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Asking the Tiger for His Skin: Rights Activism in China

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Abstract

Based on a discussion of consequentialist, pragmatist, and deontological forms of reasoning as applied in debates about Chinese rights-defending, this Article makes two related observations. First, some Chinese rights defenders assess actions merely by whether they will promote institutional reform. They may reject courses of action because they would consider themselves responsible for their bad consequences, such as official reprisals. Their attitude puts them in danger of blinding themselves to the limits of legal reform in China's current constitutional and political structure. Second, according to the more radical view also described here, the case for speaking out against certain wrongs does not rest on predictable consequences. Instead, it rests on the idea of rights-defending as a strict moral obligation toward the victims of abuses, as well as toward human society and toward oneself. Rights activism, according to this second view, cannot always be understood as a constructive contribution to the reform of an existing legal system. While the practice of caution and self-restraint arising from awareness of the potentially dangerous consequences of rights activism may appear to be the only sensible attitude in the current Chinese context, the lawyer discussed here was unable, for what is suggested are fully justified reasons, to practice such caution, as he acted to help those most in need of defense of their rights. The attitude of lawyers and activists like him not only accentuates the deep contradictions in China's current legal and political system. Their experience also indicates the limits of possible reform. At some point, "radical" rights defenders stop appealing to the existing system's legal institutions; and as they stop taking that system seriously, they start calling for the creation of a new system, without, at present, describing a method how to create one. It is important to appreciate this further implication of an approach now taken by some of China's professionally established, prominent, and dedicated rights defenders. After briefly discussing consequentialist, pragmatist, and deontological perspectives on rights activism and institutional law reform strategies in Part II, this Article focuses on the more "radical" approach and the criticisms its proponents experienced. This Article presents the experience of Gao Zhisheng in his effort to try to "play the system" for a Falungong practitioner in 2004 in Part III, describing the contradictions of principle he encountered in Part IV, and then moves on to an account of Gao's and some fellow rights defenders' increasingly radical actions to "defend rights" in Part V. Finally, it discusses the debates about the consequences of rights activism in Part VI and about "politicization" of the work of lawyers in Part VII, which were triggered by these actions.

ASKING THE TIGER FOR HIS SKIN: RIGHTS ACTIVISM IN CHINA

*Eva Pils**

I. *INTRODUCTION: THE DEBATE AMONG CHINESE "RIGHTS DEFENDERS"*

In late 2005, a Chinese lawyer named Gao Zhisheng decided to address a politically particularly sensitive issue in a particularly provocative way. He published an online call, addressed to China's leadership, to stop the torture of Falungong practitioners, substantiating his appeal by detailed descriptions of individual cases of torture, about which he claimed to have information from tortured victims themselves.[1] Within days, his Beijing law firm's license to practice was suspended and he was put under surveillance by the secret police; but these were not the only consequences. Following his public call for a hunger strike to oppose State violence, launched a few months later, he was also subjected to vehement criticism by other Chinese lawyers and rights activists, who advised, implored, or even angrily requested him to stop. At one point, he narrowly escaped being imprisoned in a *yaodong* cave by his own brothers in his home village in the province of Shaanxi. His experience, while unique, is in many ways characteristic of the current situation of Chinese rights activists, now often described as "rights defenders" in China[2]

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1. *See infra* note 93 and accompanying text (discussing Gao Zhisheng's letter).

2. *See* Keith Hand, *Using a Law For a Righteous Purpose: The Sun Zhigang Incident and Evolving Forms of Citizen's Action in China*, 45 COLUM. J. TRANSNAT'L L. 114, 159 (2007). "Rights defenders" (*weiquan renshi*), are also known as "rights defense lawyers" (*weiquan*

Despite remarkable successes in the past twenty-seven years of reform, Chinese law and civil society remain weakened by party and personal autocracy, and by contradictions between rules and principles recognized in different parts of the law and legal practices. This weakness shapes the experiences of those engaged in using the law to fight injustices. "Rights defenders" do not only record and protest the denial of legal rights to Chinese citizens. In doing so, they also expose and challenge the inner contradictions of the legal and political system, in particular, the contradiction between the P.R.C. Constitution's new commitment to constitutional rights, and its old commitment to party rule and democratic centralism.

To serve both these functions, rights activists tend to emphasize those aspects of current Chinese law which are consistent with the protection of legal rights against State power, and downplay those aspects which could only be justified by principles of autocracy, such as party leadership.[3] Rights defenders have to live with contradictions which cannot themselves be discussed freely. They live in conditions of State censorship, peer censorship, and, potentially, self-censorship.

The need to choose strategies in this difficult situation has proved divisive among Chinese rights defenders, pitting the more cautious ones against those who could be called more radical. Some of the more "radical" activists now take on cases of political persecution which have no prospect of institutional success, such as successful court litigation. They speak out against wrongs which no one at present has any expectation of seeing corrected, or even just addressed. They describe the contradictions as they see them. From the perspective of people working

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lushi), and "rights defense protagonists" (*weiquan jingying*). *Id.* at 161. For a further discussion of *weiquan*, see Weiquan (Rights-Defending), http://crd-net.org/Article/ (last visited May 8, 2007). For a discussion of "rights" (*quanli*) in China, see DEBORAH CAO, CHINESE LAW: A LANGUAGE PERSPECTIVE 71-92 (2004); STEPHEN C. ANGLE, HUMAN RIGHTS IN CHINESE THOUGHT: A CROSS-CULTURAL PERSPECTIVE 108-20 (2002).

3. For instance, they will say that violations of certain rights by the party-State are unconstitutional, citing appropriate articles in the Constitution for support. Yet, the party and State explicitly operate on principles opposed to constitutional scrutiny. However untenable these latter principles may ultimately be, and however much they stand in contradiction with other constitutional principles and mechanisms, they can also be supported by the text of the P.R.C. Constitution, and are prima facie also part of current Chinese law. *See* Hand, *supra* note 2, at 114, 118, 138-40, 144-47, 157, 159, 162. A Chinese expression cited in a similar analysis is *jia xi zhen chang*, which means "using a lie for a righteous purpose." *Id.* at 160.

toward institutional reform, it is risky to expose rights violations and other wrongs when there is no chance of redress, and every chance of persecution for "political" activism, or even of escalation into violence on both sides of a dispute. But from the perspective of the other, more radical side, it would be wrong not to defend those most in need of protection, and useless to pretend that civil rights cases had no political implications.

The debates among these Chinese rights defenders connect in an important way to the wider contemporary discussions of human rights activism in rapidly changing or "developing" societies. These discussions appear largely dominated by a rule of law perspective, from which rights activism and cause lawyering are viewed as subservient to rule of law reform goals. In this Article, the author suggests that consideration should be given to a radically different perspective, which may be taken by some of those actually engaged in activism. Based on case analysis, on the study of online sources some of which are not easily available outside China, and on conversations with some protagonists of current rights activism in China,[4] this Article describes how arguments addressing the likely consequences of rights activism, were used to criticize Gao Zhisheng after he began to defend the legal rights of Christians and Falungong adherents. The debate triggered by his actions took place mostly toward the end of 2005 and in the first half of 2006. Some observers and participants of the movement not only think that Gao's action was fruitless; they also blame Gao for harmful—according to some, fatal—State responses to rights activism during the past two or three years. In the eyes of some, a great chance for beneficial legal development in China is just now being squandered.[5]

But in what way should we be concerned with the consequences of rights activism, even assuming we can correctly predict them? Based on a discussion of consequentialist, pragmatist, and deontological forms of reasoning as applied in debates about Chinese rights-defending, this Article makes two related

4. Conversations, in some cases several, were conducted in June and July 2006 in Beijing, with eight anonymous rights defenders, all of whom are at the center of the events covered in this Article, along with at least a dozen or so other rights defenders. Beyond the circle of these rights defenders in a narrow sense, the author had conversations with legal academics and lawyers as well as journalists observing the movement.

5. Apart from the publicized views discussed later on in this Article (especially those of Ding Zilin) many such criticisms were expressed in conversation.

observations. First, some Chinese rights defenders assess actions merely by whether they will promote institutional reform. They may reject courses of action because they would consider themselves responsible for their bad consequences, such as official reprisals. Their attitude puts them in danger of blinding themselves to the limits of legal reform in China's current constitutional and political structure.

Second, according to the more radical view also described here, the case for speaking out against certain wrongs does not rest on predictable consequences. Instead, it rests on the idea of rights-defending as a strict moral obligation toward the victims of abuses, as well as toward human society and toward oneself.

Rights activism, according to this second view, cannot always be understood as a constructive contribution to the reform of an existing legal system. While the practice of caution and self-restraint arising from awareness of the potentially dangerous consequences of rights activism may appear to be the only sensible attitude in the current Chinese context, the lawyer discussed here was unable, for what is suggested are fully justified reasons, to practice such caution, as he acted to help those most in need of defense of their rights. The attitude of lawyers and activists like him not only accentuates the deep contradictions in China's current legal and political system. Their experience also indicates the limits of possible reform. At some point, "radical" rights defenders stop appealing to the existing system's legal institutions; and as they stop taking that system seriously, they start calling for the creation of a new system, without, at present, describing a method how to create one. It is important to appreciate this further implication of an approach now taken by some of China's professionally established, prominent, and dedicated rights defenders.

After briefly discussing consequentialist, pragmatist, and deontological perspectives on rights activism and institutional law reform strategies in Part II, this Article focuses on the more "radical" approach and the criticisms its proponents experienced. This Article presents the experience of Gao Zhisheng in his effort to try to "play the system" for a Falungong practitioner in 2004 in Part III, describing the contradictions of principle he encountered in Part IV, and then moves on to an account of Gao's and some fellow rights defenders' increasingly radical actions to "defend rights" in Part V. Finally, it discusses the de-

bates about the consequences of rights activism in Part VI and about "politicization" of the work of lawyers in Part VII, which were triggered by these actions.

II. *CONSEQUENTIALISM, INSTITUTIONAL REFORM PRAGMATISM, AND PRAGMATIC SILENCES*

The purpose of this section is to create a basis for discussing the reasons guiding different actors in the story to follow. The discussion here is also intended to indicate how their individual considerations can be related to a wider academic debate about rule of law reform and efforts to introduce constitutionalism in conditions of political authoritarianism. Broadly, an approach described as consequentialist is juxtaposed with an approach described as deontological. The consequentialist approach is also discussed in its relationship with what has been called "Chinese legal pragmatism."[6]

Everyday arguments about whether the ends justify the means, whether one should take a principled stance in a certain situation, and so on, can all be related to philosophical debates around consequentialism. For a more stringent discussion, it helps briefly to look at these philosophical arguments. While consequentialists[7] argue that the moral rightness of an act is determined by its good consequences,[8] deontological moral theories claim that there is an obligation to "do the right thing," independent of the consequences. On a deontological account, it is not possible to determine what the right thing is merely by looking at the consequences of a course of action one is contem-

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6. *See* Robb M. LaKrtiz, *Taming a 5,000 Year-Old Dragon: Toward a Theory of Legal Development in Post-Mao China*, 11 EMORY INT'L L. REV. 237, 250 (1997) (describing "Chinese legal pragmatism" as "continued 'resort to ad hoc legal measures, the separation of legal doctrine from practice, the overemphasis on the instrumental facets of law, and the placement of policy before law.'") (quoting Edward J. Epstein, *Law and Legitimation in Post-Mao China*, *in* DOMESTIC LAW REFORMS IN POST MAO CHINA 19, 22 (1994)).

7. *See* Walter Sinnot-Armstrong, *Consequentialism*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2006), *available at* http://plato.stanford.edu/entries/consequentialism. The author also discusses the relationship between consequentialism and utilitarianism, and differentiates between other types of consequentialism beliefs, including: actual, direct, evaluative, maximizing, aggregative, total, and universal. *Id.*

8. *See id.* According to consequentialism, the moral rightness of an act is defined by its consequences, rather than by reference to prior history or to some non-consequential quality of the act itself.

plating.[9] In many variations, these two viewpoints play out in arguments about legal and moral obligation, in particular about the ethical obligations of lawyers, and in arguments about how to participate in legal reform processes.

In discussions of legal development in transitional States like China, in particular, both consequentialist and non-consequentialist forms of argument are used. For instance, it appears natural to many to think of rule of law as an end goal of legal reform in China, even though, obviously, there can still be controversy about how rule of law should be interpreted. Thinking of rule of law in this way requires a judgment that rule of law is desirable as an end consequence of action to be taken now. That judgment can in turn be based on non-consequentialist arguments, such as that rule of law is simply required by justice or some other moral value. Rule of law can also be justified as desirable in consequentialist terms, however, for instance, by the argument that it promotes economic development or that it promotes social peace.

If rule of law is regarded as a good state of affairs to be attained, a broad and abstract reform goal,[10] judgments of the rightness or wrongness of actions within the existing, but imperfect legal system may be subordinated to this abstract end goal. The desirable state of having well-functioning legal institutions and practices determines what kinds of actions are right: good rights activism, based upon that reading, is simply activism leading to institutional reform ensuring a more perfect rule of law. With this logic, reformers will tend to reject as wrong actions asserting individual legal rights when they would not further, or would even hinder, the overall institutional reform goal, for instance because they would lead to a political backlash. The rule of law goal thus becomes, under certain circumstances, a strategic consideration constraining rights activism. From a deontological viewpoint, that could be a problem if it led to a situation where some individuals' rights were not protected, even though justice (understood in a deontological way) required it. This is further discussed below.

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9. *See id.* In contrast to consequentialists, deontologists believe that the rightness of an act is determined independently of whether its consequences are good or not.

10. *See generally* RANDALL PEERENBOOM, CHINA'S LONG MARCH TOWARD RULE OF LAW (2002).

A strategic approach to rights activism and legal reform, for instance, regarding the selection of cases to work on, is of course not limited to the Chinese context. It has been used by lawyers and rights activists in many legal systems, especially transitional and post-authoritarian ones, and is associated with the ideas of "cause lawyering" and "impact litigation." These are ways of promoting, not just the rights of a litigant in a particular case, but also changes in legal and political awareness, legal practice, and institutional reform.[11] What distinguishes the Chinese situation from cases of cause lawyering in certain "post-authoritarian"[12] South American States and in the United States is that consequentialist constraints result especially from the authoritarian nature of the Chinese political and legal system.

For instance, famous U.S. jurists have described legal practice by reference to predictions of what judges will do.[13] However accurate this account may be with regard to a legal system like that of the United States, the predictions human rights activists are concerned with in China are, at any rate, different. As one of them pointed out, it would be unrealistic to think of rights activism in China as primarily concerned with the actions of courts.[14] In his view, this was because China was not a country actually practicing or even verbally endorsing the separation of powers, and because the courts remained weak. Indeed, while judicial practice may flourish in some areas of law in China, certain types of rights infringement have little chance of being adjudicated, or of being adjudicated fairly, by courts, because courts have no independent authority to adjudicate in those areas. Examples which might be given by rights defenders themselves are the constitutional rights to freedom of religion and freedom of speech, but also the now very frequent cases of illegal land requisitioning, which may affect peasants' individual legal rights of

11. *See* Stephen Meili, *Cause Lawyers and Social Movements: A Comparative Perspective on Democratic Change in Argentina and Brazil*, *in* CAUSE LAWYERING, POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 487, 512 n.2 (Austin Sarat & Stuart Scheingold eds., 1998) (describing cause lawyering as directed at "progressive social change").

12. *See id.* at 496, 502, 507 (discussing the impact of military regimes).

13. *See* Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897) ("The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts.").

14. Interview with Rights Defender #1, in Beijing, China (July 15, 2006) (on file with author).

use as well as rural collectives' legal rights of ownership, and legal rights to compensation.[15] Therefore, according to some, *weiquan*, "rights-defending,"[16] could instead be described as an effort to "persuade" the government to protect the rights of citizens or to provide redress in cases of rights violation.[17]

On the other hand, assuming the inability of the Party-State effectively to protect or defend (*wei*) rights, the term "weiquan" could be related to the special public responsibility of activists taking on the task of "defending" others' rights themselves.[18] In this latter sense, "defending" suggests a heightened degree of confrontation between the activists and lawyers working on rights issues, and the Party-State. Just because of this heightened degree of confrontation, rights activists in China sometimes face special questions of responsibility for the further consequences of their actions. They have to decide about "taking risks." At a crucial moment in his campaign, lawyer Gao Zhisheng found himself faced with the reproach that the risks he was taking were too great. The risk was described not just as the risk that rule of law reform might fail, but also as a risk of people dying as a consequence of what he, Gao, was doing.

The problem of "taking risks" can be usefully discussed with reference to the idea of negative responsibility. Implicit in many consequentialist arguments is an assumption of "negative" responsibility for the consequences of one's omissions, as well as one's acts. The attribution of negative responsibility is based on the idea that we should prevent bad things from happening.[19] On this basis, there may also be responsibility for harm predict-

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15. *See Laodong he shehui baozhang bu: shidi nongmin meinian jiang xin zeng 300 wan* [*Ministry for Work and Social Insurance: Landless Peasants Number to Rise by Three Millison Per Year*], XINJINGBAO [BEIJING NEWS], July 24, 2006, *available at* http://news.xinhuanet.com/politics/2006-07/24/content_4870891.htm. Around forty million peasants are officially supposed to have been affected by land requisitioning in the past ten years only. *See id.*

16. *See supra* note 2 and accompanying text (discussing the meaning of *weiquan*).

17. It was impossible, this lawyer felt, to describe it as a way of challenging the State, or the government (*tiaozhan zhengfu*). *See supra* note 14 and accompanying text (discussing rights activism in Chinese courts).

18. Interview with Rights Defender #2, in Beijing, China (July 15, 2006) (on file with author).

19. Peter Singer, *Famine, Affluence, and Morality*, 1 PHIL. & PUB. AFF. 229, 231 (1972) ("If it is in our power to prevent something bad from happening, without thereby sacrificing anything of comparable moral importance, we ought, morally, to do it.").

ably done by others if we could have prevented it; for instance, harm done in a predictable response to what one has done oneself. To quote Bernard Williams, the idea is that "if I am ever responsible for anything, then I must be just as much responsible for things that I allow or fail to prevent, as I am for things that I myself, in the more everyday restricted sense, bring about."[20] To use an example not too far removed from the current Chinese Rights Defense Movement, and occasionally invoked in discussions about it, one might hold some of the leading June 1989 protesters on Tiananmen Square responsible for their own and others' deaths, because their actions triggered brutal repression by the Chinese army. Actual reproaches in this case may be factually very complex, but they at any rate make use of the idea of negative responsibility.[21]

This kind of attribution of responsibility does not necessarily follow from adopting a consequentialist approach, because consequentialism requires us to weigh consequences. Singer in his consequentialist and utilitarian account of morality, for instance, while endorsing negative responsibility, also notes that bad consequences may be outweighed by good consequences.[22] One might argue, then, that even though many got killed, the Tiananmen demonstrations were simply worth it, because the good achieved—call it the good of public protest against oppression—was overwhelmingly great. In that case, those who let other protesters continue when they could have stopped them cannot be responsible for their deaths on a consequentialist account, oriented toward achieving good. Instead, those protestors did right. But, then again, it seems intuitively problematic to consider others' lives somehow outweighed by the "good" of public protest,[23] however well-grounded such protest may have been.

The core argument against this way of thinking is that it distorts one's judgment of moral obligation. In the example above

20. Bernard Williams, *A Critique of Utilitarianism*, *in* UTILITARIANISM FOR AND AGAINST 77, 95 (1973).

21. Discussions of this idea as an abstract problem are more clear-cut and allow for a clear distinction between action and omission. Williams presents the example of Jim, who is given the choice of killing one person in ten to save the nine others, or letting those giving him this choice kill all ten. *Id.* at 98-99.

22. *See* Singer, *supra* note 19, at 240-41.

23. John Rawls notes that a fatal flaw of utilitarianism is that it does not take seriously the distinction between persons. *See* JOHN RAWLS, A THEORY OF JUSTICE 26 (1971).

it is the agents of the State, not the protesters, who violated an injunction not to kill. As Bernard Williams puts it, the point of a "deontological restriction" on conduct is that you *yourself* should not kill.[24] On an alternative "deontological" account, law can be understood to track non-consequentialist restrictions and permissions by means of imposing legal obligations and protecting legal rights. This understanding of law is directed at a moral ideal, rather than at an institutional reform goal. Regarding rights activism, moral, as well as legal responsibility for one's actions might be considered limited by the fact that one had a right to protest against oppression, for instance. No one should reproach another for any consequences of her actions, as long as that person had acted strictly "within" her rights.

There are problems with a deontological account of rights and rights activism, too. One difficulty is that having a right is inconclusive of the question of how one should exercise it, on the deontological view. Also, while it must be within one's moral rights to speak up for the rights of others as long as they themselves consent, imposing a moral obligation on anyone to speak up for others may require further justification. Rights activists will often point to a sense of moral duty to speak up against injustice to explain why they expose themselves and others to the risks of retaliation. As the further discussion shows, Gao Zhisheng, for one, clearly felt that to speak up was his moral duty.[25] He explained this duty by saying, for instance, that "we must prove that we are still human beings" in a situation in which, in his view, humanity had been outraged by the actions of his own political community and government. This perceived duty at crucial times became so important that he could not shirk it even for the sake of keeping his own family out of harm's way.

Institutional reform thinking is also often associated with "pragmatism." In the essay which created the label "pragmatism" for a group of U.S. philosophers around the turn from the nineteenth to the twentieth century, William James explained that understood as an "attitude of orientation," pragmatism was "the attitude of looking away from first things, principles, "cate-

24. *See* Williams, *supra* note 20, at 99-100, 116-17.

