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The New-Breed, “Die-Hard” Chinese Lawyer: A Comparison with American Civil Rights Cause Lawyers


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The New-Breed, “Die-Hard” Chinese Lawyer: A Comparison with American Civil Rights Cause Lawyers

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ABSTRACT

In times of social upheaval, lawyers can mark the way toward social change. In particular, when lawyers become more aggressive than traditional lawyers in the cause of fighting injustice, they face backlash from multiple sources, including government and their own profession. Such was the case during the U.S. civil rights movement. Unusually aggressive behavior by cause lawyers was met with hostility from their own profession and from government action. Those lawyers, while battered at times with physical violence, bar ethics charges, contempt of court, and state hostility, survived and changed social conditions at the same time they altered the culture of their own profession. Some have blamed them for the so-called civility crisis in the legal profession. A phenomenon with some, but not perfect parallels is happening in China. Activist human rights and criminal defense lawyers have undertaken tactics that are dramatically outside norms of behavior for Chinese lawyers and arguably in violation of law. In general, they face even harsher retribution than American civil rights lawyers did, although the small number of American lawyers who faced violence and near-death in racially-motivated violence could have faced no harsher retaliation. The parallels, while far from completely matching the two circumstances, are worth exploring and considering as the world watches developments in the Chinese justice system.

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I. Introduction

A new breed of lawyer is practicing criminal defense in China.¹ Dubbed the “die-hard lawyer” by the press, but sometimes self-eschewing the label, these new lawyers say they are simply representing their clients zealously, advancing their interests by whatever legitimate means are at hand.² What is being said of

1. See Alex Olesen, *Meet China’s Swaggering, ‘Diehard’ Criminal Lawyers*, FOREIGN POLICY (May 16, 2014), <https://foreignpolicy.com/2014/05/16/meet-chinas-swaggering-diehard-criminal-lawyers/> (explaining that a new group of lawyers has developed in China over the last few years) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

2. See *id.* (remarking on the new “diehard lawyers faction” in China and what these lawyers believe).

them in the press?³ What do they say about themselves?⁴ How do they compare with the American civil rights era cause lawyer?⁵

Both groups of lawyers have been derided by the traditional elements of their professions; members of both groups were occasionally incarcerated by the government; both groups used previously unused, aggressive methods to challenge the status quo.⁶ The aggressive lawyering of the civil rights era cause lawyer eventually became one of several accepted ways of lawyering in the U.S.⁷ The long-term effects of developments in China remain to be seen.⁸ But there is no question of the stir that has been created by the die-hard lawyer.⁹ Like that of the American civil rights era cause lawyer, it is a stir that is being felt at the highest levels of government and established power structures.¹⁰

3. *See id.* (noting that these lawyers are being talked about in the press).

4. Interview by Professor James Moliterno with two of the more prominent new breed of Chinese lawyers (July 2014).

5. *See infra* Section IV (comparing the Chinese die-hard lawyers with U.S. civil rights cause lawyers).

6. *See* Teng Biao, Opinion, *Chinese Human Rights Lawyers Under Assault*, WASH. POST (July 25, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/24/AR2009072402940.html> (describing the emergence of Chinese human rights lawyers, their motivations, and the consequences they face for their insistence on the rule of law) (on file with the Washington & Lee Journal of Civil Rights & Social Justice). *See generally* VOICES OF CIVIL RIGHTS LAWYERS: REFLECTIONS FROM THE DEEP SOUTH, 1964–1980 (Kent Spriggs ed., 2017) [hereinafter VOICES OF CIVIL RIGHTS LAWYERS] (recounting the professional development of civil rights lawyers, the various causes they pursued, the consequences they faced, as well as the historical context of civil rights litigation, in the 1960s).

7. *See generally* ALAN W. HOUSEMAN & LINDA E. PERLE, SECURING EQUAL JUSTICE FOR ALL: A BRIEF HISTORY OF CIVIL LEGAL ASSISTANCE IN THE UNITED STATES (rev. ed., 2007) (describing the efforts and impact of legal aid lawyers, a “new breed of lawyers,” during the twentieth century).

8. *See* Olesen, *supra* note 1 (discussing the new phenomenon created by the lawyers in China and the uncertain long-term effects).

9. *See id.* (referring to an article in a Communist Party journal that complained that die-hard lawyers, “a ‘poisonous cancer’ on society,” were “disrupting social order and undermining public safety”).

10. *See id.* (“The Chinese government is clearly worried about the so-called diehards’ impact, and is moving to trim it . . . responding with an ‘increasingly repressive policy’ that is trying to rein in the legal profession.”).

Perhaps it seems exaggerated to compare the torture of Chinese human rights lawyers to the hardships of U.S. civil rights lawyers. This is a fair point, and to be sure, we do not suggest the situations are precisely the same. We mean only to compare two core aspects of the two sets of mistreatment that are strikingly similar. Both groups of lawyers have “committed” the same core offense: They are disrupting deeply-entrenched, well-guarded social orders and power structures, and both groups of lawyers are engaging in lawyering conduct that disturbs the norms of traditional lawyer conduct. In these two ways, ways we suggest are significant, the two groups of lawyers have parallel experiences and potential impacts. In this article, we will both compare and contrast the two sets of lawyers.

Although the torture, “disappearance,” and risk endured by aggressive Chinese lawyers undoubtedly outstrips the day-to-day life risks endured by U.S. civil rights lawyers, it bears remembering the fervor and passion with which authorities, especially but not exclusively in the South, endeavored to protect the continued forms of slavery and white supremacy that continued to thrive in the 1940s–1970s (and in some ways until the present).¹¹ Intent on maintaining a legal system of white supremacy, authorities abandoned all sense of humanity when dealing with the most audacious and the most successful civil rights lawyers.¹² While some such lawyers were run off, some were physically beaten, and a few were bombing and lynching targets.¹³ The ferocity of treatment by authorities was sometimes cloaked in the surface civility of a judge’s ruling against an out of state lawyer’s *pro hac vice* motion, and was sometimes as raw as attempted murder by local law enforcement and the local citizens that the authorities tolerated and with whom they sometimes conspired.¹⁴

11. Compare *infra* Part II (describing the harsh treatment of criminal defense and human rights lawyers in China), with *infra* Part IV (describing the treatment of U.S. civil rights lawyers).

12. See *infra* Part IV (describing the treatment of U.S. civil rights lawyers).

13. See *infra* Part IV (describing the unfortunate consequence of being a civil rights lawyer).

14. See *infra* Part IV (discussing how the effort against civil rights lawyers

When they were charged with a crime, the criminal charge of choice against civil rights lawyers was practicing law without a license or various forms of professional misconduct such as barratry.¹⁵ These were lawyers, properly licensed in their home states in the North, to be sure, but they were charged with practicing without a Mississippi or Louisiana or Georgia law license.¹⁶ Then, as now, it is common practice for a lawyer to be temporarily out of his home state representing a client in a state where he lacks a license.¹⁷ The common practice in litigation settings is to associate with a local lawyer and ask the local court’s permission to represent the lawyer’s client *pro hac vice*.¹⁸ Such requests are routinely granted, although there is no due process right to be heard on such a request and it can be denied without any cause.¹⁹ These requests are a normal part of interstate practice, and are rarely denied except when a local judge has some active dispute with the lawyer or the client.²⁰ For civil rights

was typically local).

15. See VOICES OF CIVIL RIGHTS LAWYERS, *supra* note 6, at 167–95 (detailing the arrests of John C. Brittain, Armand Derfner, and Richard Sobol for practicing without a license); see also NAACP v. Button, 371 U.S. 415, 445 (1963) (Douglas, J., concurring) (“Arkansas, Georgia, Mississippi, South Carolina, and Tennessee passed laws following our 1954 decision [in *Brown v. Board of Education*,] which brought within their barratry statutes attorneys paid by an organization such as the N.A.A.C.P and representing litigants without charge.”). Virginia later joined the ranks of those states by enacting similar laws in 1956. NAACP, 371 U.S. at 445.

16. See VOICES OF CIVIL RIGHTS LAWYERS, *supra* note 6, at 167–95 (explaining that these lawyers were in good standing in their home states).

17. See *Leis v. Flynt*, 439 U.S. 438, 451 (1979) (Stevens, J., dissenting) (“[A]pppearances by out-of-state counsel have been routine throughout the country . . .”).

18. See MODEL RULE ON PRO HAC VICE ADMISSION (AM. BAR ASS’N 2016) (providing the current procedure for *pro hac vice* admission).

19. See *Leis*, 439 U.S. at 442 (finding that because the right of an out-of-state lawyer to appear *pro hac vice* is not a “cognizable property interest” protected by the Fourteenth Amendment, the Constitution does not obligate state courts to provide procedural due process to lawyers applying for *pro hac vice* admission).

20. See *id.* at 451 (Stevens, J., dissenting) (“The custom is so well recognized that . . . there is not the slightest reason to suppose that a qualified lawyer’s *pro hac vice* request will be denied.” (quoting *Spanos v. Skouras Theatres Corp.*, 364 F.2d 161, 168 (2d. Cir. 1966))).

lawyers, that dispute was their disruption of social order and their challenge to entrenched power structures.²¹ In China, human rights lawyers are typically charged with disrupting public order, picking quarrels and causing trouble, or inciting state subversion.²² In reality, that is also what the U.S. civil rights lawyer was being charged with, but there was (and is) no U.S. law criminalizing such conduct. But unmistakably, the U.S. civil rights lawyer was under attack in the South for disrupting social order and causing trouble, and indeed, as in China, for threatening the status quo power structure.

In the U.S., civil rights lawyers were subject to short jail terms, some beatings, a rifle in the mouth, car bombings, house bombings, and lynch mobs.²³ In China, typically pursuant to the RSDL (Residential Surveillance at a Designated Location) statute,²⁴ detained lawyers are subject to sleep deprivation, food deprivation, mental anguish on relatives and friends, denial of counsel, mental/emotional torture, and some physical beatings.²⁵ Many such disappearances ended in forced confessions, broadcast on television and reported in the state print media.²⁶

21. See *id.* at 450 (Stevens, J., dissenting) (“In a series of cases brought in courts throughout the South, out-of-state lawyers [appearing *pro hac vice*] . . . developed the legal principles which gave rise to the civil rights movement.”).

22. See Andrew Jacobs & Chris Buckley, *China Targeting Rights Lawyers in a Crackdown*, N.Y. TIMES (July 22, 2015), <http://www.nytimes.com/2015/07/23/world/asia/china-crackdown-human-rights-lawyers.html> (discussing the accusations of “subversion and swindles” made by the Communist Party against rights lawyers in China) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

23. See *infra* Part IV (describing violent threats and physical assaults civil rights lawyers had to endure).

24. Zhonghua Renmin Gongheguo Xingshi Susong Fa (中华人民共和国刑事诉讼法) [Criminal Procedure Law of the People’s Republic of China] (promulgated by Standing Comm. Nat’l People’s Cong., July 7, 1979, effective Jan. 1, 1980, amended Mar. 14, 2012), art. 64, P.R.C. LAWS 72–77.

25. See SAFEGUARD DEFS., THE PEOPLE’S REPUBLIC OF THE DISAPPEARED: STORIES FROM INSIDE CHINA’S SYSTEM FOR ENFORCED DISAPPEARANCES 49–65 (Michael Caster, ed., 2017) [hereinafter SAFEGUARD DEFS., THE PEOPLE’S REPUBLIC OF THE DISAPPEARED] (describing the treatment under RSDL based on the account of Liu Shihui).

26. See *generally* SAFEGUARD DEFS., SCRIPTED AND STAGED: BEHIND THE

In both situations, massive state power was brought down on lawyers.²⁷ One enormous difference: In the U.S., ultimately but often belatedly, federal authority was on side of civil rights lawyer.²⁸ Not so in China.

II. Who or What Is the “Die-Hard” Chinese Lawyer?

As groundwork for understanding the new breed of more aggressive Chinese lawyer, one must first recognize that Chinese Lawyers Law (the rough equivalent of laws on advocates in European countries or the rules of professional conduct adopted by each of the United States, usually by their state supreme courts) places State interests above those of clients.²⁹ To be sure, Western lawyers must obey laws and balance their duties to clients with their positions as “officers of the court.”³⁰ But the understanding in China that the State comes first is made explicit by the Chinese Lawyers Law: “Practice by lawyers shall be subject to supervision of the State, society and the parties concerned.”³¹ The foundational

SCENES OF CHINA’S FORCED TELEVISED CONFESSIONS (Rachel Tyrell ed., 2018) [hereinafter SAFEGUARD DEFS., SCRIPTED AND STAGED] (analyzing forty-five forced confessions between 2013 and 2018).

27. See *infra* Section II (comparing the respective government responses to lawyer activism in contemporary China and in America during the civil rights movement).

28. See *NAACP v. Button*, 371 U.S. 415, 429 (1963) (holding that the activities of the NAACP, its affiliates and legal staff are modes of expression and association protected by the First and Fourteenth Amendments, which Virginia may not prohibit under its power to regulate the legal profession as improper solicitation of legal business).

29. See *Zhonghua Renming Gongheguo Lüshi Fa* (中华人民共和国律师法) [Lawyer Law of the People’s Republic of China] (promulgated by the Standing Comm. Nat’l People’s Cong., Sept. 1, 2017, effective Jan. 1, 2018), P.R.C. Laws, 2018, art. 3. (“In legal practice, a lawyer shall subject himself to the supervision of the State, society and the parties concerned.”).

30. See MODEL RULES OF PROF’L CONDUCT Preamble (AM. BAR ASS’N 2018) (“A lawyer’s responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious.”).

31. See *Zhonghua Renming Gongheguo Lüshi Fa* (中华人民共和国律师法) [Lawyer Law of the People’s Republic of China], (promulgated by the Standing Comm. Nat’l People’s Cong., Sept. 1, 2017, effective Jan.1, 2018), P.R.C. Laws,

independence of lawyers in the United States is at least implicitly prohibited and replaced by a foundation of State supervision.

III. Some History of Post-Revolutionary Chinese Lawyer Regulation

1949–2012

In 1949, the newly established People's Republic of China abolished all of the laws under the old Republic of China government, under the spirit of "contempt and criticize the counterrevolutionary law and regulation of the KMT,³² contempt and criticize Euro-American-Japanese capitalist anti-people law and regulations."³³ Beginning in 1950, China experimented with a new lawyer system, modeled after the Soviet system, which made lawyers part of the government employee.³⁴ Under the strong ideology of class struggle, criminal defense lawyers were seen as defending bad people, which was an abandonment of class warfare.³⁵ The initial lawyer system was discontinued during the

2018, art. 3.

32. Refers to Kuomintang, the Chinese Nationalist Party, which was defeated in the revolution.

33. Zhang Zhiming (张志铭), *Huimou he Zhanwang: Bainian Zhongguo Lüshi de Fazhan Guiji* (回眸和展望: 百年中国律师的发展轨迹) [*Looking Back and Forward: Lawyer's Development in China in the Past Century*], Guojia Jianchaguan Xueyuan Xuebao (国家检察官学院学报) [Journal of National Prosecutors College] (2013 vol. 1); see *Zhongyang Guanyu Feichu Guomindang Liufaquan shu he Queding Jiefangqu Sifa Yuanze de Zhishi* (中央关于废除国民党《六法全书》和确定解放区司法原则的指示) [*The Party Central's Guidance Regarding the Abolishment of KMT's Six Codes and the Establishment of Judicial Principles of the Liberated Area*], (Feb. 22, 1949) <http://cpc.people.com.cn/GB/64184/64186/66650/4491574.html#> (deriding the laws and policies of the KMT and calling for their abolition) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

34. Zhang, *supra* note 33 (describing the historic development of lawyer system in China).

35. See *id.* (describing the public opinion towards lawyers in China in the 1950s).

“anti-rights movement” in 1957, when many lawyers were criticized as rightists, and some were sent to labor camps.³⁶

During the Cultural Revolution (1966–1976), the legal system as a whole was abolished when the “authoritarianism of the mass” replaced the police-prosecutor-court system.³⁷ During this period, philosophically, there was no need for courts, judges, prosecutors, and defense lawyers.³⁸ The public was encouraged to take matters of loyalty to the Party into their own hands and enforce these norms.³⁹ The results included rampant mob confiscation and destruction of property belonging to “landlords,” and the meting out of punishment for perceived offenses against the Chinese Communist Party (CCP or Party) in the name of the revolution. The Red Guards ruled. Formal justice administration by courts and their officers was superfluous.

The lawyer system was reinstated in 1978 when China ended the Cultural Revolution and was on its way toward the Reform and Opening Up.⁴⁰ In April 1979, the National People’s Congress (NPC) set up a special team for drafting regulations on lawyers, and in July, the Criminal Procedural Law was passed and the lawyer’s participation in the legal system was officially established through this law.⁴¹ In August 1980, the NPC Standing Committee passed the Temporary Regulation on Lawyers.⁴²

The reinstated lawyer system was similar to the one established in the 1950s in which lawyers were “legal professionals

36. *See id.* (describing the impact of anti-rights movement on lawyers and the end of the lawyer system in China).

37. *See id.* (describing the abandonment of the law during the Cultural Revolution).

38. *See id.* (explaining the incompatibility of the western lawyer system to the revolutionary China).

39. *See id.* (explaining that political ideology was more important than the law during the Cultural Revolution).

40. *See id.* (describing the reinstatement of the lawyer system in China).

41. *See id.* (explaining the legislative effort to reinstate the lawyer system in China).

42. Xiong Qihong (熊秋红), *Xin Zhongguo Lüshi Zhidu de Fazhan Licheng ji Zhanwang* (新中国律师制度的发展历程及展望) [*Lawyer Development History and Expectations of the New China*], *Zhongguo Faxue* (中国法学) [China Legal Science] 15 (1999 Vol. 5).

of the state.”⁴³ All lawyers worked for the “legal consultancy bureau (法律顾问处),” (later called Lawyer Affairs Bureau (律师事务所), which is the same word used by private law firms today) which was a government-organized nonprofit organization.⁴⁴

Starting in 1988, the State Council (essentially the central government body) started to experiment with partnership models for law firms where the partners no longer worked for the government and the law firms were no longer in the government budget.⁴⁵ This activity was one small part of this period’s general phenomenon in China of slightly opening the economic system while maintaining tight control over political processes.⁴⁶ In this period, the Soviet Union first opened the political process, resulting in massive instability, collapse of the Union, its economy, and its control over its satellite states in Eastern and Central Europe. China followed largely an opposite path from that of the Soviet Union.

These new experiments with private lawyering and partnerships were legalized in 1993 when State Council passed the Ministry of Justice Plan for Deepening Lawyer Reform (司法部关于深化律师工作改革的方案).⁴⁷ NPC Standing Committee passed the PRC Lawyer’s Law (中华人民共和国律师法) in May 1996,⁴⁸ which defined lawyers as “professionals that provide legal services to the society, who have obtained professional license according to law” (依法取得执业证书, 为社会提供法律服务的执业人员) instead of the “legal professional of the state” (国家法律工作者) in the old system.⁴⁹ Lawyers became private practitioners instead of government employees.⁵⁰

43. See Zhang, *supra* note 33 (comparing the lawyer system in the 1980s with 1950s).

44. See *id.* (describing the public service nature of the lawyer in the 1980s).

45. See Xiong, *supra* at 42 (describing the privatization of lawyers in China).

46. See *id.* (describing the privatization of the legal profession as part of the market economy reform).

47. See *id.* (describing the privatization of lawyers in China).

48. See *id.* at 15 (describing the privatization of lawyers in China).

49. See *id.* (describing the privatization of lawyers in China).

50. See *id.* at 16 (describing the privatization of lawyers in China).

China’s Legal Reform 2012–2015

Since Xi Jinping took power as the General Secretary of the Chinese Communist Party in 2012, China has undergone significant legal reform.⁵¹ Revisions in criminal and administrative procedural laws seemed to allow lawyers to play a larger role in the legal process.⁵² A range of wrongful criminal convictions were overturned, many after decades, and received huge media attention as the success of the legal reform.⁵³ Human rights lawyers and activists were at first encouraged by these reforms and many believed they signaled an opening up to a heightened role for lawyers in the justice system.⁵⁴

Ironically, given later events, the apparent reforms during the early period of President Xi’s term may have emboldened human rights lawyers in a way that alarmed the Party.⁵⁵ This alarm may have contributed to the 709 Crackdown.⁵⁶

51. See *China Focus: China Scores New Achievements in Judicial Protection of Human Rights*, XINHUA (July 15, 2017, 9:52:28 PM), http://www.xinhuanet.com/english/2017-07/15/c_136446475.htm (identifying different areas of legal reform since 2012) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

52. See *id.* (detailing new or revised laws that protect lawyers’ right of practice and rules criminal defense lawyers may use to exclude illegally obtained evidence).

53. See *id.* (indicating that certain judicial reform initiatives aimed at quelling the miscarriage of justice led to the overturning of wrongful convictions); see also *infra* Part II.A.2.c (describing some of the wrongful convictions that were overturned).

54. See XINHUA, *supra* note 51 (explaining how human rights lawyers were encouraged by the reforms).

55. See *id.* (explaining how the reforms possibly emboldened human rights lawyers).

56. July 9, 2015 marked a months-long sweep of more than 300 human rights lawyers, legal assistants, and activists. *China: On “709” Anniversary, Legal Crackdown Continues*, HUM. RTS. WATCH (JULY 7, 2017 1:54 AM), <https://www.hrw.org/news/2017/07/07/china-709-anniversary-legal-crackdown-continues> (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

*Amendments in Legislation**1. Criminal Procedure Law*

The Criminal Procedure Law went through extensive revision in 2012, aiming to increase the role of trials, judges and lawyers, and thus rid the courts' reputation as rubber stamps for the state.⁵⁷ The revision added five articles (articles 54–58) that purport to preclude the use of evidence obtained through torture.⁵⁸

The new Criminal Procedure Law also encouraged the taking of witness testimony in the courtroom for the first time.⁵⁹ In the past, witness testimonies were only presented to the court on paper and judges made decisions purely from the paperwork.⁶⁰ Cross-examination of witnesses was rare.⁶¹ The newly revised Article 59 requires that witness testimony must be examined by both sides to be admitted.⁶² Newly added Articles 62 and 63 contemplated the protection and compensation for witnesses who appear in court.⁶³ Newly added Articles 187 and 188 regulated what kind of witnesses must testify (in court) and compulsory attendance measures for witnesses who do not appear in court

57. Quanguo Renmin Daibiao Dahui Guanyu Xiugai Zhonghua Renmin Gongheguo Xingshi Susongfa de Jueding(全国人民代表大会关于修改《中华人民共和国刑事诉讼法》的决定) [Decision of the National People's Congress on the Amendment of the Criminal Procedure Law of the People's Republic of China] (promulgated by the Nat'l People's Cong., Mar. 14, 2012, effective Jan. 1, 2013), § 18.

58. *See id.* (describing the various revisions of articles of the Criminal Procedure Law of the People's Republic of China).

59. *Id.* §§ 19–20 and §§ 71–72.

60. *See generally* Zhuohao Wang, *Why Chinese Witnesses Do Not Testify at Trial in Criminal Proceedings*, CHINA MINISTRY OF EDUC.—PROJECT OF HUMAN AND SOC. SCI. (No. 13YJC820073) (2011) (explaining how testimony was originally presented).

61. *See* Quanguo Renmin Daibiao Dahui Guanyu Xiugai Zhonghua Renmin Gongheguo Xingshi Susongfa de Jueding, *supra* note 57 (describing the various revisions of articles of the Criminal Procedure Law of the People's Republic of China).

62. *Id.* § 19, art. 59.

