

# Leniency in Chinese Criminal Law? Everyday Justice in Henan

Benjamin L. Liebman\*

*This Article examines one year of publicly available criminal judgments from a basic-level rural county court and an intermediate court in Henan Province in order to better understand trends in routine criminal adjudication in China. I present an account of ordinary criminal justice in China that is both familiar and striking: a system that treats serious crimes, in particular those affecting State interests, harshly, while at the same time acting leniently in routine cases. Most significantly, examination of more than five hundred court decisions shows the vital role that settlement plays in criminal cases in China today. Defendants who agree to compensate their victims receive strikingly lighter sentences than those who do not. Likewise, settlement plays a role in resolving even serious crimes, at times appearing to make the difference between life and death for criminal defendants. My account of ordinary cases in China contrasts with most Western accounts of the Chinese criminal justice system, which focus on sensational cases of injustice and the prevalence of harsh punishments.*

*The evidence I present provides insight into the roles being played by the Chinese criminal justice system and the functions of courts in that system. This Article also provides empirical evidence that contributes to debates on a range of other issues, including the relationship of formal law to community norms in Chinese criminal justice, the roles of witnesses and lawyers, the function of appellate review, and how the system confronts and handles a range of high-profile topics. My findings also contribute to literature on courts in authoritarian regimes and the evolution of authoritarian*

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\* Robert L. Lieff Professor of Law and Director, Center for Chinese Legal Studies, Columbia Law School. BLiebm@law.columbia.edu.

*transparency. This Article provides a base for discussing the future of empirical research on Chinese court judgments, demonstrating that there is much to learn from the volume of cases that have recently become publicly available in China.*

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## INTRODUCTION

English-language scholarship on the Chinese criminal justice system largely focuses on major cases and harsh punishments: "strike hard" campaigns, capital cases, torture, and sensational cases of wrongful convictions. With few exceptions, the term "leniency" rarely factors into Western accounts of criminal justice in China. When it does, it is principally in the discussion of national policies embracing the combination of leniency and harsh punishment, *kuanyan xiangji*, or leniency for those who confess, rather than empirical study of court

practices.<sup>1</sup> In contrast, this Article shows that leniency is a key characteristic of everyday Chinese criminal justice, particularly in rural areas.

This Article examines one year of publicly available criminal judgments from a basic-level county court and an intermediate court in Henan Province in order to better understand criminal justice in rural China and in small towns and mid-sized cities of the country. I supplement my analysis of cases with interviews of judges, academics, and lawyers in Henan. I have two primary goals. The first is to develop an understanding of trends in basic-level criminal adjudication in China. I aim to paint a picture of what ordinary crime and criminal justice looks like in one county and one municipality<sup>2</sup> in China. What emerges is an account of ordinary criminal justice in China that is both familiar and striking: a system that treats serious crimes, in particular those affecting State interests, harshly, while at the same time practicing leniency in more routine cases. Most significantly, examination of more than five hundred court decisions shows the vital role that settlement plays in Chinese criminal cases today. Defendants who agree to compensate their victims receive strikingly lighter sentences than those who do not. Whether or not a settlement has been reached is far more important to the resolution of a case than more traditional legal factors, including legal arguments and evidence presented. Although the importance of settlement has been noted in prior Chinese language scholarship, no prior work has examined the practice through the study of court dockets or a large volume of case decisions.<sup>3</sup> My dataset also allows me to examine the role of intermediate courts in trying major crimes and in reviewing appeals from lower courts.<sup>4</sup> Again, the findings are surprising. Appellate courts are far more

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1. See, e.g., Susan Trevaskes, *The Death Penalty in China Today: Kill Fewer, Kill Cautiously*, 48 ASIAN SURV. 393, 399 (2008) (describing the creation of the “balancing leniency and severity” policy).

2. In China the municipality, or *shi*, is the primary subprovincial governance unit. A municipality generally includes both extensive rural areas and county towns, administered by county governments, and urban areas, administered by district governments.

3. The most detailed and important prior work in English on the Chinese criminal justice system looks at a selection of cases from a range of different courts but does not examine every case from any individual jurisdiction. See MIKE MCCONVILLE, CRIMINAL JUSTICE IN CHINA: AN EMPIRICAL INQUIRY 40 (2011).

4. China’s court system is divided into four tiers: basic courts at the county (in rural areas) or district (in urban areas) level, intermediate courts at the municipality level, provincial high courts, and the Supreme People’s Court. The vast majority of cases are tried in basic-level courts, with a right to a single appeal to an intermediate court. But serious cases, including criminal cases in which a defendant faces a potential death sentence or life imprisonment, are tried in intermediate courts with a single appeal to the provincial high court. The State is represented by the procuratorate in criminal cases. The procuratorate may appeal verdicts in criminal cases regardless of the outcome in the first-instance court; there is no bar to the procuratorate appealing nonguilty verdicts or to arguing that a lower court was too lenient toward a defendant. Decisions become final after a decision on appeal is issued (or after the time for an appeal has expired). But courts may also decide to retry cases at a later date through retrial (*zaishen*) procedures. Courts also must retry a case if requested to do so by the procuratorate. Litigants may request a rehearing within two years of a final decision. There is no time limit on rehearings initiated by the courts or procuratorates. In practice this means

aggressive in policing lower-court judgments than is commonly assumed. Likewise, settlement plays a role in resolving even serious crimes, at times appearing to make the difference between life and death for criminal defendants.

My second goal is methodological. Until recently, Chinese criminal judgments were either difficult or impossible to obtain, especially for non-Chinese researchers. Those who did obtain such opinions largely relied on friends and colleagues with connections to local courts. Within the span of just a few years this situation has changed dramatically: in Henan Province alone, tens of thousands of criminal judgments are now available online. In 2013, China's Supreme People's Court (SPC) called on courts nationwide to follow the Henan example and place most judgments online.<sup>5</sup> The reasons behind this sudden embrace of transparency are complex (and certainly do not include facilitating research by scholars, Chinese or foreign). Nevertheless, the widespread availability of large volumes of criminal judgments raises the question of what can actually be learned from reading court opinions in China. Chinese and Western scholars have generally assumed Chinese criminal judgments tell us very little about either the facts or reasoning behind a case. To be sure, much is missing from these decisions. The task of reading contemporary criminal judgments is at times akin to reading Qing Dynasty cases: readers are left to speculate about the facts of the case and behind the scenes interactions among the courts, the procuratorate, and the police. Cases are written in a standard format and generally emphasize outcomes, not analysis. Certain cases, most notably death sentences, remain unavailable and we know little about those that are not made public. Nevertheless, this Article demonstrates there is much to learn from publicly available cases, including about the role of settlement, the types of sentences imposed, the legal arguments made, and the roles of lawyers. Even relatively minor and simple case decisions generally provide information about the defendant, the crime charged, alleged facts, evidence, lawyer and procuratorate attendance and arguments, and outcome, including fines and sentences. This Article is the first step toward exploring what scholars can learn from the huge volume of material now publicly available.

The evidence I present provides insight into the roles being played by the Chinese criminal justice system, the functions courts play in that system, and the meaning of leniency in Chinese criminal practice. My findings also offer a baseline for evaluating future changes to the Chinese criminal justice system, in particular the effect of the 2012 revisions to the Criminal Procedure Law,<sup>6</sup> the

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that after the two-year period has run litigants seeking to reopen cases protest or petition to courts or procuratorates in an attempt to convince them to initiate rehearings.

5. *Zuigao Renmin Fayuan Guanyu Renmin Fayuan Zai Hulianwang Gongbu Caipan Wenshu De Guiding* (最高人民法院关于人民法院在互联网公布裁判文书的规定) [Provisions of the Supreme People's Court on the Issuance of Judgments on the Internet by the People's Courts] (promulgated by Sup. People's Ct., Nov. 21, 2013, effective Jan. 1, 2014), available at <http://www.chinacourt.org/law/detail/2013/11/id/147242.shtml> (China).

6. *Zhonghua Renmin Gongheguo Xingshi Susong Fa* (中华人民共和国刑事诉讼法) [Criminal

most important development in Chinese criminal justice in two decades, as well as the effect of major personnel shifts in the wake of the 2012 leadership transition.<sup>7</sup> The evidence I present also adds to debates on a range of other issues, such as the relationship of formal law to community norms in Chinese criminal justice, the role of witnesses and lawyers, and how the criminal justice system confronts and handles a range of controversial topics, including land disputes, corruption, protests, and disputes within families.

This Article also contributes to the literature on the evolution of China's courts and courts in authoritarian regimes. The emphasis that courts, procuratorates, and police place on settling cases reflects trends in the Chinese legal system away from formal adjudication in favor of mediated outcomes. Carl Minzner has described such developments as a "turn against law."<sup>8</sup> I have written of China's "return to populist legality."<sup>9</sup> In criminal cases, concerns about stability often lead to surprisingly lenient outcomes, at least in routine cases. As in high-profile civil disputes—most notably medical, labor, and land cases—extreme State emphasis on social stability is leading courts to innovate in routine cases. Although judges generally claim they are lenient only where formally permitted by law, some cases represent quite flexible interpretations of existing law. Courts are most concerned with defending themselves from criticism, minimizing conflicts with other State actors, and reducing the risk of petitions and protest.<sup>10</sup> Such concerns explain both emphasis on settlements and deference to procuratorates. Evidence from Henan also contributes to literature on the role of transparency in the Chinese legal and political system and in authoritarian systems more generally. Henan's experiment with judicial transparency is an example of the ways in which increased public exposure may be used primarily to serve the interests of centralized State oversight and control.

In Part I of this Article I discuss Henan's efforts to make court decisions publicly available. In Part II, I present my empirical findings based on examination of one year of publicly available criminal division decisions from

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Procedure Law] (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 14, 2012), *available at* [http://www.gov.cn/flfg/2012-03/17/content\\_2094354.htm](http://www.gov.cn/flfg/2012-03/17/content_2094354.htm) (amending Zhonghua Renmin Gongheguo Xingshi Susong Fa (中华人民共和国刑事诉讼法) [Criminal Procedure Law] (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 17, 1996, effective Jul. 1, 1997), *available at* <http://www.oecd.org/site/adboecdanti-corruptioninitiative/46814279.pdf>) [hereinafter Criminal Procedure Law]. I refer to the 1996 version of the law as the "1996 Criminal Procedure Law" and to the 2012 version of the law as the "2012 Criminal Procedure Law."

7. The leadership transition included the installation of new leaders of the courts, procuratorates, and the Communist Party's Political Legal Committee, which oversees the entire legal system.

8. Carl Minzner, *China's Turn Against Law*, 59 AM. J. COMP. L. 935, 937 (2011).

9. Benjamin Liebman, *A Return to Populist Legality: Historical Legacies and Legal Reform, in* MAO'S INVISIBLE HAND 165 (Elizabeth Perry & Sebastian Heilmann eds., 2011).

10. See generally Benjamin Liebman, *A Populist Threat to China's Courts? in* CHINESE JUSTICE: CIVIL DISPUTE RESOLUTION IN CONTEMPORARY CHINA 269 (Margaret Y. K. Woo & Mary E. Gallagher eds., 2011).

one county court and one intermediate court. In Part III, I discuss the methodological significance of the large amount of data only recently made available in China, the implications of my empirical findings for literature on the Chinese criminal justice system, and on courts and transparency in authoritarian regimes.

## I.

### BACKGROUND: HENAN'S PUSH TOWARD "JUDICIAL TRANSPARENCY"

Henan Province is home to roughly 100 million people. Located in central China and regarded as the historical birthplace of Chinese civilization, Henan has lagged behind many eastern and central provinces economically: its per capita GDP ranks twenty-first out of thirty-three provincial units in China (not including Taiwan).<sup>11</sup> Henan is divided into seventeen municipalities, each administering populations that range from 1.5 to 8.5 million people. With 61 million classified as rural, Henan is home to the largest rural population in China.<sup>12</sup>

Beginning in mid-2009, the Henan High People's Court ordered all courts in the province to begin putting most decisions online.<sup>13</sup> Although Chinese law provides for most court decisions to be made publicly available, in general they are not readily available to nonlitigants. The Henan High Court rule came in the wake of Supreme People's Court (SPC) statements that courts should embrace

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11. *Comparing Chinese Provinces with Countries*, THE ECONOMIST, [http://www.economist.com/content/chinese\\_equivalents](http://www.economist.com/content/chinese_equivalents) (last visited Oct. 18, 2014).

12. Wang Keya (王克亚), *Henan Sheng Nongcun Renkou Liudong Ji Qi Dui Liuchu Di Jingji Fazhan De Yingxiang Yanjiu* (河南省农村人口流动及其对流出地经济发展的影响研究) [Henan Rural Population Flows and Their Economic Development Impact Study], HENAN DAXUE (河南大学) [HENAN UNIVERSITY] (2009), available at <http://wenku.baidu.com/view/a81c65c22cc58bd63186bd79.html?re=view..>

13. Related notices stated that the policy was being implemented in order to make the courts "more convenient for the people" and to improve "communication with the people." See Henan Fayuan Caipan Wenshu Shangwang Qingkuang Tongbao (河南法院裁判文书上网情况通报) [Notice on the Situation Concerning Placing Henan Court Judgments on the Internet] (promulgated by the Henan High People's Ct., Nov. 5, 2011), available at <http://www.hncourt.org/public/detail.php?id=91015>; see also Guanyu Renzhen Zuoacao Caipan Wenshu Shangwang Gongzuo de Tongzhi (关于认真做好裁判文书上网工作的通知) [Notice on How To Diligently Accomplish the Work of Publishing Court Judgments on the Internet] (promulgated by the Sanmenxia Ct., May 11, 2009), available at <http://smxzy.chinacourt.org/public/detail.php?id=369>; Henan Sheng Gaoji Renmin Fayuan Guanyu Yingfa Caipan Wenshu Shangwang Gongbu Guanli Banfa De Tongzhi (河南省高级人民法院关于印发《裁判文书上网公布管理办法》的通知) [Henan Provincial High Court's Notice on Printing and Distributing Court Judgment Publication Online Management Measures] (promulgated by the Henan High People's Ct., Feb. 22, 2010), available at <http://gsxfy.hncourt.org/public/detail.php?id=356,%20>; Henan Sheng Gaoji Renmin Fayuan Caipan Wenshu Shangwang Guanli Shishi Xize (河南省高级人民法院裁判文书上网管理实施细则) [Implementing Rules of Henan Provincial High Court for the Management of Online Publication of Judgments] (promulgated by the Henan High People's Ct., Aug. 12, 2011), available at <http://jfqfy.chinacourt.org/public/detail.php?id=569> [hereinafter Implementing Rules].

transparency and place cases online,<sup>14</sup> yet Henan's efforts to post cases went beyond what had been done in other provinces and regions up to that point.<sup>15</sup> Other courts had placed cases online selectively, or, in some instances, had placed all cases from a specific court division online. In contrast, the presumption in Henan is that all cases are to be posted online unless they fall within specified exceptions.<sup>16</sup>

The official Henan policy is that all court decisions formally classified as judgments or verdicts, *panjue shu*, are to be posted online.<sup>17</sup> Documents classified as rulings, *caiding shu*, which are typically brief decisions, are required to be posted online only if they fit into one of eight categories, generally those involving substantive rulings.<sup>18</sup> Exceptions to the general rule include cases involving State secrets, personal privacy issues, business secrets, crimes committed by juveniles and other cases not publicly tried, capital cases, State compensation cases, mediated cases, and withdrawn cases.<sup>19</sup> Litigants may also request that cases not be posted online or be removed after posting.<sup>20</sup> The rules state that a court may grant such a request only after "strict review" by a supervising judge and only if the case is deemed likely to cause emotional distress to a litigant or third party. In practice this is most often done in a broad

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14. The SPC's regulation was permissive, not mandatory. It stated in relevant part that "the people's courts may, according to the needs of legal advocacy, law research, case guidance and unification of standards for judgment, compile, print and publish various judgment documents in a centralized way." *See Zuigao Renmin Fayuan Yingfa Guanyu Sifa Gongkai de Liuxiang Guiding He Guanyu Renmin Fayuan Jieshou Xinwen Meiti Yulun Jiandu De Ruogan Guiding de Tongzhi* (最高人民法院印发《关于司法公开的六项规定》和《关于人民法院接受新闻媒体舆论监督的若干规定》的通知) [Supreme People's Court's Notice on the Publication of Six Measures on Judicial Openness and Certain Provisions on People's Court Accepting News Media Supervision] (promulgated by the Sup. People's Ct., Dec. 8, 2009), available at [http://www.law-lib.com/law/law\\_view.asp?id=305059](http://www.law-lib.com/law/law_view.asp?id=305059).

15. Some other provinces and municipalities began to emulate the Henan example.

16. In 2013 the SPC issued new rules calling for courts nationwide to place more opinions online. *See Zuigao Fa Shouci Shangwang Shai "Caipan Wenshu* (最高法首次上网"晒"裁判文书) [Supreme Law for the First Time Puts Judgment Documents Online], RENMIN RIBAO (人民日报 [PEOPLE] (Jul. 3, 2013), <http://legal.people.com.cn/n/2013/0703/c42510-22054836.html>.

17. Implementing Rules, *supra* note 13, arts. 3, 5, 6 (stating that "all first instance, appeal, and rehearing case opinions shall be posted online" with the exception of specific listed categories of cases).

18. The implementing rules list eight categories of such rulings that must be posted online: rulings affirming decisions in criminal cases, rulings refusing to accept a case, rulings reflecting differing opinions on jurisdiction, rulings directly rejecting suits or rehearing decisions, rulings remanding a case for retrial, rulings in cases involving disputes concerning enforcement, rulings regarding appeals of enforcement decisions, and rulings correcting typographical errors in opinions. Implementing Rules, *supra* note 13. More routine and nonsubstantive court notices and decisions are excluded. Interview 2012-24.

19. Interview 2012-13; Implementing Rules, *supra* note 13, art. 5.

20. Interview 2012-24; Implementing Rules, *supra* note 13, art. 16. The Rules state that cases may be removed if a party makes a valid request or a serious error is discovered, but only after formal review by senior officials at the court that posted the decision. The rules appear designed to prevent individual judges from removing cases that they do not want made public.

range of family law disputes.<sup>21</sup> By contrast, no exception is made for criminal cases; a defendant has no right to request a case not be made public or be removed after it is posted online.<sup>22</sup> Certain information is redacted: victim and witness names are removed prior to publication, as are parties' phone numbers and addresses.<sup>23</sup>

The exceptions leave significant room for local court interpretation. Nevertheless, the policy is designed to require posting most cases online. Provincial high court rules state that judges who believe a case should not be placed online must seek approval from a court vice-president; otherwise, all cases must be submitted for online posting at most three days after judgment is handed to the parties. Cases submitted for online posting are reviewed by a court official responsible for the website who has an additional three days to decide whether or not to make the case publicly available.<sup>24</sup>

As of early 2013, the Henan High Court reported that more than 440,000 cases had been posted online since the policy was adopted in 2009.<sup>25</sup> By early 2014, that number had increased to more than 600,000.<sup>26</sup> Although official

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21. Interview 2012-13; Implementing Rules, *supra* note 13, arts. 6, 7. The regulations state that legitimate reasons for granting such a request include cases in which "there is strong antagonism" among the parties or between one party and the court or the contents of an opinion may cause "emotional pressure or negative effects" to a litigant or third party. The rules list certain categories of cases likely to have such an effect: those involving reputation rights, disputes among neighbors, divorce cases, claims concerning care for the elderly, inheritance disputes and those likely to "intensify contradictions."

22. Interview 2012-13; Implementing Rules, *supra* note 13, arts. 6, 7.

23. Interview 2012-24; Implementing Rules, *supra* note 13, art. 22. The Implementing Rules state that victims' names are to be excluded only in cases involving violent crimes. In practice it appears that victims' names are redacted in all cases. The Rules state that full names, gender, and age of parties is to be included, but all other information is to be redacted. *See also id.* art. 21 (stating that witnesses, juveniles, and those performing meritorious conduct such as helping to arrest a defendant shall be listed only by last name).

24. Interview 2012-13; Implementing Rules, *supra* note 13, arts. 10, 11. The Rules state that the presiding judge has three days from receiving confirmation that the decision has been delivered to the parties, or from the end of the stipulated time for delivery, to submit the judgment for posting. If the judge responsible for posting cases decides not to place a decision online she or he must provide a specific reason for such a decision.

25. *Henan Sanji Fayuan Shangwang Gongkai Caipan Wenshu Yu 44 Wan Jian* (河南三级法院上网公开裁判文书逾44万件) [*Henan Three Levels of Courts Have Published More than 440,000 Cases Online*], RENMIN FAYUAN PINDAO (人民法院频道) [PEOPLE'S COURT CHANNEL] (Jan. 25, 2013), <http://court.gmw.cn/html/article/201301/25/117953.shtml>. The figure was 280,000 as of early 2012; Interview 2012-24; *see also Henan Fayuan Caipan Wenshu Shangwang 28 Wan Yu Fen* (河南法院裁判文书上网28万余份) [*More Than 280,000 Henan Court Judgment Are Available Online*], CAIXIN WANG (财新网) [ECONOMIC NEWS NET] (Jan. 31, 2012), <http://china.caixin.com/2012-01-31/100352036.html>.

26. *Henan Sheng Gaoji Renmin Fayuan Gongzuo Baogao* (河南省高级人民法院工作报告) [*Henan High People's Court Work Report*], ZHONGGUO FAYUAN WANG (中国法院网) [CHINA COURT WEB] (Jan. 22, 2014), <http://www.chinacourt.org/article/detail/2014/01/id/1205214.shtml>; *see also* interview 2014-1.

reports claim Henan courts now put ninety-nine percent of their cases online,<sup>27</sup> this figure refers to cases outside the exceptions. In practice, a significant percentage of court rulings are not posted online: for example, court-approved mediation agreements, which represent a large portion of all first-instance civil cases.<sup>28</sup>

Initially, cases posted online were not permanently made public. Court rules stated that cases should be public for one year, and in the initial years of the policy courts generally removed cases from their websites at the end of the calendar year. As judges explained, the primary goals of making cases publicly available are “to make courts transparent,”<sup>29</sup> to increase public confidence in the courts, and to increase pressure on judges to decide cases correctly.<sup>30</sup> These goals are achieved with the publication of cases for one year. In practice, however, many such cases remain available in commercial case databases even after they have been removed from court websites. The policy also appears to be evolving toward permanent publication of cases. In 2012, the Henan High Court began aggregating all cases province-wide onto its own website, with cases no longer being removed after one year.<sup>31</sup>

The decision to place cases online came in the wake of a number of high-profile wrongful convictions in Henan. Zhang Liyong, the president of the Henan High People’s Court, stated that the policy of placing opinions online was “compelled” by the illegal conduct of some judges. Zhang stated that with online publication, errors by judges will be “immediately discovered and criticized online.”<sup>32</sup> Judges now know that any errors will directly affect their

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27. One report from late 2011 put the figure at 99.37%. See *Judicial Reform in Henan Gets Public Support*, PEOPLE’S DAILY ONLINE, Dec. 12, 2011, <http://english.peopledaily.com.cn/102774/7674038.html>.

28. Interview 2012-24; Henan Provincial High Court’s Notice on Printing and Distributing Court Judgment Publication Online Measures, *supra* note 13, art. 4.

29. Interview 2012-13.

30. Interview 2012-24; see also Notice on the Situation Concerning Placing Henan Court Judgments on the Internet, *supra* note 13.

31. *Henan Kaitong Caipan Wenshu Wang He Tingshen Zhibo Wang* (河南开通裁判文书网和庭审直播网) [*Henan Launches Case Website and Trial Live-Streaming Website*], ZHONGGUO FAYUAN WANG (中国法院网) [CHINA COURT WEB] (May 17, 2012), <http://www.chinacourt.org/article/detail/2012/05/id/517955.shtml>.

