Riots and Cover-Ups: Counterproductive Control of Local Agents in China

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Chinese cadre responsibility systems are a core element of Chinese law and governance. These top-down personnel systems set concrete target goals linked to official salaries and career advancement. Judges and courts face annual targets for permissible numbers of mediated, reversed, and closed cases; Communist Party secretaries and government bureaus face similar targets for allowable numbers of protests, traffic accidents, and mine disasters. For many local Chinese officials, these targets have a much more direct impact on their behavior than do formal legal and regulatory norms.

This Article argues that Chinese authorities are dependent on responsibility systems, particularly their use of strict, vicarious, and collective liability principles, as an institutional tool to address pervasive principal-agent problems they face in governing a large authoritarian bureaucracy. But excessive reliance on these methods to control local officials ironically fuels governance problems that Chinese central leaders seek to address. Central
Chinese authorities do not want township officials colluding to falsify tax records or engaging in ill-conceived development projects that waste central funds. Nor do they want rural residents burning down government buildings or staging mass petitions to Beijing to protest the actions of local officials. But these are the direct results of cadre evaluation systems that Chinese authorities use to govern their local agents.

Continued reliance on responsibility systems as a tool of governance raises significant conflicts with the legal reforms that Chinese authorities have pursued since 1978. And recent developments suggest that central Chinese authorities may be backing away from their efforts to govern China, and their local agents, through law and legal institutions. At least some leaders appear to favor an alternative strategy—strengthening the role of responsibility systems as a tool for monitoring local agents. This is a fundamental conflict over the core question of how to govern China. How it is resolved will have lasting implications for China’s domestic evolution and stability.

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1. INTRODUCTION

Their tactics were brutal and rapacious. In May 2007, local officials in the southwestern Chinese province of Guangxi descended on Bobai county in a campaign aimed at enforcing China’s population laws and meeting target goals for allowable numbers of births in their jurisdiction. They forced pregnant women to have abortions. They demolished homes to make residents cough up fines demanded for excess children. Citizen anger boiled over into rioting. Thousands of angry rural residents took to the streets, sacking government offices in protest.¹

The vicious nature of the local Guangxi enforcement campaign was all the more striking because it directly conflicted with the explicit orders of China’s top leaders. Just months before, in January 2007, Central Communist Party (“Party”) and government officials had issued a joint directive ordering stronger enforcement of China’s population planning laws—precisely the aim of Guangxi authorities. However, the national directive clearly limited the measures to be used. It banned forced abortions, emphasized financial aid to reward compliance with birth control policies, and downplayed the use of coercive measures to punish noncompliance.² Indeed, the director of China’s national family planning council even suggested that national authorities would waive fines entirely for poor Chinese citizens.³

What explains such a striking disconnect between the central aims and the local realities? Conflicting norms governing official behavior are a key factor. Local cadre responsibility systems employed to evaluate the performance of Party and government officials do not necessarily correspond with central laws and policies. In April, 2007, Bobai county Party and government officials issued an implementation plan for the national population planning efforts. The plan designated hard enforcement targets.

For example, it required each Party, government, or state-owned enterprise employee to successfully raise 500 yuan in “social compensation” fees from residents who had borne children in excess of population planning laws, and to get one local resident to undergo a tubal ligation or “other remedial measure” by the end of August. Failure of individual state employees to make target resulted in loss of their annual salary bonus and forfeiture of any possibility for career promotion or honors that year. Failure of township governments to reach their collective targets resulted in all township employees receiving similar penalties for up to two years.4

Bobai county authorities were not ignorant of the central authorities’ instructions. Their plan was aimed at implementing it. Indeed, their plan specifically called for the January directive to be printed in booklet form and distributed to local cadres and farmers as part of an education campaign to accompany enforcement efforts.5 But township officials were placed in an untenable situation. Sure, the central directive set out broad behavioral norms, but the county plan set clear, hard targets directly linked to their salaries and careers. In such a situation, violating national rules (and laws) to aggressively fulfill specific work targets was simply rational economic behavior.

Conflict between national law or central directives and local cadre evaluation systems occurs in numerous areas of Chinese law and governance. China has enacted extensive environmental laws and regulations, but Party personnel evaluations of local officials used to determine their career advancement and promotion have traditionally placed heavy emphasis on economic growth statistics. This incentivizes some local officials to violate relevant laws, falsify GDP statistics to superiors, and blindly engage in development

4 It also specified enforcement timetables, detailed county-level Party cadres to assist township authorities with enforcement, and detached a vice-president of the local court to head a special unit for the rapid trials of residents who resisted. See Li Yijin & Liu Yadong, Bobai County Government website, Bobai yi wushi de zuofeng dada renkou jihua shengyu gongzuo fanshezhang [Through Pragmatism in Attacking the Problem of Population Planning, Bobai [County] Will Bring About A Turnaround], BOXUN.COM, Apr. 30, 2007, http://news.boxun.com/news/gb/china/2007/05/200705210347.shtml (describing the Bobai county plan to implement population planning policy after receiving a “yellow card” from Guangxi Autonomous Region authorities for their failure to achieve policy targets).

5 Id.
projects in an effort to reach their annual targets. National regulations bar local authorities from retaliating against citizen petitioners who seek to bring complaints before higher authorities. However, Party cadre evaluation systems heavily stress social order statistics. These sanction local Party secretaries based on the number of citizen petitioners who leave the jurisdiction to present grievances to higher-level officials. This leads local officials to resort to repressive tactics (including illegal detentions) to prevent petitioners from reaching higher officials and thereby negatively affecting the career prospects of local officials.

These examples reflect an alternative incentive structure created by the target responsibility systems (zeren zhuiju zhi, mubiao guanli zeren zhi) that are the core of the Chinese Party and government cadre evaluation process. These personnel systems set concrete target goals linked to officials’ salaries and career advancement. They apply sanctions and rewards based on strict, collective, and vicarious liability for the failure (or success) of officials and their units in attaining designated targets. As Chinese scholars have noted, this creates a “pressurized” environment in which making target (or appearing to do so) is all-important. For many ordinary local Chinese officials, these targets have a much

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8 Carl Minzner, Xinfang: An Alternative to Formal Chinese Legal Institutions, 42 STAN. J. INT’L L. 103 (2006). Local taxation provides another example. Some county-level authorities impose hard tax revenue targets that township officials are expected to generate. Failure results in deductions from annual bonuses, or negative notations in official career files. Success results in retention of the excess funds generated. In relatively poorer regions of central and western China, this fuels a range of illegal behavior and corruption as local officials strike backroom deals with companies outside the local jurisdiction to falsely report taxes within the jurisdiction in return for a discount (or kickback) on the taxes paid. See, e.g., Zhongxi bu chuxian xiangzhen mai shui bao zhi zhong ji xiexiang [Central and Western China Experience Township Officials ‘Buying Tax Receipts’ in Order to Cook up Official Evaluation Results], Politics.People.com, Sept. 21, 2006, http://politics.people.com.cn/GB/14562/4840559.html.

more direct impact on their behavior than abstract legal and regulatory norms.

The existence of two separate sets of normative rules governing official behavior—legal norms enacted by state institutions and Party-managed cadre responsibility systems—means that the possibility for conflict is always latent. In some instances, this simply leads to the emergence of quiet divergences and systematic inconsistencies, as local officials respond to the more direct personnel incentives created by responsibility systems that poorly reflect the purported aims of national law. In other cases, this tension erupts into spectacular violations of legal norms that central authorities have publicly promulgated.

Given the critical nature of cadre responsibility systems—officially promulgated instructions to local Party and government authorities as to what their responsibilities are, and what punishments or rewards will result from failure or compliance—it is surprising how sparsely they are analyzed in the existing literature. Political scientists have begun to explore cadre responsibility systems as a subject in the last few years. But almost no literature exists examining the interaction of responsibility systems with the Chinese legal system. Legal academic literature has extensively studied formal legal norms promulgated by central institutions such as the Supreme People’s Court (“SPC”) and National People’s Congress (“NPC”), but responsibility systems have been ignored. As one prominent American scholar of Chinese law has noted, local court responsibility systems and the incentives they create for Chinese judges are “terra incognita in terms of published systematic studies.”

All significant studies of Chinese law, of course, do remark on the core role of the Chinese Communist Party. However, they

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12 See RANDALL PEERENBOOM, CHINA’S LONG MARCH TOWARD RULE OF LAW 211-223, 302-09 (2002); STANLEY B. LUBMAN, BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO 253-58, 263-67 (1999) (discussing how the Party remains
tend to depict the Party as an external force intervening in legal institutions and processes—ordering the arrest and convictions of dissidents, controlling the nominations of top judges, and supervising the operations of the procuratorate and courts through Party political-legal committees. Few have focused on the internal role of Party committees and organization bureaus in setting performance targets that incentivize particular behavior of local officials through the use of salary and career rewards.

Furthermore, prior literature has not fully examined core questions regarding the reasons underlying the use of responsibility systems. What institutional role do these systems fill, particularly their reliance on strict, vicarious, and collective liability principles? Why do Chinese authorities rely on these systems when they create problematic behavioral incentives for local officials that compete, conflict, and sometimes completely violate norms that central authorities have promulgated?

China's authoritarian political system and a lack of commitment to legal norms that might curtail state power are part of the picture, but they do not fully explain it. The strict, vicarious, and collective liability regimes embodied in cadre responsibility systems create perverse incentives for local officials to violate not only central legal norms, but also central Party ones. This generates significant practical problems for central authorities. Incentives established under local responsibility systems press local officials to engage in abuses of power that national authorities would very much like to stamp out. Central Chinese authorities do not want local township officials colluding to falsify tax records or engaging in ill-conceived development projects that waste central funds. Nor do they want rural residents burning down local government buildings. Nonetheless, these are direct results of the cadre evaluation systems that Chinese authorities use to govern their local agents. So, why?


13 Neither comprehensive studies of Chinese governance that stress the declining institutional capabilities of the Party center to monitor local officials, nor those that emphasize the institutional resilience of central authorities in addressing these problems, analyze these systems. See, e.g., David Shambaugh, China's Communist Party: Atrophy and Adaptation 128-60 (2008); Minxin Pei, China's Trapped Transition: The Limits of Developmental Autocracy 144-66 (2006).
This Article fills this void. It is divided into three main parts.

Part 2 outlines the nature and history of Chinese responsibility systems. It also identifies their key shared characteristics: Party-managed personnel systems, based on principles of strict, collective, and vicarious liability, linking the career advancement and salaries of officials to their success or failure in meeting designated goals.

Part 2 also identifies the institutional role that responsibility systems play in Chinese law and governance. They are critical governance mechanisms for Chinese leaders to steer and manage a massive bureaucracy. In particular, the widespread application of strict, vicarious, and collective liability through the bureaucratic personnel system is a top-down response by authoritarian Chinese central rulers (imperial and Party alike) who are seeking to address severe principal-agent problems and informational gaps in monitoring their local officials, but who remain very uncomfortable with allowing the emergence of independent, bottom-up institutional channels to respond to these problems.

Part 3 examines the negative side effects produced by central Chinese reliance on responsibility systems to govern—particularly their excessive reliance on strict, vicarious, and collective liability. This strategy creates incentives that fuel a range of abuses by local officials, including cover-ups, corruption, and distorted policy implementation. Ironically, Chinese leaders’ existing strategy for addressing the principal-agent problem at the heart of the Chinese bureaucracy is itself a significant source and cause of the governance problems they are seeking to address.

Part 4 suggests how our understanding of the Chinese legal system may need to change in light of this Article’s analysis. It calls for the study of Chinese law to expand beyond formal law and recognize the functional role that internal Party regulations play within the bureaucratic system. Explicitly examining them may be essential to understanding (or altering) the actual incentive structures that affect the behavior of Chinese officials.

Finally, this Part raises important questions regarding the future evolution of the Chinese legal and political system. The governance strategy embodied in responsibility systems exists in uneasy tension with formal legal norms promulgated by the Chinese state in the post-1978 reform period. It conflicts with an alternative conception of “law” supported by Chinese legal reformers, a view that sees law as outside of, and perhaps an alternative to, the top-down bureaucratic personnel control
mechanisms on which Chinese authorities have traditionally relied to govern.

Recent developments, however, suggest that central Chinese authorities may be backing away from their decades-long effort to govern China and their local agents, through law and legal institutions. At least some leaders appear to favor an alternative strategy—strengthening the role of responsibility systems as a tool for monitoring their local agents. This is a fundamental conflict over the core issue of how to govern the world's largest nation. How it is resolved will have lasting implications for China's domestic evolution and stability.

2. RESPONSIBILITY SYSTEMS

2.1. Background.

Modern Chinese responsibility systems are not new. They are lineal descendants of governance practices employed by generations of imperial and Party authorities to administer a sprawling authoritarian bureaucracy.

One of the world's earliest bureaucratic systems, the imperial Chinese state endured under different dynastic successors (with some interruptions) from 221 BCE to 1911 CE. A concentration of formal power characterized imperial governance. At the top, ultimate authority rested in the hands of the emperor. At the bottom, the imperial Chinese state fused all political and judicial authority in the hands of district magistrates, each responsible for the affairs of an individual county. In order to effectively manage their local agents, central authorities relied on an extensive system of regular personnel evaluation and review. Magistrates with superior performance received promotions, those with poor performance suffered censure and fines.

Central imperial authorities faced a classic principal-agent problem in managing the bureaucracy. The concentration of power in the hands of individual magistrates, combined with their control over channels of information and reporting to higher

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14 DERK BODDE & CLARENCE MORRIS, LAW IN IMPERIAL CHINA 4-5, 114 (1967); JOHN R. WATT, THE DISTRICT MAGISTRATE IN LATE IMPERIAL CHINA 11-21 (1972).

authorities, generated real problems in evaluating local officials. How was the center to assess the accuracy of magistrate reports regarding local governance? Was the local magistrate telling the truth that the decline in annual tax revenue from his county was the result of external factors, or was he simply covering up his own corruption or incompetence?

Chinese emperors adopted a range of strategies in response. Increased direct top-down supervision was one method they employed. Emperors attempted to open alternative channels of information to evaluate magistrates' performance—channels that did not depend on (potentially distorted) self-reporting by magistrates themselves. Perhaps the best-known example of these efforts was the imperial censorate. Chinese emperors established a group of high-level authorities (censors) and endowed them with wide-ranging powers to investigate governance problems throughout the country. Emperors attempted to use the censorate to carry out an end-run around information blockages at lower levels of the Chinese bureaucracy, authorizing censors to bypass ordinary reporting channels and provide recommendations and reports directly to the throne.

However, such efforts at direct supervision faced fundamental constraints. Censors were few in number. No guarantee existed that their reports were entirely free from bias or self-serving political ingratiation. Most importantly, the nature of the censorate as a tool for the emperor's personal supervision of the bureaucracy imposed inherent limits. Censors could serve as a myriad of "eyes and ears" to funnel a mass of information directly to the emperor, but they were not permitted to usurp his ultimate power of decision. This dependence on a single individual (or "brain") to take action on a mass of censorial reports (from the "eyes and ears") meant that the utility of such direct supervision mechanisms depended on the available time and energy of the reigning emperor. Faced with an overworked or incompetent emperor, or one who preferred to spend time with the imperial concubines

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18 Id.; Jonathan K. Ocko, I’ll Take it All the Way to Beijing: Capital Appeals in the Qing, 47 J. ASIAN STUD. 291, 296 (1988).
rather than managing matters of state, unread censorial reports simply piled up, and the system lost effectiveness.