25. He felt he could not refuse to take on cases of Falungong persecution as a lawyer, for instance.

gories," supposed necessities; and of looking towards last things, fruits, consequences, facts." Understood as a theory of truth, it meant: "The true is the name of whatever proves itself to be good in the way of belief, and good, too, for definite, assignable reasons."[26]

As a philosophical school, the pragmatists had great influence on the way law is practiced in the United States, and taught in U.S. law schools. Some Chinese scholars were also attracted by pragmatism, especially in China's Republican era in the 1920s and 1930s. Yu Xingzhong,[27] in his insightful discussion of "Chinese legal pragmatism," describes this attraction, as well as the period of sharp criticism of pragmatism as "bourgeois" by Chinese Communists, especially in the 1950s.[28] He views current Chinese legal pragmatism as different from Western legal pragmatism, in important respects, and characterizes the Chinese version by "the resort to ad hoc measures, the separation of legal doctrines from practice, the overemphasis of instrumental facets of law, and the placement of policy before law."[29] For the purposes of the present discussion it is particularly important to note the connection between the label "pragmatist" and Deng Xiaoping's economic and legal reforms. After the Chinese Cultural Revolution, since the 1980s, a certain slackening of adherence to communist doctrines was often characterized as "pragmatist." A commitment to "facts" and a skeptical attitude toward abstract principles could be associated, in particular, with the precept of "seeking truth from facts" of the Deng Xiaoping era.

But what aspects of the institutional system to be reformed

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26. William James, What Pragmatism Means, Lecture Two of Eight Dedicated to the Memory of John Stuart Mill (1904), http://www.marxists.org/reference/subject/philosophy/works/us/james.htm (last visited Apr. 23, 2007).

27. Yu Xingzhong, Comment, *Legal Pragmatism in the People's Republic of China*, 3 J. CHINESE L. 29 (1989).

28. Yu Xingzhong discusses Chinese legal pragmatism in juxtaposition with Soviet law doctrines, referring most notably to the work of Andrej Y. Vyshinski and with American scholars such as Oliver Wendell Holmes and Roscoe Pound. *Id.* at 30-31. He says that:

> Chinese Marxist legal scholars of the 1950s did not fully understand the theory of legal pragmatism that they were criticizing. Their criticism was less an attempt to understand legal pragmatism than a general refutation of all things Western and "bourgeois," including all institutions and ideas associated with Nationalist thought.

Id. at 36.

29. *Id.* at 30.

should themselves count as "facts" from which truth was to be sought, according to Deng? Once a pragmatic[30] perspective is adopted, existent legal and political institutions—in the Chinese context, we may think of Party Central, of the Party Discipline and Inspection Committee, of the Central Party Propaganda Department, or of the National Letters and Visits Office, for instance—may become part of a pragmatic outlook on "facts." To quote the Dean of Peking University Law School, Zhu Suli:[31]

> Firstly, it is impossible not to see the practically ubiquitous, enormous influence of the Chinese Communist Party on the construction of the contemporary Chinese legal system. This means that the Party must by all means be regarded as a constituent part of the current Chinese legal system. Therefore the current state of Chinese legal practice with all its many problems ought not to be regarded as an abnormal state brought about by theoretical or ideological mistakes, but instead primarily as a concrete, normal state of affairs. Secondly, even though the current Chinese legal system is characterized by a number of weak points, problems and even mistakes, and although all these are directly or indirectly related to the Chinese Communist Party, we should certainly not therefore fail to see the Chinese Communist Party's contribution to the legal system. In fact, there are some deficiencies and mistakes which can hardly be distinguished from these contributions; they are merely two different aspects of one phenomenon.
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> (. . .) In a modern state, political parties will always be influencing legal practice; party politics is an inevitable factor in the constitution and operation of a legal system. Therefore, given that the Chinese Communist Party is the ruling party, a ruling party which to a certain extent continues to shoulder the historic task of rebuilding China and constructing China, and given that it is a ubiquitous political force in contemporary China, it does not matter whether you oppose it; you cannot at any rate deny it. Even if one day it ceases to be the ruling party, while it exists, it will still be exercising influence

30. In Chinese, the word *shiyongxing* can be used to translate "pragmatic" but also "practical." *Shiyong zhuyi* is generally used to translate "pragmatism" or "pragmatist." *See* THE CONTEMPORARY CHINESE DICTIONARY, CHINESE-ENGLISH EDITION (2002). Note that Yu Xingzhong, in his work on Chinese legal pragmatism, uses "pragmatist" and "pragmatic" interchangeably. *See* Yu Xingzhong, *supra* note 27.

31. Zhu Suli is often characterized as intellectually close to Richard Posner, some of whose works he translated.

on the legal system in some way.[32]

More briefly, Zhu Suli summarizes his position by the—perhaps slightly ironic—use of the propaganda slogan "No New China Without the Communist Party."[33]

Such attitudes are different from, but related to the "consequentialist" form of argument considered above. Take a public rejection of communist party leadership in China as an example. On a consequentialist understanding, one might desist from open and provocative criticism of party leadership on account of its likely consequences. On a pragmatist understanding criticism may appear straightforwardly wrong. It might not appear "good in the way of belief," to use James's phrase, to be opposed to the Chinese Communist Party, and even less to think that one ought to make one's opposition public. To quote Zhu Suli again, "*it does not matter whether you oppose it*, you cannot at any rate deny it" (emphasis added). An attitude of critical opposition might strike one as pointless in view of the apparently unshakeable fact that the Chinese Communist Party is in power. It might amount to an "untruthful" denial of this fact, and appear bad in the way of belief. Instead, one should face up to the fact that institutional reform is only going to be achieved with the Party, because it is in power. Good institutional reform will therefore—for the time being, as Zhu Suli notes—be reform under Party leadership. While this analysis may fail to capture what pragmatism as a theory of truth aims at, it seems to be a form of analysis influential in contemporary Chinese legal circles, including the circles of rights defenders discussed in this Article.

The most important kind of "pragmatic" attitude encouraged by the Chinese Party-State to date could perhaps be characterized as an attitude of "pragmatic silence" about certain

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32. Zhu Suli, *Zhongguo sifa zhong de zhengdang* [*The Political Party in Chinese Legal Practice*] (on file with author). This paper was presented at a conference at the China Exploration and Research Society ("CERS") in Paris in December 2005. It is a reply to Frank Upham's review of Zhu Suli's book, SONG FA XIA XIANG, ZHONGGUO JICENG SIFAZHIDU YANJIU [SENDING LAW TO THE COUNTRYSIDE: RESEARCH ON CHINA'S BASIC-LEVEL JUDICIAL SYSTEM] (2000), in *Who Will Find the Defendant If He Stays With His Sheep? Justice in Rural China*, 114 YALE L.J. 1675 (2005). This reply was later published in ZHU SULI, FALU HE SHEHUI KEXUE [LAW AND SOCIAL SCIENCE] (2005), under the same title.

33. *Mei you gongchandang jiu mei you xin Zhongguo. Id. See* Guo Shengxin, *Wei fangzi zen nai ban ge shiji de jiuge zhi zhong* [*For One's Home—How to Suffer the Hardship of Half a Century's Conflict*], XINHUA, Aug. 3, 2004, *available at* http://news.xinhuanet.com/house/2004-08/03/content_1700601.htm.

matters of legal, moral, and political principle. In contrast to the era of Mao Zedong, the Party itself now often treats its dominant role of leadership with rhetorical obfuscation. The P.R.C. Constitution is a good example for this, as it declares a commitment to Party leadership and to democratic centralism on the one hand, but subjection of all organizations and political parties to the law on the other. These self-contradictory commitments allow the reform-oriented to seek support for their rule of law ideals in the text of the Constitution, but precisely because they offer such a basis, they also invite those who rely on the Constitution for their arguments to accept Party leadership, which on principle they must reject if they want genuine rule of law. In that sense, the presence of such textual contradictions tends to silence genuine discussion. There are also concrete legal mechanisms, which prevent institutionalized (judicial) legal argument from gaining the normative depth which would be required for their resolution. The infringement of constitutional rights or human rights (now mentioned in the P.R.C. Constitution) is not supposed to be raised in judicial processes.

Rights activists have to make choices about which silences they wish to break, and which imperfections in the system they wish to tackle. It takes courage to mention some of them. In 2006, for instance, Professor He Weifang of Peking University Law School mentioned in a later publicized comment that the Party was not registered as an organization with legal personality in China, that it could not be sued in court, and that this ran counter to the rule of law.[34] In doing so, albeit in a meeting which he thought was closed to the public, he was breaking a powerful unwritten command, a largely unspoken requirement to remain silent—to remain silent not with a view to "first things" or "principles," perhaps, but instead with a view to the consequences of speaking out on principle. In light of Professor Weifang's actions, it is appropriate to speak of the breaking of "pragmatic" silences here.

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34. Professor He Weifang, Zhongguo hongguan jingji yu gaige zoushi zuotanhui [Macro-economy and Reform Trends], Speech in Xinglin Shanzhuang (Mar. 4, 2006), *available at* http://www.peacehall.com/forum/gmlt/118.shtml; http://www.peacehall.com/forum/gmlt/119.shtml; http://www.peacehall.com/forum/gmlt/120.shtml. A partial translation of Weifang's speech can be found at *What He Weifang Said*, EAST-SOUTHWESTNORTH, http://www.zonaeuropa.com/02212.htm (last visited Apr. 11, 2006).

Gao Zhisheng, through his actions in 2004, broke certain pragmatic silences, which, until then, had been observed in legal practice. Beginning with the example of just one legal case handled by Gao, the following section describes how, through experience with the legal institutions, he came to be more vocal and explicit on the persecution of Chinese citizens on account of their beliefs, after initial more "pragmatic" efforts to protect the legal rights of one particular Falungong client.

III. *LAWYER GAO ZHISHENG TRIES TO "PLAY BY THE RULES" FOR A FALUNGONG PRACTITIONER*

Gao Zhisheng was born in the early 1960s as one of seven children of a rural family in the province of Shaanxi, an area where many people still live in so-called "yaodong caves," dwellings either dug into the hilly landscape, or constructed from mud (loess) bricks. He lost his father early.[35] With difficulties, his mother enabled him to attend school up to junior high school. Then he joined the People's Liberation Army, which allowed him to get further education. After working in a variety of odd jobs, he eventually obtained a legal education and a lawyer's license by attending evening classes. He did not get a lot of academic training, he did not attend an elite Chinese or Western educational institution, and he never went abroad.[36] He began practicing law in the 1990s. At that time, the law held out many promises, not least because of the intense propagation of the idea of "ruling the country in accordance with law."[37] Gao was successful in winning compensation for his clients in a number of cases, which attracted media attention, and for a few years made him one of China's famed new lawyers—a respected pub-

35. *See* Joseph Kahn, *Rebel Lawyer Takes China's "Unwinnable" Cases*, N.Y. TIMES, Dec. 12, 2005.

36. *See* Cai Chu, *Zhe yang de ren keyi zuo ren*, BOXUN, May 2 2006, http://peacehall.com/news/gb/pubvp/2006/05/200605022317.shtml (last visited Feb. 2, 2007) (stating that Jiao Guobiao, who participated in one of his adventurous investigative trips, calls Gao half-illiterate).

37. *Yi fa zhi guo.* This idea began to take shape with Deng Xiaoping's legal reforms from the late 1970s, and was especially encouraged by the 1989 Administrative Procedure Law. Jiang Zemin heightened the popularity of this phrase by using it in a law lecture to senior party officials in 1996 with reference to Deng Xiaoping's reform policies. For an account of this event, see *Yi fa zhi guo, yi de zhi guo* [*Ruling the Country in Accordance With Law and Ruling the Country in Accordance With Virtue*], XINHUA, Sept. 6, 2002, *available at* http://news.xinhuanet.com/newscenter/2002-09/06/content_552721.htm.

lic figure, who in Gao Zhisheng's case was particularly active in representing clients belonging to what in China are termed the "weak groups in society," such as peasants, migrant workers, the poor. In Beijing, where he moved in 2000, Gao Zhisheng co-founded Shengzhi Law Firm. In 2001, through his performance in a public contest, he won the title of one of "China's ten most excellent lawyers nationwide," an honor awarded every year to ten lawyers by the Chinese Ministry of Justice.[38]

But from the late 1990s, Gao also began taking on government authorities as defendants, and defendants with strong links to government institutions. He and other lawyers were involved in seeking compensation from the owners of a coal mine,[39] from the government bureau responsible for carrying out demolitions in Beijing,[40] and from a Guangdong government authority in a land seizure affecting thousands of peasants,[41] as well as in a dispute with local government in Shaanxi,[42] which tried to confiscate land with oil wells run privately by rural residents. Like other lawyers with public interest commitments, Gao Zhisheng learned to make use of public attention and the media, in many cases co-operating with other lawyers as well as with legal academics. Even though there are many restrictions on reporting on such cases, a lot of information and comment does get out into a public domain. One reason for this is that government authorities at different levels have different interests in allowing

38. *See* Liu Xiaobo, *Gao Zhisheng lushi de qishi* [*The Warning from Lawyer Gao Zhisheng*], BOXUN, Nov. 6, 2005, http://www.peacehall.com/news/gb/pubvp/2005/11/200511080255.shtml. For an official news website referring to Gao by this title, see Guo Shengxin, *Wei fangzi zen nai ban ge shiji de jiuge zhi zhong*, XINHUA, Aug. 3, 2004, *available at* http://news.xinhuanet.com/house/2004-08/03/content_1700601.htm.

39. *See* Kahn, *supra* note 35.

40. For example, Ye Guozhu's case. *See* Li Yongjing & Li Huiwen, *Tian'anmen zhizao shiduan liang an fan bei pan xing* [*Criminals Sentenced in Two Cases of Creating Disturbances on Tian'anmen*], XINHUA, Nov. 28, 2003, *available at* http://news.xinhuanet.com/legal/2003-11/28/content_1203464.htm; *see also* Gao Zhisheng, Ye Guozhu de xingshi shangsu zhuang [Ye Guozhu's Criminal Appeal], Nov. 21, 2004, http://www.epochtimes.com/gb/4/11/23/n726596.htm (last visited Apr. 23, 2007) (containing the statement of appeal written by Gao on behalf of Ye Guozhu).

41. *Comparing Taishi and Shanwei*, EASTSOUTHWESTNORTH, http://www.zonaeuropa.com/20060118_1.htm (last visited Dec. 28, 2007). This is a partial translation of an interview with Guo Feixiong, who worked for Gao Zhisheng's law firm. *Id.*

42. *See generally* Howard W. French, *Whose Oil Is It? Property Rights at Issue in China*, N.Y. TIMES, July 18, 2005, at A3; *Shanbei Min Ying Shiyou Qiye Huishou An*, Li Heping's Documents, *available at* http://gaozhisheng.blog.edoors.com/rss.php?categoryId=1776.

or prohibiting such publications. A further consequence of this publicity is that it raises the profile of the lawyers involved.

By taking on "unwinnable" cases against government,[43] Gao had assumed a place among China's so called "rights defense lawyers" or *weiquan lushi*.[44] As already mentioned, this term is used alongside "rights activist" and "civil rights lawyer," terms more common in Western languages. "Rights-defending" is of course the natural province of lawyering anyway. The 2001 Lawyers' Law states what the lawyer's task is, as "protecting the legal rights and interests of the client within the limits of his mandate in civil law," and as "providing material and views which demonstrate [are evidence of] the suspect's or defendant's innocence or the lightness of his crime or his [deserving] mitigation of punishment, and protecting the legal rights and interests of the suspect or defendant," in criminal matters.[45] Chinese rights protection lawyers identify themselves by their commitment to protecting the rights of the weak in society, and to protecting these rights against the Party-State. In that sense, the term could also be translated as "human rights lawyers" or "civil rights lawyers."

The character "wei" conveys a sense both of "defending" and "protecting", the character "quan" at its most basic means "power," but it now often signifies "quanli," "rights." "Wei quan" can be understood as an abbreviation for *weihu quanli*, which translates into "defending rights" with greater precision than "wei quan" does. Occasionally it is also explained as "weihu faquan," "protecting legal rights." "Wei quan" is a common, albeit recent, term in China and by itself not politically "sensitive"; there are entire websites dedicated to promulgating knowledge about protecting one's legal rights.[46] Websites providing information about the types of activism described in this Article, how-

43. *See* Kahn, *supra* note 35.

44. For an excellent, systematic discussion of contemporary *weiquan*, that provides a typology of Chinese rights defenders, in the context of cause lawyering, and argues that a beneficial gradual change of the system as a consequence of *weiquan* lawyering can, on the whole, be expected, see Fu Hualing and Richard Cullen, Weiquan (Rights Protection) *Lawyering in an Authoritarian State*, draft on file with author.

45. Lushi Fa di 27, di 28 tiao [Lawyer's Law art. 27, 28] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 29, 2001, effective 2002) (P.R.C.), *available at* http://www.cecc.gov/pages/newLaws/lawyersLawENG.php (last visited Apr. 21, 2007).

46. *See, e.g.*, Zhongguo weiquan wang [Chinese Rights Defense Net], http://www.wq-investigation.com (last visited Feb. 2, 2007); Weiquan 365 [Rights-defending 365], http://www.weiquan365.com/first.asp (last visited Feb. 2, 2007).

ever, are blocked out,[47] although illegal software is being used by some to break through some of these internet blocks.[48] Consequently, although this Article uses the term "Rights Defense Movement" as used by the rights defenders discussed here, this term may occasion puzzlement among ordinary Chinese people, including legal professionals.

The movement gathered momentum in the year 2003, which was by many perceived as a year of new political opportunity. There had been a change in the highest leadership (from Jiang Zemin to Hu Jintao and Wen Jiabao) and there was some expectation that the new leadership would prove more committed to rule of law than the previous one. The outbreak of *Severe Acute Respiratory Syndrome* led to a certain opening up of news reporting and to calls for respecting citizens' "right to be informed" about situations such as SARS. Most importantly for legal reform, the *Sun Zhigang* case, discussed briefly below, raised the possibility that China might in time develop its own forms of constitutional review to address the problem of legislation violating basic rights. As Gao explained later, he was one among many legal professionals believing that there would be a slow and incremental development toward rule of law in China. He was a public interest lawyer committed to institutional reform, and convinced that the system would be able to reform itself.[49] But only the following year, in a lecture delivered on November 3, 2004 in Beijing's University of Industry and Commerce, Gao was describing the legal profession as being in crisis, and saying that this crisis, while it was "tolerated," or "looked at but not

47. *See, e.g.*, Gong min weiquan wang [Civil Rights Defender Net], http://www.gmwq.org/web/index.asp (last visited Feb. 2, 2007); Gongmeng [Open Constitution Initiative], http://www.gongmeng.cn/sub_list_3/php?zyj_mid=78 (last visited Feb. 2, 2007); Qian Min Wan [Signature Campaigns] http://www.qian-ming.net/gb/ (last visited Feb. 2, 2007); Boxun, http://peacehall.com (last visited Feb. 2, 2007); and Ziyou Yazhou diantai [Radio Free Asia], http://www.rfa.org/mandarin (last visited Feb. 2, 2007). In the context of the present Article, Falungong news websites such as *Dajiyuan*, http://www.dajiyuan.com (last visited Feb. 2, 2007), were also used, but the frequent unreliability of these websites and their obvious biases made their use a less eligible option, when there were other news sources.

48. One apparently popular one is called *Ziyou men* [Freegate]. It is frequently updated, and updates can be downloaded from a Falungong website accessible through the use of Freegate. *See* Jon Newton, *Google and the Chinese Government*, TECHNEWSWORLD, Sept. 9, 2004, *available at* http://www.technewsworld.com/story/36818.html.

49. Interview with Rights Defender #2, *supra* note 18.

seen" in society, amount[ed] to "a crisis of society as a whole."[50] He was about to embark on a frontal challenge to the system he was describing. In the winter of 2004, Gao took on the case of a Falungong practitioner named Huang Wei who was protesting his administrative detention.

Falungong, or Falun Dafa, is a group—often called a cult or sect, and in Chinese official language referred to as a "crooked teaching"[51]—of people practicing meditation and *qigong*. They adhere to beliefs formulated chiefly by Li Hongzhi, the master teacher and founder of Falungong. It has been observed that this group grew out of the revival of meditation practices after 1976 in the P.R.C.,[52] and the closeness of Falungong practices and beliefs to the Chinese Buddhist and other religious traditions is a matter of some debate.[53] Falungong operates numerous websites, including some propagating its practices and beliefs. The three cardinal virtues to which adherents of Falungong are committed are truthfulness, benevolence, and forbearance. Many of the writings of Li Hongzhi emphasize the technical aspects of practicing qigong, and adopt a language of "scientific"[54] and utility-optimizing individualism.[55] Claims include that meditation may allow practitioners to levitate, and a fairly strained explanation is provided for why none of them have actually ever been seen to take off the ground.[56] The au-

50. Gao Zhisheng, Lushi de shiming [The Lawyer's Mission], Lecture Delivered at the Beijing University of Industry and Commerce (Nov. 3, 2004), *available at* http://www.epochtimes.com/gb/4/11/3/n708306.htm.

51. *Xiejiao.*

52. *See generally* Barend Ter Haar, Falungong: Evaluation and Further References, http://website.leidenuniv.nl/~haarbjter/falun.htm (last visited Feb. 1, 2007).

53. *See id.*

54. *See* Ter Haar, *supra* note 52 (emphasizing the importance of the Falungong's claims to be grounded in science).

55. To quote Li Hongzhi on mediation, for instance:

> When a person does the exercises in that state his body is being evolved to its fullest extent. It's the best state. So that's why we have you enter into stillness in that kind of state. But don't go to sleep or get all foggy-headed. Somebody else might practice and get the good things then.

Li Hongzhi, *The Eighth Talk*, FALUNDAFA.ORG, http://www.falundafa.org/book/eng/zfl_new_8.html#6 (last visited Feb. 2, 2007).

56. For instance:

> Then why aren't we seeing all those people taking off, right? "I don't see them flying off!" The way of things in the ordinary world can't just be upset—you can't just go and damage the form of the ordinary world or change it. How could having everyone fly in the air work? Would that be a world of ordinary people? That's the main reason.

thor joins others[57] in holding that its practices and beliefs characterize Falungong as a religious group.

At its main website, it is also asserted that "Falun Dafa is apolitical, informal, and completely free of charge, obligation, and membership."[58] But, at least the claim regarding the apolitical nature of Falun Dafa seems untenable at the time of writing. This is partly due to the repression of Falungong, especially since 1999, when a silent mass sit-in in front of the central government's quarters alerted the central Chinese leadership to the degree of influence Falungong had over its adherents. This process has been described, for instance by journalists and human rights groups, in various publications.[59] Repression has included a public announcement by the National People's Congress (avoiding the mention of Falungong by name but clearly referring to it nevertheless),[60] propaganda against Falungong, and systematic persecution of individual practitioners who refused to renounce it. Such persecution has, according to the reports just mentioned, included illegal detention, severe forms of systematically inflicted torture, and the confinement in closed psychiatric institutions.[61] Falungong can now be considered one of the driving forces of propaganda and information directed against the Party, especially from abroad. One of its major campaigns has the sole purpose of encouraging Party members to quit.[62] In the view of one of the rights defenders consulted for this Article, the challenge from Falungong has, in recent time, been waning,

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Id.