32. See *Henan Fayuan Jiang Caipan Wenshu Shangwang “Daobi” Faguan Jinze* (河南法院将裁判文书上网“倒逼”法官尽责) [*Online Publication of Judgments Forces Judges to be Responsible*], ZHONGGUO WANG (中国网) [CHINA NET] (Jan. 25, 2009), [http://www.china.com.cn/law/txt/2009-01/25/content\\_17185088.htm](http://www.china.com.cn/law/txt/2009-01/25/content_17185088.htm); see also Notice on the Situation Concerning Placing Henan Court Judgments on the Internet, *supra* note 13 (commenting that online publications of judgments have offered judges an opportunity to study precedents and narrow the discrepancy and randomness among judgments). Implicit in Zhang’s comment was the argument that erroneous outcomes in criminal cases are the fault of the courts. In practice, however, it seems clear that many errors in criminal cases result from mistakes or misconduct by the police and procuratorates and the courts’ subsequent inability or unwillingness to challenge such mistakes. I discuss this phenomenon in the context of one high-profile Henan case elsewhere. See Benjamin Liebman, *Professionals and Populists: The Paradoxes of China’s Legal Reforms*, in CHINA IN AND

chances of promotion. Placing cases online is not intended to facilitate use of the decisions in future cases or to serve as precedent.<sup>33</sup> Nevertheless, judges acknowledge that lawyers often use prior cases in legal arguments.<sup>34</sup>

Local courts in Henan vary in their implementation of the policy. Some courts have taken more restrictive approaches to access than suggested by the provincial high court, for example by not posting cases that have been appealed.<sup>35</sup> Some jurisdictions appear to have liberal definitions of privacy interests, and thus keep a larger percentage of cases from being posted. Yet a number of courts also report “100 percent compliance” with the high court’s rules—meaning that they have posted all cases that do not come within a listed exception.<sup>36</sup> The provincial high court has criticized courts that have lagged in compliance.<sup>37</sup> High court officials report that in general most courts have complied with the policy.<sup>38</sup>

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BEYOND THE HEADLINES 214, 215 (Timothy B. Weston & Lionel M. Jensen eds., 2012).

33. Interview 2012-13; Interview 2012-24.

34. Interview 2012-13; *see also* *Caipan Wenshu Shangwang “Yangguang Sifa” De Zhutuqi* (裁判文书上网 判阳光司法”的助推器) [*Online Publication of Opinions Promotes “Sunny Judicial Administration”*], ZHONGGUO PUFA WANG (中国普法网) [CHINA LEGAL INFO] (Oct. 9, 2012), [http://www.legalinfo.gov.cn/pfkt/content/2012-10/09/content\\_3886221.htm?node=7908](http://www.legalinfo.gov.cn/pfkt/content/2012-10/09/content_3886221.htm?node=7908) (quoting lawyer noting the “reference value” of cases posted online).

35. Interview 2012-24; *Caipan Wenshu Shangwang Guocheng Zhong Cunzai De Wenti He Duice* (裁判文书上网过程中存在的问题和对策) [*Problems Facing Publishing Judgments Online and Solutions to Such Problems*], HENAN FAYUAN WANG (河南法院网) [HENAN COURT NET] (Aug. 30, 2011), <http://hnfy.chinacourt.org/article/detail/2011/08/08/id/777200.shtml>; *Ji Yangguang Fangfu Zhi Gongneng Er Mian Qi Zuooshang Zhihuan—Zenme Kan Caipan Wenshu Shangwang* (集阳光防腐之功能而免其灼伤之患—怎么看裁判文书上网) [*Take Advantage of Online Publication’s Sunshine Power Without Getting Burnt—How to Look at Online Publication of Judgments*], ZHONGGUO MINSHANG FALU WANG (中国民商法律网) [CHINA CIVIL AND COMMERCIAL LAW NET] (Jun. 9, 2012), <http://test.civilaw.com.cn/Article/default.asp?id=55495> (stating that nonfinal decisions shall not be posted online because they could “confuse the masses” if such decisions were subsequently changed).

36. Interview 2012-13; *Luoshan Xian Fayuan Caipan Wenshu Shangwang Lü Da 100%* (罗山县法院裁判文书上网率达100%) [*Luoshan Municipality’s Court Judgments are 100% Published Online*], HENAN SHENG LUOSHAN XIAN FAYUAN WANG (河南省罗山县法院网) [LUOSHAN COURT NET] (Oct. 16, 2012), <http://xylsfy.chinacourt.org/public/detail.php?id=1256>; *Nanyang Shi Wolong Qu Fayuan Qianghua Caipan Wenshu Shangwang Gongzuo Xiaoguo Hao* (南阳市卧龙区法院强化裁判文书上网工作效果好) [*Nanyang Municipal Wolong District Court Reinforced the Online Publication of Judgments and the Effect Is Positive*], ZHONGXIN WANG (中新网) [CHINA NEWS NET] (Mar. 12, 2012), <http://www.ha.chinanews.com/lanmu/news/159/2011-07-01/news-159-127846.shtml> (claiming one hundred percent compliance in one court).

37. Interview 2012-24; *see also* Notice on the Situation Concerning Placing Henan Court Judgments on the Internet, *supra* note 13. In 2009, fifteen basic-level courts that “lagged behind” in implementing the policy were exposed and the presidents of such courts were required to come to the provincial high court to explain why they had not complied. The high court stated that such actions were highly effective in promoting compliance. The Implementing Rules call for the Provincial High Court to engage in regular review of implementation of the policy by each division in the high court and by all lower courts, including issuing a ranking of courts based on their level of compliance. Courts that lag in implementing the policy “are to have points deducted” when they are evaluated. Implementing Rules, *supra* note 13, art. 36.

38. Interview 2012-24.

The policy of putting cases online initially encountered resistance from judges who feared increased workloads and scrutiny.<sup>39</sup> Judges and courts are now evaluated based on the percentage of cases they put online.<sup>40</sup> Judges describe such efforts as resulting in “tremendous pressure” on them as they handle cases.<sup>41</sup> Lawyers concur, noting that judges are under pressure to avoid mistakes and as a result are now far more careful than in the past.<sup>42</sup>

The policy of making cases public has generally been praised by officials, lawyers, and academics.<sup>43</sup> For example, lawyers who handle criminal cases praised the policy, arguing that judges need to be controlled—and that greater oversight and transparency are effective routes for doing so.<sup>44</sup> Yet the policy has also received criticism. A number of lawyers and academics in Henan expressed concern in discussions that the push to place all decisions online is resulting in

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39. Interview 2012-24; *see also* Notice on the Situation Concerning Placing Henan Court Judgments on the Internet, *supra* note 13 (acknowledging and critiquing resistance to the policy among some judges who were concerned either at the workload or the effect of publishing cases online).

40. Interview 2012-3; Interview 2012-13; Implementing Rules, *supra* note 13, art. 18. The implementing rules state that judges who fail to comply with the policy, or who delay in making cases public, shall be subject to administrative sanctions. Implementing Rules, art. 18.

41. Interview 2012-11; Interview 2012-19; *Henan Gaoyuan Jiang Panjueshu Shangwang Gong Shimin Chaxun* (河南高院将判决书上网供市民查询) [Henan Provincial High Court Uploaded Court Opinions Online for Citizens to Examine], DAHE WANG (大河网) [DAHE NET] (Dec. 31, 2008), <http://news.sina.com.cn/c/2008-12-31/072216954042.shtml> (quoting judge stating that even a small error may be reported by parties); *Zhang Liyong Daibiao Yu Wangyou Zaixian Jiaoliu: Zhengyi Buneng Guanzai Wuzi Li* (张立勇代表与网友在线交流：正义不能关在屋子里) [Representative Zhang Liyong Communicates with Netizens Online: Justice Should Not Be Locked in a Room], ZHONGGUO FAYUAN WANG (中国法院网) [CHINA LEGAL INFO NET] (Mar. 5, 2009), <http://old.chinacourt.org/public/detail.php?id=347301> (stating that judges know that their decisions will be posted online and examined by ordinary people, and thus will be careful to follow the law from the beginning).

42. Interview 2012-7.

43. *Zhang Liyong, Shehui Fating: Tiaochu Fayuan Zhiwai de Shijian Yu Sikao* (社会法庭：跳出法院之外的实践与思考) [Society Courts: Practice and Thoughts Outside the Courtroom], RENMIN FAYUAN BAO (人民法院报) [PEOPLE'S COURT NEWS] (Mar 17, 2010), <http://old.chinacourt.org/public/detail.php?id=399684> (reporting official praise for Henan's Court reforms); *Henan Shengwei Shuji Lu Zhangong Yu Faguan Daibiao Zuetan* (河南省委书记卢展工与法官代表座谈) [Party Secretary of Henan Province Meets Representatives of Judges], FAZHI RIBAO (法制日报) [LEGAL DAILY] (Apr. 19, 2011), [http://www.legaldaily.com.cn/bm/content/2011-04/19/content\\_2603116.htm?node=20729](http://www.legaldaily.com.cn/bm/content/2011-04/19/content_2603116.htm?node=20729) (reporting praise of Henan courts by Lu Zhangong, Party Secretary of Henan); *Fayuan Gongzuo Liangdian Duo Qunzhong Manyidu Gao* (法院工作亮点多群众满意度高) [There Are Many Highlights in Courts' Work and Approval Rate Is High], RENMIN FAYUAN BAO (人民法院报) [PEOPLE'S COURT NEWS] (Jan. 17, 2012), <http://www.mzyfz.com/cms/fayuanpingtai/xinwenzhongxin/fayuanxinwen/html/1071/2012-01-17/content-272259.html> (reporting praise of courts by Henan party officials).

44. Interview 2012-6; Interview 2012-28; *see also* *Zhang Liyong, Yi Caipan Wenshu Shangwang Tuidong Sifa Gongkai* (以裁判文书上网推动司法公开) [Promote Judicial Openness through Online Publication of Decisions], FAZHI RIBAO (法制日报) [LEGAL DAILY] (Jul. 31, 2012), [http://www.legaldaily.com.cn/zt/content/2012-07/31/content\\_3741689.htm](http://www.legaldaily.com.cn/zt/content/2012-07/31/content_3741689.htm) (stating that court decisions are “a product” and that whether decisions are satisfactory is decided by litigants and the masses, not the courts themselves, and that placing decisions online will force courts to improve).

court judgments that are increasingly simple in their reasoning; these lawyers suggest that this simplicity is the result of judges trying to avoid any possible errors.<sup>45</sup> As one lawyer noted, in Henan any error becomes a “big error” when it is posted online.<sup>46</sup> This alleged trend toward simplified reasoning is in tension with the SPC’s efforts to encourage courts to provide more detailed explanations of their reasoning in opinions.<sup>47</sup> High court officials, in contrast, argue that the policy has forced judges to pay more attention to legal analysis and thus has improved the overall quality of court opinions.<sup>48</sup>

I selected for study one rural county court in Henan that appeared to be putting the large majority of cases of all types online in 2010.<sup>49</sup> The court is situated in the county seat, an average-sized county town in China. I do not claim that this county is representative either of basic courts in Henan or of courts across China more generally. It is one of thousands of such courts in China.<sup>50</sup> I also do not claim that my study is comprehensive: in 2010, the court placed 171 cases online. I supplemented the cases found online with an additional 6 cases from the county court that were located on commercial websites,<sup>51</sup> making a total of 177 cases. The highest reported case number was

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45. Interview 2012-2; Interview 2012-3; *see also* Liu Yuewu, *Xingshi Panjueshu Ni Qineng Bu Jiangli?* (刑事判决书你岂能不讲理?) [How Can You Not Give Reasons in Criminal Adjudication], FENGHUANG BOKE (凤凰网博客) [FENGHUANG BLOG] (May 17, 2012), <http://blog.ifeng.com/article/17858797.html> (reporting that decisions in criminal cases have become increasingly simple and lack reasoning); Hu Yuansheng, *Minshi Panjueshu Yue Xie Yue Jiandan* (民事判决书越写越简单) [Civil Opinions Are Becoming Increasingly Simple], TIANYA (天涯) [TIANYA BLOG] (Dec. 10, 2008), [http://blog.tianya.cn/blogger/post\\_read.asp?BlogID=1879622&PostID=15981099](http://blog.tianya.cn/blogger/post_read.asp?BlogID=1879622&PostID=15981099) (arguing that opinions in civil cases have become increasingly simple and thus increasingly resemble criminal cases).

46. Interview 2012-3.

47. *See Zuigao Renmin Fayuan Guanyu Jinyibu Jiaqiang Sifabianmin de Ruogan Yijian* (最高人民法院关于进一步加强司法便民工作的若干意见) [Some Opinions of the Sup. People’s Ct. on Further Strengthening People’s Access to Judicial Services] (promulgated by the Sup. People’s Ct., Mar. 10, 2009), available at [http://news.xinhuanet.com/legal/2009-03/10/content\\_10981330.htm](http://news.xinhuanet.com/legal/2009-03/10/content_10981330.htm) (stating that court opinions should be clear, concise, and should provide sufficient reasoning to convince the parties); *see also Zuigao Renmin Fayuan Guanyu Sifa Gongkai de Liuxiang Guiding* (最高人民法院《关于司法公开的六项规定》) [Notice of the Supreme People’s Court on Issuing the Six Provisions on Judicial Openness], ZHONGGUO XINGWENG WANG (中国新闻网) [CHINA NEWS] (Dec. 23, 2009), <http://www.chinanews.com/gn/news/2009/12-23/2034717.shtml> (requiring courts to provide reasons to support their decisions).

48. Interview 2012-25.

49. This was done after surveying a range of Henan courts in 2010 to ascertain the volume of cases being put online. Judges and lawyers in the jurisdiction agreed to speak with me on the understanding that their names and the name of their courts would not be identified. I identify court decisions with a letter, indicating whether the decision came from the intermediate court (I) or basic-level court (B), followed by a reference number. I cite interviews based on the year in which the interview occurred.

50. The county court has forty-five persons classified as judges, thirty of whom hear cases. Interview 2013-9.

51. It is unclear why those six cases were not posted to the court website. They do not appear particularly sensitive or noteworthy. The cases may have been cases originally posted online and then removed, as they are also available on the provincial high court website, which collects cases

number 221, suggesting that the court placed roughly eighty percent of cases on its website.<sup>52</sup> Most omitted cases involve juveniles charged with crimes or rape.<sup>53</sup> Judges state that it is rare for a party to a criminal case to object to the decision being placed online.<sup>54</sup>

I also examined the publicly available annual criminal docket for 2010 of the intermediate court in the same jurisdiction (the court directly above the county court). The intermediate court is located in a third-tier Chinese city, with a combined rural and urban population of approximately six million. The county is home to roughly five hundred thousand people.<sup>55</sup> The intermediate court has jurisdiction over a total of twelve county or district courts.<sup>56</sup> The cases on review in the intermediate court thus came from a broader geographic area than those in the county court. The intermediate court posted 276 opinions in criminal cases from 2010 on its website. I located an additional 16 on commercial websites, making a total of 292 judgments.<sup>57</sup> Of these, 37 were first-instance trials, 239 were decisions in appeals, and 16 were decisions in rehearing procedures. Intermediate court decisions were divided across three court divisions. Calculating the percentage of cases posted from the intermediate court is thus more difficult than for the county court. Nevertheless, using the highest case number as a guide and excluding decisions from the court's third criminal division, which handles cases involving crimes committed by juveniles, it appears that the court posted just under half of its first-instance decisions not involving juvenile crimes, just over three-quarters of its appellate decisions, and just over two-thirds of its rehearing cases.<sup>58</sup> According to intermediate court officials, as of early 2012 the court had placed nearly seven thousand decisions on its website since the online policy began in the second half of 2009.<sup>59</sup> This was roughly half of the total number of decisional documents issued by the intermediate court during the same period. The vast majority of excluded documents were mediation agreements or decisional documents that do not discuss the merits of a case.<sup>60</sup> The court reported just 37 instances during the

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posted to lower-court websites.

52. Court officials confirmed this rough calculation and stated that in 2012 the figure was closer to ninety percent. Interview 2013-8.

53. Interview 2013-8; 2013-9.

54. Interview 2013-8.

55. *Zhongguo Yixian Erxian Sanxian Chengshi Mingdan* (中国一线二线三线城市名单) [*China's First Tier, Second Tier, Third Their Cities List*], 360DOC (Aug. 28, 2011), [http://www.360doc.com/content/11/0828/08/0\\_143824472.shtml](http://www.360doc.com/content/11/0828/08/0_143824472.shtml).

56. Eight lower courts were county courts and thus primarily rural. Four were district courts, meaning they were in towns or urban areas.

57. As with the county cases, the additional cases do not appear to be particularly sensitive or noteworthy, and it is unclear why they were not available on the intermediate-court website.

58. I calculated this approximate figure by dividing the total number of cases available by the combination of the highest case numbers for each criminal division.

59. Interview 2012-13.

60. *Id.*

same period when a case of any type was not posted online at the request of one of the parties.<sup>61</sup> In addition to reviewing the cases, I conducted interviews with approximately forty judges and lawyers in three cities in Henan.

The push to place court decisions online is one of a number of innovations adopted under the leadership of Henan High People's Court President Zhang Liyong. Zhang, who came to the court with no legal background, has promoted new policies he said are designed to increase the quality of, and public confidence in, Henan's courts.<sup>62</sup> These have included: live broadcasts of court cases;<sup>63</sup> requiring court leaders to meet directly with aggrieved litigants; experimentation with a form of jury system;<sup>64</sup> requiring courts to hold hearings in villages;<sup>65</sup> the creation of "society courts" (*shehui fating*) staffed by laypeople to mediate cases;<sup>66</sup> the establishment of an annual "wrongful conviction day" on which courts examine their files for any incorrectly decided cases; and the creation of a "life responsibility system" for judges, under which judges are responsible "until the end of their lives" for any errors made in handling cases.<sup>67</sup>

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61. *Id.*

62. *Da Faguan Zhang Liyong Wunian Kao* (大法官张立勇五年考) [*Grand Judge Zhang Liyong's Exam in the Fifth Year*], MINZHU YU FAZHI WANG (民主与法制网) [DEMOCRACY AND LEGAL SYSTEM NET] (Nov. 12, 2012), <http://www.mzyfz.com/cms/minzhuyufazhishibao/fanfu/html/1248/2012-11-12/content-568478.html> (discussing Henan efforts to make courts more welcoming to ordinary people and requiring judges to be more like ordinary people, strengthening courts' obedience to Party leadership and their rejection of concepts of separation of powers, and making courts more open to comments from ordinary people). The moves were controversial, with some complaining that judges were being forced to take on inappropriate roles and would be overwhelmed by their new workload.

63. For a live broadcast of court cases of Henan Courts, see <http://ts.hncourt.org/>. As of early 2012, the High Court reported that more than 1500 cases had been broadcast online.

64. *Henan Gaoyuan Yuanzhang Jianyi Pizhun Jinxing Renmin Peishentuan Shidian* (河南高院院长建议批准进行人民陪审团试点) [*Chief Judge of Henan Provincial High Ct. Proposes Approving Jury Trial Experiment*], DAHE BAO (大河报) [DAHE NEWS], (Mar. 13, 2012), <http://news.sina.com.cn/c/2012-03-13/031424103258.shtml>.

65. *Henan Sheng Gaoji Renmin Fayuan Guanyu Dali Hongyang Ma Xiwu Shenpan Fangshi Qieshi Wei Renmin Sifa De Yijian* (河南省高级人民法院关于大力弘扬马锡五审判方式切实为人民司法的意见) [*Henan High People's Court's Notice on Energetically Carrying Forward Ma Xiwu-Style Adjudication in Order to Implement Justice for the People*] (promulgated by the Henan High People's Ct., Jul. 15, 2009), available at <http://zzfy.hncourt.org/public/detail.php?id=11729>.

66. See "Shehui Fating": *Huajie Maodun De Henan Chuangzao* ("社会法庭":化解矛盾的河南创造) [*"Society Courts": A Henan Innovation That Resolves Contradictions*], HENAN PINGAN WANG (河南平安网) [HENAN PINGAN NET] (Jun. 3, 2011), <http://www.mzyfz.com/cms/jujiaosanxiangzhongdiangongcheng/shehuiguanlichuangxin/shehuibaozhang/html/1037/2011-06-03/content-76470.html>; see also Zhao Gang et al., *Xuchang Fayuan: Dakai Shehui Fating Shenshang De Wenhao* (许昌法院: 打开社会法庭身上的问号) [*Xuchang Court: Unfold the Question Mark on Society Courts*], LUOYANG SHI XIGONG QU RENMIN FAYUAN WANG (洛阳市西工区人民法院网) [LUOYANG PEOPLE'S COURT] (May 17, 2011), <http://xgqfy.chinacourt.org/public/detail.php?id=78>. Society courts, made up of ordinary people selected from the local community, are designed to further mediation in routine cases. They appear largely to be the repackaging of traditional mediation authorities under the direct supervision of the courts.

67. See Ji Tianfu, *Henan Fayuan Yanjiu Jianli Cuoan Zeren Zhongshen Zhuijiu Zhidu* (河南法院将研究建立错案责任终身追究制度) [*Henan Courts Will Research and Establish Lifelong*

Zhang has also welcomed increased supervision of the courts from the People's Congress representatives.<sup>68</sup> Some of these policies have drawn extensive criticism from legal academics, who warn of a return to populist justice and who argue that many of these reforms lack a legal basis.<sup>69</sup> In one prominent early account of Zhang's reforms, *Southern Weekend* described him as a "judge who does not play according to legal principles."<sup>70</sup> Yet others in the legal community have come to his defense, noting that he has significantly increased judicial transparency.<sup>71</sup>

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*Responsibility System for Wrongly Decided Cases]*, RENMIN FAYUAN WANG (人民法院网) [PEOPLE'S COURT NET] (Jan. 11, 2012), <http://court.gmw.cn/html/article/201201/11/83609.shtml>. It appears that the lifetime responsibility system is targeted at the most egregious forms of judicial misconduct, primarily corruption.

68. Henan: *Fayuan Ban'an Yao Zhudong Jieshou Renda Daibiao Jiandu* (河南法院办案要主动接受人大代表监督) [Henan: Courts Should Take Initiative To Accept People's Congress's Supervision over their Handling of Cases], FAZHI WANG (法制网) [LEGAL DAILY] (Sep. 15, 2011), [http://www.legaldaily.com.cn/index/content/201109/15/content\\_2956921.htm?node=20908](http://www.legaldaily.com.cn/index/content/201109/15/content_2956921.htm?node=20908) (detailing requirements that each court report on its work to every local people's congresses delegate regularly, including on its handling of major cases; that courts invite delegates to attend cases and participate in enforcement activities; and that each court establish a text-messaging system to report to People's Congress members on their work); see also *Henan Sanji Fayuan Quanbu Kaitong Renda Daibiao Zhengxie Weiyuan Zhanxian Dianhua* (河南三级法院全部开通人大代表政协委员专线电话) [*Three Levels of Courts in Henan All Opened Hotlines for People's Congress Representatives and People's Consultative Committee Members*], ZHONGGUO FAYUAN WANG HENAN PINGDAO (中国法院网河南频道) [CHINA COURT] (Apr. 21, 2012), <http://www.chinacourt.org/article/detail/2012/04/id/479195.shtml> (discussing the creation of hotlines to be used by people's congress delegates to contact the courts twenty-four hours a day, seven days a week, and requiring courts to respond to any enquiries within one working day).