Confronted with the inherent limitations of direct top-down oversight, the imperial Chinese system developed other mechanisms to help monitor magistrates. Strict liability was one alternative. Magistrates received automatic sanctions for a range of specified failings, such as failing to meet designated quotas for tax revenue from their jurisdictions. Emperor administrative regulations and the criminal code imposed corporal punishments for any magistrate whose judicial decision was reversed on appeal, regardless of the reason. Strict liability reduced the need for higher-level authorities to inquire into the reasons behind every particular governance failure. Strict liability also introduced strong incentives for magistrates to exert themselves to avoid reversal or other specified outcomes leading to sanctions.

The imperial Chinese system also responded to principal-agent monitoring problems by widely employing collective and vicarious liability. This allowed central authorities to partially offload monitoring responsibilities by creating strong incentives for lower-level authorities to watch each other. The Ming Code, for example, applied collective criminal liability to the colleagues and supervisors of magistrates and other officials who committed inadvertent errors (not just intentional crimes) in the course of their public duties. Imperial regulations held magistrates personally responsible for the infractions of their subordinate clerks or runners, such as embezzlement or abuse of authority. Magistrates used similar principles to govern their subordinates. In one late-19th-century Sichuan example, two local police constables took a detainee to a local opium den, proceeded to smoke themselves into a stupor, and permitted the prisoner to escape. In addition to ordering the beating of the two constables involved, the local magistrate also decreed that all head runners in

19 See CH’U, supra note 15, at 32-33 (describing the system for promotion and punishment of magistrates); WATT, supra note 14, at 18-19 (describing the disciplinary regulations imposed on officials).
22 CH’U, supra note 15, at 70–73.
the division would face penal confinement if the escaped prisoner was not recaptured within fifteen days.\(^{24}\)

The collapse of imperial dynastic rule in 1911 did not spell the end of the Chinese bureaucratic state. Both Nationalist (post-1927) and Communist (post-1949) authorities re-established extensive authoritarian bureaucracies after seizing power. Regularized top-down personnel control was a key element of their rule.\(^{25}\) To ensure the loyalty of its cadres, Communist personnel systems implemented during the 1950s required regular assessments of the local officials' political attitudes. These assessments were entered into individuals' permanent personnel dossiers, and used for deciding promotions (and demotions) throughout the bureaucracy.\(^{26}\)

Party authorities also experimented with making defined work targets a component of local officials' performance evaluations. In the early 1950s, Chinese authorities imported industrial management methods from the Soviet Union as part of establishing a state-run economy. In particular, Chinese officials borrowed the concepts of "responsibility systems" and "one-man management." These top-down systems set production targets for individual factories, and held factory managers personally responsible for ensuring that their work units made target. Success resulted in rewards; failure in sanctions. Factory managers received sweeping decision-making authority regarding how to make these targets, with broad powers to set quotas and compensation standards for subordinates as a means to push them to realize work unit goals.\(^{27}\)

Such top-down management systems were marginalized as tools of Chinese bureaucratic supervision, however, during the two

\(^{24}\) Id.

\(^{25}\) Patricia M. Thornton, Disciplining the State: Virtue, Violence, and State-Making in Modern China, 81-83, 141-44 (2007). Top-down personnel control included strategies of mandatory self-reporting by local officials, as well as the use of top-down inspections by higher-level work teams that paralleled imperial censorate practices. See Jean C. Oi, State and Peasant in Contemporary China: The Political Economy of Village Government, 84-103 (1989). In the face of such management techniques, local officials countered with a range of strategies for evading and concealing negative information. Id., at 104–130.


decades of political radicalism that began in the late 1950s. Partially as a result of their decades-long experience leading a revolutionary movement, Party leaders such as Mao Zedong distrusted bureaucracy. They feared it would lead inexorably to the distancing of officials from the people, and the dimming of revolutionary ardor among the masses. Party authorities consequently relied on frequent (and chaotic) rectification campaigns involving highly politicized bottom-up mass participation as a preferred governance tool to supervise the bureaucracy. Campaigns involved mass rallies, public denunciations, and mandatory self-criticism by accused officials. The aims of these campaigns were to expose the work errors of local officials (and of citizens themselves) and to ferret out disloyalty and incompetence. Political campaigns led to regular upheavals in the bureaucracy, and were a prime factor in the highly unstable political climate that marked China from the late 1950s until the mid-1970s. The prevailing anti-bureaucratic emphasis of this period also led to a rollback of experiments with top-down target-based responsibility systems in the economic sphere. State-owned factory managers were instead expected to maintain close contact with the workers, accept bottom-up supervision and suggestions, and lead from the factory floor.

The onset of the reform period in the 1970s saw a shift back toward the official use of incentive-based target systems. This first took place in agriculture. Dissatisfied with the economic stagnation that resulted from Maoist agricultural policies that separated actual work from economic rewards, central Chinese authorities undertook radical reforms. In the late 1970s and early 1980s, they authorized local experimentation with "household contract responsibility systems" and "production responsibility systems." These set production quotas for individual households or work teams, devolved authority to them to decide exactly how

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30 O'Brien & Li, supra note 28, at 172.
31 SCHURMANN, supra note 27, at 287-93.
to meet the targets, and allowed production teams and households to collectively reap any excess generated for exceeding the targets. These reforms established strong production incentives for farmers, and fueled China's massive agricultural and economic boom in the 1980s and 1990s.

Similar changes took place in the political arena. Traumatized by the turbulence of the Maoist era, central Party authorities reduced (but did not completely eliminate) the use of political campaigns as a tool to manage local officials. In their place, officials turned to a revised cadre evaluation system. Beginning in 1979, central Party authorities began to shift cadre evaluation systems to emphasize concrete and quantifiable performance standards, such as foreign investment generated or GDP growth, rather than political-ideological ones. Whiting notes that this "was seen in part as a means to break the paralysis of many cadres following the Cultural Revolution and to actively mobilize cadres to pursue specific goals set by their superiors." In 1988, central Party authorities drafted national guidelines detailing the broad categories of work targets to be used to evaluate county-level Party secretaries and government leaders. These provided that results of the evaluations should be linked to career rewards and penalties. They also encouraged competition between cadres based on their success in fulfilling targets.

These reforms rippled down through the Chinese bureaucracy. In the late 1980s and early 1990s, legal institutions (such as local courts and procuratorates) and administrative organs (such as birth control agencies) adopted responsibility systems based on work targets. As with their Party counterparts, these systems aimed at strengthening top-down supervision of lower-level officials and establishing positive incentives for good work.

33 Johnson, supra note 32, at 436–39.
36 MAO HONGJUAN, YINCHUAN LAW ASSN'N, CUO'AN ZEREN ZHUIJU ZHI CHUTAN [PRELIMINARY INVESTIGATION INTO RESPONSIBILITY SYSTEMS FOR INCORRECTLY DECIDED CASES] (2006), available at http://www.nxylawyer.com/lyj/html/929.html (discussing the establishment of judicial responsibility systems for incorrect decided cases starting in the 1990s and their effects). See also Di Tianli, Woguo xianxing shenpan yunxing jizhi ruogan wenti sikao [Thoughts on Some Problems
2.2. Content

Chinese authorities use cadre responsibility systems (*mubiao guanli zeren zhi, zeren zhuijia zhi*) to evaluate and discipline Party and government officials. These generally set a range of performance targets, often numerical, that are linked to career rewards and sanctions. This Section briefly analyzes how these systems operate in Party, administrative, and judicial organs.

Efforts to make generalizations about Chinese responsibility systems encounter difficulties. First, precise details vary across bureaus and regions. Given a state sector of some 60 million employees—more than the entire population of most European countries—this can lead to significant differences. Second, judicial, government, and Party rules establishing responsibility systems are not systematically filed or published. Third, internal Party documents governing cadre evaluation policies can be sensitive, hampering efforts to systematically collect data. Fourth, Chinese government regulations bar foreign organizations and individuals from independently collecting survey data. Regulations also bar foreigners from obtaining such data from Chinese organizations that have not received government authorization to share it.

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38 See Shewai diaocha guanli banfa, [Measures on the Management of Foreign-Related Surveys], issued Oct. 13, 2004, arts. 9, 10-20, 22 (P.R.C.) available at http://www.stats.gov.cn/tjfg/gzjgfwj/t20041018_402200576.htm (setting out the rules by which foreign scholars and researchers are required to abide in order to conduct survey research in China, including locating an approved Chinese organization willing to serve as a partner, and submitting the proposed survey questions or interview proposals for government approval). Some foreign researchers and organizations do conduct surveys and research in violation of these rules. They risk government suppression. See Nick Young, Why China Cracked Down on My Nonprofit, CHRISTIAN SCI. MONITOR, Dec. 4, 2007, at 9; Nick Young, Message From the Editor, http://www.chinadevelopmentbrief.com
Nonetheless, careful study of publicly available Chinese responsibility systems reveals certain shared characteristics. These characteristics are shared across Party, administrative, and judicial organs, confirmed by the findings of other scholars who have done research on the subject, and correspond with the personal accounts of Chinese officials themselves who are subject to them.

Heimer and Whiting outline the Party responsibility systems facing the core political leaders in local Chinese government—county and township Party secretaries. These systems establish comprehensive annual targets for a given jurisdiction. Specific targets include: economic development, tax collection, Party building, poverty alleviation, birth control, and social order. Targets are assigned point values that leaders receive for meeting them. Vicarious liability applies. Party leaders of local governments that meet their targets (and outperform other jurisdictions or leaders) may be personally designated as "advanced leaders," awarded enhanced chances for promotion, or receive substantial financial bonuses. Control over the evaluation process rests with Party organization bureau officials.

Targets differ in importance. Less important targets (such as local educational statistics) may be "soft targets" that constitute one factor among many used to assess official performance. In contrast, exceptionally important targets may be designated "priority targets with veto power" (yipiao fojue). Failure to attain these targets unilaterally cancels out all positive work performance in other fields. The yipiao fojue designation is reserved for a limited number of targets identified by higher-level Party authorities as critically important. For example, birth control and social order

40 See Edin, supra note 10, at 39-45 (describing the cadre reward system); see also Whiting, supra note 10, at 111 (noting one case in which the financial bonus received by a village Party secretary under the local responsibility system accounted for 85% of his total income).
targets—expressed in terms of permissible numbers of births and collective petitions/protests—often receive such designation.42

Some Party responsibility systems apply strict liability to officials and bureaus for failure (or success) in making target. For example, the 2007 Xiaoji township responsibility system specifies numerical point deductions (and awards) for a range of negative (and positive) outcomes. Some targets are clearly within the control of local officials, such as deductions for their own tardiness or for playing cards at work. Other targets are less clearly within their control. Examples include sanctions for participation rates of local farmers in rural health collectives falling below 85%, outbreaks of wildfires exceeding fifty mou (8.2 acres), the outbreak of collective petitions of local citizens to higher authorities, and the (re)occurrence of religious heterodoxy among local residents.43 Importantly, the system makes no allowance for why the specified outcome occurred. The events might be the direct result of a local Party head’s dereliction of duty. Alternatively, they might take place despite her best efforts to prevent them.

Party responsibility systems often apply collective sanctions. If a given Party or government entity exceeds others in their target rankings, the entire unit may be designated as “advanced,” with resulting financial and career rewards for the unit and its members (in addition to the leader). Low-rated units receive corresponding collective sanctions.44

Responsibility systems also permeate the Chinese administrative state. Provincial health authorities set comprehensive annual targets for hospitals.45 Environmental

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42 See Edin, supra note 10, at 38-40 (explaining the importance placed upon family planning and social order policies by the Communist Party); Whiting, supra note 10, at 112-15; see also Maria Edin, Remaking the Communist Party-State: The Cadre Responsibility System at the Local Level in China, 1 CHINA INT'L J. 1, 10 (2003) (noting the parallel between priority targets that are enforced nationwide in China—family planning and social order (shehui zhi'an)—and the policy priorities of the Communist Party).


44 Edin, supra note 10, at 41, 45.

45 See Jiangsu sheng weisheng ting zhishu danwei 2005 niandu zonghe mubiao guanli zeren zhi kaohe zhibiao [Jiangsu Provincial Health Department 2005 Comprehensive Target Management Responsibility System and Evaluation
authorities set targets for subordinate bureaus and municipal governments. Transportation officials do so as well. For example, Hebei provincial transportation authorities rate subordinate railroad, port, and road bureaus on a 100-point evaluation scale. Points are deducted based on the number of transportation accidents and deaths occurring annually in their jurisdiction. Accidents resulting in 1–2 deaths result in the loss of 5–10 points; 3–9 deaths result in the loss of 10–20 points. Bureaus with annual ratings exceeding designated levels receive recognition and reward. Bureaus that fail to meet minimum standards suffer reprobation and sanction. Accidents causing thirty or more deaths, involving children, or creating a "serious domestic impact," are "priority targets with veto power," and cause the relevant bureau to fail automatically.

See Carlos Lo & Shui-yan Tang, Institutional Reform: Economic Changes, and Local Environmental Management in China, 15 ENVTL. POL. 189, 202–04 (2006) (describing the new responsibility system ordered by the State Council for environmental protection, and the way in which it trickled down to provincial and municipal governments in the late 1990's); Dan Guttman & Yaqin Song, Making Central-Local Relations Work: Comparing America and China Environmental Governance Systems, 1 FRONTIERS OF ENVTL. SCI. & ENG'G IN CHINA 418, 429–30 (2007) (describing the target system as it interacts with Chinese environmental law). These systems differ in their details and implementation. Guttman and Song note that in the Pudong district of Shanghai, local environmental protection bureaus ("EPBs") each bear responsibility for drafting environmental targets. The Shanghai government subsequently incorporates these standards in their evaluations of other municipal agencies, such as transportation authorities. In contrast, Nanjing municipal authorities directly require the head of the local EPB to bear responsibility for ensuring that the jurisdiction meets environmental standards. To accomplish this, local EPB authorities enter into target responsibility arrangements with polluters, which may include private actors. Id.


In the event of an accidental killing of three to nine people, a bureau that has "failed to carry out safe production" duties loses 20 points, while a bureau "directly in charge of supervising" the location or subject involved in the accident loses 10 points. Id.

Chinese officials also adopt standalone responsibility systems that specify sanctions for particular outcomes, such as the occurrence of citizen petitions to higher levels of the bureaucracy. See, e.g., Jinchang shi xinfang
Officials in the state-run media adopt similar systems for print and Internet publications. For example, in 2005, the editors of one of China's leading publications, the China Youth Daily, drafted a new internal appraisal system for journalists' articles. Journalists received points, linked to salary rewards, depending on the results of their work. Authors of the top three most frequently read articles in each month's reader survey each received fifty points. Journalists also received points if their articles received official praise—100 points if singled out by national government or provincial Party authorities, 300 points if singled out by central Politburo officials. Editors received 30% of the points generated by the journalists they supervised. Criticism of journalists by name resulted in corresponding losses of points. The China Youth Daily's point system received national attention when one of its editors publicly distributed a memo that revealed details of the appraisal system and criticized it for limiting free speech. The paper's leaders subsequently announced their intention to abandon the appraisal system. But similar evaluation systems continue to be available on the websites of local Party propaganda bureaus.