57. *See* MERLE GOLDMAN, FROM COMRADE TO CITIZEN: THE STRUGGLE FOR POLITICAL RIGHTS IN CHINA 219 (2005). There, the author strives (unsuccessfully) to portray Falungong as apolitical. *Id.*

58. Falun Dafa, http://www.falundafa.org/eng/overview.htm (last visited Apr. 10, 2007).

59. *See, e.g.*, IAN JOHNSON, WILD GRASS: THREE STORIES OF CHANGE IN MODERN CHINA (2004); HUMAN RIGHTS WATCH, DANGEROUS MEDITATION: CHINA'S CAMPAIGN AGAINST FALUNGONG (2002), *available at* http://hrw.org/reports/2002/china/China0102.htm; Ter Haar, *supra* note 52.

60. *Quanguo renmin daibiao dahui "guanyu quid xiejiao zuzhi, fangfan he chengzhi xiejiao huodong de jueding"* [*NPC Standing Committee Decision on Banning Heretical Sects, and Guarding Against and Punishing Heretical Sect Activities*], XINHUA, Oct. 30, 1999, http://news.xinhuanet.com/legal/2003-01/21/content_699651.htm (last visited Feb. 2, 2007).

61. *See* Robin Munro, *The Ankang—China's Special Psychiatric Hospitals*, 1 J. COMP. L. 41 (2006) (discussing the issue of psychiatric confinement).

62. *See generally* DA JIYUAN [EPOCH TIMES], http://tuidang.epochtimes.com (last visited Apr. 10, 2007). *The Epoch Times* is a newspaper run by Falungong and has dedicated a section of its website to this effort. *Id.*

while Christian groups have increased in their importance.[63] This perception seems strong especially, on the part of those who are themselves Christians and committed to constitutionalism, and who place great value on a connection between constitutionalism and Christian faith.[64] Gao Zhisheng, when he took up the cases of a Falungong practitioner affected by illegal detention, did so expressly not in order to promote Falungong beliefs or practices. He was attracted by people with religious faith and emphasized the importance of the legal right to hold religious beliefs as such and of the right to freedom of mind; but he was not attracted by Falungong itself, and remains cautiously non-committal regarding Falungong's various tenets and objectives.[65] He became a Protestant Christian, joining one of Beijing's house churches, in late 2005, as several of his fellow rights defenders did.[66] He had previously contributed to the legal effort for persecuted house church Christians.[67] Partly as a consequence of his involvement in cases of Christian persecution, he began receiving many letters by Falungong adherents asking him to take on their cases, from 2003.[68] At that time, Falungong adherents, too, may have believed in the possibility of benign change, such as legal redress for abuses, or perhaps even an offi-

63. Interview with Rights Defender #3, in Beijing, China (July 12, 2006) (on file with author).

64. For instance, Fan Yafeng, as well as Wang Yi. *See* WANG YI, XIANZHENG ZHUYI: GUANNIAN YU ZHIDU DE ZHUANLIE [CONSTITUTIONALISM: CONCEPT AND SYSTEMIC TRANSFORMATION] 150 (2006) (*Cong shengyue dao xianyue* [From being bound by God to being bound by a Constitution.]).

65. Interview with Rights Defender #2, *supra* note 18. This rights defender said that the CCP could afford to call Falungong an "evil sect" (*xiejiao*) whereas it could not do so with regard to Christians.

66. For instance, Li Heping, Fan Yafeng.

67. *See* Interview with Rights Defender #2, *supra* note 18. For instance, when a Protestant priest named Cai Zhuohua was tried for illegally distributing Bibles in 2005, Gao Zhisheng and other rights defenders were able to improve his procedural protections, to obtain punishment considerably lower than the ten years that would have been possible, and to ensure better prison conditions for him while he served his sentence. *See* Conversations with Rights Defender #2, in Beijing, China (June 16, 2006 & July 27, 2006). For "edited versions" of the criminal defense statements submitted to the court and copious further material on the case, see Cai Zhuohua an bianhu tuan zhengli Cai Zhuhua [Cai Zhuohua's Criminal Defense Team], Cai Zhuohua an jishi (yi), (er) [Case notes (1 & 2)], INDEPENDENT CHINESE PEN CENTER, http://www.penchinese.com/wipc/july/79-czh.htm (last visited Feb. 2, 2007); *see also* Open Constitution Initiative, http://www.gongmeng.cn/en/sub_list_3.php?zyj_mid=21; *accord* Philip Pan, *Protestant Pastor in China Convicted for Printing, Distributing Bibles*, WASH. POST, Nov. 9, 2005, at A22.

68. *See* Interview with Rights Defender #2, *supra* note 18.

cial "rehabilitation" of their group.[69]

Huang Wei had been accused of distributing material propagating Falungong in his native Shijiazhuang, in Hebei province, and had consequently been sentenced to "Re-education Through Labor" (labor camp). It is interesting to study the complaint Gao Zhisheng drafted in Huang Wei's case, which was made available on the internet, with a view not only to what it says but also to what it is silent about. In a first step, consider what it says. The cause of the administrative complaint was "failure to act" on the part of Shijiazhuang City government, after Huang had been committed to Re-education Through Labor by the Shijiazhuang Public Security (police) Department's Committee for Re-education Through Labor, and sought to initiate administrative "reconsideration" of this decision.[70] The complaint lists a number of legal reasons why the measure imposed on Huang was illegal. Firstly, it argues that the factual finding of "having participated in illegal Falungong activities" was an insufficient ground for detaining Huang, who had already been subjected to the same kind of detention in November 1999, on the same grounds. The administrative decision is quoted:

> Decision number 152 stated the following reason for imposing three years of administrative detention on the plaintiff: "The trial process has shown that on 13 April 2004 Huang Wei was apprehended for carrying out illegal Falungong activities, and a search of his place of abode brought up about 43 copies of Falungong slogans (written on scrolls) whose size was 3 by 15 centimeters, as well as 16 tapes and a copy of Li Hongzhi's *Touring North America To Teach the Fa*, one of *Achieving Self-Satisfaction Through Practicing Falungong* and other Falungong material." So these are all the "facts" on the basis of which a citizen is sent to prison for three years![71]

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69. *See id.*

70. Huang Wei de qisu zhuang [Huang Wei's Complaint] [hereinafter Huang Wei's Complaint], Dec. 21, 2004, *available at* http://www.epochtimes.com/gb/4/12/21n755685.htm.

71. *Id.* The complaint also states that:

> In the administrative decision to impose Re-education Through Labor on the plaintiff there is not one [mention of] illegal conduct; instead, the reason stated for imposing three years of administrative detention is that "he refused to be reformed (ju bu zhuanhua)." The law constrains conduct; but whether one is "reformed" or not is a matter of one's mental attitude. The plaintiff was going about his business in society entirely in respect of the law, he was paying his taxes according to the regulations, he was not endangering anyone.

The difficulty with this last observation is that there are legal (administrative) rules, even though they may not be consistent with other, higher-ranking legal and constitutional norms, which prohibit and penalize even the possession of Falungong materials. Although the complaint argued that on the particular day he was apprehended, Huang Wei had been doing nothing more objectionable than taking his daughter to school, it does not contend that the material found by the police was not Huang Wei's, although it alleges that no procedural requirements were observed when the police entered Huang Wei's home to obtain them.[72] The complaint had been made on the basis of an unsuccessful application for administrative reconsideration, which failed, but which (as is explained further below) might theoretically have led to "reconsideration" also of the adequacy of the legal rules penalizing "possession." When the administrative reconsideration authority did nothing, Huang, represented by Gao Zhisheng, tried to sue.

Huang also complained that at the time of his arrest and for days afterward, his jailers refused to identify themselves or to tell them for which administrative department they worked. Most strikingly, he complained that the protocol of his "interrogation" in May 2004 was falsified before Huang Wei's eyes by an officer, who faked his, Huang Wei's signature.[73] Various procedural requirements regarding administrative punishment according to the Administrative Punishment Law were not adhered to.[74] And, according to Huang Wei, in three years, he had never been granted a hearing as required for the imposition of Re-Education Through Labor.[75]

The written complaint winds up by pointing out the unconstitutionality of the legal regulations on which the system of Re-education Through Labor is built.[76] In submitting this com-

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Id. § II.6.

72. *See id.* § II.9.

73. *See id.* §§ II.1, II.2. The complaint also says that Huang tried unsuccessfully to get the officers to tell him why he was being apprehended. The answer, according to the complaint cited here, was, "so how come that of among so many people who have not been arrested, only you have been arrested? Just think about it." *Id.*

74. Huang Wei's complaint cites Articles 2, 37, 31, 32, and 41 of the Constitution. *Id.*

75. *Id.* § II.7.

76. It should be noted that the complaint is vague on which regulations are used as such a basis.

plaint, Gao was tracing arguments which had already been put forth by other Chinese rights activists, as well as by constitutional scholars. The general argument is based on Article 37 of the P.R.C. Constitution, which says that no citizen may be arrested except with the approval or by decision of a People's Procuracy or by decision of a People's Court.[77] Neither courts nor People's Procurators are involved in the decision to impose Re-education through Labor, made exclusively by a committee internal to the police, yet it can be imposed for up to four years. Further legislation clarifies the preconditions for the legal restriction of the constitutional right to personal freedom as guaranteed in Article 37 of the Constitution. According to the 2000 Legislation Law (Article 9 in conjunction with Article 8) and the Law on Administrative Punishment (Article 9), only a "statute"[78] created by the National People's Congress can restrict the right to personal freedom. Yet the legal "basis" for Re-education through Labor consists in a number of administrative regulations and administrative decisions; it is therefore an "unconstitutional" basis and in that sense, as discussed further below, it cannot legally justify detention under Re-education Through Labor.

The points made in the complaint, as summarized above, are all important and deserved to be made. The aim pursued at the time by Gao Zhisheng and his co-workers was to expose illegality of the persecution of Falungong, by use of a detention system that appeared independently flawed.[79] But there are two related problems with the complaint, which deserve particular notice. One is that there is currently no functional mechanism to subject laws, legal regulations and a large number of other official decisions to legal scrutiny in the context of an adjudicative process. There are, moreover, principles of law and governance, which are opposed to judicial or constitutional review.

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77. The Constitution states:

> The freedom of the person of citizens of the People's Republic of China is inviolable. No citizen may be arrested except with the approval or by decision of a People's Procuracy or by decision of a People's Court, and arrests must be made by a public security organ. Unlawful detention or deprivation or restriction of citizens' freedom of the person by other means is prohibited, and unlawful search of the person of citizens is prohibited.

XIAN FA art. 37 (2004) (P.R.C.).

78. *Falü*. This expression is commonly translated as "law" but for the sake of clarity the translation "statute" has been chosen here.

79. *See* Interview with Rights Defender #2, *supra* note 18.

This is the subject of the following section, which by explaining in what ways Huang Wei's case was hopeless as a case of potential litigation, throws some light on the institutional limits of rights protection and constitutionalism in an environment of fragmented law. The other problem concerns what the complaint in Huang Wei's case did not mention, and is discussed later.

IV. *CHALLENGING THE LESSONS OF INSTITUTIONAL REFORM PRAGMATISM*

The most notable case in the movement toward constitutional review so far was the abolition of a detention system for vagrants, triggered by the so-called Sun Zhigang incident in 2003.[80] It presents an interesting foil for Huang Wei's case, taken up by Gao Zhisheng one year later. Sun Zhigang, whose case was widely discussed in China, was a victim of wrongful detention as a vagrant; during detention, he was beaten to death. This case was widely reported on, and the detention system for "vagrants" came under attack from academics and the public.[81] It was ultimately repealed by the authority which had created it, the State Council.

Importantly, Sun had been an educated university graduate, while victims of the detention system were usually "peasant" migrant workers in low-qualified jobs. To go by the images of civic success fostered in Chinese society at present, he was an intensely sympathetic figure.[82] If "picking" Sun Zhigang was therefore a conscious strategy on the part of the many public intellectuals and lawyers trying to support this case, the strategy worked: the system of detention was abolished. It was perhaps the only case of a successful utilization of the mechanism for submitting "constitutionality review suggestion letters" to the legislative

80. *See* Hand, *supra* note 2; *see also* Eva Pils, *Citizens? The Legal and Political Status of Peasants and Peasant Migrant Workers in China* 4-5 (2005), http://uschinalawsociety.org/symposium/papers/postconference/pdf/Eva.Pils.eng.pdf (last visited Apr. 23, 2007); Helen Hsiu, *Remaking the Rural-Urban Divide in Post-Reform South China: Modernity and Marginality* 7-8 (2005), http://uschinalawsociety.org/symposium/papers/postconference/pdf/Helen.Siu.eng.pdf (last visited Apr. 23, 2007).

81. He Weifang and others sent an open letter to the National People's Congress, in which they reaffirmed this view first taken by Xu Zhiyong and Teng Biao in their suggestion letter. *See* Letter from He Weifang, Shen Kui, Xiao Han, He Haibo, and Sheng Hong, to the Standing Comm. Nat'l People's Cong. (May 22, 2003), *available at* http://www.legaltheory.com.cn/info.asp?id=3891.

82. *See* Hand, *supra* note 2.

body of the Chinese central state, the NPC Standing Committee, in accordance with Article 90 of the Legislation Law. It was only a partial success: for while the mentioned procedure for suggesting constitutionality review was used, and while the regulation targeted was repealed, there was no clear evidence that one happened as a consequence of the other, and the NPC Standing Committee never issued a public opinion on the unconstitutionality of the regulation. The celebration of the case as a success, when the regulation for detaining vagrants was repealed, was therefore almost a little misleading. It was a case, however, which established in the public mind the idea that a law might be bad even on the lawgiver's own terms, and in that sense represented an important breakthrough.

But only a few weeks later, a very similar challenge to another set of regulations for administrative detention of an even more invasive kind failed. Above, it was briefly stated why the administrative detention system known as Re-education Through Labor was unconstitutional. A brief comparison of these arguments with those used after the Sun Zhigang incident demonstrates that they were very similar, involving Article 37 of the Constitution, Article 9 of the Legislation Law and Article 9, in conjunction with Article 8 of the Administrative Punishment Law.[83] Indeed, after the "success" of the Sun Zhigang incident, constitutional concerns relating to Re-education Through Labor were promptly put forth in a suggestion letter for constitutional review of a set of three regulations and decisions on Re-education Through Labor.[84] Although this suggestion letter was at one point published online, further publications on this topic were quickly suppressed. The NPC Standing Committee did not reply; nor was the regulation repealed. The issue died down, at

83. In his complaint, Gao cited Article 10 of the Administrative Punishment law. *See* Huang Wei's Complaint, *supra* note 70, § 3. Article 10 of the Administrative Punishment Law was also cited by Hu Xingdou in his suggestion letter for constitutionality review of the Re-education Through Labor System. Letter from Hu Xingdou, Professor, Beijing University of Technology, to Standing Comm. Nat'l People's Cong. (Nov. 3, 2003), *available at* http://www.gmwq.org/web/news_view.asp?newsid=100.

84. *See* Hu Xingdou, *supra* note 83. This suggestion letter lists three regulations, namely *Guanyu Laodong jiaoyang wenti de jueding* [The State Council Regulation of 3 August 1957], *Guanyu laodong jiaoyang buchong guiding* [The State Council Regulation of 29 November 1979], and *Laodong jiaoyang shixing banfa* [The State Council of 21 January 1982].

least as a matter of public discussion in mainland China.[85]

The reason why the letter was suppressed is widely considered to be that Re-education Through Labor was not, at that time, a mechanism which the Party wanted to dispense with,[86] because it represented a mechanism entirely in the hands of the powerful police under the Ministry of Public Security, created State (or police) revenue, and it was considered an important mechanism for political and social control.[87] From the perspective of wanting to achieve institutional success, this made Re-education Through Labor an ineligible target for public-minded constitutionalists. The pragmatist lesson from this experience was that, if one wished to push for legal reform through the available institutional mechanisms, one had to accept some of the limitations set by them in order to strengthen such institutions and mechanisms.

The fact that limitations can be so easily set by the NPC Standing Committee regarding what issues it wishes to address is a result of how the review system has been designed in accordance with Article 90 of the 2000 Legislation Law. The procedure is, generally speaking, not public (even though citizens may be able publicly to write *about* it); the institution addressed is under no explicit legal obligation to reply; and if the concerned working group of the NPC Standing Committee believes that a particular item of legislation should be repealed, it will seek to contact the authority which produced the regulation and ask it to change it, rather than striking it down itself.[88] All these aspects of the mechanism for constitutionality review make it obscure and uncertain, and give the NPC Standing Committee as well as affected government authorities wide room for negotiation, delay, or downright rejection of any "suggestion" they may have received.

By the end of 2004, Gao Zhisheng was certainly aware of these difficulties. Before he embarked on helping Huang Wei,

85. *See, e.g.*, Letter from Gao Zhisheng, Sun Wenguang, Wang Yi, Yu Jie, Shi Ruoping, Li Changyu, Zhao Dagong, Liu Di, Yang Zaixin & Mu Zhuanheng, to Standing Comm. Nat'l People's Cong. (March 12, 2006), *available at* http://www.qian-ming.net/gb/default.aspx?dir=scp&cid=74 (representing an open letter of this kind, requesting unconstitutionality review of the Re-education Through Labor System).

86. *See* Hand, *supra* note 2, at 173-74 (discussing this political background).

87. *See id.* at 184.

88. *See* WANG ZHENMIN, ZHONGGUP WEIXIAN SHENCHA ZHIDU [THE CHINESE SYSTEM OF CONSTITUTIONALITY REVIEW] (2004) (discussing this process).

he had himself tried to use the mechanism of Article 90 of the Legislation Law three times, suggesting the review of the Regulation on Managing Housing Demolition and Relocation in Urban Areas, and of related regulations and Supreme People's Court Judicial Interpretations. In all three instances, he writes, "these three requests had the same result—no reply whatsoever."[89] It may have seemed better, then, to raise the subject of unconstitutionality directly in the context of concrete administrative litigation, rather than in a suggestion letter for constitutional review by appeal to the NPC Standing Committee. In his administrative complaint drafted for Huang Wei, intended for the ordinary court system (which handles administrative litigation), Gao used arguments similar to the arguments against the constitutionality of the Re-education Through Labor System, which had been used earlier on in suggestion letters for Constitutional Review of this system.

Yet, in technical terms, the mechanism of administrative litigation before ordinary courts[90] is an even less acceptable way to protest the unconstitutionality of administrative regulations. This is due to a doctrine in Chinese administrative litigation law, which is intimately connected with the system of legislation in China. According to Article 12, § 2 of the Administrative Litigation Law, only challenges to so-called "concrete" administrative acts are allowed before the courts. So-called "abstract" administrative acts, by contrast, are excluded from administrative litigation and consequently from judicial scrutiny. The courts must not accept litigation applications "directed at decisions or orders 'of generally binding force' by administrative bodies."[91] Administrative regulations can therefore not themselves be the subject

89. Letter from Gao Zhisheng, to Wu Bangguo and the Standing Comm. Nat'l People's Cong., (Dec. 31, 2004), *available at* http://www.dajiyuan.com/gb/4/12/30/n764897.htm.

90. Despite the discussion in the following it should be noted that, since its formal introduction by legislation in 1989, administrative litigation was in some ways a success. On the early development of administrative litigation, see Pei Minxin, *Citizens vs Mandarins: Administrative Litigation in China*, 152 CHINA Q. 832 (1997).

91. Guanyu zhixing xingzheng susong fa ruogan wenti de jiesh [Supreme People's Court's Judicial Interpretation "On questions relating to the application of the administrative litigation law" art. 3] (promulgated by the Sup. People's Ct., Nov. 24, 1999, effective March 10, 2000) (P.R.C.), *reprinted in* CHINALAWINFO (last visited Mar. 23, 2006); *see* Liu Xin, *Jianlun chouxiang xingwei de tezheng* [*A Short Discussion of Peculiarities of Abstract Administrative Acts*], LEGALDAILY, http://www.legaldaily.com.cn/gb/content/2001-07/29/content_21642.htm (Feb. 2, 2007). Party policies, unless issued jointly with an ad-

of an administrative litigation challenge; nor can laws made by the National People's Congress or its Standing Committee. Compared to NPC Laws, administrative regulations may in some cases be subjected to legal (albeit not judicial) scrutiny by the administration itself. This can occur in "administrative reconsideration" of a concrete abstract administrative act, according to Article 7 of the Administrative Reconsideration Law.[92] A form of review within the hierarchy of the administration, such "administrative reconsideration" can, and in some cases must, precede administrative litigation. But in Huang Wei's case a reconsideration application had already been submitted without success.

On a narrow interpretation, which is often preferred by the courts, no type of law (statute) or administrative regulation can be expressly held inconsistent with other legislation or with the Constitution, by any Chinese court, even if judicial scrutiny is only incidental to the judicial review of a concrete administrative act *based on* more general administrative norms. This interpretation is in dispute,[93] but in practice, it can be convenient for courts to resort to it to avoid handling unwelcome litigation. So far as Gao was complaining that the Re-education for Labor system was not in accordance with the Constitution and other laws, or that the rules against Falungong practitioners were unconstitutional, his complaint was very unlikely to be even considered by a court.

From the standpoint of democratic centralism in a system of one-party leadership, there is no clear political or moral requirement for laws to be challengeable in court on the grounds of inconsistency with the Constitution or other legislation.[94] The

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ministrative authority, cannot be the basis of a legal decision, but neither is there a mechanism for challenging them in litigation.

92. Xingzheng fu yi fa di 7 tiao [Administrative Reconsideration Law art. 7] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 29, 1999, effective Oct. 1, 1999) (P.R.C.), *available at* http://www.cecc.gov/pages/virtualAcad/index.phpd?showsingle=27830. Note that Article 53 of the Administrative Litigation Law requires that when courts come across a "norm" (*guiding*) that is "not consistent" with other "administrative" legislation, they have to submit this question to the State Council for decision. Li fa fa di 53 tiao [Administrative Litigation Law art. 53] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 4, 1989, effective Oct. 1, 1990) (P.R.C.), *available at* http://www.cecc.gov/pages/newLaws/adminLitigationENG.php.

