁴⁰ In addition, the Chinese Supreme People's Court deliberately distinguished DUI crimes from direct intentional crimes "in which a person maliciously hits people with a car for the purpose of creating troubles and causes heavy casualties."¹⁴¹ Given that drunk driver's ability to reason and exercise self-control is relatively weak at the time of their crime, the Chinese Supreme People's Court agreed with the courts from Guangdong and Sichuan provinces on the grounds that a life sentence would be more appropriate than capital punishment for the accused.¹⁴² Furthermore, driving while intoxicated shall be subject to the legal sanction of the criminal law, even without any damage caused.¹⁴³ On February 25, 2011, Amendment (VIII) to the criminal law was issued. One provision was added after article 133: "Whoever . . . drives a motor vehicle on a road while intoxicated shall be sentenced to criminal detention and a fine."¹⁴⁴

Although judicial decisions are not recognized as a source of law in China, they nevertheless precipitate and promote the promulgation of judicial interpretations by the Chinese Supreme People's Court and even legislative amendments. Informed of prior DUI case decisions that took the adverse social consequences incurred by DUI crimes into consideration and made changes in offenders' convictions, subsequent judges started to voluntarily follow what the first judge had done.¹⁴⁵ "The

订)) [Criminal Law of the People's Republic of China (97 Revision)] (promulgated by National People's Congress, Mar. 14, 1997, effective Oct. 1, 1997), art. 133, <http://en.pkulaw.cn/display.aspx?cgid=17010&lib=law>.

140. *Id.* art. 115.

141. *Id.*

142. *Id.*

143. Zhonghua Renmin Gongheguo Xingfa Xiuzhengan (Ba) (中华人民共和国刑法修正案 (八)) [Amendment (VIII) to the Criminal Law of the People's Republic of China] (promulgated by Standing Committee of the National People's Congress, Feb. 25, 2011, effective May 1, 2011), art. 22, <http://en.pkulaw.cn/display.aspx?cgid=145719&lib=law>.

144. *Id.*

145. See Guangdong Sheng Foshan Shi Renmin Jianchayuan Su Li Jingquan (广东省佛山市人民检察院诉黎景全(2007)) [Foshan Municipal People's Procuratorate of Guangdong Province v. Li Jingquan (2007)], http://www.pkulaw.cn/fulltext_form.aspx?Db=pfnl&Gid=117731113; Liaoning Sheng Renmin Jianchayuan Su Wu Kai (辽宁省沈阳市人民检察院诉吴凯) [Shenyang Municipal People's Procuratorate of Liaoning Province v. Wu Kai (2008)], <http://www.chinacourt.org/article/detail/2009/05/id/356840.shtml>; Sichuan Sheng Chengdushi Renmin Jianchayuan Su Sun Weiming (四川省成都市人民检察院诉孙伟铭) [Chengdu Municipal People's Procuratorate of Sichuan Province v. Sun Weiming (2009)], http://www.pkulaw.cn/fulltext_form.aspx?Db=pfnl&Gid=117685580.

idea of incremental, step-by-step development, with each step being fully realized or complete, resembles punctuated evolution.”¹⁴⁶ With more and more judicial decisions in similar cases moving in the same direction, public attention and support against drunk driving were raised and a new legal doctrine was generated over time. Within the scope of the criminal law, judges intensified the legal punishment of DUI offenders by applying another provision of the criminal law, endangering public safety, rather than following article 133 as related to traffic crime. From these DUI cases, one may observe that a judicial consensus on a new doctrine was seeded among multiple local courts. A judicial interpretation by the Chinese Supreme People’s Court and a legislative amendment regarding DUI crimes did not occur until public support for increasing drunk drivers’ legal liabilities had accumulated significantly over a decade.

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

The cases discussed are not the only examples that can be used to demonstrate the judicial creativity of Chinese local judges. Unlike DUI cases, judges handling ATM theft cases went beyond the scope of the criminal law and warranted ATM thieves a sentence much more lenient than the penalty prescribed under the criminal law. A highly controversial case first tried in the Guangzhou Municipal Intermediate People’s Court of Guangdong Province¹⁴⁷ not only contributed to the lenient judgments of two sister courts¹⁴⁸ but also catalyzed an amendment to the criminal law.¹⁴⁹ In the Chinese two-tier trial system,¹⁵⁰ this case

146. Edward L. Rubin & Malcolm Feeley, *Creating Legal Doctrine*, 69 S. CAL. L. REV. 1989, 2018 (1996).

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

148. Zhejiangsheng Ningboshi Renmin Jianchayuan Su Tang Fengjun Deng Daoqie Yanshi Yingman Fanzui Suode An (2008) (浙江省宁波市人民检察院诉唐风军等盗窃、掩饰、隐瞒犯罪所得案) [Ningbo Municipal People’s Procuratorate of Zhejiang Province v. Tang Fengjun etc. (2008)], http://www.pkulaw.cn/Case/pfnl_119202516.html?match=Exact; Yunnan Sheng Qujing Shi Zhongji Renmin Fayuan (2009, Zaishen Caijue) (云南省曲靖市中级人民法院 (2009), (2009) 云高刑再终字第 8 号) [Qujing Municipal People’s Procuratorate of Yunnan Province v. He Peng (2009, Trial Supervision)], <https://bit.ly/2DNSekG>.

149. Article 246 is amended as follows:

Whoever steals a relatively large amount of public or private property, commits thefts many times, commits a burglary or carries a lethal weapon to steal or pick pockets shall be sentenced to imprisonment of not more than 3 years, criminal detention or control

experienced five instances until it reached a final conclusion.¹⁵¹ The case made judges, as well as the public, realize how harsh and unreasonable the relevant provision of the criminal law was. According to article 264 of the criminal law,¹⁵² stealing money from financial institutions can yield

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

Zhonghua Renmin Gongheguo Xingfa Xiuzhengan (Ba) (中华人民共和国刑法修正案(八)) [Amendment (VIII) to the Criminal Law of the People's Republic of China] (promulgated by Standing Committee of the National People's Congress, Feb. 25, 2011, effective May 1, 2011), art. 246, <http://en.pkulaw.cn/display.aspx?cgid=145719&lib=law>.

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

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

152.

Those who steal relatively large amounts of public or private property and money or have committed several thefts are to be sentenced to three years or fewer in prison or put under criminal detention or surveillance, in addition to fines; or are to be fined. Those stealing large amounts of property and money or involving other serious cases are to be sentenced to three to 10 years in prison, in addition to fines. Those stealing extraordinarily large amounts of property and money or involving especially serious cases are to be sentenced to 10 years or more in prison or given life sentences, in addition to fines or confiscation of property. Those falling in one or more of the following cases are to be given a life sentence or sentenced to death, in addition to confiscation of property: (1) Those stealing extraordinarily large amounts of money and property from financial institutions; (2) those committing serious thefts of precious cultural relics.

a sentence of life in jail or even the death penalty.¹⁵³ Debates as to how to define “financial institutions” and how much money shall qualify as “extraordinarily large amounts” were boosted after this case came out.¹⁵⁴

In *Guangzhou Municipal People’s Procuratorate of Guangdong Province v. Xu Ting (2007)*, defendant Xu Ting inadvertently discovered that an ATM was malfunctioning when he withdrew his salary from his debit card account, which had a balance of ¥170 (approximately \$26).¹⁵⁵ After discovering that the ATM could dispense money that was not limited to his bank account balance, he intentionally withdrew ¥170,000 (approximately \$26,560) from the ATM.¹⁵⁶ Guangzhou Municipal People’s Court first tried this case and found Xu Ting guilty of intentionally stealing extraordinarily large amounts of money¹⁵⁷ from

Zhonghua Renmin Gongheguo Xingfa (Xianfa) (97 Xiuding) (中华人民共和国刑法 (97 修订)) [Criminal Law of the People’s Republic of China (97 Revision)] (promulgated by National People’s Congress, Mar. 14, 1997, effective Oct. 1, 1997), art. 264, <http://en.pkulaw.cn/display.aspx?cgid=17010&lib=law>.