Responsibility systems employed by administrative agencies adopt liability principles paralleling those seen in Party systems. In systems such as the Hebei one above, the key trigger for sanctions is the specified occurrence—death of a specified number of people, a particular number of accidents, or the fact that an
accident created a "serious domestic impact." This is a strict liability standard—it is independent of the fault or mental state of any of the state employees in question. Collective and vicarious sanctions are employed as well. In one example from a state-owned media outlet, all employees in a particular bureau lost their annual bonuses (of several thousand yuan apiece) as a result of a single employee being detained on prostitution charges that "negatively impacted" the bureau's image.54

Chinese courts also adopt responsibility systems.55 Targets vary under these systems. Some targets reflect routine management concerns. Judges can lose points for extensive absences or poor courtroom behavior. Other targets reflect Party political interests. For example, tribunals and judges can receive (or lose) points depending on whether they have held the proper number of conferences on Party theory or produced the requisite number of propaganda articles.56 Still other targets are directly linked to judicial performance in handling cases. Judges face annual target ratios for mediation,57 case closure,58 and appellate

54 Interview with Chinese official, in Beijing China (on file with author).


57 See, e.g., Du Xichen, Shi fayuan minshang anjian tiaojie lü da 70.6% [Commercial Tribunal Municipal Court Mediation Rate Reaches 70.6%], Linghai Government Website, http://www.lnlh.gov.cn/news/news.asp?id=107 (last visited Nov. 1, 2009) (P.R.C.) (noting that the court responsibility system requires each tribunal to reach a target of 70 percent of mediated cases, in conjunction with an effort to reduce citizen petitioning—i.e. shangfang—and that individual tribunals are docked or awarded points depending on whether they reach or exceed the target ratio).

reversal. Thus, for example, individual Chinese judges and tribunals may face expectations that they close 100% of criminal cases in a given year, successfully mediate 80% of civil cases, or have no more than 2% of their cases reversed on appeal. Other numerical targets include: enforcement ratios, average numbers of cases handled by individual judges, and numbers of citizen petitions (shangfang) to higher-level Party or government authorities generated by citizen discontent with court decisions.

Chinese court responsibility systems also employ liability principles that parallel those found in their administrative and Party counterparts. Court presidents and tribunal heads bear vicarious responsibility—and receive corresponding sanctions or rewards—for ensuring that their subordinates make target.

Some systems apply collective sanctions. Under such systems, judges receive financial penalties (or bonuses) for the failure (or success) of their tribunals to make target. Last, some local court responsibility systems apply strict liability principles to sanction judges. For example, some local court systems automatically sanction judges or tribunals for any case reversed on appeal, even if the reversal was for simple legal error arising from decision.

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59 See Minzner, supra note 20, at 69-73 (explaining the types of liability that judges can receive as a result of negative appellate review or reversals of their decisions).

60 See Fujian sheng gaoji renmin fayuan yanjiu shi [Research Department of the Fujian HPC], Fujian fayuan shenpan yeji pinggu tixi de goujian he yingyong [Creation and Application of an Evaluation System for the Trial Work of Fujian Courts], RENMIN SIFA [PEOPLE'S JUDICIARY J.], Dec. 2006, at 41 (P.R.C.) [hereinafter Fujian Evaluation System] (describing targets used on a province-wide basis by the Fujian High People's Court).


62 See Minzner, supra note 20, at 63 (analyzing Chinese court responsibility systems used to evaluate and discipline judges).
fundamentally unclear laws or regulations, rather than any failing of the judge himself.\textsuperscript{63}

The above discussion is simply the tip of the iceberg. Chinese authorities use responsibility arrangements based on similar principles to create incentives for a wide range of actors, including non-state ones. Heads of village committees, not technically part of the Chinese government apparatus, commonly sign responsibility contracts with township officials linking their success in meeting particular governance targets to concrete financial bonuses.\textsuperscript{64} As part of the campaign to maintain social order for the 2008 Olympics, urban residents' committees compelled individual businesses throughout Beijing to sign responsibility arrangements and assume liability for any activities of their employees that disrupted social order.\textsuperscript{65} A range of local authorities have experimented with similar systems holding employers or landlords vicariously responsible for infractions by their migrant workers or residents, such as failure to comply with birth control policies.\textsuperscript{66}

2.3. Functions

Responsibility systems play critical institutional roles in the Chinese political and legal system. They are tools that central authorities can use to push local officials to address particular issues of concern. They are transmission belts by which vague central legal and administrative norms are operationalized into meaningful directives for local authorities to carry out. And they are top-down monitoring devices that assist central authorities in addressing pervasive principal-agent problems in the Chinese bureaucracy.

\textsuperscript{63} Id.

\textsuperscript{64} YANG ZHONG, LOCAL GOVERNMENT AND POLITICS IN CHINA: CHALLENGES FROM BELOW 140-41 (2003).


First, higher-level authorities can use responsibility systems as a rudder to steer lower levels of the bureaucracy. As Chinese scholars themselves note, the combination of work targets, significant career and financial rewards and sanctions, and vicarious and collective liability for leaders and units, create a "pressurized system."67 "Making target" (or at least appearing to do so) is all-important for local officials. Higher-level Chinese authorities can consequently pressure local authorities to devote more or less attention to particular target areas through their choice of responsibility targets. Unsurprisingly, central authorities consistently prioritize targets (such as birth control statistics) that are associated with core, long-term national policies (such as population planning).

Higher authorities can also use responsibility targets as an electric cattle prod to jolt the bureaucratic apparatus into addressing pressing short-term tasks. During the 2008 Beijing Olympics, for example, central authorities faced the need to maintain stability and uphold China's external image in the face of international attention. They responded with a sweeping campaign setting severe career sanctions for any local Party or government officials whose actions led to outbreaks of protests or mass petitions.68

Authorities continually tinker with targets depending on practical need or prevailing political winds.69 In 2002-2003, China

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69 See Whiting, supra note 10, at 114-15 (discussing how Chinese authorities changed tax and finance targets in the wake of negative experiences with earlier targets).
experienced a leadership transition when Hu Jintao assumed office as head of the Chinese Party and state. Both Hu and his premier, Wen Jiabao, sought to alter the course of the Chinese bureaucracy. They wanted to reduce the emphasis on economic development set by their predecessors, and focus attention on a broader range of social and environmental issues. Noting that the "mild environment management and legal measures [used] in the past have proved to be ineffective" to combat increasing environmental damage, deputy director of the State Environmental Protection Agency Pan Yue and other Chinese reformers promoted efforts to directly affect the calculations of local officials by adjusting personnel evaluation and responsibility systems. In particular, they supported the development of new responsibility targets for issues such as environmental protection. Since 2004, Chinese authorities have experimented with adopting the concept of "Green GDP" into the cadre evaluation process. By adopting environmentally-adjusted measures of economic growth as the basis for local cadre performance, reformers hope to counteract incentives for local officials to grant approval to illegal and environmentally hazardous projects simply to improve their economic development scores.

Similar tinkering occurs within the legal system. In the last several years, central court authorities have altered their emphasis regarding the work of the Chinese judiciary. They have sought to encourage local courts to dispose of cases through mediation, rather than trial. Shifting responsibility targets has been a critical

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73 See Benjamin L. Liebman, A Return to Populist Legality? Historical Legacies and Legal Reform 22-25 (Mar. 31, 2009) (unpublished paper, on file with author) (discussing the increased recent emphasis by Chinese courts on
tool in this endeavor. Court officials have ramped up the importance of numerical rates of cases closed through mediation in systems for evaluating local courts and judges. They have required regular public disclosure of mediation statistics. And they have awarded titles such as “Pace-Setting Mediator” to high-performing judges, along with resulting financial rewards, in an effort to stimulate competition between judges to outperform each other in their mediation efforts.\textsuperscript{74}

Second, responsibility targets play a critical functional role in interpreting and “operationalizing” abstract central norms. Following the issuance of a broad directive by national authorities (such as the 2004 central directive to improve Party governance), there is a “cascade” effect as it is transmitted level-by-level down through the bureaucratic hierarchy. Lower-level authorities progressively flesh out the vague language of the central orders with increasing detail and instructions as to how to implement them.\textsuperscript{75} Responsibility systems are a crucial link in this process.

\textsuperscript{74} Duoyuan tiaojie jianxiao Anhui minshangshi an tiaojielv 3 nian you 28\% shang sheng dao 50\% [Diverse Mediation (System) Proves Effective, Mediation Rates for Civil Commercial Cases in Anhui (Province) Increase From 28\% to 50\% in Three Years], FAZHI RIBAO [LEGAL DAILY], May 4, 2009, available at http://www.chinapeace.org.cn/zfdt/2009-05/04/content_72640.htm (discussing relevant measures taken in Anhui province to promote mediation).

\textsuperscript{75} For an example of this process, see Zhonggong zhongyang guanyu jiaqiang dang de zhizheng nengli jianshe de jueding [Central Party Committee Decision Regarding Strengthening Party Governance Capacity], XINHUA NEWS AGENCY, Sept. 19, 2004, available at http://news.xinhuanet.com/newscenter/2004-09/26/content_2024232.htm (broad national Central Party directive instructing local officials to strengthen Party governance, respond to citizen discontent, address official errors, and adopt responsibility systems); Huludao City Working Committee, Zhonggong Fujian shengwei guanche “Zhonggong zhongyang guanyu jiaqiang dang de zhizheng nengli jianshe de jueding” de shishi yijian [Fujian Communist Party Provincial Party Committee Implementation Opinion Regarding The “Central Party Committee Decision Regarding Strengthening Party Governance Capacity”], issued 2004, art. 4(4) (P.R.C.), available at http://www.hldjgdj.gov.cn/Article/ShowArticle.asp?ArticleID=1149 (Fijian provincial Party committee directive calling for carrying out the central directive, fleshing out the aims of the central orders by adding additional content, and calling for the use of responsibility systems to operationalize these orders); Shennongjia Lin District Party Committee, Zhonggong shennongjia lin qu weiyuanhui guanyu xuexi guanche “Zhonggong zhongyang guanyu jiaqiang dang de zhizheng nengli jianshe de jueding” de yijian [Shennongjia Lin District Party Committee
They translate abstract norms into more concrete targets that have meaning for lower level officials who have to implement them. They include critical details such as timetables, numerical evaluation standards, and specific delegations of responsibility to particular bureaus for ensuring that targets are met.\(^\text{76}\)

Legal norms experience this process of translation as well. The 2002 Law on Safe Production, for example, sets out a range of broad national goals. These include production safety standards, the rights of workers to a safe workplace, and institutional channels for supervising these goals.\(^\text{77}\) As this mandate percolated down through the bureaucracy, provincial and county authorities fleshed it out with target goals and punishments incorporated into target responsibility systems facing relevant authorities.\(^\text{78}\) Vague

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language regarding the rights of trade unions and workers to participate in the oversight of work safety disappeared. In its place: numerical target goals capable of being measured. County-level systems established 100-point scales for grading officials on production safety. These set out targets for “safe production” legal propaganda events that local officials were expected to carry out. They delineated permissible numbers and scale of work accidents that were allowed to occur. And they specified the corresponding personnel sanctions for bureaus and officers who failed to reach these target goals, such as requiring the immediate resignation of relevant officials whose jurisdictions experienced accidents resulting in more than 10 deaths.79 Through this process, the relatively vague content of central laws was translated into meaningful operational instructions for front-line local county and township authorities, and cast in terms of strict, collective, and vicarious liability linked to specific target goals.

Third, responsibility systems are a core tool for central authorities to address severe principal-agent problems. This may seem counterintuitive at first glance. Influenced by news photos of public security forces rounding up dissidents, outsiders often view the Chinese state as an all-powerful authoritarian monolith. Many assume that Chinese central authorities are able to assert their will throughout the system at all times. But central authorities actually

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79 Under the Yongshun county system, for example, officials who experience a production accident resulting in one to two deaths lose their ability to be selected as “outstanding” that year. Accidents resulting in from three to nine deaths result in the loss of officials’ ability to be re-nominated for their position, while accidents resulting in more than ten deaths require the immediate resignation of the relevant official. Yongshun xian renmin zhengfu ban’gongshi guanyu yinfa 2006 nian anquan shengchan zeren mubiao kaohe banfa de tongzhi [Notice of the General Office of the Yongshun County People’s Government Regarding the Issuance of the 2006 Evaluation Measures for the Safe Production Target Responsibility System], issued Feb. 9, 2006, art. 8 (P.R.C.), available at http://www.ysx.gov.cn/Article/ShowArticle.asp?ArticleID=2902.
face extreme difficulties in regularly imposing their will on their local agents. They lack the time and energy to comprehensively monitor local agents' work around the clock. They also lack reliable and independent channels of information to do so. The centralized control enjoyed by a few local Party authorities over local governments, legislatures, courts, and media outlets, means that they can choke off negative information to Beijing that reflects poorly on their performance. Following a large industrial accident that caused a massive benzene leak on the Songhua River in November 2005, for example, Jilin provincial officials simply barred any reporting on the incident for over a week, blinding central authorities as to the extent of the crisis.

Naturally, central Party authorities attempt to defeat such concealment. As with their imperial predecessors, they use direct observation as one tactic. High-level Chinese authorities conduct regular inspection tours to see how central policies are being carried out. These are often cloaked in secrecy to prevent local officials from learning in advance which areas will be investigated. Zhao Shukai, a State Council researcher, notes cases in which provincial-level birth control inspection teams do not know their destinations when they set off on survey inspections. Rather, they are given three letters. The first, to be opened upon departure, tells them which county they are to proceed to. The second, to be opened on arrival in the designated county, tells them which township to inspect. The last, to be opened upon arrival in the township, specifically instructs them which villages to survey. This theoretically limits the ability of local officials to conceal facts on the ground (for example, by temporarily hiding unregistered

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81 Kim Hunter Gordon, Ssh, Don’t Mention it to the Emperor, GUARDIAN, Dec. 4, 2005, available at http://www.guardian.co.uk/media/2005/dec/04/business.china. The incident led to an international incident with Russia, and generated panic among the residents of the provincial capital denied accurate information as to why their municipal water system had been shut off.
children), or engaging in advance collusion with the inspection teams (for example, by bribing them). But local officials can defeat even these controls. As one township official noted:

Actually, [these surprise inspections] can be circumvented; it just requires the use of calculation and manpower. First, regardless of how secretive preparations for the inspection are, we are always able to figure out when [the inspection team] enters our [prefecture], because we have contacts in the provincial government. We even know their license plate number. Second, once they have entered our [prefecture], things are easier to handle. Relevant bureaus from the prefecture and each county monitor the inspection teams. [We] even know what restaurant they ate at, what they ate, and what time they left the following day. Third, along their route, county and township authorities set up observers. We can establish where the [inspectors] are going and where they stop. Fourth, once we determine their trail, it is easy for us to determine what days they are likely to enter our township. That way, we can warn in advance those villages that are in the scope of the sample ... and allow those families with children in excess of the birth quotas to hide themselves. In this manner, we generally manage to pass these inspections without incident.