93. See *infra* note 107, at 55 (citing to Jiang Ming'an).

94. Stephen C. Angle quotes a classic Lenin-derived formulation by Wang Ming:

> The minority obeys the majority; party members have complete freedom to discuss and criticize before any issue is decided; after it is decided, everyone

principle of democratic centralism is affirmed in Article 3 of the Constitution.[95] So far as legislation is concerned, this principle requires participation from the public, but also assumes that views submitted from "below" will be utilized in such a manner as decision-makers "above" see fit. Insofar as democratic centralism requires that once a decision has been made, it is to be obeyed, it is therefore difficult to address the problem of inconsistency among different rules, without challenging the principle of democratic centralism.

This principle is greatly mitigated by the recognition of the need to allow public remonstrations when mistakes or injustice have occurred,[96] for instance, through the petitioning system. But these are different from mechanisms for the challenge of legal rules as a matter of constitutional principle and strict legal and political obligation. As an expression of democratic centralism and with a view to the way the Chinese legislation system was designed, a narrow interpretation of the abovementioned rule about "abstract administrative acts" therefore makes some sense.

But with a view to constitutionalism, and especially to the commitment to protect constitutional rights, it is nevertheless a devastating doctrine. The complaint that a certain legal rule is unconstitutional or otherwise inconsistent with higher-ranking legal rules, prima facie amounts to the uncompromising statement that such a rule must be invalidated. Article 5 of the P.R.C. Constitution[97] does state that all State action is bound by the

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> must implement the decision of the organization no matter what their view; the subordinate must implement the resolutions and directives of the superior, they may present their views to the superior, but they must still implement these resolutions and directives before they are changed by the superior.

Stephen C. Angle, *Decent Democratic Centralism*, 33 POL. THEORY 518, 525 (2005). This principle was modified by the idea of the "mass-line," formulated by Mao Zedong. *See id.* at 526.

95. XIAN FA art. 3 (1982) (P.R.C.) ("The state organs of the People's Republic of China apply the principle of democratic centralism.").

96. *See id.* art. 41.

97. *Id.* art. 5. Article 5 states that:

> The state upholds the uniformity and dignity of the socialist legal system. No laws or administrative or local rules and regulations may contravene the Constitution. All state organs, the armed forces, all political parties and public organizations and all enterprises and institutions must abide by the Constitution and the law. All acts in violation of the Constitution or the law must be investigated. No organization or individual is privileged to be beyond the Constitution or the law.

Id.

Constitution. However, it continues to say that "all actions in violation of the Constitution or the law must be "investigated," not "invalidated." Other legislation, in particular the 2000 Legislation Law, suggests that regulations do become invalid when higher-ranking law in the same matter is produced and there would be a contradiction;[98] but this does not amount to a procedure for invalidation by an independent authority. Indeed, Article 64 provides that the authority which originally produced the lower-ranking regulation now in contravention of higher-ranking legislation should repeal it.[99]

The only model, therefore, on which the review of rules can work in democratic centralism is one in which rules are invalidated by an act of fiat, a new political decision by the norm-giver.[100] It can be argued that this is the reason why, according to Article 90 of the Legislation Law, citizens are only allowed to make "suggestions" for the review of rules.[101] At least, this arrangement is entirely consistent with the logic of democratic centralism, whereas it is inconsistent with the logic of rights, and of norm hierarchy in a constitutional governance structure.

The doctrine excluding "abstract administrative acts" from judicial scrutiny has moreover been applied extensively in court practice, for reasons again related to the nature of legislation and administration in the Chinese system. "Abstract" administrative acts are characterized as acts for multiple applications, and addressed to an indefinite number of administrative subjects; but it seems that under the influence of democratic centralism, the distinction between commands and rules becomes easily blurred. If it is expected that all official decisions follow more general rules made "above" but there is no room for principled requests that non-compliant decisions be disregarded or struck down, then rules meant to be general may easily fail to produce generally binding effects. Despite being addressed to the citizenry as a whole, the general rules in such a system do not

98. Li fa fa di liu shi si tiao [Legislation Law art. 64] (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 15, 2000, effective July 1, 2000) (P.R.C.), *available at* http://www.novexcn.com/legislat_law_00.html.

99. *Id.*

100. This requires a conception of political power and of the judiciary reminiscent of the German jurist Carl Schmitt, whose theories explain and justify totalitarianism. *See* CARL SCHMITT, DER BEGRIFF DES POLITISCHEN [THE CONCEPT OF THE POLITICAL] (George G. Schwab trans., University of Chicago Press 1996) (1932).

101. Li fa fa di jiu shi tiao, *supra* note 98, art. 90.

in effect hold out any guarantee to citizens that the rules will be followed.

In practice, this has led to the well-known problem of "red-letterhead documents."[102] Red-letterhead documents are documents issued by administrative or party institutions, which in practice carry the authority of law. "Rule by red-letterhead documents"[103] has emerged, over time, as a form of local governance in which even flagrant violations of central law by locally produced rules cannot be effectively challenged. Faced with a "red-letterhead document" made by a powerful local party or government authority, and restrained by the rule on "abstract administrative acts," courts may choose not even to accept an application for litigation, whether the challenged act itself, or only its basis, is "abstract."[104] As a systemic problem built into the system of legislation, and partly resulting from a narrow conception of judicial powers, this issue has relevance far beyond the realm of the Re-education Through Labor System and the persecution of Falungong.

In sum, as a potential court case, the case of Huang Wei was hopeless at the time of the complaint, in a number of ways. From the perspective of that time there was no way the challenge to the detention of Huang Wei was going to be successful in terms of the administrative litigation lawsuit Gao Zhisheng was trying to institute. Some regulations and red letterhead documents on which their detention was based could be argued to be unconstitutional, but could not be challenged in court.

The various procedural flaws and more narrowly case-related further arguments Gao Zhisheng cited for why Huang Wei's detention was illegal even if the Regulation for Re-education Through Labor was considered applicable, might by themselves of course have been sufficient ground for a court decision

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102. *Hongtou wenjian.*

103. *See* ZHOU QINGZHI, ZHONGGUO XIANJI XINGZHENG JIEGOU JI QI YUNXING—DUI W XIAN DE SHEHUI XUEKAO [COUNTY LEVEL GOVERNMENT ORGANIZATION AND OPERATION IN CHINA—A SOCIOLOGICAL STUDY OF COUNTY W] (2004).

104. This is called *bu yu shouli. See* JIANG MING'AN, XINGZHENGFA YU XINGZHENG SUSONG FA [ADMINISTRATIVE AND ADMINISTRATIVE PROCEDURE LAW] (Peking University Press 2002) (1999) discussing ways of adressing this problem as a doctrinal issue. Jiang Ming'an argues that challenges to concrete administrative acts based on abstract administrative acts ought to be accepted by courts, but that courts must not publicly declare such abstract acts invalid, even if they are illegal. *Id.* at 173; *see also* WANG ZHENMIN, *supra* note 88.

in his favor. But it should have been clear from the outset that the court would not accept Gao's case anyway. In 1999, the Supreme People's Court had already issued a directive to all lower courts to the effect that cases involving Falungong petitioners in cases of confiscated "illegal" material they had been charged with carrying should not be accepted for litigation.[105] This directive and various other decisions directed against Falungong[106] might be abstractly questionable on a variety of legal and constitutional grounds; but there was no procedure whatsoever to challenge them. Moreover, according to assertions by Gao himself, lawyers in Beijing had been instructed not to accept Falungong clients.[107] If this was the case, then by merely accepting Huang Wei as a client, Gao was incurring the risk of sanctions.[108]

In this situation, why did Gao even try? Why did he—like his colleagues shortly after the Sun Zhigang incident, but in a case with even fewer chances of success—act as though his argument might be considered? We need not attribute to Gao any expectation that this attempt might somehow influence future legal practice; such an expectation would hardly be justified since information about Falungong cases tends to be suppressed. As a matter of normative inquiry, it would be wrong to assume that Gao simply failed to consider the chances of successful litigation, to describe him as dumb or naïve.

Gao argued in terms of legal obligation, rather than pro-

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105. *See* PEERENBOOM, *supra* note 10, at 99 n.161.

106. For an overview of such regulations as of 2000, see AMNESTY INTERNATIONAL, REPORT 2000: THE CRACKDOWN ON FALUN GONG AND OTHER "HERETICAL ORGANIZATIONS" (2000), *available at* http://web.amnesty.org/library/print/ENGASA170112000.

107. *See* PEERENBOOM, *supra* note 10; *see also* Letter from Gao Zhisheng, to Wu Bangguo and the Standing Comm. Nat'l People's Cong., *supra* note 89.

108. The legal profession is generally regulated and controlled by the All China Lawyers' Association, which was set up in accordance with Article 37 of the 2001 Lawyers' Law as "self-regulating organization." Lushi Fa di 37 tiao [Lawyer's Law art. 37] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 29, 2001, effective 2002) (P.R.C.), *available at* http://www.cecc.gov/pages/newLaws/lawyersLawENG.php (last visited Apr. 21, 2007). The legal profession in China is also regulated by the Ministry of Justice (an institution separate from the People's Courts and People's Procuracies) and the bureaus under it. *Id.* art. 47. The People's Procuracies, as they are generally responsible for the prosecution of criminal offences by lawyers in a professional context, and the Party also regulate the Chinese legal profession. *See* William P. Alford, *Of Lawyers Lost and Found: Searching for Legal Professionalism in the People's Republic of China*, *in* EAST ASIAN LAW—UNIVERSAL NORMS AND LOCAL CULTURES 182, 188 (Arthur Rossett, Lucie Cheng, & Margaret Woo eds., 2002).

spective success. He insisted that the government had a legal duty to annul its public security bureau's illegal administrative decision, and that consequently the court had an obligation to decide in favor of Huang Wei.[109] Of course, he was also aware that the court was not going to decide as it should have, in his view. This was the reason why he took further measures to help his client.

In fact, the court never accepted the application to adjudicate the case of Huang Wei protesting his administrative detention. But was there therefore no point in seeking adjudication? Different perspectives on law lead to different answers to this question. Institutional-reform-oriented pragmatism requires actions to be taken only against obstacles that can be expected to be removed, and indirectly discourages the recognition of those obstacles that no one hopes to be able to remove in the foreseeable future. According to one view of law, lawyers predict legal results.[110] By contrast, "deontological"-minded rights defenders like Gao request, rather than merely predict, legal decisions.

It has become an almost common move for rights protectors to make information about their cases publicly available in order to put pressure on officials.[111] As we saw, this method was used to great effect in the case of Sun Zhigang. It led to the idea among reformist legal scholars that, by getting the public involved in "impact litigation"[112] cases, one could put concerned institutions under pressure. In the specific Chinese context, importantly, one could also add a dimension of publicity to institutional processes which did not, by themselves, provide for such publicity.[113] In contrast to impact litigation for instance in the

109. The formulation used was "luxing zuowei yiwu, yifa chexiao xxx shi laodong jiaoyang weiyuanhui di 0000152 hao laodong jiaoyang jueding." Huang Wei's Complaint, *supra* note 70.

110. *See* Holmes, *supra* note 13.

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

112. "Yingxiangxing susong."

113. *See* Interview with Rights Defender #4, in Beijing, China (July 13, 2006) (on file with author); Interview with Rights Defender #5, in Beijing, China (June 16, 2006) (on file with author); Interview with Rights Defender #5, in Beijing, China (July 27, 2006) (on file with author). The project in question, *Gongmeng*, in English called "The Open Constitution Initiative," is designed to publicize cases, both in order to promote their just resolution, and in order to draw attention to these cases, deemed to be representative of wider legal and social problems. *See Gongmeng*, http://www.gongmeng.cn/com_1.php (last visited Apr. 23, 2007) (stating the objectives of the Initiative).

United States, in important and central civil rights cases in China there may be no actual litigation process at all in such cases.

In the case of Huang Wei, Gao Zhisheng used the same tactic. He published an open letter describing his involvement in Huang Wei's case as a lawyer and the process of trying to protect him through bringing a lawsuit against the administrative decision to impose Re-education Through Labor on him. He also published the complaint he had drafted on behalf of Huang Wei. He used an open letter—his first regarding the issue of Falungong—to the government about the persecution of Falungong practitioners. In this letter, after stating the basis of Huang's complaints and narrating the process of trying to get a case accepted for litigation in three different courts, he went on to make "observations" about a number of phenomena concerning members of Falungong in general. His concerns included double jeopardy; the wrongness of persecuting people on account of their beliefs; the vagueness of language in the 1999 NPC "Decision to Eradicate Evil Cult Organizations and to Prevent and Punish Evil Cult Activities"; the denial of basic rights during the detention of Falungong petitioners, the moral corruption of enforcement personnel involved in this, and "vicious conduct" on the part of law enforcement officers. The strategy of the open letter may have worked. At any rate, Huang was released on health grounds six months after Gao Zhisheng got involved in his case. He had served fourteen months of his three-year administrative sentence.

What this complaint, later published online, did not mention was that according to Gao Zhisheng's information, Huang Wei had been repeatedly subjected to torture.[114] The effects of torture were still perceptible when Huang Wei came forward to seek legal advice.[115] The complaint also did not mention the fact that, apart from being twice subjected to administrative de-

114. In his first "open letter," addressing mainly the case of Huang Wei, he only mentioned "the vicious behavior of legal workers" and said that in Huang Wei's case, "the legal workers' irresponsibility and their corrupt, un-professional conduct have reached an alarming level despised by any civilized society." In greater detail, it was mentioned that Huang had been handcuffed for many hours on end. But the far more severe torture orally alleged to have occurred was not mentioned. Letter from Gao Zhisheng, to Wu Bangguo and the Standing Comm. Nat'l People's Cong., *supra* note 89.

115. Interview with Rights Defender #2, *supra* note 18.

tention, Huang had been detained at other times without any legal form or basis at all—again according to information which Gao said he had from his client.[116] The reason he gave for this was not that complaints about torture would have been impossible to back up with evidence, or that his client or he himself might have been held responsible for making wrong allegations, although conceivably these were considerations involved at the time. Gao explained that the strategy at the time was to address the illegality of persecuting Falungong generally, rather than to address the specific issue of torture in this case.[117]

It was only after Huang's case had been handled with some success that Gao broke a pragmatic silence which he had kept while still handling the case. He wrote an open letter about the torture of Falungong practitioners; and he instigated a hunger strike to protest "violent and rights-infringing government action."

V. *PROTESTING THE SYSTEM: OPEN LETTERS AND "RELAY HUNGER-STRIKING"*

Even though Huang Wei was granted an early release, he did not receive a decision confirming that he was innocent, or that he had been treated wrongly.[118] The judicial system had still failed him. Gao Zhisheng, on the other hand, had learned more about the persecution of Falungong practitioners through handling this case,[119] and through becoming a prominent person whom Falungong adherents seeking redress or protection increasingly turned to. Prior to this, he had himself been "like many others, inured[120] to the issue of Falungong, and really not even interested in these people."[121] He now attributes this attitude, which he considers very widespread, to the Party-State's successful propaganda against Falungong. Even now that this

116. *Id.*

117. *Id.*

118. A Falungong news service also alleged that Huang's family suffered more persecution, for example at the beginning of 2006. *Repeated Ransacking of Falun Dafa Practitioner Huang Wei's Home in Shijiazhuang City*, CLEARWISDOM.NET, March 25, 2006, http://clearwisdom.net/emh/articles/2006/3/25/71190.html (last visited Apr. 23, 2007).

119. *See generally* HUMAN RIGHTS WATCH, DANGEROUS MEDITATION: CHINA'S CAMPAIGN AGAINST FALUNGONG (2002); James D. Seymour, *The Wheel of Law and the Rule of Law*, *in* FALUN GONG'S CHALLENGE TO CHINA 170 (Danny Schechter ed., 2001).

120. *Mamu.*

121. Interview with Rights Defender #5, *supra* note 113.

propaganda has been reduced, people still *know* that this subject is off-bounds in certain contexts (e.g. in class), although they may not be able to explain how they know.[122] What changed Gao's attitude was confrontation with individual cases, especially with victims, who nevertheless inspired his admiration for having persisted through terrible torture.[123] In an interview with *Radio Free Asia*, Gao also mentioned that the decision to provide legal aid was motivated by the memory of his mother's exemplary altruism.[124]

He decided to conduct his own small-scale "investigation" of torture against Falungong practitioners. In the fall of 2005, he undertook a journey to some northeast provinces, collecting the testimonies of Falungong practitioners and their relatives about cases of alleged abuse and murder in clandestine interviews. On October 18, 2005, he published an open letter on the internet about the cases of eleven persons who described various forms of torture they had suffered.[125] On December 24, after another trip to collect such allegations in a different province (Xinjiang), he published a third open letter, similar in content to the second. To the extent possible, Gao tried to double-check information he gathered, and to obtain general reports on torture of Falungong prisoners.[126] As they stand, the open letters should be regarded as accusations and demands for further investigation, in themselves very possibly insufficient as evidence in court trials, if such trials ever happened. (The author of this Article has no means of independently assessing their accuracy.)

It has been persuasively argued that despite various efforts to address the problem, torture remains widely used among the Chinese police (Public Security and National Security).[127] The

122. Interview with Rights Defender #2, *supra* note 18.

123. *Id.*

124. *See* Zhang Min, *Gao Zhisheng lushi suifang lu (zhi qi); shiwusuo bei tingye xiang sifabu shenqing fuyi, Gao Zhisheng yu xian xing wu yang hui xiang ji mu* [*Gao Zhisheng Interview Series (no. 7): After Closure of Law Firm Gao Zhisheng Nevertheless Goes to Visit Mother's Tomb*], RADIO FREE ASIA, Jan. 24, 2006 [hereinafter Zhang Min, *7th Interview*], http://www.rfa.org/mandarin/other/2006/01/24/gaozhisheng (last visited Feb. 1, 2007).

125. *See* Gao Zhisheng, *Tingzhi pohai ziyou xinyangzhe, gaishan tong Zhongguo renmin de guanxi* [*Stop the Persecution of Persons Freely Adhering to a Faith, Improve Your Relationship with the Chinese People*], Oct. 18, 2005, http://www.peacehall.com/news/gb/china/2005/10/200510190023.shtm (last visited Feb. 1, 2007).

126. *See* Interview with Rights Defender #5, *supra* note 113.

127. *See, e.g.*, Manfred Nowak, U.N. Comm'n on Human Rights, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ¶¶

lack of an explicit right to silence during interrogation as a suspect[128] and the lack of various basic protections in criminal procedure, especially of the right to the presence of a lawyer, are at the root of this problem.[129] It is at the same time prohibited and punished by criminal law and rules on discipline,[130] as well as by the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which China has signed and ratified.[131] Therefore, allegations of torture always also involve an accusation of great moment to those accused, and pose a risk to the accuser. Because of its neglect of the right to silence and related procedural rights, criminal law practice on the other hand in many ways enables the use of torture, to the point where law enforcement officers and investigators feel they cannot do without it. Many police officers apparently continue to think that cases cannot be "solved" (*po'an*) without using torture.[132] Partly due to existing prohibitions and sanctions, and partly due to continued uncertainty over how torture, when it occurs, should be responded to by the legal system, allegations are still rarely made in the context of legal processes, such as

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40—59, E/CN.4/2006/6/Add.6 (Mar. 10, 2006) [hereinafter *Report of the Special Rapporteur*]; AMNESTY INTERNATIONAL, EXECUTED ACCORDING TO LAW? §§ 3.1-3.2 (2004), *available at* http://web.amnesty.org/library/index/engasa170032004.

128. Article 93 of the Criminal Procedure Law of the People's Republic of China states that:

> When interrogating a criminal suspect, the investigators shall first ask the criminal suspect whether or not he has committed any criminal act, and let him state the circumstances of his guilt or explain his innocence; then they may ask him questions. The criminal suspect shall answer the investigators' questions truthfully, but he shall have the right to refuse to answer any questions that are irrelevant to the case.

See Criminal Procedure Law of the People's Republic of China art. 93 (promulgated by the National People's Congress on March 17, 1996, effective January 1, 1997).

129. *See* Open Constitution Initiative, Lushi zai chang xiangmu, fangtan Tian Wenchang lushi [Right to Lawyer Program, Visiting Lawyers Tian Wenchang] (Apr. 26, 2006), http://www.gongmeng.cn/sub_r.php?zyj_id=497 (last visited Apr. 14, 2007).

130. *See* Criminal Law of the People's Republic of China arts. 247—48 (promulgated by the National People's Congress on July 1, 1979, revised Mar. 14, 1997). For a discussion of these and related legal provisions, see *Report of the Special Rapporteur*, *supra* note 127, ¶¶ 14-20.

131. China ratified the Convention in 1988. *See* Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U.N.T.S. 85; *see also* Off. High Nations High Comm'r for Human Rights, Ratifications and Reservations, http://www.ohchr.org/english/countries/ratification/9.htm#N4 (last visited Apr. 24, 2007).

132. *See* SONG YINGHUI, XINGSHI SUSONG YUANLI DAODU [INTRODUCTION TO THE ELEMENTS OF CRIMINAL PROCEDURE] 329 (2003).

litigation. Or if they are made, they may not be followed up appropriately.[133]

To judge from the very limited material used in the context of this Article, it must be difficult to talk about torture in a way that appears truthful to the speaker. It changes its victims; it spreads fear, of course; it has been characterized as an "illusory spectacle of power," to quote Elaine Scarry.[134] It does not make sense; and those who try to comment on it will not want to make sense of it. For those gathering information from victims, there are the problems of voyeurism, of a natural reluctance to describe people in situations of extreme pain and humiliation, and of interacting with victims whose rationality and judgment may have been impaired. This obviously makes it harder to rely on such descriptions as evidence. One rights defender reported that persons he talked to had become "like animals,"[135] and perhaps that is where attempts at describing his own impressions had to stop.

In Gao Zhisheng's two open letters on this subject, he mostly confined himself to putting the allegations he was passing on in the form of verbatim records, eliminating, as it were, his own intermediary role and giving the impression that the victims themselves are relating their experience.