63. *Id.* § 20.

without adequate excuse.⁶⁴ Revised Article 192 allowed expert witnesses to testify in trials for the first time.⁶⁵ Starting from early 2017, the Supreme People’s Court (SPC) initiated a national campaign to “substantialize criminal trials,” requiring participation of defense lawyers and live witnesses in more criminal trials.⁶⁶ Together these revised articles and following reforms described a possible conversion from largely paper trials to trials dominated by live testimony.⁶⁷ In practical application, despite the vast revisions and some increase in the use of live testimony, trials today are still largely based on paper.⁶⁸

On paper, the revisions expanded the scope of the defense lawyers’ participation throughout the criminal process.⁶⁹ Article 36 was changed so that lawyers may “participate” in the investigation stage, rather than “assist,” as the old law allowed.⁷⁰ Lawyers were also allowed to participate in the review of death penalty cases with the Supreme Court.⁷¹ An ambitious reform proposal recently

64. *Id.* § 71.

65. *Id.* § 72.

66. Sup. People’s Ct., Zuigao Renmin Fayuan Guanyu Quanmian Tuijin yi Shenpan wei Zhongxin de Xingshi Susong Zhidu Gaige de Shishi Yijian (最高人民法院关于全面推进以审判为中心的刑事诉讼制度改革的实施意见) [Enforcement Opinion of the Supreme People’s Court on Carrying out Criminal Procedure Reforms Centered on Trials] (Feb. 17, 2017).

67. *See supra* notes 57–66 and accompanying text (noting how trial practice has changed).

68. *See generally* Zhuohao Wang, *supra* note 60.

69. *See* Sup. People’s Ct., Zuigao Renmin Fayuan Guanyu Quanmian Tuijin yi Shenpan wei Zhongxin de Xingshi Susong Zhidu Gaige de Shishi Yijian, *supra* note 66 (explaining the work defense lawyers would participate in).

70. Quanguo Renmin Daibiao Dahui Guanyu Xiugai Zhonghua Renmin Gongheguo Xingshi Susongfa de Jueding (全国人民代表大会关于修改《中华人民共和国刑事诉讼法》的决定) [Decision of the Nat’l People’s Cong. on the Amend. of the Crim. Proc. L. of the People’s Republic of China] (promulgated by the President of the People’s Republic of China, Mar. 14, 2012, effective Jan. 1, 2013), at § 8, <https://www.cecc.gov/resources/legal-provisions/second-amendment-to-the-criminal-procedure-law-of-the-peoples-republic-of> (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

71. *See China’s New Criminal Procedure Law: Death Penalty Procedures*, HUM. RTS. J. (Apr. 3, 2012), https://www.duihuahrjournal.org/2012/04/chinas-new-criminal-procedure-law-death_03.html (referring to the amendment to Article 240, which requires the Supreme People’s Court to listen to the opinion of

promulgated aims to provide professional assistance to every criminal defendant,⁷² although currently less than 30% of defendants have a lawyer.⁷³

2. Administrative Procedure Law

The 2014 Administrative Procedure Law revision changed the case acceptance system of courts from “review system for case docket” (立案审查制) to “registration system of case docket” (立案登记制).⁷⁴ The revision means that when plaintiffs file cases in a court, the court will no longer decide whether to accept the case depending on the merits of the case, but the court will accept and register all the cases, or will provide a written explanation of why the case is not accepted within seven days of filing.⁷⁵ This change

defense attorney upon his or her request during the death penalty review process) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

72. See Guanyu Kaizhan Xingshi Anjian Lüshi Bianhu Quanfugai Shidian Gongzuo de Banfa (最高人民法院 司法部 关于开展刑事案件律师辩护全覆盖试点工作的办法) [Sup. People’s Ct. & Ministry of Just. Pilot Plan of Universal Coverage of Law. Def. in Crim. Cases] (effective Oct. 11, 2017), <http://www.court.gov.cn/zixun-xiangqing-62912.html> (detailing defense counsel representation reform plans) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

73. CONG.-EXEC. COMM’N ON CHINA, DEFENSE LAWYERS TURNED DEFENDANTS: ZHANG JIANZHONG AND THE CRIMINAL PROSECUTION OF DEFENSE LAWYERS IN CHINA 11 (2003) (citing Wang Jin, *Are Defense Lawyers Able to Enjoy ‘Special Rights,’* BEIJING YOUTH DAILY, May 22, 2001).

74. Susan Finder, *New Docketing Procedures Come to the Chinese Courts*, SUP. PEOPLE’S CT. MONITOR (June 18, 2015), <https://supremepeoplescourtmonitor.com/2015/06/18/new-docketing-procedures-come-to-the-chinese-courts/> (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

75. Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Xiugai Zhonghua Renmin Gongheguo Xingzheng Susongfa de Jueding (全国人民代表大会常务委员会关于修改《中华人民共和国行政诉讼法》的决定) [Decision of the Nat’l People’s Cong. Standing Comm. on the Amend. of the Admin. Proc. L. of the People’s Rep. of China] (promulgated by the Standing Comm. Nat’l People’s Cong., Nov. 1, 2014, effective May 1, 2015), at § 31, http://www.npc.gov.cn/npc/xinwen/2014-11/02/content_1884662.htm (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

made it easier for people to file administrative lawsuits. In the past, courts were reluctant to review administrative lawsuits against the government that they considered too “sensitive.”⁷⁶

The 2014 Administrative Procedure Law revision also added a clause prohibiting administrative agencies from interfering with the courts’ filing of administrative cases and requiring agencies to appear in court for lawsuit hearings.⁷⁷

In February 2018, the Supreme People’s Court released an interpretation document for the Administrative Procedure Law.⁷⁸ It removed ten kinds of actions from the jurisdiction of administrative courts.⁷⁹ Among them are claims based on actions of public security and state security agencies authorized under the Criminal Procedure Law, which include detention under RSDL.⁸⁰

76. *See For Some Plaintiffs, Courts in China are Getting Better*, ECONOMIST (Sep. 30, 2017) <https://www.economist.com/china/2017/09/30/for-some-plaintiffs-courts-in-china-are-getting-better> (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

77. *See* Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Xiugai Zhonghua Renmin Gongheguo Xingzheng Susongfa de Jueding (全国人民代表大会常务委员会关于修改《中华人民共和国行政诉讼法》的决定) [Decision of the Nat’l People’s Cong. Standing Comm. on the Amend. of the Admin. Procedure L. of the People’s Rep. of China] (promulgated by the Standing Comm. Nat’l People’s Cong., Nov. 1, 2014, effective May 1, 2015), at § 3, http://www.npc.gov.cn/npc/xinwen/2014-11/02/content_1884662.htm (detailing the revised procedural requirements) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

78. *Zuigao Renmin Fayuan Guanyu Shiyong Zhonghua Renmin Gongheguo Xingzheng Susongfa de Jieshi* (最高人民法院关于适用《中华人民共和国行政诉讼法》的解释) [Interpretation of the Sup. People’s Ct. Concerning the Application of the Admin. Proc. L. of the People’s Rep. of China] (promulgated by the Jud. Comm. of the Sup. People’s Ct., Nov. 13, 2017, effective Feb. 8, 2018), <http://www.court.gov.cn/zixun-xiangqing-80342.html> (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

79. *See id.* art. 1.

80. *See id.*

*Political Commitments**1. Judicial Independence*

Besides the legislative changes, statements, and regulations from the CCP, in other ways the government suggested the leadership was committed to increasing the role of lawyers and bringing more independence to the courts.

Starting in 2015, the SPC started to set up circuit courts that are separated from local governments and directly report to the SPC in Beijing.⁸¹ Within two years, the SPC set up six circuit courts around the country.⁸² The President of the Second Circuit Court, Hu Yunteng, wrote at the time in *Qiu Shi*, one of the most influential political commentary magazines published by the CCP, that setting up the circuit courts was aimed to ensure the independence of the judiciary from the influence of local authorities.⁸³

In March 2015, the CCP and State Council jointly issued a regulation on the prevention of and penalties for local government officials intervening in judiciary activities.⁸⁴ In November of the

81. See Margaret Y.K. Woo, Court Reform with Chinese Characteristics, 27 WASH. INT'L L. J. 242, 263–64 (2017) (discussing the establishment of circuit courts as branches of the Supreme People's Court to hear inter-regional cases).

82. *Id.* at 265.

83. See Hu Yunteng (胡云腾), Wei Shenme Yao Sheli Xunhui Fating? (为什么要设立巡回法庭?) [Why Do We Need to Set Up Circuit Courts?], *Qiu Shi* [求是] (June 15, 2015, 8:00 AM), http://www.qstheory.cn/dukan/qs/2015-06/15/c_1115588377.htm (explaining that the circuit courts were established to separate the judicial system from administrative divisions and to guarantee an independent, fair, and impartial judiciary) (on file with the Washington & Lee Journal of Civil Rights & Social Justice); see also Carl Minzner, Legal Reform in the Xi Jinping Era, 20 ASIA POL. 4, 7 (2015) (“The creation of cross-jurisdictional local courts and procuratorates seeks to cut across existing administrative lines of authority and curb the influence of local officials.”).

84. Guanyu Lingdao Ganbu Ganyu Sifa Huodong Chashou Juti Anjian Chuli de Jilu, Tongbao he Zeren Zhuijiu Guiding (关于领导干部干预司法活动插手具体案件处理的记录、通报和责任追究规定) [Regulation on the Recording, Reporting and Accountability Measures for Intervention of Judicial Activities and Meddling of Specific Cases by Officials] (promulgated by the General Office of the Communist Party of China and General Office of the State Council, effective Mar. 18, 2015) http://www.gov.cn/guowuyuan/2015-03/30/content_2840521.htm (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

same year, and again in February 2016, the CCP’s Central Political and Legal Affairs Commission published a combination of twelve typical examples of prohibited intervention by government officials in judicial activities.⁸⁵ These cases include local government officials, judges, prosecutors, and police officers trying to influence cases by exercising their public authority.⁸⁶

The term “judicial independence” in China only means independence from the personal interests of officials or the undue influence of local governments.⁸⁷ It does not mean independence from the CCP leadership.⁸⁸ The ideological control by the CCP is a foundational aspect of the justice system; at least in matters of interest to the CCP, there is no judicial independence from the interests of the CCP.⁸⁹ In fact, the CCP ideological control has been

85. See *Zhongyang Zhengfawei Tongbao 5 qi Ganyu Sifa, Chashou Anjian Chuli Dianxing Anjian* (中央政法委通报5起干预司法、插手案件处理典型案件) [Central Political and Legal Affairs Commission Reports 5 Typical Cases of Intervention of Judicial Activities and Meddling of Cases], RENMIN WANG (人民网) [PEOPLE’S NETWORK] (Nov. 6, 2015 11:17 AM), <http://fanfu.people.com.cn/n/2015/1106/c64371-27785727.html> [hereinafter 2015 Cases of Intervention] (providing examples of five government officials intervening in judicial activities and specific cases) (on file with the Washington & Lee Journal of Civil Rights & Social Justice); see also *Zhongyang Zhengfawei Tongbao qi qi Ganyu Sifa Dianxing Anjian* (中央政法委通报七起干预司法典型案件) [Central Political and Legal Affairs Commission Reports Seven Typical Cases of Intervention of Judicial Activities] RENMIN RIBAO (人民日报) [PEOPLE’S DAILY] (Feb. 2, 2016, 7:30 AM), <http://fanfu.people.com.cn/n1/2016/0202/c64371-28102905.html> [hereinafter 2016 Cases of Intervention] (providing seven examples of government officials intervening in judicial activities and specific cases) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

86. See *Cases of Intervention*, *supra* note 85.

87. See *Judicial Independence in the PRC*, CONG.-EXEC. COMM’N ON CHINA, <https://www.cecc.gov/judicial-independence-in-the-prc> (last visited Oct. 16, 2018) (describing the more limited concept of judicial independence that exists in China as compared with that in the West) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

88. See *id.* (explaining that the leadership of the Party, the people’s congresses, and the procuratorate “are generally not considered improper restraints on judicial independence”).

89. See *id.* (noting that “judges are expected to adhere to the leadership of the Party” and that while “Party interference is less common than local government official interference . . . this distinction is clouded in practice, as most

growing even stronger, even among legal professionals. At a conference with provincial high court presidents in 2017, the SPC's president, Zhou Qiang, explicitly addressed the importance of ideological work and categorized the western ideas of "constitutional democracy," "checks and balances," and "judicial independence" as "wrongful thought."⁹⁰ Although it caused a huge backlash from the public, the SPC did not back down from Zhou Qiang's statement.⁹¹ Instead, the SPC published two commentaries three days later supporting the statement, further explaining why the western legal system is not suitable for China and why promoting western ideology is dangerous to the country.⁹² Despite technical improvements in independence from local

key government officials are also Party members").

90. Supreme People's Court (最高人民法院), *Zhou Qiang: Zhashi Zuohao Renmin Fayuan Gexiang Gongzuo, Yi Youyi Chengji Yingjie Dang de Shijiuda Shengli Zhaokai* (周强: 扎实做好人民法院各项工作, 以优异成绩迎接党的十九大胜利召开) [*Zhou Qiang: Solidly Accomplish all the Tasks of the People's Courts, Welcome the Victorious Opening of the Nineteenth Party Congress with Excellent Achievements*], SINA WEIBO (Jan. 14, 2017, 7:14 PM), https://weibo.com/3908755088/EqOiSharJ?type=comment#_rnd1519865052159 (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

91. See Michael Forsythe, *China's Chief Justice Rejects an Independent Judiciary, and Reformers Wince*, N.Y. TIMES (Jan. 19, 2017) https://www.nytimes.com/2017/01/18/world/asia/china-chief-justice-courts-zhou-qiang.html?_ga=2.186358443.369514703.1519864599-175205695.1517193387 (addressing the frustrations felt in China and abroad with Zhou Qiang's rejection of the Western concept of judicial independence) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

92. See Supreme People's Court (最高人民法院), *Guchui Cuowu Sichao Weiji Guojia Zhengzhi Anquan* (鼓吹错误思潮危及国家政治安全) [*Promoting Wrongful Thoughts are Dangerous for the Political Security of the Country*], SINA WEIBO (Jan. 17, 2017, 11:38 PM) https://weibo.com/3908755088/ErijuBj4q?type=comment#_rnd1519866340176 (providing support for Zhou Qiang's statement) (on file with the Washington & Lee Journal of Civil Rights & Social Justice); see also Supreme People's Court (最高人民法院), *Dui Cuowu Sichao Liangjian Shi Women de Lishi Shiming* (对错误思潮亮剑是我们的历史使命) [*Challenging Wrongful Thoughts is Our Historical Mission*], SINA WEIBO (Jan. 17, 2017, 11:39 PM), https://weibo.com/3908755088/ErijQecNt?type=comment#_rnd1519866312942 (same) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

authorities, ideological control is not going away in the Chinese court system but, instead, is growing even stronger.⁹³

2. Protecting Lawyers’ Professional Rights

Even after the 709 Crackdown, in September 2015, the Supreme People’s Court, the Supreme People’s Procuratorate, Ministry of Public Security, Ministry of State Security, and Ministry of Justice jointly issued the *Regulations on Protecting Lawyers’ Professional Rights According to Law*.⁹⁴ Similar to the added professional rights for lawyers in the Criminal Procedure Law amendment,⁹⁵ this Regulation is a reiteration of the lawyer’s rights and an implementation guide for the agencies.⁹⁶ Although the Regulation shows the commitment to protect the lawyers’ rights, violations are still common.⁹⁷

93. See Forsythe, *supra* note 91, (describing President Xi Jinping’s demand for obedience from the judiciary).

94. See Guanyu Yifa Baozhang Lüshi Zhiye Quanli de Guiding (关于依法保障律师执业权利的规定) [Regulations on Protecting Lawyers’ Professional Rights According to Law] (promulgated by the Sup. People’s Ct., the People’s Procuratorate, Ministry of Public Security, Ministry of St. Security, and Ministry of Just., effective Sept. 16, 2015) http://www.xinhuanet.com/legal/2015-09/20/c_1116616593.htm (outlining the rights of Chinese lawyers) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

95. Quanguo Renmin Daibiao Dahui Guanyu Xiugai Zhonghua Renmin Gongheguo Xingshi Susongfa de Jueding (全国人民代表大会关于修改《中华人民共和国刑法》的决定) [Decision of the National People’s Congress on the Amendment of the Criminal Procedure Law of the People’s Republic of China] (promulgated by the Nat’l People’s Cong., Mar. 14, 2012, effective Jan. 1, 2013), http://www.npc.gov.cn/huiyi/lfzt/xsssfxg/2012-03/15/content_1717671.htm (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

96. Guanyu Yifa Baozhang Lüshi Zhiye Quanli de Guiding (关于依法保障律师执业权利的规定) [Regulations on Protecting Lawyers’ Professional Rights According to Law] (promulgated by the Sup. People’s Ct., the Sup. People’s Procuratorate, Ministry of Pub. Security, Ministry of St. Security, and Ministry of Just., effective Sept. 16, 2015) http://www.xinhuanet.com/legal/2015-09/20/c_1116616593.htm (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

97. See *China: Release Human Rights Lawyers*, HUM. RTS. WATCH (Feb. 15, 2018, 12:00 AM), <https://www.hrw.org/news/2018/02/15/china-release-human->

Several of the lawyers defending the “709 lawyers,” for example, were shown a boilerplate Decision to Reject the Lawyer’s Request to Meet with the Criminal Suspect.⁹⁸ Article 9 of the Regulation says that if law enforcement determines that, in cases involving state security, terrorist activity, or significant bribery, allowing a lawyer to meet with the suspect might impair the investigation or leak state secrets, law enforcement may deny the meeting and provide an explanation to the lawyer.⁹⁹ These

rights-lawyers (detailing the many ways the Chinese government has wrongfully punished Chinese lawyers) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

98. See Liu Sixin, *Zhao Wei Shexian Shandian Buyu Lüshi Huijian ji Biangeng Qiangzhi Cuoshi* (刘四新、赵威涉嫌煽动不予律师会见及变更强制措施) [*Liu Sixin and Zhao Wei Suspected for Inciting Subversion, Not Allowed to Meet Lawyer or Change Custodian Measures*], CHINA FREE PRESS (Sept. 22, 2015), <http://www.canyu.org/n103083c12.aspx> [hereinafter *Liu Sixin and Zhao Wei Suspected*] (showing letters from the Tianjin Public Security rejecting for state security reasons the request of lawyers for Zhao Wei and Liu Sixin to meet with their clients) (on file with the Washington & Lee Journal of Civil Rights & Social Justice); see also Wang Yu Lüshi She Shandong Dianfu Guojia Zhengquan Zaici Buzhun Lüshi Huijian (王宇律师涉煽动颠覆国家政权再次不准律师会见) [*Lawyer Wang Yu Suspected for Inciting Subversion of State Regime, Not Allowed to Meet Lawyer Again*], BOXUN (博讯) (Sept. 30, 2015), http://boxun.com/news/gb/china/2015/09/201509302135.shtml#Vre_BDYrLNA [hereinafter *Wang Yu Suspected*] (showing a letter from Tianjin Public Security rejecting for state security reasons the request of Wang Yu’s lawyers to meet with their client) (on file with the Washington & Lee Journal of Civil Rights & Social Justice); Zhang Kai Buzhun Jian Lüshi, *Wenzhou Jingfang Fa Shumian Tongzhi* (张凯不准见律师 温州警方发书面通知) [*Zhang Kai Not Allowed to Meet Lawyer, Wenzhou Police Issued Written Notice*], RADIO FREE ASIA (自由亚洲电台) (Sept. 8, 2015), <https://www.rfa.org/mandarin/yataibaodao/renquanfazhi/q11-09082015123133.html> [hereinafter *Zhang Kai Not Allowed to Meet Lawyer*] (showing letter from Wenzhou Public Security rejecting for state security reasons the request of Zhang Kai’s lawyer to meet with his client) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

99. Guanyu Yifa Baozhang Lüshi Zhiye Quanli de Guiding (关于依法保障律师执业权利的规定) [Regulations on Protecting Lawyers’ Professional Rights According to Law], (promulgated by the Supreme People’s Court, the Supreme People’s Procuratorate, Ministry of Public Security, Ministry of State Security, and Ministry of Justice, Sept. 16, 2015, effective Sept. 16, 2015), http://www.xinhuanet.com/legal/2015-09/20/c_1116616593.htm (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

boilerplate rejection forms do not provide any explanation but simply say that the case is related to state security.¹⁰⁰ They plainly violate the requirement of the Regulation¹⁰¹ Professor Jerome Cohen observed that one of the rejection notices is numbered 1082, which he interprets to mean that the notice is the 1,082nd rejection of the year issued by the Public Security Bureau.¹⁰² Even if Professor Cohen’s interpretation is incorrect and it was not the 1,082nd rejection, rejecting a lawyer’s attempt to meet with a client is prevalent, and not just in state security cases.¹⁰³

3. *Overturing of Wrongful Convictions*

To showcase the country’s determination and success in legal reform, Chinese media highly publicized the overturning of several wrongful convictions.

In the case of Nian Bin, for example, Nian Bin was sentenced to death for poisoning his neighbors.¹⁰⁴ SPC rejected the death penalty because of insufficient evidence.¹⁰⁵ Nian Bin was sentenced to death again, and the death penalty was rejected three more

100. *Liu Sixin and Zhao Wei Suspected*, supra note 98; *Wang Yu Suspected*, supra note 98; *Zhang Kai Not Allowed to Meet Lawyer*, supra note 98.