Other scholars reach similar conclusions. In a comprehensive 2007 study of central-local police relations, Green and Tanner surveyed the wide formal powers that central Chinese authorities possess for monitoring and controlling their local agents, such as


83 Id. at 247-48. Setting up Potemkin villages is another option. Examples of local Chinese officials misleading central inspection teams or high-ranking visitors through such tactics are legion. See CHEN GUIDI & WU CHUNTAO, AN INVESTIGATION INTO THE CONDITION OF THE CHINESE PEASANTRY, translated at http://www.zonaeuropa.com/20040228_4.htm (providing a 1998 example of one such effort by Anhui officials to mislead visiting premier Zhu Rongji as to the success of local grain policies).
issuing central laws and policies and setting personnel quotas. But they conclude that these mechanisms:

[do] not translate into detailed, effective control over local police behaviour. The powers in the hands of local party-state leaders—leadership authority, hiring of regular officers, leading cadre management, finance and budgeting, and setting salaries—still loom much larger . . . . [I]n this cornerstone sector of state power—legal coercion—the levers of central control over provinces and localities are relatively weak, and very shallow in their reach.\footnote{Tanner & Green, supra note 80, at 668–69.}

Bottom-up monitoring is another strategy employed by central authorities.\footnote{Jing Vivian Zhan, Decentralizing China: Analysis of Central Strategies in China's Fiscal Reforms, 18 J. CONTEMP. CHINA 445, 449-51 (2009) (discussing bottom-up reporting and the problems associated with it).} Since 1978, Chinese authorities have turned away from fiery Maoist-style political campaigns as a means of stirring up the populace and checking the behavior of local officials. But central authorities have created a range of systems that harness limited bottom-up citizen participation to assist in the administrative monitoring of local authorities. Some date back to the creation of the PRC, or earlier. Examples include the state media and xinfang (letters and visits) system as locales for citizens to present their grievances to higher authorities regarding local abuses.\footnote{See generally Benjamin L. Liebman, Watchdog or Demagogue? The Media in the Chinese Legal System, 105 COLUM. L. REV. 1 (2005) (analyzing the role of media in the Chinese legal system); Minzner, supra note 8 (analyzing the xinfang system).} Others are newer. Over the last 30 years, Chinese authorities have experimented with creating legal and electoral channels for citizens to contest the actions of local authorities. Examples include the Administrative Litigation Law (allowing citizens a limited right to sue government officials) and the Organic Law on Villagers Committees (authorizing elections for village committees).\footnote{Nathan has termed these “input institutions.” Andrew J. Nathan, Authoritarian Resilience, 14 J. DEMOCRACY 6, 14–15 (2003) (defining input institutions as institutions that citizens can use to apprise the state of their concerns).} As each of these channels has opened up,
Chinese citizens have indeed actively used them to seek redress of their grievances and expose misbehavior of local authorities.\textsuperscript{88}

But central reliance on bottom-up monitoring also carries risks. As discussed in greater detail below, as each of these channels has opened up, citizen use of them has gone beyond what central authorities are comfortable with. Both electoral and legal reforms have permitted the emergence of a cadre of activists who use them not only to challenge the bad behavior of individual local officials, but also to bring a wider range of politicized grievances that implicate local (or even national) policies. From the standpoint of central authorities implacably committed to maintaining Party control, these represent worrying trends that must be closely controlled and, if necessary, suppressed.\textsuperscript{89}

So if direct monitoring is limited in its effectiveness, and bottom-up monitoring is dangerous in practice, what to do?

Faced with this dilemma, responsibility systems are a logical governance choice. Take the use of numerical targets. Broad instructions to local authorities such as “take reasonable economic measures to improve product safety” or “strengthen environmental protection” are simply too difficult for central authorities to check up on. They disappear in the ocean of local Chinese governance, leaving not a ripple behind. In contrast, easily quantifiable work statistics (numbers of mine explosions, petitioners in Beijing, judicial cases reversed, GDP statistics) have a natural appeal for administrators.\textsuperscript{90} They are simple and direct. They at least offer some concrete targets for higher officials to evaluate and grade, in contrast to entirely qualitative reports from local authorities. Numerical targets also allow higher officials to draw comparisons across jurisdictions to ferret out outliers or low performers.\textsuperscript{91} This partially helps address the problem of subjective self-reporting (or, lying) by local authorities.


\textsuperscript{89} See infra notes 186–187 and accompanying text.

\textsuperscript{90} Interview, Shanghai Intermediate People’s Court judge, in Shanghai, China (on file with author).

\textsuperscript{91} Fujian High People’s Court officials make this point in their discussion of their provincial system. See Fujian Evaluation System, supra note 60, at 42.
Naturally, this is only a partial solution. Local authorities manipulate numerical statistics as well.\textsuperscript{92} For example, according to Tsai's survey of 316 villages, 81\% of village officials admitted falsifying income data reported to higher officials (with an average discrepancy between real and reported income of 44\%).\textsuperscript{93} This creates a problem. How do you evaluate the performance of your subordinates when they can alter the very data you have to rely on to conduct your evaluation?

One possibility is to rely on criteria that are more difficult to fudge.\textsuperscript{94} Local officials certainly can find ways to pretend to be in compliance with targets such as "no mine explosions killing more than 10 people" or "generate investment of at least 1 million yuan into your county over the next six months." Mine disasters can be covered up; investment figures can be altered. But doing so requires hiding bodies, forging bank records, and paying off the relevant people. It is certainly more difficult than simply lying about one's own performance in a qualitative report ("Yet another outstanding year again, boss") or altering statistics that are entirely within the control of local officials (number of work conferences held). This added level of difficulty is precisely why particular numerical targets linked to harder-to-conceal events are attractive to central authorities seeking to monitor their subordinates.

Even better, from the perspective of higher authorities, are targets that they can directly observe themselves, without relying on reporting by local officials. Numbers of cases reversed on appeal may be a crude proxy for the efficiency of lower-level courts and the numbers of disgruntled petitioners from a particular jurisdiction who show up outside central government offices in Beijing may be a flawed tool for assessing the work of Party officials in that jurisdiction. But in the upper altitudes of a centralized bureaucracy starved for accurate tools to assess the performance of its local agents, both types of targets have a critical advantage over others. Higher-level authorities can look in their

\textsuperscript{92} Zhan, supra note 85, at 449 (explaining that because data reported by local authorities is used for performance evaluation, incentives exist for local authorities to exaggerate achievements).


\textsuperscript{94} Landry, supra note 41, at 202–06.
own files (or out their windows) and actually collect the information themselves.\textsuperscript{95}

Higher-level authorities' use of strict, collective, and vicarious liability can be understood in the same light. These are institutional responses to pervasive informational gaps and principal-agent problems in the Chinese bureaucracy. Take strict liability. Establishing \textit{why} local authorities failed to meet designated work targets requires higher officials to make difficult assessments as to the veracity of local officials' claims ("We really tried to meet the birth control targets, boss, but there was this thing . . ."). Establishing specifically \textit{who} should bear responsibility for failures poses similar problems ("The string of recent mine explosions isn't my fault, boss—it's Xiao Zhang's"). Evaluating these claims requires access to information under the control of local officials—information that can be difficult or impossible for central officials to obtain. Strict liability resolves these problems by limiting the need for central authorities to engage in complex fault-based analyses. It allows higher officials to simply disburse sanctions (or rewards) based on the failure (or success) of local officials to reach the specified goal.

Vicarious liability is attractive for the same reason. Higher-level Chinese authorities simply don't have the time, energy, or resources to investigate each time a Party committee, government bureau, imperial magistrate, or group of yamen runners fails to meet a target. Requiring the head of the unit to bear vicarious liability for the failure is an administratively direct and simple resolution to this problem. It offloads the responsibility for monitoring subordinate employees, and for figuring out how to actually reach the set target, on individual Party, government, and unit leaders. Moreover, it makes sense—after all, the relevant Party leader exercises sweeping authority over bureau operations. Why not tag him or her with responsibilities for all of its failures?

Collective responsibility provides similar advantages. As two Henan basic-level court officials noted in touting their responsibility system, "[t]ightly linking the interests of the work unit and the interests of the individual makes efforts aimed at

\textsuperscript{95} This may be a crucial reason why reform of the "letters and visits" (\textit{xinfang}) petitioning system is so institutionally difficult in China. Higher-level Chinese authorities are dependent—perhaps \textit{addicted}—to the stream of both qualitative and quantitative information that the \textit{xinfang} system brings to them regarding what is taking place at the local levels in their own country.
fulfilling the targets the conscious action of every [court] officer."96 Tying the personal economic interests of individual officials to the success or failure of their colleagues (or their unit as a whole) encourages them to watch (or assist) each other in "making target." This reduces the need for central authorities to individually monitor particular subordinates.

Top-down responsibility systems fulfill another important political function as well. They ensure that local officials remain dependent on satisfying higher-level mandates for their career advancement and legitimacy, rather than on cultivating a populist following among residents in their jurisdictions. Individual local officials occasionally pursue such strategies.97 These pose problems for centralized one-Party control, because they create the spectre that a local leader may build up political legitimacy independent of the Party's own organization, fracturing the system.

For precisely this reason, central Party authorities remain extremely leery of allowing bottom-up monitoring principles to penetrate the cadre evaluation process. Since the late 1990s, Party authorities have allowed limited local experiments that include popular opinion as a component of selecting and evaluating Party and government cadres.98 But they have severely cabined these efforts. Party regulations allow citizens only a small role in nominating potential candidates for positions. They charge higher-

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level officials with exercising tight control over the candidate pool and the actual selection process.\textsuperscript{99} And they further specify that a candidate’s popular support should not be allowed to become a determinative factor in the selection process.\textsuperscript{100}

2009 Yunnan draft provincial regulations provide one example of such efforts.\textsuperscript{101} They govern the evaluations of key municipal (prefectural-level) Party, government, and court officials. The draft regulations set a range of work targets, including crime statistics, tax revenue, and growth in per-capita GDP and rural incomes,\textsuperscript{102} that account for 60\% of officials’ numerical evaluations. The remaining 40\% of the evaluation is split equally between the results of a given official’s “democratic evaluation” (minzhu ceping) and “popular opinion survey” (minyi diaocha).\textsuperscript{103} But actual popular participation is quite restricted. Opinions of current and former Party and government officials dominate both processes. “Democratic evaluation,” for example, consists of surveying current municipal Party committee members, key leaders in the municipal people’s congress, court, procuratorate, Party disciplinary inspection committee, and subordinate county governments, as well as municipal leaders who have retired within the last three years.\textsuperscript{104}

2.4. A Comparative Look

Chinese reliance on strict, vicarious, and collective liability to govern is not cultural. Rather, it is an institutional response to informational and principal-agent problems. Western legal


\textsuperscript{100} Id. art. 17.

\textsuperscript{101} Yunnan sheng zhoushi dangzheng lingdao banzi he lingdao ganbu zonghe kaohe pingjia shishi banfa (shixing) [zhengqiu yijian gao] [(Experimental) Yunnan Provincial Implementing Measures for the Comprehensive Evaluation of Leading Prefectural-Level Municipal Party and Government Cadres] (proposed by the Kunming Municipal Personnel Bureau, Feb. 24, 2009), available at http://rsj.km.gov.cn/ImNews/List.asp?id=8596 (P.R.C.).

\textsuperscript{102} For a list of the types of targets, see id., attached forms 1-1, 1-2.

\textsuperscript{103} Id. art. 13.

\textsuperscript{104} The regulations do allow for soliciting the opinions of others “who should be consulted” as part of a given official’s “democratic evaluation.” Id. art. 8(7). But they provide that these numbers should generally not exceed 20\% of those who participate. The “popular opinion survey” provides for slightly broader participation, specifying that individuals surveyed should include delegates from municipal people’s congresses, representatives from municipal Party congresses and “popular representatives” (qunzong daibiao). Id. art. 9.
systems rely on similar mechanisms to respond to similar problems.\textsuperscript{105}

Take strict liability. It is a classic institutional response to monitoring problems caused by information gaps. American tort law provides the obvious example. Historically, tort recovery for injuries caused by product defects required proof of negligence—demonstrating a particular failure of a duty of care toward the injured party. But by the mid-20\textsuperscript{th} century, industrial production chains had become highly extended and complicated. An individual consumer faced extreme difficulty establishing exactly which (and whose) behavior in the production process was the cause of the exploding toaster that resulted in her injury. Confronted with this information gap, American courts altered the law, adopting a strict liability standard in product liability cases. This eliminated the need for individual consumers to prove fault on the part of the manufacturer. And it placed the responsibility to monitor and avoid such defects on the manufacturer, identifying him as best positioned to decide how to do so.\textsuperscript{106}

Similarly, Western legal systems, both historical and modern, rely on collective and vicarious sanctions to respond to principal-agent problems. Under the medieval English system of frankpledge, for example, adult males were organized into groups of ten and held collectively liable for crimes of their members.\textsuperscript{107} Collective liability also applied in the economic sphere. An English merchant from town A conducting trade in town B could be held accountable by residents of B for debts previously incurred


\textsuperscript{106} For the logic underlying the California Supreme Court’s decision to alter the relevant legal standard, see Greenman v. Yuba Power Prods., Inc. 377 P.2d 897, 901–02 (Cal. 1963) (explaining that the purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves).

\textsuperscript{107} Parallels between frankpledge and the Chinese \textit{baojia} system of collective responsibility might be an interesting subject of future study.
by a separate merchant from town A. Collective and vicarious sanctions exist in modern American law as well. Manufacturers and suppliers face joint and several tort liability for product defects. Employers are held vicariously liable for an employee's wrongful acts committed within the scope of his employment.

As Levinson points out, these mechanisms do not reflect a "primitive" outlook common to pre-liberal, group-based societies. Rather, they are functional. They help sanctioners address principal-agent problems. They make "sense when group members have the capacity to monitor and control the behavior of some intuitively primary wrongdoer more efficiently than an external sanctioner." Medieval English authorities lacked a centralized police force or bureaucratic state to exert individualized control over all members of society. They lacked a national credit system for citizens in one town to monitor the debts of individual merchants from other towns. In these circumstances, outsiders faced significant problems targeting particular wrongdoers. Collective liability provided one way to address this problem. It introduced incentives for members of a frankpledge group, or merchants from a particular town, to monitor the behavior of their colleagues and discipline them. Rulers or sanctioners could thus offload the administrative burden of identifying and disciplining particular individuals on the group itself.

The growth of the modern state has altered some of the calculus that supports collective sanctions regimes. Urbanization has broken down clan or kinship bonds that facilitate the intra-group monitoring that collective sanctions regimes rely on to function. Development of modern bureaucratic mechanisms (tax registration and credit bureaus) and legal institutions (independent national judiciaries) has made identification of individual wrongdoers easier, and resort to collective or vicarious sanctions less necessary. Concepts of due process have emerged as a limit on the ability to sanction individuals for the behavior of another.

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109 Levinson, supra note 105, at 360–62.