69. See He Weifang, *Sifa Gaige Bixu An Fali Chupai* (司法改革必须按法理出牌) [Legal Reform Must Follow Legal Principles], 360DOC (Feb. 27, 2009), [http://www.360doc.com/content/09/0227/16/142\\_2660965.shtml](http://www.360doc.com/content/09/0227/16/142_2660965.shtml) (arguing that populist justice is sometimes bad law and that some of Zhang Liyong's reform measures may set a bad example for judicial reform); Guo Guangdong, *Yuanzhang, Qing An Fali Chupai* (院长, 请按法理出牌) [Court President, Please Play by Legal Principles], NANFANG ZHUMO (南方周末) [SOUTHERN WEEKEND] (Feb. 2, 2011), <http://www.gongxue.cn/landunfalv>ShowArticle.asp?ArticleID=97378>; *Buan Fali Chupai Zhi Yuanzhang Yulu de Shixiang Zai Zhiyi* (不按法理出牌之院长语录的十项再质疑) [*Ten Doubts on the Quotations of the Court President Who Does Not Follow Legal Principles*], ZHENGYI WANG (正义网) [JUSTICE NET] (Apr. 6, 2012), <http://chinasjtz.fyfz.cn/art/1048006.htm> (arguing that only one or two measures Zhang adopted are reasonable but that others hurt the independence and credibility of the judicial system); Guo Shushan, *Zhang Yuanzhang Chuli Pingdingshan Fayuan De Zuofa Fansi* (张院长处理平顶山法院的做法反思) [*Reflection on Chief Judge Zhang's Measures for Handling Pingdingshang Court*], FALU WANG (法律网) [LEGAL NET] (Jan. 20, 2011), <http://www.66law.cn/domainblog/24124.aspx> (criticizing reforms under Zhang Liyong for confusing the role of courts and "ordinary Party-state entities" and for undermining judicial independence).

70. See Su Yongtong, *Buan "Fali" Chupai De Gaoyuan Yuanzhang* (不按"法理"出牌的高院院长) [High Court President Does Not Play According to Legal Principles], NANFANG ZHUMO (南方周末) [SOUTHERN WEEKEND] (Feb. 19, 2009), <http://www.infzm.com/content/24067> (describing promotion of informal trials and mediation, increasing role of popular input, deemphasis on judicial professionalism, and increasing administrative oversight over lower courts).

71. See Zhang Yifei, *Bubi Keze Henan Fayuan De "Zhang Yuanzhang Xinzheng"* (不必苛责河南法院的"张院长新政") [*It Is Not Necessary To Criticize Court President Zhang's New Measures*], HONG WANG (红网) [RED NET] (Mar. 6, 2009), <http://hlj.rednet.cn/c/2009/03/06/1720208.htm> (praising Zhang Liyong's reforms as compatible with the reality of China); *Sifa Shijian*

II.  
FINDINGS

*A. Overview*

*1. County Court*

The 177 county court cases included criminal charges against 273 defendants. In the county court, the types of cases were largely what would be expected: the largest categories of crimes were theft, willful injury (generally relating to fights), traffic accident crimes, concealment of criminal proceeds (largely reselling stolen goods), and fraud. But the cases also included a range of crimes that provide a sense of the types of issues local police, procuratorates, and courts process—everything from dissemination of porn online,<sup>72</sup> to illegal logging or cutting of trees,<sup>73</sup> to abduction and sale of children or women,<sup>74</sup> rape,<sup>75</sup> bigamy,<sup>76</sup> corruption,<sup>77</sup> and gambling.<sup>78</sup> A large number of cases involve fellow villagers. Table 1 sets forth the range of crimes and number of defendants prosecuted for each category of crime in the county court in 2010. In the county court, 133 cases were handled in summary procedures or simplified normal procedures; often these were tried without procurators attending.<sup>79</sup> Although most were minor cases where defendants did not contest the charges against them, others involved more serious charges, including one case in which a defendant was convicted of rape.<sup>80</sup>

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*Weishenme Mei An Fali Chupai* (司法实践为什么没按“法理”出牌) [*Why Doesn't Judicial Practice Follow "Legal Principles"*], FALÜ BOKE (法律博客) [LAW BLOG] (Nov. 13, 2009), <http://liumushuofa.fyfz.cn/art/544585.htm> (arguing that courts are not trusted in Chinese society and that courts should do more to emulate administrative agencies); Wang Liping, *Sifa Gaige De Kunjing Yu Lujing* (司法改革的困境与路径) [*The Predicament of and Path for Judicial Reform*], ZHONGGUO RENMIN DAXUE LÜSHI XUEYUAN (中国人民大学律师学院) [LAWYER COLLEGE RENMIN UNIVERSITY OF CHINA] (Apr. 21, 2011), <http://lawyer.ruc.edu.cn/html/lswy/3870.html> (arguing that under the reforms in Henan judges are shifting from more elite status to “legal service providers,” and are “entering into society” with their primary focus being on social stability, and noting that the reforms are consistent with the general political framework in China).

72. Cases B66, B99, and B200.

73. Cases B45, B51, B80, and B92. Although classified as environmental crimes, these cases largely appear to be handled as theft cases.

74. Cases B32 and B94.

75. Case B166.

76. Case B2.

77. Cases B104, B169, B203, and B213.

78. Cases B90 (gambling) and B97 (operation of a gambling facility).

79. Procurators attended 77 of the 133 trials involving defendants tried through simplified or simplified normal procedures. The 1996 Criminal Procedure Law did not require procurator attendance in cases tried through simplified procedures. 1996 Criminal Procedure Law, *supra* note 6, art 153. The 2012 Criminal Procedure Law makes procurator attendance mandatory at all trials. 2012 Criminal Procedure Law, *supra* note 6, art. 210.

80. Case B166. Although the opinion stated that the court used simplified procedures, three

TABLE 1: CASES PROSECUTED IN THE COUNTY COURT BY CRIME SENTENCED

Case Type	Defendants	Cases
Abduction and trafficking of children (拐卖儿童罪)	3	1
Abduction and trafficking of women (拐卖妇女罪)	2	1
Arson (放火罪)	1	1
Bigamy (重婚罪)	1	1
Bribery (受贿罪)	1	1
Concealment of illegal gains (掩饰、隐瞒犯罪所得罪)	49	22
Contract fraud (合同诈骗罪)	3	3
Corruption (贪污罪)	3	3
Destruction of electrical equipment (破坏电力设备罪)	2	1
Dissemination of obscene materials (传播淫秽物品罪)	14	4
Disturbance of the peace (寻衅滋事罪)	5	3
Embezzlement (职务侵占罪)	1	1
Extortion and blackmail (敲诈勒索罪)	2	2
Falsely issuing exclusive value-added tax invoices (虚开增值税专用发票罪)	6	2
Forgery and/or sale of state authorities' certificates (伪造、买卖国家机关证件罪)	5	1
Fraud (诈骗罪)	8	8
Gambling (赌博罪)	5	1
Illegal business act (非法经营罪)	1	1
Illegal logging (滥伐林木罪)	11	4
Illegal occupation of farmland (非法占用农用地)	3	3
Illegal possession of guns (非法持有枪支罪)	1	1
Illegal sale of invoices (非法出售发票罪)	1	1
Intentional destruction of property (故意毁坏财物罪)	1	1
Intentional injury (故意伤害罪)	37	35
Interference with public administration (妨害公务)	4	4

judges heard the case (as opposed to most simplified cases, where generally only a single judge hears the case). The defendant contested guilt, arguing that sex had been consensual. Nevertheless, the court deemed defendant to have confessed because he admitted having sex with the mentally disabled victim.

罪)		
Involuntary manslaughter (过失致人死亡罪)	1	1
Misappropriation of public funds (挪用公款罪)	1	1
Operation of gambling facility (开设赌场罪)	1	1
Organized robbery (聚众哄抢罪)	8	1
Production and/or sale of fake and substandard products (生产、销售伪劣产品罪)	5	2
Rape (强奸罪)	1	1
Refusal to execute court decision (拒不执行法院判决罪)	1	1
Robbery (抢劫罪)	2	1
Seizure by force (抢夺罪)	1	1
Theft (盗窃罪)	58	43
Traffic accident (交通肇事罪)	28	28
Total	277	187

Note: “Cases” refers to the number of cases in which a particular crime was charged. Cases with multiple charges are thus counted multiple times. The total number of unique cases is 177.

“Defendants” refers to the number of defendants charged with a particular crime. Defendants who are charged with more than one crime are counted multiple times.

## 2. Intermediate Court

Tables 2–4 provide an overview of cases in the intermediate court in first-instance cases, on appeal, and in rehearing cases. The intermediate court tried 37 first-instance cases involving 67 defendants. The court decided 239 cases on appeal, involving 442 defendants. The intermediate court also decided 16 criminal cases through rehearing procedures, including 21 defendants.

The intermediate court’s first-instance cases were, not surprisingly, more serious: murder and negligent homicide, illegal manufacture of explosives,<sup>81</sup> drug trafficking,<sup>82</sup> illegal detention of others, and robbery while impersonating a police officer.<sup>83</sup> A number of commercial and financial crimes were also tried in the intermediate court, including defendants convicted of illegally soliciting deposits (presumably running an illegal bank), selling fake medicine, and the sale of counterfeit goods. A few of the financial fraud cases resulted in suspended death sentences (for example, for the sale of counterfeit money) or

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81. Case I5b (life sentence).

82. Case I44b (life sentence for trafficking one thousand grams of opium, where one thousand grams is the threshold for a sentence of ten years to death).

83. Case I51b.

life imprisonment (for a first time offender convicted of selling counterfeit money).<sup>84</sup>

**TABLE 2: FIRST-INSTANCE INTERMEDIATE COURT CASES BY CRIMES CHARGED**

Crime	Defendants	Cases
Credit card fraud (信用卡诈骗罪)	3	1
Selling counterfeit money (出售假币罪)	1	1
Bribery (受贿罪)	1	1
Contract fraud (合同诈骗罪)	2	2
Robbery (抢劫罪)	5	2
Misappropriation of public funds (挪用公款罪)	1	1
Concealment of stolen goods (掩饰, 隐瞒犯罪所得罪)	2	2
Willful injury (故意伤害罪)	22	12
Intentional homicide (故意杀人罪)	10	9
Theft (盗窃罪)	5	3
Receipt fraud (票据诈骗罪)	3	1
Harboring criminals (窝藏罪)	6	2
Kidnapping (绑架罪)	1	1
Fraud (诈骗)	1	1
Drug trafficking (贩卖毒品罪)	4	2
Corruption (贪污罪)	1	1
Loan fraud (贷款诈骗罪)	3	1
Fraudulent raising of capital (集资诈骗罪)	1	1
Illegal manufacturing of explosives (非法制造爆炸物罪)	3	1
Loan swindle (骗取贷款罪)	3	1
<b>Total</b>	<b>78</b>	<b>46</b>

Note: “Defendants” refers to the number of defendants charged with a particular crime. Defendants who are charged with more than one crime are counted multiple times.

“Cases” refers to the number of cases in which a particular crime was charged. Cases with multiple charges are thus counted multiple times.

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84. Case I43a.

TABLE 3: APPEALS IN THE INTERMEDIATE COURT BY CRIME CHARGED

Crime	Defendants	Cases
Traffic accident (交通肇事罪)	17	16
Perjury (伪造证据罪)	1	1
Insurance fraud (保险诈骗罪)	3	1
Torture (刑讯逼供罪)	1	1
Participation in the mafia (参加黑社会罪)	16	2
Bribery (受贿罪)	3	3
Contract fraud (合同诈骗罪)	5	5
Obstructing testimony (妨害作证罪)	2	2
Obstructing public law enforcement (妨害公务罪)	18	5
Provocation (寻衅滋事罪)	26	5
Aid in destroying evidence (帮助毁灭证据)	4	1
Aid criminals to escape punishment (帮助犯罪分子逃避处罚罪)	1	1
Weapon theft (抢劫枪支罪)	1	1
Robbery (抢劫罪)	21	10
Abduction and sale of children (拐卖儿童罪)	9	4
Abduction and sale of women (拐卖妇女罪)	1	1
Misappropriation of public funds (挪用公款)	10	9
Misappropriation of funds (挪用资金罪)	2	2
Concealment of stolen goods (掩饰, 隐瞒犯罪所得罪)	15	5
Intentional injury (故意伤害罪)	96	68
Intentional homicide (故意杀人罪)	6	4
Intentional property damage (故意毁坏罪)	12	5
Extortion (敲诈勒索罪)	27	5
Crimes related to criminal syndicate (涉及黑社会性质犯罪)	17	3
Illegal logging (滥伐林木罪)	1	1
Abuse of power (滥用职权罪)	2	2
Neglect of duty (玩忽职守)	1	1
Producing and selling fake and inferior goods (生产、销售伪劣产品罪)	2	2
Excavating ancient tombs (盗掘古墓)	1	1
Theft (盗窃罪)	60	27
Sabotaging production and business operation (破坏生产、经营罪)	1	1

坏生产经营罪)		
Kidnapping (绑架罪)	6	3
Embezzlement (职务侵占罪)	11	8
Assembling crowd to disturb social order (聚众扰乱社会秩序罪)	14	3
Mob gathering and brawling (聚众斗殴)	3	1
False reporting of company registration capital (虚报注册资本)	1	1
Fraud (诈骗罪)	12	7
False accusation (诬告陷害罪)	6	2
Drug trafficking (贩卖毒品罪)	7	4
Corruption (贪污犯罪)	18	15
Buying counterfeit money (购买假币罪)	1	1
Gambling (赌博罪)	1	1
Negligent infliction of injury (过失致人重伤罪)	2	2
Tax evasion (逃税罪)	11	2
Knowingly selling merchandise under a fake trademark (销售假冒注册商标的商品罪)	1	1
Selling fake medicine (销售假药罪)	1	1
Producing fake medicine (生产假药罪)	9	1
Illegal trading of explosives (非法买卖爆炸物)	10	3
Illegal production of and sale of falsified receipt (非法制造、出售非法制造发票罪)	1	1
Illegal manufacturing of explosives (非法制造爆炸物罪)	12	5
Illegal occupation of farming land (非法占用农用地罪)	5	2
Illegally accepting deposits from the public (非法吸收公众存款罪)	10	3
Illegal detention (非法拘禁)	17	6
Illegal possession of guns (非法持有枪支罪)	2	2
Unlawful business operation (非法经营)	1	1
Illegal practice of medicine (非法行医罪)	1	1
Illegal Mining (非法采矿罪)	1	1
Withdrawing public funds for investment (抽逃出资罪)	1	1
Falsified tax receipts (虚开抵扣税款发票罪)	1	1
Crime of having a large amount of undisclosed property (巨额财产来源不明罪)	1	1

Crime of concealing deposits offshore (隐瞒境外存款罪)	1	1
Total	550	277

Note: “Defendants” refers to the number of defendants charged with a particular crime. Defendants who are charged with more than one crime are counted multiple times.

“Cases” refers to the number of cases in which a particular crime was charged. Cases with multiple charges are thus counted multiple times.

**TABLE 4: REHEARING (ZAIHEN) CASES IN THE INTERMEDIATE COURT**

Crime	Defendants	Cases
Traffic accident crime (交通肇事罪)	2	2
Misappropriation of public funds (挪用公款罪)	1	1
Corruption (贪污罪)	2	2
Willful injury (故意伤害罪)	8	5
Provocation (寻衅滋事罪)	4	1
Illegal detention (非法拘禁罪)	4	1
Abuse of power (滥用职权罪)	1	1
Theft (盗窃罪)	4	4
Fraud (诈骗罪)	4	2
Total	30	19

Note: “Defendants” refers to the number of defendants charged with a particular crime. Defendants who are charged with more than one crime are counted multiple times.

“Cases” refers to the number of cases in which a particular crime was charged. Cases with multiple charges are thus counted multiple times.

#### *B. Leniency and Settlement*

Scholars in China and the West have noted the national adoption of the policy of “balancing leniency and severity.”<sup>85</sup> The policy, adopted in 2005 and

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85. See Trevaskes, *supra*; Margaret K. Lewis, *Leniency and Severity in China's Death Penalty Debate*, 24 COLUM. J. ASIAN L. 303, 317 (2011) (discussing debate over leniency and severity in capital cases); Zuigao Renmin Fayuan Yinfu Guanyu Guanche Kuanyanxiangji Xingshi Zhengce De Ruogan Yijian De Tongzhi (最高人民法院印发《关于贯彻宽严相济刑事政策的若干意见》的通知) [Supreme People's Court's Notice on Printing and Distributing Some Views on Implementation of the Criminal Policy of Balancing Leniency with Severity] (promulgated by Sup. People's Ct., Feb. 8, 2010), available at [http://www.law-lib.com/law/law\\_view.asp?id=310425](http://www.law-lib.com/law/law_view.asp?id=310425) (stating that the policy of balancing leniency with severity is “the basic criminal policy of the nation” and that it should be implemented at all stages of the criminal process). The policy calls for strict sentences and the death penalty for serious crimes, including those that involve violence or threats to society, and leniency for less serious crimes, including nonviolent offenses or those lacking malice. The policy was first announced in a 2005 document from the Communist Party's Central Political

implemented beginning in 2007,<sup>86</sup> is generally understood as a reaction to the perception that prior reliance on “strike hard” campaigns had been ineffective and generated a strong backlash.<sup>87</sup> The “balancing leniency and strictness” policy encourages procurators and courts to treat serious crimes harshly but also encourages them to be lenient toward minor crimes, especially those not reflecting malice or posing significant risk of harm to society. In the courts, the emphasis on leniency is primarily manifest in reduced sentences for those who confess, as well as on the use of suspended sentences in minor criminal cases for those who agree to pay restitution or compensation to their victims.<sup>88</sup>

The Chinese Criminal Law<sup>89</sup> provides multiple mechanisms for a court to be lenient (or not) in its disposition of a case. The law generally stipulates a range of punishments for each crime based on whether the offending conduct was minor, serious, or extremely serious, or, for monetary crimes, whether the amount involved was small, large, or extremely large.<sup>90</sup> A court must first determine the severity of the crime, placing it within a codified sentencing band for a specific crime, after which it selects a sentence within that band. A court

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and Legal Committee. *See also* Zuigao Renmin Jianchayuan Guanyu Zai Jiancha Gongzuo Zhong Guanche Kuanyanxiangji Xingshi Sifa Zhengce De Ruogan Yijian (最高人民检察院关于在检察工作中贯彻宽严相济刑事司法政策的若干意见) [Several Opinions on Implementing the Policy of Balancing Severity with Leniency in Criminal Adjudication] (promulgated by the Sup. People's Procuratorate, Jan 15, 2007), available at [http://www.law-lib.com/law/law\\_view.asp?id=188373](http://www.law-lib.com/law/law_view.asp?id=188373) (stating that procuratorates are to follow the policy of balancing severity and leniency in order to reduce conflict and assist in the creation of a “socialist harmonious society”); Li Yunhui, *Kuanyanxiangji Xingshi Zhengce Dingwei Ji Shixian De Lujing Xuanze* (宽严相济刑事政策定位及实现的路径选择) [Policy Orientation and Route Selection for the Criminal Policy of Balancing Severity with Leniency], FAXUE LUNTAN (学论坛) [CHINA LAW INFO], [http://www.chinalawinfo.org/fultext\\_form.aspx?Db=qikan&Gid=1510092872&EncodingName=](http://www.chinalawinfo.org/fultext_form.aspx?Db=qikan&Gid=1510092872&EncodingName=) (last visited April 17, 2015) (describing creation of the policy).

86. Susan Trevaskes, *The Shifting Sands of Punishment in China in the Era of “Harmonious Society,”* 32 LAW & POLICY 332, 346 (2010).

87. *See, e.g.*, LIU RENWEN, XINGFA DE JIEGOU YU SHIYE (刑法结构与视野) [THE STRUCTURE AND SCOPE OF CRIMINAL LAW] 274–291 (2010) (arguing that the policy is primarily aimed at introducing leniency into the Chinese criminal justice system, as a reaction to the prior policy of striking hard against crime).

88. In China the term “suspended sentence” generally refers to the suspension of the defendant’s prison term. Any fines imposed as part of the sentence are not suspended. In this Article, I use the term “suspended sentence” to refer to suspension of a prison sentence, and “sentence” to refer to a prison sentence. The use of fines as a criminal sanction in China is an important possible future topic of research. Although some decisions do impose fines on defendants, fines appeared to play a relatively minor role in criminal cases in the jurisdictions I studied and rarely came up in interviews.

89. Zhonghua Renmin Gongheguo Xingfa (中华人民共和国刑法) [Criminal Law of the People’s Republic of China] (promulgated by the Nat’l People’s Cong., Mar. 14, 1997, President Order No. 83, of the President of the People’s Republic of China. Mar. 14, 1997, amended Feb. 25, 2011), available at [http://www.china.com.cn/policy/txt/2012-01/14/content\\_24405327.htm](http://www.china.com.cn/policy/txt/2012-01/14/content_24405327.htm) (last visited Apr. 11, 2015) [hereafter Criminal Law].

90. The Criminal Law provides little in the way of guidance as to what type of conduct qualifies as serious or very serious; such specifics are generally provided in subsequent judicial interpretations.

that seeks to be lenient thus can assign a sentence at the bottom of the range for the offense, referred to as *congqing*, or lightening the sentence.<sup>91</sup>

In certain cases, a court may also issue a sentence below the minimum for a specific crime set forth in the Criminal Law, referred to as *jianqing*, or mitigating a sentence.<sup>92</sup> A court may decide to convict a defendant but exempt the defendant from punishment, referred to as *mianchuchufa*.<sup>93</sup> In cases of minor crimes, courts may also determine that the conduct in question did not constitute a crime.<sup>94</sup> In addition, the Criminal Law states that defendants who are sentenced to terms of three years or less may be granted suspended sentences if they do not pose a threat to society.<sup>95</sup> Taken together, these provisions mean that Chinese courts have a very high level of discretion in sentencing.<sup>96</sup>

In addition to the Criminal Law, the SPC has provided guidance to lower courts regarding leniency and the use of suspended sentences, stipulating that defendants sentenced to three years in prison or less may receive suspended sentences or be exempt from punishment.<sup>97</sup> In practice this means that defendants convicted of a crime for which the maximum sentence is three years or less are eligible for suspended sentences, as are those convicted of a more serious offense who are given only a three-year sentence. The Henan High People's Court has issued its own sentencing guidelines, which add detail to those issued by the SPC.<sup>98</sup> Generally speaking, in Henan defendants sentenced to three years or less are divided into two categories. Court rules state that suspended sentences should be given to minors, pregnant women, or persons

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91. For examples of provisions discussing situations giving rise to lighter sentences or exemption from punishment, see Criminal Law, *supra* note 89, arts. 7, 10, 17, 18, 19, 22, 29, 65. For a more detailed discussion of how sentencing works in practice, see Li Li, *Nulla Poena Sine Lege in China: Rigidity or Flexibility?*, 43 SUFFOLK U. L. REV. 655, 658 (2010).

92. For example, see 2012 Criminal Procedure Law, *supra* note 6, arts. 20, 21, 24, 28, 68. A number of provisions in the Criminal Law give courts the discretion to lighten or to mitigate a sentence.

93. See, e.g., *id.* arts. 24, 67, 351.

94. 1996 Criminal Procedure Law, *supra* note 6, arts. 13, 15.

95. *Id.* art. 72. Revisions to the law in 2011—after the cases examined in this article were decided—added greater specificity to article 72. Such changes were largely consistent with the judicial interpretations discussed below, *see infra* note 98, that were applicable in 2010.

96. The limited scholarship on sentencing in English has generally emphasized this discretion. See, e.g., Li Li, *supra* 91, at 658–63.

97. See Zuigao Renmin Fayuan Liangxing Zhidao Yijian (最高人民法院量刑指导意见（试行）) [Supreme People's Court Opinion on Criminal Sentencing Guidelines (Provisional)] (promulgated by the Sup. People's Ct., Sep. 13, 2010), available at <http://www.xingshi110.com/xingfafagui/17082.html>.