101. See Guanyu Yifa Baozhang Lüshi Zhiye Quanli de Guiding (关于依法保障律师执业权利的规定) [Regulations on Protecting Lawyers’ Professional Rights According to Law] (promulgated by the Sup. People’s Ct., the Sup. People’s Procuratorate, Ministry of Pub. Security, Ministry of St. Security, and Ministry of Justice, Sept. 16, 2015, effective Sept. 16, 2015) http://www.xinhuanet.com/legal/2015-09/20/c_1116616593.htm (explaining the rights lawyers have to engage with criminal suspects) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

102. Posting of Jerome Cohen, jacohen@paulweiss.com, to CHINALAW@hermes.gwu.edu (Feb. 7, 2016) (on file with author).

103. See *id.*

104. Zhang Debi (张德笔), *Nianbin Xiyuan Lu: Sici Pansi, Zhongyu Wuzui* (念斌洗冤录: 四次判死, 终于无罪) [Story of Nian Bin’s Regaining of Innocence: Four Times Sentenced to Death, Eventually Acquitted], TENCENT REV. (腾讯评论) (Aug. 23, 2014), <http://view.news.qq.com/original/intouchtoday/n2894.html> (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

105. *Id.*

times.¹⁰⁶ The expert witness in this last trial finally found the evidence that fully exonerated Nian Bin.¹⁰⁷ Police evidence showed poison in the water, but the expert witness's tests found no poison on the teapot.¹⁰⁸ Nian Bin was acquitted after eight years on death row.¹⁰⁹ Nian Bin's lawyer, Zhang Yansheng, said that the introduction of the expert witness was crucial in proving Nian Bin's innocence.¹¹⁰

In another case, Chen Man was arrested in 1992 for murder and was sentenced to death with a two-year reprieve in 1994.¹¹¹ He missed the appeal deadline, but the Procuratorate thought the sentence was too light and appealed for a death sentence without reprieve.¹¹² The Hainan provincial high court upheld the suspended death sentence in 1999.¹¹³ Chen Man's family and lawyers continued to appeal and petition to the Hainan high court and Supreme People's Procuratorate.¹¹⁴ In 2014, a number of high profile lawyers (some of them may be categorized as die-hard lawyers) had a meeting to discuss Chen Man's case and a journalist in attendance later published the story.¹¹⁵ In 2015, the Supreme

106. *Id.*

107. Li Yunfang (李云芳), *Duihua Nianbin Lüshi Zhangyansheng: Yao Biaoyang Faguan, Guli Tamen Jiuzheng Yuan'an* (对话念斌律师张燕生: 要表扬法官, 鼓励他们纠正冤案) [*Conversation with Nianbin's Lawyer Zhang Yansheng: We should complement the judges and encourage them to fix wrongful convictions*], PENGPAI XINWEN (澎湃新闻) (Aug. 22, 2014), http://www.thepaper.cn/newsDetail_forward_1263125 (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

108. *Id.*

109. *Id.*

110. *Id.*

111. Wang Jianfa (王健), "Guonei Yizhi Beiguan Zuijiu de Yuanyu Fan" *Chen Man 23 Nian Hou Xuangao Wuzui* ("国内已知被关最久的冤狱犯" 陈满23年后宣告无罪) [*The Longest Known Innocent Convict in the Nation* "Chen Man Pronounced Not Guilty After 23 Years"], PENGPAI XINWEN (澎湃新闻) (Feb. 1, 2016), http://www.thepaper.cn/newsDetail_forward_1427938 (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

112. *Id.*

113. *Id.*

114. *Id.*

115. See Yi Yanyou (易延友), *Chen Man An Shen Yuan Ji* (陈满案申冤记)

People’s Procuratorate took the case and petitioned to the Supreme People’s Court.¹¹⁶ The case was retried in Zhejiang provincial high court in 2016 and Chen Man was acquitted because the only incriminating evidence was his own testimony and his testimony was self-conflicting.¹¹⁷ Although Chen Man also told his lawyer that he was tortured in 1992, the torture claim was not addressed in the case.¹¹⁸

Two other subjects of highly publicized wrongful conviction cases were not so lucky: Huge Jiletu and Nie Shubin, who posthumously got their convictions overturned, were executed in the 1990s before adoption of the requirement that the SPC had to consider, review, and approve all death penalties.¹¹⁹

[*Story of the Petition for Chen Man Case*], XIYUANWANG (洗冤网) (Feb. 24, 2015), http://www.xiyuanwang.net/html/cma_1298_1931.html (on file with the Washington & Lee Journal of Civil Rights & Social Justice); see also Liu Jing (刘旌), Wei Juzhen (魏居姘) & Li Runyang(李润阳), *Hainan Yi’an: “Chuanshuo Zhong de Wuzheng” Rang Beigaoren Fuxing le 21 Nian* (海南疑案: “传说中的物证” 让被告人服刑了21年) [*Hainan Mysterious Case: “Mythical Evidence” Made Defendant Serving 21 Years in Prison*], PENGPAI XINWEN (澎湃新闻) (July 25, 2014), http://www.thepaper.cn/newsDetail_forward_1257855 (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

116. Yi Yanyou (易延友), *Chen Man An Shen Yuan Ji* (陈满案申冤记) [*Story of the Petition for Chen Man Case*], XIYUANWANG (洗冤网), Feb. 24, 2015, http://www.xiyuanwang.net/html/cma_1298_1931.html (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

117. See High People’s Court of Zhejiang Province, *Zhejiang Gaoyuan jiu Chenman An Zaishen Wuzui Da Jizhe Wen* (浙江高院就陈满案再审无罪答记者问) [*Zhejiang High Court Answers Questions from Journalists on Retrial and Acquittal of Chen Man Case*], SINA WEIBO (新浪微博) (Feb. 1, 2016, 10:13 AM), <https://weibo.com/p/1001603937651697836422> (explaining that apart from Chen Man’s guilty confession, which was deemed “unstable” and “inconsistent,” there was no other evidence to prove that Chen Man committed the crime) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

118. See Wang Jianfa (王健), “Guonei Yizhi Beiguan Zuijiu de Yuanyu Fan” *Chen Man 23 Nian Hou Xuangao Wuzui* (“国内已知被关最久的冤狱犯” 陈满23年后宣告无罪) [*“The Longest Known Innocent Convict in the Nation” Chen Man Pronounced Not Guilty After 23 Years*], PENGPAI XINWEN (澎湃新闻) (Feb. 1, 2016), http://www.thepaper.cn/newsDetail_forward_1427938 (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

119. Wang Xiaoyu (王筱渔), *Huge Jiletu An Shimo: Bei Qiangbi 9 Nian Hou Ling Yi Nanzi Gongshu Sharen Jingguo* (呼格吉勒图案始末: 被枪毙9年后另一男

In the latest SPC report during the NPC session in March 2018, the SPC had overturned 39 wrongful convictions, involving 78 people in the last five years.¹²⁰

Undoubtedly, all of the reform from 2012–2015 contributed to the bold actions of criminal defense and human rights lawyers, all to be dashed by the 709 Crackdown and subsequent repression.

IV. *The Die-Hard Model*

The “die-hard” lawyer model, though not the moniker, may have started at least as early as 2007 or 2008, but perhaps in truth as early as Tiananmen Square, when some of today’s die-hard lawyers were cutting their social-consciousness teeth as student demonstrators.¹²¹ Although the die-hard moniker has only been applied to criminal defense lawyers, they are surely the close relative of the slightly earlier-appearing group of Chinese lawyers taking up social causes in the public interest, such as representation of families of victims of the toxic baby formula

子供述杀人经过) [*Beginning and End of the Huge Jiletu Case: Another Man Confesses the Killing 9 Years after Execution*], FENGHUANG JUJIAO (凤凰聚焦) (Nov. 12, 2014), http://news.ifeng.com/a/20141112/42452914_0.shtml (discussing Huge Jiletu’s case) (on file with the Washington & Lee Journal of Civil Rights & Social Justice); Mengyuan 21 Nian, Nie Shubin Zaishen Zhonghuo Wuzui (蒙冤21年, 聂树斌案再审终获无罪) [*Wronged for 21 years, Nie Shubin’s Retrial Finally Granted Innocence*], CAIXIN (财新) (Dec. 2, 2016), <http://china.caixin.com/2016-12-02/101021724.html> (discussing Nie Shubin’s case) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

120. *Chinese Courts Redress 39 Wrongful Conviction Cases in Past 5 Years*, XINHUA (Feb. 5, 2018, 9:41:11 PM), http://www.xinhuanet.com/english/2018-02/05/c_136951210.htm (on file with the Washington & Lee Journal of Civil Rights & Social Justice); Zhou Qiang (周强), President, Sup. People’s Ct., Work Report to the Thirteenth National People’s Congress: Zuigao Renmin Fayuan Gongzuo Baogao (最高人民法院工作报告) [Supreme People’s Court Work Report] (Mar. 9, 2018).

121. See *Gagging the Lawyers: China’s Crackdown on Human Rights Lawyers and Implications for U.S.-China Relations: Hearing Before the Cong.-Exec. Comm’n on China*, 115th Cong. 7–8 (2017) [hereinafter *Gagging the Lawyers*] (noting that some die-hard lawyers gained their courage from participation in the 1989 Tiananmen movement).

produced by Sanlu Milk Co. in 2008.¹²² Criminal defense matters, sometimes on behalf of organized crime suspects,¹²³ may appear unlike the cases against a politically well-connected milk company or cases undertaken by American civil rights lawyers who did criminal representation of protestors and activists, school desegregation, voting rights and all manner of politically-charged cases. But in China, all high-profile criminal prosecutions are political.¹²⁴ The affront implicit in challenging the State’s will, even in an otherwise non-politically-charged criminal matter, is a far different phenomenon than an American lawyer fighting hard for her routine criminal defendant client.

In late December 2012, days before the new Chinese Criminal Procedure Law took effect, the Criminal Committee of the Zhejiang Provincial Bar Association issued a series of guidelines titled “*Ten Risks of Criminal Defense and Their Solutions*.”¹²⁵ One guideline reads: “When disagreeing with the judge during a trial, a lawyer shall state his/her opinions (for the record) and then follow the presiding judge’s order and avoid direct confrontation. When the

122. See Teng Biao, Opinion, *Chinese Human Rights Lawyers Under Assault*, WASH. POST (July 25, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/24/AR2009072402940.html> (discussing the work of a few dozen Chinese “rights lawyers” who, by 2009, experienced “success in protecting the rights of individuals and in . . . [raising] awareness of the law among people all across China”) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

123. See Olesen, *supra* note 1 (discussing the representation of a person accused of gang-related crimes in China by a team of so-called “diehard” lawyers).

124. See Jayshree Bajoria, *Access to Justice in China*, WASH. POST (Apr. 17, 2008, 10:14 AM), <http://www.washingtonpost.com/wp-dyn/content/article/2008/04/17/AR2008041701692.html> (noting the direct correlation between increased media coverage of a criminal prosecution and the politicization of the case, which “reinforces [Party oversight over the courts] in order to obtain “a judgment that quiets popular sentiment”) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

125. Su Hucheng (苏湖城), Lüshi Congshi Xingshi Bianhu Yewu Shida Fengxiandian ji Caozuo Tishi (律师从事刑事辩护业务十大风险点及操作提示) [Ten Risks of Lawyers Practicing Criminal Defense and Practicing Tips], Hualu (华律) [HUALV.COM] (Feb. 4, 2013), <http://www.66law.cn/domainblog/39964.aspx> (providing a list of practice tips in anticipation of the implementation of amendments to criminal defense provisions in the Criminal Procedure Law) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

court violates procedural rules, a lawyer shall file his/her complaints in writing after the trial.”¹²⁶ On its surface, this admonition sounds little different from the American Bar Association’s Model Rule instructing lawyers to obey even erroneous orders of judges.¹²⁷ But the cultural and systemic differences between China and the United States make the instructions quite different.

Obviously the Zhejiang Bar Association guidelines are trying to protect defense lawyers from risky practice.¹²⁸ However, after the guidelines were posted online, surprisingly serious attacks came from other members of the defense bar—members of the new breed of co-called “die-hard” criminal defense lawyers. One defense lawyer, who often takes hard lines against the court, mocked the proposed guideline that defense lawyers should “defend[] clients with bended knees, instead of straight legs.” This group of die-hard lawyers repeatedly quoted the famous saying: “[T]he only thing necessary for the triumph of evil is for good men to do nothing!” In other words, avoiding confrontation with a corrupt judge is nothing but encouraging that judge to do more evil. When facing a corrupt judge, in contrast, these die-hard lawyers not only lodge objections at court, but also resort to live social media activity, disciplinary complaints and street demonstrations to challenge the court.¹²⁹ Two lawyers even handed a bag of sweet potatoes to the president of a high court, suggesting that if the president does not protect the people, he should go home and sell sweet potatoes (a traditional Chinese saying).¹³⁰

126. *Id.*

127. See MODEL RULES OF PROF’L CONDUCT 3.4(c), 3.5(d) (AM. BAR ASS’N 2016) (“A lawyer shall not . . . knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists”; “A lawyer shall not . . . engage in conduct intended to disrupt a tribunal.”).

128. See Su Hucheng, *supra* note 125 (providing a list of ten risks associated with criminal defense practice).

129. See *Gagging the Lawyers*, *supra* note 121, at 7 (“So-called diehard lawyers actively used the social media and street theater to activate supporters and expose problems in defending their clients.”).

130. Li Meng (李蒙), *Sike shi Yizhong Paibie Haishi Yizhong Fangfa?* (死磕是一种派别还是一种方法) [Is *Sike* a Faction or a Method?], MINZHU YU FAZHI (民主与法制) [DEMOCRACY AND RULE OF L.] Vol. 17, 2014.

V. New Methods Used by the Die-Hard Lawyer

In one sense, die-hard lawyers are simply more intense than their traditional Chinese counterparts. A traditional Chinese defense lawyer manages the defense-side evidence and makes technical legal arguments.¹³¹ A somewhat more aggressive form of traditional lawyer deeply and intensely analyzes the civil law articles and makes incisive arguments about their application to the defendant. But both traditional defense lawyers and their slightly more probing, technical compatriots yield when it becomes clear that the judge cannot or will not accept their arguments, sometimes with the tacit understanding that the judge is being controlled by forces outside the courtroom.¹³²

The die-hard lawyer is certainly more aggressive in the first instance. He or she does all that the technically-oriented traditional lawyer does, but also vigorously pursues arguments about the legality of the prosecution’s evidence and methods. The die-hard lawyer challenges judges’ rulings on evidence admission and procedural rights and does so vociferously.¹³³ And the die-hard lawyer does so even after it is clear that the judge will not be permitted by others to rule in the defense’s favor.¹³⁴ But in addition to being more aggressive and more persistent, the die-hard lawyer

131. Zhonghua Renmin Gongheguo Xingshi Susong Fa (中华人民共和国刑事诉讼法) [Crim. Proc. L. of the People’s Republic of China], (promulgated by Standing Comm. Nat’l People’s Cong., July 7, 1979, effective Jan. 1, 1980, amended Mar. 14, 2012), ch. IV, <https://www.cecc.gov/resources/legal-provisions/criminal-procedure-law-of-the-peoples-republic-of-china#body-chinese> (describing the rights of a criminal suspect to representation and the role of a criminal defense lawyer) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

132. See CECC, *Judicial Independence in the PRC*, <https://www.cecc.gov/judicial-independence-in-the-prc> (last visited Nov. 28, 2018) (“China’s judiciary continues to be subject to a variety of internal and external controls that significantly limit its ability to engage in independent decision making.”) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

133. See Ye Zhusheng (叶竹盛), *Sike Pai Lüshi (死磕派律师) [Die-hard sect]*, RENMIN WENZHAI (人民文摘) [PEOPLE’S DIGEST] (describing lawyer Chi Yusheng’s fierce and emotional protest against the presiding judge for interfering with the illegal evidence exemption procedure in the Li Qinghong case).

134. See *id.* (discussing the various pressures affecting judicial decisions).

uses tactics that are outside the walls of the courtroom and its procedures.¹³⁵

In particular, the die-hard lawyer uses social media as a tool of advocacy.¹³⁶ During the Li Qinghong trial, an “all-star team” of defense lawyers blanketed the Chinese social media with news of the proceedings, commenting on everything from errors in the indictments to the disparate volume of the defense and prosecution microphones.¹³⁷ The media work was so intense that Weibo—a Chinese version of Facebook and Twitter—updates were being sent live from the courtroom by defense lawyers, and large segments of the population were riveted to the news.

[L]awyers’ online activities can be traced back to the influential case of Li Zhuang, a lawyer falsely prosecuted with perjury in Chongqing, in 2010. While the voices of the official media framing and blaming Li were dominating public opinion, the defense had no choice but to tell the other side of the story via social media.¹³⁸

Such use of media to offset public information that cuts against a defendant may cause some to think of Model Rule 3.6¹³⁹ and *Gentile v. State Bar of Nevada*,¹⁴⁰ the Supreme Court case that trimmed the rough edges from the earlier version of the Model Rule and established the propriety of self-defense use of public

135. See *Gagging the Lawyers*, *supra* note 121, at 7 (“So-called diehard lawyers actively used the social media and street theater to activate supporters and expose problems in defending their clients.”)

136. See *id.* (“Through social media, activist lawyers could create instant crowds to rush to a courthouse or defend a lawyer being harassed by police.”)

137. Zhang Xueran, *China’s All Star Legal Team Pleas for Defendants’ Right on Social Media*, TEA LEAF NATION (July 25, 2012).

138. *Id.*

139. See MODEL RULES OF PROF’L CONDUCT 3.6 (AM. BAR ASS’N 2018) (providing restraints on a lawyer’s ability to make extrajudicial statements regarding an investigation or litigation in which he or she is participating or has participated).

140. See *Gentile v. Nev. State Bar*, 501 U.S. 1030, 1048 (1991) (finding a Nevada Supreme Court Rule prohibiting a lawyer from making extrajudicial statements to the press he knows or reasonably should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding, but allowing him to state without elaboration the general nature of the defense, is void for vagueness).

statements, especially those meant to counter negative media reports about the defendant.¹⁴¹ But that quick leap would be mistaken. The U.S. law on the subject is an effort to balance free speech with fair trial, and specifically to protect the jury pool from undue factual contamination regarding celebrated cases, while respecting free speech rights of lawyers and media.¹⁴² By contrast, the Chinese use of this balancing concept has nothing to do with non-existent jury pools and ensuring an impartial lay fact-finder. Instead, the Chinese use of social media by defense lawyers is an effort to combat raw power of those in control of the justice system, both judges and so-called “higher-ups,” CCP officials who can control judges’ decisions.¹⁴³

This use of social media, designed to create public pressure and possible embarrassment of “higher ups” seems odd to some Americans, simply because such a technique would be so unlikely of success in influencing a U.S. judge. Ironically, it is the *lack* of judicial independence in China that makes the technique viable.

141. *See id.* at 1056 (noting that rules restricting speech of criminal defense attorneys must be scrutinized when, in comparison, “[t]he police, the prosecution, other government officials, and the community at large hold innumerable avenues for the dissemination of information adverse to a criminal defendant”).

142. *See* MODEL RULES OF PROF’L CONDUCT 3.6 cmt. 1 (AM. BAR ASS’N 2018) (“It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression.”).

Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves.

Id.

143. *See* Oleson, *supra* note 1 (noting die-hard lawyers’ extensive use of social media to advocate for their clients and their combative posture towards corrupt Party officials, the police and judges who have abused their power); *see also* Nathan Vanderklippe, *Thwarted by China’s Courts, ‘Diehard’ Lawyers ‘Fight to the Death’ for Justice*, GLOBE AND MAIL (Apr. 27, 2017), <https://www.theglobeandmail.com/news/world/thwarted-by-chinas-courts-diehard-lawyers-fight-to-the-death-for-justice/article34830997/> (noting the influence of local authorities on courtroom decisions, which leaves judges in China with “very little independent authority”) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

The well-founded expectation of Chinese criminal defense lawyers in high profile cases is that judges are told what to do by people often referred to as “higher ups.”¹⁴⁴ These higher ups are party officials whose will is being done by local judges and prosecutors.¹⁴⁵ Such orders from government officials were referred to as “telephone justice” in Central and Eastern Europe during communist times.¹⁴⁶ Such orders, while not entirely unheard-of in an independent court system, are both rare and, we would expect, ineffectual. In such an independent court system, nothing much would be gained in an individual case by generating public opinion. But the taste of the Chinese public seems to have been whetted for news of injustice, and the “higher ups,” while they wield mostly unchecked power, do care about stirring the public ire.¹⁴⁷ This is just the trend and tendency that is being banked on by the die-hard lawyer in the use of social media.¹⁴⁸ The same phenomenon allows, but does not ensure, that they will stay out of jail themselves.

These methods are far outside the norm for Chinese lawyers.¹⁴⁹ The methods themselves are used to advance both client interests and to expose flaws in the Chinese criminal justice system.¹⁵⁰ Both the use of the methods and the goal of advancing a

144. See Benjamin L. Liebman, *Watchdog or Demagogue? The Media in the Chinese Legal System*, 105 COLUM. L. REV. 1, 67 (2005) (“Higher-level officials exert pressure on individual judges and courts . . .”).

145. See *id.* (discussing higher-up officials who put pressure on judges and courts to influence the outcome of a case).

146. See Volha Kananovich, *‘Execute Not Pardon’: The Pussy Riot Case, Political Speech, and Blasphemy in Russian Law*, 20 COMM. L. & POL’Y 311, 395 (discussing the practice of “telephone law” in Russia in which “outcomes of cases allegedly [came] from orders issued over the phone by those with political power rather than through the application of law”).

147. See Vanderklippe, *supra* note 143 (discussing a two-year campaign of the Chinese government to arrest, detain, and intimidate die-hard lawyers as a way of keeping them out of the media).

148. See *id.* (“[S]ome Chinese lawyers have turned to other means to defend their clients, leveraging the power of social media and the occasional willingness of political authorities to bend to public pressure.”).

149. See *id.* (“Such tactics have been controversial, and diehard lawyers have been denounced in state media as ‘commandos’ and ‘activists’ who . . . have wild intentions to challenge and change the law . . .”).

150. See *id.* (“But I’m very sympathetic to why [die-hard lawyers] did it. It’s

lawyer’s cause have drawn harsh rebuke from the Chinese legal profession and from the state.¹⁵¹

The current term, die-hard lawyer appears to have originated in connection with a high-profile criminal defense in 2012.¹⁵²

[T]he term originated from a discussion . . . in Guiyang, the capital of Southern China’s Guizhou province, in July 2012. Yang [Xuelin, who identifies himself as a diehard lawyer on his Weibo page] and a colleague named Chi Susheng were part of a team of lawyers from around China who had come to the city to defend a former property tycoon accused of gang-related crimes. Over lunch on the first day of the trial, Chi complained the trial was already not going well. It was riddled with procedural problems, she said, and the team was going to have to “firmly fight to the bitter end,” using the northern slang term *sike*—which roughly means to fight to the bitter end, or to die hard.¹⁵³

The name stuck and has become a sensitive topic in China.¹⁵⁴

What identifies a die-hard lawyer?

If there were a checklist for China’s “diehard lawyers faction” it would probably read something like this: Must be combative, dramatic, and have a flair for social media; must not be intimidated by authority; and must be willing to spend time under house arrest or in jail.¹⁵⁵

It sounds like some U.S. civil rights cause lawyers, such as Bill Kunstler, for example, would qualify.¹⁵⁶

precisely because they couldn’t find justice in the courtroom.”).

151. *See id.* (discussing a campaign by the Chinese government to intimidate and jail die-hard lawyers and the denouncement of die-hard lawyers by the Chinese media).

152. *See Olesen, supra* note 1 (“Beijing lawyer Yang Xuelin, who identifies himself . . . as a “diehard,” told Communist Party mouthpiece newspaper *People’s Daily* that the term originated from a discussion with [fellow lawyer Chi Susheng] . . . in July 2012.”).

153. *Id.*

154. *See Vanderklippe, supra* note 143 (“The term, and the methods it evokes, have become dangerous in a country that has actively targeted lawyers.”).

155. Olesen, *supra* note 1.

156. *See infra* Part IV (describing the career of civil rights lawyer William Kunstler).

Yang Jianlin wrote that the prerequisites of *sike* include: 1) the prosecution obviously broke the law, 2) the client had already decided to *sike* and requested the lawyer to *sike*, and 3) there were no other legal remedy besides *sike*.¹⁵⁷ The *sike* methods, Yang summarized, include: 1) strictly adhering to the text of the law, 2) the use of social media, 3) the use of the internal complaint system, 4) behavioral art, such as giving a sweet potato to the judge.¹⁵⁸ Yang also said that *sike* only applies to criminal cases where the power of the government and power of the defendant are imbalanced.¹⁵⁹ It is not appropriate to use the *sike* method in civil cases.¹⁶⁰ In addition, Yang thinks lawyers should only *sike* on procedures and not substance issues because the only reason that caused lawyers to *sike* is the illegality of the procedure rather than the dispute of substance.¹⁶¹

The die-hard lawyer seems less concerned about the particular client than the cause, and the cause is the advancement of justice and the rule of law in the Chinese criminal justice system.¹⁶² They care about procedural matters and about fundamental criminal defense rights.¹⁶³ They care about the accurate application of the

157. See Yang Xuelin (杨学林), *Yang Xuelin Lüshi: Lun Sike Pai Lüshi* (杨学林律师: 论死磕派律师) [Lawyer Yang Xuelin: On Sike Lawyers], BOXUN.COM, (July 31, 2017), <https://www.boxun.com/news/gb/pubvp/2017/07/201707311218.shtml> (explaining the justifications for the use of the die-hard style of defense advocacy) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

158. See *id.* (identifying the die-hards' approach to statutory interpretation, their use of social media, and their dramatic display of advocacy); *id.* ("The most famous performance art is Yang Jinzhu and Li Jinxing's 'send sweet potato' to the Fujian High Court.").

159. See *id.* ("It is precisely because some public authorities have deliberately deprived the accused and defenders of their litigation rights with their own strengths [that] the lawyers forced to die have to die.").

160. See *id.* ("It can be seen that *sike* is not applicable to civil cases.").

161. See *id.* ("As long as the procedure of the case-handling agency is lawful, it is also possible for the lawyer to achieve the purpose of defense.").