110 Id. at 426.

111 Id. at 357–59.

112 Id. at 359–62.
But functional reasons for imposing collective and vicarious liability continue to exist in many areas. Imposition of joint and several tort liability for manufacturers and suppliers in modern product liability cases is motivated by the relative difficulty that consumers face in identifying the precise wrongdoer in the production chain that was the source of their injury.\footnote{Id. at 368. For functional arguments regarding the desirability of applying collective sanctions for ethical violations by modern American law firms, see Note, Collective Sanctions and Large Law Firm Discipline, 118 HARV. L. REV. 2336 (2005).}

2.5. Summary

The Chinese government itself is simply a very (very!) large principal-agent problem.\footnote{According to 2007 Chinese census data, there are roughly 60 million employees in Party and government organs. NAT'L BUREAU OF STATISTICS OF CHINA, 2007 CHINESE STATISTICAL YEARBOOK (2007), available at http://www.stats.gov.cn/tjsj/ndsj/2007/indexch.htm. By way of comparison, if the Chinese Party-state bureaucracy were an independent country, it would be the 19th largest in the world, roughly the same size as France.} Responsibility systems, in particular their extensive adoption of strict, collective, and vicarious liability principles, are a highly refined effort to address this problem. They are a core component of the way China is governed. This is not new. Nor is it cultural. It is institutional. Like medieval English monarchs, central Chinese leaders lack effective ways to monitor the actions of their local agents. Like modern consumers, they lack effective means to identify the fault of particular (local government) actors. Particularly in the context of a large authoritarian bureaucracy which is hesitant or unwilling to permit the development of independent institutional channels to monitor the actions of local officials, numerical responsibility targets tied to strict, collective, and vicarious liability are quite simply core mechanisms which allow the center to exercise some degree of control over their local agents.\footnote{A separate paper currently in progress by this author traces these efforts’ roots back to Legalist philosophy and Qin practices. Again, this is not to prove a cultural basis for these elements. To the contrary, it demonstrates the institutional continuity of both the problems confronted (and responses adopted) by the Chinese authoritarian bureaucratic state.}

3. COUNTERPRODUCTIVE EFFECTS OF RESPONSIBILITY SYSTEMS

If responsibility systems serve a particular institutional role in the Chinese system, they also come at a cost. Excessive central
reliance on responsibility systems as a tool for monitoring local officials fuels a host of practical problems in local Chinese governance. It also generates tension, and sometimes open conflict, with the thrust of post-1979 Chinese legal reform efforts.

3.1. An Uneasy Overlap with Legal Norms

Cadre responsibility systems overlap with formal legal norms. They establish binding norms on official behavior backed up with career and financial sanctions. In some cases, these reinforce legal norms. Some responsibility systems expressly purport to be implementing central laws or regulations. Some internalize legal outcomes and phenomena, such as the loss of an administrative litigation lawsuit or the creation of open government information standards that comply with national regulations, in their evaluation standards for local officials.

But in other cases, administrative performance targets create what Mashaw terms an "internal law of administration," existing in uneasy tension with external legal norms. Sometimes, specific targets set by responsibility systems directly violate legal norms. For example, some local court responsibility systems sanction Chinese judges and courts for any instance of cases reversed on appeal, even those reversed for non-negligent legal error. (This incentivizes a range of problematic behavior on the part of trial court judges seeking to avoid sanctions for appellate reversal.)

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116 See, e.g., Hebei System, supra note 47 (aimed at implementing the P.R.C Law on Safe Production and relevant Hebei provincial regulations); Changping qu caizheng ju guanyu xingzheng xuke shixiang guocuo zeren zhuijiu zhi [Changping District Finance Bureau Responsibility System Regarding Errors in Administrative Licensing], issued Jan. 1, 2005 (P.R.C.) (aimed at implementing the Administrative Licensing Act).


118 JERRY MASHAW, BUREAUCRATIC JUSTICE 213 (1983).

119 See Minzner, supra note 20, at 70 (discussing the relevant Jiangxi provincial regulation).

120 Faced with numerical targets for cases reversed on appeal, for example, many judges resort to an ill-defined system of requesting advance guidance (qingshi) from higher courts and judges regarding how they should decide cases. As Chinese judges themselves note, such practices can undermine parties' legal rights (particularly when the request is made in secret), weaken the value of appellate review, contribute to passivity and dependency on the part of lower
Such systems violate two 1998 Supreme People's Court directives setting clear limits on judicial liability for "incorrectly decided cases" and barring judicial sanctions for cases reversed for simple legal error.121

In other cases, responsibility systems create bureaucratic career incentives that inexorably pressure officials to violate central legal and Party norms, even if there is no direct facial conflict between them. For example, the 2005 national "Letters and Visits" (Xinfang) Regulations require Chinese officials to accept citizen petitions for the redress of grievances. They also bar official retaliation against petitioners who bring complaints.122 But local cadre responsibility systems severely sanction local officials who experience large numbers of petitions out of their jurisdictions to higher levels of government. Faced with this pressure, local Chinese officials interested in keeping their jobs engage in a wide range of measures to prevent petitioners from reaching higher authorities, including illegal detentions, kidnappings, and psychiatric confinements.123

Mediation targets create similar problematic incentives. As mentioned earlier, court responsibility systems include rates of cases closed through judicial mediation as a component of judges' courts, and inflate the workload of higher courts. Su Yongtong, Bu an “fali” chupai de gaoyuan yuanzhang [A High People's Court President Who Doesn't Play According to "Legal Principles"], NANNFANG ZHOUMO [SOUTHERN WEEKEND], Feb. 18, 2009, available at http://www.infzm.com/content/24067/1; Chai Jianguo & Wang Yanxia, Duli shenpan yu sifa tizi gaige [Adjudicate Independence and Judicial System Reforms], 23 HEBEI FAXUE [HEBEI JURISPRUDENCE] 85, 87 (2005) (providing comments by the director of the research office of the Hebei HPC). For a similar point by a vice president of the Jiangsu HPC, see Liao Disheng, Lun sifa gongzheng xiaolfi de shixian tujing [Discussion on Methods to Realizing Judicial Fairness and Efficiency], 2 JINLING FALU PINGLUN [JINLING L. REV.] 127, 130. For an extended discussion on court responsibility systems for incorrectly decided cases, and their links to qingshi practices, see Minzner, supra note 20.


122 Xinfang tiaoli [Xinfang Regulations], supra note 7, arts. 3, 46.

evaluations. Chinese authorities have significantly increased the importance of mediation targets in recent years.\textsuperscript{124} Chinese courts and judges have responded to this pressure. According to the SPC's annual work reports, the ratio of cases resolved through mediation (as opposed to trial) has drastically shifted in the last four years. The percentage of civil cases resolved through mediation rocketed from 31 percent (1.33 million cases) in 2004, to 59 percent (3.17 million cases) in 2008—a 137 percent increase in the total number of cases closed through mediation in just four years.\textsuperscript{125} More striking still is the fact that almost the entire numerical shift appears to have taken place in a single year—between 2006 and 2007!\textsuperscript{126} Chinese judges and legal scholars express concern that these numerical accomplishments (with some local courts reporting mediation rates of 99 percent) have been achieved at the expense of legal requirements of voluntariness in mediation, sacrificing parties' rights and exacerbating social tensions.\textsuperscript{127}

Concerns regarding official use of performance targets are not limited to China. Such targets, coupled with strict liability, generate concerns in other jurisdictions regarding the extent to which they impermissibly burden the independence of certain actors (such as judges) whose autonomous decision-making authority is valued. In the 1970s, for example, U.S. Social Security Administration ("SSA") officials adopted a series of initiatives

\textsuperscript{124} See supra notes 73–74 and accompanying text.


\textsuperscript{126} Compare Zui gao renmin fayuan 2007 nian gongzuojia baogao [2007 Sup. People's Ct. Work Report], issued 2007 (P.R.C.), available at http://www.chinacourt.org/public/detail.php?id=239089 (noting that 30.41\% percent of civil cases were resolved through mediation, while 55.06 percent of first-instance civil cases were resolved through "mediation and withdrawal of the case"), \textit{with} Zui gao renmin fayuan 2008 nian gongzuojia baogao [2008 Sup. People's Ct. Work Report], issued 2008 (P.R.C.), available at http://news.xinhuanet.com/newscenter/2008-03/22/content_7837838.htm (noting that 50.74\% of civil cases were resolved by "mediation and withdrawal of the case").

\textsuperscript{127} Fayuan gao tiaojie jiean lv beihou de yinyou [Concerns Behind Courts High Rates of Case Closure Through Mediation], FAZHI RIBAO [LEGAL DAILY], available at http://www.legaldaily.com.cn/0801/2009-06/11/content_1104238.htm (last visited June 09); Ai Jiahui, \textit{supra} note 33, at 79–83.
targeting administrative law judges ("ALJs") with low productivity rates or high reversal rates for targeted review and potentially adverse personnel actions. These efforts generated a firestorm of political and legal opposition among ALJs who felt that these efforts violated their guarantees of "decisional independence" under the Administrative Procedure Act.129

American immigration authorities are currently experimenting with similar caseload requirements, and raising similar controversies.130

Even if responsibility targets are not illegal themselves, and even if they do not incentivize unlawful behavior, they can still affect how local officials experience legal norms. By reframing legal norms in terms of hard, numerical targets, backed up by strict, vicarious, and collective liability, responsibility systems sensitize officials to particular numerical outcomes rather than actual norms themselves. Aims and goals expressed in national law that have not been reduced to hard targets, or are not capable of being so reduced, may fade in importance. Put simply: if you are a local Chinese official, do you care more about the vague language in the 2002 Law on Safe Production about worker rights, or do you care more about the annual worker death ratio in the particular responsibility system that governs your salary and career advancement?

3.2. Interaction with Legal Norms: No Clear Mechanism to Resolve Conflicts

The relationship between law and responsibility systems is complicated by the absence of clear institutional mechanisms to iron out conflicts between the two.

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129 Nash v. Bowen, 869 F.2d 675, 676, 680-81 (2d Cir. 1989) (involving an appeal wherein the court upheld the SSA policies, but only because they did not apply a strict liability standard with regard to the failure of ALJs to "make target;" the court noted that the SSA policies did not "dictate the content of the decision" and found that "[a] minimum number of dispositions an ALJ must decide in a given period, provided this number is reasonable and not "etched in stone," is not a prescription of how, or how quickly, an ALJ should decide a particular case").

130 See Shruti Rana, Streamlining the Rule of Law: How the Department of Justice is Undermining Judicial Review of Agency Action, 2009 ILL. L. REV. 829, 832 (arguing that the Department of Justice's "streamlining" reforms are undermining judicial review).
First, consider the drafting process. With respect to Party responsibility systems, the lack of clear institutional mechanisms for ensuring that they correspond with the law simply reflects the reality of the Chinese political system. Party responsibility systems are a key element of one-party control.\textsuperscript{131} Responsibility for writing them rests with Party institutions, such as organization bureaus, rather than with the national and local legislatures that draft China's laws, or the government agencies that enforce them. Differences can emerge intentionally, such as when publicly promulgated legal or constitutional norms (regarding the right of assembly) issued for propaganda purposes simply do not accurately reflect internal Party interests (regarding political control). Differences can also emerge unintentionally, for example, when Party organization bureaus select court responsibility targets (mediation rates or appellate reversal ratios) for administrative convenience rather than for precise compliance with legal norms.

But even with regard to run-of-the-mill responsibility systems used in administrative agencies, practical difficulties exist in ensuring that they are prepared in accordance with legal norms. Guttman and Song report that local environmental authorities (even in developed urban areas) lack both procedures and staff to evaluate whether pollution targets drafted for local responsibility systems actually comply with environmental law.\textsuperscript{132} Lack of transparency also hinders the ability of both the public and other government bureaus to provide input as to whether particular responsibility systems correspond with relevant law. Some systems and targets are publicly available, but others are not.\textsuperscript{133}

Next, consider the institutional channels that exist for resolving conflicts in practice. Imagine that you are an official who has been sanctioned by your bureau for failing to meet a responsibility target (perhaps a tax or birth control target) that would compel you (either directly or indirectly) to violate a higher-level legal or Party norm. What recourse do you have? Might you point out the inconsistency to your superiors and directly challenge the validity of the target? Perhaps, but many local responsibility systems vest power to interpret their language with the same leadership group

\textsuperscript{131} See Heimer, supra note 39, at 123–25 (discussing how the cadre responsibility system is used by central authorities to steer the bureaucracy).

\textsuperscript{132} See Guttman & Song, supra note 46, at 424, 429.

\textsuperscript{133} See id. at 429 (noting that environmental targets are not public in Beijing, except for the number of required clean air days).
that conducts evaluations and issues sanctions.134 Their evaluations of complaints regarding the validity of the sanctions they themselves have issued may be less than neutral. One local court system hints at this problem, explicitly providing that court officials who continue to argue with the evaluation committee after it has made a decision to dock points under the applicable 100-point scale will be subject to additional point deductions.135 Limited channels of review exist in such cases—the court system is not an option. The Law on Administrative Litigation specifically bars courts from reviewing decisions of administrative organs regarding personnel rewards or sanctions for their employees.136 The Law on Administrative Reconsideration expressly bars reconsideration of the validity of internal bureau regulations (guizhang).137 The Law on Civil Servants, the Regulations on Intra-Party Supervision, and the Party Charter do grant a limited right of review to aggrieved government employees or Party members subject to disciplinary sanctions. They may request that the same government or Party entity that issued the disciplinary sanction, or its immediate superior, review the decision.138 But none of these permit review of the legality of the underlying responsibility targets on which the action is based.

135 Zhenping System, supra note 61, art. 3(i).
Redressing problematic responsibility targets, either that create perverse practical incentives or that conflict with legal norms, ultimately depends on the willingness of particular higher-level authorities to expend political capital to push for changes in the content of local systems. Chinese central authorities regularly attempt to modify specific responsibility targets in order to address such problems that arise. The SPC, for example, has made significant efforts to alter how local court responsibility systems discipline judges for cases deemed “incorrectly decided” (cuo’an). In 1998, the SPC issued two directives banning lower courts from mechanically sanctioning judges for any case reversed on appeal (on a strict liability basis), even if the error merely resulted from simple, non-negligent legal error. The SPC directives also required courts to apply individualized liability for the misconduct of particular judges, instead of collectively or vicariously disciplining entire tribunals or court presidents.

The impact of the SPC directives has been mixed. Some local courts, such as the intermediate-level appellate courts in Beijing, Guangzhou, and Kunming, have expressly amended their local responsibility systems to comply with the 1998 SPC directives.

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139 This is reflected in the underlying language of the administration reconsideration law and the regulations governing the xinfang system, which allow Chinese citizens to bring petitions regarding official actions. See Xinfang tiaoli [Xinfang Regulations], supra note 7, art. 32 (providing that xinfang bureaus should “support” (zhichi) petitions grounded in law, and “supervise and urge” (ducu) other bureaus to handle them); Law on Administration Reconsideration, issued Apr. 29, 1999, art. 27 (P.R.C.) (directing administrative reconsideration organs, if they find that the basis for a particular administrative action is illegal, to “handle” [chuli] it, or transfer it to another organ).