In an interview, a friend who accompanied Gao on his second "investigative trip" commented on the targeting of the prisoners' genitals during torture, a practice described as routine by Gao. This description may give a sense not only of the kinds of

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133. In 2003, for example, the trial of a mafia boss in Heilongjiang attracted great public attention because the investigation was said to have involved torture. One of China's most prominent criminal procedure law professors, a visiting vice president of the CLA criminal law group, observed that even to write that torture might have occurred was a "daring" thing to do on the part of the 2nd Instance court. *See* Chen Guangzhong, Zhuanfang Zhongguo faxuehui fuhuizhang Chen Guangzhong: *gaipan sihuan tixian le fazhi jingshen* [Vice President of China's Official Legal Studies Association: *A Sentence Commuting to Death Penalty With Two Years' Reprieve Which Manifest the Spirit of the Rule of Law*], Dec. 24, 2003, http://www.law-thinker.com/detail.asp?id=1900 (last visited Feb. 1, 2007).

134. Scarry comments:

> The physical pain is so incontestably real that it seems to confer its quality of "incontestable reality" on that power that has brought it into being. It is, of course, precisely because the reality of that power is so highly contestable, the regime so unstable, that torture is being used.

ELAINE SCARRY, THE BODY IN PAIN 27 (1985).

135. *See* Interview with Rights Defender #2, *supra* note 18.

torture allegedly inflicted, but also of how difficult it is to talk about such crimes.[136] It reads as follows:

> My emotional response was very complicated. I mean, how can China as a civilized society, how can civilized people have such an inhumane phenomenon, a reality so much in negation of human nature? It is completely impossible to contemplate! It made us feel that we just were not humans, all of us; what they did, as part of humanity it made us feel that we lost the claim to be human. And actually the things we heard of may not even be the worst. Not even to mention the ones who died . . . . Those that stayed alive - for instance the ones we stayed with for these past few days – they didn't know how many times they had passed out, how many times they had been subjected to the "Great Punishment" and to the "Tiger Bench" and these things . . . and the police would still use electroshocks on someone lying on the "death bed." They electro-shocked his penis. The electroshock baton has a metal tip transmitting electricity; the shock goes right into the penis. The guy had already no other good place left on his body, but oh, there, his penis is still good, so let's put it there, let's see what happens if we electroshock his penis. They then used a metal bar to smash his penis. I was too embarrassed to ask what it was like now, for instance how he urinated. I thought it was unimaginable.[137]

Another friend, rights defender Guo Feixiong (Yang Maodong), in an interview described Gao as having entered into a "big" psychological mode ("weida zhuangtai") after his investigation trips. Asked to clarify what he meant by "big," Guo said that only this mode allowed him to speak up on the issue of Falungong persecution, when nobody else did.[138]

Announcing this step in the Third Open Letter, and remarking that "all individual private interests and any individual

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136. *See* Gao Zhisheng, Third Open Letter to Hu Jintao and Wen Jiabao [hereinafter Third Open Letter] (Dec. 12, 2005). For an English translation of this letter, see Gao Zhisheng, *Why One of China's Top Attorneys Broke with the Communist Party*, EPOCH TIMES, Dec. 16, 2005, http://en.epochtimes.com/news/5-12-16/35876.html (last visited Apr. 16, 2007).

137. Zhang Min, *7th interview*, *supra* note 124.

138. *See* Zhang Min, *Gao Zhisheng suifang lu (zhi liu), Tan "Jiyi," "shenpan," yu "quanmin hejie"* [*Gao Zhisheng Interview Series (no. 6), On "memory" "trial" and "harmonious reconciliation among the entire people"*], RADIO FREE ASIA, Jan. 10, 2006, [hereinafter Zhang Min, 6th interview] http://www.rfa.org/mandarin/other/2006/01/10/gaozhisheng6/ (last visited Feb. 1, 2007).

immediate needs had become entirely irrelevant" now, Gao Zhisheng then openly quit the Party.[139] From the publication of his second open letter he became unable to continue working normally as a lawyer, as his law firm was suspended from practice for one year and he was put under surveillance. So he plunged into a series of novel "rights-defense" actions. While he did not attempt again on behalf of Falungong torture victims to use the avenues of redress provided by the legal system, he continued commenting, as a lawyer might, on individual cases brought to his attention. Entitled "Lawyer Gao Talks About Cases," a series of radio interviews broadcast by a Falungong radio program from outside China addressed a wide range of ordinary cases such as assaults, land seizures, etc., brought to his attention through letters by petitioners and other complainants, which he continued receiving in large numbers throughout the months of surveillance.[140]

In early February 2006, after the second fact-finding trip to investigate Falungong persecution together with Jiao Guobiao, Gao and some fellow rights defenders including Zhao Xin and Hu Jia announced a "Relay Hunger Strike Movement to Oppose Violence." It was to be staged by rights defenders and sympathizers all across the country.[141] The "strikers" would actually not eat for just one day, and they would perform the strike in their own homes or their workplaces. The degree of association among participants and prominent protagonists was to be loose, in order to avoid trouble with the legal rules on associations. The declared aim of the hunger-strike was to "oppose violence and rights violations in government, to defend human rights, democracy and rule of law."[142] Certain key figures, including

139. *See* Zhang Min, *7th interview*, *supra* note 124.

140. *See* Interview with Rights Defender #2, *supra* note 18. For audio files of the program, see Gao lushi shuo [Lawyer Gao Discusses Cases], Sound of Hope, July 24, 2006, http://soundofhope.org/programs/772/43487-1.asp (last visited Feb. 1, 2007).

141. Interestingly, in the first interview after the announcement of the hunger-strike, Gao does not mention his collection of Falungong torture allegations, but rather emphasizes recent beatings of other lawyers, rights activists, and villagers, including Professor Ai Xiaoming, villagers in Taishi village and Chen Guangcheng. *See* Zhang Min, *Gao Zhisheng lushi fangtan lu (zhi jiu); jieli jueshi, weiquan kang bao—changyi yu fanxiang* [*Gao Zhisheng Interview Series (no. 9)—Relay Hunger-striking, Rights Defending and Protesting violence—The Launch of the Strike and Reactions*], RADIO FREE ASIA, Feb. 13, 2006 [hereinafter Zhang Min, *9th Interview*], http://www.rfa.org/mandarin/other/2006/02/13/gaozhisheng9 (last visited Apr. 16, 2007).

142. *Kangyi hei'e baoli qinquan, hanwei renquan minzhu zhengzhi. Id.*

prominently Gao, would each for themselves conduct a "relay" hunger strike on one day of the week, and supporters could join in at their own convenience. Participants' names would be published and hunger-strikers could write down their views, feelings, and individual experiences of cases of injustice; some of these notes were later published online.

This low-key action could only even be noticed in the unique conditions of communication and information transfer now created by the internet and its various uses. Its inventors and protagonists praised "relay hunger-striking" as a new form of peaceful resistance. They made explicit references to Gandhi and Martin Luther King.[143] As a congregation of passive fasters in a new virtual space, highly visible but not really tangible as a congregation, this was the kind of thing that state law would find hard to "get at," a least through the legal instruments of demonstration law and laws and regulations on social order. Those who supported the hunger-strike, including a number of prominent academics and constitutionalists, emphasized the legality of the strikes against a background of what they perceived to be increasingly brutal repression of lawyers. Teng Biao, a constitutional scholar and rights activist then already well-known due to his involvement in the *Sun Zhigang* case, and through his investigation of allegations of brutal abuses in the context of birth control regulations in a place in rural Shandong, explained:

> Nor do I think that this is a very "activist" political movement, . . . this is a non-violent way of expressing oneself, everybody hunger-strikes in their own home and then writes up their feelings and thoughts about the hunger-strike [experience], showing their concern for Chinese politics. I think that is entirely in accordance with the law, as well as with reason.[144]

Invoking the examples of Martin Luther King and of Mahatma Gandhi, Professor Fan Yafeng, another constitutional scholar and activist supporting the hunger-strike, commented:

> It could be said that the rights protection relay hunger-strike movement comes at a turning point in the rights protection movement on the mainland. The hunger-strike is unlimited

143. *See* Zhang Min, *Gao lushi suifang lu (zhi shiwu)* [*15th interview with Lawyer Gao*], Mar. 28, 2006, http://www.chinaaffairs.org/gb/detail.asp?id=62051 (last visited Feb. 1, 2007); Interview with Rights Defender #3, *supra* note 63; Interview with Rights Defender #6, in Beijing, China (July 16, 2006) (on file with author).

144. Zhang Min, *9th Interview*, *supra* note 141.

> in terms of its overall duration but it is limited to periods of time. Actually the time-limit is a central part of the strike; this way, on the basis of such a time limit, it is possible to stage the hunger-strike at a large scale involving the mainland, overseas, places all around the earth. Within the limited time and space of hunger-striking it may be possible to trigger a very large movement.
>
> And why is it that the conditions of this hunger-strike are not like the saint Gandhi's ones, taking place over a long period of time and getting very tough? This reflects lessons from Martin Luther King's civil rights movement in America. A very important innovation in the American civil rights movement was that a black person only had to stand on a platform where the whites would not allow him for five minutes, and he could already be regarded as part of the civil rights movement . . . .
>
> I see a slightly better prospect now for the opposition to feudalism, autocracy, and aristocratic capitalism and for the strengthening of rights consciousness, harmony and balance among state powers, as well as for a justice-loving and legal and democratic society. That is to say, the liberal and democratic forces on the mainland will perhaps through the rights protection relay hunger-strike movement be able to build a stable, rational and peaceful basis.[145]

Yet, as the discussion in the previous section has shown, China does not currently have a legal system that would allow for certain civil rights demands to be gradually absorbed into legal practice. Nor does it have media able to report on movements like a "relay hunger strike," nor, consequently, a reasonably well-informed and politically influential wider public to exercise pressures for policy changes. Fan's search for historical parallels that suggest political success is problematic, as he himself acknowledged.[146] Whether looking, as rights defenders in China now do, toward the United States or India, or looking toward other East Asian countries such as Taiwan, the abovementioned peculiarities of public administration, legislation and judicial practice in China, especially the fragmentation of Party-State authority in it, place China in a uniquely precarious situation. While it is widely acknowledged that the early years of the current decade, especially 2003, showed some promise that the system might be-

145. Zhang Min, *7th Interview*, *supra* note 124.

146. *See* Interview with Rights Defender #3, *supra* note 63.

come better able to respond to basic demands for rights protection,[147] developments since then have shattered many hopes cherished at the time. The unconstitutionality review system has not produced another notable success. Courts have not adjudicated another major case explicitly addressing constitutional rights since 2001;[148] or if they have, this did not become known to a wider public. Efforts to strengthen the role of the courts are at best described as "modest" by western observers,[149] and the fact that judges are asserting a desire to judge independently will not necessarily strengthen the judiciary as an institution, especially in circumstances in which new pressures are brought to bear on them, for instance from discussion in the public media and on the internet.[150] Of course, such trends might well be reversed again in the future.

The question remaining therefore was how the "relay hunger-strike" could be successful, and what would count as success both in terms of the strike's goal and of its methods. As mentioned, the primary stated goal was "to oppose violence in government"; there was nothing resembling an institutional reform goal in the many communications posted on the internet. This vagueness, the fact, in particular, that there was no condition upon which the strike would be ended,[151] seems to be as much an expression of the vagueness of the rights defenders' best hopes, as a response to a system as quick to repress speech or action explicitly addressing a specific political concern as the Chinese system. Since it also lacks much of the urgency and pressure generated by the threat of people dying as martyrs for their cause, the "relay hunger strike" had perhaps best be under-

147. On the *Sun Zhigang* case, see *supra* notes 80-83 and accompanying text.

148. For information on the *Qi Yuling* case, referred to here, see Huang Songyou, *Xianfa sifahua jiqi yiyi—cong zuigao renmin fayuan jintian de yige "pifu" tanqi* [*A Discussion of Judicialisation of the Constitution Based on an Approval Notice by the SPC*], Sept. 16, 2001, http://www.law-thinker.com/show.asp?id=205 (last visited Feb. 1, 2007); *see also* ZHOU WEI, XIANFA JIBEN QUANLI SIFA JIUJI YANJIU [A STUDY ON JUDICIAL REMEDIES FOR FUNDAMENTAL CONSTITUTIONAL RIGHTS] 161 (2003).

149. *See* Jerome Alan Cohen, *China's Legal Reform at the Crossroads*, FAR E. ECON. REV. 23 (Mar. 2006).

150. *See* Liebman and Wu, *China's Network Justice Draft*, http://papers.ssrn.com/sol3/cf_dev/absbyauth.cfm/econ.korea.ac.kr/www.solvay.edu/cours/AbsByAuth.cfm?per_id=332474, at 49 (last visited May 22, 2007).

151. Gao Zhisheng offered terminating his own hunger-strike on certain conditions later in one of his articles posted online. The conditions included a full investigation into Falungong persecution issues.

stood as a particular form of political expression, devised for China's peculiar situation. Contrary to Fan Yafeng's analysis, it is not the breaking of a particular legal rule that is at the focus of this activity, as in the Civil Rights Movement of the 1960s in the United States, when people might stand on a platform and thus act "against the law," at the same time claiming that their action ought to be allowed by higher legal (constitutional) standards. What is targeted, instead, could be understood as an undefined and largely extra-legal exaction of pragmatic silences by the Party-state. While "violence" especially in government was itself illegal in most cases, protest against it might nevertheless be repressed. From the perspective of the organizers of the "hunger-strike," it might be said that the right way to capture this kind of vague exaction has to be itself vague, and that the right way to challenge it has to be itself silent.

In numerous conversations, the author has gained the impression that some of the "rights defenders" currently active in China have given up on institutional reform, understood as the slow and incremental process of transforming existent legal institutions to bring them closer to a rule of law ideal such as the judiciary or the practice of the National People's Congress, which was still being envisaged as late as 2003. A prominent example for scholarship embracing institutional reform would be the book *The Chinese System for Constitutionality Review*, published in 2004 by Wang Zhenmin of Tsinghua University Law School. It not only incisively analyzed the current system of unconstitutionality review, but also boldly made a suggestion for a new institution, namely, a national level Constitutional Court.[152] An example for this kind of thinking put in practice would appear to be the case of Sun Zhigang, discussed above; and indeed this case was immediately taken up by academics, not only while it happened but also after it had happened, and discussed at length, for instance, in a book entitled *To Choose Constitutional Law* by Wang Lei of Peking University Law School.[153]

By 2006, the rights defenders consulted in the context of this Article, including scholars directly involved in the *Sun Zhigang* case, appeared to have concluded that one could no longer

152. *See* WANG ZHENMIN, *supra* note 88, at 382, 393 tbl.1.

153. *See generally* WANG LEI, XUANZE XIANFA [TO CHOOSE CONSTITUTIONAL LAW] (2004).

"put hope in institutional reform."[154] Gradually, the people in this group had become more skeptical. Some of those originally working as normal legal academics, such as Fan Yafeng (Chinese Academy of Social Sciences Legal Studies Institute), Teng Biao (China University of Political Science and Law), and Xu Zhiyong (China Telecommunications University) approached people originally situated in the various democracy and human rights movements China has experienced over the past, such as Ma Wendu, Zhao Xin, and Hou Wenzhuo, as well as lawyers of "humble origins" such as Gao Zhisheng (formerly Shengzhi Law Firm) and Li Heping (Globe Law Firm), and peasant leaders such as Liu Zhengyou. Increasingly, some rights defenders working on human rights cases come to view their work as embedded in a political system, which they challenge to varying degrees, by doing their work and by the attitudes they develop in the course of doing their work.[155] Rights activism in China, according to the views of some of its protagonists, must include efforts to "raise the power of civil society" rather than restrict itself to strengthening the role of legal professionals. This can be done, for instance, by publicizing individual, representative cases of rights abuse,[156] and by making ordinary people, including peasants, aware of the possibility of non-violent means of rights protection.[157]

To make the point of the movement and of the rights activism of the organization "Open Constitution Initiative" clearer, one such rights defender made a specific reference to the work of the Czech author, dissident and later president Vaclav Havel, citing to his important 1978 essay on the ideas of "living in truth," a possibility which he says reflects and constitutes the "power of the powerless."[158] Not every Chinese citizen, he said, would be willing to take the risk to speak up on particularly sensitive issues (such as torture allegations regarding Falungong ad-

154. *See, e.g.*, Interview with Rights Defender #5, *supra* note 113.

155. *See* Interview with Rights Defender #5, *supra* note 113.

156. See, for example, the case of the Linyi birth control abuses.

157. In a conversation in July 2006, a rights defender spoke of the necessity to improve the quality (*suzhi*) of the population which, he thought, required educational efforts on the part of a rights-defending elite. *See* Interview with Rights Defender #6, *supra* note 143.

158. *See* VACLAV HAVEL, MOC BEZMOCNÝCH [LIVING IN TRUTH], Prague, 1978, translated into English as "The Power of the Powerless" and published under the book title LIVING IN TRUTH 36-122 (Jan Vladislav ed., 1986).

herents). But "living in truth" might be given a negative definition—not engaging in telling lies, even if that would be advantageous, in a social context in which telling a particular kind of lie is common.[159] The reference to Havel is interesting, not only because Havel is known for insisting both on the distinction between the moral motivation of an act, and its effects, and on the possibility that "purely" moral acts may ultimately gain political significance.

> Are not these communities (and they *are* communities more than organizations)—*motivated mainly by a common belief in the profound significance of what they are doing since they have no chance of direct, external success*—joined together by precisely the kind of atmosphere in which the formalised and ritualized ties common in the official structures are supplanted by a living sense of solidarity and fraternity? . . . Is not their attempt to create an articulate form of 'living within the truth' . . . a sign of some kind of rudimentary moral reconstitution? In other words, are not these informed, non-bureaucratic, dynamic and open communities that comprise the 'parallel polis' a kind of rudimentary prefiguration, a symbolic model of those more meaningful 'post-democratic' political structures that might become the foundation of a better society?"[160]

Since the events of 1989-1990 surprised many of reform's main protagonists, Havel's name may also stand as an expression of hope for a similarly unpredictable change in China.

While rights defenders continue in their efforts to "strengthen civil society," they are also confronted with the question of what their attitude is toward the use of violence to oppose government authorities. Violent means are adopted in many places by ordinary people who consider themselves to be "defending their rights," and who often have tried unsuccessfully to access the State's legal institutions, such as the courts and petitioning bureaus, before they turn to violence. This concerns the general ethical problem whether physical resistance against what, from the perspective of the rights defenders, is an in some instances grossly unjust government, may ever be justified.

None of the rights defenders consulted for the purpose of

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159. *See* Interview with Rights Defender #5, *supra* note 113; see also HAVEL, supra note 158, at 84.

160. *Id.* at 120-21 (emphasis added).

this Article endorsed violence. Instead, most of them stressed that the mission of rights defenders and lawyers such as they themselves was to lessen the risk of violence by showing that alternatives to violence existed. Nor, in accordance with the stated commitment to non-violence, has there been any call for rebellion, insurgence, or subversion of the Party-State's power by any of the rights defenders. Many of their writings have emphasized the importance of "non-violence."[161]

But some rights defenders did observe that whatever their hopes, they might not in fact be able to *reverse* increasing trends, as they perceived them, toward increased use of violence on the part of dissatisfied people. They explained how violent means might be adopted by people "despairing" of all means of redress, noting that most frequently, violent "revenge" against officials was taken in suicide attacks using explosives.[162] Gao Zhisheng, who opposes violence, said in a notable piece published in April 2006 that central government was "running out of time" to address serious human rights issues, and that an increase in violent resistance must be expected in the near future.[163]

The non-violent "relay hunger-strikes" were reported in Chinese language as well as in U.S. and European media (albeit not in media legally distributed in China, of course). It is hard to assess how many people, and especially how many people in mainland China, joined in (at least "hundreds" according to the organizers). Some overseas Chinese-language media, in particu-

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161. *See, e.g.*, *Zhongguo weiquan jieli jueshi kangbao yundong zhanxing zhixu* [*The Provisional Rules for the Rights Defense Relay Hunger Strike Movement to Oppose Violence*], Feb. 9, 2006, http://peacehall.com/news/gb/china/2006/02/200602092255.shtml (last visited Feb. 1, 2007); Guo Feixiong, *Dui quanqiu weiquan kang bao jieli jueshi de luntan* [*Critical Discussion of the Global Relay Hunger Strike Movement to Oppose Violence*], at 1-5, http://peacehall.com/news/gb/pubvp/2006/04/200604020058.shtml (last visited Feb. 1, 2007); Wang Yi, *Weiquan yundong de zhejin yu fei baoli–zai caotang dushuhui de jianghua* [*Slow Progress and Non-violence of the Rights Defense Movement*], May 19, 2006, http://www.peacehall.com/news/gb/china/2006/05/200605200138.shtml (last visited Feb. 1, 2007).

162. *See* Interview with Rights Defender #6, *supra* note 143.

163. *See* Gao Zhisheng, *Liumang baozheng zhi zhengge minzu yu "huoyaodong" zhishang—ji zhonggong liumang zhengquan yi heibang shoufa weidu wo quanjia de di 132 tian* [*The Mafia-like Government has put the Entire Nation on a Gunpowder Barrel— Written on the 132th day of the CCP Surrounding and Obstructing My Entire Family by Mafia-Like Methods*, Apr. 2, 2006, http://www.dajiyuan.com/gb/6/4/2/n1274702.htm (last visited Feb. 1, 2007).

lar those close to Falungong, reported them as a great success; but there are no reliable numbers available.

The government soon responded. Surveillance of Gao and his family was increased, his home and work phone-lines were cut off and his internet connection was disrupted. A number of arrests followed, and more and more people supporting the strike "disappeared" for varying lengths of time.[164] As a consequence, Gao Zhisheng announced that he would hold a hunger-strike himself every Saturday while the "relay" hunger strike would continue, but without the requirement of hunger-strikers calling his office to register their phone numbers. Participants would moreover be allowed to use aliases to avoid persecution. In this form, the strike continues at the time of writing.