162. See Vanderklippe, *supra* note 143 (describing the inability of lawyers to find justice in the courtroom as the reason why die-hard lawyers began using radical means of client advocacy).

163. See *id.* ("Whenever there is a little procedural problem [die-hard lawyers] will just fight to the death."); see also Yang Xuelin, *supra* note 157 (describing die-hard lawyers' focus on procedural issues); Ye Zhusheng (叶竹盛), *Sike Pai*

written law, as opposed to the law-of-the-moment as determined by the wishes of the State.¹⁶⁴ And the State is paying attention.¹⁶⁵

They take cases where legal rights are being flouted, regardless of the client. Their opponent is the court establishment, namely the police[, the prosecution,] and even the judge. This adversarial stance has caught the attention of China’s second highest justice. “We are now seeing a very strange phenomenon,” wrote Shen Deyong, the executive vice-president of the Supreme People’s Court, China’s highest court, in a May 2013 essay published in the Communist Party-run *People’s Court Daily*. “[Defense] lawyers are not in a confrontation with prosecutors, but instead are having confrontations with the presiding judge in the case,” he complained.¹⁶⁶

The State prefers that lawyers be technically-sound practitioners who understand that their place is not to challenge the will of the State.¹⁶⁷ Chinese authorities strongly prefer that

Lüshi (死磕派律师) [*The Die-Hard Sect*], RENMIN WENZHAI (人民文摘) [PEOPLE’S DIGEST] http://paper.people.com.cn/rmwz/html/2013-11/01/content_1354207.htm (last visited Oct. 17, 2018) (explaining that lawyers will resort to die-hard tactics if the court does not follow the Criminal Procedure Law) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

164. See Vanderklippe, *supra* note 143 (“In the courthouse, they stick to the law to the extreme.”); see also Yang Xuelin, *supra* note 157 (describing die-hard lawyers’ insistence on the judiciary’s strict adherence to the law as written).

165. See Olesen, *supra* note 1 (“[T]he government is responding [to the die-hard’s impact] with an ‘increasingly repressive policy’ that is trying to rein in the legal profession.”); see also Alex W. Palmer, *Flee at Once: China’s Besieged Human Rights Lawyers*, N.Y. TIMES MAGAZINE (July 25, 2017), <https://www.nytimes.com/2017/07/25/magazine/the-lonely-crusade-of-chinas-human-rights-lawyers.html> (describing the “709 Crackdown” on July 9, 2015, during which “more than 300 rights lawyers and activists from across [China] were targeted, with 27 forbidden to leave the country, 255 temporarily detained or forcibly questioned and 28 held in government custody”) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

166. Olesen, *supra* note 1.

167. See Olesen, *supra* note 1 (“These activist lawyers, who have wild intentions to challenge and change the law, have deviated from what their jobs are supposed to entail” (quoting Shan Renping, Opinion, *Legal Activists Must Also Respect Rule of Law*, GLOBAL TIMES (May 8, 2014), <http://www.globaltimes.cn/content/859107.shtml> (on file with the Washington & Lee Journal of Civil Rights & Social Justice)).

“lawyers behave like dentists.”¹⁶⁸ “In other words, the government thinks attorneys should be ‘good technicians and not involve themselves in cases of political-legal injustice.’”¹⁶⁹ But it appears that crackdowns against activist lawyers are only breeding new activist lawyers and gaining them a public following.¹⁷⁰ The Chinese Law on Lawyers stipulates that a “lawyer must accept the supervision of the state”¹⁷¹ The die-hard lawyers are treading in new territory, and are not accepting the raw supervision of the state. They place client and system reform interests above those of the CCP.¹⁷² They are not necessarily seeking the destruction of China, as the CCP would charge; instead, they seek what they believe would be a better China, one more open to dissent and free speech rights.¹⁷³

Stories of harassment and even physical violence against activist lawyers have become frequent.¹⁷⁴ Threats, subtle and

168. *Id.*

169. *Id.*

170. *See id.* (“[T]he crackdowns . . . are only growing the ranks of ‘angry lawyers’ in China, causing more to take up rights-related cases.”).

171. Zhonghua Renming Gongheguo Lüshi Fa (中华人民共和国律师法) [Law. L of the People’s Republic of China], (promulgated by the Standing Comm. Nat’l People’s Cong., Sept. 1, 2017, effective Sept.1, 2017), art. 3.

172. *See* Palmer, *supra* note 165 (“[T]he rights lawyers were zealous, outspoken and willing to challenge the government in ways their predecessors would not have dared.”).

173. *See Gaggling the Lawyers: China’s Crackdown on Human Rights Lawyers and Implications for U.S.-China Relations: Hearing Before the Cong.-Exec. Comm’n on China*, 115th Cong. 7–8 (2017) (statement of Terence Halliday, Co-Director, Center on Law and Globalization, American Bar Foundation) [hereinafter Statement of Terence Halliday] (describing the legal ideals of die-hard lawyers).

174. *See* Palmer, *supra* note 165 (describing the treatment Chinese human rights lawyers due to their controversial advocacy); *see also Gaggling the Lawyers: China’s Crackdown on Human Rights Lawyers and Implications for U.S.-China Relations: Hearing Before the Cong.-Exec. Comm’n on China*, 115th Cong. 10 (2017) (statement of Teng Biao, Chinese Human Rights Lawyer, Visiting Scholar, Institute for Advanced Study, and Co-Founder, the Open Constitution Initiative and China Human Rights Accountability Center) [hereinafter Statement of Teng Biao] (“[In the 709 crackdown, d]ozens of lawyers were severely tortured, including beatings, electric shocks, sleep deprivation, death threats, months or years of solitary confinement, so on and so on.”).

overt, physical beatings, and even “disappearance” have occurred.¹⁷⁵ Cao Shunli, for example, was an activist who died in detention after being denied medical treatment.¹⁷⁶

The 709 Crackdown did not end the die-hard model in the courtroom today. In December 2017, the defense lawyer in a highly publicized arson case in Hangzhou staged a walk-out from the court because he demanded the case to be tried in another province to avoid pressure from the public and outside influence.¹⁷⁷ Despite the lawyers being rounded-up during the 709 Crackdown, the more commonly known die-hard lawyers often stay away from political cases, and only focus on criminal cases where abuses of power are observed and potential wrongful convictions are on the edge.¹⁷⁸ Those lawyers forced to disappear are all rights lawyers, while regular die-hard lawyers are mostly safe from criminal prosecution.¹⁷⁹ However, two best known die-hard lawyers, Yang Jingzhu and Li Jingxing, were both disciplined by the bar, and Yang was recently disbarred after criticizing authorities with obscene language and disturbing the courtroom.¹⁸⁰

175. See Palmer, *supra* note 165 (discussing the disappearance of lawyers and activists after the 709 crackdown and the use of “residential surveillance in a designated location” under the Chinese criminal code).

176. *Detained Chinese Lawyers Admit Guilt in Disorder Charges: State Media*, REUTERS (July 24, 2015), <http://www.reuters.com/article/2015/07/24/us-china-rights-lawyer-idUSKCN0PY01020150724> (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

177. See Wang Jingwei, Yang Linxin & Ma Xiaolong, *Hangzhou Baomu Zonghuo An: Yichang Yiwai Zhongduan de Tingshen Beihou* (杭州保姆纵火案: 一场意外中断的庭审背后) [*Hangzhou Nanny Arson Case: Behind an Abruptly Stopped Trial*], XIN JING BAO (新京报), (2017), <https://www.weibo.com/ttarticle/p/show?id=2309404187419451727886> (last visited Oct. 13, 2018) (discussing a defense lawyer’s decision to withdraw from a highly publicized arson case in China due to its illegality) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

178. See Alexa Olesen, *Meet China’s Swaggering, ‘Diehard’ Criminal Lawyers*, FOREIGN POLICY (May 16, 2014), <https://foreignpolicy.com/2014/05/16/meet-chinas-swaggering-diehard-criminal-lawyers/> (discussing the criminal defense nature of die-hard lawyers in China) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

179. See *id.* (noting that the increased provocation of the government has caused die-hard lawyers to take up more “rights-related cases”).

180. See *War on Human Rights Lawyers Continues: Up to 16 More Lawyers in*

“Disappearances” and Forced Confessions

In 2011, 2014, and then most intensely since July 2015, aggressive lawyers representing criminal defendants and human rights activists have been abused by the State.¹⁸¹ The State versions of events is that some lawyers have become criminals and needed to be taught a lesson about proper lawyer activity in China.¹⁸² For the most part, the crimes committed by these lawyers are for stirring up trouble, picking quarrels, and inciting subversion, which for the most part have no analog in US criminal law.¹⁸³ So, in one sense, the State is correct that these lawyers are violating criminal law, but the laws and the conduct that violates them would not be recognizable to Westerners as criminal.

China Face Disbarment or Inability to Practice, CHINA CHANGE (May 14, 2018), <https://chinachange.org/2018/05/14/war-on-human-rights-lawyers-continues-up-to-16-more-lawyers-in-china-face-disbarment-or-inability-to-practice/> (detailing the circumstances of Yang Jingzhu’s disbarment) (on file with the Washington & Lee Journal of Civil Rights & Social Justice); *see also* Te-Ping Chen, *Chinese Human-Rights Lawyer’s Legal License is Suspended*, WALL ST. J. (Dec. 2, 2016), <https://www.wsj.com/articles/chinese-human-rights-lawyers-legal-license-is-suspended-1480681832> (explaining that Chinese authorities suspended Li Jinxing’s license to practice law for one year due to his courtroom behavior) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

181. *See* Palmer, *supra* note 165 (describing the Chinese government’s treatment of rights lawyers and activists over the past few decades, which culminating in the 2015 Crackdown); *see also* Statement of Teng Biao, *supra* note 174 (describing his 2011 detainment in a “black jail” for 70 days due to his work as a human rights lawyer); *Gagging the Lawyers: China’s Crackdown on Human Rights Lawyers and Implications for U.S.-China Relations: Hearing Before the Cong.-Exec. Comm’n on China*, 115th Cong. 12 (2017) (statement of Xia Chongyu, Son of Imprisoned Human Rights Lawyer Xia Lin and a Student at Liberty University) [hereinafter Statement of Xia Chongyu] (describing the 2014 abduction of his father due to his involvement in politically sensitive cases as a human rights lawyer).

182. *See* Olesen, *supra* note 178 (describing die hard lawyers as being seen as an enemy of China).

183. *See* Matt Ford, *China’s Widening Crackdown on Lawyers*, ATLANTIC (Jan 14, 2016), <https://www.theatlantic.com/international/archive/2016/01/china-lawyer-crackdown-arrest/424005/> (discussing subversion charges filed against prominent Chinese human rights lawyers by the Chinese government and the conviction of rights defense lawyer Pu Zhiqiang) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

Since Xi Jinping took power, combating Western influence has been one of his key goals.¹⁸⁴ In June 2013, a documentary made by China’s National Defense University went viral on the Internet, alleging the United States was trying to sabotage the Chinese regime through the use of social media and non-governmental organizations.¹⁸⁵ Scholars have noticed that releasing such videos are common before a Party Congress or the National People’s Congress (NPC), to get a sense of public reaction.¹⁸⁶

The Party Congress that followed in November 2013 announced a series of reform plans, including legal reform.¹⁸⁷ The NPC has since passed a series of laws regulating foreign influence in the country. In August 2014, the NPC started to revise the old State Security Law, which was eventually broken into two laws, the Anti-Spy Law, which became effective November 1, 2014, and the new State Security Law, which became effective July 1,

184. See ROBERT D. BLACKWILL & KURT M. CAMPBELL, COUNCIL ON FOREIGN RELATIONS, XI JINPING ON THE GLOBAL STAGE: CHINESE FOREIGN POLICY UNDER A POWERFUL BUT EXPOSED LEADER 8 (2016) (explaining that Xi is “deeply suspicious of Western values and intentions” and has “commissioned studies on that subject and forced cadres to watch documentaries on the dangers of Western cultural influence”).

185. See generally *Jiaoliang Wusheng* (较量无声) [*Silent Struggle*] (National Defense University of People’s Liberation Army, *Jiaoliang Wusheng* (较量无声) [*Silent Struggle*], YOUTUBE (Nov. 15, 2013), <https://www.youtube.com/watch?v=iUjkSjxJDcw> (on file with the Washington & Lee Journal of Civil Rights & Social Justice); see also Huang Jingjing ‘*Silent Contest*’ *Silenced*, GLOBAL TIMES (Nov. 17, 2013, 7:23:01 PM), <http://www.globaltimes.cn/content/825489.shtml> (describing the release and content of the documentary) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

186. See Wang Peng (王鹏), Letter to the Editor, *Cong Jiao Liang Wu Sheng Kan Zhongmei Guanxi de Shanbian* (从《较量无声》看中美关系的嬗变) [*Looking at Sino-U.S. Relations Through Silent Struggle*], FIN. TIMES CHINESE, Nov. 12, 2013, <http://www.ftchinese.com/story/001053398?print=y> (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

187. See J. M., *Reform in China: The Party’s New Blueprint*, ECONOMIST: ANALECTS (Nov. 16, 2013) <https://www.economist.com/analects/2013/11/16/the-party-s-new-blueprint> (noting some of the reforms adopted at the Communist Party’s Third Plenum) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

2015.¹⁸⁸ The NPC started reviewing the Foreign NGO Law December 2014.¹⁸⁹ After several rounds of public comments, the law was passed in April 2016 and became effective January 1, 2017.¹⁹⁰

When the Chinese Communist Party perceives a threat to the regime, it acts to suppress that threat. Before the July 2015 crackdown, there was an earlier wave of arrests in 2011, following the Arab Spring, in which some lawyers (such as Teng Biao) encouraged people to protest in the street.¹⁹¹ The Arab Spring was

188. Jiandief Fa Lifa (反间谍法立法) [Legislation of Anti-Spy Law, http://www.npc.gov.cn/npc/lfzt/rlys/node_25394.htm (last visited July 24, 2018) (on file with the Washington & Lee Journal of Civil Rights & Social Justice); *Guojia Anquan Ri, Ni Budebu Zhi de Guojia Anquan Fa* (国家安全日 | 你不得不知的《国家安全法》) [National Security Day, the State Security Law that You Have to Know] (Apr. 14, 2017), <http://china.huanqiu.com/article/2017-04/10475277.html> (on file with the Washington & Lee Journal of Civil Rights & Social Justice); Quanguo Renda Changweihui Kaishi Shenyi Fan Jiandief Fa Caoan (全国人大常委会开始审议反间谍法草案) [National People's Congress Standing Committee Started to Review Anti-Spy Law Draft] (Aug. 25, 2014), http://www.npc.gov.cn/npc/cwhhy/12jcw/2014-08/26/content_1875442.htm (on file with the Washington & Lee Journal of Civil Rights & Social Justice); *Zhonghua Renmin Gongheguo Guojia Anquan Fa* (中华人民共和国国家安全法) [People's Republic of China State Security Law] (promulgated by the Standing Comm. Nat'l People's Cong., July 1, 2015, effective July 1, 2015).

189. Simon Denyer, *China Passes Tough Law to Bring Foreign NGOs Under Security Supervision*, WASH. POST (Apr. 28, 2016), https://www.washingtonpost.com/world/chinese-law-would-bring-civic-groups-under-state-security-supervision/2015/03/23/5d8ad994-cce7-11e4-8730-4f473416e759_story.html?utm_term=.0e8f9e64047d (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

190. *Zhonghua Renmin Gongheguo Jingwai Feizhengfu Zuzhi Jingnei Huodong Guanli Fa* (中华人民共和国境外非政府组织境内活动管理法) [Law of the People's Republic of China on Administration of Activities of Overseas Nongovernmental Organizations in the Mainland of China] (promulgated by the Standing Comm. Nat'l People's Cong., April 28, 2016, effective Jan. 1, 2017, amended Nov. 4, 2017) http://www.npc.gov.cn/npc/xinwen/2017-11/28/content_2032719.htm (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

191. See James Fallows, *Arab Spring, Chinese Winter*, ATLANTIC (Sept., 2011), <https://www.theatlantic.com/magazine/archive/2011/09/arab-spring-chinese-winter/308601/> (“[A] a large number of the country’s human-rights and public-interest lawyers . . . were arrested or detained, or were disappeared . . .”)

probably the time when CCP really started to worry that foreign influence could topple the regime.¹⁹² The propaganda videos released after the 2015 crackdown also bluntly used the hashtag “beware of color revolution.”¹⁹³ The term “color revolutions” described the post-Soviet revolutions in Eastern Europe such as Georgia’s Rose Revolution and Ukraine’s Orange Revolution.¹⁹⁴ Under this overall theme, lawyers might be treated differently under different administrations, but the overall direction of repression and control by the state is the same. There were more physical beatings in the 2011 arrests than during the 709 Crackdown, and in Gao Zhisheng’s autobiography, he explains that he was held extra-judicially in secret prisons before 2011 and was later detained in a more legalized manner (residential surveillance) after Xi took power.¹⁹⁵

During the Arab Spring, some Chinese scholars expected that a similar wave may spread to other authoritarian regimes such as China.¹⁹⁶ The movement did not spread in China, but an isolated

(on file with the Washington & Lee Journal of Civil Rights & Social Justice).

192. See *id.* (explaining how the uprisings, social injustice and political tensions threatened the CCP rule).

193. See Zheping Huang, *The Complete Guide to China’s Propaganda Videos Blaming the West for Almost Everything*, QUARTZ (Aug. 8, 2016), <https://qz.com/751338/the-complete-guide-to-chinas-propaganda-videos-blaming-the-west-for-almost-everything/> (documenting the widespread support of a propaganda video posted by a hip-hop group sponsored by the Communist Youth League from the city of Chengdu that encouraged Chinese citizens to be wary of American influence (on file with the Washington & Lee Journal of Civil Rights & Social Justice)).

194. See THOMAS LUM & HANNAH FISCHER, CONG. RES. SERV., RL34729, HUMAN RIGHTS IN CHINA: TRENDS AND POLICY IMPLICATIONS 2 (2009) (explaining the fear that the combination of China’s foreign “democracy assistance” and the involvement of international NGOs could bring about a “color revolution”).

195. See Tom Phillips, *Gao Zhisheng: Persecuted Chinese Lawyer Smuggles out Book of Abuses*, GUARDIAN (June 15, 2016), <https://www.theguardian.com/world/2016/jun/15/gao-zhisheng-persecuted-chinese-dissident-smuggles-out-book-of-abuses> (describing accounts of Gao’s treatment contained in his memoir) (on file with the Washington & Lee Journal of Civil Rights & Social Justice). See generally GAO ZHISHENG (高智晟), 2017 NIAN QILAI ZHONGGUO (2017年 起来中国) [2017 STAND UP CHINA] (2016) (describing the torture Gao suffered during his detainment and imprisonment).

196. See Fallows, *supra* note 191 (explaining that “Jasmine” protests emerged

“Jasmine Revolution” walk took place in Beijing’s busy commercial street Wangfujing in February 2011.¹⁹⁷ Video of U.S. Ambassador Jon Huntsman on the scene was circulated on the internet and many Chinese nationalists were angered by the foreigner’s intention to interfere with the stability of the country.¹⁹⁸ After the Wangfujing incident, many dissidents and lawyers were arrested.¹⁹⁹ Those who were under investigation included Ai Weiwei, Jiang Tianyong, Li Heping, and Teng Biao. Jiang Tianyong recounted the interrogator asking him, “Do you really think you can successfully take over the regime and interrogate us in the future?”²⁰⁰ None of the lawyers or activists were criminally charged at the time. Many of them, such as Jiang Tianyong and Li Heping, were arrested again and convicted of crimes during the 2015 crackdown.²⁰¹

“to extend the spirit of the Arab Spring protests to several major Chinese cities”); *see also* Ying Chen, *Is Arab Spring Coming to China? The Missing Piece of the Puzzle*, J. OF INT’L AFF., Nov. 5, 2013, <https://jia.sipa.columbia.edu/online-articles/arab-spring-coming-china-missing-piece-puzzle> (“Similar to the factors underlying the Arab Spring, social drivers of popular discontent in China are many . . . [t]hese factors have created accumulated tensions in China, fueling a growing problem of social instability.”) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

197. Fallows, *supra* note 191.

198. *See id.* (explaining that Senator Huntsman’s appearance at the event was damaging and referencing a video of the event where a Chinese man can be yelling at Senator Huntsman, “You want chaos for China, don’t you?”); *see also* Shane2406, *U.S. Ambassador Jon Huntsman Spotted at Wangfujing Protest in Beijing*, YOUTUBE (Nov. 22, 2011), https://www.youtube.com/watch?v=0_dNNLeaw1s (showing Senator Huntsman at the Wangfujing incident) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

199. *See* Fallows, *supra* note 191 (explaining that the Chinese government responded to the “Jasmine” protests by putting pressure on Chinese citizens involved in politics).

200. Ai Weiwei, *Ai Weiwei’s Interview with Lawyer Jiang Tianyong*, YOUTUBE (Feb. 18, 2017), <https://www.youtube.com/watch?v=h3WyQudKiNk&t=5s> (on file with Washington & Lee Journal of Civil Rights & Social Justice).

201. *See China: Latest Information on Crackdown Against Lawyers and Activists*, AMNESTY INT’L (Aug. 28, 2015), <https://www.amnesty.org/en/press-releases/2015/08/china-list-of-lawyers-and-activists-targeted/> (documenting the lawyers and activists targeted by police in the 2015 crackdown) (on file with the

The state security apparatus was also using different strategies on different people. In terms of foreigner versus Chinese, the state portrays itself as protecting the Chinese against subversive foreign powers. In terms of older, more experienced lawyers versus their younger and junior associates, the state played the role of a “protector” that prevented the naïve youngsters from stepping into the wrong direction in following the influence of a more experienced lawyer or mentor.

In January 2016, China arrested Peter Dahlin, a Swedish legal NGO worker who had sponsored Fengrui Law Firm’s work.²⁰² In the news article, Peter Dahlin was accused of not properly registering his activities in China, avoiding financial supervision, receiving sponsorship from seven different foreign NGOs, and hyping up negative news and agitating conflicts against the government.²⁰³ He was released and expelled from China after he made a confession that was broadcasted on the television.²⁰⁴

Li Heping’s 24-year-old associate Zhao Wei was detained for a year and released on parole with a letter confessing that she was being manipulated as a “chess piece” and denounced Li Heping’s work of “subversion.”²⁰⁵ In her letter, she described her dream of

Washington & Lee Journal of Civil Rights & Social Justice).