98. Henan Sheng Gaoji Renmin Fayun Renmin Fayuan Liangxing Zhidao Yijian (Shixing) Shishi Xize (河南省高级人民法院《人民法院量刑指导意见（试行）》实施细则) [Implementation Provisions of the Henan High People's Court's Criminal Sentencing Guidelines (Provisional)] (promulgated by the Henan High People's Ct., effective Oct. 1, 2010), available at <http://www.lawtime.cn/article/111383464038397340028122> [hereinafter Supreme People's Ct. Guideline on Sentencing (Provisional)] (stating that defendants qualify for a suspended sentence when they are given a sentence of three years or less and meet other specified provisions).

over seventy-five.<sup>99</sup> For all others, the imposition of a suspended sentence is discretionary and is determined by a range of factors relating to the defendant's conduct. Judges say it is official policy in Henan for courts to try suspending sentences in cases where the statutory sentence is three years or less.<sup>100</sup> Yet the policy grants significant discretion to local courts; as a result, actual practice at the local level varies.<sup>101</sup>

Until recently formal law did not authorize courts to base sentencing determinations on whether a defendant had paid compensation to her or his victim. Nevertheless, the practice emerged and spread throughout the 2000s, in particular following a 2010 notice from the SPC concerning implementation of the Combining Severity with Leniency policy. The notice stated that reconciliation in criminal cases helped to resolve future cases and prevent petitioning.<sup>102</sup> In the SPC's 2010 annual work report to the National People's Congress, the SPC noted the value of mediating compensation agreements in cases where defendants received suspended death sentences.<sup>103</sup> China's revised Criminal Procedure Law, which became effective on January 1, 2013, explicitly authorizes the use of criminal settlement procedures in specific circumstances. These include crimes arising out of private disputes punishable by three years imprisonment or less and crimes of negligence punishable by seven years imprisonment or less.<sup>104</sup> At the time of the cases examined in this Article,

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99. *Id.* ch. 2, art. 3, para. 7 (stating that defendants who are sentenced to three years or less and who meet other specified preconditions may have their sentences suspended); Interview 2012-25.

100. Interview 2012-25; *Henan Fayuan Ni Tui "Huanxing Yugao Shu" Zhi* (河南法院“缓刑预告书”制) [Henan Courts Plan to Extend Suspended Sentence Advance Notice Policy], HENAN PINDAO (河南频道) [HENAN CHANNEL] (Aug. 13, 2009), <http://henan.people.com.cn/news/2009/08/13/411406.html>.

101. Interview 2012-26. Supreme People's Ct. Guideline on Sentencing (Provisional), *supra* note 98, ch. 2, art. 3, para. 6. The Criminal Law provides only rough guidelines regarding when a defendant who has been sentenced to three years or less of detention may be given a suspended sentence: when the circumstances of the crime are light, when the defendant has shown remorse, when there is no risk of reoffending, and when there would be no negative effects on the local area from a suspended sentence. Criminal Law, *supra* note 89, arts. 72–77.

102. *Zuigao Renmin Fayuan Yinfu Guanyu Guanche Kuanyi Xiangji Xingshi Zhengce de Ruoguan Yijian de Tongzhi* (最高人民法院印发《关于贯彻宽严相济刑事政策的若干意见》的通知) [Notice of the Supreme People's Court on Issuing Some Advice on Implementing the Criminal Policy of Combining Leniency with Strictness] (promulgated by the Sup. People's Ct., Feb. 8, 2010), available at [http://www.law-lib.com/law/law\\_view.asp?id=310425](http://www.law-lib.com/law/law_view.asp?id=310425). For a description of the emergence of the practice of settlement in criminal cases in the late 2000s, see Rosenzweig et al., *The 2012 Revision of the Criminal Procedure Law: (Mostly) Old Wine in New Bottles* 21–32 (CRJ Occasional Paper, 2012).

103. The SPC emphasized the importance of courts' not immediately carrying out death sentences in order to allow for victims' families and defendants' to reach a settlement and thus "reduce social contradictions." *Zuigao fa: Yange Zhangwo He Tonyi Sixing Shiyong Biao zhun* (最高法: 严格掌握和统一死刑适用标准) [Supreme Court: Death Penalty Strictly Controlled and Subject to Uniform Standards], XINHUA WANG (新华网) [XINHUA] (May 25, 2011), <http://www.people.com.cn/GB/220005/222646/14738739.html>.

104. 2012 Criminal Procedure Law, *supra* note 6, arts. 277–79. For an analysis of the new

however, China's Criminal Procedure Law did not authorize courts to consider compensation agreements as factors influencing sentences.

The promotion of settlement in criminal cases followed a general renewed emphasis on mediation in China's courts in the early 2000s. Embrace of the practice reflected the belief that mediated cases were less likely to result in escalation, protest, and petitioning from victims or defendants (or their families). The policy also reflected resource concerns in the criminal justice system resulting from increased numbers of criminal cases and the belief that many minor offenders, in particular first offenders convicted of nonviolent crimes, did not need to be incarcerated.

In this Article I use the term "leniency" to refer to two specific phenomena in China's courts: the widespread use of suspended sentences, in some cases even for defendants facing a sentence in excess of three years, and the decision to give a suspended death sentence or life imprisonment to a defendant whose conduct made him or her eligible for the death penalty. My focus is thus on the actual sentences courts grant, not on the legal provisions concerning leniency.

My findings provide evidence of how the policy is being implemented at the local level and suggest that local courts' embrace of leniency and settlement exceeds national policy. Judges in Henan stated that they try to be lenient where they can, in particular in cases involving minor crimes, crimes committed by youths or students, crimes committed within a family, cases involving defendants who turn themselves in, and cases in which a family member turns in a relative.<sup>105</sup> As one judge explained, if "cases come from ordinary lives" then

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provisions, including controversy leading up to their adoption, see Rosenzweig et al., *supra* note 102, at 21–32. The revised law also explicitly states that in such cases the procuratorate may recommend that a defendant receive a lenient sentence or be exempt from punishment. 2012 Criminal Procedure Law, *supra* note 6, art. 279. Prior to the revision, the 1996 Criminal Procedure Law authorized settlement only in cases involving private prosecutions. 1996 Criminal Procedure Law, *supra* note 6, art. 172.

105. Official reports list seven categories of cases in which courts ordinarily should issue suspended sentences in Henan: defendants who take appropriate action to minimize harm; minors; deaf, mute, blind or disabled defendants who lack the ability to harm society; those who terminate their crime; those who turn themselves in or engage in meritorious service after the crime; those who assist in cracking a case; and those who commit crimes of negligence. In an additional five categories of cases, courts in Henan have the discretion to issue suspended sentences: those who commit intentional crimes in which there is little negative intent; those who actively repay stolen goods; those who actively pay compensation to victims; those who pay fines in advance; and those who turn themselves in, confess, or otherwise engage in conduct stipulated in law as a basis for leniency. The policy also specifically excludes certain defendants from eligibility for suspended sentences: defendants who fail to confess, fail to show remorse, or cause serious harm; defendants who have "despicable motivations"; defendants who use the proceeds of crimes to engage in other illegal conduct; defendants who take part in a collective crime whose conduct is serious or who commit multiple crimes; defendants with a prior criminal record or who have been subject to administrative sanction two or more times in the past; defendants whose crime involves the use of national relief funds or materials or whose crimes otherwise have serious characteristics. Similarly, defendants whose crimes are subject to punishment of a minimum of three years or more will not be eligible for a suspended sentence unless they have surrendered or engaged in other legally stipulated basis for leniency. Defendants whose crimes are to be punished by a sentence of five years or more

courts will try to be lenient, even if there is no formal legal basis for doing so.<sup>106</sup> Likewise, courts may seek to be lenient in cases where a victim was partially at fault, such as in intentional injury cases arising from fights.<sup>107</sup>

Judges acknowledged some flexible adaptation of the SPC's official policy. Henan courts often impose suspended sentences for crimes that ordinarily would result in a three-to-seven-year sentence, for example sentencing the defendant to three years and then suspending the sentence. Some observers suggested that the policy was in tension with the SPC's intent that suspended sentences be used only for minor crimes,<sup>108</sup> although technically the SPC rules do permit the use of a suspended sentence for those sentenced to three years for a crime for which the legally stipulated range is three to seven years.

The 177 county court decisions in my dataset resulted in criminal convictions for 273 individual defendants, 219 of whom were given criminal sentences. Sixty-nine percent of these sentences, 152 sentences, were suspended sentences, meaning that defendants spent no time in prison following the judgment. An additional 53 defendants received only fines or were sentenced to detention or control.<sup>109</sup> Many others who received a sentence received a relatively short one. The median sentence for such defendants was three years, reflecting the fact that most county court cases concerned relatively minor crimes. Cases that resulted in suspended sentences generally involved first-time offenders charged with relatively minor crimes such as fights, traffic offenses

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are only eligible for a suspended sentence if there is a legal basis for reducing their sentence to three years or below. *Henan Fayuan Nitui "Huanxing Yugao Shu" Zhi* (河南法院拟推“缓刑预告书”制) [Henan Courts Plan to Apply Suspension Advance Notice Policy], HENAN PINDAO (河南频道) [HENAN CHANNEL] (Aug. 13, 2009), <http://henan.people.com.cn/news/2009/08/13/411406.html>. An article by a judge in the Henan provincial capital, Zhengzhou, provided some additional details as to how judges apply the policy. *Qianxi "Huanxing Yugaoshu" De Sifa Jiazhi* (浅析“缓刑预告书”的司法价值) [A Brief Analysis of Suspension Advance Notice's Judicial Value], HENAN FAYUAN WANG (河南法院网) [HENAN COURT NET] (Aug. 17, 2009), <http://hnyf.chinacourt.org/article/detail/2009/08/id/746727.shtml>. The judge noted seven types of cases in which suspended sentences are used: traffic accidents and other crimes of negligence; minor crimes involving students at universities or other schools; minor crimes by juveniles; cases of minor harm to persons, serious harm resulting from negligence, serious harm with an “antecedent,” or cases of harm to property or other economic harm in which the defendant actively agrees to pay compensation; minor crimes to property such as theft; criminal disputes resulting from disputes among neighbors or family members; and cases involving crimes of negligence, accomplices, those who terminate their crimes, who turn themselves in, or in which the defendant engages in meritorious service or takes preventative action or action to minimize the harm. *Id.*

106. Interview 2012-25.

107. *Id.*

108. *Id.*

109. Detention refers to a short sentence, not to exceed one year, administered by the police in a police-run detention facility, not a prison. In theory those sentenced to detention have greater liberty than those sentenced to prison. Criminal Law, *supra* note 89, arts. 42–44. Control, sometimes also translated as “public surveillance,” refers to defendants who are not incarcerated but have their movements monitored by the police and who must obtain police permission for a range of activities. *Id.* arts. 1, 38–41; Cases B49, B184, B187, and B189 (explaining that four defendants received detention and a fine, all for theft).

resulting in personal injury, and low-value thefts. Most outcomes appear consistent with the SPC's instructions on balancing severity and leniency.

Yet the leniency apparent in cases in the dataset appears to go beyond that announced in official policy. Numerous cases that one might expect to result in incarceration under China's Criminal Law instead resulted in suspended sentences. Thus, for example, the dataset includes multiple traffic crime cases in which a drunk driver caused a fatality or fatalities but received only a suspended sentence, despite the Criminal Law specifying a sentence range of three to seven years.<sup>110</sup> Other cases involved violent conflict with local authorities that nevertheless resulted in suspended sentences, including a defendant who drew a knife on local officials seeking to seize counterfeit cigarettes<sup>111</sup> and a case in which a villager attacked a local birth planning official in his home with an axe.<sup>112</sup> Likewise, the county court granted suspended sentences in a case involving arson<sup>113</sup> and in four separate cases involving corruption by local officials,<sup>114</sup> the largest of which involved the theft of 70,000 yuan.<sup>115</sup> The practice of granting leniency in cases involving corruption by officials appears directly in conflict with an SPC notice on the policy of balancing leniency and severity, which explicitly called for strict punishment for crimes involving official malfeasance.<sup>116</sup> In another case, defendants convicted of manufacturing and selling low-quality (presumably fake) fertilizer received suspended sentences. Although the court found that their crime had yielded 120,000 yuan in profit and caused 340,000 yuan in harm, it nevertheless gave defendants a suspended sentence in a simplified trial.<sup>117</sup>

Settlement with the victim or victim's family appeared to be the most significant factor that led courts to impose lenient sentences. Sixty-eight of the county court cases reported settlements with victims or their families; another fourteen cases reported payment of restitution or compensation in cases not involving personal injury; and thirty cases reported the return of stolen goods.<sup>118</sup> Fifty-eight of the cases in which defendants paid victims mentioned that

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110. *See, e.g.*, Case B193 (deciding that sentences be suspended, despite multiple fatalities).

111. Case B153.

112. Case B55 (illustrating that the defendant had argued and fought with the official earlier in the day, apparently when the official visited defendant's home in the course of his duties as the local birth planning official).

113. Case B91.

114. Cases B104, B169, B199, and B213.

115. Case B199. In contrast, a defendant in a credit card fraud case who was convicted of stealing 10,000 yuan received six years in prison and was fined 60,000 yuan. Case B142.

116. Notice of the Supreme People's Court on Issuing Some Advice on Implementing the Criminal Policy of Combining Leniency with Strictness, *supra* note 102, art. 8.

117. Case B130 (demonstrating that the defendants had surrendered and had assisted the police in locating other criminals).

118. Cases B179 and B187 (mentioning restitution, specifically). *See, e.g.*, Cases B61, B70, B144, and B156 (discussing return of goods or repayment to victim).

defendants had “obtained the forgiveness of” victims or family members, and court decisions explicitly discussed compensation to families as a basis for a suspended sentence.<sup>119</sup> Although some in China have drawn parallels between reconciliation in criminal cases and models of restorative justice elsewhere, the Chinese system relies almost entirely on direct payment to victims and their families as a direct factor justifying mitigation of a sentence.

Settlement cases were largely made of up cases resulting from traffic accidents and fights. Because compensation determinations in criminal cases come through attached civil compensation claims, compensation levels should correspond to compensation in tort cases. In practice, however, settlement values ranged widely, and it is difficult to discern whether settlement amounts correspond to amounts potentially available in tort. The largest settlement, in a case involving multiple fatalities, was 370,000 yuan.<sup>120</sup> The court found the defendant to have been drunk and to have fled the scene, which would potentially have exposed the defendant to a sentence in excess of seven years. After paying the compensation to the victims’ families, the defendant received only a three-year sentence, which was suspended for five years, resulting in no prison time.<sup>121</sup> Defendants received suspended sentences in virtually all county court cases involving settlements.

Yet the number of settlements in the county I studied may actually be low compared to elsewhere in Henan: settlement rates in criminal cases at some first-instance courts in Henan reached eighty or ninety percent.<sup>122</sup> One lawyer commented that the actual practice of settlements in Henan extends far beyond what is authorized in law: “the reality of practice exceeds real life.”<sup>123</sup>

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119. Case B1.

120. Case B193.

121. Case B193 (demonstrating that the defendant may also have been helped by his status as deputy director of the local family planning bureau, and as son of a local official).

122. Interview 2012-17.

123. Interview 2012-7. See also *Henan Xinmi Tui Peichang Baozhengjin, Qingzui Xiansan Jiaqian Ke Mianyu Pibu* (河南新密推赔偿保证金 轻罪嫌犯交钱可免于批捕) [*Xinmi, Henan Adopts Compensation Deposits, Misdemeanor Suspects Can Pay to Avoid Arrest*], FAZHI RIBAO (法制日报) [LEGAL DAILY] (Aug. 23, 2010), [http://www.legaldaily.com.cn/zbk/content/2010-08/23/content\\_2253710.htm](http://www.legaldaily.com.cn/zbk/content/2010-08/23/content_2253710.htm) (stating that for minor crimes, defendants may be able to provide a “compensation guarantee payment” to the police and thus avoid being formally arrested by the procuratorate, and that the policy was the explicit reaction to the overuse of compulsory measures against defendants charged with minor crimes); *Henan Sheng Jiancha Jiguan Yi Nian Hejie 6433 An* (河南省检察机关一年和解6433案) [*Henan Procuratorate Settled 6433 Cases in One Year*], FAZHI RIBAO (法制日报) [LEGAL DAILY] (Mar. 28, 2010), [http://www.legaldaily.com.cn/zbk/content/2010-04/30/content\\_2129568.htm](http://www.legaldaily.com.cn/zbk/content/2010-04/30/content_2129568.htm) (stating that seventy five percent of the cases in Henan in 2009 involved sentences of three years or less; sixty-eight percent of these defendants received a suspended sentence, a sentence of control or detention, were exempt from criminal punishment, or were subject only to a fine; the procuracy also reported resolving approximately ten percent of cases through mediation before going to court, a total of 6433 cases involving 7622 people in 2009); *Henan Geji Fayuan YiNian Tiaojie Jian 221732 Jian* (河南各级法院一年调解结案221732件) [*Henan Courts Mediated 221732 Cases in One Year*], FAZHI RIBAO (法制日报) [LEGAL DAILY] (Mar. 16, 2010), [http://www.legaldaily.com.cn/zbk/content/201004/30/content\\_2129568.htm](http://www.legaldaily.com.cn/zbk/content/201004/30/content_2129568.htm)

My dataset also includes a number of cases in which defendants convicted of relatively minor crimes did not receive a suspended sentence, apparently at least in part because the defendant did not reach a settlement with the victim. Thus, for example, defendant Wang Xisheng was sentenced to a year in prison following a fight that caused minor injury to a neighbor. The two parties were unable to reach a settlement and the court sentenced Wang to prison, in contrast with other cases involving fights in my dataset where the defendants settled and received only suspended sentences.<sup>124</sup> In one of the two traffic crime cases that resulted in a prison sentence, defendant Liu Tao failed to come to the immediate assistance of his alleged victims after an accident that left two people riding an electric bicycle dead and a third injured, and also failed to compensate his victims. The court found his conduct involved “particularly bad circumstances,” thus warranting a five-year jail sentence.<sup>125</sup> The court explicitly stated that the failure to compensate the victims’ families was a factor justifying a heavier sentence.<sup>126</sup> The other defendant sentenced to prison in a traffic crime case was a recidivist who received an effective sentence of eight months. All other traffic crime cases involved both settlement and compensation.<sup>127</sup>

Particularly unlucky were those defendants who had spent the proceeds of a crime and thus were not able to pay restitution. For example, although the dataset includes a number of cases involving motorcycle thefts where the

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m (discussing emphasis on mediation in Henan courts generally and a nearly fifty percent increase in the percentage of cases mediated); *Yang Tao*, “*Xingshi Hejie*” *Zhong Faguan Buneng Dang Heshilao* (刑事和解”中法官不能当和事佬) [Judges Cannot Be the Peacemakers in Criminal Settlement], FAZHI RIBAO (法制日报) [LEGAL DAILY] (Sep. 27, 2012), [http://www.legaldaily.com.cn/Frontier\\_of\\_law/content/2012-09/27/content\\_3872770.htm](http://www.legaldaily.com.cn/Frontier_of_law/content/2012-09/27/content_3872770.htm) (noting that China’s new Criminal Procedure Law restricts the use of mediation in criminal cases to specific categories and discussing the risk that mediation will be overused or forced on parties by courts seeking quick resolution of even serious criminal cases); “*Xingshi Hejie*” *Xingui: Furen Ke Jiao Fukuan Qiongren Zhineng Zuolao?* (刑事和解”新规:富人可交罚款穷人只能坐牢?) [New Rules of Criminal Settlement: The Rich Can Pay Fine, While the Poor Can Only Go to Prison?], FAZHI RIBAO (法制日报) [LEGAL DAILY] (Sep. 27, 2012), [http://www.legaldaily.com.cn/commentary/content/2012-09/27/content\\_3873374.htm](http://www.legaldaily.com.cn/commentary/content/2012-09/27/content_3873374.htm) (discussing concerns that emphasis on settlements in criminal cases will favor the rich).

124. Case B95.

125. Case B5 (illustrating that the defendant had apparently pledged to compensate a small amount, 5400 yuan, but had defaulted on compensation payment).

126. Case B5. No provision in the criminal law authorizes the imposition of heavier sentence to defendants who fail to compensate. In Case I3, the court affirmed that a three-year sentence for a defendant in a traffic accident. Although the defendant had paid compensation, defendant had apparently not obtained forgiveness of victim’s family. Although defendant requested leniency, defendant’s lawyer contested guilt on appeal. *See also* Cases B5 and B98 (demonstrating the only two cases that had no suspended sentence arising from a traffic crime). Cases B1, B4, B7, B9, B12, B16, B27, B42, B71, B87, B103, B112, B120, B128, B129, B134, B154, B170, B180, B181, B193, B205, B206, B207, B216, and B220 are examples of cases resulting in suspended sentences.

127. Only Cases B5 and B98 had no suspended sentence in a case arising from a traffic crime. Cases B1 B4 B7, B9, B12, B16, B27, B42, B71, B87, B103, B112, B120, B128, B129, B134, B154, B170, B180, B181 B193, B205, B206, B207, B216 and B220 were traffic crime cases resulting in suspended sentences.

defendants returned the stolen goods and received suspended sentences, it also includes cases such as that of Hou Yunchang who stole a pig and motorcycle and wound up in prison, both because he fled after the crime and because he was apparently unable to pay restitution.<sup>128</sup> In another case involving motorcycle thefts, two defendants were treated differently because one had sold, and thus not returned, a stolen motorcycle, while the other defendant had returned all the stolen motorcycles.<sup>129</sup>

Although somewhat less pronounced in influence, intermediate court cases suggest that settlements are likewise important both in first-instance trials in the intermediate court and in appeals. Eleven defendants who were tried in the intermediate court and convicted of murder or of intentional injury leading to death received either life sentences, suspended death sentences, or fixed terms of imprisonment after paying compensation to victims' families. In at least one of these cases the court explicitly stated that it was imposing a life sentence, presumably instead of death, because the defendant had compensated the victim's family and had "obtained the understanding" of the family.<sup>130</sup> In another case, a defendant who killed someone in a fight but confessed and paid compensation received a fifteen-year sentence, while a defendant in another case who contested the allegations and failed to pay compensation received life in prison.<sup>131</sup> In a third case, a defendant convicted of the kidnapping and killing of a child was sentenced to life in prison despite the Criminal Law specifying the death penalty for a killing in the course of a kidnapping. The court noted that the defendant had settled and had surrendered.<sup>132</sup>

Settlement was also an important factor in cases in which sentences were revised on appeal to the intermediate court. As discussed below, 27 defendants (out of a total of 442 defendants in the cases on appeal to the intermediate court) had their sentences reduced by the intermediate court, mostly because of settlements subsequent to the initial trial. Judges confirm that settlements may result in reduced punishment in some serious cases and that settlements of cases subsequent to first-instance verdicts may lead the intermediate court to revise sentences on appeal.<sup>133</sup>

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128. Case B62.

129. Case B19.

130. See Case I14a (explaining that a codefendant received a fixed term sentence because he paid compensation and assisted in capturing the primary defendant).

131. Cases I27b, I28b.

132. Case I5a. Article 239 of China's Criminal Law states that a defendant who kills another person in the course of a kidnapping shall be sentenced to death. Criminal Law, *supra* note 89, art. 239. As Margaret Lewis has noted, a surge in suspended death sentences has in recent years also resulted in public questioning of whether corruption is playing a significant role in courts' decisions to grant suspended death sentence instead of the death penalty. Lewis, *supra* note 85, at 325–26. One commentator at a presentation of this Article in China noted that victim's families in murder cases often have the choice of accepting compensation or having the defendant executed.

133. Interview 2012-19.

In interviews, judges confirm that compensation is an important factor determining outcomes, in particular in relatively minor cases, such as traffic crimes leading to injury, theft, and assault.<sup>134</sup> Compensation claims may be resolved privately or through the resolution of civil claims attached to criminal cases. For example, intermediate court judges reported that, in general, roughly half of their first-instance cases have civil cases attached to them and that half of these are resolved through settlement. Other cases may be resolved through settlements outside of court.<sup>135</sup> Cases can be settled at any point in the criminal process, including after courts have issued their decisions,<sup>136</sup> although in practice it appears that courts often wait to see if cases are resolved via reconciliation before issuing their judgments.