153. *Id.*

154. Su Li, *Fatiao Zhuyi, Minyi yu Nanban Anjian* (法条主义, 民意与难办案件) [*Black-Letter Law, Public Opinion and Hard Cases*], PEKING U. L.J. 3, 4-7, 11-14 (2009); Zhang Minkai, *Xuting An de Xingfaxue Fenxi* (许霆案的刑法学分析) [*Criminological Analysis of the Xuting Case*], PEKING U. L.J. 35, 35-37 (2009); He Weifang, *Xuting An: Faguan Heyi Shuoli* (许霆案: 法官何以说理) [*Xuting Case: How Judges Reason*], TENCENT (Jan. 24, 2008), <http://view.news.qq.com/a/20080223/000020.htm>.

155. Guangdongsheng Guangzhoushi Renmin Jianchayuan Su Xuting Daoqie An (2008) (广东省广州市人民检察院诉许霆盗窃案) (2007), (2007) 穗中法刑二初字第 196 号) [*Guangzhou Municipal Peoples’ Procuratorate of Guangdong Province v. Xu Ting (2008) (China)*], http://www.pkulaw.cn/case/pfnl_119202235.html?keywords=许霆&match=Exact.

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

157. Noting that the “Provision of the Supreme People’s Court, the Supreme People’s Procuratorate and Ministry of Public Security on Issues Concerning the Determination Standards of Amount Prescribed in the Crime of Theft” (1998), which was abolished in 2013, states that

[w]hoever steals public or private property of ¥500 to ¥2000 and more; ¥5000 to ¥20,000 and more; or ¥30,000 to ¥100,000 and more shall be deemed to respectively fall within the scope of “relatively large amount,” “large amount,” and “extraordinarily large amount,” respectively, as prescribed in article 264 of the Criminal Law. The high people’s courts and the people’s procuratorates of all provinces, autonomous regions, and municipalities directly under the Central Government may, in light of the economic development status of their respective regions, and in consideration of the social security situation, determine, within the scope of the amounts specified in the preceding paragraph, specific amount standards for their respective regions.

Zuigao Renmin Fayuan Guanyu Shenli Daoqie Anjian Juti Yingyong Falv Ruogan Wenti De Jieshi (最高人民法院关于盗窃案件具体适用法律若干问题的解释) [*Interpretation of Supreme People’s Court on Several Issues Concerning the Application of Law in the Handling of Criminal Cases of Theft*] (promulgated by Supreme People’s Court, Mar. 17, 1998, effective Mar.

financial institutions¹⁵⁸ for the purpose of illegal possession. The intermediate court sentenced Xu Ting to life imprisonment for violating section 1 of article 264 of the criminal law.¹⁵⁹ This result was not unexpected because ATMs are operated by banks, which fall within the scope of financial institutions, and stealing money from an ATM met the circumstances for a life sentence or the death penalty under the criminal law.¹⁶⁰ Because the criminal provision regarding ATM theft is so tightly regulated, Xu Ting was not the only person to be sentenced to life imprisonment for ATM theft.¹⁶¹ However, he was the luckiest because his case attracted the attention of mass media.

After the decision of the first instance was made, Xu Ting appealed the case to the Guangdong Provincial High People's Court.¹⁶² The

17, 1998), art. 3, <http://en.pkulaw.cn/display.aspx?cgid=198681&lib=law>; *see also* Zuigao Renmin Fayuan, Zuigao Renmin Jianchayuan, Gonganbu Guanyu Daoqiejue Shue Rending Biao Zhun Wenti De Guiding (最高人民法院、最高人民检察院、公安部关于盗窃罪数额认定标准问题的规定) [Provision of the Supreme People's Court, the Supreme People's Procuratorate and Ministry of Public Security of Issues Concerning the Determination Standards of Amount Prescribed in the Crime of Theft] (promulgated by Supreme People's Court, Supreme People's Procuratorate, and Ministry of Public Security, Mar. 26, 1998, effective Mar. 26, 1998), arts. 1, 2, 3, <http://en.pkulaw.cn/display.aspx?cgid=198681&lib=law>.

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

159. "Those falling in one or more of the following cases are to be given life sentence or sentenced to death, in addition to confiscation of property: (1) Those stealing extraordinarily large amounts of money and property from financial institutions." Mu, *supra* note 80; *see also* Zhonghua Renmin Gongheguo Xingfa (97 Xiuding) (中华人民共和国刑法 (97 修订)) [Criminal Law of the People's Republic of China (97 Revision)] (promulgated by National People's Congress, Mar. 14, 1997, effective Oct. 1, 1997), art. 264, <http://en.pkulaw.cn/display.aspx?cgid=17010&lib=law>.

160. *See* Zhonghua Renmin Gongheguo Xingfa (97 Xiuding) (中华人民共和国刑法 (97 修订)) [Criminal Law of the People's Republic of China (97 Revision)] (promulgated by National People's Congress, Mar. 14, 1997, effective Oct. 1, 1997), art. 264, <http://en.pkulaw.cn/display.aspx?cgid=17010&lib=law>.

161. *See id.*

162. Guangdongsheng Guangzhoushi Renmin Jianchayuan Su Xuting Daoqie An (2008) (广东省广州市人民检察院诉许霆盗窃案 (2008) (2008) 粤高法刑一终字第 5 号) [Guangzhou Municipal Peoples' Procuratorate of Guangdong Province v. Xu Ting (2008)], <https://bit.ly/2GcERQt>.

appellate court deemed that the facts found in the first instance, which determined that Xu Ting had committed theft, were unclear and that the findings lacked legal basis.¹⁶³ The appellate court thereby remanded the case to the original court for retrial.¹⁶⁴ The intermediate court reheard the case and sentenced Xu Ting to five years' imprisonment, which was below the legally prescribed punishment.¹⁶⁵ This mitigated sentence was given based on his relatively slight subjective malevolence, because Xu Ting's criminal act was contingent upon the ATM malfunction.¹⁶⁶ Upon Xu Ting's second-time appeal, the Guangdong Provincial High People's Court affirmed the intermediate court's second decision of five years' imprisonment on May 23, 2008, with the further approval of the Chinese Supreme People's Court on August 20, 2008.¹⁶⁷

The Xu Ting case offered hope to ATM thieves. The influence of this decision was not limited to the jurisdiction of Guangdong province: it extended to courts from other jurisdictions straightaway. A similar case decided by a sister court even reversed its effective decision based on Xu Ting's case—*Qujing Municipal People's Procuratorate of Yunnan Province v. He Peng (2002)*.¹⁶⁸ In 2001, defendant He Peng uncovered the technical problems at the Agricultural Bank of China, while checking his account balance at an ATM.¹⁶⁹ He then used the same debit card from the Agricultural Bank of China, which only had ¥10 (equivalent to approximately \$1.56), to withdraw ¥429,700 (equivalent to approximately \$67,140.63) from multiple ATMs.¹⁷⁰ On his way home, to hide the illegally obtained money, he threw his debit card into a sewer and called his mother to ask her to report his lost debit card to the Agricultural Bank of China.¹⁷¹ After he returned home, he spent the money on purchases, including a cell phone, and deposited the rest of the money into two of his classmates' bank accounts.¹⁷²

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. Yunnan Sheng Qujingshi Renmin Jiancha yuan Su Hepeng Daoqie An (2002) (云南省曲靖市人民检察院诉何鹏盗窃案 (2002), (2002) 曲刑初字第 66 号, (2002) 云高刑终字第 1397 号, (2009) 云高刑再终字第 8 号) [Qujing Municipal People's Procuratorate of Yunnan Province v. He Peng (2002)], <https://bit.ly/2DNSekG>.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