202. *Xinhuashe: Zhongguo Pohuo Yi Weihai Guojia Anquan Anjian, Yi Ruidian Xianfan Bei Jianshi Juzhu* (新华社: 中国破获一危害国家安全案件, 一瑞典嫌犯被监视居住) [*Xinhua: China Cracks a State Security Case, One Swedish Suspect Under Residential Surveillance*], PENGPAI XINWEN (澎湃新闻) (Jan. 19, 2016), https://www.thepaper.cn/newsDetail_foward_1422494 (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

203. *Id.*

204. *China Deports Detained Swedish Civil Rights Activist Peter Dahlin*, SOUTH CHINA MORNING POST (Jan. 26, 2016). See generally *Zhifa Bumen Pohuo Yiqi Weihai Guojia Anquan Anjian, Zhongwai Xianfan Bei Yifa Caiqu Xingshi Qiangzhi Cuoshi* (执法部门破获一起危害国家安全案件 中外嫌犯被依法采取刑事强制措施) [*Law Enforcement Cracks a State Security Case, Chinese and Foreign Suspects Under Criminal Custody According to Law*], CCTV NEWS (Jan. 20, 2016), <http://news.cntv.cn/2016/01/20/VIDEEKYr4ld4N9Jh0oXJZC0K160120.shtml> (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

205. Tom Phillips, *China to Release Human Rights Worker Zhao Wi on Bail After a Year of Detention*, GUARDIAN (July 7, 2016); see Zhao Wei (@考拉就是考拉), *Zhi Pengyoumen de Yifeng Xin* (致朋友们的一封信) [*A Letter to Friends*], SINA WEIBO (July 7, 2016, 8:07 PM)

bringing positive change to the society and how her dream was manipulated by the rights lawyers.²⁰⁶ She regretted her naivety and vowed to start a new life.²⁰⁷

The same protection mentality can be found in various official public service messages. In a poster made by Beijing State Security Bureau, posted at the entrances of some busy subway stations, a man had his head down, face covered by the hands.²⁰⁸ The big caption reads “you can turn back!” and, referencing article 28 of the Anti-Spy Law, suggests that if you were being recruited or coerced into spying against or subverting China, you may turn yourself in and be exonerated from criminal liability if you show remorse.²⁰⁹

The state security also uses different tactics while detaining different people. Following his detention and torture, Gao Zhisheng recounted a conversation with a sympathetic police officer who told him that he was tortured because he was willing to make concessions after being tortured and that Liu Xiaobo was never tortured because the police knew torture would not work on Liu.²¹⁰

In May 2014, “Pu Zhiqiang, a Beijing-based civil rights lawyer, was detained by Beijing police . . . on the charge of provoking troubles”²¹¹ Later, in 2016, Pu was disbarred and jailed for “crossing the line” between lawyer and activist by daring to attend twenty-fifth anniversary Tiananmen Square commemorative events.²¹² Indeed the events commemorated his own actions

<https://weibo.com/ttarticle/p/show?id=2309403994696165783381> (original post deleted, repost may be found at <http://blog.dwnews.com/post-900336.html>) (describing Zhao’s personal regret for hurting China by working for Heping) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

206. *A Letter to friends*, *supra* note 205.

207. *Id.*

208. *See* Poster from Beijing State Security Bureau (on file with author).

209. *Id.*

210. *See* GAO, *supra* note 195, at 118.

211. Shan Renping, Opinion, *Legal Activists Must Also Respect Rule of Law*, GLOBAL TIMES (May 8, 2014), <http://www.globaltimes.cn/content/859107.shtml> (on file at the Washington & Lee Journal of Civil Rights & Social Justice).

212. *Id.*

because he was there on June 4, 1989.²¹³ Because a person cannot be a lawyer if he or she has a serious criminal conviction, Pu’s convictions made his disbarment inevitable.²¹⁴

Pu Zhiqiang (浦志强) was convicted of “inciting ethnic hatred” (煽动民族仇恨) and “picking quarrels and provoking trouble” (寻衅滋事) in December 2015 and was sentenced to a three-year suspended sentence.²¹⁵ He had already been confined for about nineteen months at the time of his conviction.²¹⁶

The only evidence against Pu were seven social media posts that Pu wrote on Weibo between 2011 and 2014.²¹⁷ To Western eyes, his social media posts are ordinary comment and criticism of government actions and policies. He was arrested in May 6, 2014, three days after he had a meeting commemorating the June 4th Anniversary of Tiananmen Square.²¹⁸ Several other participants were also arrested.²¹⁹ Pu was initially investigated under the charges of “picking quarrels and provoking trouble” (寻衅滋事) and “illegally obtaining personal information” (非法获取公民个人信息)

213. *Id.*

214. *Chinese Rights Lawyer Pu Zhiqiang Convicted, but to be Released Soon After Receiving Three-Year Suspended Jail Sentence*, SOUTH CHINA MORNING POST (Dec. 22, 2015, 10:26 AM), <https://www.scmp.com/news/china/policies-politics/article/1893795/chinese-rights-lawyer-pu-zhiqiang-convicted-be-released> (“Pu’s lawyer’s licence [sic] would be permanently revoked as convicted lawyers were barred from practising [sic]”) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

215. *Pu Zhiqiang: China Rights Lawyer Gets Suspended Jail Sentence*, BBC NEWS (Dec. 22, 2015), <https://www.bbc.com/news/world-asia-china-35157525> (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

216. *See id.*

217. *See* Patrick Bohler, *China’s Case Against a Civil Rights Lawyer, in Seven Social Media Posts*, N.Y. TIMES (Dec. 14, 2015), <https://www.nytimes.com/2015/12/15/world/asia/pu-zhiqiang-china-trial-weibo-posts.html> (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

218. Andrew Jacob, *China to Prosecute Pu Zhiqiang for Activism*, N.Y. TIMES (June 13, 2014), <https://www.nytimes.com/2014/06/14/world/asia/formal-arrest-announced-of-chinese-human-rights-lawyer-Pu-Zhiqiang.html> (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

219. *Id.*

).²²⁰ He was later additionally charged with “inciting subversion of the state” (煽动分裂国家罪) and “inciting ethnic hatred and ethnic discrimination” (煽动民族仇恨、民族歧视罪).²²¹ The latter charge stemmed from his social media posts in support of the Uyghars, a predominantly Muslim population living mostly in the Xinjiang Autonomous Region of China.²²² The post criticized the Chinese government treatment of the Uyghars.²²³

Pu Zhiqiang was detained for more than a year before the criminal charges were brought against him.²²⁴ The prosecutor and police used all the extensions available under the Criminal Procedure Law to detain him without formal charges.²²⁵ The Beijing No. 2 Intermediate Court extended the time before the trial period twice, adding an additional six months.²²⁶

Pu Zhiqiang had participated in the hunger strike in Tiananmen Square in 1989 when he was a law student at China University of Politics and Law (CUPL).²²⁷ He obtained his lawyer’s license in 1995 and started to practice law in 1997.²²⁸ Since 2009, Pu had worked on several high-profile cases including Tan Zuoren case, Ren Jiayu’s Reeducation through Labor case, Ai Weiwei tax

220. *Pu Zhiqiang: China Rights Lawyer Gets Suspended Jail Sentence*, *supra* note 215.

221. *Id.*

222. *Id.*

223. *See id.* (“[Pu Zhiqiang] had questioned the ‘excessively violent’ crackdown on Uighurs in the restive Xinjiang region, alleged the Chinese Communist Party was an untruthful party, and mocked government rhetoric over disputed islands in the East China Sea.”).

224. *Id.*

225. *See id.*

226. *See Chinese Blogger Released After Six-Month Detention*, *GUARDIAN* (Aug. 10, 2011), <https://www.theguardian.com/world/2011/aug/10/chinese-blogger-ran-yunfei-released> (discussing the six-month detention of Pu Zhiqiang) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

227. *Pu Zhiqiang: Buzai shi Lüshi le, dan Xiangxin Weilai* (浦志强: 不再是律师了, 但相信未来) [*Pu Zhiqiang: No Longer a Lawyer, but Believe in Future*], DUAN CHUAN MEI (端传媒) [INITIUM MEDIA] (Apr. 15, 2016), <https://theinitium.com/article/20151214-dailynews-puzhiqiang/> (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

228. *Id.*

case, and Tang Hui’s Reeducation through Labor case.²²⁹ (Re-education through labor was abolished under Xi Jinping’s legal reform in 2014.)²³⁰

Lawyers such as Pu seem to be the forerunners of today’s die-hard criminal defense lawyers. An editorial explains:

The problem is some of them have deliberately crossed the bottom line of the rule of law. It was reported that Pu was detained after he attended an anniversary event to commemorate the June 4th incident [Tiananmen Square resistance]. Whether there is a connection has not been officially confirmed, but it is obvious that such an event, which is related to the most sensitive political issue in China, has clearly crossed the red line of law.²³¹

The problem, of course, is that the word “law” has two distinct meanings in China.²³² On one hand, it is the words of the law-makers written in official codes.²³³ But “law” also appears to mean whatever is today’s will of those in power.²³⁴ It is this latter sense in which Pu clearly crossed the line, and Chinese activists and scholars are sensitive every day to where that line may be. The

229. *Id.*

230. See Sui-Lee Wee, *China to Abolish Labor Camps, Major Victory for Xi*, REUTERS (Nov. 15, 2013, 10:59 AM), <https://www.reuters.com/article/us-china-reform-legal/china-to-abolish-labor-camps-major-victory-for-xi-idUSBRE9AE0TV20131115> (noting China’s plans to abolish its system of forced labor camps in 2014) (on file with Washington & Lee Journal of Civil Rights & Social Justice).

231. Shan Renping, *supra* note 211.

232. See Josh Chin, *‘Rule of Law’ or ‘Rule by Law’? In China, a Preposition Makes All the Difference*, WALL ST. J. (Oct. 20, 2014), <https://blogs.wsj.com/chinarealtime/2014/10/20/rule-of-law-or-rule-by-law-in-china-a-preposition-makes-all-the-difference/> (explaining that the Chinese phrase fazhi (法治) has been translated into English as both “rule of law” and “rule by law”) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

233. See *id.* (explaining that “‘rule of law’ implies fairness and predictable application” and constrains the power of political leaders by laws and regulations).

234. See *id.* (“Rule by law’ would include, for example, rule under Hitler’s Nuremberg Laws (Nürnberg Gesetze), which were neither fair nor predictably applied.”).

accuracy of their perceptions and judgments in this regard is what keeps them out of jail.

In July 2015, a significant round-up and detention of aggressive Chinese lawyers, dubbed the 709 Crackdown, occurred.²³⁵ This round-up and detention significantly increased the tension between the state and the activist lawyers, and so far, despite serious risk to themselves, the lawyers are not backing down.²³⁶ The rights lawyers rounded up included both aggressive criminal defense lawyers and lawyers who have represented unpopular clients in assertive civil rights cases. Some of the lawyers' whereabouts still remain unknown and nearly all were denied the opportunity to meet with their own lawyers. In one instance, the client of one of the detained lawyers made a request for information regarding his lawyer's whereabouts, but no response or information was forthcoming. Family members of some of the lawyers have been detained and questioned. Some of those detained have been warned against inquiring further about their loved ones. Other lawyers who were detained and released have been warned against pursuing the whereabouts of the still-detained lawyers.

This detention, even without criminal charge, is made possible by a provision of the Criminal Procedure Code, Residential Surveillance in a Designated Location (RSDL).²³⁷ Despite the use

235. Anthony Kuhn, *Chinese Authorities Detain Nearly 150 Human Rights Lawyers*, NPR (July 14, 2015), <http://www.npr.org/2015/07/14/422952236/chinese-authorities-detain-nearly-150-human-rights-lawyers> (on file with the Washington & Lee Journal of Civil Rights & Social Justice); Chun Han Wong, *Human-Rights Lawyers Detained in China Confess, State Media Reports*, WALL ST. J. (July 19, 2015), <http://www.wsj.com/articles/human-rights-lawyers-detained-in-china-confess-state-media-reports-1437307686> (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

236. See Andrew Jacobs & Chris Buckley, *China Targeting Rights Lawyers in a Crackdown*, N.Y. TIMES (July 22, 2015), <http://www.nytimes.com/2015/07/23/world/asia/china-crackdown-human-rights-lawyers.html> (noting that many activist lawyers are not being deterred by the "intense political pressure" and "previous imprisonment of lawyers under President Xi Jinping") (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

237. Zhonghua Renmin Gongheguo Xingshi Susong Fa (中华人民共和国刑事诉讼

of the word “residential,” nothing about this status resembles a house arrest. Instead, the detainee is typically kidnapped without warning, placed in a police car with a bag over the detainee’s head and taken to an unspecified location. Unless charges are brought or the status renewed, the detention can last six months. Typically, neither family nor the detainee’s lawyer are told about the detainee’s whereabouts. Thus, the term “disappeared” has been applied to this status of detention.²³⁸

During the RSDL detention, food deprivation, sleep deprivation, intense interrogation, threats to family, and occasional physical violence mark the experience of the disappeared person.²³⁹

One goal appears to be to dissuade and intimidate the detainee and others from engaging in the aggressive lawyering that brought on the detention in the first place. A second goal is to extract a guilty plea, resulting in the disbarment of the lawyer, and a video confession to be publicly broadcast and written about in state print media.²⁴⁰ The video confessions are often bizarre, staged events. The confessions are tightly scripted, rehearsed and done in many

讼法) [Criminal Procedure Law of the People’s Republic of China], art. 64, 72–77 (promulgated by Standing Comm. Nat’l People’s Cong., July 7, 1979, effective Jan. 1, 1980, amended Mar. 14, 2012).

238. See generally THE PEOPLE’S REPUBLIC OF THE DISAPPEARED (Michael Caster ed., 1st ed. 2017); Anthony Kuhn, *Chinese Authorities Detain Nearly 150 Human Rights Lawyers*, NPR (July 14, 2015), <http://www.npr.org/2015/07/14/422952236/chinese-authorites-detain-nearly-150-human-rights-lawyers> (on file with the Washington & Lee Journal of Civil Rights & Social Justice); see also generally Chun Han Wong, *Human-Rights Lawyers Detained in China Confess, State Media Reports*, WALL ST. J. (July 19, 2015), <http://www.wsj.com/articles/human-rights-lawyers-detained-in-china-confess-state-media-reports-1437307686> (on file with the Washington & Lee Journal of Civil Rights & Social Justice); Andrew Jacobs & Chris Buckley, *China Targeting Rights Lawyers in a Crackdown*, N.Y. TIMES (July 22, 2015), <http://www.nytimes.com/2015/07/23/world/asia/china-crackdown-human-rights-lawyers.html> (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

239. See *supra* note 238.

240. See SAFEGUARD DEFENDERS, SCRIPTED AND STAGED: BEHIND THE SCENES OF CHINA’S FORCED TV CONFESSIONS (2018).

takes to get the desired effect.²⁴¹ In the confessions, the detainees make statements that are entirely out of character and appear obviously to be nothing more than the price of release, along with the criminal conviction that follows.

State media has reported extensively on the confessions of the detained lawyers. Among the chief targets of the crackdown, Zhou Shifeng, was the lawyer who represented families of victims of the toxic baby formula produced by Sanlu Milk Co. in 2008.²⁴² Media reports his confession to the charges leveled against himself and his firm, charges “ranging from hyping up legal cases to spreading smears against China’s legal system.”²⁴³ The publicized confessions that precede any hearings or taking of evidence by a court have been a common feature of previous crackdowns against dissidents. To date, the public confessions seem not to have dampened the spirits of the rights lawyers.²⁴⁴

In August 2016, four activists who were among those rounded up in July 2015 were sentenced for the crime of subverting state power.²⁴⁵ Beijing lawyer Zhou Shifeng was among the four and was

241. *See id.*

242. *See* Teng Biao, Opinion, *Chinese Human Rights Lawyers Under Assault*, WASH. POST (July 25, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/24/AR2009072402940.html> (on file with the Washington & Lee Journal of Civil Rights & Social Justice); *see also* *Detained China Human Rights Lawyer ‘Confesses’: State*, BUS. INSIDER (July 19, 2015), <http://www.businessinsider.com/afp-detained-china-human-rights-lawyer-confesses-state-media-2015-7> (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

243. Chun Han Wong, *Human-Rights Lawyers Detained in China Confess, State Media Reports*, WALL ST. J. (July 19, 2015), <http://www.wsj.com/articles/human-rights-lawyers-detained-in-china-confess-state-media-reports-1437307686> (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

244. *See* CHINESE HUMAN RIGHTS DEFENDERS, THEY TARGET MY HUMAN RIGHTS WORK AS A CRIME (2017).

245. *See* *Subversion of State: ‘There’s no place for Outlaws’*, CHINA DAILY (Aug. 8, 2016), http://www.chinadaily.com.cn/china/2016-08/08/content_26379881.htm (on file with the Washington & Lee Journal of Civil Rights & Social Justice); *see also* *China Justified in Punishing Subversion*, GLOBAL TIMES (Aug. 5, 2016), <http://www.globaltimes.cn/content/998684.shtml> (expressing an editorial opinion that claims of free speech are misguided defenses to “intolerable crimes that threaten national security”) (on file with the Washington & Lee Journal of

said to have influenced the others toward Western-style, open protest against Chinese law. Two of the other three were said to have operated an “illegal church.” The cases of the four, Zhou Shifeng (周世锋), Hu Shigen (胡石根), Zhai Yanmin (翟岩民), and Gou Hongguo (勾洪国) were tried together in Tianjin Intermediate Court. They were all convicted of “subversion of the state” [颠覆国家政权罪] and all promised not to appeal.²⁴⁶ Zhou Shifeng was sentenced to seven years in prison under “subversion of the state” in Tianjin.²⁴⁷ Hu Shigen was sentenced for seven years and six months on August 3, 2016.²⁴⁸ Zhai Yanmin was sentenced for three

Civil Rights & Social Justice).

246. See *Zhou Shifeng Deng Ren Dianfu Guojia Zhengquan An Yishen Xuanpan* (周世锋等人颠覆国家政权案一审宣判) [Sentencing Announced for the First Trial of Zhou Shifeng and Others], CCTV NEWS (Aug. 5, 2016), <http://tv.cctv.com/2016/08/05/VIDENH2aEqLx40UiH3XJnMMI160805.shtml> (including the sentencing of Zhou, Hu, Zhai, and Gou) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

247. See *Zhou Shifeng Bei Rendeng Fan Dianfu Guojia Zhengquan Zui: Yishen Panchu Youqituxing 7 Nian* (周世锋被认定犯颠覆国家政权罪：一审判处有期徒刑7年) [Zhou Shifeng Was Convicted of Subversion of the State Regime: First Trial Sentenced for 7 Years], CCTV NEWS (Aug. 4, 2016), <http://tv.cctv.com/2016/08/04/VIDEWgZmFo4IG2QKjJnCZfJ5160804.shtml> (showing Zhou confessing his wrongdoing, praising the fairness of the court, and promising to “never appeal” the court’s decision) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

248. *Hu Shigen Bei Pan Youqituxing Qinian Liugeyue* (胡石根被判有期徒刑七年六个月) [Hu Shigen Was Sentenced for Seven Years and Six Months], XINHUA WANG (新华网) [XINHUA.NET] (Aug. 3, 2016), <https://weibo.com/ttarticle/p/show?id=2309351000444004352497951926&u=5031100920&m=4004364224066745&cu=5031100920&ru=2997829562&rm=4004359865822737> (on file with the Washington & Lee Journal of Civil Rights & Social Justice); see *Hu Shigen Dianfu Guojia Zhengquan An Yishen Xuanpan, Hu Shigen Huoxing Qinian Ban, Dangting Biaoshi Bu Shangsu* (胡石根颠覆国家政权案一审宣判 胡石根获刑七年半 当庭表示不上诉) [Hu Shigen Subversion of State Regime Case First Trial, Hu Shigen Sentenced to Seven and a Half Years, Pledged Not to Appeal in Court], CCTV NEWS (Aug. 3, 2016), <http://tv.cctv.com/2016/08/03/VIDEzubE11c91cZN1Wy8PDq1160803.shtml> (showing Hu sentenced with the most severe punishment because he was the leader of the group and a repeated offender of “subversion”; also shows his confession and promise not the appeal) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

years with four more years suspended.²⁴⁹ Gou Hongguo was sentenced to three years in prison with a three year suspension on August 5, 2016.²⁵⁰

Some US Embassy staff went to the Tianjin court on their diplomatic car. State security filmed the US diplomats and the diplomatic car and made a video mocking US involvement. The Ministry of Public Security posted the video on its Weibo account and generated a wave of nationalist reaction on the social media.²⁵¹

249. See *Zhai Yanmin Dianfu Guojia Zhengquan An Yishen Xuanpan: Zhai Yanmin bei Pan Youqituxing Sannian, Huanxing Sinian* (翟岩民颠覆国家政权案一审宣判: 翟岩民被判有期徒刑三年, 缓刑四年) [*Zhai Yanmin Subversion of State Regime Case Sentenced: Zhai Yanmin Sentenced to Three Years, with Suspension of Four Years*], CCTV NEWS (Aug. 3, 2016), <http://tv.cctv.com/2016/08/03/VIDEUoXxaPM3uivvQJEPO474160803.shtml> (showing Zhai's confession, especially about his participation of an underground church involving rights lawyers, organized by Hu Shigen) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

250. *Gou Hongguo Shexian Dianfu Guojia Zhengquan Xuanpan, Huoxing Sannian Huanxing Sannian* (勾洪国涉嫌颠覆国家政权宣判, 获刑三年缓刑三年) [*Gou Hongguo Subversion of State Regime Case Sentenced: Three Years with Three Years Suspension*], SINA NEWS (Aug. 5, 2016), <http://news.sina.com.cn/c/nd/2016-08-05/doc-ifyxutpf1290837.shtml>; see also <http://tv.cctv.com/2016/08/05/VIDEuJv0wax0pPy3ofwaDld160805.shtml> (showing Gou's confession, praising the fairness of the court, and promising not to appeal) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

251. See *Zhōnghuá Rénmín Gònghéguó Gōng'ānbù* (中华人民共和国公安部) [Ministry of Public Security of the People's Republic of China], SINA WEIBO (Aug. 3, 2016, 19:45 PM), <https://weibo.com/2328516855/E1Sq5uRSB?type=comment> (video from original post was taken down, a repost of the video may be found at a local police department's Weibo post at <http://t.cn/RtXY10N>) (on file with the Washington & Lee Journal of Civil Rights & Social Justice); see also "Weiquan Quan" de Muhou Heishou, "Weiquan Shi" Zishi: "Lüshi" Goulian "Fangmin" ("维权圈"的幕后推手"维权式"滋事: "律师"勾连"访民") [*The Hand Behind the "Rights Protection Circle," Inciting Trouble in "Rights Protection Style": "Lawyers" Collude with "Petitioners"*], CCTV NEWS (July 12, 2015), <http://news.cntv.cn/2015/07/12/VIDE1436662081249696.shtml> (on file with the Washington & Lee Journal of Civil Rights & Social Justice); *Fengrui Lüshisuo Zuian Diaocha* (锋锐律所罪案调查) [*Investigation of Fengrui Law Firm's Criminal Case*], CCTV NEWS (July 19, 2015), <http://news.cntv.cn/2015/07/19/VIDE1437264109686345.shtml> (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

In its editorial, the state newspaper said:

Lawyers advocate for the law. But a few of them went to the other side of the law, and at one time won a certain degree of response on the Internet. This reflects how seriously the Western ideology has been infiltrating the country. Confronting the country’s basic political system, and inciting people to resist the country’s laws, the lawyers believed they were acting through freedom of expression. It is ridiculous.²⁵²

The various defendants made uncharacteristic statements as part of their confessions to the charges, apparently reducing their sentences. Gou Hongguo pleaded guilty to subverting state power by “collude[ing] with a group of religious people, petitioners, lawyers and legal administrators to agitate in controversial cases and incite public hatred against the State”²⁵³ Guo said at his sentencing: “I’m grateful to the government for saving me and resolve not to participate in any criminal activities and will make a clean break with all those anti-government forces.”²⁵⁴ Hu Shigen, former college professor from Beijing and head of the illegal church, said the “trial was fair and just” and thanked the authorities for making sure he was properly treated for his “diseases.”²⁵⁵ Hu had “teamed up with some lawyers to embarrass the government” and promote a “peaceful transformation overthrow of the government leadership.”²⁵⁶ These were the very lawyers, several like Zhou from the Fengrui law firm, who engaged in the aggressive tactics of the new breed of Chinese lawyer.

Another Fengrui lawyer, Wang Yu 王宇, slated to receive a human rights award from the American Bar Association, was “released on parole awaiting trial” [取保候审] on July 22, 2016 after a six-month detention.²⁵⁷ Her statement²⁵⁸ accompanying her

252. *China Justified in Punishing Subversion*, *supra* note 245.

253. *Id.*

254. *Id.*

255. *See Subversion of State*, *supra* note 245, at 5.

256. *Id.*

257. *See generally* THE PEOPLE’S REPUBLIC OF THE DISAPPEARED, *supra* note 238, at 65–84 (describing more of Wang Yu’s personal story, including the detention details and threats to her son).