VI. *CONSEQUENCES AND RESPONSIBILITIES*

Even in his October 2005 letter (the second open letter), Gao had already explained:

> A new wave of systematic, large scale, organized violence and brutal persecution of Falungong adherents is occurring at the present time. This is a fact not only reflected in letters sent recently from many different places, but also a fact that we have seen with our own eyes during our last trip. As a citizen, as a lawyer, I am willing to bear any legal consequence of making this known to the public.

The actions taken by the Party-State, as described by Gao and a number of legal scholars and practitioners in articles and interviews, were not legal in every respect. But they partly chose a legal form. We can discern a dualistic strategy: on the one hand, there was a one-year suspension of Shengzhi law firm by the Beijing Bureau of Justice under the Ministry of Justice.[165] It

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164. Prominent among these was the activist Hu Jia, who was detained in an unknown location for forty-one days, by people who did not disclose who they were. *See* Zhang Min, *Dawen—chujing—jueshizhemen, Gao Zhisheng lushi suifang lu (zhi shiyi)* [*Interview Series with Gao Zhisheng (no. 11)—Answers from the Hungerstrikers*], Radio Free Asia, Feb. 28, 2006, http://www.rfa.org/mandarin/other/2006/02/28/gaozhisheng11 (last visited Apr. 13, 2007).

165. *See* Beijing shi sifa jue guanyu dui Beijing shi Shengzhi lushi shiwusuo de chufa jueding [Punishment Judgment to the Beijing Shengzhi Law Firm by the Beijing Judicial Bureau], Nov. 30, 2005 (on file with author); Beijing shi sifa ju xingzheng chufa zhixing gaozhi shu [Executory Notice of Administrative Punishment by the Beijing Judicial Bureau], Nov. 30, 2006 (on file with author); Xingzheng fuyi shenqing shu [Application for Administrative Reconsideration by Shengzhi Law Firm], Jan. 19, 2006 (on file

went through the formal stages of administrative decision, administrative reconsideration, and—unsuccessful—administrative litigation.

The decision to suspend Shengzhi Law Firm's practice for one year was based on two reasons: first, the firm had failed to register its new address with the supervising bureau under the Ministry of Justice, when it moved offices in June 2005. Second, the Beijing Justice Bureau said that it had found that a lawyer belonging to Shengzhi Law firm (*Wen Haibo*), and another not even belonging to it, had requested to see the criminal suspect Yang Maodong (a lawyer publicly known under the alias Guo Feixiong) who was then detained in Panyu in Guangdong, without Shengzhi law firm being able to produce its own records of receiving a mandate from Yang Maodong (*Guo Feixiong*). They had met with the suspect on the strength of an "introduction letter" containing both lawyers' names, which was handed to the local police detention center. The letter did not satisfy the requirement to use standardized law firm administration forms for recording mandates received,[166] and did not present any evidence of Shengzhi law firm having formally authorized the mentioned other lawyer to work on this case. The violation, the decision stated, "was especially serious."[167]

Shengzhi law firm, represented by rights defenders belonging to other law firms, contested both points. It argued that Shengzhi law firm tried several times to register the change of address but was not allowed to do so. In their application for administrative reconsideration, the lawyers also argued—eventually unsuccessfully—that failure to use standardized letters or forms for the inner administration of a law firm was not sufficient ground for closing it down for one year.[168] They argued,

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with author); Zhonghua renmin gongheguo sifabu xingzheng fuyi jueding shu [Judgment of Administrative Reconsideration by the People's Republic of China Department of Justice], Mar. 17, 2006 (on file with author); Xingzheng qisu shu [Application for Administrative Litigation], Mar. 30, 2006 (on file with author).

166. BEIJING JUSTICE BUREAU, Decision on Administrative Punishment (on file with author).

167. "*Shuyu qingjie yanzhong.*"

168. In an interview, but not in the application for administrative reconsideration, one of the lawyers also pointed out that the additional name of the Guangzhou lawyer not belonging to Shengzhi law firm, Tang Jingling, must have been added to the document in question. At Shengzhi, Li said, it was unclear how the name had been added, but Tang Jingling had not written it himself, and had provided his own documentation. *See* Zhang Min, *Gao Zhisheng lushi suifang lu (zhi san)—zai jingcha genzong jiankong xia*

moreover, that according to the Lawyer's Law, the Administrative Punishment Law, and the Administrative Permit Law, four administrative regulations on which the measure against Shengzhi law firm was based were illegal and should be struck down or altered. These requests were made in the context of administrative reconsideration, in which as mentioned it is possible to challenge the legality of administrative legislation.[169]

The two lawyers working on this case claimed that the suspension of Shengzhi Law Firm was motivated by the desire to "get at" Gao Zhisheng,[170] whereas the Beijing Bureau of Justice, in November and December 2005, respectively, issued statements addressed to all Beijing law firms, to the effect that legal requirements and procedures were strictly followed, and that no political motivations existed for the measure imposed on Shengzhi law firm.[171] The second one also pointed out that five other law firms had been disciplined for not adhering to rules. Moreover, the first of these announcements contained an admonition. It was dated November 8, 2005, that is before the legal dispute about the suspension of Shengzhi Law Firm had begun. It read:

> All of the city's law firms and lawyers ought to take a high-minded attitude, conscientiously acknowledge the true account, and raise their ability to discern right from wrong in

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[*Gao Zhisheng Interview Series (no. 3)—Under Police Persecution and Surveillance*], RADIO FREE ASIA, Nov. 29, 2005, http://www.rfa.org/mandarin/other/2005/11/29/gaozhisheng (last visited Apr. 13, 2007) [hereinafter Zhang Min, *3rd Interview*].

169. *See* Zhang Min, *Gao Zhisheng lushi suifanglu (zhi er) – tingzhenghui mu qian mu hou i* [*Gao Zhisheng Interview Series (no. 2)—Before and After the Hearing*], Nov. 24, 2005, http://www.peacehall.com/news/gb/china/2005/11/200511241241.shtml (last visited Feb. 1, 2007); Interview with Rights Defender #1, *supra* note 14.

170. Extensive analysis of the decision, and of the entire legal process it triggered by Li Heping and Xu Zhiyong, as well as Gao Zhisheng, Zhang Sizhi and Teng Biao, is provided in the interviews with Zhang Min from Radio Free Asia. *See* Zhang Min, *3rd Interview*, *supra* note 168; Zhang Min, *Gao Zhisheng lushi suifang lu (zhi si)—Gao Zhisheng shuaidiao genzong qu ban an; sifaju chufa juedingshu songda* [*Gao Zhisheng Interview Series (no.4)—Gao Zhisheng Shakes Off Surveillance to Handle a Case; Notice of Law Firm Closure Served*], RADIO FREE ASIA, Dec. 6, 2005, http://www.rfa.org/mandarin/other/2005/12/06/gaozhisheng/ (last visited Apr. 14, 2007).

171. Copies of these statements, in the form of letters addressed to all Beijing lawyers (law firms), are on file with the author. *See Beijing shi sifaju guanyu Gao Zhisheng de tonggao* [*Beijing City Justice Bureau announcement regarding Gao Zhisheng*] Nov. 8, 2005 (on file with author); Beijing shi sifaju guanyu dui Beijing shi shengzhi lushishiwusuo xingzheng chufa qingkuang de tongbao [Beijing City Justice Bureau announcement regarding the circumstances of the administrative punishment imposed on the Shengzhi Law Firm in Beijing City], Dec. 5, 2005 (copy on file with author).

> this affair. Do not accept untruthful and distorted reports from foreign media and illegal organizations. Do not participate in any instigating or organizing activities by foreign media or by individuals with ulterior motives. If you receive reports regarding Shengzhi Law Firm or Lawyer Gao from foreign media or illegal organizations, report directly to this Bureau.[172]

The suspension of Shengzhi Law Firm's license to operate reflects a wider tendency in recent years to strengthen the supervision of legal professionals in China through legal regulation. The dispute it triggered reflects the profession's resentment of this trend. Supervision, extended to professionals and actors potentially critical of the Party-State by means of new legislation of an administrative, regulating kind, now allows for any number of legalistic squabbles with the affected persons or entities, but also for the claim that things are handled "in accordance with law." Faced with new legislation which, from their perspective, violates higher-ranking norms either by itself or as applied, lawyers find that the obstacles to challenging such norms now suddenly affect themselves, not only their clients. As various lawyers observed in conversation, this has produced the need to "defend the rights defenders."[173]

One among the rights defenders commented on the trend to "legalize" control of the profession as follows:

> You know, recently the Communist Party's control has become increasingly refined. The majority of the Communist party cadres have all been abroad. Many of those who have been at Harvard's [John F.] Kennedy School of Government are high level cadres. . . . The control is becoming more and more refined, and there's nothing one can do about it. In recent years there is a clear tendency, regarding the increased control of the media, internet law, the control of the internet, control regarding lawyers, and what do they rely on? Legisla-

172. *See Beijing shi sifaju guanyu Gao Zhisheng de tonggao* [*Beijing City Justice Bureau announcement regarding Gao Zhisheng*], *supra* note 171.

173. *See, e.g.*, Interview with Rights Defender #6, *supra* note 143. The "Open Constitution Initiative" supported by Teng Biao, Xu Zhiyong and others, for instance, created a program entitled "The Right to Have a Lawyer Present." For an introduction to this program (*lushi zai chang xiangmu*) and further links, see Open Constitution Initiative, http://www.gongmeng.cn/sub_list.php?zyj_mid=62 (last visited Feb. 1, 2007). The program drew attention to the difficulties of lawyers trying to help clients in public interest cases especially in rural settings. It came to co-ordinate a large number of lawyers seeking to help a prominent blind "barefoot" lawyer, for instance.

> tion. Now they can with just one law render several thousand people unable to make any move!
>
> And where are these techniques coming from? From the west, from a large number of cadres who received their education in the west. It is like the law was in Germany, formerly, exercising control through the law. You know, China did not use to be like that. It used to have just arbitrary rule. But now that control relies on law, the degree of "legality" has increased and so they can now say that they are entirely "doing things according to law."[174]

These comments bring to mind a number of then new regulations and "red-letterhead documents" targeting the professional groups she mentioned. These include, for instance, a draft regulation on the reporting of sudden incidents by the media.[175] They also include a *Guiding Opinion of the All China Lawyers Association Regarding Lawyers Handling Cases of a Mass Nature* ("*Guiding Opinion*"),[176] and a campaign for the construction of a "Chinese socialist legal system" which admonishes the procuracy, the police and the courts to "co-operate."[177] These developments are an important, albeit unintended and for many unwelcome, aspect of legal reform in China. Professor He Weifang's sarcastic comment on the implications of the new *Guiding Opinion* for lawyers may remind us of the Beijing Justice Bureau's exhortation to other Beijing lawyers to "take a high-minded attitude" and "conscientiously acknowledge the true account" in the case of Gao Zhisheng:

> I think that the emergence of such a document [the *Guiding Opinion*] is not accidental; we all know that recently, for the

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174. *See* Interview with Rights Defender #6, *supra* note 143.

175. On the debate of this draft legislation, see Wan Gan, Zhongguo tufa shijian fa gei meiti shang jinguzhou shanzi baodao fa shi wan [Trammels Imposed on Media Reporting of Sudden Incidents; Penalties of Ten Thousand for Unauthorized Reports], June 25, 2006, http://www.peacehall.com/news/gb/china/2006/06/200606252309.shtml (last visited Feb. 1, 2007); Open Constitution Initiative, *supra* note 173.

176. *See* All China Lawyer's Ass'n, *Zhonghua quanguo lushi xiehui guanyu lushi banli quntixing anjian zhidao yijian* [*Guiding Opinion of the All China Lawyers Association Regarding Lawyers Handling Cases of a Mass Nature*], Mar. 20, 2006, http://www.chineselawyer.com.cn/pages/2006-5-15/s34852.html (last visited Feb. 1, 2007) [hereinafter *Guiding Opinion*], *translated in* Congressional-Executive Commission on China ("CECC"), *Guiding Opinion of the All China Lawyers Association Regarding Lawyers Handling Cases of a Mass Nature (CECC Full Translation)*, May 30, 2006, http://www.cecc.gov/pages/virtualAcad/index.phpd?showsingle=54314 (last visited Apr. 14, 2007).

177. *See* Interview with Expert Lawyer, in Beijing, China (July 27, 2006).

> past year or even longer, lawyers all across the country have been subjected to re-adjustment and rectification[178] by the Ministry of Justice or the All China Lawyers' Association. That is to say, the lawyers were treated as a group of people in need of regulation and education, and restraint. So we can never be grown-ups, we will always belong to a category of people who are being educated and rectified. Apart from special education and rectification programs [for lawyers] we are also frequently subjected to *Preserving Progressiveness*,[179] *The Three Emphases*[180] and similar broader education programs. This never-ending uninterrupted education just makes it clear that we are not yet grown up, and consequently need to learn from the grown-up people. This is a tradition of ours.[181]

Following the dualistic strategy mentioned above, Gao was not only subjected to "legal" measures such as the closing down of his law firm for one year, but also to twenty-four-hour persecution through the presence of plainclothes police and special agents. He had his phone connections cut off or frequently disrupted, and his internet access was severely restricted and eventually interrupted.[182] If Gao left his home, the special agents would follow. An early illustration of this was provided by Manfred Nowak, the U.N. Special Rapporteur on Torture who was on a mission to China and met with Gao Zhisheng on November 20—21, 2005. Nowak notes that:

> During the meeting with the Special Rapporteur [Manfred Nowak], he noted that he and his team were being heavily monitored by intelligence officers with portable listening devices and cameras from an adjacent table. When he approached them the three officers became irate . . . .[183]

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178. In Chinese, *zuzhi zhengdun* [re-adjustment and rectification].

179. A Hu Jintao slogan, *Bao chi gongchandangyuan xianjinxing* ["Keep the advanced nature of the Communists"]. *See* http://www.china.com.cn/zhuanti2005/node_5752204.htm (last visited Feb. 1, 2007).

180. A Jiang Zemin slogan, *Jiang xuexi, jiang zhengzhi, jiang zhengqi* [Emphasizing Learning, Emphasizing Politics, Emphasizing Rectitude]. *See* http://news.xinhuanet.com/ziliao/2003-01/20/content_698043.htm (last visited Feb. 1, 2007).

181. *See* He Weifang, Lushi canyu quntixing anjian daili de wenti [Problems with Representation by Lawyers Involved in Mass Character Cases], June 14, 2006, http://www.ccwlawyer.com/center.asp?idd=628 (last visited Feb. 1, 2007).

182. For further descriptions, see Zhang Min, *7th Interview*, *supra* note 124; Zhang Min, *9th Interview*, *supra* note 141.

183. *See Report of the Special Rapporteur*, *supra* note 127, App. 3, ¶ 2.

Gao Zhisheng added that as they tried to take pictures of the special agents seeking to monitor their conversation, these "irate" agents actually complained that taking their pictures against their will was "seriously violating their human rights." The scene erupted in a verbal fight witnessed by other restaurant customers, which eventually prompted Nowak's and his early departure.[184]

The rhetoric offered here by persons themselves apparently violating others' rights on behalf of the government in this episode could be regarded as a somewhat cynical distortion of the development toward "legality" described just above by one of the rights defenders—a distortion still owing itself to the fact that such a development is taking place.

There were other consequences. By August 2006, Gao had not only himself suffered several physical attacks.[185] There were also the "costs" of rights-defending borne by people in his environment, especially by his family and by his friends and colleagues. References to these consequences for others run like a thread through the interviews conducted by the RFA journalist Zhang Min, and through conversations with other lawyers. Thus, what upset Gao about the closure of his law firm was not so much the fact that the Party-state was "getting back" at him. But he did express himself shaken by the fact that his colleagues were affected by the decision to suspend the law firm as a whole, rather than targeting him personally.[186]

Rights defenders will sometimes describe themselves as uniquely lonely: The moment, one of them said, one decided to

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184. *See* Zhang Min, *3rd Interview*, *supra* note 168.

185. For a description of the last one, which apparently included an attack by a special agent wielding a piece of concrete, see Ding Xiao, *Gao Zhisheng bei bianyi ouda jieshou ben tai zhuanfang* [*Gao Zhisheng Gives an Interview After Having Been Roughed Up by Plainclothes Officers*], July 31, 2006, RADIO FREE ASIA, http://www.rfa.org/mandarin/shenrubaodao/2006/07/31/gaozhisheng/ (last visited Feb. 1, 2007); *see also Report of the Special Rapporteur*, *supra* note 127, App. 3, ¶ 3. This triggered a public call by other rights defenders to cease violence against Gao. *See* Lin Mu, *Sun Wenguang, Yuan hongbing, Zhang Jiankang & Yang Zaixin, Dui canhai Gao Lushi baoli xingwei de gongmin lianshu kangyishu* [*Citizens Protest Violence Against Lawyer Gao*], Aug.2, 2006, http://www.qianming.net/gb/default.aspx?dir=scp&cid=85 (last visited Feb. 1, 2007).

186. *See* Zhang Min, *Gao Zhisheng lushi suifang lu (zhi yi)—ma bu ting ti—dedao lushishiwusuo bei tingye yi nian koutou tongzhi hou* [*Gao Zhisheng Interview Series (no. 1)—The Horse Keeps on Walking—After Being Orally Informed of One Year Suspension of Law Firm*], Nov. 18, 2005, http://www.peacehall.com/news/gb/china/2005/11/200511180332.shtml (last visited Feb. 1, 2007).

speak out against certain kinds of injustice – in the language used in earlier sections of this Article, to break a pragmatic silence—the people "in one's back," meaning those normally supporting and co-operating with oneself, ceased to understand one. One was left with "no one to talk to," and most people would find that very hard, or impossible, to bear.[187] Even if they did not become one's opponents, their being victimized becomes a burden imposed on the rights defenders. Persons involved in this way included family, colleagues in one's law firm and other fellow lawyers, his family and neighbors in Shaanxi, as well as the general public.

Moreover not just family and colleagues, but a lawyer's clients, too, might be adversely affected by the lawyer's politically sensitive "rights defender" status. A lawyer who had undertaken the challenging task of representing a blind rights activist accused of criminal offenses in the context of exposing rights abuses to "implement" birth control, provided some insight into this kind of situation. His special responsibility toward his client, this lawyer explained, made him view other activists' working on this case with anxiety. Publicizing the case of his client by these other activists and the media had turned him, he said, "into the enemy of Chinese officialdom as whole"; as a result, his chances of getting a fair trial seemed worse than ever. The presence of numerous well-known political activists and rights defenders outside the courthouse on the day his client was going to be tried, all of them wearing T-shirts with a picture of his client, was well-meant, he appreciated. But, of course, these lawyers and activists were going to be beaten by State officials or State-hired thugs (they were) and turned away (they were), and would that not make it even more frightening for the already frightened local witnesses expected to exonerate his client?[188] Even if his client did not oppose such actions raising the profile of his case, how could the rights defenders engage in them? Rights defenders, he concluded bitterly, were "really the most selfish people of

187. Interview with Rights Defender #2, *supra* note 18.

188. *See* Interview with Rights Defender #7, in Beijing, China (July 22, 2006) (on file with author). Concerning the July 20, 2006 trip to Yinan country court that this relates to, see Ma Wendu, Yinan xian pangting Chen Guangcheng an jishi [Notes on the Hearing of Chen Guangcheng in Yinan County], August 5, 2006, http://www.peacehall.com/news/gb/pubvp/2006/08/200608022128.shtml (last visited Feb. 1, 2007).

all," because they put their own notions of justice and morality above everything else, and made others suffer for them.[189]

The problems mentioned here are typical of the conflicting felt obligations affecting people engaged in what is generally called "cause lawyering," of the conflicting desires, for instance, to promote a particular cause (such as popular rights awareness or awareness of a particular type of abuses, with a view to eradicating them), and to help a particular client. In the Chinese context these conflicts seem to be especially deep and especially numerous. Thus, mere publicity for a case would in many democratic or "post-authoritarian" settings not trigger the problem of intimidating witnesses who, it should be added, moreover have the option of not appearing in court if they so choose in China. The problem of State-hired thugs intimidating lawyers in politically important (or "sensitive") cases, too, is not so usual for many other jurisdictions, but apparently becoming more usual for China. Severe intimidation affecting a rights defender will affect the rights defender's family all the more, too. In the case of Gao Zhisheng, for instance, his thirteen-year old daughter was reported to have been followed, always, on her way to school and back, and to have been occasionally verbally molested by the persons employed to follow her. From the moment the system decided to persecute Gao in earnest, the entire family led an anxious and, at times, unbearably restricted life.[190]

One's responsibility to persons occupying these special roles in one's life, it was noted earlier on, but especially to one's immediate family, might not be adequately defined by what could be called one's public rights and obligations. It seems instead to be defined by the special relationship one had with them, especially with one's children while they are minors. That relationship can be described as one of affection as well as moral obligation. It is far removed, not only from considerations about one's rights in society, but also from considerations about constructing the rule of law in a people of 1.3 billion. How do the rights defenders experience and handle these responsibilities? Is there real conflict? How far any subjectively experienced conflict goes

189. *See* Interview with Rights Defender #7, *supra* note 188; *see also* Ma Wendu, *supra* note 188.

190. Regarding the daughter, see *Report of the Special Rapporteur*, *supra* note 127, at App. 3, ¶ 2 and Interview with Rights Defender #2, *supra* note 18.

will depend on the choices made (positions taken) by the persons close to the rights defenders. But such conflict, at least at an emotional level, seems unavoidable.

As was observed earlier on, to identify a conflict between different goals or values does not imply that the right way for resolving the conflict is to *weigh up* the different consequences a particular course of action has in regard to these goals. It does not require that we think of the unwelcome consequences in terms of a moral "cost" incurred to achieve the morally desired consequences. Even less are we required to think of rights activism as catering to a mere personal preference, a kind of moral taste one indulges in—but it must recognized that that, as just mentioned, is how rights activism appears to some, for instance to the lawyer acting on behalf of the blind activist. It is important, however, at least to recognize that there is a rational alternative to this particular form of consequentialist thinking. It consists in assigning responsibility for particular consequences not according to the question of who caused them (or foreseeably caused them), but rather according to the question of who intended them, and especially of whether one intended them oneself. However, much can be added to refine this simple question, it is removed, by a principled distinction, from the previous question of (mere) causation. From his own testimony, it is clear that Gao felt obligated to speak up against torture after he had met people whom he believed to have been subjected to torture of the worst kind; and this obligation seemed to hold no matter what, even if it involved feelings of guilt toward persons who suffered as a consequence of his choosing to fulfill it.