Compensation also affects outcomes in capital cases. Lawyers state that in capital cases, settlement agreements can make the difference between death and a suspended death sentence<sup>137</sup>: to avoid the death penalty, a defendant must pay compensation.<sup>138</sup> One lawyer directly linked the recent decline in executions in China and the emphasis on mediating outcomes in criminal cases.<sup>139</sup>

Judges (and procurators and police) at times play active roles in settlement negotiations,<sup>140</sup> reflecting their strong interest in having cases resolved through payment of compensation. As one judge noted, “we work very hard to try to resolve cases via settlement.”<sup>141</sup> Court efforts to settle will often be guided by the amounts potentially available in civil cases,<sup>142</sup> and courts explain relevant standards governing compensation in order to persuade victims to accept compensation.<sup>143</sup> Judges say they question victims or their family members to ensure they are satisfied with compensation agreements and in some cases add money to the agreed amount.<sup>144</sup> Such efforts are guided by the belief that

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134. Interview 2012-17.

135. Interview 2012-19.

136. Interview 2012-12; Interview 2012-18.

137. Interview 2012-23.

138. Interview 2013-5.

139. *Id.*

140. Interview 2012-6; Interview 2013-11; *Chen Ruihua: Xingshi Susong De Sili Hezuo Moshi* (陈瑞华：刑事诉讼的私力合作模式) [*Chen Ruihua: Integration of Private Remedy into Criminal Litigation*], FAZHI RIBAO (法制日报) [LEGAL DAILY] (Nov. 1, 2010), [http://www.legaldaily.com.cn/fxy/content/2010-11/01/content\\_2335275.htm](http://www.legaldaily.com.cn/fxy/content/2010-11/01/content_2335275.htm) (discussing prevalence of negotiated outcomes in criminal cases in Beijing and noting success at avoiding petitions; *Xingsifa Shishi Zhong De Zhongdian Nandian Wenti* (刑诉法实施中的重点难点问题) [*Key Points and Difficulties in Application of Criminal Procedure Law*], FAZHI RIBAO (法制日报) [LEGAL DAILY] (Jan. 9, 2013), [http://www.legaldaily.com.cn/Frontier\\_of\\_law/content/201301/09/content\\_4119385\\_2.htm](http://www.legaldaily.com.cn/Frontier_of_law/content/201301/09/content_4119385_2.htm) (discussing preference of procurators and police for mediating criminal cases during the trial stage)).

141. Interview 2013-9.

142. Interview 2012-26.

143. Interview 2013-11.

144. *Id.*

settlement works.<sup>145</sup> As another judge noted, settlements reduce contradictions and the possibility of escalation; thus, judges “want a settlement.”<sup>146</sup>

Judges describe their roles as neutral actors seeking to ensure that the rights of victims are protected. Yet, it is clear that in some cases, courts place pressure on both sides of a case to agree to a mediated outcome.<sup>147</sup> Lawyers contend that defendants are sometimes under extreme pressure to pay compensation to victims, with trials delayed to encourage settlement.<sup>148</sup> Judges confirm that courts sometimes pressure defendants to settle, noting that criminal trials can be delayed for up to two months in cases in which a civil claim is attached to the criminal case.<sup>149</sup> A few of the cases in the dataset involved delayed trials for minor crimes while a defendant remained in detention, suggesting that the court was attempting to encourage a settlement. In one case,<sup>150</sup> the defendant was sentenced to eighteen months in jail for causing an injury in a fight between neighboring families. That defendant allegedly injured the neighbor by throwing a brick on his foot. The court initially delayed the trial by two months, apparently to encourage the two sides to mediate. When they failed to reach an agreement, the court ordered a relatively modest compensation of 3834 yuan, but also imposed an eighteen-month jail sentence.

In the county court the average time from indictment by the procuracy to court decision was 32.2 days.<sup>151</sup> Twenty-four cases<sup>152</sup> took more than 45 days from indictment to court judgment; only eleven cases took more than 80 days. In these eleven cases, nine of the thirteen defendants eventually either paid compensation or some form of restitution, suggesting that ongoing settlement negotiations may have played a role in the delays. The court appeared to move relatively quickly to decide cases when a settlement seemed unlikely or impossible, with cases not involving a settlement being resolved more quickly

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145. *Id.*

146. Interview 2013-2.

147. *Xiayi Fayuan Jianli “Qixiang Jizhi” Tigao Zhixing Hejielu Chengxiao* (夏邑法院建立“七项机制”提高执行和解率显成效) [Xiayi Court to Establish a “Seven Mechanism” to Improve the Implementation Rate of Paying off a Settlement], SHANGQIU FAYUAN WANG (商丘法院网) [SHANGQIU COURT WEB] (Jul. 13, 2009), <http://hnsqzy.chinacourt.org/public/detail.php?id=968>; *Langzhong Fayuan Suan Hao “Si Bi Zhang” Cujin Zhixing Hejie* (商丘法院算好“四笔账”促进执行和解) [Langzhong Court Considered “Four Accounts” to Facilitate the Implementation of Reconciliation], ZHONGGUO FAYUAN WANG (中国法院网) [CHINA COURT] (Aug. 19, 2010), <http://old.chinacourt.org/public/detail.php?id=424266>; *Pizhou Fayuan “Si Ge Qianghua” Zhuo Hao Zhixing Hejie* (邳州法院“四个强化”抓好执行和解) [Pizhou Court “Four Enhanced” Ensures Effective Enforcement of Settlement], ZHONGGUO FAYUAN WANG (中国法院网) [CHINA COURT] (May 12, 2011), <http://old.pz.gov.cn/Htmls/News/mtkpz/JF28B04N066X4T60V6.htm>.

148. Interview 2012-6.

149. Interview 2012-17.

150. Case B115.

151. The fastest case was decided 5 days after the filing of the indictment. The slowest case took 399 days.

152. Cases B134, B215, B22, B112, B130, B193, B12, B163, and B106.

than those involving a settlement. The average time from indictment to decision in cases involving crimes against identifiable victims was 29.1 days for cases not involving settlements and 37.4 days for those with settlements. In the intermediate court, the average time from indictment to judgment was longer—74 days. Yet some intermediate court cases also moved quickly from indictment to trial. For example, only 21 days elapsed from indictment to judgment for a defendant charged with fraudulently raising nearly 3 million yuan in capital. The defendant, who lacked legal representation, was sentenced to life in prison.

It is also common for cases involving multiple defendants accused of the same crime to result in different sentences depending on whether the defendants paid compensation.<sup>153</sup> Defendants who compensate victims often receive suspended or reduced sentences; those who do not receive prison terms.<sup>154</sup> For example, a defendant convicted of intentional homicide had his sentence reduced on appeal from five years to four years after he paid 35,000 yuan in compensation to the victim's family. The defendant had been part of a group that went to the victim's home to pressure her to repay a gambling debt. The victim drank pesticide, killing herself in front of the defendants. The court affirmed a finding of intentional homicide for two of the defendants, but accepted one defendant's argument that the sentence should be reduced in light of the compensation paid and the secondary role played by the defendant in the crime.<sup>155</sup> In a companion case,<sup>156</sup> three others who were convicted of participating in the same crime but who failed to pay compensation had their sentences affirmed.<sup>157</sup>

Judges say they consider settlement offers even in cases in which victims reject such settlements,<sup>158</sup> but it is impossible to verify this from the written judgments. Judges also say they take account of defendants who cannot pay,<sup>159</sup> although the cases do not provide evidence to support this claim. Judges say that, in general, defendants will borrow from friends and family in order to come up with money to pay compensation.<sup>160</sup> In some cases courts may also provide funds to victims' families from court assistance funds to encourage settlements, in particular where the defendant or defendant's family has tried to settle but lacked adequate resources.<sup>161</sup> Defendants also sometimes act strategically when

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153. Interview 2012-6.

154. *Id.*

155. Case I156.

156. Case I14b.

157. *See also* Case 6c (illustrating that defendants who settled received lighter sentences than codefendants who did not settle for beating corncob seller after motorcycle crashed on spilled corncobs).

158. Interview 2012-17.

159. Interview 2013-11 (noting that in cases in which a defendant lacks fund the court will seek to explain the situation to the victim or victim's family).

160. Interview 2013-11.

161. Interview 2012-17.

it comes to organizing settlements: in one traffic accident case, the defendant fled after the accident and then waited to turn himself in until the two families had reached a settlement. He received a suspended sentence.<sup>162</sup>

Cases that were not amicably resolved sometimes resulted in defendants receiving jail sentences even when they did pay compensation. Defendant Wang Xisheng was charged with willful injury after he punched his neighbor in the chest, causing “minor harm.”<sup>163</sup> Wang did so after his neighbor dug a hole outside his house into which he fell. Wang agreed to compensate his neighbor 7,000 yuan, an amount approved by the court. Nevertheless, he was sentenced to a year in prison. The court, while rejecting the victim’s demands for additional compensation, nevertheless decided that Wang deserved a prison sentence—in contrast to numerous other cases where defendants charged with crimes arising out of fights received only suspended sentences.

Surrender and confession are also important factors affecting leniency, although the county court made clear that surrender must be useful to the authorities and confession must be truthful. Confession is a prerequisite to the imposition of a suspended sentence.<sup>164</sup> The overwhelming majority of defendants confessed: 202 of the 273 defendants in the county court confessed at some point in the process. A small number of cases involved multiple defendants in which one defendant was treated more harshly than codefendants because of failure to confess.<sup>165</sup> Helping victims after an accident was also a factor courts considered in imposing a lenient sentence.<sup>166</sup> Informing on others and providing evidence of other crimes were also useful routes for those seeking leniency. Failure to surrender or to confess, in contrast, can lead to a heavier sentence. Thus, for example, a defendant who tried to escape after being detained was sentenced to four months for a minor crime that otherwise almost certainly would have resulted in a suspended sentence.<sup>167</sup>

Some apparent lenient outcomes may reflect court and procuratorate attempts to adapt to local customs and expectations. Thus, for example, a defendant who attacked another person with an axe was prosecuted for attempted murder but was sentenced at the bottom of the specified range to 144 months in the trial court. On appeal, the intermediate court reduced the sentence to 72 months. The defendant had acted in response to an attempt by the victim to “cure [the] defendant’s wife by superstitious means.” Prior to the attack, the two had argued with the victim stating that the defendant had offended the heavens

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162. Case B103.

163. Case B95.

164. Interview 2012-26.

165. Case B73; Case B73. *But see* Cases B139, B113, and B79 (demonstrating that in additional cases longer sentences appeared to be based both on failure to settle and on the other defendant committing additional offenses).

166. Case B154.

167. Case B62.

and was cursed.<sup>168</sup> In another example of both leniency and efforts to reconcile disputes among neighbors, the intermediate court affirmed a one-year sentence for a defendant for willful injury. The defendant was apparently a traditional healer who the court said used “witchcraft” to attempt to remove a serpent that she said was inside the victim. The victim was suffocated when the defendant compressed her neck and held her nose closed during the treatment. The defendant paid more than 100,000 yuan to the victim’s family prior to trial.<sup>169</sup> The one-year sentence appears low even considering the payment of compensation.

The cases provide a window into the practice of leniency in Henan that likely is over- and underinclusive. Many cases settle during the investigation phase under the guidance of the procuratorate; these cases never proceed to court and thus do not appear in the dataset. Likewise many traffic cases that could potentially lead to criminal charges are settled by the police because charges are dropped once compensation is paid.<sup>170</sup> Procurators say that it is common to drop charges for minor crimes when the defendant agrees to compensate the victim. Compensation agreements can also affect the criminal charge selected by the procuratorate.<sup>171</sup>

Yet suspended sentences may not reflect leniency at all: some interviewees suggested that many suspended sentences reflect cases where defendants should never have been charged with or convicted of a crime in the first place. Chinese courts in criminal cases serve almost entirely as fora for determining sentences, not guilt. Courts are under enormous pressure to convict all defendants, and suspended sentences may thus be a proxy for cases where there is insufficient evidence to convict.<sup>172</sup> Although most nonpublic cases involve juveniles, it is also possible that courts choose not to make certain cases public.

Confession, surrender, and compensation are not the only factors affecting sentencing. Courts may also consider factors not stated in the opinion. For example, one judge noted that courts will often consider whether the defendant has children although the court may not put such reasoning into an opinion.<sup>173</sup> Additionally, suspended sentences may also reflect direct corruption.<sup>174</sup> It is impossible to know how many such cases occur, but defense lawyers acknowledge that defendants can sometimes win suspended sentences through direct payments to judges.<sup>175</sup>

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168. Case I88a.

169. Case I92a.

170. Interview 2013-11.

171. Interview 2013-12.

172. Interview 2013-2.

173. Interview 2013-8.

174. Interview 2012-6.

175. *Id.*

*C. Overcriminalization and State Interests*

Despite the official embrace of leniency, the county court decisions also show that the criminal justice system continues to criminalize a wide range of minor conduct. Thus while many criminal defendants appear to be treated leniently, the county cases suggest that the criminal justice system handles a significant number of primarily civil disputes. Many of the cases appear to reflect the criminalization of tort disputes or business disputes, perhaps reflecting the difficulty of winning and enforcing a civil judgment. Hence the dataset includes numerous cases that involve fights among neighbors resulting in minor harm—in one case a fight resulting in minor harm to a finger—that become criminal cases.<sup>176</sup> Such cases largely follow statutory guidelines, which impose sentences of up to three years for intentional harm resulting in minor injury. Nevertheless, the large volume of such cases appears in tension with efforts to mediate minor criminal matters. Settlement is encouraged, but even very minor crimes remain a concern of the State. Likewise, the cases include fairly routine traffic accidents—in one case caused by a wheel falling off a car—that are treated as criminal matters.<sup>177</sup> Also, property disputes—in particular illegal use of land that does not belong to the defendant—were another source of criminal cases.<sup>178</sup> China is not unique in criminalizing such conduct, but the cases reflect the long reach of the criminal justice system.<sup>179</sup> Procurators and lawyers say that it is common for the criminal system to be used to resolve civil cases—in particular economic cases and disputes among neighbors.<sup>180</sup>

The threat of criminal charges is at times used to extract compensation from an opposing party or used to force those who refuse to comply with civil cases to do so. This was most clear in a case in which a defendant was convicted and sentenced to a suspended sentence for refusing to pay a prior civil award for 440,000 yuan resulting from a traffic accident. The court noted that the defendant had spent money decorating his house and purchasing household appliances despite claiming to lack resources to pay the judgment.<sup>181</sup>

The cases also show that harsh punishments are imposed when core interests of the State are involved or where there are concerns about repeat or copycat crimes. Thus, the county court imposed long sentences for creating a tax

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176. Case B159.

177. Case B134.

178. Cases B17, B47, and B63. See also Case I69a, in which a dispute about use of land led to criminal charges for destruction of property. The court in that case ordered the defendant to pay forty percent of the victim's damages.

179. The cases also do not include defendants sentenced to reeducation through labor or other forms of administrative custodial detention.

180. *See, e.g.*, Interview 2013-7 (stating that it is easy to use criminal cases to resolve economic or business disputes).

181. Case B195.

fraud scheme,<sup>182</sup> stealing parts from highways,<sup>183</sup> or stealing electrical wires or electrical installations belonging to the power grid or installations or materials belonging to telecommunications companies.<sup>184</sup> Crimes involving threats of violence, guns, or trafficking of women and children were treated harshly.<sup>185</sup> One of the longest sentences in the county court was in a case involving defendants who created a company for the purposes of exporting labor to Singapore. The scheme involved charging victims a fee in exchange for promising to arrange work.<sup>186</sup> The primary defendant received an eleven-year sentence.<sup>187</sup>

Those with prior criminal records were likewise treated harshly, virtually always receiving criminal sentences regardless of the seriousness of the crime charged. Thus, a defendant in the intermediate court who was convicted of stealing 200,000 yuan in jewelry received a life sentence despite the fact that there was no suggestion of violence, apparently because of a prior conviction for theft.<sup>188</sup>

Courts also are careful to ensure that sentences imposed generally exceed time held in pretrial detention, thus avoiding a suggestion that the procuratorate or police had erred in ordering that a defendant be detained. All of the 169 county court defendants held in detention for a period prior to trial were found guilty, and most of them received criminal sentences that were equal to or greater than the time already served in detention. Yet 85 of these defendants had their sentences suspended, meaning they likely served no additional time in detention. Nevertheless, the imposition of a suspended sentence or fine (as opposed to a nonguilty verdict) also precluded a State compensation claim that the procuratorate or police had erred in their decisions to detain the defendants.

#### *D. High-Profile Issues*

The cases in this study provide insight into how the criminal justice system is being used to address a number of contentious social issues, including: corruption, land disputes, disputes related to social stability, and violent domestic disputes. They also provide details on crimes charged against women.

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182. Case B79 (holding that a defendant is sentenced to six years for selling fake value added tax certificates).

183. Case B139.

184. Cases B6, B14, and B157.

185. *See, e.g.*, Cases B133 and B2221 (holding that a crime of troublemaking and provocation for assault in which defendant stole twenty-five yuan deserved a five-month sentence); *see also* Cases B90, B32, and B94.

186. The defendants were able to return only ten percent of the money collected.

187. Case B161.

188. Cases I29a (suspended sentence); Case I29b.

*1. Corruption and Financial Crimes*

Six county court cases involve financial crimes relating to corruption: bribery,<sup>189</sup> corruption,<sup>190</sup> embezzlement,<sup>191</sup> and misappropriation of public funds. In all but one of the cases, defendants received a suspended sentence.<sup>192</sup> In contrast, a number of defendants who were not State employees received significant sentences for financial crimes. Seventeen county court cases involved other forms of financial crime: fraud;<sup>193</sup> contract fraud;<sup>194</sup> credit card fraud;<sup>195</sup> extortion and blackmail;<sup>196</sup> forgery or sale of State certificates or fake tax invoices;<sup>197</sup> and illegal business activities.<sup>198</sup> Sentences were suspended in only eight of these cases, with some defendants receiving sentences of up to thirteen years. Differences in sentencing may reflect underlying provisions in the Criminal Law and in the amount of money involved: Chinese law links sentences to the amount involved in financial crimes. A number of the contract-fraud and financial-crime cases that resulted in criminal sentences involved large amounts of money, while the amounts involved in many of the official corruption cases were relatively small. More serious sentences were imposed in corruption and embezzlement cases tried in the intermediate court.<sup>199</sup>

Nevertheless, the cases suggest the possibility that financial crimes involving State officials are treated more leniently than those committed by non-State employees and that the criminal justice system is being used to resolve business disputes.<sup>200</sup> In interviews, lawyers confirm that it is common for

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189. Case B70 (holding that a defendant policeman would receive a suspended sentence for accepting money in exchange for attempting to eliminate a criminal sentence).

190. Case B169 (convicting sanitation bureau head for stealing 30,000 yuan by falsifying financial statements for his department); Case B123 (defendant adjusted electricity meters to collect more money).

191. Case B104 (imposing three-year sentences, which were suspended for four years, for misappropriating 60,000 yuan in public funds); Case B203 (embezzled public funds by stealing from a rural health fund).

192. The one defendant who did not receive a suspended sentence received a twelve-year sentence for embezzling more than 100,000 yuan from a local rural health fund. Case B203. The finding is not surprising: at numerous workshops in China at which I presented this paper there was general consensus that prior to 2013, officials convicted of corruption and related offenses generally were treated leniently unless their conduct was extremely serious.

193. Cases B46, B61, B101, B144, B161, B202, B204, and B214.

194. Cases B10, B88, and B209.

195. Case B23.

196. Cases B40, and B65 (both receiving suspended sentences).

197. Cases B53, B210, and B79.

198. Case B161.

199. See, e.g., Case I6a (imposing a fifteen-year sentence for embezzling 3 million yuan intended to be used for relocation payments to villagers).

200. Case I4A is another case in which a lower court appeared lenient toward a defendant charged with corruption. A county court convicted a police officer of abuse of power for extorting money but then ordered him exempt from punishment because the consequences were slight and the defendant had been subject to Party discipline. The procuratorate successfully objected and the

officials to receive comparatively lenient sentences, in particular when funds are returned.<sup>201</sup>

Most of the cases studied involve low-ranking officials who received apparently lenient sentences. But one first-instance intermediate court case involved the prosecution of a county Party secretary, the highest ranking official at the county level, on forty-nine corruption counts, totaling more than 5 million yuan. The defendant, who argued that he acted in the public interest and that the funds were used to buy gifts for other officials, was sentenced to eighteen years.<sup>202</sup>

### *2. Land Disputes*

A number of cases demonstrated the prevalence of land disputes in rural China in recent years, in some cases fights resulting from such disputes.<sup>203</sup> Three other cases were brought against defendants for illegal occupation or use of farmland, generally for use of land in ways not approved by the State or for using land that did not belong to the defendant.<sup>204</sup> For example, two defendants were prosecuted for illegally selling sand from their land,<sup>205</sup> in one case by digging a hole eleven meters deep.<sup>206</sup> One case involved defendants prosecuted for beating villagers who refused to cooperate with a relocation order in conjunction with a land seizure. Defendants were sentenced to thirty months, with the intermediate court affirming a decision to treat defendants leniently because they had assisted other investigations.<sup>207</sup>

### *3. Social Stability and Protest*

A few cases touched on issues concerning social stability, hinting at local unrest. One case in the county court involved an attack on a local high school by villagers, the result of an apparent dispute between two villages.<sup>208</sup> A county

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intermediate court imposed a two-year sentence.

201. Interview 2013-7.

202. Cases I21a and B190. See also Case I70a, in which defendants were prosecuted for illegal detention after a group of villagers blocked access to police seeking to arrest a fellow villager. Although the defendants prevailed on an initial appeal, on retrial they were once again convicted.

203. Case B106 (fighting arising from land dispute).

204. Cases B17, B47, and B63.

205. Cases B17 and B63.

206. Case B17 (admonishing that the defendant had caused “serious deterioration to farmland”). In another case, a defendant was convicted of illegal use of farmland after opening a dairy. Case B47. Numerous other cases resulted from conflicts relating to land disputes. *See, e.g.*, Case I7 (convicting defendant of cutting down neighbor’s trees after neighbor cut down defendant’s trees following contract dispute over land use rights).

207. Case I83a.

208. Case B190. See also Case I70a, in which defendants were prosecuted for illegal detention after a group of villagers blocked access to police seeking to arrest a fellow villager. Although the defendants prevailed on an initial appeal, on retrial they were once again convicted.

court case resulting from a labor dispute ended in convictions for employees charged with stealing crops.<sup>209</sup> In another case, the intermediate court convicted a defendant for abuse of power for entering into a contract that resulted in massive financial losses to a hotel.<sup>210</sup> The court's opinion noted the deep unhappiness of the defendant's employees, presumably from the resulting job losses. The case suggested that the prosecution was at least in part a response to a fear of labor unrest.

In one case, the intermediate court affirmed a lower court sentence of five years for extortion. The defendant was unhappy about a separate decision in the lower court determining the amount of land assigned to the defendant and her family pursuant to a land use transfer agreement. She told the court that unless it paid her 1 million yuan, she would go to Beijing to protest. In response, the procuratorate brought criminal extortion charges.<sup>211</sup>

Other cases showed how persistent petitioning affects the courts. In a case that began in 2002, defendants were convicted of disturbing public order after they allegedly organized a protest at local government offices. They served thirty months in prison. Upon their release, they began petitioning, seeking to have the judgment reversed. They eventually succeeded in convincing the provincial high court to order the case retried—but the county court once again found them guilty, and the intermediate court affirmed.<sup>212</sup>

#### *4. Female Defendants and Crimes Within the Family*

Court opinions provide only limited information about individual defendants: age, gender, and in some cases, education level and employment status. In the county court, 27 of the 273 defendants were women.<sup>213</sup> In the intermediate court, 72 of 530 defendants were women, including 9 defendants in first-instance cases. The limited sample size makes generalizations about types of crimes committed or sentencing of women difficult. Women were prosecuted for crimes ranging from organized robbery to forgery to intentional harm and trafficking or abduction of women or children. Women involved in serious crimes, such as organized robbery, received sentences along the lines of their male accomplices or counterparts given the crimes charged, although there is some evidence that women were detained for shorter periods pretrial. Women involved in trafficking cases received harsher sentences than their male accomplices, but courts found that the women were the primary culprits in these

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209. Case B183.