258. *See* (王宇) [Wang Yu], *Wo Weishenme Zai Dianshi Shang Renzui* (我为什

release said that the ABA was using her to publicly smear the Chinese legal system.²⁵⁹ She publicly vowed to refuse to accept any such awards. “I am Chinese. I love my homeland. I’m not going to accept the award issued by foreigners.”²⁶⁰ Similar to other smear videos, the Communist Party League posted a video mocking the ABA giving an award to a chair²⁶¹ (referring to the Nobel Peace Prize to Liu Xiaobo in 2010, when Liu was serving a prison sentence in China and the Nobel Prize ceremony reserved an empty chair on the podium honoring Liu.).

The crackdown against such lawyers has persisted. Most recently, Yu Wensheng (余文生) was arrested on January 19, 2018 for circulating an open letter calling for amending the constitution.²⁶² Since his arrest, Yu’s wife Xu Yan had been

么在电视上认罪) [Why did I Confess on TV], DUAN CHUAN MEI (端传媒) [INITIUM MEDIA] (June 5, 2018), <https://theinitium.com/article/20180604-taiwan-wangyu-confession/> (on file with the Washington & Lee Journal of Civil Rights & Social Justice); see also Zhao Wen Tian Xia (朝闻天下) [Behind the Illegal Smuggling Case: Weaving Lies, Hiding Innocent Youth into Tools], CCTV (Oct. 17, 2015), <http://news.cntv.cn/2015/10/17/VIDE1445038921662355.shtml> (filmed after Wang Yu’s son was caught crossing the border; interviewed in detention facility, broadcasted Oct. 17, 2015) (on file with the Washington & Lee Journal of Civil Rights & Social Justice); (锋锐律所王宇取保候审：不接受“国际人权奖”) [Feng Rui Law Firm Wang Yu is on bail pending trial: does not accept the "International Human Rights Award"], IFENG.COM (Aug. 01, 2016), http://inews.ifeng.com/yidian/49698903/news.shtml?ch=ref_zbs_ydzc_news (filmed after Wang Yu’s release from detention and interviewed in a garden of a hotel, broadcasted Aug. 1, 2016) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

259. See CHINESE HUMAN RIGHTS DEFENDERS, *supra* note 245, at 5.

260. *Id.*

261. See (@共青团中央) [Communist Youth League Central], *American Bar Association’s Awarding Nobel Peace Prize to Liu Xiaobo*, SINA WEIBO (Aug. 6, 2016, 22:42 PM), https://weibo.com/3937348351/E2lRlBrSV?refer_flag=1001030103_&type=comment (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

262. Joanna Chiu, *China Detains Rights Lawyer After Call for Reform*, YAHOO! NEWS (Jan. 19, 2018), <https://uk.news.yahoo.com/china-detains-rights-lawyer-call-reform-035507714.html> (on file with the Washington & Lee Journal of Civil Rights & Social Justice); see Joanna Chiu (@joannachiu), TWITTER (Jan. 18, 2018, 7:10 PM), <https://twitter.com/joannachiu/status/954189316653170688> (tweeting Yu Wensheng’s letter calling for constitutional amendment) (on file

advocating for Yu’s release and met with several foreign media and embassies. Xu was detained by the police for several hours on April 1 and was told not to speak up about the case. Yu Wensheng was formally charged for “inciting subversion of the state” [煽动颠覆国家政权罪] and “obstruction of public service” [妨碍公务罪].²⁶³

Yu’s lawyer license was revoked by the Beijing Justice Bureau on January 15, 2018.²⁶⁴ The official reason was that Yu was unemployed by any law firms for more than six months, a technical requirement of the Chinese Lawyer Law.²⁶⁵ Yu said the government forced his former employer to discharge him and threatened other law firms not to hire him.²⁶⁶ He was also not able to register his own law firm because of obstacles from the government.²⁶⁷

Before his arrest, Yu Wensheng recorded a video claiming that he would not give up his right to choose his own attorney unless tortured.²⁶⁸

Yu Wensheng was one of the lawyers hired by Wang Quanzhang’s wife, Li Wenzu, to defend Wang’s case, but he was not able to meet with Wang (none of the 709 lawyers were able to meet with lawyers hired by their families). Wang Quanzhang is still being detained today after more than a thousand days of

with the Washington & Lee Journal of Civil Rights & Social Justice).

263. *Changyi Xiuxian Beizhua, Lu Weiquan Lüshi zao Zhengshi Daibu* (倡议修宪被抓, 陆维权律师遭正式逮捕) [Initiative to Amend the Constitution and Lu Weiquan Lawyer Yu Wensheng was Formally Arrested], ZHONG YANGSHE (中央社) [CENTRAL NEWS AGENCY] (Apr. 20, 2018), <http://www.cna.com.tw/news/acn/201804200219-1.aspx> (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

264. *Yu Wensheng Lüshizheng bei Zhuxiao, Cheng zao Zhengfu “Daya Baofu”* (余文生律师证被注销, 称遭政府“打压报复”) [Yu Wensheng’s Lawyer License Revoked, Claimed “Retaliation” from the Government], BBC NEWS CHINESE (Jan. 17, 2018), <http://www.bbc.com/zhongwen/simp/chinese-news-42710495> (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

265. *See id.*

266. *See id.*

267. *See id.*

268. Hong Kong Free Press, *I Will Not Accept Gov’t-Appointed Lawyer Unless Tortured, Arrested Chinese Lawyer Yu Wensheng Says*, YOUTUBE (Apr. 26, 2018), <https://www.youtube.com/watch?v=XD0VYOAPWoE> (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

detention without a trial.²⁶⁹ Wang's wife is still advocating for Wang's release.²⁷⁰

Yu Wensheng was originally detained in 2014 for supporting Hong Kong's pro-democratic "Occupy Central" protest.²⁷¹ He was not formally charged with a crime in 2014.

Being an activist lawyer in China is not a safe activity. The numbers of such lawyers appears to be growing and despite the jailings and physical violence, they stayed determined in their work.

What most impedes our work, though, is the revocation of our licenses to practice law. China's cities and provinces have "lawyers' associations" that appear to be modeled after the bar associations of Western countries, and these groups decide annually who is qualified to practice law. This is a good example of where pretense and reality diverge in China's legal world. The lawyers' associations are, in fact, puppets of the government whenever a political question arises. Last year my license to practice law was revoked.²⁷²

The battle has been joined between the die-hard lawyers and the state. "These activist lawyers, who have wild intentions to challenge and change the law, have deviated from what their jobs are supposed to entail," a state-oriented editorial said.²⁷³ The

269. See Gao Feng & Luisetta Mudie, *Lawyer Withdraws from Wang Quanzhang's Case, Citing Injuries, Fall*, RADIO FREE ASIA (Oct. 23, 2018), <https://www.rfa.org/english/news/china/lawyer-10232018110436.html> ("A Chinese attorney representing rights lawyer Wang Quanzhang, who has been held incommunicado without trial since 2015, has withdrawn from the case, citing injuries sustained in a 'fall.'") (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

270. See generally Joanna Chiu, *Wife of 'Vanished' Chinese Lawyer Marches for Answers*, AFP NEWS (Apr. 05, 2018), <http://sg.news.yahoo.com/wife-vanished-chinese-lawyer-marches-answers-114700248.html>; Christian Shepherd, *Wife of Detained Chinese Lawyer Begins 100-km March to Press for Answers*, REUTERS (Apr. 04, 2018), <https://reuters.com/article/us-china-rights/wife-of-detained-chinese-lawyer-begins-100-km-march-to-press-for-answers-idUSKCN1HB0J7> (on file with the Washington & Lee Journal of Civil Rights & Social Justice); see also generally *China Human Rights: Wife Marches for 'Vanished' Husband*, BBC NEWS (Apr. 04, 2018), <http://www.bbc.com/news/world-asia-china-43644599> (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

271. Changyi Xiuxian Beizhua, *supra* note 264.

272. See Teng, *supra* note 6.

273. Shan Renping, *supra* note 211.

editorial leveled a warning at the group, who must “realize that they are not commandos or the authoritative forces behind improvements to rule of law in China.”²⁷⁴ Such challenges seem only to further embolden the die-hards and their followers.

VI. Comparisons with the American Civil Rights Cause Lawyer

Beginning roughly seventy years ago, a new breed of lawyer was born in the United States.²⁷⁵ These lawyers cared about the “cause” as much or sometimes more than did their clients.²⁷⁶ These lawyers viewed their role as more than that of a traditional lawyer who represented, but was separate from, their clients.²⁷⁷ These lawyers threatened well-guarded social orders,²⁷⁸ as did the Chinese die-hards. They faced intense government and bar association repression and reproach.²⁷⁹ Their work largely started in the South, in the effort to press toward racial equality,²⁸⁰ and spread to causes opposing the Vietnam War,²⁸¹ discrimination against women,²⁸² mistreatment of the institutionalized, and organization of workers, tenants and consumers²⁸³.

274. *Id.*

275. *See generally* KENNETH W. MACK, *REPRESENTING THE RACE: THE CREATION OF THE CIVIL RIGHTS LAWYER* (Harv. Univ. Press 2012).

276. *Id.*

277. *Id.*

278. *Id.*

279. *See generally* James E. Moliterno, *Politically Motivated Bar Discipline*, 83 WASH. U. L. Q. 725 (2005) (describing how these new lawyers faced backlash).

280. *See* MACK, *supra* note 275, at 3–6 (describing the aim of civil rights lawyers, such as Thurgood Marshall, and their efforts to evoke changes in American race relations).

281. *See generally* Michal R. Belknap, *The Warren Court and the Vietnam War: The Limits of Legal Liberalism*, 33 GA. L. REV. 65 (1998).

282. *See* Cary Franklin, *The Meaning of the Civil Rights Revolution: Separate Spheres*, 123 YALE L.J. 2878, 2889 (2014) (identifying the women’s movement as a derivative of the Civil Rights Movement).

283. *See* Marion Crain & Ken Matheny, *Labor’s Identity Crisis*, 89 CALIF. L. REV. 1767, 1834 (2001) (identifying workers’ rights as a category to be included in the civil rights discussion).

Like their Die-Hard counterparts, these lawyers were subjected to threats, deprivations, violence, and near-death.²⁸⁴ The methods were different, to be sure. There was no RDSL, and civil rights lawyers who were arrested were largely permitted contact with their own lawyers and family.²⁸⁵ But at times, the intensity of reaction to their threat to social order was no less than the reaction has been to the die-hard lawyer. Consider a few examples.

Following somewhat surprising success in defending Black defendants following racial violence in 1946 Tennessee, Thurgood Marshall was driving back to Nashville with three colleagues.²⁸⁶ On the road, their car was confronted by a car occupied by police²⁸⁷ and another occupied by local White citizens. The police stopped Marshall's car and insisted that they must search for illegal alcohol or other contraband.²⁸⁸ None was present.²⁸⁹ Nonetheless, the police placed Marshall in the backseat of their car between two officers.²⁹⁰ They said he was to be returned to town to come before

284. See Sarah H. Brown, *STANDING AGAINST DRAGONS: THREE SOUTHERN LAWYERS IN AN ERA OF FEAR* 236 (1998) (describing a white civil rights lawyer who was evicted from his office building and chased with a shotgun due to his involvement in civil rights cases and association with the Committee to Assist Southern Lawyers).

285. See Kenneth T. Andrews, *Lawyers and Embedded Legal Activity in the Southern Civil Rights Movement*, *UNIV. OF DENVER L. & POL'Y* (Dec. 07, 2017), <https://doi.org/10.1111/lapo.12096> (discussing the need for civil rights lawyers in the South to have access to field offices for assistance when confronted with local authorities).

286. See CHARLES L. ZELDEN, *THURGOOD MARSHALL: RACE, RIGHTS, AND THE STRUGGLE FOR A MORE PERFECT UNION* 40 (Paul Finkelman et al. eds., 2013) ("One of Marshall's closest brushes with death came in November 1946 in Maury County, Tennessee . . . [when] Marshall was driving back to Nashville with two other lawyers.").

287. See *id.* ("Suddenly, three police cars stopped their car.").

288. See JUAN WILLIAMS, *THURGOOD MARSHALL: AMERICAN REVOLUTIONARY* 131 (1998) ("[The police] announced they had a warrant to search for illegal whiskey.").

289. See ZELDEN, *supra* note 286, at 40 ("No alcohol was found and the three lawyers drove off.").

290. See Ron Cassie, *Justice For All*, *BALTIMORE MAGAZINE*, <https://www.baltimoremagazine.com/2017/8/7/justice-for-all-50-years-after-thurgood-marshall-supreme-court-confirmation> (last visited Sept. 18, 2018)

a judge on a drunk driving charge.²⁹¹ Marshall had not been drinking on that occasion.²⁹² The police told his colleagues to continue driving to Nashville.²⁹³

They began to drive, but had second thoughts and turned to follow the police.²⁹⁴ Instead of proceeding into town, the police car turned onto a dirt road that would end near a river.²⁹⁵ The colleagues followed.²⁹⁶ The police car stopped near the river where a lynch mob was waiting, surely meant for Marshall.²⁹⁷ When the colleagues pulled in behind the police car, the police told them to leave.²⁹⁸ They refused.²⁹⁹ In any event, even if they had turned and left, unless the police were now willing to turn them all over to the mob to be killed, the colleagues would be witnesses to the existence of the lynch mob and the police collaboration with it.³⁰⁰ Instead of

(“Marshall . . . was soon separated from the two attorneys and the journalist driving with him and ordered into the back seat of an unmarked vehicle.”) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

291. See ZELDEN, *supra* note 286, at 41 (“Finally, the police returned to town and told Marshall to cross the street unaccompanied to the magistrate’s office.”).

292. See *id.* (describing Marshall’s interaction with the magistrate judge in which he told the judge he was not drunk).

293. See *id.* (“Though the police told his companions to drive on down the road, they bravely followed the police car with Marshall in it.”).

294. *Id.*

295. See Cassie, *supra* note 290 (“Marshall later recounted that he hadn’t been scared until the car he was in turned from the unpaved road toward the water . . .”).

296. See *id.* (“Marshall was later saved only because fellow NAACP lawyer Alexander Looby whipped a U-turn after seeing the car carrying Marshall—supposedly headed to Columbia to face a judge with drunk driving—veer off the main road.”).

297. See *id.* (“The mob got me one night . . . and they were taking me down to the river where all of the white people were waiting to do a little bit of lynching.” (internal quotation marks omitted)).

298. See ZELDEN, *supra* note 286, at 40 (“Though the police told his companions to drive on down the road, they bravely followed the police car with Marshall in it.”).

299. *Id.*

300. See Cassie, *supra* note 290 (“The mob got me one night . . . and they were taking me down to the river where all of the white people were waiting to do a little bit of lynching.” (internal quotation marks omitted)).

leaving Marshall with the mob, presumably as planned, the police drove back to the main road and into town where they presented Marshall to the local judge.³⁰¹ The judge declared that Marshall had not been drinking and set him free from the police custody.³⁰² Marshall, later to litigate *Brown v. Board*, and still later to become the first Black Justice of the Supreme Court of the United States,³⁰³ was as close to being murdered as he could be that day. If not for the actions of his colleagues, the course of history and his influence on it would have been dramatically altered.

One of Marshall's colleagues that very day was Alexander Looby,³⁰⁴ arguably the most successful civil rights lawyer in Tennessee. He went on from that day with Marshall in 1946 to file the first desegregation suit against the Nashville public schools.³⁰⁵ When the student sit-ins began in Nashville in 1960 he became their first attorney, an action that resulted in violent response against him.³⁰⁶ Fourteen years after Looby and his colleagues probably saved Marshall's life, on April 19, 1960, his house was bombed and almost entirely demolished, as well as shattering neighbors' doors and windows.³⁰⁷ Fortunately, he and his wife were

301. See WILLIAMS, *supra* note 288, at 140 (“[The police] ordered Marshall out of the car and told him to go to the judge’s chamber on the second floor of the courthouse by himself.”)

302. See *id.* at 132 (“[Marshall] protested that he hadn’t had a drink in several days.”)

303. See *id.* at 4–5 (identifying Marshall’s involvement in *Brown v. Board of Education* and his appointment as the first African-American Supreme Court Justice).

304. See Cassie, *supra* note 290 (“Marshall was later saved only because fellow NAACP lawyer Alexander Looby whipped a U-turn after seeing the car carrying Marshall . . . veer off the main road.”)

305. See Dorothy Granberry, *Looby, Z. Alexander (1899–1972)*, THE BLACK PAST: REMEMBERED AND RECLAIMED, <http://www.blackpast.org/aah/looby-z-alexander-1899-1972> (last visited Sept. 17, 2018) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

306. *Id.*

307. *Blast Wrecks Home of Nashville Negro Lawyer*, OSHKOSH NORTHWESTERN (Apr. 19, 1960), https://www.newspapers.com/clip/14347170/blast_wrecks_home_of_nashville_negro/ (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

asleep in a back room of the house and escaped the serious injuries undoubtedly intended.³⁰⁸

Some five years later, a promising young lawyer who was threatening the social order in Charlotte, North Carolina, Julius Chambers, also narrowly avoided violent death.³⁰⁹ Chambers had filed the school desegregation claims on behalf of parents in Mecklenberg County, North Carolina, in what would eventually become the landmark case of *Swann v. Mecklenberg County*, upholding the use of busing to desegregate schools.³¹⁰ While making a speech at a church not long after he had filed those claims, his car was bombed.³¹¹ He and others went outside, inspected the damage, and he returned to finish his speech.³¹² Undeterred, he filed more than 50 school desegregation complaints and was also known for threatening the racial order attached to perhaps an even more sacredly guarded activity: Football.³¹³ Chambers had filed a claim on behalf of a record-setting Black high school football player who could not be chosen for a local all-star game because of his race.³¹⁴

Marshall, Looby, and Chambers were not alone in being violently terrorized by authorities and the locals with whom they conspired.³¹⁵ David Lipman had a rifle put his mouth for

308. *Id.*

309. See Jim Morrill, *50 Years Ago: Bombs Ignited Night of Terror*, CHARLOTTE OBSERVER (Nov. 21, 2015), <http://www.charlotteobserver.com/news/politics-government/article45744905.html> (describing the targeted bombing of Julius Chambers’ car) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

310. See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (holding that the busing of students is included in the scope of school authorities’ duties to eliminate racial segregation in public schools as mandated by the United States Supreme Court).

311. Morrill, *supra* note 309.

312. *Id.*

313. *Id.*

314. Jim Morrill, *50 Years Ago: Bombs Ignited Night of Terror*, CHARLOTTE OBSERVER (Nov. 21, 2015), <http://www.charlotteobserver.com/news/politics-government/article45744905.html> (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

315. See VOICES OF CIVIL RIGHTS LAWYERS 200–01 (Kent Spriggs ed., Univ. Press of Fla., 2017).

monitoring an election in Mississippi,³¹⁶ others were punched or beaten,³¹⁷ and many jailed for “practicing law without a license,” a crime that under normal circumstances would never produce arrest and jail, particularly when the defendant was indeed a lawyer in good standing in a state other than the arresting venue.³¹⁸

Especially in school desegregation cases, these new lawyers drew the ire and reproach of traditional lawyers and the organized bar. Following *Brown*, a strategy of fending off its mandate emerged in the South, alternately called The Southern Manifesto or Massive Resistance.³¹⁹ The strategy was formulated by no less than two United States Senators, one each from South Carolina and Virginia.³²⁰ It was carried out by countless state and local government officials.³²¹ A central theme of this strategy was to resist desegregation on the local level despite the *Brown* mandate, forcing an almost county-by-county enforcement by desegregation activists. The only path to the enforcement of *Brown* was for NAACP and other activist lawyers to go to community gatherings in small towns to discuss the possibilities for a local desegregation law suit.³²² Coming out from behind their desks to meet prospective clients, these lawyers offended traditional sensibilities, not to mention the politics and social preferences of traditional lawyers, especially southern white lawyers.³²³ They

316. *Id.*

317. *Id.* at ch. 5.

318. *Id.*

319. *See generally* JOHN K. DAY, *THE SOUTHERN MANIFESTO: MASSIVE RESISTANCE AND THE FIGHT TO PRESERVE SEGREGATION* (2014).

320. *See id.* at 63.

321. *See* Jared A. Goldstein, *The Klan’s Constitution*, 9 ALA. C.R. & C.L. L. REV. 285, 344 (2018) (discussing the implementation of the Southern Manifesto by Southern governors, legislators, mayors, and members of city councils and school boards).

322. *See* Roy Wilkins, *The Role of the NAACP*, 2 SOCIAL PROBS. 201, 203 (1955) (discussing the intention of the NAACP to make its legal services available to parents of African American school children).

323. *See* Moliterno, *supra* note 279, at 739 (“Together, [civil rights lawyers] collective fault in the eyes of the organized, traditional strength-center of the bar was the disruption to the legal, social, and cultural status quo that their work

were doing what their clients needed, they were pursuing a cause, and they used means that were more aggressive and outside common lawyer practice. The backlash was intense, with bar associations and government authorities accusing these lawyers of unethical conduct: solicitation of clients, stirring up litigation, and the like, all in violation of newly-modified-to-the-task barratry and champerty laws.³²⁴ Like today’s die-hard Chinese lawyers who are using social media to reach outside the traditional lawyer-advocacy-in-court mode,³²⁵ these lawyers were breaking molds that produced negative, sometimes angry response from government and their profession.

Harassment of Southern lawyers who represented civil rights workers was fierce.³²⁶ A very few white Southern lawyers were willing to represent civil rights workers in the deep South.³²⁷ Among the few who did, at least one was disbarred in Mississippi.³²⁸ A Black lawyer representing school desegregation plaintiffs in Mississippi was harassed by a federal district judge regarding his professionalism, threatened with findings of professional misconduct, and interrogated long enough to fill 118 pages of transcript.³²⁹ The harassment continued until the court of appeals said that the district judge was creating “humiliation, anxiety, and possible intimidation of a . . . reputable member of the bar.”³³⁰ The claims against the lawyer were entirely baseless. “All

promised.”).

324. See JEROLD S. AUERBACH, *UNEQUAL JUSTICE* 264–65 (1976) (“Few dared to defend advocates of racial equality. Daring was costly: [I]t prompted harassment by courts, legislatures, vigilantes, and fellow professionals . . .”).

325. See Zhang, *supra* note 137.

326. See Moliterno *supra* note 279, at 742.

327. See *id.*

328. See AUERBACH, *supra* note 324, at 264–65; see also *id.* at 264 (describing the disbarment of a Mississippi civil rights lawyer for his representation of a civil rights advocate).

329. *In re Brown*, 346 F.2d 903, 905–08 (5th Cir. 1965) (suggesting that a civil rights lawyer, whose professional conduct had never before been questioned, was cited for contempt of court due to his engagement in litigation seeking desegregation of certain Mississippi schools).

330. See *id.* (establishing that pages thirty-nine through 157 of the Court’s record documented the harassment of a Mississippi civil rights lawyer by a federal

of the testimony taken in this matter . . . completely exonerates Brown from any improper conduct.”³³¹

Once Northern lawyers began to undertake representation and organization of Southern civil rights clients and causes, new forms of professional harassment emerged.

Among the lawyers whose work acted as a lightning rod for organized bar criticism was William Kunstler.³³² Kunstler’s identification with his activist clientele broke sharply with traditional lawyer norms of professional separation from clients and earned him a folk hero status among law students and young lawyers.³³³ Kunstler went from representing civil rights workers including Mississippi Freedom Riders³³⁴ and other protesters in the South, to Black Panthers,³³⁵ to the Chicago Seven.³³⁶ Kunstler was not a large firm, New York lawyer who took up civil rights causes.³³⁷ His early practice in the 1950s was characterized by undistinguished representation in will, domestic relations, and real estate closing matters, with one ironic exception: referred by classmate Roy Cohn, Kunstler drafted a will for the soon-to-be-infamous Joseph McCarthy.³³⁸

district court judge due to his engagement in litigation seeking desegregation of certain Mississippi schools).