The Qujing Municipal Intermediate People's Court first tried this case.¹⁷³ During the trial, He Peng's attorney argued that his client's over-withdrawal was done under the bank's authorization given the bank's technical problems.¹⁷⁴ He Peng's criminal acts, thus, should be recognized as unjust enrichment under the General Principles of the Civil Law of the People's Republic of China, rather than theft under the criminal law.¹⁷⁵ The court, nonetheless, disregarded this argument, and determined that He Peng had intended to secretly steal money from the bank because he had discarded his debit card and called his mother to report the card lost.¹⁷⁶ He Peng was found to have stolen extraordinarily large amounts of money from financial institutions and was sentenced to life imprisonment pursuant to section 1 of article 264 of the criminal law.¹⁷⁷ The appeal court further affirmed the trial court's decision.¹⁷⁸ When Xu Ting received a lenient five-year sentence, He Peng had been in jail for almost six years.¹⁷⁹ He Peng's request for retrial seemed futile, until ATM theft cases received a lot of public attention following Xu Ting's retrial. The news media then reported on He Peng's case and dubbed him the "Xu Ting of Yunnan."¹⁸⁰ The head of the news center of the High People's Court of Yunnan Province stated, in his interview with the media, that the process of retrying the He Peng case would not begin, unless Xu Ting's case yielded a final result.¹⁸¹ After the judgment given

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*; Guangdongsheng Guangzhoushi Renmin Jianchayuan Su Xuting Daoqie An (2008) (广东省广州市人民检察院诉许霆盗窃罪 (2008) (2008) 粤高法刑一终字第 5 号) [Guangzhou Municipal Peoples' Procuratorate of Guangdong Province v. Xu Ting (2008)], <https://bit.ly/2GcERQt>.

180. Yunnan "Xuting" Wuqi Tuxing Zhoujian Wei Banian Jiangyu Xiayue Huoshi (云南“许霆”无期徒刑骤减为 8 年 将于下月获释) [*The Sentence of "Xuting of Yunnan Version" Immediately Dropped to Eight Years He Will Be Released Next Month*], SOHU (Dec. 15, 2009), <http://news.sohu.com/20091215/n268947762.shtml>; see also Yunnan "Xuting An" Gaipan Wuqi Tuxing Jianxing Wei Banian Ban (云南“许霆案”改判 无期徒刑减刑为 8 年半) [*The Modification of the Final Judgment of the Case of "Xu Ting of Yunnan Version" The Life Sentence was Reduced to Eight and A Half Years*], TENCENT (Dec. 15, 2009), <http://news.qq.com/a/20091215/000075.htm>.

181. Yunnansheng Gaoyuan: Guangzhou Xuting An Bujie "Yunnan Xuting An" Bu Chongshen (云南省高院:广州许霆案不结“云南许霆案”不重审) [*The High People's Court of Yunnan Province: The Case of "Xuting of Yunnan Version" Will Not Be Retried Until the Xu Ting Case Is Closed*], XINHUA NEWS AGENCY, http://news.xinhuanet.com/legal/2008-04/17/content_7995230.htm (last visited May 3, 2018).

in Xu Ting's retrial was affirmed by the Chinese Supreme People's Court in August 2008, the High People's Court of Yunnan Province finally accepted He Peng's application for retrial and entered a ruling modifying his original life sentence to eight and a half years' imprisonment on November 18, 2009.¹⁸² The retrial ruling in this case was based on the concerns that He Peng's criminal intent was not premeditated but was accidentally triggered by the bank's technical problems; that the circumstances of his crime were relatively minor and his subjective malevolence was slight; and that He Peng's actions caused no actual damages because he returned all the stolen money to the bank after being arrested.¹⁸³ Under article 63 of the criminal law, the retrial court thereby sentenced him to eight and a half years in jail, which was below the legally prescribed punishment.¹⁸⁴

In addition to "Xu Ting of Yunnan," "Xu Ting of Ningbo" was also sued in *Ningbo Municipal People's Procuratorate of Zhejiang Province v. Tang Feng Guang etc. (2008)*.¹⁸⁵ The case gathered much public attention. Defendant Tang Fengguang intentionally transferred ¥589,500 (equivalent to approximately \$92,109.38) to his bank account from his sibling's debit card account, which only had ¥4.49 (equivalent to approximately \$0.70) after accidentally discovering a technical problem

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

183. *Id.*

184.

Where the circumstances of a criminal element are such as to give him a mitigated punishment under the stipulations of this law, he shall be sentenced to a punishment below the legally prescribed punishment. Although the circumstances of a criminal element do not warrant giving him a mitigated punishment under the stipulations of this law, he too may be sentenced to a punishment below the legally prescribed punishment based on the special situation of the case and with the approval of the Supreme People's Court.

Zhongguo Renmin Gongheguo Xingfa (1997 Xiuding) (中华人民共和国刑法(1997修订)) [Criminal Law of the People's Republic of China (97 Revision)] (promulgated by National People's Congress, Mar. 14, 1997, effective Oct. 1, 1997), art. 63, <http://en.pkulaw.cn/Display.aspx?lib=law&Cgid=17010#264>.

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

with an ATM.¹⁸⁶ This case was accepted by the court earlier than the Xu Ting case, but on July 15, 2008—almost two months after the final judgments in the Xu Ting case was reached—the Ningbo Municipal Peoples' Court warranted the defendant a lenient sentence of seven years' imprisonment.¹⁸⁷ Similar to the Xu Ting case, the court also found Tang Fengguang's subjective malevolence relatively slight given that his stealing act was contingent on an ATM malfunction.¹⁸⁸ In the first instance of the Tang Fengguang case, Ningbo Municipal People's Procuratorate remanded the case to the public security office twice for additional investigation.¹⁸⁹ The procurator handling this case told a reporter that they were paying close attention to the progress of the Xu Ting case.¹⁹⁰

Scholars in China, where the legal system was developed under civil law tradition, had mixed feelings about the fact that the reversal of the He Peng case's effective judgment followed the decision of the Xu Ting case rather than a legislative amendment to the criminal law.¹⁹¹ Some criticized the Xu Ting case and He Peng case as having been decided by public opinion instead of by law.¹⁹² Some suspected that the

186. *Id.*

187. *Id.*

188. *Id.*

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

190. *Id.*

191. Zhao Binzhi & Zhang Xinxiang, *Xingshi Caipan Buqueding Xing Xianxiang Jiedu: Dui "Xuting An" De Chongxin Jiedu* (刑事裁判不确定性现象解读——对“许霆案”的重新解读) [*The Instability of Criminal Judgment: A Refresh Interpretation of Xuting Case*], 8 FAXUE (法学) [L. SCI.] 36, 36-52 (2008); Chen Ruihua, *Tuojiang De Yema: Cong Xuting An Kan Fayuan De Ziyou Cailiangquan* (脱缰的野马：从许霆案看法院的自由裁量权) [*The Wild Horse: The Review of Courts' Discretion Based on the Case of Xuting*], 1 ZHONGWAI FAXUE (中外法学) [PEKING U. L.J.] 67, 67-81 (2009); Lv Jianqing, *Jia Hongli, Qiantan Bianzheng Siwei Zai Falv Shijian Zhongde Yunyong: You Xuting An Hepeng An Zuizhong Panjue De Quehan Yinfā De Sikao* (浅谈辩证思维在法律实践中的运用——由许霆案、何鹏案最终判决的缺憾引发的思考) [*The Application of Dialectical Thinking During Legal Practice: Rethinking the Flaws of the Final Judgments of the Cases of Xuting and He Peng*], 11 JINRI ZHONGGUO LUNTAN (今日中国论坛) [CHINA-TODAY F.] 177, 178 (2012); Xie Enzhi, *Goujian Zhongguo De Sifa Panli Zhidu* (构建中国的司法判例制度) [*Building Up Chinese Case Law System*], 2 RENMIN LUNTAN [PEOPLE'S TRIBUNE] 135, 135 (2014).