210. Case I26.

211. Case I68 (demonstrating that, as the defendant had already been to Beijing to protest three previous times, she almost certainly drew the ire of the local court).

212. Case B190. See also Case I70a, in which defendants were prosecuted for illegal detention after a group of villagers blocked access to police seeking to arrest a fellow villager. Although the defendants prevailed on an initial appeal, on retrial they were once again convicted.

213. All but one of the remaining defendants were male; one defendant was a corporation.

cases, actually selling the women and children, as opposed to their male accomplices who received only suspended sentences for introducing the defendant women to buyers.

Tables 5 and 6 list crimes with which women were charged in the county court and in first-instance intermediate court cases.

**TABLE 5: FEMALE DEFENDANTS IN THE COUNTY COURT BY CRIME SENTENCED**

Case Type	Defendants	Cases
Organized robbery (聚众哄抢罪)	4	1
Theft (盗窃罪)	3	3
Forgery and/or sale of state authorities' certificates (伪造、买卖国家机关证件罪)	3	1
Intentional injury (故意伤害罪)	3	3
Abduction and trafficking of women (拐卖妇女罪)	2	1
Concealment of illegal gains (掩饰、隐瞒犯罪所得罪)	4	4
Abduction and trafficking of children (拐卖儿童罪)	1	1
Bigamy (重婚罪)	1	1
Disturbance of the peace (寻衅滋事罪)	1	1
Fraud (诈骗罪)	1	1
Gambling (赌博罪)	1	1
Illegal sales of invoices (非法出售发票罪)	1	1
Misappropriation of public funds (挪用公款罪)	1	1
Traffic accident (交通肇事罪)	1	1
Total	27	21

Note: "Defendants" refers to the number of defendants charged with a particular crime. Defendants who are charged with more than one crime are counted multiple times.

"Cases" refers to the number of cases in which a particular crime was charged. Cases with multiple charges are thus counted multiple times.

**TABLE 6: FEMALE DEFENDANTS IN FIRST-INSTANCE TRIALS IN THE INTERMEDIATE COURT**

Crime	Defendants	Cases
Credit card fraud (信用卡诈骗罪)	2	1

Concealment of stolen goods (掩饰，隐瞒犯罪所得罪)	1	1
Intentional homicide(故意杀人罪)	1	1
Receipt fraud (票据诈骗罪)	2	1
Harboring criminals (窝藏罪)	3	2
Drug trafficking (贩卖毒品罪)	1	1
Loan fraud (贷款诈骗罪)	2	1
Illegal manufacturing of explosives (非法制造爆炸物罪)	1	1
Loan swindle (骗取贷款罪)	2	1
Total	15	10

Note: “Defendants” refers to the number of defendants charged with a particular crime. Defendants who are charged with more than one crime are counted multiple times.

“Cases” refers to the number of cases in which a particular crime was charged. Cases with multiple charges are thus counted multiple times.

A few cases likely reflect gender issues or potential bias. One female defendant was convicted of the crime of bigamy and sentenced to six months in prison after she began living with a man other than her husband.<sup>214</sup> She argued that she had done so only after her husband had an affair with another woman. The criminalization of a routine domestic dispute strongly suggests that the criminal system was used to settle personal scores to the detriment of the female defendant.

The dataset also confirms that courts are lenient in their handling of intrafamily crimes, including spousal killings. In one county court case, the court convicted the defendant of negligently killing a woman following a domestic argument.<sup>215</sup> The defendant and the victim were living together, and the victim, who was married to another man, suffered from mental illness. The court reported that the two argued after drinking. The defendant left the woman to sleep on a concrete floor in an unheated room while wearing only her underwear and a coat. When she froze to death, the defendant received a six-year sentence. The case was the only nontraffic accident case involving the death of a victim tried in the county court. All other cases involving death of the victim were treated more seriously and thus were tried in the intermediate court.

Similar trends appear in the intermediate court cases. In another case, a defendant who killed his wife received a suspended death sentence. The court’s opinion emphasized the defendant’s unhappiness in his marriage, perhaps providing a basis for avoiding a death sentence.<sup>216</sup> Another defendant who

214. China’s Criminal Law criminalizes cohabitation with someone other than one’s spouse, but it provides that charges may only be brought by a private complaint.

215. Case B167.

216. Case I3a. The case had been decided twice previously by the intermediate court; each time

killed his wife was convicted of intentional injury, not murder, and was sentenced to just under ten years.<sup>217</sup> In interviews, judges and lawyers confirm that serious crimes that occur within families, most notably the killing of a spouse, are treated leniently, with the death penalty virtually never imposed.<sup>218</sup>

Not all assailants were male. One woman was convicted of homicide in the intermediate court for killing her husband by setting fire to a building and locking him inside. The defendant argued that she had intended to burn down the home of a woman she believed was having an affair with her husband. The court imposed a suspended death sentence, stating that it was acting leniently because the defendant had surrendered. But the court also argued that further leniency was not warranted, in part because the defendant failed to provide any evidence of an actual affair<sup>219</sup>—despite the fact that the killing had taken place in the other woman’s home.

#### *E. Lawyers and Legal Arguments*

Few of the defendants in the county court had lawyers or other legal representatives. This observation is not surprising: the lack of lawyers in criminal cases has been widely noted. Nevertheless, these cases show that it is common for defendants to be convicted with no legal representation. Also, the cases describe the types of arguments made by defendants and their lawyers at trial and on appeal.

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it was remanded for retrial by the provincial high court. It appears that the defendant had settled with the victim’s family, as the family had dropped their civil case as the case proceeded.

217. Case I4c. In contrast, a defendant convicted of intentional homicide for choking his girlfriend to death received a suspended death sentence. Case I20. The fact that death-penalty cases are not made public makes comparisons difficult, but the apparent trend of avoiding death sentences in such cases is consistent with observations from local lawyers. In another case a defendant received a suspended death sentence for the intentional killing of his wife. The defendant explicitly argued that he should be treated leniently because the murder took place in domestic dispute. Case I3a; *see also* Case I40 (imposing fifteen-year sentence for killing brother in a fight, after the lawyer argued for leniency because it was a family dispute, and after the victims’ family argued for leniency). Only one appeal to the intermediate court appeared to involve a domestic dispute. Case I141. In that case, the defendant’s husband assaulted his father-in-law, who had come following a fight between the husband and wife. *Id.* The victims appealed, arguing that compensation was too low and that the sentence was too short. *Id.* The procuratorate, however, did not participate in the appeal, suggesting a reluctance to become more deeply involved in the case. *Id.* In another appeal that reflected the interaction of gender roles and traditional values in the countryside, the court affirmed sentences of up to three years for robbery for a woman and her two sons after they allegedly detained and demanded money from their daughter/sister’s boyfriend. Case I103. They argued that he had forced them to lose a bride price by having sex with his girlfriend—and thus should pay compensation as a result. *Id.* Other crimes of passion likewise appeared to receive relatively lenient treatment. *See, e.g.*, Case I47b (imposing fifteen-year sentence for willful injury for killing in a fight, where defendant, who had a prior record, suspected victim was having an affair with his girlfriend).

218. Interview 2012-17.

219. Case I9b.

Of the 273 defendants in the county court, only 48 defendants had a legal representative of any kind. Three defendants were represented by basic-level legal workers,<sup>220</sup> and an additional 3 were represented by family members. The remaining 42 defendants were represented by lawyers.

Representation rates in first-instance cases in the intermediate court were higher, reflecting the more serious charges faced by defendants in such cases. Of the 67 first-instance defendants, 50 were represented at trial; 49 of these were represented by lawyers.<sup>221</sup> Rates of representation were much higher in the most serious cases. All of the 9 defendants sentenced to suspended death sentences had lawyers; 15 of the 20 defendants sentenced to life in prison had lawyers.<sup>222</sup>

Cases on appeal to the intermediate court had lower rates of representation: only 123 of the 442 defendants in cases on appeal to the intermediate court had legal representation detailed in the court opinions.<sup>223</sup>

Table 7 lists the cases by crime charged in which defendants in the county court were represented by lawyers. Table 8 presents similar data for the intermediate court.

TABLE 7: COUNTY COURT CASES WITH LEGAL REPRESENTATION

Crime	Defendants	Cases
Theft (盗窃罪)	9	9
Traffic accident (交通肇事罪)	7	7
Concealment of illegal gains (掩饰、隐瞒犯罪所得罪)	4	4
Dissemination of obscene materials (传播淫秽物品罪)	4	1
Intentional injury (故意伤害罪)	4	4
Production and sale of fake and substandard products (生产、销售伪劣产品罪)	3	2

220. Basic level legal workers are State-licensed paraprofessionals, generally with limited legal training. Basic-level legal workers are authorized to represent clients in civil cases; they are not permitted to represent clients in criminal cases.

221. The remaining defendant was represented by a family member.

222. *See, e.g.*, Case I6 (imposing against a woman, who was not represented by lawyer, a sentence of life in prison for drug trafficking); Case I9 (imposing against a defendant with no lawyer a sentence of life in prison for defrauding 2.92 million yuan). The 1996 Criminal Procedure Law mandated legal representation only in cases in which a defendant faced a potential death sentence or was blind, deaf, mute, or a minor. 1996 Criminal Procedure Law, *supra* note 6, art. 34.

223. The cases specified that 128 defendants had legal representation, while 238 lacked representation. For an additional 86 defendants, the opinions provided no information. It is thus likely that the actual number with some form of legal representation was higher than 128—but nevertheless still significantly below half of the cases. Of 21 defendants in rehearing cases, 11 had legal representation.

Corruption (贪污罪)	2	2
Fraud (诈骗罪)	2	2
Illegal logging (滥伐林木罪)	2	1
Abduction and trafficking of children (拐卖儿童罪)	1	1
Bigamy (重婚罪)	1	1
Contract fraud (合同诈骗罪)	1	1
Disturbance of the peace (寻衅滋事罪)	1	1
Embezzlement (职务侵占罪)	1	1
Extortion and blackmail (敲诈勒索罪)	1	1
Falsely issuing exclusive value-added tax invoices (虚开增值税专用发票罪)	1	1
Gambling (赌博罪); Illegal possession of guns (非法持有枪支罪)	1	1
Illegal business act (非法经营罪)	1	1
Destruction of electric equipment (破坏电力设备罪)	1	1
Refusal to execute court decision (拒不执行法院判决罪)	1	1
<b>Total</b>	<b>50</b>	<b>43</b>

Note: Total number of cases with legal representation is 41. Two cases that involved multiple charges are counted twice under "cases." Defendants are listed by the most serious crime charged.

**TABLE 8: LEGAL REPRESENTATION IN FIRST-INSTANCE INTERMEDIATE COURT CASES**

Crime	Defendants	Cases	Defendants with Legal Rep?
Credit card fraud (信用卡诈骗罪)	3	1	3
Selling counterfeit money (出售假币罪)	1	1	1
Bribery (受贿罪)	1	1	1
Contract fraud (合同诈骗罪)	2	2	2
Robbery (抢劫罪)	5	2	5
Misappropriation of public funds (挪用公款罪)	1	1	1
Concealment of stolen goods (掩饰隐瞒犯罪所得罪)	2	2	1
Willful injury (故意伤害罪)	22	12	17

Intentional homicide (故意杀人罪)	10	9	10
Theft (盗窃罪)	5	3	2
Receipt fraud (票据诈骗罪)	3	1	3
Harboring criminals (窝藏罪)	6	2	0
Kidnapping (绑架罪)	1	1	1
Fraud (诈骗)	1	1	1
Drug trafficking (贩卖毒品罪)	4	2	3
Corruption (贪污罪)	1	1	1
Loan fraud (贷款诈骗罪)	3	1	3
Fraudulent raising of capital (集资诈骗罪)	1	1	0
Illegal manufacturing of explosives (非法制造爆炸物罪)	3	1	3
Loan swindle (骗取贷款罪)	3	1	3
Total	78	46	61

The county court cases also show that defendants and, where represented, their lawyers, were rarely effective when they contested guilt.<sup>224</sup> Lawyers represented defendants in only five of the nine cases in which defendants contested guilt.<sup>225</sup> In only one county case did the court indicate that it was accepting a defendant's argument regarding guilt: in that case the court accepted the defendant's argument that the evidence provided failed to support the procurator's claim that the defendant had participated in one of four alleged thefts (the defendant was sentenced for the three other thefts).<sup>226</sup> The court rejected defense arguments in the other eight cases in which a defendant or a lawyer contested guilt.

Lawyers in Henan say that courts will generally, but not always, mention defense arguments in opinions.<sup>227</sup> Thus, it is possible that some defense arguments are not reflected in the court opinions. Nevertheless, it is clear from the cases that acknowledging guilt is by far the most common strategy.

The outcomes in the cases reflect a fact that is widely known: winning a nonguilty verdict is nearly impossible. No defendants in the county court cases received nonguilty verdicts. Three out of more than four hundred defendants in the intermediate court cases (including appeals and first-instance trials) received nonguilty verdicts. In one case, the intermediate court reversed a conviction by a

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224. Chinese criminal procedure does not bifurcate determinations of guilt and sentencing. Because a defendant generally must admit guilt in order to obtain leniency, defendants thus face the choice of contesting guilt and forgoing arguments for leniency or admitting guilt and arguing for leniency.

225. Cases B5, B6, B20, B61, B161, B195, and B209.

226. Case B26. A codefendant was convicted of all four of the thefts.

227. Interview 2012-4.

lower court of a local village committee for illegal occupation of farmland. On appeal, the intermediate court found that criminal liability could not be imposed on the village committee. The intermediate court affirmed criminal judgments against the farmers who actually illegally occupied the land. In a second case, the intermediate court affirmed a nonguilty decision from a lower court in a malicious accusation case. Yet the case was a claim filed by a private individual, not the procuratorate, and thus did not reflect on the work of the procuratorate. In a third case, a trial court had acquitted defendants of intentional assault; on appeal, in response to a procuratorate's objection, the court vacated and remanded. No first-instance trials in the intermediate court resulted in nonguilty verdicts. In interviews, judges and lawyers confirm the lack of nonguilty verdicts in criminal cases in Henan.<sup>228</sup>

County court judgments almost always convicted defendants of the exact crimes charged by the procuratorate, differing from procuratorate charges in only two cases. In both cases the court convicted the defendant of an additional charge not alleged by the procuratorate.<sup>229</sup> The intermediate court likewise convicted the defendant of the exact crime charged by the procuratorate in all sixty-four first-instance cases for which data are available. Yet contesting guilt may not be fruitless. Judges and lawyers also acknowledge that they have other strategies to deal with cases they view as incorrectly decided or lacking evidence. Judges say that they will not rule against the procuratorate because doing so would affect the career development of both procurators and police involved in the case. Instead, courts will "communicate [with the procuratorate] and work it out" if they find problems in cases.<sup>230</sup> Courts may also impose suspended sentences or exempt defendants from punishment in order to avoid finding a defendant not guilty.<sup>231</sup> Judges acknowledge mediating outcomes even in cases where there is insufficient evidence to convict.<sup>232</sup> In other cases they

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228. Interview 2013-2 (stating that winning a nonguilty verdict is impossible, but that in some cases lawyers nevertheless have no option but to try).

229. Case B23 (adding a charge of credit-card fraud to procuratorate charge of concealment of illegal gains); Case B80 (adding a charge of theft to procuratorate charge of illegal logging).

230. Interview 2012-11; *see also* Interview 2012-4 (noting that courts are generally reluctant to offend the procuratorate).

231. Interview 2012-7; Interview 2012-10.

232. Interview 2012-26. For discussion of the issue, see Liu Wei, *Wuzui Panjuelü Qudi De Beimian* (无罪判决率趋低的背面) [Behind Low Rate of Non-Guilty Cases], MINZHU YU FAZHI SHIBAO (民主与法制时报) [DEMOCRACY AND LEGAL SYSTEM NEWS] (Oct. 29, 2012), <http://www.mzyfz.com/cms/minzhuyufazhishibao/fanfu/html/1248/2012-10-29/content-552683.html> (stating that court and procuracy evaluation standards directly overturn the presumption of innocence because they result in avoidance of nonguilty verdicts); Zhu Xiaoding, *Shuzi Kan Zhongguo: Basan Nian Yilai Zuihao Fayuan Baogao Zhong De Xingshi Panjue Yu Wuzui Xuangao* (数字看中国：八三年以来最高法院报告中的刑事判决与无罪宣告) [Look at China through Numbers: Criminal Cases and Nonguilty Cases in the SPC's Annual Report Since 1983], SOHU BOKE (搜狐博客) [SOHU BLOG] (Mar. 20, 2012), <http://yejuduxingzhe.sohu.com/blog/view/208173345.htm> (arguing that the nonguilty rate is a measure of courts' independence and noting that since 2009 the Supreme People's Court has stopped disclosing the number of people found not-guilty in its

may reduce a sentence on appeal to time served. For example, in one case the intermediate court initially remanded a conviction for illegal manufacture of explosives. On appeal from the trial court for a second time, the court reduced the sentence from seventy-two to twenty-one months, effectively the time already served.<sup>233</sup>

Some cases in which evidence against the defendant is weak are never resolved. One Henan lawyer described a case that was vacated and sent back for retrial twice. The lower court never reheard the case; instead, the defendant was released on bail and no further action was taken in the case.<sup>234</sup> Another lawyer stated that defendants prevail with nonguilty arguments only when they are already on bail or in cases filed by private parties (as opposed to the procuratorate).<sup>235</sup> Other concerns also impact courts' reluctance to issue nonguilty verdicts: judges may be worried about protests from victims' families in cases in which they issue not guilty verdicts,<sup>236</sup> may be concerned that judges may be blamed if the procurator files an objection to the decision resulting in the verdict being changed,<sup>237</sup> or may be concerned about potential State compensation claims from the acquitted defendant.<sup>238</sup>

Lawyers also note that it is often hard to contest guilt because many defendants have confessed prior to the intervention of lawyers.<sup>239</sup> In such cases, lawyers who pursue a nonguilty defense risk being targeted for prosecution under Article 306 of China's Criminal Law. Lawyers have no space to make independent assessments of the merits of a nonguilty defense because their clients have generally already been pressured into acknowledging their guilt.<sup>240</sup> As one lawyer commented, "once you are at court it is too late."<sup>241</sup> Lawyers

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annual Work Report); *Morang "Wuzui Panjue" Qinzhou Jiancha Jiguan Shenpan Jiandu (莫让"无罪判决"掣肘检察机关审判监督)* [Don't Let "Nonguilty Decisions" Circumvent Procuratorate Supervision], ZHONGGUO CAIXUN WANG (中国财讯网) [CAIXUN] (Jul. 10, 2012) (on file with author) (noting procuracy concerns that a nonguilty verdict will affect their evaluation and will have negative social effects); *Chehui Gongsu Zai Woguo Lifa Ji Sifa Shiwu Zhong De Zhuangkuang (撤回公诉在我国立法及司法实务中的状况)* [The Situation of Withdrawal of Prosecution in Legislation and Adjudication in Our Nation], FAZHI WANG (法制网) [LEGAL DAILY] (Oct. 6, 2008), [http://www.legaldaily.com.cn/fxy/content/2008-06/10/content\\_875885.htm](http://www.legaldaily.com.cn/fxy/content/2008-06/10/content_875885.htm) (stating that any case in which a court proposes to find a defendant nonguilty must be submitted to court adjudication committees, that courts will consult with procuratorates in advance of any such decision, and that procuratorates will in practice withdraw a case prior to a court issuing a nonguilty decision).

233. Case I75a. Defendants had argued that they did not know how the fertilizer they were grinding would be used. The court found they were merely accessories to the crime.

234. Interview 2012-6.

235. Interview 2012-28.

236. *Id.*

237. *Id.*

238. Interview 2012-10.

239. Interview 2012-7.

240. *Id.*

241. *Id.*

also say they need to be careful in criminal cases to avoid becoming potential targets of criminal sanctions themselves.<sup>242</sup> They thus rarely present new evidence or seek out additional evidence; doing so is too dangerous.<sup>243</sup> The general environment for lawyers is also widely viewed as having deteriorated in recent years, making lawyers less likely to take on difficult criminal cases.<sup>244</sup> Constraints on lawyers likely also increase the pressure on defendants to agree to settlements.

Yet there were also a few cases in which lawyers appeared to mount spirited defenses. In one case, a defendant was sentenced to thirteen years for theft of 90,000 yuan from an office during a break-in. On appeal of a second trial in the case, the defendant's lawyer argued that the defendant's confession resulted from torture and stated that the court should follow the presumption of innocence. The court rejected the argument, affirming the sentence, arguing that the defendant showed no physical evidence of torture.<sup>245</sup> In another case, a lawyer argued, unsuccessfully, that his client was denied access to counsel in the trial court.<sup>246</sup>

There is substantial debate about the effectiveness of hiring lawyers, both in China generally and in Henan. Lawyers and academics note that procurators and judges will sometimes threaten defendants with longer sentences if they hire a lawyer, will pressure defendants to settle cases absent a lawyer rather than going to trial,<sup>247</sup> or will offer lighter sentences if the accused do not hire a lawyer.<sup>248</sup> As one lawyer noted, lawyers make procurators' jobs harder, and procurators are likely to try to dissuade defendants from hiring lawyers in complex or problematic cases.<sup>249</sup> Some judges likewise say that hiring lawyers can sometimes result in worse outcomes for defendants.<sup>250</sup>

Yet lawyers also argue that they can add value by arguing for leniency and facilitating negotiations with courts and procuratorates.<sup>251</sup> Lawyers state that in serious cases, pleading for leniency (rather than contesting guilt) can mean the difference between life and death.<sup>252</sup> In contrast, judges argue that lawyers are not as important to courts as are institutional dynamics in affecting outcomes. As one judge explained, judges are already under enormous pressure to avoid

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242. Interview 2012-20.

243. Interview 2013-2.

244. Interview 2012-28.

245. Case I18A.

246. See Case I41a. In that case, the intermediate court said that the defendant had clearly stated that she did want to be represented by a lawyer. The woman was convicted of threatening a victim and her parents after her son allegedly committed rape.

247. Interview 2012-1.

248. Interview 2012-7.

249. Interview 2012-28.

250. Interview 2012-11.

251. Interview 2012-5.

252. Interview 2012-5; Interview 2013-4.

incorrect decisions; lawyers' arguments thus play a marginal role in affecting how courts handle cases.<sup>253</sup> Yet other judges noted that lawyers can be helpful in persuading their clients to settle cases. As one judge noted, parties often do not trust judges. Lawyers therefore can be useful in persuading parties to settle.<sup>254</sup>

In Henan, as elsewhere in China, lawyers continue to find it extremely difficult to access their clients.<sup>255</sup> It is common, say lawyers, to be denied even the limited access to their clients permitted under the 1996 Criminal Procedure Law.<sup>256</sup> Local authorities largely ignore the provisions in the Lawyers Law that grant additional access, with some detention facilities in Henan posting signs that explicitly state that they follow the Criminal Procedure Law and not the Law on Lawyers, which prior to 2013 gave lawyers increased access to their clients compared to the Criminal Procedure Law.<sup>257</sup> Conversations between clients and lawyers are monitored: as one lawyer noted, the most important role of lawyers "is to comfort" their clients.<sup>258</sup> Likewise lawyers comment that it remains extremely difficult for them to access witnesses or documentary evidence.<sup>259</sup> A nonparty witness appeared to testify in court in only one case in the dataset. All other cases that involved witness testimony in court were cases in which the witness was also a victim seeking compensation.

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253. Interview 2012-19.