331. *Id.* at 909–10.

332. *See* Moliterno, *supra* note 279, at 744.

333. *See* Victor S. Navasky, *Right On! With Lawyer William Kunstler*, N.Y. TIMES MAGAZINE, Apr. 21, 1970, at 30. (referring to Kunstler as a “radical lawyer of the century”).

334. *See* Jerry Schwartz, ‘Chicago 7’ Attorney William Kunstler Still Champion of the Political Underdog, L.A. TIMES, Apr. 5, 1987 (“Then, in 1961, the ACLU asked [Kunstler] to go to Mississippi to assist local lawyers representing the Congress of Racial Equality’s freedom riders.” (internal quotation marks omitted)).

335. *See* Navasky, *supra* note 333.

336. *See* Schwartz, *supra* note 334 (“But to many, [Kunstler] is linked forever with the Chicago 7 conspiracy trial . . .”).

337. *See* DAVID J. LANGUM, WILLIAM M. KUNSTLER: THE MOST HATED LAWYER IN AMERICA 44 (1999) (describing Kunstler’s early years of legal practice during which he and his brother established Kunstler & Kunstler, “a rather ordinary practice” on Fifth Avenue in New York City).

338. *See id.* at 44–45.

As a traveling civil rights activist lawyer, Kunstler needed *pro hac vice* admission in various courts to represent his clients, which was not always freely given.³³⁹ Interestingly, Kunstler regarded himself as a modern-day, “itinerant lawyer in the colonial tradition.”³⁴⁰ The image of Lincoln, riding circuit with his colleagues from rotating court-day to court-day³⁴¹ is not one that traditional lawyers would have attached to Kunstler. And to be sure, the political nature of their practices bears no comparison whatever. But in another sense, the comparison to a 17th or 18th century lawyer traveling from court to court to meet his clients and represent them, is apt. The mode of transportation and its speed and capacity had changed dramatically, but it was true that Kunstler seemed to be everywhere, especially throughout the South in the 1960s. Between the time of colonial lawyers and later Lincoln’s circuit-riding and Kunstler’s traveling civil rights lawyer show, UPL (unauthorized practice of law) restrictions on cross-border law practice had become far more stringent.³⁴²

The Chicago Seven representation won him national attention and, in some circles, derision.³⁴³ The circus nature of the Chicago trial, and especially Kunstler’s openly hostile, two-way war with Judge Julius Hoffman, produced four years’ worth of contempt citations which were later reversed by the Seventh Circuit.³⁴⁴ The

339. See *Kunstler Upheld by Appeals Court*, N.Y. TIMES MAG., May 19, 1973, at 34 (describing a district court’s refusal to admit Kunstler. Kunstler needed permission to represent a client in prison for refusing induction, having been transferred because of participation in a prison protest led by Rev. Daniel Berrigan).

340. LANGUM, *supra* note 337 at 65.

341. See Willard L. King, *Lincoln’s Manager: David Davis*, U. OF CHI. L. SCH. REC. 59 (Dec. 1960) (describing Abraham Lincoln and his manager, David Davis, “riding the Eighth Illinois Circuit” in the 1940s and 1950s).

342. Compare Edward F. Sherman, *The Right to Representation by Out-of-State Attorneys in Civil Rights Cases*, in ARTICLES BY MAUER FACULTY 65 (1968) (discussing the shift away from the lenient attitude of southern courts towards out-of-state attorneys towards a more stringent outlook), with *Pro Hac Vice Admission Rules* (ABA 2016) (providing the current requirements for *pro hac vice* admission by state).

343. See Schwartz, *supra* note 334 (“But to many, [Kunstler] is linked forever with the Chicago 7 conspiracy trial . . .”).

344. See *In re Dellinger*, 461 F.2d 389 (7th Cir. 1972) (reversing the district

bar reaction to his ferocious representation in Chicago was strikingly swift.³⁴⁵ The Association of the Bar of the City of New York so anxiously awaited the opportunity to discipline Kunstler that it began proceedings before the Chicago Seven trial had ended, violating its own rules of procedure.³⁴⁶

In the end, confession came, as some elements within the organized bar realized that repressive mistakes had been made, especially in the context of efforts to chill zealous representation of the so-called “new left.”³⁴⁷ The bar had “misconstrued . . . the dimensions and causes of courtroom disorders . . . confus[ing] zeal in the defense of clients with revolution . . . [in its movement to] intimidate defense counsel.”³⁴⁸ Like the Die-Hard lawyer, Kunstler challenged the government orthodoxy and he paid a price for it.

As they had to Kunstler, responding to outsiders with law practice restrictions was a key measure for southern lawyer-dominated legislatures.³⁴⁹ Five southern states enacted harsher restrictions on client getting, unauthorized practice, and community organizing activities, in an effort to prevent outside lawyers (especially NAACP lawyers) from organizing and recruiting plaintiffs for school desegregation cases that would force compliance with *Brown v. Board*. The Virginia bar’s efforts to keep outside lawyers outside resulted in the Supreme Court’s entry into the fray in *NAACP v. Button*.³⁵⁰ The NAACP and its affiliate, the

court’s imposition of a four year, 13 thirteen-day sentence for contempt).

345. See Tom Goldstein, *Bar Group Withdraws Charges Against Kunstler*, N.Y. TIMES Magazine 34 (Feb. 21, 1974) (discussing the grievance committee’s departure from standard policy of “waiting until all appeals have been heard before bringing disciplinary action”).

346. See *id.* (same).

347. *Id.*

348. NORMAN DORSEN & LEON FRIEDMAN, *DISORDER IN THE COURT: REPORT OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, SPECIAL COMMITTEE ON COURTROOM DISORDER* xiii–xvi (1973).

349. See Edward F. Sherman, *The Right to Representation by Out-of-State Attorneys in Civil Rights Cases*, in ARTICLES BY MAUER FACULTY 65 (1968) (“[A]fter the large demonstrations and mass arrest subsided and civil rights law practice in the South shifted from defense to affirmative suits, the lenient attitude of southern courts towards out-of-state attorneys began to change.”).

350. *NAACP v. Button*, 371 U.S. 415 (1963).

Legal Defense Fund (LDF) had chapters in Virginia.³⁵¹ Through these chapters, Virginia residents were informed of the possibility of pursuing school desegregation suits by retaining NAACP and LDF lawyers.³⁵² Lawyers affiliated with the NAACP were paid a per diem during such representation, but often without any other form of compensation.³⁵³ The Virginia State Bar proceeded against these lawyers and the NAACP on the ground that their conduct amounted to inappropriate solicitation of business and, in particular, that the NAACP, which was not a party to the various school desegregation litigation, had unlawfully interjected itself into litigated matters by soliciting plaintiffs and supplying lawyers.³⁵⁴ The Virginia courts held that the NAACP lawyers had acted unethically.³⁵⁵ The Virginia courts asserted that the statutes’ purpose was to uphold high standards of the legal profession by “strengthen[ing] the existing statutes to further control the evils of solicitation of legal . . . [s]olicitation of legal business has been considered and declared from the very beginning of the legal profession to be unethical and unprofessional conduct.”³⁵⁶ Eliminating the activities of the NAACP at that juncture would likely have spelled an end to school desegregation in Virginia for the foreseeable future. The Supreme Court reversed the Virginia courts’ treatment of the issue, holding that such an application of the solicitation rules violated expression and association rights under the First and Fourteenth amendments.³⁵⁷

351. *See id.* at 421 (discussing the involvement of Defense Fund lawyers in litigation in Virginia).

352. *Id.*

353. *See id.* at 420–21 (describing the payment of Defense Fund lawyers by the Virginia Conference as “a per diem fee not to exceed [sixty dollars], plus out-of-pocket expenses”).

354. *See id.* at 419 (analyzing whether solicitation of clients by the Defense Fund and the NAACP was unethical and in violation of Chapter 33 of the Virginia Code).

355. *See NAACP v. Harrison*, 202 Va. 142, 155, 116 S.E.2d 55, 66 (1960) (holding that the actions of the NAACP constituted “fomenting and soliciting legal business in which they are not parties and have no pecuniary right or liability”).

356. *Id.* at 154.

357. *See NAACP v. Button*, 371 U.S. 415, 444 (1963) (“We conclude that although the petitioner has amply shown that its activities fall within the First

Both federal courts and the executive branch in some ways protected the civil rights lawyer from mistreatment at the hands of state and local officials. In this respect, the Chinese Die-Hard lawyer is markedly different.

David Mays was an example of a moderate segregationist lawyer, whose views of civil rights lawyers would today be regarded as extreme.³⁵⁸ Mays was congratulated and thanked repeatedly for his Gray Commission role at a 1955 Virginia State Bar meeting, the same meeting at which the organization adopted a resolution condemning the Supreme Court for its invasion of states' rights in *Brown*.³⁵⁹

Mays, the moderate who was praised by his fellow lawyers for stabilizing the radical segregationists,³⁶⁰ referred to W. Hale Thompson of Newport News as that “unbelievably arrogant . . . nigger lawyer.”³⁶¹ Thompson had dared to suggest in a Gray Commission public hearing that “Thomas Jefferson, James Madison and Patrick Henry would be ashamed of some members of the [Virginia] General Assembly.”³⁶²

When Mays described the pleasure of having two former FBI men play surreptitiously-made recordings of NAACP lawyer conversations with plaintiffs in the Prince Edward County case and the Charlottesville case, he made no mention of whether he

Amendment's protections, the State has failed to advance any substantial regulatory interest . . . which can justify the broad prohibitions which it has imposed.”). Other “association” cases followed, arising largely from a new ethos of cause or issue lawyering that accompanied the first federally funded legal aid programs.

358. See DAVID J. MAYS, RACE, REASON, AND MASSIVE RESISTANCE 2 (James R. Sweeney ed., 2008) (“A product of white society in the early-twentieth-century South, [Mays] retained the attitudes of that time, although his temperament and his legal training prevented him from taking extreme positions.”)

359. See *id.* at 62 (discussing the praise that Mays' peers gave him pertaining to his views on segregation and with the Gray Commission of 1954).

360. See *id.* (“Many lawyers have made it clear to me that they look upon me as the stabilizing influence that has prevented a stacked commission from taking radical action” (internal quotation marks omitted)).

361. See *id.* at 85–86 (suggesting that Mays was referring to W. Hale Thompson when he referred to a speaker at a Gray Commission public hearing as “one nigger lawyer [who] was unbelievably arrogant.”).

362. *Id.*

was listening to an intrusion on the lawyer-client relationship.³⁶³ Instead he said, "These may prove very helpful in probable proceedings by the [Virginia State Bar] against Oliver Hill [a preeminent school desegregation lawyer] and possibly others." No evidence appears to exist that Hill was ever charged, but his colleague Samuel Tucker was repeatedly brought before bar authorities and charged with misconduct.³⁶⁴ Mays openly favored the bills introduced by Charles Fenwick and Harrison Mann, which he thought was meant to "harass the NAACP."³⁶⁵

In correspondence with Sidney Carleton, a former President of the Mississippi State Bar, ABA President Lewis Powell, long regarded as a voice of moderation in the profession and later on the Supreme Court, registered his views on Northern lawyers who represented Southern Blacks. Carleton, in an angry response to National Lawyers Guild (NLG) representation in Mississippi, said:

[T]here has never been a time when the lawyers of the state of Mississippi have not stood ready, willing, and able to represent those in need of legal representation. It has not, however, been the policy of either the Mississippi State Bar nor of its members to violate public policy or to engage in the unethical practices or to become accessories before the fact by agreeing in advance to represent persons in criminal proceedings arising from contemplated actions not then having occurred.³⁶⁶

Powell replied to Carleton with praise for the Mississippi Bar, in language that implies negative views of NAACP and NLG lawyers who had organized the school desegregation plaintiffs such as those at issue in *Button*:

363. See *id.* at 191 (describing two former FBI agents playing recordings of conversations with plaintiffs in the Prince Edward County and Charlottesville NCAAP cases).

364. See *id.* at 191; see also interview with Senator Harry L. Marsh III, <http://www.library.vcu.edu/jbc/speccoll/civilrights/marsh01.html> (on file with the Washington & Lee Journal of Civil Rights & Social Justice); S.J. Ackerman, *The Trials of S.W. Tucker*, WASH. POST, June 11, 2000, at W14.

365. MAYS, *supra* note 358, at 158.

366. Letter from C. Sidney Carlton, Partner, Carleton & Henderson, to Ernest Goodman, President, National Lawyers Guild (Aug. 6, 1964) (on file in Lewis F. Powell, Jr. Archives, Washington & Lee University School of Law Library, General Correspondence during Presidency, Box 76).

My own view is that your bar took a fine step in its recent resolution on this subject. I think all of the southern bars should do the same thing, and follow them up with actual representation of Negroes—not to foment litigation but to defend those accused of crime. This is the best way I know to keep northerners from ‘invading’ the southern states. I am afraid nothing can keep some of the radicals from defaming the South generally without the slightest recognition that lawlessness in the northern cities is on a larger scale.³⁶⁷

Powell’s and Carleton’s remarks echo the resistance of the Chinese authority to the undermining ideas and interference of foreigners. Western interference and dangerous influence, including an ABA Human Rights award issued to Wang Yu, threaten the Chinese authority. For Southern lawyer-leaders, the foreign influence to be resisted came from the “invasion” of Northern lawyers and organizations.

Meanwhile, labor unions endeavored to provide counsel to their members, and federally-funded legal aid lawyers organized tenants and farm workers and represented entire classes of welfare recipients, institutional inmates and others. Still other lawyers sought to represent middle class clients at lower cost, using office automation and high client-volume generated by bar-prohibited advertising.

In every instance the profession objected. In part, to be sure, the objections were motivated by opposition to the *causes* advanced by the new style of lawyer, but the objections were also to the new style of lawyering itself. To the traditional, one-client-at-a-time lawyer, whose clients found the lawyer through word of mouth in clubs and churches and social organizations rather than through advertising, this aggressive new style of lawyering was unprofessional, distasteful and demeaning to the profession generally. For these traditional lawyers, who not coincidentally represented corporate interests, cause lawyering was not proper lawyering at all, and it had to be stopped. Cause lawyers identified not exclusively with the private interests of clients, but to a great degree with the cause missions of the lawyers themselves. Cause lawyers pursued reform or closure of substandard prisons, jails and mental health facilities; they organized tenants, farm workers, and public assistance recipients; they identified specific laws and

367. *Id.*

worked toward their reform. Like the Chinese die-hard lawyer whose goal is to reform the criminal justice system or the human rights policies of the state, the client was in some ways a vehicle for the reform work of the lawyer. And for both, traditional lawyers and the state itself objected vociferously.

The profession’s impression of this new form of lawyering was accurate. Attorney General Nicholas deB. Katzenbach called for “new techniques, new services, and new forms of intra-professional cooperation to . . . analyze the rights of welfare recipients, of installment purchasers, of people affected by slum housing, crime and despair.”³⁶⁸ “There are signs, too,” he noted, “that a new breed of lawyers is emerging, dedicated to using the law as an instrument of orderly and constructive social change.”³⁶⁹ Charles Hamilton Houston viewed the mission of the Howard Law School, to which he brought respectability and accreditation, as the creation of “social engineers” capable of making real the teachings of sociological jurisprudence that emerged during the first half of the twentieth century.³⁷⁰ It was to be a cause-lawyer school. Neither Katzenbach’s nor Houston’s vision of lawyering meshed with the profession’s status-quo, and it met resistance from the organized bar as a result. Lawyers who were as fully committed to their clients’ cause as were their clients threatened to disrupt the classical image of lawyers as being entirely independent and separate from their clients’ goals.³⁷¹

In China, many of the detained human rights advocates and their lawyers were champions of the peaceful transition theory, under which advocates believed that the moves toward market economy in China would pave the way for non-violent reform of the political system and elimination of the CCP’s strangle-hold on

368. *Id.* at ch. 5.

369. *History of Civil Legal Aid*, NAT’L LEGAL AID & DEFENDER ASS’N, http://www.nlada.org/About/About_HistoryCivil (last visited Aug. 14, 2018) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

370. See Susan D. Carle, *From Buchanan to Button: Legal Ethics and the NAACP (Part II)*, 8 U. CHI. L. SCH. ROUNDTABLE 281, 295–96 (2001) (citing Genna Rae McNeil, *GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS* 84 (Univ. of Pa. Press 1983)) (using the term “social engineers” to describe the “new generation of mostly American civil rights lawyers” who would use the law as the means to attain the goal of improved social policy).

371. See generally GAO ZHISHENG, *supra* note 195.

power.³⁷² This theory invoked fear among CCP leadership, likening it to the color revolutions and the Arab Spring uprisings. The CCP reaction compares with the fears of US corporate and political power structures that cause lawyers' empowerment of workers, tenants, and the poor were essentially subversive of the status quo.

Fierce criticism of poverty lawyers and civil rights activist lawyers came from the highest levels of judicial, government and bar leadership. Ronald Reagan was "openly hostile to legal services lawyers," first as Governor of California and later as President of the United States.³⁷³ Warren Burger, in his pleas for civility,³⁷⁴ gave substantial blame for the impending downfall of the profession to lawyers in political trials, or as Burger called them, the "new litigation."³⁷⁵ He encouraged the legal profession to apply "rigorous powers of discipline" to the misbehaving lawyers by either the judicial or bar enforcement systems.³⁷⁶ Failure to do so, he warned, would allow "the jungle [to] clos[e] in on us."³⁷⁷ Bar leaders and commentators followed the Chief Justice's lead.³⁷⁸

As ABA President, Powell was a vocal condemner of civil disobedience, repeatedly decrying the actions of sit-in

372. See generally *id.*

373. HOUSEMAN & PERLE, *supra* note 7, 29–33.

374. See *Burger Speaks and Kunstler 'Counters'*, N.Y. TIMES 25 (Sept. 18, 1971) (noting that at the dedication of the Georgetown Law School building in 1971, a most striking contrast was framed by Chief Justice Burger's dedication speech and William Kunstler's "counterdedication" speech—Kunstler and others delivered their student-organized counterdedication speeches from the bed of a pick-up truck parked outside the building).

375. Fred P. Graham, *Burger Assails Unruly Lawyers*, N.Y. TIMES 1 (May 19, 1971) (quoting and excerpting from Chief Justice Burger's speech).

376. *Id.* (quoting and excerpting from Chief Justice Burger's speech).

377. *Id.* (quoting and excerpting from Chief Justice Burger's speech).

378. See William A. Stanmeyer, *The New Left and the Old Law*, 55 A.B.A. J. 319 (1969) (echoing Powell's address before the American Association of State Colleges and Universities in 1968). See generally DORSEN & FRIEDMAN, *supra* note 348; see also generally AMERICAN BAR ASSOCIATION SPECIAL COMM. ON EVALUATION OF DISCIPLINARY ENFORCEMENT, AMERICAN BAR ASS'N, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT xvii (1970); William A. 319 (1969).

demonstrators' and Freedom Riders' testing of discriminatory laws regulating racial treatment in the South.³⁷⁹

We have witnessed, over the past decade, the development of a heresy that could threaten the foundations of our system of government under law. This is the doctrine that each person may determine for himself what laws are "just," and that laws and court orders are to be obeyed only so long as this seems 'just' to the individuals or groups concerned In 1965 many people believed that civil disobedience of orders and laws deemed to be unjust is a legitimate means of asserting rights and attaining objectives. Indeed, it is not too much to say that this form of civil disobedience—and its own unique tactics of demonstrations, sit-ins, lie-downs and mob pressure—has become the principal weapon of certain minority and dissident groups But our Constitution and tradition contemplate the orderly assertion of these rights.³⁸⁰

He did not mention states and state bar associations that were resisting the *Brown* mandate, ostensibly because they were of the view that it was unjust.

Professional opposition and harassment of legal aid lawyers proceeded in part on the ground that state bars and powerful institutional interests saw their economic and political interests threatened by the lawsuits and legislative lobbying being done by cause lawyers on behalf of their clients.³⁸¹

State and local bar associations in California, Texas, Florida, Pennsylvania and Washington, D.C. unsuccessfully sued the Office of Economic Opportunity (OEO), claiming it was violating ethical canons.³⁸² They claimed that legal services lawyers were engaged

379. See, e.g., Lewis F. Powell, Jr., President, Am. Bar Ass'n, The President's Annual Address: The State of Legal Profession, Address at the Assembly of the American Bar Association (Aug. 9, 1965), in 51 A.B.A. J. 821, 827 (1965) (calling civil disobedience "a dangerous trend"); see also, e.g., JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 210–11 (Charles Scribner's Sons, NY, 1994).

380. JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 1–3.

381. See Harry P. Stumpf, *Law and Poverty: A Political Perspective*, 3 WIS. L. REV. 694, 708–09 (1968) ("Opposition to federally funded legal services has been voiced on economic, professional, and ideological grounds. To the marginal (often solo) private practitioner, legal services may represent a threat to his livelihood. To the well-established lawyer the program is often seen as socialistic and unnecessary.").

382. See EARL JOHNSON, JR., JUSTICE AND REFORM: THE FORMATIVE YEARS OF

in unauthorized practice and were unlawfully soliciting clients.³⁸³ In doing so, they were largely reacting to the new, aggressive style of lawyering. These lawyers did not wait in their offices for clients to come; instead they sought clients to pursue the lawyers' causes. These lawyers did not pursue ordinary contract, commercial, tort and property claims. Instead, they sought social reform. They worked toward closing inhumane prisons and mental institutions, they organized tenants and farm workers, they worked to reform public assistance laws, and establish enhanced rights for criminal defendants. All of this drew the ire of the established power structures, both corporate and legal. In this way, US civil rights lawyers do resemble Chinese die-hard and human rights lawyers: both groups broke ranks with the traditional lawyering methods and practices of their predecessors.

Perhaps the most vociferous fight between legal aid lawyers and a coalition of business and government interests was spawned by the California Rural Legal Assistance (CRLA) organization and representation of farm workers.³⁸⁴ CRLA moved in a variety of ways to increase wages for farm workers and demand government services for them.³⁸⁵ These lawsuits drew the ire and outrage of then Governor Ronald Reagan and Senator George Murphy, speaking and acting on behalf of the California agribusiness

THE OEO LEGAL SERVICES PROGRAM 91 (Russell Sage Found. 1978) (summarizing various conflict-producing combinations of political and bar interests); *see also* Troutman v. 1969); AUERBACH, *supra* note 324, at 273; Billie Bethel & Robert Kirk Walker, *Et Tu, Brute!*, 1965 TENN. S.B.A.J. 11 (1965), *quoted in* A. Kenneth Pye & Raymond F. Garraty, Jr., *The Involvement of the Bar in the War Against Poverty*, 41 NOTRE DAME L. REV. 860, 866–69 (1966) (quoting “Et Tu, Brute!” depicting the OEO Legal Services Program as affecting “the destruction of the free, vital and independent protector of human rights—the creator of the system—the legal profession”). *See generally* Troutman v. Shriver, 417 F.2d 171 (5th Cir. 1969).

383. *See* JOHNSON, *supra* note 382.

384. *See* HOUSEMAN & PERLE, *supra* note 7, at 15–16 (describing the CRLA as a “particularly aggressive legal services program that had gained notoriety for its successful efforts to stop certain draconian welfare and Medicaid policies in California and for its advocacy on behalf of farmworkers against agricultural employers”).