192. Pan Shuyu, *Cong Yulun Jiandu Yu Minyi Caijue Kan Sifa Gongxinli: Dui Xuting An De Lixing Fansi* (从舆论监督与民意裁决看司法公信力：对于许霆案理性反思) [*The Review of the Judicial Accountability Based on the Monitoring of Public Opinions and Judgment of Public Opinions: Rethinking Xu Ting Case*], 17 FAZHI YU SHEHUI (法治与社会) [LEGAL SYS.

retrial of the He Peng case was intended to prepare the promulgation of the “*Interpretation of the Supreme People’s Court and the Supreme People’s Procuratorate of Several Issues Concerning the Specific Application of Law in the Handling of Cases of Crimes Disturbing the Administration of Credit Cards*”¹⁹³ (12.16 interpretation).¹⁹⁴ The dates of the following events are noteworthy: On October 12, 2009, the 12.16 interpretation was adopted at the 1475th meeting of the Chinese Supreme People’s Court; on November 12, 2009, the 12.16 interpretation was adopted at the 22nd meeting of the Chinese Supreme People’s Procuratorate; on November 18, 2009, the retrial request of the He Peng case was approved; on December 3, 2009, the 12.16 interpretation was issued; on December 16, 2009, the 12.16 interpretation came into effect, and the judgment of the He Peng case was publicly announced by the High People’s Court of Yunnan Province.¹⁹⁵ From these dates, it can be seen that the decision to retry the He Peng case decision was made six days after the 12.16 interpretation was ready to be promulgated. In addition, the modification of the He Peng case decision was announced on the same day as the effective date of the 12.16 interpretation.¹⁹⁶ Because giving a sentence below the legally prescribed punishment needs the approval of the Chinese Supreme People’s Court, the retrial of the He Peng case was recognized as a rehearsal for the implementation of the 12.16 interpretation.¹⁹⁷

& SOC’Y] 157, 157-58 (2009); Zhang Lu, *Minyi Yu Xingshi Sifa: You Xuting An Yu Hepeng An Yinqi De Sikao* (民意与刑事司法——由许霆案与何鹏案引起的思考) [*Public Opinion and Criminal Tribunals: Rethinking Xu Ting Case and He Peng Case*], 3 SHANXI MEITAN GUANLI GANBU XUEYUAN XUEBAO (山西煤炭管理干部学院学报) [J. SHANXI COAL-MINING ADMIN. C.] 203, 203 (2010).

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

194. Huasheng Zaixian, *Yunnan Xuting Chuyu He Peng An Gaipan Shi Sifa Jieshi De Shengli* (云南“许霆”出狱：何鹏案改判是司法解释的胜利) [*The Release of “Xuting” of Yunnan Version: The Modification of Judgment of He Peng Case Is the Victory of Judicial Interpretation*], HUASHENG ONLINE (Jan. 1, 2010), <http://www.voc.com.cn/article/201001/201001180836558931.html>.

195. *Id.*

196. *Id.*

197. *Id.*

Drawn from the Xu Ting case and its aftermath, one may find that statutory interpretation undertook an essential role in directing judges' legal conclusions in these ATM theft cases. What is the literal meaning of financial institution? Do ATM thieves fall within the scope of the criminals whom the drafters of section 1 of article 264 of the criminal law intended to severely penalize? What was the legislators' original purpose in enumerating "stealing from financial institution" as one type of theft crimes that shall be subject to a harsher punishment? How would the Chinese Supreme People's Court determine the standard of "extraordinarily large money" in 2007? There are situations and technologies that the legislators might not have encountered when drafting statutes. ATM crime was one of those unexpected legal issues. The Bank of China introduced the first ATM to China in 1987.¹⁹⁸ Most of those teller machines were located inside the banks and were not commonly utilized by the general public for cash deposit and withdrawal purposes until 2001.¹⁹⁹ The money stored in financial institutions had to be withdrawn from banks in person and was nearly impossible to steal without premeditation when the criminal law came into effect in 1997. Furthermore, given the inflation and economic growth between 1997 and 2007, the amount of money that was deemed an "extraordinarily large amount" at the time of legislation is no longer an extraordinarily large amount of money from a modern perspective. The transmission of the Xu Ting case decision through the media served as an avenue for other courts to re-articulate the interpretation of "financial institution" and "extraordinarily large amount,"²⁰⁰ and further prepared for the legislative

198. Showing that the first ATM appeared in Zhuhai Municipal City of Guangdong Province in February 1987. Lu Shaoping, *Zidong Guiyuanji De Jizhong Guanli Moshi* (自动柜员机的几种管理模式) [*Several Management Patterns of ATMs*], 10 DIANNAO YU XINYONGKA (电脑与信用卡) [COMPUTER & CREDIT CARD] 46, 46 (1999), <http://www.cqvip.com/QK/81321X/199910/1004437097.html>.

199. *Id.*

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

amendment of the criminal law.²⁰¹ In February 2011, the “Amendment VIII to the Criminal Law of the People’s Republic of China” removed section 1 and 2, which prescribe a heavier punishment for two types of theft cases, from article 264 of the criminal law.²⁰²

Litigants, lawyers, and procurators are bringing cases with difficult legal issues every day, which gives courts an opportunity to witness first-hand new situations and identify flawed, vague, or outdated portions of statutes. When it comes to controversial cases, different interpretations of the law by different judges may lead to distinctive conclusions. Some judges choose to follow the written statutes strictly, believing that is what a civil law judge should do. These judges are more likely to sentence ATM larceners to life imprisonment, given that their criminal acts meet the circumstances of heavier punishment prescribed in article 264 of the criminal law. This is what the judges, who decided the He Peng case, did in the first instance.²⁰³ However, some judges, like the ones in the Xu Ting case, are willing to be the first to reach a different conclusion in a controversial case.²⁰⁴ Subsequent judges from sister courts then can look to prior judicial decisions and determine whether to follow the first judges and decide an ATM theft case in a similar way. The innovative interpretation adopted by judges might be driven by their judicial role perception of justice, internal or external pressure, or even their intention of simply seeking a just solution to solve the cases before them.

The selected two case studies revealed plaintiff-friendly and defendant-friendly judicial innovations, respectively.²⁰⁵ In the DUI cases,

201. Zhao Binzhi & Peng Xinlin, *Guanyu Xuting Anjian De Fali Wenti Sikao* (关于许霆案件的法理问题思考) [*The Jurisprudence Issues in Xu Ting Case*], 2 XINGFA LUNCONG (刑法论丛) [CRIM. L. REV.] 236, 285-87 (2008).

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

203. See Yunnan Sheng Qujing Shi Zhongji Renmin Fayuan (2009, Zaishen Caijue) (云南省曲靖市中级人民法院 (2009)云高刑再终字第 8 号) [Qujing Municipal People’s Procuratorate of Yunnan Province v. He Peng (2009, Trial Supervision)], <https://bit.ly/2DNSekG>.

204. See Guangdongsheng Guangzhoushi Renmin Jianchayuan Su Xuting Daoqie An (2008) (广东省广州市人民检察院诉许霆盗窃案) (2007), (2007)穗中法刑二初字第 196 号) [Guangzhou Municipal Peoples’ Procuratorate of Guangdong Province v. Xu Ting (2008) (China)], http://www.pkulaw.cn/case/pfnl_119202235.html?keywords=许霆&match=Exact.

205. See Bydlinski, *supra* note 15.

judges adjusted their convictions by applying article 115, endangering public safety, rather than article 133, traffic crimes, to raise the legal liabilities of drunk-driving offenders. In contrast, in the ATM theft cases, judges reached lenient sentences below the legally prescribed punishments to show mercy to non-premeditated ATM larceners. Before the official judicial interpretation by the Chinese Supreme People's Court was announced, the courts from Liaoning and Sichuan provinces voluntarily followed the judgment of *Foshan Municipal People's Procuratorate of Guangdong Province v. Li Jingquan (2007)*.²⁰⁶ Before the amendment to article 264 of the criminal law was issued by the legislature, the courts under the jurisdictions of Yunnan and Zhejiang provinces voluntarily followed the decision of *Guangzhou Municipal People's Procuratorate of Guangdong Province v. Xu Ting (2007)*.²⁰⁷ With a closer examination of the case decisions, one may find that the DUI cases decided by Sichuan province in 2009 imitated the judgment of *Foshan Municipal People's Procuratorate of Guangdong Province v. Li Jingquan (2007)*, without citing it, by including very similar statements regarding the defendant's limited ability to reason and exercise self-control, active compensation of victims, and good attitude in confessing.²⁰⁸ In contrast, in ATM theft cases, the decisions handed down in Yunnan and Zhejiang provinces copied *Guangzhou Municipal People's Procuratorate of Guangdong Province v. Xu Ting (2007)* without reference by similarly stating that the defendant's subjective malevolence was relatively slight given that his act of stealing was contingent upon an ATM malfunction.