254. *Id.*

255. For a general discussion of the challenges facing criminal defense lawyers, see generally Sida Liu & Terence C. Halliday, *Political Liberalism and Political Embeddedness: Understanding Politics in the Work of Chinese Criminal Defense Lawyers*, 45 LAW & SOC'Y REV. 831, 839-44 (2011).

256. Interview 2012-20; Interview 2012-28.

257. Interview 2012-7. Prior to the 2012 revision of China's Criminal Procedure Law, a conflict existed between article 33 of the Lawyers Law (adopted in 2007) and article 96 of the Criminal Procedure Law (adopted in 1996). The Criminal Procedure Law originally provided access to a client only after the procuratorate brought formal charges; in contrast the revised Lawyers Law granted access as soon as a defendant was subject to any compulsory measure. The Lawyers Law also provided that lawyers could meet defendants without being monitored; the 1996 Criminal Procedure Law stated that authorities could monitor such meetings. Revisions to Criminal Procedure Law and the Lawyers Law in 2012 made the two laws consistent, largely adopting the prior provisions of the Lawyers Law. Du Feijin et al., *Weile Gongzheng Gaoxiao He Quanwei* (为了公正高效和权威) [For Fairness, Efficiency, and Authority], RENMIN FAYUAN BAO (人民法院报) [PEOPLE'S COURT NEWS] (Oct. 9, 2012), [http://rmfyb.chinacourt.org/paper/html/2012-10/09/content\\_51765.htm](http://rmfyb.chinacourt.org/paper/html/2012-10/09/content_51765.htm) (detailing the prior conflict between the Criminal Procedure Law and the Lawyers Law); Yuan Dingbo, *Lüshi Fa Yu Xingshi Susong Fa Chongtu Cheng Yixie Difang Ban'an Jiguan Huxiang Tuiwei Liyou* (律师去与刑事诉讼法中突成一些地方办案机关互相推诿理由) [Conflict between Lawyers Law and Criminal Procedure Law Has Become Local Authorities' Excuse for Shirking Responsibilities], FAZHI RIBAO (法制日报) [LEGAL DAILY] (May 26, 2009), <http://fzzx.gansudaily.com.cn/system/2009/05/31/011115445.shtml> (detailing problems in implementing provisions in the Lawyers Law governing access of lawyers to their clients while in detention).

258. Interview 2012-28.

259. *Id.*

#### F. Appeals and Rehearings

Outcomes of appeals to the intermediate court suggest that the court is far more active in reviewing lower court decisions than is commonly assumed to be the case of appellate courts in China. Yet the cases also confirm many of the widely recognized problems that exist with appellate review of criminal cases. A total of 442 defendants appealed to the intermediate court in 2010 or had their cases appealed by the procuratorate or victims. Of these, 86 had their cases vacated and remanded for trial, 28 had their sentences lowered, and 3 had their sentences increased. An additional 10 defendants had no change to their sentence but had civil compensation claims either remanded or revised.<sup>260</sup> Taken together, the cases suggest that the intermediate court is adjusting outcomes or remanding cases for retrial in nearly one-third of the cases. This figure is far higher than is commonly assumed to be the case in criminal cases in China or the estimate of ten to twenty percent given in interviews.<sup>261</sup>

Many cases involved appeals by multiple parties, including victims (plaintiffs in civil compensation cases) and the procuratorate. Table 9 lists the total number of defendants who had their cases appealed, by party filing the appeal. Table 10 sets forth outcomes on appeal.

**TABLE 9: APPEALS FILED BY DEFENDANTS, VICTIMS, AND PROCURATORATE**

Party Bringing the Appeal	Number	Percent of Total
Defendant	254	57.5
Plaintiff (Victim)	32	7.2
Procuratorate	9	2.0
Defendant and Plaintiff (Victim)	35	7.9

260. See, e.g., Case I65 (affirming sentence but increasing compensation to victim's family).

261. Interview 2012-19; see also "Tongyi Ershen Gaipan Biaozhun" De Diaoyan Baogao (统一二审改判标准的调研报告) [Report on Unifying the Standard for Adjusting and Remanding Appeals], GUANGDONG FAYUAN WANG (广东法院网) [GUANGDONG COURT NET] (Mar. 20, 2012), <http://www.gdcourts.gov.cn/gdcourt/front/front!content.action?lmdm=LM53&gjid=20120320022237085591> (reporting that nationwide between 2005 and 2007 on average 14% of appeals were adjusted and 7.1% were remanded); Woguo Wunian Lai Gong 90,000 Yu Jian Xingshi Ershen Anjian Bei Yifa Gaipan Huo Fahui Chongshen (我国五年来共9万余件刑事二审案件被依法改判或发回重审) [90,000 Criminal Appeal Cases Were Adjusted or Remanded During the Past Five Years], XINHUA WANG (新华网) [XINHUA NEWS NET] (Oct. 26, 2008), [http://news.xinhuanet.com/newscenter/2008-10/26/content\\_10254795.htm](http://news.xinhuanet.com/newscenter/2008-10/26/content_10254795.htm) (reporting that between 2003 and 2008, 90,000 out of 470,000 criminal appeal cases were adjusted or remanded in China); Guangzhou Zhongyuan Xing Erting Xingshi Ershen Anjian Gaipan, Fahui Chongshen Qingkuang Fenxi (广州中院刑二庭刑事二审案件改判、发回重审情况分析) [Analysis of Remanded and Changed Cases in Guangzhou Intermediate Court Second Criminal Division], ZHONGGUO XINGSHI FALU WANG (中国刑事法律网) [CHINA CRIMINAL LAW NET], <http://www.lw315.com>ShowArticle.shtml?ID=201013121312166297.htm> (reporting that between 2002 and 2004, Guangzhou Intermediate Court adjusted 11.48% and remanded 2.75% of 1054 criminal appeals).

Defendant and Procuratorate	9	2.0
Plaintiff (Victim) and Procuratorate	1	0.2
Defendant, Plaintiff (Victim) and Procuratorate	1	0.2
Not applicable	101	22.9
Total	442	100

Note: “Not applicable” reflect cases with multiple defendants where one or more defendants did not appeal. In cases where multiple defendants did appeal, all defendants that appealed were counted in the “Defendant” row. In cases concerning multiple defendants where the procuratorate appealed, the “Procuratorate” row reflects the number of defendants for whom the procuratorate launched the appeal.

**TABLE 10: OUTCOMES ON APPEAL (SECOND INSTANCE DEFENDANTS ONLY)**

Outcome	Number of defendants	Percent of total
Affirmed	244	55.2
Vacated and remanded for retrial	87	19.7
Reduced the criminal sentence	28	6.3
Increased the criminal sentence	3	0.7
Changed the applied law but sentence affirmed	5	1.1
Criminal case affirmed but the attached civil compensation case vacated and remanded for retrial	6	1.4
Criminal case affirmed but attached civil compensation amount increased	3	0.7
Reversed (Defendant acquitted)	1	0.2
Not applicable	65	14.7
Total defendants	442	100

Note: “Not applicable” refers to circumstances where a case had multiple defendants, one or more of whom did not appeal. As a result, the trial verdict against these defendants was effectively unchanged. This number is lower than the number of defendants coded as “not applicable” in Table 9: Appeals Filed by Defendants, Victims, and Procuratorate because in certain appeal decisions, particularly those where the criminal case was vacated and remanded, defendants who did not appeal benefited from the appeal of their codefendant.

As is standard practice in appellate review in China, court decisions vacating and remanding lower court judgments never stated the specific reasons. Instead, appellate decisions indicate only whether the problem was with the evidence (generally by stating that the “evidence was unclear”), the procedure, or the application of law. The majority of the decisions remanding cases in my dataset simply stated that “the facts are unclear.” Appellate courts often, but not always, follow up such decisions with either an internal, nonpublic letter to the

lower court regarding the specific problems in the case or with a telephone call that explains the reason for reversal.<sup>262</sup>

As noted above, many of the cases in which the intermediate court changed outcomes on appeal were modest changes to civil compensation claims attached to criminal cases. Judges note that the largest category of cases that are changed on appeal arise from settlements reached after the conclusion of the first-instance trial.<sup>263</sup> Seven appellate decisions made explicit reference to the payment of compensation as a basis for a reduction in sentence on appeal.<sup>264</sup> Other cases changed on appeal involved defendants who paid fines or restitution subsequent to the original sentence.<sup>265</sup>

Changes on appeal are not always in favor of defendants. Indeed, appealing can in some cases be dangerous for defendants. In one intermediate court case, the defendants were charged with illegal manufacture and sale of explosives.<sup>266</sup> Defendants appealed a county court judgment imposing sentences of ten and four years on the two primary defendants; the procuratorate did not appeal. The appellate court vacated and remanded the decision. On retrial the case was assigned to a different court, which increased the sentences to twelve and ten years. The appellate court then affirmed.<sup>267</sup>

Appellate courts may also impose longer punishments than those imposed in the trial court in response to an appeal by the procuratorate or in a retrial, or *zaishen* proceedings. Sixteen of the appellate cases explicitly involved *kangsu*, or “objections,” filed by the procuratorate either alone or alongside an appeal filed by a defendant or victim challenging a compensation award. In eight of these cases only the procuratorate appealed. The intermediate court increased

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262. Interview 2012-19.

263. Interview 2012-19.

264. Cases I156, I1d, I133, I144a, I79, I83, and I13b. In Case I79 the reference was indirect: the court noted that subsequent to the original court decision, the victim forgave the defendant and withdrew her civil claim. Case 179. The lower court had ordered defendant to pay 3255 yuan in compensation, but the defendant’s family subsequently paid 14,000 yuan. *Id.* The victim then requested that the court treat the defendant leniently. *See also* Case I35 (vacating and remanding decision in traffic-accident case after lower court imposed three-year sentence despite settlement of civil compensation claim and the fact defendant took victim to the hospital following the accident). Sometimes the adjustment is minor. *See* Case I13b (demonstrating a minor adjustment where defendant had a prior record, reducing sentence from 210 months to 204 months on appeal following the payment of compensation).

265. *See, e.g.*, Case I19. In that case, defendant paid a fine and returned stolen goods after a conviction in county court; the appellate court reduced the sentence from two years and three months to fifteen months, exactly the time already served.

266. Case I49.

267. Although Article 190 of the 1996 Criminal Procedure Law stated that an appellate court could not increase a defendant’s sentence absent an appeal filed by a procuratorate, the restriction did not apply to first-instance courts retrying a defendant following a reversal and remand. The 2012 Criminal Procedure Law removes this loophole, stating that on remand a trial court may only increase a sentence where the procuratorate brings new criminal charges. 2012 Criminal Procedure Law, *supra* note 6, art. 226.

the defendant's sentence in three of these eight cases, affirmed the decision in three cases, and vacated and remanded the remaining two cases to the trial court. In all three cases in which the intermediate court increased a sentence its reasoning was exactly in line with the procuratorate's argument. Thus, for example, the intermediate court increased a defendant's sentence from six to twelve months for the crime of concealing 18,000 yuan in stolen property; the court stated that the original sentence was "inappropriate."<sup>268</sup> In a child trafficking case the intermediate court imposed a five-year sentence on a defendant who had received only a suspended sentence at trial.<sup>269</sup>

Judges say that many *kangsu* petitions come at the request of victims or their families who object to the sentence but who cannot directly appeal the sentence.<sup>270</sup> Under the 1996 Criminal Procedure Law, victims could appeal a compensation award in their status as plaintiffs in an attached civil compensation case but could not appeal the actual sentence; the same is true under the 2012 Criminal Procedure Law. One of the objections filed by the procuratorate was in direct response to complaints from the victim's family: the court increased a sentence from thirteen to fifteen years for a defendant who killed another man in a fight. The court noted that the defendant failed to compensate the victim's family and did not "obtain the family's forgiveness," and thus the sentence in the lower court was too light.<sup>271</sup> In an additional three cases involving four defendants, the intermediate court vacated and remanded lower court decisions following a procuratorate objection to the lower court decision.<sup>272</sup> One such case was a rare lower court acquittal of a defendant in an intentional injury case. The intermediate court remanded, finding the facts unclear, following an objection to the sentence from the procuracy and an appeal of the failure to award compensation by the victim.<sup>273</sup> Although not technically an acquittal, another remand occurred in a case in which the lower court had imposed no prison sentence on a defendant convicted of fraud.<sup>274</sup>

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268. Case I3b.

269. Case I29. The court found that the defendant had not merely purchased trafficked children, but had actually engaged in trafficking. Another case was heard via retrial procedures at the request of the procuratorate (who apparently had failed to file an appeal on time). The court agreed to increase a sentence from thirty months to thirty-six months for a recidivist defendant convicted of stealing electric bicycles. Case I4b. The procuratorate's successful argument noted that the sentence imposed in the lower court was below the range set forth in the criminal law.

270. In some locations procuratorates may also be required to file a certain number of *kangsu* each year. Lin Shiyu (林世钰), *Jiancha Yewu Kaoping Jizhi Ying Fuhe Sifa Guiliu* (检察业务考核制应符合司法规律) [Procuratorial Kaoping Should be Consistent with the Law], JIANCHA RIBAO (检察日报) [PROCURATORATE DAILY] (Nov. 23, 2008), <http://www.spp.gov.cn/site2/006/2008-11-24/0003421232.html> (China).

271. Case I21. It is unclear why the procuratorate charged the defendant with willful injury rather than homicide, although the fact that the defendant attacked the victim after the victim harassed the defendant's daughter (forcing her to urinate in front of him) likely played a role.

272. Cases I21b, I43b, and I97a (two separate defendants).

273. Case I43b.

274. Case I97a. In this case, the court imposed a fine of 50,000 yuan. A codefendant, who

Yet given the widespread portrayal of Chinese courts largely complying with the procuracy in criminal cases, the four cases<sup>275</sup> in which the intermediate court rejected the objection filed by the procuratorate were perhaps more noteworthy. In one case, the procuratorate objected to a lower court's imposition of a suspended sentence for a coal company official prosecuted for misappropriating 100,000 yuan in public funds; the intermediate court affirmed without a hearing, stating that the procuratorate lacked evidence to support its argument.<sup>276</sup> Other cases in which the intermediate court refused a procuratorate objection requesting a higher sentence involved the theft of a Tang Dynasty Buddha, an intentional injury case arising out of a knife fight at a mahjong game,<sup>277</sup> and a complex case in which the procuratorate and defendant both appealed after a defendant was found guilty of misappropriation of public funds and tax evasion.<sup>278</sup> In the final case, the procuratorate argued that the defendant should have been convicted of the more serious crime of corruption. The defendant had used public funds to start a company; he then returned the money and sold the company. The defendant also appealed, arguing that the sentence was too harsh because he had acted on the instruction of the company board. It is difficult to draw any conclusions from the cases as to why the procuratorate failed in these cases, in particular whether any of the defendants had particularly strong cases or sources of external support that might have affected court determinations.

Sixty-nine cases involved appeals by victims or their families. Although victims may only appeal compensation awards, many victims contested both compensation amounts and the sentence.<sup>279</sup> In three cases victims succeeded in receiving additional compensation through an appellate court judgment.

Eight of the cases in my appellate dataset involved appellate review of a case for at least the second time. Lawyers say such cases generally are those in which courts have discovered problems with lower-court decisions but are unwilling to issue a nonguilty verdict.<sup>280</sup> Some of the cases clearly represent attempts to avoid decisions being classified as incorrect. Thus, for example, the

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received a suspended sentence and a fine, likewise had his case remanded.

275. Cases I13, I7b, I8e, and I20a.

276. Case I13. In this case, the defendant also appealed, suggesting perhaps that the procuratorate's objection was in part an effort to prevent a reduction in sentence.

277. The defendant had already compensated the victims, thus perhaps explaining the court's reluctance to increase the sentence.

278. Case I20A. In the original trial the defendant was sentenced to five years. The procuratorate objected, the court vacated and remanded, and the trial court retried defendant and imposed an eight year sentence. The procuratorate and defendant then both appealed. The defendant argued that he was not guilty of misappropriation because he had acted on the instruction of the company board. The procuratorate argued that that defendant had used public funds to start a company and thus should have been convicted of the more serious crime of corruption.

279. *See, e.g.*, Case I43b (vacating and remanding compensation award, but stating that the court cannot reconsider the sentence).

280. Interview 2012-6.

intermediate court twice remanded for retrial the conviction of the boss of a State-owned hotel for abuse of power after he entered into an allegedly unauthorized contract resulting in massive losses. In the third trial in the county court the defendant was again convicted, but the court imposed no punishment. In a third appeal the intermediate court affirmed.<sup>281</sup> Other cases reflected ongoing disputes concerning compensation; in one case in which the compensation amount was the only issue in dispute, the court remanded the same lower court decision three times.<sup>282</sup> In another case the appellate court ordered that the lower court try a case for the fifth time, despite the fact that the defendants had already served three-year sentences.<sup>283</sup> Other cases were reopened many years after the conviction—including one for a defendant who was convicted of fraud in 1983 and served an eight-year sentence. The defendant, who never appealed the original sentence, apparently successfully petitioned the provincial high court to order a rehearing. The intermediate court did so but, applying the law of the 1980s, affirmed.<sup>284</sup>

In one of the stranger cases in the dataset, a defendant originally arrested in 1990 on charges of intentional injury for an alleged killing in a fight fled after being detained. He was eventually arrested in 2001 and then tried and acquitted in 2002 by the trial court. The victim's family apparently appealed the attached civil compensation case and the intermediate court ordered a retrial of both the criminal judgment and the civil case, something it was not permitted to do absent the initiation of formal rehearing procedures. By this point the defendant had been found nonguilty and had skipped town. He was located in 2008, eighteen years after the incident, and retried and sentenced to eight years. Both the defendant and the procuratorate appealed, and the appellate court again vacated and remanded. In 2010, twenty years after the alleged crime, the trial court tried the defendant for a third time (and a codefendant for a second time) and increased his sentence to nine years. On appeal for the third time the intermediate court affirmed, with the primary defendant receiving a nine-year sentence and the second defendant receiving a suspended sentence.<sup>285</sup>

Judges estimate that they hear appeals in only ten percent of cases.<sup>286</sup> This reflects that generally hearings are held on appeal only in cases involving an objection filed by the procuratorate, where a hearing must be held, or in major

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281. Case I26.

282. The third remand was because the lower court had impermissibly assigned the case on retrial to the same three judges who initially tried it. Case I57. The reasons for the prior two remands were unclear. *See id.*

283. Case I16a. The four retrials apparently came after repeated petitioning by the defendants. Three of the retrials came after successful appeals. One came after a successful petition for rehearing.

284. Case I16b.

285. Case I86.

286. Interview 2012-19.

cases. The data are consistent with such estimates: only eight percent of the appeals indicated that the courts held hearings.

Defendant's arguments on appeal largely focused on leniency. The inclusion of new evidence on appeal is rare; as one lawyer commented, "who would dare to do it?," a reference to the risk of prosecution for fabricating evidence.<sup>287</sup>

#### *G. Roles of Individual Judges*

Participants in trials in the county court, not surprisingly, were repeat players. In the county court a relatively small number of judges presided over the overwhelming majority of cases. A total of seven judges and one people's assessor heard all of the cases.<sup>288</sup> A single judge, sitting alone, tried 64 defendants and three-judge panels tried 169 cases. One judge participated, either alone or as part of a panel, in the trials of 172 of the 273 defendants. Two of the three judges were the same for 145 of the defendants. A people's assessor, who is not considered a judge, sat on panels for 40 of the 273 defendants. The same people's assessor was involved in all of these cases. The people's assessor participated in many of the more serious crimes, perhaps reflecting an attempt to suggest that the court was soliciting public input in such cases.

#### *H. Predecision Detention and Bail*

The county court held 169 of the 273 defendants in pretrial detention at some point, for periods ranging from 2 days to 369 days. The average detention period, prior to a decision, was 39 days. But some defendants were held for comparatively long periods prior to the decision. In four separate cases, 5 defendants were detained for 300 or more days prior to decision. All of these cases involved relatively complex cases involving large amounts of money. The issuance of false value added tax invoices and fraud or contract fraud.

Of the 273 defendants in the county court, 166 were granted bail, including 75 who were granted bail after initially being detained. Only 8 of the bailed defendants eventually received nonsuspended criminal sentences.<sup>289</sup> This suggests that the decision to grant bail is a strong predictor of whether or not a defendant will face incarceration after trial. Of the remaining bailed defendants, 1 received no sentence or fine, but nevertheless was convicted; 39 received fines but no criminal sentence;<sup>290</sup> 51 received fines and a suspended sentence; and 67

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287. Interview 2012-6.

288. People's assessors are laypeople, often former cadres or teachers, who are selected to hear cases alongside judges in some cases.

289. Defendants in Cases B20 (two of three defendants), B62, B66 (three of eleven defendants), B67, B69, and B128 all received nonsuspended sentences. One of the defendants in Case B23 received a six-year sentence suspended for twelve months, making for an effective sentence of five years.

290. Three of the fined defendants were also sentenced to public surveillance. Another was

received a suspended sentence but no fine. Although the defendants that were granted bail were charged with a wide range of crimes, the largest categories of bailed defendants were those sentenced for traffic offenses, willful injury, concealing criminal gains, and illegal logging. Although the court judgments do not provide information regarding a defendant's residence, in interviews judges note that only local residents receive bail.<sup>291</sup> Likewise, generally a defendant must agree to compensate a victim as a prerequisite to being granted bail.<sup>292</sup>

Not surprisingly, defendants in cases appealed to or tried in the intermediate court were generally detained far longer.<sup>293</sup> Defendants in first-instance trials, for which data were available, averaged 367 days in detention prior to decision. Defendants in appeals were detained for shorter periods—215 days—but nevertheless far longer than defendants in the county court. Defendants whose cases were on review in the intermediate court for the second time, or for more than the second time, were detained for an average of 411 days.<sup>294</sup>

### III. IMPLICATIONS AND ANALYSIS

The empirical analysis presented above provides insights into criminal justice in China that was largely missing from prior scholarship. This section discusses the implications of the above analysis in four areas of empirical and theoretical literature.

#### *A. Methodology and Empirical Findings*

Many of this article's findings will not be surprising to scholars familiar with the Chinese legal system. Scholars are widely aware of the lack of lawyers, prevalence of confessions, and near impossibility of winning a nonguilty verdict in China. Nevertheless, this study offers some of the first empirical evidence of just how widespread such phenomena continue to be. This article confirms findings that have been based on observational studies of and interviews in courts, or based on research conducted prior to the recent reemphasis on populism in China's legal system. The lack of access to earlier cases makes it impossible to compare 2010 to prior years. Qualitative evidence from interviews, however, suggests that such problems persist even as China embarks

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sentenced to public surveillance but then had the sentence suspended.

291. Interview 2013-11.

292. *Id.*

293. The intermediate court cases did not always include complete information on detention periods, in particular for cases on appeal. As a result, these figures may not be representative. The cases provide data on predecision detention periods for 56 of the 73 first-instance defendants, 223 of the 452 defendants on appeal, and 13 of the 21 defendants in cases heard in rehearing procedures. Defendants in rehearing procedures on average had been detained for 243 days.

294. The cases provide information on six of the eight defendants in such cases.

on its most important criminal-justice-system reforms in more than fifteen years with the enactment and implementation of the 2012 revisions to the Criminal Procedure Law.<sup>295</sup> Likewise, the lack of access to prior decisions makes it difficult to determine to what degree making opinions public affects the quality and substance of court decisions. Nevertheless, this study offers a baseline against which future developments can be measured. The data also provide a narrative of ordinary criminal justice in rural China as well as insight into institutional dynamics within the criminal justice system.

Some of the discussed data, however, are surprising. Recent literature has described the policy of balancing leniency and severity or has focused on specific cases of individuals purchasing leniency by compensating victims. Prior literature has neglected how leniency is manifest across a range of cases. Evidence from court decisions and from interviews with lawyers and judges suggests that settlement and compensation to victims are playing far greater roles in the criminal justice system than previously recognized in routine criminal matters and in serious cases.<sup>296</sup> I lack access to capital cases, and thus am unable to observe the most serious cases that most often do not receive leniency. Yet, it is clear that in a wide range of cases leniency in the wake of confessions and settlement is a common incentive to efficiently resolve criminal matters. The scope of the use of suspended sentences in the county court and the apparent use of settlement to reduce sentences in cases tried in the intermediate court at the very least represent a liberal interpretation of the SPC's guidelines.