And it seems noteworthy that just as one lawyer attributed the actions of other activists to a kind of moral "selfishness," so other, more "radical" rights defenders will say that the difference between themselves and other rights defenders could "be summed up in one single character": "fear" (*yi ge 'pa' zi*)." Fear made some of their friends and colleagues "calculate the costs" of their actions, and shrink back from breaking certain silences which to break would be too "costly." What took away the fear of this rights defender, on his view, was a strong sense of moral obligation combined, perhaps, with a sense of religious mission. Speaking out against injustice "proved that we are still humans." It was necessary because at least "an historical record (of the abuses, and protest against them) had to be created." This

rights defender added that the reason he was without fear was his new-found Christian (Protestant) faith.[191]

The debate around Lawyer Gao Zhisheng's action, and the various consequences it triggered for himself, his family, and—some have argued—for the fate of institutional legal reform in China, should be understood against the background of these contrasting attitudes. It soon became clear that Gao's own attitude appeared extremely provocative to some, while admired by others. In late January 2006, during a trip home to spend Spring Festival with his family, Gao Zhisheng discovered that while his wife had been staunchly supporting him,[192] family in his home village in Shaanxi were frightened into opposing him.[193] On this trip, he managed to elude the special agents.[194] While there he was rung up by the RFA journalist Zhang Min for another interview. With some (nervous) amusement, he told her that his wider family had suggested to his brothers to lock him up in a cave, and that his brothers were now discussing this option.[195] This would be done to prevent him from going on with his dangerous political activities, which, they thought, might endanger the entire family or village, including of course Gao Zhisheng himself.[196] Gao Zhisheng's eldest brother Gao Zhiyi was there-

191. *See* Interview with Rights Defender #2, *supra* note 18.

192. *See* Zhang Min, *3rd Interview*, *supra* note 168; Interview with Rights Defender #2, *supra* note 18.

193. He went to Xiaoshibanqiao Village in Hulu Township, Yulinjia County, Shaanxi Province, where members of his family live in a row of yaodong caves. *See* Zhang Min, *7th Interview*, *supra* note 124.

194. *See id.* When Gao Zhisheng returned to his home village in April, apart from his friend and colleague, Ma Wendu, several special agents followed him. Their conduct, according to Gao Zhisheng, further disturbed and frightened the villagers. He said that the agents parked their car(s) in front of his family's dwellings, and made their presence as disagreeable as possible. Among other things, he said, they pointed electric torches through the women's *yaodong* window at night, and made a lot of noise, not allowing them to sleep. They urinated and defecated right in front of his family, he said, and used threatening and insulting language. *See* Interview with Rights Defender #2, *supra* note 18.

195. In that part of Shaanxi many families live in *yaodong* caves either dug into the hilly landscape, or constructed from mud bricks, traditionally with wooden fronts and kang brick beds. The following translation of the conversation is based on a transcript and on the MP3-audio file available online. In this particular instance, the audio file and the transcript diverge rather often because the journalist, for the benefit of her *Putonghua*-speaking audience, repeated many things said by Gao Zhisheng's brother, who speaks with a thick *Shaanxi* accent; these repetitions were left out in the transcript. The transcript was used in cases of divergence.

196. 8th interview with Zhang Min, *The Journey Home*, http://www.rfa.org/

upon interviewed by the startled Zhang Min, the *Radio Free Asia* journalist in Washington, D.C., over the phone.[197] The first thing he told her, defensively, was that he was "a peasant, working in the fields," who "understood nothing." Then he explained that the village was:

A: Telling him [Gao Zhisheng] not to make trouble. Not to pick a fight with the Communist Party.
Q: Do you know what precisely he's been doing? Is what he's doing bad or good?
A: Well, that depends what way you look at it. Basically, it is not bad. But we can't tolerate such a thing, we fear it is not safe! How can his brothers and family not worry?
Q: And what do you tell him to make him change his mind?
A: "You will get yourself locked up [*literally*, cause yourself to lose your freedom.] Aren't you just making trouble?"
Q: Do all the family talk like that to him?
A: I am sure they all take this view.
Q: Is there anyone who thinks differently?
A: No one. We are all agreed. We are planning to lock him up. We won't let him go.
Q: Would you really do that?
A: We have all planned it out already; we have found a place and we won't let him go, not on any account![198]
Q: For how long will you not let him go?
A: He can go around in the village, now. We're just not letting him go anywhere else.
Q: And what do the cadres in the village say?
A: There are no cadres in the village. Just a couple of village elders.
Q: Have you not been put under pressure by someone?
A: At any rate we always feel . . . . The police has already investigated us, how could we be looking for still more trouble? We're not letting him go after Spring Festival.
Q: Doesn't that mean that he can't continue his work?
A: I don't know about that.
Q: How many people have decided not to let him go?
A: Oh dear, not a few. The entire family, especially us brothers.
Q: Didn't someone come and talk to you before this?

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mandarin/other/2006/02/01/gaozhisheng/ (last visited May 22, 2007) [hereinafter *8th Interview, The Journey Home*].

197. *Id.*

198. *Bu jiao ta zou le, yao laoming ye bu jiao ta zou lei. Id.*

A: The police checked our household registrations. Into the third generation they checked up on us. He can have the phone. We just won't let him go.[199]

Gao Zhisheng himself had explained to the journalist that his brothers' plan involved taking his mobile phone away, and finding someone familiar with computers, who was to put a communication online. This communication indicated that Gao Zhisheng had decided to retreat into the bosom of his family and that the family desired no further interaction with anyone.[200]

Perhaps noticing Gao Zhiyi's agitation, the journalist steered the conversation away from the subject of his brother, to the impending Spring Festival. Then she asked a question about Gao Zhiyi's and Gao Zhisheng's recently deceased mother.

A: My mother was a very kind person. And she also had no education.[201] Anyone who came in contact with her said she was a very good person. They said she had the heart of a Pusa [Boddhisatva].

Q: Why did they say she had the heart of a Pusa?

A: She upheld morality. She never inconvenienced anyone, and took responsibility for everything.[202] Therefore the younger generation respected her very much.

Q: So now Lawyer Gao is back, when you talk to him to persuade him [not to go on with his rights defense activities], how does he respond?

A: He doesn't talk. He just doesn't interact.

Q: What do you say to him?

A: We tell him he should listen to the Party and go with the Party. And that he should not "pick fights" with the Communist Party.

Q: Do you know in what way he is "picking fights" with the Party?

A: I don't know. The Communist Party is pretty evil.[203] They would do anything.

Q: And who has told you that Gao Zhisheng is "fighting" with the Communist Party?

A: The police did not come to us. They came to people in

199. *Cha zuzong san dai. Id.*

200. *Id.*

201. Gao Zhiyi has just told her that he never went to school. *See id.*

202. *Zhuchi gongdao, bu zhan bie ren de bianyi, dui suoyou de shi dou shi ziji chikui. Id.*

203. *Gou hei. Id.*

> our village. So of course we would be hearing a couple of things. But they didn't come to me personally. They just investigated indirectly.[204]
>
> Q: So who told you, then?
>
> A: Whoever they investigated indirectly, that's who told us.

Remarkably, this conversation reflects a notion that the village, the family, or clan, the *zongzu*, can decide to lock someone up, without even having to use deception toward its prospective victim. The very openness of the discussion of this topic, which baffled the Washington journalist, indicates that a decision to subject Gao to this kind of village "house arrest" would have carried the authority of a court judgment. It is also clear that in the mind of Gao Zhiyi, detaining his (incomprehensibly activist) lawyer brother for the sake of the safety of the community, the family, and for his, Gao Zhisheng's, own safety, would have been *right*. The reasons cited by Gao Zhiyi are a fear of reprisals against Gao Zhisheng and the family, but also, as indicated in his reference to their mother, the importance of "not inconveniencing" others and "taking responsibility"—hence the formulation, which he says is used toward his brother by the family, that *you will cause yourself to lose your freedom.*[205]

No less plainly, the conversation shows a local community in fear of the ruling Party-State, however distant its actual representatives. Even though clearly Gao Zhisheng's brother is not willing to disclose everything, some intimidating moves by Party-State officials (the police) have been made, and the villagers have decided that it is too dangerous to allow their urbanized lawyer member to continue with his activism for far-off other Chinese citizens. In Gao Zhisheng's view, the most important reason why the villagers were opposed to his "picking fights" with the Party was that as peasants, they had experience of arbitrary rule, at a different level from most urban residents.

Zhang Min's conversation with Gao's brother may also remind us of the pragmatist acceptance of political facts advocated by Zhu Suli. Zhu Suli[206] admonishes his Chinese readership to pay heed to the brute facts of power distribution, saying that "it doesn't matter whether you oppose [the Party], you cannot deny

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204. *Ce mian diaocha. Id.*

205. *Shi ziji bu ziyou. Id.*

206. Zhu Suli, *supra* note 32.

it."[207] He leaves it deliberately open whether one should oppose or endorse the Party, or Communism, or any other ideology it may stand for, and argues that such endorsement or rejection is in an important way irrelevant. By contrast, Gao Zhisheng's brother Gao Zhiyi Gao Zhiyi remarks that the Party is "pretty evil" (*gou hei*) but that nevertheless the family are hoping that his brother will "listen to the Party and go with the Party." His attitude could be described as "pragmatic" in a more colloquial sense—he is not prepared to characterize his brother's opposition to the Party as wrong, but simply observes that it is not "safe." He cites his fear of the Party as a reason for obeying it. He insists, ultimately, on the need to protect oneself and one's people, and therefore to be submissive in what he perceives to be conditions of arbitrary rule and lawlessness.

In the end, Gao says, he "escaped" from his home village, and from the *yaodong* cave awaiting him, by means of a ruse: he pretended that he and his friend Ma Wendu were merely going for a visit nearby the day he left to go back to Beijing, and called his family later en route to tell them that he was not coming back.[208] The decision to announce a "relay hunger strike" was made in Beijing. The relay hunger strike began on February 4, 2006, as mentioned in the preceding section of this Article. It was supported by a number of prominent rights activists and academics, but back in Beijing, Gao was also vehemently opposed by other rights activists and government critics.

VIII. *"POLITICIZATION"*

Criticism came most prominently from "Tiananmen Mother" Ding Zilin, an academic at Renmin University whose teenage son had been killed in the Tiananmen massacre on June 4, 1989. For many years she has been vocal in claiming justice in these cases, compensation, as well as an official reassessment of the "Tiananmen incident." Her criticism was important, because she derived authority from her suffering and her courageous efforts to seek justice for many years. She also articulated most acutely and directly what many felt was the problem with Gao Zhisheng's actions, by warning him not to "become political," not to trigger another disaster like Tiananmen, and by implor-

207. *Id.*

208. *See* Zhang Min, *9th Interview*, *supra* note 141.

ing him to keep to "the original professional task" of a lawyer. The following is an excerpt from her open letter, which was written on February 23, 2006, and placed on the internet (it reached Gao through a friend reading it out to him over a phone).[209]

> Although we are not acquainted I decided to take the liberty of writing to you. I have thought about this letter for many days. Every day when I saw the news regarding your "hunger strike to oppose persecution" I felt unhappy. It was as though I returned to the time sixteen years ago, a time of no appetite and no peace, that time when day and night the ambulances for hunger-striking students were passing to and fro between Tiananmen and all the larger hospitals with their sirens, each sound went right through me and made it hard for me to be calm. Later the government's army moved into the city and, using armed force, brutally killed many peaceful residents, including my seventeen-year-old son. The shock of this experience was too great for me. My abhorrence of this evil government is a hundred times as deep as yours; my craving for a free China is a hundred times as strong as yours; and my sympathy for the weak and persecuted in our society cannot be any smaller than yours. I know the cruelty of this government very well and I feel the suffering and persecution you and your friends have experienced as though they had happened to my own body, because I have come the same way as you since the 90s of the last century. But even so, I want to persuade you to stop the hunger strike because I don't know what will happen if you persevere with it. What is the point of acting like a fish which dies trying to break through the net! Have you thought about this? In case something like the calamity of sixteen years ago happens again, how are we going to face the mothers and wives of the victims?
>
> Mr. Gao Zhisheng, you are a lawyer, a great rights protection lawyer. There are by no means too many lawyers like this in China at present; there are indeed too few of them. I do not believe that this kind of hunger strike movement can achieve its goal of rights protection for the common people, I

209. *See* Gao Zhisheng, *Gao Zhisheng guanyu Ding Zilin nushi gongkaixin de huiying* [*Gao Zhisheng's Answer to Ding Zilin's Open Letter*], Epoch Times, FEB. 24, 2006, http://www.epochtimes.com/gb/6/2/24/n1236006.htm (last visited Apr. 16, 2007). For an English translation, see Gao Zhisheng, *Attorney Gao's Response to Ms. Ding Zilin's Open Letter*, EPOCH TIMES, Feb. 27, 2006, http://en.epochtimes.com/news/6-2-27/38731.html (last visited Apr. 16, 2007). This response to Ding Zilin's letter was also dictated over the phone.

> only believe that every case of rights infringement must ultimately be resolved through the techniques of the law. Therefore, I find it hard to understand why you so light-heartedly abandoned your profession as a lawyer to engage in political activities. I feel that you have mixed up rights protection with political activities. In my view, a politicized method of rights protection ought not to be adopted. It might result in hardly bearable dangers to the people engaged in rights activism, and you yourself would only be distancing yourself further and further from those masses at the lowest stratum [of society] who need your help. You say that you are acting the way you do in order to "reduce" the "moral decline and "shame" of the "rights protection heroes." But in my view, those honorable lawyers who bring all their intelligence and wisdom to bear in their proper work as lawyers, and wholeheartedly throw themselves into [work on] every individual case of rights protection, deserve general admiration. Sometimes perhaps they may not be successful; but at least they contribute a few bricks and tiles to the process of the construction of rule of law. A concrete rights protection activity on the part of the honorable lawyers will be a wonderful triumph of publicity for awakening people's legal consciousness and rights consciousness. From a long term perspective, a people which lacks in respect for the law has no future . . . .[210]

Ding tries to offer an alternative to hunger-striking. The alternative is that of "pragmatic" and constructive reform work, evoked by Ding's metaphor of "bricks and tiles" contributed to the construction of rule of law. The real force of Ding's letter does not come from the persuasiveness of alternatives, however, nor from pointing out that Gao himself might perish, or that his efforts might in some other way be unsuccessful. It comes, rather, from the attribution of hypothetical responsibility for "another calamity" like Tiananmen; her somewhat vague sentiment, "how are *we* going to face the mothers and wives and sisters (and fathers and husbands, one might add) of the victims" is really directed to Gao.

This could remind us of the positions characterized as consequentialist in an earlier section of this Article. Consequential-

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210. Ding Zilin, *Ding Zilin zhi Gao Zhisheng gongkaixin: qing huidao weiquan de hanglie zhong lai* [*Open Letter from Ding Zilin to Gao Zhisheng: Please Return to the Job of Rights-Defending*], Feb. 23, 2006, http://peacehall.com/news/gb/china/2006/02/200602232225.shtml (last visited Feb. 1, 2007).

ist ascriptions of responsibility can be negative or indirect. On a consequentialist reading Gao's hunger-strike could make him responsible for any violent consequences (such as people being locked up, beaten, or killed) if things escalated. Although she does not (for whatever reason) mention it, informed readers of the letter will know that at the time of writing such consequences had already resulted from the inception of the hunger-strike, and more were to follow. But, of course, not all actual and possible consequences would implicate Gao in this way. We remember that the attribution of responsibility would only be successful in a consequentialist sense if the bad consequences were not outweighed by good consequences and if he had some ability to prevent them. The implication in what Ding Zilin says, on a consequentialist reading, is that both might be the case.

Beyond hypothetically ascribing responsibility, Ding also construes an image of the legal profession, which reflects legal reform pragmatism; yet rather than changing the institutions of the Party-State (in which she, like Gao Zhisheng, appears to put little hope) she advocates changing (educating) the public mind about law. In a consequentialist move, she shifts attention from the actions of rights defenders, to an ultimate state of affairs to be attained or, in her words, "constructed." Professional responsibility, it turns out, must also be understood on consequentialist terms and is therefore related to what can be made intelligible in terms of "constructing" the rule of law regime of the future. Ding Zilin infers from the consequence of illegal political oppression that to demand basic rights for the "politically" persecuted is un-lawyerly, even though she explicitly endorses Gao Zhisheng's right to express his concern for persecuted Falungong members. But, put shortly, the Falungong adherents should wait until the system has got better.

In the internet discussion of this subject, but perhaps even more in unpublicized discussions, Ding Zilin won strong support for her criticisms. Some of those supporting her went further than she did in criticizing Gao. Others supported her, but did not voice direct criticism in public. Prominent activists and academics published open letters entitled, for instance: "Why I am not hunger-striking."[211] Stainless Steel Mouse, the author of this particular open letter, rejected Ding Zilin's, in her view, far too

211. Liu Di (Pseudonym, *Bu xiugang laoshu*, [Stainless Steel Mouse]), *Wo wei*

direct connection between hunger-striking and deaths predicted by Ding Zilin. In other words, she was skeptical about the attribution of negative responsibility. But she viewed the movement as pointless for herself, partly because of the peculiarities described earlier on, its vagueness, and partly because of her own personal "weakness." She thought that the "rights defense hunger strike movement" can only have meaning if it substitutes non-violence for violence as an actual "possibility."

> Gandhi thought that non-violent action was not a "choice of the weak in a situation of no alternative choices." Instead, it was a free decision of the strong "rather to suffer harm themselves, than to inflict harm on others." In other words, only when it is possible for someone to use violent means of resistance, will his choice of non-violent means carry meaning. Therefore I think that if gentlemen like Wu Yiran choose hunger-striking and other non-violent forms of action, this is meaningful, but if someone as weak as a mouse does the same, then it will inevitably look like a child refusing to eat to annoy his parents, or like a young girl being restricted by her parents and feeling that since she cannot control her own life, all she can control is whether or not she eats; her own body—ultimately, this will always lead to nervous anorexia. This is the main reason why I am not hunger-striking: I personally have no way of distinguishing it from nervous anorexia.[212]

Stainless Steel Mouse remains attached to the (pragmatist) idea of effectiveness as a necessary attribute of politically meaningful action, somewhat differently from Havel, whose influence on some of the rights defenders was mentioned earlier on. She also rejects what appears to be behind much of Gandhi's ideas, namely the thought that anyone could choose to view themselves as politically powerful just by virtue of membership in a political community—"indigent" immaturity and resignation before authority appear to have been the very things Gandhi meant to challenge. But, then again, Gandhi's activism occurred in a context very notably different from the Chinese context.

There were also many who supported the movement.[213]

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shenme bu jueshi [*Why I am Not Hunger-striking*], BOXUN, Feb. 27, 2006, http://www.peacehall.com/news/gb/china/2006/02/200602270330.shtml (Feb. 1, 2007).

212. *Id.*

213. *See, e.g.*, Tan Baigiiao, Gao Zhisheng jijin ma? [Is Gao Zhisheng Radical?],

Given the media situation, it might be surmised that it was easier for supporters of Gao than for his critics to get their views published in overseas Chinese language fora,[214] whereas the entire subject was out of bounds in mainland discussion fora and the media, whether or not one was critical of the "Rights Defense Hunger Strike Movement."

The specific criticisms varied, but they all related to Ding Zilin's basic two standpoints: a consequentialist conception of responsibility, and a conception of law opposed to its "politicization." Thus a friend, fellow-lawyer and publicist, Liu Lu (pen name for Li Jianqiang),[215] now criticizing Gao Zhisheng and his supporters, said that hunger-striking and rights-defending were two completely different things, and that "of course" the hunger-strike initiated by Gao Zhisheng was not conducted for the purpose of rights protection. A very interesting aspect of this form of argument is that it plays on the meaning of *quan* as both "rights" and "power," and that it relates to the need to make optimistic assumptions and engage in strategic pretences about the functioning of available legal procedures.

> Liu: The protection of rights (*wei quan*) is just the protection of legal rights (*weihu faquan*). If in communications about rights protection you insult the government, you are acting like a rogue. To deny the legality of the government at its most basic means to deny the government as well as the law protecting and constituting that government; so what kind of right (*quan*) are you then still protecting? It almost amounts to fighting for power (*zheng quan*) or grasping power (*duo quan*). I believe that this rights protection hunger-strike movement is in reality a political demonstration; especially since overseas all [kinds of] political forces have separately

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Feb. 25, 2006, http://www.peacehall.com/news/gb/pubvp/2006/02/200602251250.shtml (last visited Feb. 1, 2007); Yuan Hongbing, Wei Gao Zhisheng bian [In Defense of Gao Zhisheng], Feb. 24, 2006, http://www.peacehall.com/news/gb/pubvp/2006/02/200602242309 (last visited Feb. 1, 2007).

214. Radio Free Asia reported about the controversy and Boxun posted some criticisms, for instance Ding Zilin's open letter, whereas Epoch Times did not.

215. For his personal blog, see Li Jianqiang (pseudonym, Liu Lu), http://www.boxun.com/hero/liulu (last visited Apr. 24, 2007). In December 2005, Liu Lu wrote one of the various articles analyzing and protesting the closure of Gao Zhisheng's law firm. *See* Liu Lu, *Yu bu ke ji de caijue—wo kan Beijing sifaju caijueshu* [*A Resolution That Could Not Be More Stupid—My View of the Beijing Justice Bureau's Resolution*], Dec. 3, 2005, http://www.peacehall.com/news/gb/china/2005/12/200512032258.shtml (last visited Feb. 1, 2007).

joined in and blown the matter up this peculiarity has become even more obvious.

Ying: But recently the government in many places in China has become entirely mafia-like, it has brutally beaten up rights defenders and dissidents and put them under soft surveillance. This had no appearance of rule of law at all. If the government starts with destroying the rule of law, do not the ordinary people have the right to oppose this/resist by hunger-striking?

Liu: Of course they have the right to resist/oppose and to demonstrate but you should call that opposition/resistance and demonstration, not rights-defending.

Ying: I am not sure if I can follow you; I would still like to ask, what's wrong with calling it rights-defending? Let it be terminologically incorrect; would that not be a semantic question? And we are not discussing semantics here.