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

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

207. Guangdongsheng Guangzhoushi Renmin Jianchayuan Su Xuting Daoqie An (2008) (广东省广州市人民检察院诉许霆盗窃案) (2007), (2007) 穗中法刑二初字第 196 号) [Guangzhou Municipal Peoples' Procuratorate of Guangdong Province v. Xu Ting (2008) (China)], http://www.pkulaw.cn/case/pfnl_119202235.html?keywords=许霆&match=Exact.

208. Sichuan Sheng Chengdushi Renmin Jianchayuan Su Sun Weiming (四川省成都市人民检察院诉孙伟铭) [Chengdu Municipal People's Procuratorate of Sichuan Province v. Sun Weiming (2009)], <https://bit.ly/2DNI5oi>.

Chinese jurists believe that courts should limit themselves to the rigorous interpretation of written statutes. However, statutes drafted by the legislature cannot cover every detail or address every particular situation that will occur in the future. Compared to the legislature, courts have a more timely awareness of vagueness or flaws in statutes because litigants and lawyers bring various cases and legal issues to judges every day. More importantly, to win the case, the potential losing party will make every possible effort to identify the ambiguities and point out the problems in the relevant statutes. Taking this information into consideration, local judges are able to run massive experiments on new policies that are used to fix flaws in statutes, adjust policies based on public feedback, and accumulate support for future legislative amendments. However, creating legal doctrines in Chinese courts does not mean freely applying or interpreting statutes because the power of individual judges is constrained by political monitoring and the courts to which they belong. Rather, it refers to the incremental style of *stare decisis*²⁰⁹ in which judges use statutory interpretation with dynamic features to mandatorily or voluntarily follow earlier courts' decisions and adapt statutes to changing social conditions in a timely manner.

IV. WHEN JUDICIAL INNOVATIONS SURVIVE OR FAIL IN CHINA

A. *Judicial Diffusion of Policy in China*

Similar to other civil law countries, judicial lawmaking activities of Chinese courts are mostly driven by the publication and transmission of prior judicial decisions. For a long period of time, the difficulties in accessing legal information were one of the major obstacles that Chinese judges and legal practitioners face in conducting legal research. Since the 1980s, the norm of judicial openness and the development of technology have been gradually building up an unprecedented modern legal information system.²¹⁰ Today, Chinese judges can read judicial decisions from selective collections of cases in print and comprehensive online database. These recent developments in the Chinese legal landscape allow judges to consult each other on statutory interpretation techniques. The influence of prior judicial decisions in future

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

210. Liebman & Wu, *supra* note 27, at 262-64.

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

1. The Vertical and Horizontal Influence of Previous Judgments

Civil law judges tend to follow the judicial decisions of higher courts, because they have been traditionally evaluated by their hierarchical superiors. The influence of rulings from higher courts has waxed and waned over the course of Chinese history. Although statutes have constituted the dominant source of law since imperial times, the legal significance of judicial decisions dates back at least to the Qin dynasty (221 B.C.-206 A.D.).²¹¹ During the time of the Qing Dynasty (1644-1912), judicial decisions had become “indispensable to legal reasoning” and reasoning by analogy, a “universally accepted [method] in Qing decision-making.”²¹² Although Mao’s government ended this practice in 1949,²¹³ compilations of influential and typical cases, including the *Summary of the Inspection of Fornication with Underage Girls Cases Decided Since 1955*²¹⁴ and the *Summary of Criminal Charges*,

211. In Qin China, binding precedents were used as a legal basis in adjudications when there was no enacted law or when the enacted law was erroneous or vague. DONG HAO, PANLI JIESHI ZHI BIANQIAN YU CHONGGOU: ZHONGGUO PANLI JIESHI FAZHAN YU GOUJIAN ZHILU [THE REVOLUTION AND RECONSTRUCTION OF PRECEDENT INTERPRETATION: THE ROAD OF DEVELOPMENT AND CONSTRUCTION OF CHINESE PRECEDENT INTERPRETATION] 19-22 (2015); Wu Shuchen, *Guizu Jingshen Yu Panlifa Chuantong* [Nobility Spirit and Case Law Tradition], 5 ZHONGWAI FAXUE [PEKING U. L.J.] 25, 25-30 (1998); see also Nanping Liu, *Legal Precedents’ with Chinese Characteristics: Published Cases in the Gazette of the Supreme People’s Court*, 5 J. CHINESE L. 107, 109-10 (1991).

212. After the law of late Qing dynasty was abolished, only a few new statutes had been issued. The cases compiled by the Cassation Court (named “Daliyuan,” the highest court during the Beiyang Government period) thus functioned as binding precedents. The use of prior judicial decisions in Qing can also be demonstrated by article 45 of *The Law of the Organization of the Judiciary of the Chinese Republic*, which requires courts at all levels to adhere to these decisions when adjudicating similar cases. Qing judges deduced legal principles and rules from prior cases and analogized or distinguished those cases based on facts and statutes. Zhiqiang Wang, *Case Precedent in Qing China*, 19 COLUM. J. ASIAN L. 323, 334-40 (2003).

213. Alexy & Dreier, *supra* note 21, at 112 (“In administering justice the people’s courts are independent, subject only to the law.”); XIANFA art. 78 (1954) (China).

214. Zuigao Renmin Fayuan 1955nian Yilai Jianyi Younü 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 Supreme Peoples’ Court on

Punishment Types, and Sentencing Ranges (First Draft),²¹⁵ continued to be produced by the Chinese Supreme People's Court to guide adjudications and train judicial agents.²¹⁶ These internally circulated materials were, however, not made available to the public.²¹⁷ The Gazette of the Supreme People's Court started regularly publishing selected cases in 1985 to "provide better guidance to local courts for correctly applying laws and decrees."²¹⁸ The decisions reported in the Gazette do not always issue from the apex court itself: many selected and slightly modified by the Chinese Supreme People's Court were originally decided by the lower courts.²¹⁹

In December 2011, the Chinese Supreme People's Court strengthened its precedential function by issuing guiding cases. As of January 2018, ninety-two such cases have been promulgated.²²⁰ These cases were selected by the Supreme People's Court from decisions made by provincial-level courts at all levels and must be followed by courts in future adjudications. According to article 7 of the *Provisions of the Supreme People's Court Concerning Work on Guiding Cases (Provisions)*, judges are required to "refer to (参照) the Guiding Cases released by the Chinese Supreme People's Court when adjudicating similar cases."²²¹ In addition, when trying a similar case, a people's court at any level is required to refer to the relevant guiding case by quoting it as the judgment's reasoning and pointing out its number and the key points of the judgment.²²² Furthermore, according to the *Provisions*,

the Inspection of Fornication with Underage Girls Cases Decided Since 1955] (promulgated by Supreme People's Court, Apr. 30, 1957, effective Apr. 30, 1957), <https://bit.ly/2udSFFl>.

215. See Zhou Jue, *Jianguo Chuqi Xingshi Shenpan Gongzuo De Huiyi* [Memories About Criminal Adjudication Work in the Early Days of the Establishment of the Country], CHINA COURT NET (Sep. 29, 2007), <http://www.chinacourt.org/article/detail/2007/09/id/268326.shtml>.

216. Wang Lifeng, *Zhongguo Anli Zhidao Zhidu De Biyaoxing He Gongneng* [The Necessity and Functions of China's Guiding Cases System], STANFORD L. SCH.: CHINA GUIDING CASES PROJECT 2 (Oct. 15, 2013), <https://cgc.law.stanford.edu/commentary/9-professor-wang>.

217. Liu, *supra* note 211, at 112-13.

218. *Id.* at 114.

219. *Id.* at 115-16.

220. *The Supreme People's Court of the People's Republic of China*, CHINESE GUIDING CASES, <http://www.court.gov.cn/fabu-gengduo-77.html> (last visited May 3, 2018).