141 Kunming shi zhongji renmin fayuan shenpan ting, heyi ting gongzuoguize (shixing) [Kunming Municipal Intermediate People’s Court Trial Tribunals, Collegiate Judicial Panels Work Principles (Provisional)], issued April 27, 2001, art. 31 (P.R.C.) [hereafter Kunming Principles]; Guangdong sheng gaoji fayuan judges fayuan guanyu weifa shenpan zeren zhuijiu de bianli banfa (HPC Regarding Responsibility for the Illegal Behavior of Court Personnel), issued August 30, 2000, art 8(1-3) (P.R.C.) [hereinafter Guangdong Measures], available at http://china.findlaw.cn/fagui/
But in the ten years since 1998, other courts have implemented responsibility systems that openly violate the SPC directives by applying judicial sanctions based on strict, vicarious, and collective liability for cases reversed on appeal.\textsuperscript{142}

The SPC's experience with disciplinary reform illustrates the extent to which core elements of responsibility systems—strict, vicarious, and collective liability tied to numerical work targets—are institutionally embedded within the Chinese bureaucracy. It also illustrates the difficulty that exists in resolving latent conflicts between responsibility systems and legal norms. If China's highest court experiences difficulty in altering such practices within their own bureaucratic hierarchy, and on subjects as mundane as judicial sanctions for ordinary appellate reversal, imagine the difficulties that exist in reforming responsibility target practices with regard to truly sensitive areas (such as petitioning).

3.3. Negative Practical Effects

Apart from their uneasy interaction with legal norms and institutions, responsibility systems also have a range of negative practical side effects for Chinese governance.

First, heavy application of strict and vicarious liability to resolve principal-agent monitoring problems generates classic risks of "over control." Those on the receiving end of such sanctions may find themselves driven to take excessively harsh measures with regard to people they are expected to monitor in order to ward off their own liability. For example, Title VII imposes vicarious liability on American employers for individual employee actions that create a "hostile work environment." Faced with this pressure, some employers defensively impose blanket controls on the speech of all employees. This can result in excessively strict, zero-tolerance policies that infringe on legitimate employee interests in political and religious speech (e.g., banning a Goya painting from a university classroom).\textsuperscript{143}

\textsuperscript{142} See Minzner, \textit{supra} note 20, at 63 (discussing judicial sanctions in China).

The widespread imposition of strict and vicarious liability on Chinese Party or government leaders for the actions of their employees (or of local citizens) generates similar problems. But the excesses involved are magnified by the absence of significant bottom-up electoral or legal constraints on official behavior. Bobai county officials (discussed in the Introduction) faced strict and vicarious sanctions for failures to make birth control targets. Faced with these pressures, they rationally (and brutally) decided to sacrifice villager interests and rights in a harsh coercive campaign. Party xinfang responsibility systems generate similar behavior. Concern over vicarious and strict liability resulting from citizen petitions to higher authorities leads local authorities to resort to extreme measures to control and suppress petitioners.144

Second, reliance on collective and vicarious sanctions to govern contributes to another problem: the dangerous convergence of interests among local officials faced with sanctions. The birth control and petitioning examples above illustrate one risk of such solidarity—the risk of local officials engaging in widespread collective conspiracies that violate clear central instructions (e.g., no coercive birth control measures, no retaliation against petitioners) in their efforts to fulfill responsibility targets set by higher authorities.

If group members are collectively or vicariously subject to sanctions for the failings of a single member, they may also simply decide to cooperate in concealing misbehavior or compliance failure from higher authorities.145 Local Chinese governance is rife with examples. As Zhao Shukai notes, municipal, county, township, and village authorities collude to defeat birth control inspections by provincial-level leaders. County, township, and village officials conspire to thwart municipal efforts.146 Ironically, the reliance of central Chinese authorities on collective and vicarious sanctions itself helps create the problematic unity of interests among local officials—the very source of Beijing's enforcement problems.

144 See Minzner, supra note 8, at 154–55 (describing harsh methods employed by local authorities as a result of xinfang responsibility systems, including interrogations and arbitrary barring of suspected petitioners attempting to purchase railway tickets, and instances of violent suppression of petitioners).
145 Cf. Levinson, supra note 105, at 388–91 (discussing this same phenomena with regard to the frankpledge system in medieval England, in which ten-person groups devoted particular effort to cover up crimes committed by group members rather than reporting them).
146 See Zhao, supra note 82, at 248.
Third, responsibility systems contribute to selective and distorted policy implementation. As Whiting notes, the combination of specific performance targets and high financial incentives in cadre responsibility systems creates moral hazard problems. Local Chinese authorities "game the system" by engaging in undesirable behavior to optimize outcomes with respect to certain target goals. They have strong incentives to focus solely on high-value targets designated as "priority targets with veto power" (yipiao fojue) that are easily quantifiable and subject to measurement. They have similarly strong incentives to overlook other, lower-value targets that are not so easily measured, or to overlook legal responsibilities that are not factored into their evaluations. Consequently, as O'Brien and Li have found, local officials pay significant attention to meeting (or creating the appearance of meeting) social protest, birth control, and revenue targets, while disregarding targets such as respecting villagers' autonomy or limiting peasants' burden.

These negative effects are amplified when coupled with other personnel practices, such as the cadre rotation system. Local Party officials are regularly rotated among positions across the nation. This theoretically limits their ability to develop local power bases and ensures that their interests (and loyalties) remain tied to the bureaucratic apparatus rather than the people they govern in any particular jurisdiction. However, it also generates negative side effects. Faced with limited time in a given office and strong pressure to demonstrate "success" to their superiors on high-value, easily measurable targets, some local Party cadres sacrifice the long-term interests of their jurisdictions in favor of short-term "show" projects. Indeed, responsibility systems that strongly emphasized economic growth targets in the 1980s and 1990s spurred many local Party cadres into initiating crash economic development programs without considering long-term

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147 See Whiting, supra note 10, at 112-15 (noting that assignment of "output value" as a key performance indicator resulted in local cadres supporting gratuitous economic expansion, without considering the efficiency of production processes or market demand for products).

148 Id. at 112-15; see also O'Brien & Li, supra note 28, at 173-75 (noting that policies that have quantifiable output tend to drive out policies that do not, despite the fact that the latter policies are just as important).

149 O'Brien & Li, supra note 28, at 174. See also supra Section 2.2. and accompanying text.
consequences. O’Brien and Li note that one Henan county leader ordered every village in his jurisdiction to set up a paper mill within a year. Some one hundred paper mills were built and the county leader received a promotion on the basis of his economic accomplishments, but when the mills went bankrupt, and their environmental consequences became clear, the county leader had already been rotated to another county, presumably having reaped the career benefits of his earlier “successes.”

Fourth, responsibility systems contribute to the “mistranslation” of central norms. As discussed earlier, responsibility systems play an important role in “operationalizing” vague central mandates. They transform central orders into concrete directives that can be carried out by local officials and monitored by their superiors. But this process invariably alters the underlying content of the original instructions from above.

The population planning directive in the introduction provides one such example. The central order set forth clear, broad goals: greater adherence to population planning rules, no forced abortions. This order subsequently filtered down through various levels in the bureaucratic chain of command. But when it emerged in concrete form in the Bobai county responsibility system, nothing remained but hard revenue figures and numbers of people to be swept up in the campaign, coupled with a feeble order to distribute the central directive in an educational campaign. Faced with these pressures, local township authorities rationally resorted to coercive measures that violated the original intent of the central orders.

Recent central efforts regarding rural health reform provide a second example. On March 17, 2009, central Party and state officials issued a joint opinion calling for improvements in health infrastructure. The opinion specifically called for local authorities to “establish medical health centers in every township, and undertake different measures to support the construction of village health clinics, enabling each administrative village to have a village health clinic, increasing and improving village medical and health conditions, and improving service quality.” The central order

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150 See Whiting, supra note 10, at 112–15 (describing long-term dysfunctional outcomes of local authorities “gaming the system”).

151 O’Brien & Li, supra note 28, at 176.

152 See supra notes 75–79 and accompanying text.

153 Zhonggong zhongyang guowuyuan guanyu shenhua yiyao weisheng tizhi gaige de yijian [Opinion of the Central Committee of the Communist Party
prompted a flurry of activity among local authorities seeking to demonstrate their compliance. In April, the Xinyang municipal Party secretary announced that a village health clinic would be built in each of the municipality's 3,042 administrative villages within eight months. Each health clinic was expected to use exactly the same building design and floor plan. Designating this as a "priority target with veto power" (yipiao fojue), the municipal Party secretary issued an order stating that township party secretaries who failed to make this target would be relieved of their posts. Township officials subsequently leaped into action, requiring village medical workers to construct or remodel their health clinics in accordance with the pre-approved blueprints as a condition of continuing to practice medicine.\footnote{Note that in both examples described above, the process of translating the original central directive (strengthen population planning work, improve rural health work) into specific responsibility targets (ensuring that a specified number of women have tubal ligations, building a precisely defined structure by a precisely defined date) effectively generated pressures (forced}

These targets generated resistance. Village medical workers in one county noted that the proposed plan would require the abandonment of a large number of recently constructed health clinics (some one-third of the clinics in the county)—clinics that met provincial standards but did not correspond to the chosen municipal floor plan. Noting that the plan would only reimburse one-quarter the cost of building the clinics, many village medical workers also asserted that they would have to abandon medicine rather than comply with the building requirements, leaving their villages without practicing medical personnel. Expressing doubt that they could actually fulfill the requirements, dozens of other workers nonetheless signed responsibility agreements with township officials, promising to construct the required clinics by the end of September.\footnote{Note that in both examples described above, the process of translating the original central directive (strengthen population planning work, improve rural health work) into specific responsibility targets (ensuring that a specified number of women have tubal ligations, building a precisely defined structure by a precisely defined date) effectively generated pressures (forced}

\footnote{Xinyang tui "bieshu weishengshi" ling cunyi xian kunjing [Xinyang Effort to Promote 'Villa-Style Medical Clinics' Places Village Doctors in a Difficult Position], XIN JING BAO [BEIJING NEWS], June 11, 2009 [hereinafter Village Doctors].}

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abortions, encouraging medical personnel to leave the profession) that contravened the intent of the original central orders.

Why does this happen?

Two possible answers present themselves immediately. The local Chinese officials in question might just be very incompetent. Their selection of particular targets might reflect crude work attitudes or an inability to fully comprehend (and implement) the rarified goals of central policies. Alternatively, central Chinese officials might be engaged in a conspiracy of silence. They might fully intend for policies regarding birth control or petitioners to be brutally implemented. Under this interpretation, language in central directives (such as language that bars coercive birth control measures) is nothing but “window dressing,” to be ignored by local authorities or countermanded by secret instructions from central officials that reflect their “real” interests.

There is some truth behind each explanation. Incompetent officials cause policy mis-implementation in every country. Some targets are explicitly chosen (and concealed) for authoritarian political purposes. However, these explanations do not fully suffice. Not all instances of policy mis-implementation reflect pervasive stupidity on the part of local officials, and the center certainly does not affirmatively intend for local authorities to engage in economic development or rural health plans that waste central resources.

This leaves room for a third explanation. At a deeper institutional level, the process of transmitting directives within the Chinese bureaucracy actually alters the underlying content. Central Party and government officials issue broad instructions to local authorities such as “follow the law” or “represent interests of residents in your jurisdiction” as part of promulgating new policies aimed at environmental conservation or economic development. But local officials in Party organizational bureaus or county governments do not enjoy the luxury of incorporating these same principles in the responsibility systems they draft to implement the central will. Such standards are too difficult to monitor. They also run the risk of creating independent standards (popular satisfaction, legal norms) that conflict with core principles of Leninist one-party rule. Consequently, Chinese responsibility systems are drawn to translating central directives into numerical targets. They are particularly drawn to targets that can be checked up on. Ordering every local village to build a clinic with exactly the same floor plan by a particular date makes sense from this
perspective—Party or government officials can theoretically inspect a village clinic to see if it is in compliance. They cannot do that with broad instructions to "improve village health."\textsuperscript{156}

Distortion can be conceived in other terms as well. Transmission of higher-level directives down through the Chinese bureaucracy resembles the children’s game of "telephone," in which a child whispers a phrase in the ear of another, in sequence. Just as the original spoken sentence becomes twisted as it makes its way from child to child, the express content of central instructions becomes distorted as they descend through the bureaucratic hierarchy. The relatively closed Chinese political system (like the closed nature of children’s communication in the game of "telephone") contributes to this. Lack of governmental transparency, restricted channels for political participation by citizens, and lack of judicial channels to challenge responsibility systems that violate central norms mean that citizens (and other officials) are often unable to "shout out" when central norms become distorted at a particular step during the process of reducing them to concrete responsibility targets.\textsuperscript{157} Complex shades are lost; nuances degrade. What gets remembered (and repeated) are clear, hard numbers and instructions ("no petitioners to Beijing in the next year").

This fourth point differs somewhat from those made in the policy mis-implementation literature discussed above. Particular responsibility systems and targets do create perverse incentives that twist the behavior of local officials. However, part of the reason why these targets are selected reflects an institutional problem facing the Chinese system, a problem much deeper than nonsensical or authoritarian targets chosen by individual leaders. The nature of responsibility systems locks Chinese authorities into expressing themselves in particular ways (reversed case ratios, mediation targets, etc.) that may not fully correspond with original central wishes. Further, the process of transmitting norms between levels within the system and generating responsibility systems

\textsuperscript{156} Similarly, responsibility systems are drawn toward enforcing targets through strict or vicarious liability, such as suspending the licenses of local doctors for failing to meet particular targets.

\textsuperscript{157} Naturally, some channels do exist for the airing of problematic targets. See, e.g., Village Doctors, supra note 154 (illustrating the ability of one independent-leaning Beijing publication to expose problematic targets).
inherently introduces a degree of "information decay" that ensures the responsibility systems can not fully reflect central intentions.

Finally, excessive reliance on top-down responsibility systems risks undermining official Chinese efforts to develop stable institutions of governance. For officials and citizens alike, targets and their liability regimes matter. This is not necessarily true for institutions in which the targets are embedded. At least in some cases, formal legal institutions and procedures devolve into a shadow puppet show around which the real game of responsibility targets plays itself out.

What happens to officials? Judges become sensitized to mediation rates. Administrators become sensitized to numbers of mine explosions or traffic accidents. Party and government officials become sensitized to numbers of petitions, particularly mass petitions. Faced with this pressure, procedural norms (e.g., requirements of voluntariness in mediation) and substantive considerations (e.g., legal merit of petitioners' complaints) erode and give way.

Citizens have similar experiences. They find that relying on formal norms and procedures governing state institutions is of limited value in resolving their grievances. They learn that responsibility targets offer a more direct button to push in their effort to trigger a state reaction. Disgruntled parties discover that threatening to mount a mass petition or disseminating inflammatory (or false) information on the Internet provides more effective levers with which to force officials to heel, rather than proceeding step-by-step through the legal machinery of administrative reconsideration or litigation.\(^{158}\)

This complex state-society relationship has a corrosive effect on institutions. It erodes the authority of the courts, encourages citizens to escalate their grievances in the streets, and breeds a strongly reactive outlook on the part of officials, who find themselves driven to respond to the external manifestations of underlying problems rather than their roots.

\(^{158}\) See generally Minzner, supra note 8 (examining the ways in which the xinfang system creates problematic behavioral incentives for citizen petitioners).
3.4. Summary

This leads to the second central argument of this paper. Chinese leaders' existing strategy for addressing the principal-agent problems at the heart of the Chinese bureaucracy is itself the cause of many governance problems that they seek to address. Central reliance on top-down application of strict, collective, and vicarious liability linked to responsibility targets as a tool to govern their local agents incentivizes problematic behavior on the part of local officials, particularly in the absence of effective bottom-up institutional channels for citizens to participate politically or resolve their grievances. While these strategies do allow central Party authorities some degree of control over local officials in the short-term, they have a destructive long-term impact on Chinese society and governance, undermining efforts of central Chinese authorities to effectively monitor and supervise their subordinates.