Liu: The problem is of course not as simple as that. In China, rights-defending has a specially constituted meaning and clear boundaries, if these are exceeded then the expression "rights-defending" may become as dangerous as "popular movement" and "Taiwan independence."

Ying: And what is the boundary of rights-defending?

Liu: The law. What is defended by "rights-defending" are the legal rights of the ordinary people, their real and concrete interests. That is why rights-defending is a form of conduct in accordance with law. Rights-defending is subject to a standard, contained in the paragraphs of the law. The central and local government cannot, at least not in theory, deny the legitimizing value of the rights-defense movement, because it is in accordance with law. And just because this is so, rights-defending must take the law as its boundary. Once it exceeds this boundary, it has lost its legal justification. Then it becomes an object of repression by the government. That is [rights-defending at] the first level.

At the second level, rights-defending does not necessarily comply with all the legal requirements, but that certainly does not mean that rights-defending can be [entirely] against the law. In cases at this level, what rights-defending accords with is a higher-ranking law. It is what we often refer to as natural law, that is, the concept of justice and public fairness. Take for instance the civil disobedience movement. At that level, rights-defending is targeting bad laws in violation of the natural law and the evil institutions protected and constituted by these bad laws, for instance the institution of "Custody and

> Repatriation" [the system targeted after the "Sun Zhigang incident" discussed above]. But this kind of rights-defending still has clear boundaries, that is: peacefulness, rationality, and non-violence.
>
> What should be emphasized is that these two levels of rights-defending must be clearly distinguished. At different stages, different options must be chosen and different groups of people must engage in these.[216] They must not be mixed up.[217]

So justice may be invoked as higher law, but not, it appears, by everybody, and only on certain occasions. It should not, according to Liu Lu, be invoked by means of a popular movement.

Very interestingly, the supposed boundaries of the use of the term rights-defending are themselves elevated into the status of law. Perhaps without realizing it, Liu Lu is advocating a silence that benefits no one clearly, without being clearly required by law. There is—as yet—no written, certainly no statutory law setting out, for instance, that it would be alright to discuss the constitutionality of Re-education through Labor at an academic conference, whereas it would not be alright to write about it in *Southern Weekend.* There are commands and directives, such as those issued by the Central Propaganda Department; but these do not reach the level of statutory law and restrictions are often imposed on pieces already written when they do not pass the propaganda department approval process. Pragmatic silences such as the one described above are often the result of anticipation and guesswork, or of indirect and secret instructions.

Liu Lu's comment suggests, however, that he found some comfort in thinking of these restrictions as "law" rather than mere arbitrary imposition. It is difficult not to consider this analysis self-deceptive, most importantly because Liu Lu never dis-

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216. Above it was concluded that a procedure allowing for unconstitutionality review requests as a matter of right by ordinary people would directly contradict the principle of democratic centralism and the mass line, because it would contradict the principle requiring that decisions, once taken, be followed.

217. Ying Chunzi, *Liu Lu jiu jueshi shijian fangtan lu,* [*Interview with Liu Lu on the Hunger-strike*], Feb. 28, 2006, http://peacehall.com/news/gb/china/2006/02/200602280026.shtml (last visited Feb. 1, 2007); *see also* Liu Lu, *Yi ge ge'an shan huo zhe de ling yun ba qi—Yuan Hongbing "wei Gao Zhisheng bian"* [*The reckless remarks of an inflammatory trouble-maker—Yuan Hongbing's "defence of Gao Zhisheng"*], Feb. 25, 2006, http://www.peacehall.com/news/gb/pubvp/2006/02/200602252004.shtml (last visited Feb. 1, 2007).

cusses how, precisely, "the boundaries of law" are exceeded by not eating for a day or by writing about this experience.[218] Liu Lu's argument can be understood better if we supplement it by a consequentialist consideration implicit in Liu's reference to the "danger" inherent to the use of certain words. What he really says here (similar to Ding Zilin) is that it would be wrong to create a popular constitutional rights movement, because of the backlash it would provoke. In his terminology, such a movement would inappropriately try to reach up from the first level of rights assertion to the second. The legal profession and intellectual elite may pose some legal—even constitutional and political challenges, he suggests; but if they associate with the "ordinary" people and create a popular movement invoking the concept of rights, the government may no longer be persuaded that protecting legal rights is good for it. Creating such a popular movement would therefore be wrong on consequential grounds; it would be wrong not for the reasons which Liu Lu gives, but for reasons he obfuscates by semantic arguments.

If the consequentialist attribution of responsibility to "radical" rights activists is wrong and if Ding Zilin and Liu Lu are unconvincing in their argument that there is an inherent quality of law which prohibits rights assertion by "popular movement," the constructivist picture of bricks and tiles used by Ding Zilin may also turn out to be misleading. In the worst case, the "rule of law" being built in China would become a mere façade, if it did not offer any—not even the most basic—protection to some people, like Falungong adherents or certain Christian believers. A former P.R.C. law professor now based in Australia, supporting Gao Zhisheng in this controversy, puts this problem as follows: His argument, questionably, negates the rhetoric of legal reform as a new beginning in 1979, and makes sweeping reference to a half-century of Communist Party rule. He argues that:

> According to the spirit of legality now universally recognized by mankind, what is called "good law" is a legal system based on democratic politics. "Bad law," by contrast, is the system supporting the current authoritarian regime. And the law of

218. Liu Lu might cite such prohibitions of the criminal law as that on "plotting to subvert state power," for instance; but such a reference might only make it clearer that the participants of the strike have not violated criminal law. *Shandong bianfu guojia zhengquan zui. See* Criminal Law of the People's Republic of China art. 105 (promulgated by the National People's Congress on July 1, 1979, revised Mar. 14, 1997).

> violent Communist Party politics, is the cruelest law based on the mechanisms of autocracy. The Communist Party has since coming into power used the law for a period of fifty-six years to slaughter innumerable people in the name of this law[219] injured innumerable people, put innumerable people under surveillance. . . . Therefore, if you want the people to put trust in this kind of legal system when they defend their rights, to put trust in this kind of bad law, that really is like wanting them "to ask the tiger for his skin." (. . .)
>
> Journalist: In the letter [by Ding Zilin], it was also said that for all interest groups in society this was a vitally important phase, so it was important to keep to the rules of the game and not to "play with guns and fool around with sticks." Is there a misunderstanding of the rights protection movement?
>
> Yuan Hongbing: First of all I feel that this sort of talk is misleading. What interest groups? What vital phase? What rules of the game? The crucial point right now is that the rules of the game as prescribed by the violent political regime of the Chinese Communist Party deprive people of their human rights, of their basic rights, and they protect the "ten thousand families" at the top stratum of society; they follow a rule of protecting the interests of the powerful elite. The crucial point is that we should not respect such rules of the game.
>
> Moreover, regarding these so-called vital interests, under the violent political regime of the Chinese Communist Party there are only the interests of corrupt officials [to protect], what interests of ordinary people are there to protect? Nine hundred million peasants have to this day all been excluded from the social welfare system; ninety million peasant migrant workers can only earn one US dollar a day; what interests do they have that would be vital to protect?[220]

Though enraged and inaccurate, Yuan Hongbing appears to have a point. If law protects only some but not others in society it seems less worth having than if it protected all. A legal system

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219. This seems inappropriate given that during the Cultural Revolution the Party was explicitly denouncing the idea of law and embracing lawlessness. *See* Xinhua News, *Completely Smash the Feudal, Capitalist, and Revisionist Legal System* (1968), *translated in* 2 CHINESE L. & GOV'T 7 (1969-1970).

220. *Interview with Yuan Hongbing*, Feb. 25, 2006, http://xinsheng.net/xs/articles/gb/2006/2/25/36002.htm (last visited Feb. 1, 2007); *see also* Yuan Hongbing, *supra* note 213.

entrenching inequality could ultimately become a victim of its own partial success if there were more social crisis (instigated, inevitably, not by those most oppressed, but by those who are disadvantaged yet still able to protest). People in the intellectual or material elite might conceivably be reluctant to consider how unfairly the peasants, the peasant migrant workers, and several disadvantaged minorities are being treated, partly through the operation of the law (in the thin sense of law under democratic centralism), and partly due to law's significant absence from rural areas and other spheres of socially inferior life in China.

This must prompt us to reconsider the reproach of politicization in the arguments described above. Even if there is a reasonable way of separating "political" from "legal" work, or of separating legal from political argument and decision-making, it is hard to understand "politicization" as a valid reproach when the legal system lawyers seek to apply has itself ceased to make sense, from their perspective, and they engage in simple criticism of that system, or seek to challenge rules and commands on the grounds of their patent illegality.

We must also keep in mind that even in relatively coherent, stable and liberal legal systems, breaking a law can be an ethically right choice. Can it, paradoxically, be demanded that Chinese rights defenders refrain from similar choices, because officials of the Chinese Party-State would like to impose an authoritarian conception of what counts as legal? Indeed, there are official attempts to define legality narrowly. The already mentioned new *Guiding Opinion of the All China Lawyers Association Regarding Lawyers Handling Cases of a Mass Nature*[221] is an example of this trend. It uses the categories of "cases of a mass nature" and of "sensitive"[222] cases to restrain lawyers. Its effect could be described as government-induced "politicization" of the work of lawyers[223] quite possibly based on a perception of

221. *See Guiding Opinion*, *supra* note 176.

222. For discussion on the differentiation between the political and the non-political, as well as the conclusion that some cases are far from being "politicized" by lawyers, and are originally political in nature, see Interview with Rights Defender #5, *supra* note 113.

223. Gao countered the argument by Ding Zilin by pointing out that under present conditions, it was up to the Party-state to decide what could be repressed as "political" at will, and that this would only be political views and actions opposed to itself. But politics, he said, should by itself be a public matter (and hence be open to debate). *See Gao Zhisheng's Answer to Ding Zilin's Open Letter*, *supra* note 209.

lawyers' success in challenging Party-State authorities on behalf of their clients.[224]

"Politicization" captures also the process which has been pushing a few people originally at the centre of institutionalized legal professions, such as lawyers and academics, to the edges where they have encountered political dissidents and activists, and where they are now liaising with peasants and other members of the new underclass, actively forming associations and assemblies,[225] and communicating information abroad. At these edges, some legal professionals have taken what would appear to be the logical next steps from the conclusion that the P.R.C. Constitution and the legal system under it, as they are now, are dysfunctional. By doing so, they at least superficially intensified the tensions with more cautious reformers also committed to constitutional constraints on government and rights protection. In May 2006, Gao Zhisheng and Yuan Hongbing published a joint proposal for amending the Constitution.[226] Their principal proposed "amendment" was to throw out Party leadership and guidance by the principles of Marxism-Leninism, Mao Zedong Thought, and the Three Represents.[227]

In mid-June, Professor He Weifang, commenting on the recently imposed restrictions on lawyers,[228] observed:

> But personally I have a worry—namely, the recent large-scale readjustment imposed on the lawyers is not without cause. Some lawyers did things which scared the government, or

224. By contrast, in a conversation in July 2006, a criminal defense lawyer stated that the draft version of the *Guiding Opinion, Law on Handling Sudden Incidents*, and the *Socialist Legal System* education campaign were all direct consequences of the "Relay Rights Defense Hunger Strike Movement." Interview with Expert Lawyer, *supra* note 177.

225. To give an example for the description of such a process, Fan Yafeng of CASS's Legal Studies Institute and Li Baiguang, a lawyer and "rights defender," traveled to Taizhou in Zhejiang province to observe (and advise on) the formation of a Landless Peasant Association (in the course of formation). *See* Yan Zhengxue, Fan Yafeng, *Li Baiguang Zhongguo Taizhou zaoyu hongse taifeng* [*Li Baiguang Encountered Red Typhoon in Taizhou*], Aug. 11, 2006, http://peacehall.com/news/gb/china/2006/08/200608111113.shtml (last visited Feb. 1, 2007).

226. *See* Gao Zhisheng & Yuan Hongbing, Xiugai xianfa weihu jiben renquan xuanyan [Call for Amending the Constitution to Protect Basic Rights], May 19, 2006, http://boxun.com/hero/2006/gzs/64_2.shtml (last visited Feb. 1, 2007). This proposal as downloaded bears the names of over fifty people, self-described as human rights activists, rights defense lawyers, journalists, and others.

227. *See id.*

228. *See* He Weifang, *supra* note 181.

> they used some not very appropriate methods to carry out rights-defending activities. Actually, personally I have very great respect for such lawyers; but should we not think of an even better method, a more appropriate method to pursue justice—I am not really sure how to express it. At the time, when Hu Shih, Mao Zishui and others were calling for a more reasonable way of realizing freedom of speech, they quoted a sentence from the *Book of Rites:* "Strive for honesty/genuineness in your feelings and for cleverness in your expression."[229] When Mao Zishui talked about cleverness in this context he did not mean cleverness as in "flattering and clever speech." What he meant was just that you should talk so that people are able to listen and take in what you say. It should not be just third persons able to see that your criticism makes sense, but those criticized should also be able to see the fairness of the criticism, they should be able to take it in. Today, compared with thirty or forty years ago, our room for freedom of expression has already increased greatly. And our system – although it is still not fully satisfactory in many ways, we are now gradually progressing toward rule of law. At such a time, those of us who are pursuing the rule of law should above all take care that our speech and action has a kind of friendly resoluteness, or a kind of resolute friendliness. We should not make a one-off show of strength; we must not through one overly enthusiastic action lose the entire reform.[230]

This reflection by an academic who had three months earlier himself severely criticized one-party rule and expressed hopes for a Party split in the future[231] suggests that some of the differences amongst those whom He Weifang characterizes as "pursuing the rule of law" are grounded in their different experiences, rather than in different goals.

Having talked about amending the existent Constitution in May, Gao Zhisheng and some people around him announced the drafting of a new "Constitution for a Future China," in August 2006. Gao remarked that it would be important in such a Constitution to manage to restrain political power, and not "again to fall into the error of emphasizing that China was 'special.'" The website created for debating the new Constitution

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229. *Qing yu xin, ci yu qiao.*

230. He Weifang, *supra* note 181.

231. *See supra* note 34 and accompanying text.

soon contained postings discussing a multi-party system, federalism, etc.[232] Gao also said that the Constitution, which he associated with the "contours" of a future China, would be drafted "for whenever it was needed."[233]

Although neither side might agree, it appears important that there is in effect so much communication between reformist and more radical critics. To a degree that would have appeared unimaginable ten years ago, persons working "within" the system, as ordinary lawyers and academics and—it may be surmised—officials, can be informed about the legal and political challenges formulated by more radical critics on the edges of the system. These critics, moreover, consist in part of professional lawyers, technical experts with experience in legal practice who, as this Article hopes to demonstrate, initially tried to take the legal system as it is seriously and to reform it "from within." The discussion among the "radical" ones of the rights defenders, freer and more daring, can be expected to exert influence back on the more cautious rights defenders, and on people established in state and academic institutions, even if such influence is unacknowledged.

One rather more cautious lawyer, who was highly critical of Gao Zhisheng, observed in a conversation that the Party-State could, at any point, decide to strike harder.[234] "And if he goes too far, all he will achieve is being locked up. Then who will have heard of Gao Zhisheng?"

But when Gao Zhisheng was abducted from his sister's home only about two weeks later,[235] that lawyer was among the

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232. *See, e.g.*, Zhonghua lianbangguo xianfa [Chinese Federal Constitution], http://bbs.futurechinaforum.org/viewtopic.php?t=933 (last visited Feb. 1, 2007); Posting of Fanren, Jianyi yinjin zhengdang jingzheng jizhi [Suggesting a System of Political Party Competition], http://bbs.futurechinaforum.org/viewtopic.php?t=682 (last visited Feb. 1, 2007).

233. For audio commentary on this, see Gao Zhisheng, *Yao ba weilai Zhongguo de lunkuo gaosu Zhongguo ren* [*Telling the Chinese People About the Contours of a Future China*], SOUND OF HOPE, Aug. 11, 2006, http://soundofhope.org/programs/162/44676-1.asp (last visited Feb. 1, 2007).

234. Some attributed the fact that he was not locked up for such a long time to willingness among some in the highest leadership to protect him. *See* Wu Fan, Jie Gao Zhisheng xianxiang zhi mi, pou zhonggong neibu maodun zhi jie [Solving the riddle of the Gao Zhisheng Phenomenon, cutting through the knot of internal contradictions in the CCP] May 5, 2006, http://www.peacehall.com/news/gb/pubvp/2006/05/2006 05112056.shtml (last visited Feb. 1, 2007).

235. For information on the details of his abduction, which took place on August

first to sign a public letter of commitment to join Gao's legal support team, along with over one hundred other Chinese lawyers.[236] Gao's abductors were plainclothes agents of the Beijing Public Security Bureau.[237] As he went into detention Gao lost the ability to communicate with the comparative freedom he had had before. The story of his detention and exposure to threats and to torture, of his criminal trial, conviction for "plotting to subvert the political power" and subsequent "release" into continued strict surveillance at the end of 2006 is in part told by reports in the news media and on related websites;[238] but it was no longer a story which he could tell for himself. As traced in this Article, Gao Zhisheng's story ends at this point.

VIII. *CONCLUSION: THE POINT OF "RIGHTS-DEFENDING" AND THE LIMITS OF REFORM*

This Article discusses the possibilities of cause lawyering and rights activism in conditions of autocratic party rule and fragmented law. It juxtaposes two distinct approaches available to Chinese rights defenders at the present time. One applies a consequentialist and pragmatist mode of thinking to the goal of institutional reform. Its representatives use the specific rules publicized by the Party-State and seek to show their meaning for rights protection, for instance by promoting cases of politically "harmless," successful rights protection; and by academic and other debates directed at influencing decisions by those in

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15, 2006 in Shandong, see Yan Ming, *Gao Zhisheng bei juliu shencha, hai nei wai yunniang huyu shifang* [*Gao Zhisheng detained for investigation, calls for his release are being prepared in China and abroad*], RADIO FREE ASIA, Aug. 18, 2006, http://www.rfa.org/mandarin/shenrubaodao/2006/08/18/gao_zhisheng/ (last visited Feb. 1, 2007).

236. *See* Posting of Cai Chu, 102 ge ge jie renshi zucheng "Gao Zhisheng falu hou yuan tuan [102 People from Different Groups in Society Form a Legal Support Team for Gao Zhisheng], Aug. 25, 2006, http://peacehall.com/news/gb/china/2006/08/200608250429.shtml (last visited Feb. 1, 2007).

237. For several weeks there was no report of where he was held, although Xinhua News Agency carried a notice of a few lines. "The Beijing Municipal Bureau of Public Security said on Friday that it has detained Gao Zhisheng for questioning for his suspected involvement in criminal activities. Gao, 42, of Han nationality, was residing in Room 202, Unit 7 of Building 11, Xiaoguan Beili, Chaoyang District, Beijing, the bureau said in a brief press release." *Beijing Police Detains Gao Zhisheng*, XINHUA NEWS, Aug. 18, 2006, http://www.chinadaily.com.cn/china/2006-08/18/content_668137.htm (last visited Apr. 16, 2007).

238. Reports are available from websites such as Chinese Human Rights Defenders (http://crd-net.org/Article/), Radio Free Asia (http://www.rfa.org/mandarin/), and Boxun (http://www.peacehall.com/).

power. This approach combines a consequentialist conception of responsibility for outcomes with an assumption that institutional reform will gradually realize pre-conceived goals of the rights activists, who are generally committed to ideas of rights protection, justice, and equality. It confides in the tendency of legal processes, *qua* legal processes, to produce justice,[239] and historically it can be characterized as the initial mode of action chosen by P.R.C. legal professionals, who believed in the necessity of constitutional restraints on political power. Such professionals began to emerge from the start of the "opening up and reform" process[240] twenty-five years ago, and a reformist mindset has characterized the work of many lawyers, legal academics, and international organizations devoted to promoting rights protection in China. The pragmatic reformist approach most recently celebrated a victory in 2003, when the Sun Zhigang case happened, and an unconstitutional legal regulation was repealed as a consequence.

But, although reformist constitutionalists successfully brought the issue of bad law to the notice of the general Chinese public, they may have failed fully to appreciate the potential dimensions of bad law in conditions of autocratic governance. They may have invited people, as one critic put it, to "ask the tiger for his skin" by using the law against the Party-State to mount constitutional challenges, while the Party-State has been discovering law's usefulness as a means of controlling rights activism. This use of the law for illiberal purposes disappoints observers in and outside China, who may have believed that there would necessarily be a one-directional development toward better and better rule of law, understood in an increasingly substantive sense of liberal, rights-centered law strengthened by constitutional adjudication or judicial review—understood as genuine rule of law.

The central argument of the other, alternative, emphatically non-violent, yet more radical approach, represented by Gao Zhisheng and the relay hunger-strike movement is that unjust State actions must be exposed and criticized as a matter of justice, whatever the consequences for institutional reform. This approach rejects attributions of responsibility based on predict-

239. *See* LON L. FULLER, THE MORALITY OF LAW 157—58 (1965).

240. *Gaige Kaifang.*

able reprisals or backlashes. In the language of contemporary moral philosophy it can be viewed as based on a deontological understanding of rights and moral obligation. If it is seen as a matter of strict moral obligation toward fellow human beings, the success of rights activism should not be measured by its institutional consequences—such as failures and successes in lawsuits, or in legal reform.

At a time when human rights activism is widely given a constructivist, pragmatist, rule of law-oriented interpretation, Gao's experience therefore shows that it may not be possible for protest against human rights violations to serve an institutional reform goal, and that activists may pursue goals which are both less and more ambitious than that of reforming the legal and political institutions of their system. As the more cautious rights activists rightly point out, and as the experience of Gao Zhisheng described here illustrates, some consequences of rights activism, especially that which was described as "more radical," may be terrible.

In the example considered here, it appeared that the confrontation with extreme wrongs done to others transformed Gao Zhisheng's sense of how such consequences mattered. The lesson he drew was not pragmatic. It was not that one must wait until conditions would have ripened for certain types of wrong to be addressed. It was, rather, that one could not expect with any certainty to gain control over the circumstances that might allow for them to be addressed in the future. In Gao Zhisheng's words, a duty remained "to show that we are human beings" by exposing the wrongs of the present.