221. Zuigao Renmin Fayuan Yinfa Guanyu Anli Zhidao Gongzuo de Guiding de Tongzhi (最高人民法院印发《关于案例指导工作的规定》的通知) [Notice of the Supreme People's Court on Issuing the Provisions on Case Guidance] (promulgated by Supreme People's Court, Nov. 26, 2010, effective Nov. 26, 2010), art. 7, <http://en.pkulaw.cn/display.aspx?cgid=143870&lib=law>.

222. *Id.*; see also Zuigao Renmin Fayuan Guanyu Anli Zhidao 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 Rules for the Implementation of the Provisions of the Supreme People's Court on Case Guidance]

Chinese courts should follow guiding cases that were decided even by inferior courts.²²³ This means that a court's creative interpretation would be mandatorily followed by courts at all levels, regardless of that court's hierarchical level, once the Chinese Supreme People's Court selects and releases it as a guiding case.²²⁴ However, the influence of guiding cases is significantly constrained by the number and coverage of those cases.

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

(promulgated by Supreme People's Court, May 13, 2015, effective May 13, 2015), arts. 9, 10, 11, <http://en.pkulaw.cn/display.aspx?cgid=249447&lib=law>.

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

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

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

Zhonghua Renmin Gongheguo Xingfa Xiuzhengan (Ba) (中华人民共和国刑法修正(八)) [Amendment (VIII) to the Criminal Law of the People's Republic of China] (promulgated by Standing Committee of the National People's Congress, Feb. 25, 2011, effective May 1, 2011), art. 4, <http://en.pkulaw.cn/display.aspx?cgid=145719&lib=law>.

225. Benjamin Chen & Zhiyu Li, *The Foundations of Judicial Diffusion in China: Evidence from an Experiment*, REV. L. & ECON. (Dec. 12, 2017), <https://www.degruyter.com/view/j/rle.ahead-of-print/rle-2017-0008/rle-2017-0008.xml>.

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

2. Empirical Studies on Transmission of Judicial Decisions

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

a. Surveys of Judges' Views on Previous Judgments

i. Research Design

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

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

226. Maria Angela Jardim de Santa Cruz Oliveira & Nuno Garoupa, *Stare Decisis and Certiorari Arrive to Brazil: A Comparative Law and Economics Approach*, 26 EMORY INT'L L. REV. 555, 595-98 (2012).

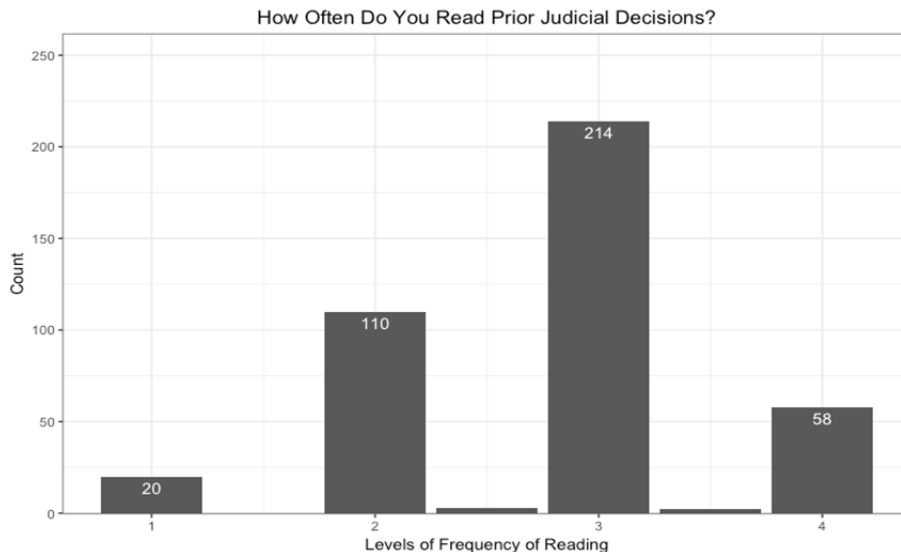
highest education qualification, 180 judges hold a bachelor's degree, 205 judges hold a master's degree, five judges hold a doctorate, fourteen judges have received some form of adult education, and three respondents did not answer the academic background question. Finally, 326 judges had passed the Chinese bar, while seventy-nine judges had yet to pass the bar, and two judges did not answer the question.²²⁷

ii. Results and Analysis

Among the responding judges, 4.9% of judges (twenty out of 407) barely read prior judicial decisions, 27% of judges (110 out of 407) did not often read, 52.6% of judges (214 out of 407) sometimes read, and 14.3% of judges (fifty-eight out of 407) judges always read previous judgments. The following bar plot reveals judges' answers regarding their frequency of reading previous judicial decisions.

227. Also note that the bar exam mentioned here refers to *Sifa Kaoshi*, which is a national and uniform qualification examination annually organized by the Ministry of Justice for those who plan to engage in a certain legal profession. Prior to the Chinese bar exam that was carried out in 2002, one had to pass the "Lawyer Qualification Examination" to become a lawyer. However, neither "Judge Law of the People's Republic of China" nor "Method of Qualification Test for Lawyers" required a person to pass the "Judge Qualification Examination" to become a judge. The eligibility for judgeship varies from region to region. Prior to 2002, many judges in China were retired military officials or government cadres and lacked significant legal training. They were elected and were only subject to removal by the local People's Congress. Thus, even after the Chinese bar exam was implemented, judges who passed the "Judge Qualification Examination" or did not take any relevant exam, rarely were required to pass the Chinese bar exam to continue to hear cases. The local courts or local government do not have authority to do so, because the requirement stated in "Measures for the Implementation of the National Judicial Examination" only applies to new judges. It thus explains why a group of responding judges in the survey had not passed the Chinese bar. Zuigao Renmin Fayuan Zuigao Renmin Jianchayuan Sifabu Guanyu Guojia Sifa Kaoshi Shishi Banfa (Shixing) (最高人民法院、最高人民检察院司法部关于国家司法考试实施办法(试行)) [Measures for the Implementation of State Judicial Examination (for Trial Implementation)] (promulgated by Supreme People's Court, Supreme People's Procuratorate, and Ministry of Justice, Oct. 31, 2001, effective Jan. 1, 2002), arts. 2, 5, <http://en.pkulaw.cn/display.aspx?cgid=37758&lib=law>; see also Guojia Sifa Kaoshi Shishi Banfa (2008 Xiuding) (国家司法考试实施办法(2008修订)) [Measures for the Implementation of the National Judicial Examination (2008 Revision)] (promulgated by Ministry of Justice, Aug. 14, 2008, effective Aug. 14, 2008), art. 2, <http://en.pkulaw.cn/display.aspx?cgid=107491&lib=law>; Lvshi Zige Kaoshi Banfa (律师资格考试办法) [Method of Qualification Test for Lawyers] (promulgated by Ministry of Justice, July 26, 2000, effective July 26, 2000), <http://en.pkulaw.cn/display.aspx?cgid=31085&lib=law>.

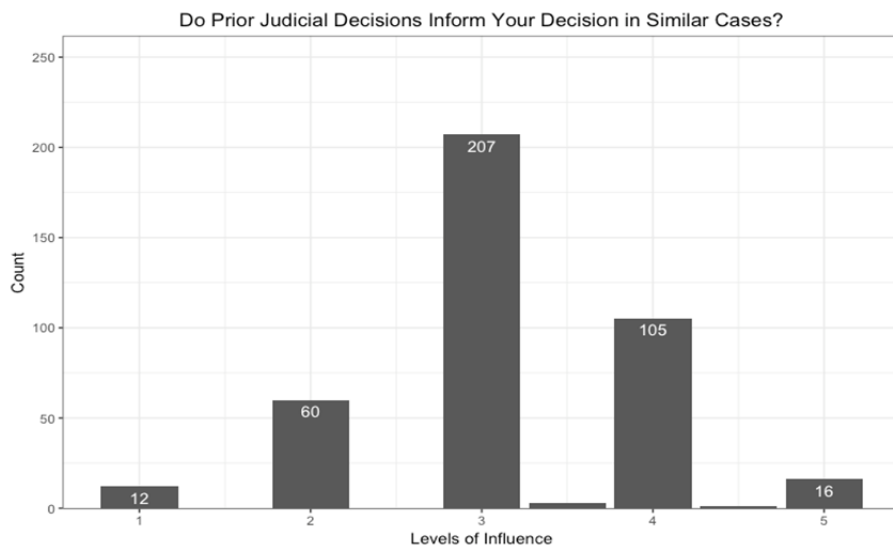
Figure I: Levels of Frequency of Reading Prior Judicial Decisions²²⁸



When asked how much prior judicial decisions would influence their decisions in similar cases, 3% of judges (twelve out of 404) said they were not influenced by prior judicial decisions when adjudicating similar cases, and 14.9% (sixty out of 404) and 26% (105 out of 404) reported that prior judicial decisions had little and significant influence over their judgments, respectively. The majority of responding judges (207 out of 404) stated that previous decisions had some influence, while 4% (sixteen out of 404) indicated they were greatly influenced by prior judicial decisions when adjudicating similar cases. Three judges did not respond to this question. Judges’ responses are shown in the following bar plot.