4. New Perspectives on Chinese Law and Governance

This Article offers several new perspectives on Chinese law and governance. It deepens our understanding of how the Chinese legal and political systems operate. It also helps explain recent domestic political choices made by central leaders, raises important questions regarding the future impact of these choices on the legal system, and provides practical suggestions for advancing legal reform in China.


First, this Article identifies the key functional role of Chinese cadre responsibility systems. Central leaders face pervasive principal-agent problems in governing China. Cadre responsibility systems' application of strict, collective, and vicarious liability for success or failure in reaching target goals is an institutional response to these problems. These measures bear some resemblance to those adopted by other legal systems confronted with principal-agent problems in particular fields. American administrative law scholars seeking to explore the utility of collective or vicarious sanctions as a mechanism to control bureaucratic behavior might find that internal Chinese Party and state practices offer a fertile field for comparative analysis.

Responsibility systems based on strict, collective, and vicarious liability principles are not simply post-1949 inventions of Party
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authorities. Their roots stretch much further back in Chinese imperial history. This Article, however, does not argue that these elements of responsibility systems are rooted in Chinese culture. Rather, their continuity exists because the underlying institutional problem facing Chinese leaders has remained the same across both the imperial and modern periods. Chinese central authorities lack effective channels to monitor and evaluate the actions of their local agents. They remain highly uncomfortable with allowing the development of bottom-up institutional channels that could help to monitor and check local authorities, precisely because they fear these channels might develop to limit the power of the emperor or central Party officials as well. Faced with these problems, top-down responsibility systems tied to the personnel apparatus remain the preferred governance tool for a bureaucratic and authoritarian Chinese state.

Second, this Article challenges several prevailing assumptions regarding China. The Chinese legal and political systems are characterized by a wide gap between the way things are supposed to work (“law on the books”) and the way they actually do (“law in practice”). Central laws or directives emphasize rigorous enforcement of intellectual property or environmental protection norms. But actual implementation of these policies by local officials can range from spotty to non-existent. National institutions issue formal laws or regulations that create institutions (such as courts) to handle citizen grievances. But many citizens choose to bypass these institutions in favor of less formal ones (such as direct petitioning of higher-level authorities).

Confronted with this disconnect, observers often find themselves resorting to one of two explanations. Some point to cultural or educational factors. Under this view, the reason that local officials fail to implement central policies (or violate them) is because the officials are uneducated or lack a proper understanding of the law. Rural citizens allegedly fail to use

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159 A separate work currently in progress by this author traces these efforts back to core principles of Legalist philosophy and Qin (221-206 BCE) dynastic practices.

160 For example, some argue that Chinese judges’ lack of legal education leads them to misunderstand how law or the judicial system “should” operate. See, e.g., Faguan suzhi di zhiyue zhifa shuiping [Low Quality of Judges Constrains the Quality of Execution Work of Legal Judgments], SOUTHCN, July 7, 2002, available at http://www.southcn.com/news/gdnews/gdtodayimportant/200207191435.htm.
legal institutions for the same reasons. These views are frequently expressed in dismissive comments that the “quality” of local officials or citizens is simply too low (suzhi tai di) to appreciate how central policies are supposed to work.

Other observers rely on a vague “external Party interference” rubric to explain the gap between the law on the books and the way things work in practice. This view paints a picture of a hazy and monolithic institution called “the Party” that interferes with the legal system in a heavy-handed manner. It issues broad political directives that expand or contract room for legal reforms. It directly intervenes to ensure the arrests and convictions of political dissidents. And it violates legal and constitutional norms with periodic political campaigns that shutter newspapers or close internet chat-rooms.

This Article suggests that both descriptions are incomplete. Not all local Chinese officials are uneducated simpletons, wildly pursuing nonsensical policies. Rather, many are highly rational actors responding to specific incentive structures created by local responsibility systems. Heavy emphasis by local courts on mediation, abusive birth control enforcement campaigns by some local authorities, and the lack of attention by local officials to national environmental laws and policies do not reflect a lack of legal consciousness by local authorities. Nor do they reflect an ignorance of the “modern rules of the game.” If anything, they often reflect the opposite—an acute and finely-tuned sensitivity on the part of local authorities towards fulfilling (or appearing to fulfill) the particular performance criteria they face under local responsibility systems.

Attention to the incentives established by responsibility systems can help explain actions of particular Chinese legal actors that can be difficult to understand at first glance. For example, comprehensive works on Chinese law note in passing the common resort by lower courts to an ill-defined qingshi system to solicit the views of higher courts and judges regarding how to decide pending cases (and avoid appellate reversal). But they do not fully

161 Another expression of this view comes in the form of arguments that traditional Confucian views contribute to citizen distrust of courts and the legal system. See, e.g., QING-YUN JIANG, COURT DELAY AND LAW ENFORCEMENT IN CHINA 24–25 (2006), available at http://www.springerlink.com/content/n1uh6614n46122u1.

explain the reasons motivating Chinese courts and judges to rely on qingshi requests, particularly in light of express SPC efforts to curtail such practices. In contrast, an examination of local court responsibility systems, particularly the disciplinary sanctions that they mete out to judges for incorrectly decided cases reversed on appeal, helps illuminate the underlying incentives motivating such behavior.

This Article also suggests the need for a more nuanced understanding of the Party’s role in the Chinese system. True, Party authorities do make broad policy decisions regarding how China is run. They also clearly retain the power to intervene in specific instances, such as cases involving dissidents. But an even more significant and underappreciated source of Party influence on the legal system arises from the role of Party organization bureaus and committees in setting particular performance targets for judges and other officials, and deciding whether judges and officials have fulfilled them.

Third, this analysis suggests that the academic study of Chinese law may need to shift in focus. Modern research into Chinese law has, until recently, tended to emphasize formal legal norms enunciated by judicial bodies such as the SPC and legislative entities such as the NPC. This is because these institutions have become important since 1978. As central Party authorities have strategically pulled back from routine governance matters, the SPC and NPC have acquired significant responsibilities over adjudication and law-making. Others reasons exist as well. These institutions resemble what many Westerners think legal institutions “should” look like. Chinese legislative and judicial leaders employ terminology and concepts familiar to American legal academics. Many have studied in the United States or in other countries. They are natural subjects of study.

163 See RANDALL PEERENBOOM, CHINA’S LONG MARCH TO THE RULE OF LAW 314–15 (2002) (generally describing the undue influence higher courts exert on lower courts in China); see also Zhao Shuping, Woguo fayuan zai juti anjian shang shiyong fulu de qingshi yu pifu de lixing sikao [Thoughts on Chinese Court Use of Qingshi Requests and Replies in the Application of Law in Concrete Cases], J. HUNAN PUB. SEC. COLL. 35, 36 (2004). In contrast, the link between qingshi and court disciplinary treatment is noted in the CONG.-EXEC. COMM’N ON CHINA, ANNUAL REPORT 2004, at 78–81 (2d Sess. 2004); see also Veron Mei-Ying Hung, China’s WTO Commitment on Independent Judicial Review: Impact on Legal and Political Reform, 52 AM. J. COMP. L. 77, 104–05 (2004).
But this analytical lens is too simplistic. It ignores how the Chinese bureaucracy actually works, overlooking the core role that Party institutions continue to play in interpreting abstract behavioral norms and setting concrete incentives for officials. This analytical lens also misses the extent to which the Party-administered personnel system is a key component of the bureaucratic-authoritarian institutional framework that has run China for the past two thousand years. Simply because foreign observers are not accustomed to viewing central Party circulars, the Party Organization Department, and local responsibility systems as "legal" in nature—and because some may have normative reactions against doing so—we may be missing some of the key institutions that actually interpret, operationalize, and implement Chinese legal norms. This bias is not limited to Western observers. Prominent Chinese legal scholars note the same tendency within Chinese academia to overlook the role of institutions, such as Party responsibility systems, because they do not correspond to an idealized view of what law "should" look like.\textsuperscript{164}

Some scholars explicitly recognize this disconnect. A growing number of political scientists and sociologists regularly cross the border between law and administration in analyzing how the Chinese state actually operates.\textsuperscript{165} This realization is spreading in legal academia as well. In 2003, Donald Clarke warned against simplistic and superficial comparisons between Chinese and foreign institutions (specifically between the NPC and the US Congress, or between the formal administrative legal norms of both countries) without taking into account the deep political and structural differences of how the two countries actually operate.\textsuperscript{166} A few legal scholars explicitly analyze Party institutions and directives alongside their formal legal counterparts, for example, as Ben Liebman did in his comprehensive study of the Chinese

\textsuperscript{164} Interview with Zhu Suli, Dean, Beijing University Law School (June 27, 2008) (on file with author); Interview with He Weifang, Professor, Beijing University Law School (Aug. 4, 2008) (on file with author).

\textsuperscript{165} See, for example, the works of Kevin O’Brien, Susan Whiting, and Andrew Mertha in the field of political science, and Ethan Michelson and Sida Liu in the field of sociology.

\textsuperscript{166} Donald C. Clarke, Puzzling Observations in Chinese Law: When is a Riddle Just a Mistake?, in UNDERSTANDING CHINA’S LEGAL SYSTEM, 93–121 (Stephen Hsu ed., 2003).
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However, this is still far from mainstream practice. Foreign scholarship on the Chinese legal system is still replete with articles that merely take the text of some recently promulgated Chinese statute, and then analyze it in isolation or simply juxtapose it with corresponding Western statutes.

What direction should the study of Chinese law take? The relevant field of vision must continue to broaden. It needs to accurately correspond with the integrated concept of zhengfa (politics and law) employed by Chinese Party officials. In China, national laws, such as the 2007 Property Law, are often preceded by both draft legal opinions of scholars and broad Party directives giving general policy guidance. It is an environment where those laws are implemented locally by both formal government regulations and official Party instructions. Furthermore, those laws, once implemented, are often the target of citizen petitioning efforts that employ both legal rhetoric and Party slogans in an effort to change them. In light of this, it does not make sense to separate the study of “law” from the study of “Party directives.”

Legal analysis must therefore be adapted to the study of Party documents and institutions. Legal scholars are accustomed to using textual and comparative analyses to dissect government rules and regulations. Why not use those high-powered tools on the mass of Party documents that set out norms of behavior for Party and government officials? Many of these are openly available in one form or another on Party and government websites. This would give legal scholars a much more nuanced and accurate view of how legal and bureaucratic norms are actually interpreted and implemented.

What would this mean in practice? Think about how one might draft a textbook on Chinese law. You are trying to explain to a student how rules governing the behavior of Chinese officials and citizens are actually made and implemented. Should you write something like an American or European textbook, setting

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167 See Liebman, supra note 86, at 14–59 (analyzing the interaction between the Chinese media, legal system, and Party institutions).

forth constitutional provisions and statutes, followed by interpretative regulations and cases? Or should you proceed by choosing a sweeping central Party directive—for example, a central circular on "harmonious society"—identifying the formal legal and regulatory changes that follow in its wake, then analyzing the specific Party and administrative personnel responsibility systems that implement these changes through the Chinese bureaucratic apparatus? Or should you adopt a side-by-side approach, devoting half the book to the norms and procedures of the National People's Congress and Supreme People's Court, and the other half to those of the Central Party Committee, Organization Bureau, and Disciplinary Inspection Committee? Either of the latter two options would present a more realistic representation of how China actually operates.169

4.2. Responsibility Systems: A Necessary Target for Chinese Legal Reformers

Appreciating the role of responsibility systems is not merely a question of improving our academic understanding of how China operates. It also helps to identify both practical problems in local Chinese governance, as well as potential solutions.

Excessive reliance by central authorities on Party-led responsibility systems to govern generates serious conflicts with the Chinese legal system. This is partly a result of the content of many of these systems, which reflect the interests of a one-Party political system, with strong emphasis on maintaining tight social control. Requiring officials to meet strict (and high) targets for judicial convictions or similar (low) numbers of permissible mass citizen petitions unavoidably generates conflict with purported legal protections for citizen rights. But conflict also arises because of the general disconnect between the process by which responsibility systems are established and those by which legal norms are adopted. There is simply no institutional guarantee that these two mesh.

Excessive reliance on top-down responsibility systems also fuels a range of practical governance problems. Widespread application of collective and vicarious liability strengthens

169 Naturally, examining formal Party documents, even in conjunction with formal legal ones, is still insufficient to understand how things actually work in practice. There will always be a gap between de jure institutional norms (whether legal or Party) and de facto practice.
destructive convergences of interests among local officials, and can facilitate their efforts to conceal governance failures from central officials. Extensive reliance on strict liability for success or failure in meeting responsibility targets sensitizes local officials to making particular numerical goals, contributing to policy misimplementation among local officials.

How does one resolve these problems? One answer is to alter the concrete incentives that cadre responsibility systems create for local authorities. Simply relying on formal laws and regulations issued by institutions such as the SPC, NPC, and State Council is insufficient. No number of well-meaning central policy statements, national laws, or official speeches will suffice to reduce the repressive tactics employed by local officials against citizen petitioners, as long as local responsibility systems continue to make the numbers of petitions one of the most important factors in assessing local Party officials' work. Similarly, SPC efforts to reduce qingshi requests to higher courts will not be successful absent comprehensive measures to alter the incentives present in local court responsibility systems that push local judges to resort to such practices in the first place.

What does this mean practically for domestic and foreign organizations interested in pursuing legal reform in China? The focus cannot just be on drafting national laws. Rather, it must include the concrete criteria by which officials are evaluated. Do not limit your cooperative programs to the National People's Congress and other legislative bodies. Rather, try to ensure that representatives from the Party organization bureau attend your conferences as well. Encourage them to talk to the attendees from the legal affairs offices of the local people's congresses. Work to ensure that internal Party personnel norms reflect the same standards as publicly promulgated legal ones.

But if central Chinese officials are really interested in addressing some of the fundamental problems in local Chinese governance, merely tinkering with specific criteria used to evaluate local Chinese officials may be insufficient. Instead, officials need to come up with a better institutional response to the principal-agent problem at the heart of Chinese governance. This requires structural political and legal reforms. It requires independent bottom-up channels for citizens to redress their grievances, check

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170 See Minzner, supra note 8, at 151-58 (describing xinfang responsibility systems, the incentives they establish, and their effects).
government misconduct, and participate in the decisions that affect their lives. What form this takes—whether modified versions of Western-style courts, Party disciplinary commissions, or even the imperial Chinese censorate—is not important. The function of these reforms is.

Foreign and domestic activists seeking to advance these kinds of reforms in China, may want to tone down their normative arguments. Rights-based arguments, invocations of international legal norms, or negative comparisons of Chinese practices may be useful if activists are trying to mobilize domestic and international public opinion to condemn China. But the willingness of outside actors to resort to such strategies is rapidly weakening in a world where foreign governments increasingly find official Chinese cooperation essential in handling issues such as North Korea, international nuclear proliferation, and global financial stability. Moreover, the effectiveness of relying on such strategies alone is questionable. Moralistic lecturing by Westerners can generate a nationalistic backlash among the domestic Chinese public. It can also lead to Chinese cynicism about foreign motives when Western governments sacrifice (or use) their own principles for concrete political purposes. Finally, Chinese Party authorities focused on maintaining their own political power simply are not that likely to be moved by normative arguments about what they should or should not do.