This Article's findings thus challenge common Western assumptions about the Chinese criminal justice system, in particular the focus on heavy punishments. The findings provide empirical support for those in China who argue that wealth is becoming a key determinant in criminal sentencing. I do not claim that the system is always lenient; the system can treat defendants extraordinarily harshly, in particular when the State considers its interests threatened. A decision that appears lenient may in fact be excessive if it results from court doubts about the guilt of the defendant. The cases also manifest a strong State interest in maintaining control by criminalizing minor disputes or those that present a threat to social stability. But my findings suggest that more attention should be paid to developments in routine cases and that leniency is used even in some serious cases.

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295. Participants at workshops in China and interviewees noted that some recent legal changes are already having a significant effect, most notably amendments to the Criminal Law in 2010 that mandate a term of detention for defendants convicted of drunk driving and also heightened focus on official corruption in the wake of China's 2012 leadership transition. Interview 2013-8; Interview 2013-9; Criminal Law, *supra* note 89, art. 133(a).

296. For example, McConville's important study found that only eleven percent of defendants in basic court cases received noncustodial sentences. MCCONVILLE, *supra* note 3, at 363–64. One earlier study found that eighty-four percent of defendants received a prison sentence and that sixty-four percent received a sentence in excess of five years. Hong Lu & Terance D. Miethe, *Confessions and Criminal Case Disposition in China*, 37 LAW & SOC'Y REV. 549, 571 (2003).

This Article also makes the methodological claim that there is significant value in studying the vast volume of routine cases now publicly available in China. I am well aware of the limitations of my data and of the risks of Western scholars over-relying on court opinions. Numerous cases in this Article leave one to speculate regarding likely machinations at work behind the scenes. The ability to read the entire case files would certainly add to our understanding of how courts process criminal cases. Scholars in China are now doing some work in this area.<sup>297</sup> But the cases available in Henan provide a new window into the practice of justice in China, one that has yet to be explored in depth by scholars in China or elsewhere. The hundreds of thousands of cases available are a massive untapped resource for scholars, both for learning what is actually going on in the Chinese legal system and for mapping out future lines of scholarly inquiry. Most prior scholarship on China's courts, including my own, relies heavily on either what judges say they do or on cases selected for researchers by judges. The widespread availability of large numbers of opinions allows us to compare what judges say they do with what actually happens.

More can be done with the data presented in this article. Future work will include more sophisticated quantitative analysis and also more detailed analysis of particular types of cases. It is now possible to examine issues such as the effect of lawyers on outcomes in criminal cases and perhaps the role of individual judges. Related projects based on this study are likely to include a more detailed analysis of how judges interpret and adapt national laws, judicial interpretations, and policy guidelines; analysis of how courts process a wide range of financial crimes, including corruption; the use of nondeath sentences for homicide; the impact of the relationship among victims and defendants on outcomes; the role and meaning of confession; the role of appellate review and whether certain types of cases are more likely to succeed on appeal; and potentially the impact of gender and family relations on the criminal justice system.

#### *B. Leniency and the Roles of Chinese Criminal Law*

As noted above, the definition of leniency is contested in China. Leniency in sentencing in China can be manifest through formal law, judicial policy, and actual practice. Chinese law and court guidelines provide technical answers to when and how courts should act leniently, setting forth conditions under which a defendant may have a sentence reduced or may receive a suspended sentence. My analysis suggests another definition, focusing on when individuals are able to avoid jail time, in relatively minor cases, or avoid death, in more serious cases.

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297. McConville's study also relied in part on analysis of case files conducted by members of his research team. MC CONVILLE, *supra* note 3, at 363–64.

It is counterintuitive to discuss leniency when referring to a system with virtually no chance of acquittal at trial and in which wrongful convictions are common. Not everyone receives leniency, and victims play an important role in determining whether leniency is granted. Nevertheless, policy and practice in Henan suggest that many defendants are receiving sentences that are lower than what is likely or even possible under formal legal rules and might otherwise be expected. My claim that courts are surprisingly lenient should be understood narrowly to state that the data show a surprisingly large number of cases (compared to popular and scholarly expectations)<sup>298</sup> in which defendants receive only suspended sentences or receive life or suspended death sentences for murder.

The practice of leniency also provides insight into the goals of the Chinese criminal justice system. The evidence presented in this Article suggests that the policy of leniency is not being used to protect defendants' rights or to further an interest in restorative justice. In contrast to most models of restorative justice, negotiations between victims and defendants appear to influence charging decisions and court determinations regarding guilt. Courts place extreme pressure on the parties to reach negotiated outcomes, often guiding the parties to such outcomes, and reconciliation focuses overwhelmingly on financial payments. Negotiations in China take place in the context of a system that has no real mechanism for protecting the rights of defendants and in which money and stability concerns play a large role in determining outcomes.

Resource concerns are one factor leading to greater use of suspended sentences. China has seen a significant increase in the number of criminal cases in the past decade, from 656,788 in 2000 to 884,737 in 2010.<sup>299</sup> The growth in cases makes continuation of "strike hard" policies both impracticable and also perhaps risky. Such policies risk alienating a widening segment of the population. Yet resource concerns do not appear to be a main factor. Instead, the primary goals in embracing leniency are to maintain State legitimacy, ensure social stability, insulate the courts from criticism, and protect individual judges from responsibility for potentially incorrect decisions. In interviews, judges

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298. In discussing this project with numerous distinguished Chinese criminal justice scholars, I have been struck that virtually all have been surprised at the prevalence of suspended sentences in routine cases. Likewise, participants at presentations of this paper in China expressed surprise; one judge stated that my findings were "impossible." Yet the findings were also confirmed with judges in county B, one of whom stated that nonpublic juvenile cases would show even more surprising levels of leniency. Interview 2013-9. It is clear there is widespread variation in the frequency with which suspended sentences are granted, both within Henan and nationwide. Data are difficult to obtain. One workshop participant estimated that suspended-sentence rates in one major city in Henan would not exceed thirty percent. There has been less surprise at my finding that compensation can make a difference between life and death in more serious cases.

299. See ZHONGGUO FALU NIANJIAN (2001) [LAW YEARBOOK OF CHINA (2001)] 1256, 1258; ZHONGGUO FALU NIANJIAN (2011) [LAW YEARBOOK OF CHINA (2011)] 1051, 1053.

repeatedly noted that mediated and settled cases are much less likely to result in petitions, protests, or appeals than are ordinary criminal matters.<sup>300</sup>

The strong emphasis on compromise in the cases also suggests that courts are focused less on the legal correctness of their decisions than on ensuring cases be resolved. Evidence from Henan suggests that courts' jobs today focus less on determining the guilt of the defendant and more on preventing social instability. Trials determine only sentences, not guilt. The cases reviewed also demonstrate that procurators and courts have extreme discretion when it comes to bringing charges and imposing sentences.<sup>301</sup> Although there is a technical legal basis for most lenient (and harsh) outcomes, the cases show just how wide this discretion can be in determining the crime charged, as demonstrated in the corruption and financial crime cases, and the sentences imposed.<sup>302</sup> Efforts to make the criminal justice system more rule-based are in tension with the extensive discretion that judges and procurators possess. Yet, this discretion is an important tool for encouraging negotiated outcomes. Whether the inconsistency that results from such discretion poses a challenge to the legitimacy of the criminal justice system remains to be seen.

It is also clear from the data that the criminal justice system is not serving the interests of the State alone. In contrast with the traditional characterization of people in rural China avoiding contact with the formal legal system, my data suggest it has become routine for the criminal system to be utilized to settle disputes among strangers (traffic accidents) and among neighbors and family (fights). The large number of what appears to be primarily tort disputes reflects the weakness of the tort system. Litigants, prosecutors, and judges use criminal charges strategically to force settlements or to ensure that tort judgments are paid. There is also evidence that the criminal system is being used to settle scores, in particular in the context of financial crimes. Evidence from Henan suggests that much of the victims' rights discourse that dominates discussions of criminal settlement in China may be glossing over the potential use of the criminal system for personal animus. This is made possible by the fostering of

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300. China is certainly not the only system that treats a large range of defendants leniently; Japan's incarceration rates are also very low. Routine cases in many U.S. jurisdictions likely would appear lenient to many outside observers. Nor is China the only place in which bargaining is a key aspect of the resolution of criminal disputes, although parallels to plea bargaining (and the resulting low number of nonguilty verdicts) in the United States should not be overstated. Negotiations in China rarely include lawyers, and victims have extraordinary power in the process. China has undergone a shift from a traditional authoritarian law-and-order approach to criminal cases; as recently as eighteen years ago it was possible for defendants to be executed for theft. Yet it also seems clear that the Chinese system is not converging toward either the Japanese model or Western liberal systems that put heavy emphasis on procedure.

301. The fact that procurators face incentives to obtain convictions, but not to achieve specific sentences, also encourages flexibility and leniency.

302. Prosecutors elsewhere, including the United States, often have extensive discretion in changing decisions. In China, however, such discretion is exercised with little or no subsequent oversight from the courts.

direct negotiations between the parties prior to a court hearing a case. One key question that the cases raise, but do not answer, is why traditional community-based institutions for dispute resolution do not function. Another is whether the desirability of a system that relies so heavily on settlement varies depending on the crime charged. For example, whether there is a difference between an emphasis on settlement in traffic and fight cases compared to corruption cases.

The emphasis on mediated outcomes may reflect both China's legal history and also changes in contemporary Chinese society. Aspects of the practice have clear historical antecedents.<sup>303</sup> At the same time, however, the heavy emphasis on settlement may reflect trends in contemporary Chinese society. All of Chinese society has become an exchange, in which money and personal relationships dominate outcomes.

The evidence presented in this Article represents a modest first step toward creating a theory of the practice of ordinary criminal law in China. The State continues to focus on law and order as a mechanism for maintaining legitimacy and for maintaining control. This is evidenced by the heavy punishments in cases affecting State interests and the extreme discretion placed in the hands of police and procurators. Yet the data in this Article also suggest other themes that appear to be increasingly important in criminal cases in China. Such values include repairing social ties; maintaining social harmony; and ensuring compensation to victims, in particular those who have lost a key breadwinner in a society lacking a social safety network.<sup>304</sup> The Chinese system also provides minor criminals with a second and final chance; reinforces communal norms, even when those norms are in tension with formal law (as appears to be the case in family disputes and the one bigamy case); and introduces elements of collective punishment by ensuring that family members and neighbors bear the financial cost of crime.<sup>305</sup>

China appears to be shifting toward a bifurcated criminal justice system. Routine cases are resolved through negotiated outcomes and suspended or result in short sentences, while more serious cases result in long sentences. A key insight from the data presented in this Article is that defendants may wind up in the second category not only because of the seriousness of their crime but also because of their inability to settle or the victims' unwillingness to settle. The data also make clear that there is significant randomness with regards to who gets punished and how much punishment they receive. Flexibility on the part of

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303. Involving another person in the legal system was a common means of retaliation in traditional China. The use of money to reduce sentences was also common. Because China's imperial legal system did not distinguish between civil and criminal disputes, it was also common to see disputes that today might be classified as civil disputes being resolved through the use of criminal sanctions.

304. As one lawyers noted, the system may make sense for China given that victims generally lack resources and can be financially crippled by the loss of a breadwinner. Interview 2013-2.

305. In rural areas it is common for family members of defendants to rely on neighbors to come up with the money necessary to pay a settlement. Interview 2013-2.

procurators and police and the apparent randomness of outcomes may further State interests in social control by sending a message that all are subject to the State's power.

Most debate within China focuses on technical issues directly linked to specific reforms: eliminating torture, increasing access to lawyers, and forcing appellate courts to decide cases before them when they find problems (not simply engaging in repeated cycles of vacating and remanding problematic decisions). The cases described above, however, suggest that more fundamental issues, concerning the core goals of Chinese criminal law, are contested as well. Understanding the reality of every day criminal justice in China provides a first step to conceptualizing the goals of Chinese criminal justice. Evidence from Henan suggests that the focus of Chinese criminal law in China has shifted away from a focus on incarceration and control. The criminal system today mixes emphasis on legal principles with quick resolution of disputes, compensation for victims, observance of community norms, and reliance on high levels of discretion by decision makers.

### *C. The (D)evolving Roles of China's Courts*

This Article's findings also contribute to literature on the role of China's courts and the evolution of institutions in an authoritarian system in which stability is prioritized above all else. The observation that courts are innovating and adopting flexible practices not entirely consistent with formal laws in order to minimize discontent and insulate themselves from criticism is not unique to criminal cases.<sup>306</sup> I have recently written of a similar phenomenon in medical disputes,<sup>307</sup> and other scholars have noted similar trends in other areas. Recent scholarship notes the emphasis on mediation in recent years in civil cases and the focus in the courts on *anjie, shiliao*—deciding the case *and* resolving the dispute.<sup>308</sup> Henan's bar to posting mediated cases online provides an additional incentive for courts to mediate cases, as judges know such cases will not be publicly scrutinized.

The trends this Article describes in Henan show how such policies have extended to criminal cases. Authorities believe that mediating or compelling settlements in criminal disputes will reduce threats to social stability, most significantly the threat of protest or petitioning.<sup>309</sup> Specifically, mediated outcomes prevent victims (or their families) from protesting sentences they view

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306. In some jurisdictions in China judges may be evaluated both on whether or not a decision is reversed or vacated and also on whether or not there is an appeal at all.

307. Benjamin L. Liebman, *Malpractice Mobs: Medical Dispute Resolution in China*, 113 COLUM. L. REV. 181 (2013).

308. Liebman, *supra* note 9; Minzner, *supra* note 8.

309. For a more detailed discussion of stability concerns, see Benjamin Liebman, *Legal Reform: China's Law-Stability Paradox*, DAEDALUS, Spring 2014, at 96.

as too light and prevent defendants' families from objecting to sentences viewed as excessive.

In contrast with the social worker model of adjudication emphasized in literature in the United States, however, the primary concern of China's courts appears to be problem elimination, not problem solving. Hence, courts appear not only to compel settlement, but also to implicitly and explicitly threaten those who do not comply with such settlements, as evidenced by cases that target repeat petitioners. The State is also taking an active role in resolving what we might otherwise think of as private, civil disputes that appear to indirectly affect State interests. Resolution of such cases appears to be based less on efforts to meet social expectations or impose community norms, and more on a functional focus on eliminating disputes.

China appears to be seeking to use courts to create a "no loser" model, where the focus on outcomes, not procedure (or law), leads all parties to accept negotiated outcomes. In this system, failure to do so is an indication that courts are not doing their job. The conflict between this approach and the adoption of a rule-based system has been widely noted in China, with many arguing that such moves undermine China's efforts to construct a legal system.

The encouragement of State-mediated (or coerced) settlements may be particularly troubling in the criminal sphere. The promotion of negotiated outcomes marks a sharp departure from recent efforts to create a more adversarial system. The emphasis on settlement introduces a new element of coercion into the system.<sup>310</sup> The focus on negotiated outcomes reinforces the fact that courts are not a forum for determining guilt.

Equity concerns are also readily apparent. Although most criticism of China's embrace of settlement and mediation in the criminal context has focused on serious crimes—where defendants in effect purchase their life<sup>311</sup>—my data suggest similar concerns in the imposition of sentences in routine cases. This Article shows not only that some defendants are receiving strikingly lenient sentences but also that defendants who either refuse or lack the ability to pay may be punished harshly. Whether negotiated outcomes actually produce stability is unclear. Criminal cases continue to be a primary source of complaints concerning the courts, in particular from victims' families' reported concern that defendants will avoid punishment through back-room deals.

The data also show that courts are willing to assert their authority in some cases. One of the most surprising findings is the high rate of reversal or changes to decisions on appeal to the intermediate court. This rate is much higher than generally understood to be the case within the legal community or rates reported in most prior research and in the official media. Yet this high rate of reversal is not limited to this one court or to criminal cases; I have also noted a high rate of

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310. Rosenzweig et al. report similar findings and provide additional details regarding the coercive nature of criminal mediation. Rosenzweig et al., *supra* note 102, at 29–31.

311. For example, see Lewis, *supra* note 85, at 329, discussing equity concerns in capital cases.

reversal in medical malpractice cases in courts elsewhere in China.<sup>312</sup> Some of the changes and reversals almost certainly reflect attempts to appease particular parties, or to encourage further settlement. But it also seems clear that the intermediate court is taking its role in reviewing cases seriously. In some cases, institutional relationships and the fear of a case being labeled an error result in a dynamic in which the appellate and basic-level courts are locked in a standoff. Cases are remanded only to have lower courts issue the same or a similar decision at retrial. This finding contrasts with those who have argued that appellate review in China has little effect, or that higher courts are generally unwilling to reverse lower court decisions because of the impact such decisions have on the career development of judges below. Likewise, the cases show that courts, in certain cases, will challenge and reject procuratorate determinations or arguments on appeal. Imposing lenient sentences may also allow courts to disagree with procuratorates without issuing a nonguilty verdict. Increased oversight over the courts appears to be making judges more careful and less willing to sign off on clearly incorrect cases.

Future research will provide insight into the interplay between the adoption of formal law (the revised Criminal Procedure Law) and new procedural requirements and continued concerns about stability and emphasis on settling cases. The new law should in theory result in numerous changes readily apparent in case decisions. Procurators are now required to attend all trials, something clearly not done in many cases handled via summary procedures in my dataset. Appellate courts will be required to decide more cases on appeal (as opposed to remanding them). Additionally, witnesses should begin to attend trials. Many of these provisions in the new law are based on the assumption that the system is shifting toward an adversarial model of adjudication and impartial determination of guilt by judges. The evidence presented in this Article shows how far the current reality is from this model, and thus highlights the challenges facing attempts to implement the new law.

Henan's experiment with judicial transparency also provides insight into innovation in China's courts. Henan's reforms have resulted in part from attempts to address widely publicized egregious cases of injustice. They also reflect the personal goals of Zhang Liyong, the president of the Henan High People's Court. Innovation has helped to boost Zhang's profile. It remains to be seen to what degree his reforms will outlive his time on the court. Henan's innovations, the most important in China's courts in the past decade, were not designed to increase judicial power. Innovative steps were part of an attempt to make the courts function more efficiently and make fewer errors, and in so doing win greater popular support. Legitimacy for the courts does appear to be a goal, but it is legitimacy rooted in meeting popular expectations, avoiding instability, and serving the interests of the State.

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312. Liebman, *supra* note 307, at 220.

The fact that judges in China play roles different from those played by their Western counterparts has long been observed in academic literature, as has the growing tension between judges' own aspirations regarding their roles and the actual roles they play. I have argued elsewhere that many of the roles being played by Chinese courts today represent a continuation of revolutionary and prerevolution tradition rather than a shift against efforts to build some form of liberal rule-of-law system. This Article shows how these trends manifest themselves in the criminal justice system, where judges balance efforts to resolve disputes with their own self-interest in avoiding responsibility for mistakes. The cases studied also provide insight into the roles lawyers play in such a system, with most focusing on technical arguments for leniency and on facilitating negotiated outcomes. Substantive arguments not relating to leniency are almost entirely unsuccessful. The cases thus provide an initial window into an as yet understudied topic: the role of lawyers in a system in which compelled mediation is dominant.

#### *D. Authoritarian Transparency*

Finally, this project also adds to literature about the role of transparency in the Chinese political system and authoritarian systems more generally. In some respects, the courts in Henan today are the most transparent in China.<sup>313</sup> Yet this transparency has very specific goals: controlling judges, reducing errors, and, in so doing, increasing public confidence in the courts. The fact that so much continues to go on behind the scenes makes the efficacy of such efforts at the very least questionable.<sup>314</sup> Most notably, however, is the parallel to other areas in which the State has similarly embraced an instrumentalist view of transparency. Such areas include the adoption of freedom-of-information regulations and the "controlled transparency" model of media supervision of the legal system.<sup>315</sup> Absent from discussion of the Henan policy of making cases available online is concern with citizens' right to know. Likewise, discussion of the policy does not focus on the possibility that making vast amounts of information publicly available may also play a role in furthering the development of the Chinese legal system. Instead, official discussion focuses almost entirely on the need to ensure judges obey the rules.

Henan's experiment with judicial openness highlights three characteristics of China's emerging model of authoritarian transparency. First, transparency is targeted, and it is applied to limited areas and with specific constraints. This is

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313. Publication of cases is not the only possible metric of judicial transparency: the cases tell us little about whether trials were actually open to the public.

314. For example, the Henan cases provide no insight into the rule of court adjudication committees or Party Political legal committees. For a discussion of the general functioning of the courts, see Benjamin Liebman, *China's Courts: Restricted Reform*, 191 CHINA Q. 633 (2007).

315. Benjamin Liebman, *Watchdog or Demagogue? The Media in the Chinese Legal System*, 105 COLUM. L. REV. 1, 125 (2005).

evident from the limitations on publication of a range of types of cases, arguably some of which would provide the best window into courts' performance in the most difficult cases. Second, transparency appears to be directed mainly at curbing official wrongdoing, not empowering individuals. This is true both in the courts and in media coverage of official corruption. Third, appeals to transparency are combined with appeals to populism. As Zhang Liyong noted, putting cases online is intended to subject judges to scrutiny by the online masses. Transparency is aimed at scaring judges into better performance and creating a platform for State oversight, with populism playing a functional role in supporting such goals.

Henan's experiment is of particular relevance now, as the SPC seeks to encourage and require courts nationwide to place decisions online. Yet the SPC's new rules also highlight some of the apparent uncertainty among court and Party-State leaders about the utility of transparency. The SPC rules will require the Henan courts to make some decisions publicly available that were not previously made available under Henan's own rules on publication of court documents. Yet in one crucial respect the SPC rules will reduce transparency in Henan.<sup>316</sup> The SPC rules state that court decisions may only be posted online when case decisions are "effective"—meaning either that the time period for filing an appeal has passed, or an appellate court has decided the case.<sup>317</sup> Prior to the SPC rules, Henan required publication of first-instance decisions even when they were pending on appeal.<sup>318</sup> Henan court officials note that this is no longer permitted. The ban on publication of decisions on appeal suggests discomfort with the possibility of public scrutiny of pending cases. Scrutiny is permitted only once courts have reached a definitive outcome. Transparency is being used for specific purposes, but is also being controlled.

The near-daily corruption scandals in China in the past two years show that increased transparency and public scrutiny are not easily contained. New technologies are combining with increased focus by the State on attacking corruption to provide fertile ground for individuals and activists alike to expose wrongdoing. Yet this dynamic supports, rather than undermines, this model of authoritarian transparency, in significant part because such efforts are not rule (or law) based. Those who are exposed receive little in the way of legal process, and those not exposed fear online exposure or popular reaction rather than sustained compliance with legal rules. There is value in increased transparency in the Chinese system, but there is also danger in mistaking such steps with fundamental change in how the system functions. Transparency may be a virtue, but it is also a tool of control.

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316. Interview 2014-1 (stating that "less will be made public under [the] SPC rules" than had previously been the case in Henan).

317. See sections 2, 4, and 8 of Provisions of the Supreme People's Court on the Issuance of Judgments on the Internet by the People's Courts, *supra* note 5.

318. Implementing Rules, *supra* note 13, arts. 3, 5, 6 (stating that all first-instance cases, except for those specifically excluded, shall be placed online).

## CONCLUSION

This Article is a first step in taking advantage of the vast amount of data now available to scholars of Chinese law regarding court decisions. This Article is also an initial step toward conceptualizing what such data mean for our understanding of the Chinese criminal justice system and for broader trends in the Chinese political-legal system. What remains most surprising is that such research is now possible, in large part due to Party-State interests in asserting oversight over China's courts.