228. Respondents were provided with a 1-4 point scale, which represents “Barely,” “Not Often,” “Sometimes,” and “Always.” Higher scores represent higher levels of frequency. There were three respondents who chose 2.5 and two respondents who chose 3.5.

Figure II: Levels of Influence of
Prior Judicial Decisions on Judges' Judgments²²⁹



Among the ten regions I surveyed, judges in Fujian, Guangdong, Jiangxi, and Tianjin tended to read prior judicial decisions more often, while judges in Fujian, Jiangsu, Tianjin, and Zhejiang tended to be more influenced by previous judicial decision, when adjudicating similar cases (see Appendices II, III).²³⁰

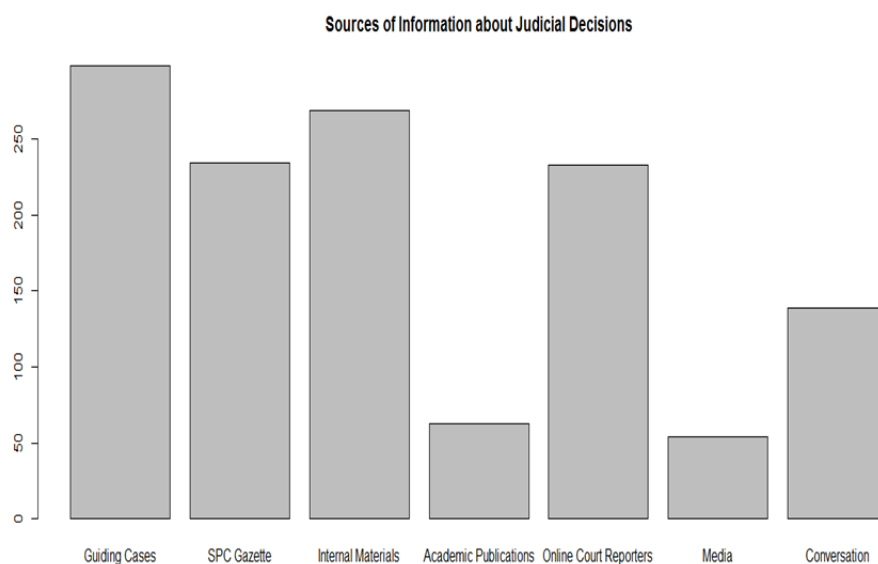
When asked how they kept informed of judicial decisions, the four major sources that the responding judges used to obtain relevant information were guiding cases (298 out of 407), internal materials (269 out of 407), the Supreme People's Court Gazette (234 out of 407), and

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

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

online court reporters (233 out of 407). A few respondents also heard about decided cases from conversations with judges, attorneys, or other legal professionals (139 out of 407), academic publications (sixty-three out of 407), and media (fifty-four out of 407).

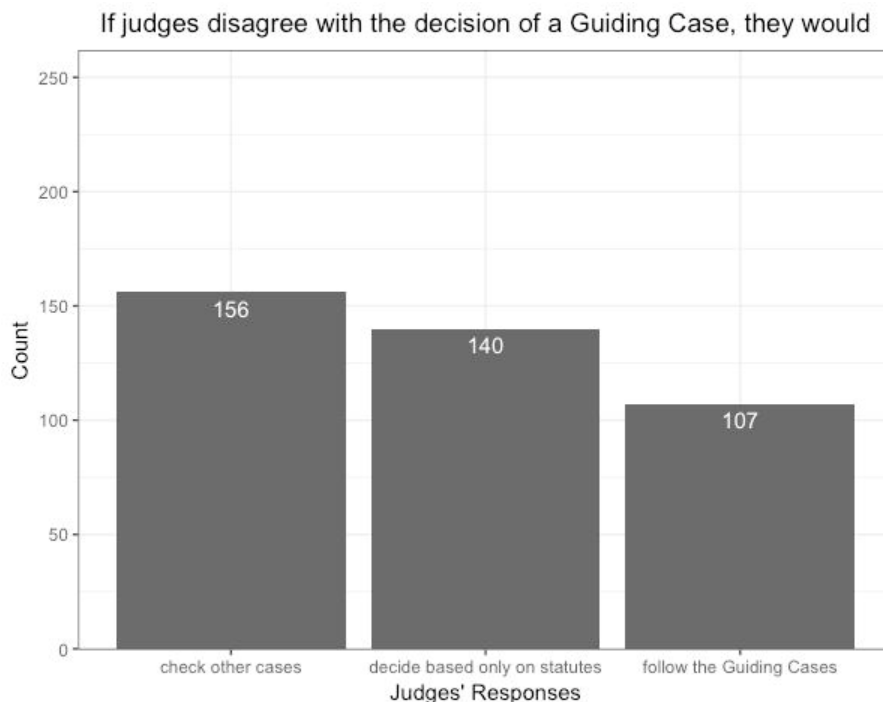
Figure III: Judges’ Sources of Information About Prior Judicial Decisions



In addition, judges were asked what they would do if they did not agree with the decision of a guiding case. According to article 7 of the *Provisions*, “People’s Court at all levels should refer to the guiding cases released by the Chinese Supreme People’s Court when adjudicating similar cases.”²³¹ The bar plot below shows that 26.6% of responding judges (107 out of 403) would follow guiding cases, 34.7% (140 out of 403) would render judgment based only on statutes, and 38.7% (156 out of 403) would check for cases that departed from guiding cases.

231. Zuigao Renmin Fayuan Yinfa Guanyu Anli Zhidao Gongzuo de Guiding de Tongzhi *supra* note 221, art. 7.

Figure IV: The Strategies Adopted by Judges when Disagreeing with a Relevant Guiding Case²³²



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

232. There were two respondents who chose two answers, "I would render judgment based only on statutes" and "I would check if any decided cases departed from guiding cases." Two respondents did not answer the question.

case, only 26.6% would follow guiding cases, while 38.7% would consult decisions handed down in sister courts. Drawn on the survey findings above, one could speculate that the receptiveness of Chinese judges to prior judicial decisions is driven by their solicitude for judicial legitimacy, which requires judges to apply the same legal rules and standards as others on the bench.

b. Interviews with Judges and Law Clerks

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

i. The Nature and Function of Guiding Cases

I asked interviewees about their views on the issuance of Chinese guiding cases. Chinese academic scholars have suggested that implementing guiding cases is an early stage in establishing a Chinese case law system,²³³ and I asked if they agreed with these academic comments. Unsurprisingly, all the interviewees strongly disagreed and claimed that guiding cases in China were different from binding precedent in common law countries. They generally gave the following three reasons to support their disagreements: first, judges in China do not have legislative power; second, guiding cases are neither a legal source in China nor mandatorily cited by courts; third, China has no foundation for implementing a case law system. A judge from the Chinese Supreme People's Court argued that courts at all levels only have to refer to the key points of the guiding cases rather than the cases' facts, so reasoning by analogy under common law tradition does not apply.