385. *See id.* (“The anti-CRLA testimony came from the California Farm Bureau, an organization of agricultural employers, which was frequently at odds with the CRLA and the farmworkers it represented.”).

industry.³⁸⁶ At the time, state governors had the power to veto funding for their state’s federally funded legal aid programs, but that veto could be over-ridden by the OEO Director.³⁸⁷ Only once was a California governor’s veto sustained: In 1970, Governor Ronald Reagan vetoed the funding and the veto was sustained by then-OEO Director Donald Rumsfeld.³⁸⁸ Unsuccessful efforts by Murphy would have placed full control of legal services programs in the hands of governors, localizing control to suppress locally unpopular legal aid activities, and would have prohibited legal aid suits against the government.³⁸⁹ The latter effort was a part of a national affront to the successes of legal aid lawyers in various government-defendant matters, especially in the arena of welfare reform.³⁹⁰

In some instances, courts refused to certify legal aid organizations whose community organizing went beyond traditional law service bounds.³⁹¹ A New York Appellate Division objected to certifying more than one legal services provider for a particular county, for fear of their “unseemly[] competition” for representation of non-paying clients, and out of worry that the

386. AUERBACH, *supra* note 324, at 274–75; Fred J. Hiestand, *The Politics of Poverty Law, in WITH JUSTICE FOR SOME: AN INDICTMENT OF THE LAW 160, 160–89* (Bruce Wasserstein & Mark J. Green eds., 1970); see John D. Robb, *Controversial Cases and the Legal Services Program*, 56 A.B.A.J. 329, 329 (1970); see also AUERBACH, *supra* note 328, at 274–75 (noting that Senator Murphy’s remarks indicated the intent to prevent legal services programs from bringing cases against governmental agencies and officials and from engaging in test cases).

387. See HOUSEMAN & PERLE, *supra* note 7, at 4.

388. See Hiestand, *supra* note 386, at 182.

389. See Robb, *supra* note 386, at 329–30 (noting that the Senate did not pass a 1967 version of the Murphy amendment that would have precluded suits against government agencies, and that the 1969 version was “a reaction at the national level that surfaced in a number of communities”).

390. See, e.g., *King v. Smith*, 392 U.S. 309, 333 (1968) (concluding that Alabama breached its federally imposed obligation to furnish federal assistance to families with dependent children by preventing otherwise eligible children from aid if the mother cohabits with a man not obligated to support the children); see also *Shapiro v. Thompson*, 394 U.S. 618, 637–42 (1969) (deciding that statutory prohibitions of welfare benefits to residents of less than a year is unconstitutional).

391. See, e.g., *In re Cmty. Action for Legal Servs., Inc.*, 274 N.Y.S.2d 779, 786 (App. Div. 1966).

court could not maintain minimum standards of conduct.³⁹² The court also expressed concern about the applicants' mixing of community action goals and legal service.³⁹³

Along with labor union lawyers, federally funded legal aid lawyers were a significant part of the new style of lawyering, cause or group lawyering, that did not go unchallenged by the organized bar and, acting through the bar, powerful economic interests. The standard one-client- at-a-time model of lawyering did not suit the goals of legal aid lawyers and union lawyers. Their strength lay in collective action that allowed a marshaling of modest resources in pursuit of a cause. The standard bar obstruction first took the form of unauthorized practice restrictions and later advertising and solicitation rules.

Having failed in its efforts to restrict the activities of school desegregation lawyers,³⁹⁴ the Virginia State Bar worked to stifle opportunities for labor unions to provide counsel to their members.³⁹⁵ And the Illinois Bar initially prevented the United Mine Workers from hiring inside, house counsel.³⁹⁶ Each of these efforts was rejected by a Supreme Court whose decisions fostered the accumulation of power through collective legal action. "Collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment."³⁹⁷ The Court's rejection of the bar's insistence on the traditional one lawyer-one client notion of lawyering laid the legal

392. *See id.* (expressing concern over the court and agencies being able to effectively supervise multiple legal assistance corporations in one area).

393. *See id.* (expressing concern over the court and agencies being able to effectively supervise multiple legal assistance corporations in one area).

394. *See* NAACP v. Button, 371 U.S. 415, 428–29 (1963) (holding that the activities of the NAACP and its legal staff are "modes of expression and association protected by the First and Fourteenth Amendments which Virginia may not prohibit . . . as improper solicitation of legal business . . .").

395. *See* Bhd. of R.R. Trainmen v. Virginia, 377 U.S. 1, 8 (1964) (holding that the First and Fourteenth Amendments protect the rights of labor organization members "to maintain and carry out their plan for advising workers who are injured to obtain legal advice and for recommending specific lawyers").

396. *See* UMW v. Ill. State Bar Ass'n, 389 U.S. 217, 218 (1967) (noting that the Bar had claimed that when UMW hired inside, house counsel, this employment amounted to the unauthorized practice of law).

397. *United Transp. Union v. State Bar of Mich.*, 401 U.S. 576, 585 (1971).

groundwork for legal aid lawyers' representation of causes, groups, and social issues, rather than individual clients. This sort of representation presented the shocking circumstance for powerful economic interests and government agencies, not used to having to deal with poor people on so nearly an equal footing. As the lawyer in charge of OEO programs in California put it, "What we have created in CRLA [California Rural Legal Assistance] is an economic leverage equal to that of large corporations. Clearly that should not be."³⁹⁸ The mere concept of such power residing in poor people and their lawyers seemed foreign, dangerous and subversive to the legal profession.

Lawyers representing causes could not simply wait in their offices for the causes to arrive in the personage of an eligible client. While Attorney General, Nicholas Katzenbach tried to deter bar application of advertising and solicitation restrictions against poverty lawyers when he announced that lawyers should "go out to the poor rather than wait . . . to be reduced to inaction by ethical prohibitions is to let the canons . . . serve the cause of injustice."³⁹⁹ Katzenbach was an officer of the federal executive branch, which along with the federal courts, supported the cause lawyer.⁴⁰⁰ The Chinese Die-Hard lawyer has no such champion in the Chinese state apparatus.

An uneasy measure of conditional cooperation regarding federally-funded legal aid eventually emerged from the organized bar at the national level.⁴⁰¹ Even as the ABA began to co-operate

398. AUERBACH, *supra* note 324, at 274.

399. Nicholas deB. Katzenbach, Att'y Gen., U.S. Dep't of Justice, Address at the National Conference on Law and Poverty 3 (June 24, 1965).

400. See Michal R. Belknap, *Civil Rights During the Kennedy Administration*, 23 Law & Soc'y Rev. 921, 921 (1989) (stating that the Kennedy administration laid the ground work for the Johnson administrations ultimate passage of the Civil Rights Act of 1964 and the Voting Rights Act of 1965); see also Steven J. Simmons, *Earl Warren, the Warren Court and Civil Liberties*, 2 PEPP. L. REV. 1, 3 (1975) (stating that protection of civil liberties, particularly for African Americans was a common thread of the Warren Court).

401. See HOUSEMAN & PERLE, *supra* note 7 (discussing that in later years and controversies, the ABA grew to be almost unerringly supportive of legal services programs, fighting against, for example, President Reagan's proposal to zero-fund the Legal Services Corporation in 1980.); see also *id.* at 30 ("[B]eginning in the early 1980s, a significant effort was made by the ABA and LSC to involve private

with federally funded legal services, its best and most able spokespersons continued to put an unduly positive face on the organization's prior record of opposing meaningful legal services for the poor. William McCalpin, who was truly instrumental in shaping the ABA's more enlightened position on legal services, prefaced his strong advocacy for support of legal services by imagining an ABA previously unaware of the legal needs of the poor: "[R]ecently we have begun to be aware of the possible legal needs of 40,000,000 disadvantaged citizens . . ." ⁴⁰² The prior month's issue of the same ABA Journal featured an article by Marvin Frankel that began with a statement more reflective of reality outside the walls erected by the ABA: "It is no new discovery that the promise of equal justice is a hollow one for people too poor to retain counsel." ⁴⁰³

The ABA supported the new federal legal services program, provided that those services were "performed by lawyers in accordance with ethical standards of the legal profession." ⁴⁰⁴ Legal aid lawyers, like any lawyers in other fields, were expected to comply with normal ethical rules. However, courts had not yet reformed the rules regarding solicitation, ⁴⁰⁵ and consequently legal

attorneys in the delivery of civil legal services. While the organized bar was generally supportive of LSC, certain segments of the legal profession remained unfamiliar with legal services practice, felt threatened by legal services advocacy, and, in some instances, were hostile to LSC's mission.").

402. F. William McCalpin, *The Bar Faces Forward*, 51 A.B.A.J. 548, 550 (1965).

403. Marvin E. Frankel, *Experiments in Serving the Indigent*, 51 A.B.A.J. 460, 460 (1965) (hoping against some of the early evidence that the ABA would allow new, OEO funded legal services offices to be established rather than merely pressing for additional funding for the traditional legal aids under the supervision of NLADA); interview by Olavi Maru with F. William McCalpin, Aug. 22, 1975, <http://www.abf-sociolegal.org/oralhistory/mccalpin.html>, Tape MCA-1-B (noting that ironically, some years later in an oral history of his ABA involvement, McCalpin himself described the unfortunate, introspection practiced by the ABA in dealing with difficult issues) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

404. McCalpin, *supra* note 402, at 551 (quoting Richard Pious, *Congress, the Organized Bar, and the Legal Services Program*, 1972 WIS. L. REV. 418, 420–21 (1972)) (discussing the political background for the ABA House of Delegates Resolution).

405. See *In re Primus*, 436 U.S. 412, 423–25 (1978) (stating that the

aid and cause lawyers engaged in community organizing were subject to continued harassment by bar authorities for direct solicitation of clients.⁴⁰⁶

VII. Concluding Thoughts

Fifty to seventy years later, some wounds of the war on civil rights lawyers remain, but such lawyering is no longer so far outside the mainstream. Although this reality continues to distress some with long memories of what they consider more civil times, there is no doubt that the more aggressive style of lawyering created by the cause lawyers of the 1960s and 1970s is a part of today’s American legal profession.

How will Chinese lawyering look in fifty to seventy years? No one can be sure. Nonetheless, the reaction to the July 2015 round-up and detention of rights lawyers offers some clues and some parallels with the experience of American civil rights lawyers.

This round-up and detention significantly increased the tension between the state and the activist lawyers, and so far, despite serious risk to themselves, the lawyers are not backing down.⁴⁰⁷ Despite being warned against continued aggressive activity, current trends indicate that the state pressure appears to be having the opposite effect, with more lawyers answering the call

solicitation of clients by non-profit organizations, such as the NAACP, for political and associational purposes enjoyed broad First Amendment protections, which could only be regulated with narrow specificity); *see also* MODEL RULES OF PROF’L CONDUCT 7.2 (AM. BAR ASS’N 2016) (proposing a rule regarding lawyer’s ability to solicit clients).

406. *See* James Moliterno, *Politically Motivated Bar Discipline*, 83 WASH. U. L.Q. 725, 742–45 (2005) (detailing Southern state bar efforts to deter civil rights litigation).

407. *See* Andrew Jacobs and Chris Buckley, *China Targeting Rights Lawyers in a Crackdown*, N.Y. TIMES (July 22, 2015), <http://www.nytimes.com/2015/07/23/world/asia/china-crackdown-human-rights-lawyers.html> (“Despite the intense police pressure, and the previous imprisonment of lawyers . . . dozens have organized petitions denouncing the detentions and volunteered to defend those held by the police.”) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

of staunch criminal defense and human rights lawyering.⁴⁰⁸ Despite the intense and politically repressive environment, more lawyers are joining the ranks of the die-hard segment.⁴⁰⁹

Yu Wengsheng, a commercial lawyer in Hong Kong, is typical of these newly minted activists. When Yu's client was arrested for involvement in the annual Hong Kong turn-back day protests—demanding more self-government and democratic selection processes in Hong Kong—Yu attempted to visit his client in detention.⁴¹⁰ Yu felt outraged when he was prohibited from seeing his client, given his long background of ordinary commercial work and the absence of any previous criminal defense or activist work.⁴¹¹ Yu organized his own protests outside the jail on behalf of his client, and was promptly arrested himself.⁴¹² Now, Yu says, “I used to think being a lawyer was just a tool to make money But now I believe we have a greater mission to change a broken system. The crackdown is fierce, but we rights lawyers will fight back.”⁴¹³

Indeed, as Yu said, “the crackdown is fierce.”⁴¹⁴ “This mass crackdown on lawyers is the broadest in terms of location, and clearly coordinated because of the timing of the initial crackdown,” said Sharon Hom, executive director of Human Rights in China.⁴¹⁵

408. See Abby Seiff, *China's Latest Crackdown on Lawyers is Unprecedented, Human Rights Monitors Say*, A.B.A.J. (Feb. 1, 2016, 12:10 AM), http://www.abajournal.com/magazine/article/chinas_latest_crackdown_on_lawyers_is_unprecedented_human_rights_monitors/news/article/do_you_volunteer_on_a_regular_basis/?utm_campaign=sidebar (“[t]here was a broad expectation that it would have a very, very bad chilling effect . . . [w]hat happened was the movement grew. More and more lawyers were joining these groups . . . holding meetings . . . and taking on cases together with more experienced human rights lawyers.”) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

409. See *id.* (“A decade ago, there were a few dozen rights lawyers there. Today, there are hundreds.”).

410. Jacobs & Buckley, *supra* note 407.

411. *Id.*

412. *Id.*

413. *Id.*

414. *Id.*

415. Seiff, *supra* note 408.

“It included more than 23 provinces. It was a combination of detentions, disappearances and targeting family members, together with a very clear propaganda smear campaign in the *People’s Daily*. This is clearly a mass attack on lawyers that’s misusing legal process, using propaganda and then bringing back the collective punishment of China’s past by targeting the families.”⁴¹⁶

The attack consists not only of the 2015 round-up of more than 200 lawyers, law firm staff, human rights activists, and family members, two of whom probably remain in detention in 2018,⁴¹⁷ but of a state media blitz smearing the detained lawyers.⁴¹⁸ State media outlets such as Xinhua and others have painted the rights lawyers in terms reminiscent of the complaints about the conduct of American civil rights lawyers.⁴¹⁹ The state media reports the

416. *Id.*

417. “709 Crackdown” Latest Data and Development of Cases as of 1800, CHINA HUM. RTS. L. CONCERN GROUP (July 7, 2018), <http://www.chrlawyers.hk/en/content/%E3%80%90%E2%80%9C709-crackdown%E2%80%9D%E3%80%91-latest-data-and-development-cases-1800-7-july-2018> (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

418. Anthony Kuhn, *Chinese Authorities Detain Nearly 150 Human Rights Lawyers*, NPR, (July 14, 2015), <http://www.npr.org/2015/07/14/422952236/chinese-authorities-detain-nearly-150-human-rights-lawyers> (on file with the Washington & Lee Journal of Civil Rights & Social Justice); Chun Han Wong, *Human-Rights Lawyers Detained in China Confess*, State Media Reports, WALL ST. J. (July 19, 2015), <http://www.wsj.com/articles/human-rights-lawyers-detained-in-china-confess-state-media-reports-1437307686> (on file with the Washington & Lee Journal of Civil Rights & Social Justice); Andrew Jacobs & Chris Buckley, *China Targeting Rights Lawyers in a Crackdown*, N.Y. TIMES (July 22, 2015), <http://www.nytimes.com/2015/07/23/world/asia/china-crackdown-human-rights-lawyers.html> (on file with the Washington & Lee Journal of Civil Rights & Social Justice); China Cracks Down on Lawyers and Activists, ALJAZEERA (July 19, 2015), <http://www.aljazeera.com/news/2015/07/china-crackdown-lawyers-activists-150719112829794.html> (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

419. See *Detained Chinese Lawyers Admit Guilt in Disorder Charges: State Media*, REUTERS (July 24, 2015), <https://www.businessinsider.com/r-detained-chinese-lawyers-admit-guilt-in-disorder-charges-state-media-2015-7> (“The People’s Daily accused the group connected with the Fengrui firm of orchestrating protests outside courts to help secure favorable verdicts for clients The Xinhua state news agency, in a separate report on Sunday, described such

accusations against the lawyers as “stirring up” trouble,⁴²⁰ and of supporting protests on behalf of the lawyers’ clients, echoing Southern states use of a barratry and champerty statutes to deter American civil rights lawyer from stirring up litigation, and of participating in civil rights protests to aid their clients.⁴²¹ The Chinese lawyers stand accused of “seriously interfering with normal judicial activities and disrupting social order.”⁴²² The likeness to the accusations against US civil rights lawyers is striking.

A further sign that Chinese authorities may actually be creating more cause lawyers rather than deterring them is a petition movement begun by a group of prominent lawyers in response to a 2015 crackdown that led to the detention of 200 lawyers and activists.⁴²³ The petition denounces the “intimidating harassment” of authorities against lawyers.⁴²⁴ The petition calls on the Chinese government to “respect the constitutional rights” of the detained lawyers, as well as an end to the raids on law offices and a fair and transparent judicial process for the detained lawyers.⁴²⁵ The petition, which was signed by over 1,000 people, states that “[o]nly when lawyers’ professional duty and rights are respected can the rule of law as understood in the civilised world take root in Mainland China,”⁴²⁶ Within China, only in Hong Kong could such a petition drive take root and grow. But for all of the economic benefits that have inured to China from the return of

behavior as ‘very close to blackmailing.’”) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

420. *Id.*

421. See Wayne Rhine, *Barratry—A Comparative Analysis of Recent Barratry Statutes*, 14 DEPAUL L. REV. 146, 147 (1964) (describing Southern states efforts to strengthen their barratry statutes as a legal weapon against civil right litigation).

422. *Detained Chinese Lawyers Admit Guilt in Disorder Charges: State Media*, *supra* note 419.

423. See *China Cracks Down on Lawyers and Activists*, ALJAZEERA (July 19, 2015), <http://www.aljazeera.com/news/2015/07/china-crackdown-lawyers-activists-150719112829794.html> (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

424. *See id.*

425. *Id.*

426. *Id.*

Hong Kong, the social upheaval wrought by the island's long-British-ruled inhabitants may cost the Party dearly.

The American social upheaval of the 1960s, topped off by Watergate in the early 1970s, produces a generation of lawyers who were far more devoted to social justice than their predecessors.⁴²⁷ Along with Ford Foundation funding,⁴²⁸ the greatest impetus for the development of law school clinical programs focused on social justice was student demand.⁴²⁹ The clinical legal education movement has begun in China during the last decade, and appears connected with heightened levels of student interest in social justice.⁴³⁰ Like their American cause lawyer counterparts of fifty to seventy years ago, the new breed of die-hard lawyer may be marking a way forward for their legal profession.

427. See Laura G. Holland, *Invading the Ivory Tower: The History of Clinical Legal Education at Yale Law School*, 49 J. LEGAL EDUC. 504, 514 (1999) ("The social and political movements of the 1960s called lawyers to become activist reformers. Law students heard the same call and sought out work that would make their theoretical study of law relevant to the social struggle that was going on outside the walls of the law school.").

428. See Stephen Wizner, *The Law School Clinic: Legal Education in the Interests of Justice*, 70 FORDHAM L. REV. 1929, 1933 (2002) ("But it was not until the late 1960s that clinical legal education received financial support and found an effective advocate in the person of William Pincus, a Vice-President of the Ford Foundation who was responsible for the Foundation's anti-poverty initiatives.").

429. See Ralph S. Tyler & Robert S. Catz, *The Contradictions of Clinical Legal Education*, 29 CLEV. ST. L. REV. 693, 695 (1980) ("Not until the mid-1960's, in response then to societal pressures, student demand, and educational commitment, was the innovation of Langdell's case method extended from the study of decided cases to student work on actual and undecided cases.").

430. See Yearly Reports of Secretary Office of Committee of Chinese Clinical Legal Education, <http://www.cliniclaw.cn>. (on file with the Washington & Lee Journal of Civil Rights & Social Justice). A Chinese/U.S. Program in Experiential Legal Teaching has been contributing much to the development and promotion of clinical legal education in China. This program is initiated and led by Brian Landsberg, Distinguished Professor and Scholar of Pacific McGeorge School of Law. See Brian Landsberg, *Walking on Two Legs in Chinese Law Schools: A Chinese/U.S. Program in Experiential Legal Education*, 16 INT'L J. CLINICAL LEGAL EDUC. 38 (2011); see also Liu Xiaobing, *Recent Reform on the Legal Ethics Test in Chinese Legal Profession Admission System and the Challenges It Faces* (forthcoming).

In two remarkable ways, the Die-Hard lawyer and the U.S. civil rights lawyer are cut from the same cloth. First, both groups have been persecuted for challenging deeply-entrenched social order and power structures. And second, both groups have offended traditional professional norms of behavior, engendering the approbation from professional and state officials.

The current mood of the possibility of legal change by cause lawyer is grim. Although there has surely been an increase in the number of human rights-oriented lawyers in China since 2012, and even since the 709 Crackdown, there is evidence that the ramped-up suppression and harassment by the state is wearing down the resolve of long-time activist lawyers. On a recent proposal to limit the number of times a non-Beijing licensed car may enter Beijing,⁴³¹ a lawyer commented on his social media that, “if this policy came out 9 years ago, I might organize meetings, write ‘public interest petitions,’ and call for constitutionality and legality review; 6 years ago, I might write articles, receive interviews, and propose suggestions; 3 years ago, I might grumble a little; now, I only want to watch them silently.”⁴³²

Despite these striking similarities, the two groups exist in powerfully different legal environments. By law, the Chinese lawyer’s number one professional duty is to the state, while the US lawyer’s independence from state influence is legendary.⁴³³ Further, for the US civil rights lawyer, the highest authority, often belatedly, supported the lawyer’s reform work.⁴³⁴ The federal

431. See Owen Guo, *Want to Drive in Beijing? Good Luck in the License Plate Lottery*, N.Y. TIMES (Jul. 28, 2016), <https://www.nytimes.com/2016/07/29/world/asia/china-beijing-traffic-pollution.html> (detailing the difficulty of Chinese drivers with out-of-town license plates in getting a Beijing license plate through the city’s lottery system) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

432. Confidential post to listserv on file with author.

433. See Leland Benton, *From Socialist Ethics to Legal Ethics: Legal Ethics, Professional Conduct, and the Chinese Legal Profession*, 28(a) PAC. BASIN L.J. 210, 212 (2011) (“The Constitution, whose emanations permeate the legal system and which all lawyers are bound to uphold, lays heavy emphasis on the obligations of individual citizens to the state and the Party.”).

434. See Belknap, *supra* note 400 (describing federal government’s role in advancing civil rights during the Kennedy administration).

courts and to some extent the executive branch stepped in at crucial junctures to thwart the repressive state and local regimes. There will be no such support from higher authority in China.

In the end, the spirit of reform and justice-seeking connects the US civil rights lawyer with the Chinese Die-Hard lawyer. But the surrounding legal structures make the mission of the of the Die-Hard lawyer far more daunting than that of his US counterpart.⁴³⁵ The challenges faced by US civil rights lawyers were stiff. And without question, the US civil rights struggle persists today and many injustices remain. Indeed, during the presidency of Donald Trump, civil rights are under renewed and vigorous attacks.⁴³⁶ Lawyers, in the spirit of their 1940s–70s forerunners, have fought back and played significant roles in resisting these renewed attacks. Importantly, because of the work of their forerunners, US lawyers today can use the aggressive methods and represent causes with little or no professional or legal consequences. As difficult and at times seemingly hopeless was the US civil rights lawyer’s mission, and as much as that mission continues some seventy years after it began in earnest, the mission of the Chinese Die-Hard lawyer is infinitely more difficult.⁴³⁷

435. *See id.* (“The Chinese legal system is often characterized by the strong influence of the Communist Party and informality in both the law and legal process.”).

436. *See Trump Administration Civil and Human Rights Rollbacks*, LEADERSHIP CONF. ON CIV. AND HUM. RTS., <https://civilrights.org/trump-rollbacks/> (last visited September 18, 2018) (listing civil and human right rollbacks by the Trump Administration) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

437. Although this article is a joint effort of the two authors, Prof. Lan does not agree with the characterization of those Chinese rights lawyers as “die-hard” lawyers, nor does he contribute to drafting the related part.