This Article, however, does provide activists another arrow in their quiver of strategies to promote political and legal reform in China. It provides a dispassionate argument that Chinese leaders' own governance practices are undermining the stability of their country, and that addressing this problem is in the interests of central authorities themselves. Naturally, not all will heed this call. However, it may resonate with those Chinese officials and citizens who are seriously concerned with the future of their country. It also allows outsiders who seek to raise issues of domestic Chinese political reform an alternative vehicle that contrasts favorably to the two strategies commonly pursued: confrontational normative moralizing and active avoidance of the issues.

This Article's argument that the underlying problem and solutions facing China are institutional in nature may help limit the possibility of a nationalist backlash to calls for political reform. China does not need to adopt Western political culture, values, or systems. Rather, it needs domestically-generated political reform plans that address the institutional principal-agent problem at the
heart of Chinese politics, that order to open up bottom-up legal and political channels, and that adequately respond to the needs of Chinese citizens themselves.

4.3. A Turn Away From Legal Institutions in Favor of Responsibility Systems?

Many Chinese authorities already recognize the problems that result from exclusively relying on top-down monitoring strategies to control their local agents. Over the last two decades, Chinese authorities have consequently allowed legal institutions to emerge as limited bottom-up fora providing popular input into—and supervision of—local government. The Administrative Litigation Law, Administrative Licensing Law, and Regulations on Open Government Information have opened channels for ordinary citizens to contest and challenge actions of local officials. The role of national and local legislatures in policy-making has increased. Authorities have experimented with holding public hearings and soliciting academic and citizen input on draft laws and regulations.

The aim of these efforts is better resolution of the age-old principal-agent problem at the core of Chinese governance. Bottom-up citizen supervision of local officials aids central authorities. It helps address information gaps. Local officials can easily hide ongoing corruption from central work teams that drop in only periodically. It is much more difficult for them to conceal misbehavior from the tens of thousands of residents living in their jurisdiction. By allowing citizens to bring administrative lawsuits, central authorities can essentially “deputize” the public at large to monitor local officials’ compliance with national laws. Increased citizen input into the policy-making process through legislative or administrative hearings provides similar benefits. It helps ensure that local plans implementing education, environmental, or economic development policies are not simply drafted to respond


172 Zhonghua renmin gongheguo xingzheng susong fa [Law on Administrative Litigation], issued Apr. 4, 1989 (P.R.C.); Zhonghua renmin gongheguo xingzheng xuke fa [Law on Administrative Licensing], issued Aug. 27, 2003 (P.R.C.); Zhonghua renmin gongheguo zhengfu xinxi gongkao tiaoli [Regulations on Open Government Information], issued May 1, 2008 (P.R.C.).
to the interests of a select few who happen to have the ear of local officials.

Chinese citizens have actively used the increased space provided by these central reforms. Over the last decade, the ranks of Chinese public interest lawyers and activists have swelled. They have used China’s laws and regulations to challenge a range of local government actions. These involve issues ranging from environmental pollution\textsuperscript{173} to hepatitis discrimination\textsuperscript{174} to electoral fraud.\textsuperscript{175} In 2003, following the death of a young migrant named Sun Zhigang in police custody, legal activists even targeted a national-level policy: a controversial—and extralegal—form of administrative detention known “custody and repatriation” (C&R). Buoyed by a wave of public outrage and media coverage surrounding Sun’s death, legal activists petitioned national authorities, challenging the constitutional and legal basis of the regulations governing the C&R system. Central authorities avoided the more controversial elements of the petitions, such as calls for China’s national legislature to exercise its constitutional and legal authority to supervise the actions of the executive branch of government, the State Council. However, Chinese authorities did take concrete steps to appease public anger. Less than two months after the story surrounding Sun’s death broke in the national media, the State Council itself announced the withdrawal of the C&R regulations, replacing them with a system of voluntary aid stations for vagrants and beggars.\textsuperscript{176}

Some Chinese authorities are growing uncomfortable with the energies they have unleashed. Central officials are certainly

\textsuperscript{173} The Center for Legal Assistance to Pollution Victims is a non-governmental environmental protection organization established in China in 1998. Center for Legal Assistance to Pollution Victims, http://www.clapv.org/new/en/ (last visited Nov. 1, 2009).

\textsuperscript{174} See Chen Qian, Hepatitis-B Carriers Win Right to Attend School, SHANGHAI DAILY, Nov. 21, 2008, available at http://www.shanghaidaily.com/sp/article/2008/200811/20081121/article_381528.htm (discussing activists’ use of the legal system to guarantee the right of Hepatitis-B carriers to attend school).

\textsuperscript{175} See EastSouthWestNorth: The Tashi (China) Elections—Part I (Chronology), http://www.zoneuropa.com/20050919_1.htm (last visited Nov. 1, 2009) (discussing a 2005 recall campaign mounted by residents in Taishi village against their village committee head).

\textsuperscript{176} For an excellent analysis of the Sun Zhigang incident, see Keith J. Hand, Using Law For a Righteous Purpose: The Sun Zhigang Incident and Evolving Forms of Citizen Action in the People’s Republic of China, 45 COLUM. J. TRANSNAT’L L. 114 (2006).
interested in seeing legal institutions and citizen participation develop as effective tools to assist national Party authorities in managing and controlling an unruly bureaucracy. However, they do not want these tools evolving into independent checks on Party power. They also most certainly do not want to see China’s legal activists developing into a force for organizing the discontented, launching thinly veiled political challenges to Party power. Chinese officials have responded in a variety of ways. These range from garden-variety harassment of public interest lawyers representing clients in high-profile cases, to issuance of broad directives requiring lawyers representing clients in mass cases to accept government supervision and guidance, to promulgating internal directives that explicitly bar courts from handling particular types of cases.

In the spring of 2008, Chinese authorities escalated these efforts. After serving as president of the SPC for ten years, Xiao Yang retired in March 2008. Xiao possessed an extensive legal background in the procuracy, had previously served as Minister of Justice, and had been closely identified with efforts to professionalize the Chinese judiciary. He was not replaced with a judge, lawyer, or someone with a professional legal background. Rather, central authorities elevated Wang Shengjun, a former provincial public security head who had risen to national prominence within Party political circles, to head China’s

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177 See, for example, the statements of Politburo member Jia Qinglin in Zhonggong zhongyang zhuokai zuotanhuai tinggu dangwai renshi dai shenru sifa tizhi gaige de yijian [Central Committee Holds Forum to Listen to Non-Party Representatives Suggestions Regarding Judicial Reform], XINHUA, Nov. 29, 2008, available at http://www.chinacourt.org/html/article/200811/29/333020.shtml (noting that Chinese judicial reform will “strengthen the supervision of [official] power,” but that it will “unswervingly” “uphold Party leadership.”).


judiciary.\textsuperscript{181} Mere months after Wang assumed office, Chinese courts found themselves in the throes of a new political campaign—the "Three Supremes"—emphasizing "the supremacy of Party work, the supremacy of popular interests, and the supremacy of the constitution and law."\textsuperscript{182} While this language does include law as a guiding source for court work, comments by other officials suggest that the campaign is actually aimed at curbing excessive reliance by judges on law in deciding cases, particularly if doing so contributes to social unrest or conflict. As one municipal court official noted in explaining the content of the "Three Supremes":

For a relatively long period of time, some units and individuals have been accustomed to simply emphasizing the supremacy of the constitution and the law . . . . Simply handling cases, mechanically handling cases, handling cases in isolation, and generating petitions or causing [people] to be in confrontation with judges, these phenomena are not few in number. Experience teaches us only emphasizing the constitution and the law is insufficient. Each official carrying out the law must understand that strictly handling cases according to the law will only have significant autonomy and vitality when unified with Party work and the interests of the people.\textsuperscript{183}

In the summer of 2009, Beijing officials took further steps to curtail the activities of public interest lawyers: they closed one of the most prominent domestic legal activist organizations, the Open Constitution Initiative ("OCI"), arrested one of its founders, Xu


Zhiyong, and disbarred other lawyers who had handled public interest cases.\textsuperscript{184}

It’s not entirely clear what these developments indicate. The Chinese Communist Party and government are far from monolithic. In the shifting factional mélange of modern Chinese politics, existing central attitudes may be simply nothing more than a temporary blip that will shift when prevailing political winds change. Current resistance to the role of law may simply be the modern parallel to that faced by state-owned enterprise reform in 1990s—a transitory period in China’s long-term process of economic and social modernization.\textsuperscript{185}

On the other hand, it might not be. Chinese legal reform might actually be encountering some fundamental limits. Since 1989, Chinese authorities have adhered to one core political tenet: that under no circumstances will they allow the supremacy of Party power to be called into question. In the interest of maintaining this power, Chinese authorities intervened in the 1990s to curb experiments with local elections, aimed at providing better popular supervision of official power, when activists began to use elections to mount organized challenges to core principles of Party control.\textsuperscript{186} Chinese authorities moved in the early 2000s to clamp down on civil society organizations when these groups, initially tolerated as providing a forum for popular participation into the political system, began to stage high-profile challenges to central

\textsuperscript{184} See Zhu Zhe & Cui Xiaohuo, Legal Aid Group Told to Pack Up, CHINA DAILY, July 18, 2009 (discussing Chinese authorities’ closure of OCI for improper registration, imposing a 1.4 million yuan [$200,000] fine for improperly receiving financial contributions). See also Michael Wines, Public-Interest Lawyer is Held in China, N.Y. TIMES, Aug. 19, 2009, at A6 (detailing the arrest of Xu Zhiyong on tax evasion charges).


Recent events suggest that Chinese officials may have drawn similar conclusions with regard to legal reform efforts. Officials seem to have decided that these reforms are creating a political space that is generating unacceptable challenges by activists and citizens to Party control of the system. For Chinese leaders, this may represent a genie that must be stuffed back into the bottle at all costs—even at the cost of curtailing the underlying legal reforms aimed at resolving pervasive principal-agent problems at the heart of Chinese governance.

This, of course, is but a partial solution. Central Chinese officials still find themselves confronted with the need to come up with mechanisms to effectively control and monitor their local agents. Central authorities do not want to see local officials abusing their official power to embezzle billions of dollars. Nor do they want to see pervasive corruption facilitating food adulteration practices that sicken hundreds of thousands of Chinese citizens. But if emphasizing the role of the judicial system in redressing grievances against officials risks turning them into a venue for politicized criticism of Party and state policies, and if establishing procedural norms for the exercise of local government power risks setting precedent that critics can turn against central government actions, what options do they have?

One option is strengthening the use of responsibility systems. These top-down systems offer central authorities a tool (albeit an imperfect one) to force local officials to address particular issues of concern and monitor their compliance. And importantly, since control of these systems rests in the hands of higher authorities rather than the citizenry at large, top-down responsibility systems do not pose the same risks to Party control that elections or legal channels do.

Central Chinese authorities are indeed calling for stronger responsibility systems to address pressing problems facing China today. Some Party documents contain positive calls for importing bottom-up monitoring principles into the cadre evaluation

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187 See CONG.-EXECUTIVE COMM'N ON CHINA, ANNUAL REPORT, 109th Cong., at 81–83 (1st Sess. 2005) (detailing the development of the rule of law and the institutions of democratic governance in China); CONG.-EXECUTIVE COMM'N ON CHINA, ANNUAL REPORT, 109th Cong., at 6 (2d Sess. 2006) (discussing regulatory controls on the development of civil society, and official creation of a government-controlled "mass organization" to supervise Chinese environmental groups).
process. But others rely heavily on traditional measures of assigning strict and vicarious liability to individual Party and government leaders for a range of governance failures. Central Party authorities have re-emphasized the need for the “core leader” (yibashou—generally, the party secretary) at each level of the official Chinese hierarchy to personally bear liability for maintaining social order. They also have called for strengthening responsibility systems applying strict liability principles for officials in political and legal organs. They have made Party “clean government” responsibility systems a key component of their 2008–2012 anti-corruption plan.

Provincial and local authorities have followed suit. In the wake of numerous scandals and disasters, they have implemented responsibility systems tagging local Party secretaries with vicarious liability for incidents of citizen petitions or protest,

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mine explosions, food safety problems, unpaid migrant worker wages, and traffic accidents in their jurisdictions. Scratch the surface of any social, legal, or political problem in China today, and you will find Party and government actors falling over themselves to enact or amend a responsibility system to address it.

Nor are courts immune from these trends. The Supreme People’s Court has required Chinese judges to bear individual responsibility for resolving complaints and petitions by citizens disgruntled as a result of their decisions. Pursuant to a 2005 central campaign aimed at addressing judicial enforcement problems, Chinese authorities ordered the incorporation of court enforcement statistics in relevant local social order responsibility systems. These systems apply career sanctions based on vicarious and strict liability for officials whose actions in enforcing judicial verdicts result in citizen protests or other “mass incidents.”


198 For the full text of the relevant national directive, see Zhongyang zhengfa wei guanyu qieshi jiejue renmin fayuan fayuan zhixing nan wenti [Central Political-Legal Committee’s Notice on Solving Enforcement Problems of Chinese Courts], issued 2005 (P.R.C.), available at http://wenda.tianya.cn/wenda/thread?Tid=4d7dd29b54aa5aa6. For the relevant provincial documents issued jointly by the Shaanxi High People’s Court and the Shaanxi provincial branch of the Committee for the Comprehensive Management of Public Security, see Guanyu jiang renmin
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Confronted with aggressive citizen use of legal institutions to demand faster and deeper reform, Chinese central authorities may be turning away from (or at least temporarily toning down) their decades-long experiment with legal reform. They may have decided that the risks associated with creating institutional bottom-up mechanisms for citizen legal and political participation are too great. For the near future, Chinese authorities may be bent on strengthening top-down responsibility systems based on strict, vicarious, and collective liability as a key tool to manage and direct the Chinese state.

But this has real and serious costs. Extensive use of strict, vicarious, and collective liability linked to responsibility targets as a means to monitor local officials itself contributes to the riots, cover-ups, and governance failures that central authorities seek to avoid. Chinese leaders may find that their preferred short-term monitoring strategy is actually undermining their own core long-term interest—the stability of their country.

fayuan zhixing gongzuo naru shehui zhi'an zonghezhili mubiao kaohe fanwei de yijian [Opinion Regarding Incorporating Court Enforcement Work into the Scope of Targets for the Comprehensive Management of Public Security], SHAANXI DAILY, July 14, 2007, available at http://news.shaanxi.gov.cn/shownews.asp?id=65512; Quansheng fayuan zhixing gongzuo naru shehui zhi'an zonghe zhili mubiao zeren kaohe xize [Evaluation Details for Incorporating Court Enforcement Work Within Responsibility Systems for the Comprehensive Management of Public Security], issued July 9, 2007 (P.R.C.), available at http://www.sxdaily.com.cn/data/flfg/20070709_9887232_2.htm. Note that these systems also apply sanctions in situations where local authorities fail to support judicial authorities who encounter violent resistance in enforcing verdicts, or where mass protests result from local government failures to cooperate with or carry out judicial verdicts. This may represent a potential tool by which judicial authorities can draw upon the power of potential career sanctions to obtain compliance of other government officials.