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

233. See HAO & WENFU, *supra* note 26.

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

ii. Choosing Among Prior Judicial Decisions for Reference

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

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

iii. The Problem and Proposed Solutions of Implementing Guiding Cases

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

kept informed of guiding cases due to their heavy caseload. They conducted legal research on guiding cases and other previous judicial decisions only when dealing with hard cases. The C2J contained statutes, regulations, and prior judicial decisions across the country. It, however, did not cover all of the guiding cases and was not updated in a timely manner. She had to pay out of pocket to purchase materials on guiding cases to study. In addition, the court in which she is working had been annually evaluating the number of cases decided by judges that were appealed or reversed and classified the appeal reasons into the categories of no errors, reasonable errors, and serious errors. The fact that judges did not follow guiding cases was generally treated as no error or reasonable error, thus giving judges less motivation to learn about guiding cases themselves when the internal database and materials were not frequently updated. For the same reason, even if the guiding cases had been referred to, judges working at her court rarely cited it in their judgments. Instead, they parroted the legal reasoning paragraph of the guiding case in their judgments. One of the local court clerks interviewed told me that the shorter a judgment is, the fewer mistakes the judge would make.²³⁴

To confront the problems that occurred in implementing guiding cases, interviewees both from the Supreme People's Court and local courts proposed launching a comprehensive training program to address how to properly refer to or cite these cases. However, a law clerk questioned the effectiveness of the training because judges might not take time to attend the training on site or watch the training online after work. The local court judge who purchased materials on guiding cases suggested that these kinds of materials should be distributed in print to every judge working in courts at all levels. In addition, a Supreme Court judge interviewed suggested that lower court judges should closely comply with article 11 of "Detailed Rules for the Implementation of the Provisions of the Supreme People's Court on Case Guidance," which requires the relevant guiding cases to be consulted and the number and key points of the guiding case to be quoted.²³⁵ He further suggested that

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

235.

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

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

B. The Pitfall of Judicial Innovations in China

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

In the process of handling a case, the case handling personnel shall consult relevant guiding cases. Where any relevant guiding case is quoted in the written judgment, the number of the guiding case and its key points of judgment shall be quoted in the judgment's reasoning. Where a public prosecution authority, a party to a case, or a defender or litigation representative thereof quotes a guiding case as the ground for prosecution (or defense), the case handling personnel shall respond in the judgment's reasoning as to whether the guiding case has been referred to, and explain the reasons.

Zuigao Renmin Fayuan Guanyu Anli Zhidao Gongzuo De Guiding Shishi Xize [Detailed Rules for the Implementation of the Provisions of the Supreme People's Court on Case Guidance], (promulgated by Supreme People's Court, May 13, 2015), art. 11, <http://en.pkulaw.cn/display.aspx?cgid=249447&lib=law>.

236. MINCHUAN TEDA, WENCHUAN TEDA DIZHEN ZHAIHOU SHEFA SHIWU DE SIFA YINGDUI: SICHUAN FAYUAN NENGDONG SIFA DE TANSUO YU SHIJIAN [THE STRATEGIES OF COURTS IN RESPONSE TO THE LEGAL RELATED AFFAIRS AFTER WENCHUAN EARTHQUAKE] (Haiping Wang ed., 2008).

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

V. CONCLUSION

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

237. Xin He, *Black Hole of Responsibility: The Adjudication Committee’s Role in a Chinese Court*, 46 LAW & SOC’Y REV. 681, 681-712 (2012).

238. *Farwell v. Bos. & Worcester R.R. Corp.*, 45 Mass. 49, 52 (Mass. 1842); Caroline Mitchell, *Products Liability, Workmen’s Compensation and the Industrial Accident*, 14 DUQ. L. REV. 349, 349-98 (1975-1976); see also Jerrilyn G. Marston, *The Creation of a Common Law Rule: The Fellow Servant Rule, 1837-1860*, 132 U. PA. L. REV. 579, 579 (1984).

239. Howson, *supra* note 29, at 303-442.

240. See SU LI, SONGFA XIAXIANG: ZHONGGUO JICENG SIFA ZHIDU YANJIU [BRING THE LAW TO THE RURAL AREAS: A STUDY OF CHINA’S GRASSROOTS JUDICIAL SYSTEM], 2002); see also Frank K. Upham, *Who Will Find the Defendant if He Stays with His Sheep? Justice in Rural China*, 114 YALE L.J. 1675 (2005).

241. *Zhonghua Renmin Gongheguo Lifa Fa*, *supra* note 38, art. 17.

promulgation.²⁴⁴ These steps may take years to complete. Moreover, statutes, once amended, are unlikely to be modified or annulled due to concerns about the stability and authority of the law. Unlike the legislature, courts frequently confront statutory vagueness or imperfections in the course of adjudication. Judicial decisions can, therefore, function as a tool for judges to gather information about the consequences of a particular policy innovation and to gauge public support for future legislative amendments. Moreover, judicial decisions can serve as a form of political communication between courts that indicate the acceptability and feasibility of the policy innovation. Indeed, the increasing accessibility of judicial decisions, since the 1980s, has facilitated such communication and the judgments handed down by other courts in factually similar controversies have evolved into a convenient resource for Chinese judges confronting hard cases or novel situations.

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

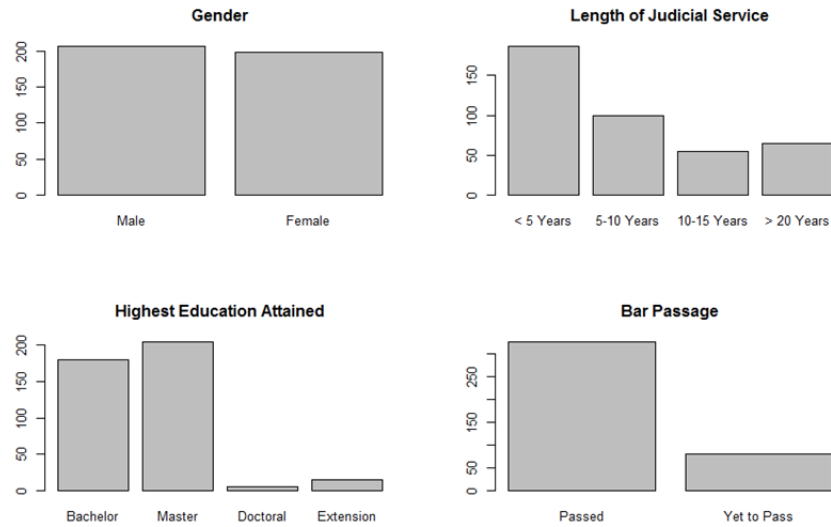
242. *Id.* arts. 18-21.

243. *Id.* art. 24.

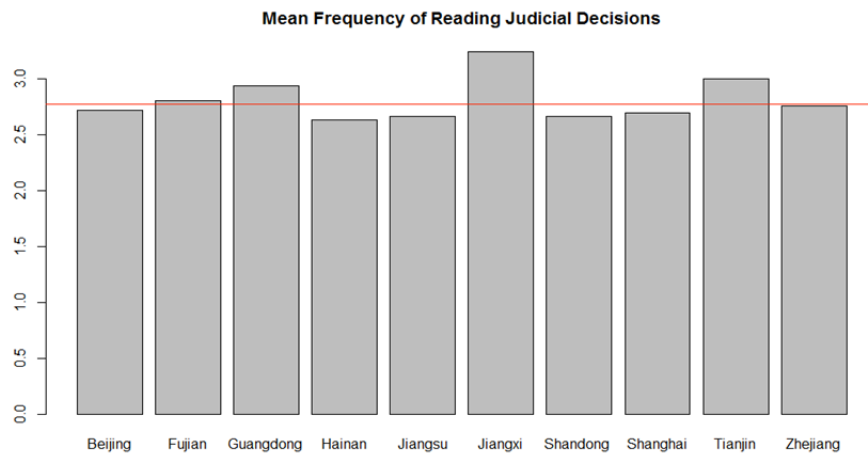
244. *Id.* art. 25.

APPENDICES

Appendix I:
Distribution of Judge-Level Covariates



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



Appendix III:
Mean Influence of Judicial Decisions
Among Ten Regions

