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# THE PEOPLE'S REGULATION: CITIZENS AND IMPLEMENTATION OF LAW IN CHINA

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**Benjamin van Rooij**

## **Abstract**

China has made a move towards society-based regulation, enabling citizens to aid in the implementation of regulatory law. This is a welcome development that may help to reduce the government's problems in enforcing its laws. Societal forces have had some success in improving regulatory efforts to mitigate risk. However, society-based regulation reforms have been halfhearted, as existing and recently introduced authoritarian restrictions obstruct citizens from becoming successful co-regulators. At its worst, China has developed a form of regulation by escalation, where ironically the exact same incentive structures for Chinese regulatory and judicial officials to prevent unrest also stimulate citizens to create instability as a successful strategy to get regulatory law implemented. Thus, China's halfhearted approach to regulatory governance with its focus on stability may ultimately be destabilizing.

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## INTRODUCTION

Over the last three decades, China has achieved the impossible: an unprecedented economic growth on the ashes of Mao's revolutionary destruction, lifting hundreds of millions out of poverty<sup>1</sup> and making China an emerging global superpower, a champion of a state-led growth model.<sup>2</sup> Nevertheless, China's incredible economic rise has come with immense environmental, food safety, construction safety, property, and occupational safety risks. According to recent estimates, for instance, pollution causes 750,000 premature deaths annually.<sup>3</sup> About 300 million Chinese drink contaminated water on a daily basis, and 190 million of them suffer from related illnesses.<sup>4</sup> In 2008, a substantial number of children died after developing kidney stones as a result of drinking milk laced with poisonous melamine.<sup>5</sup> During the 2008 Sichuan earthquake, schools—now nicknamed “tofu schools” (豆腐渣学校) (*doufuzha xuexiao*) because of their substandard cheap construction—collapsed and resulted in whole school classes dying or

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<sup>1</sup> See generally Shaohua Chen & Yan Wang, *China's Growth and Poverty Reduction—Trends between 1990 and 1999* (World Bank, Policy Research Working Paper Series No. 2651, 2001), [http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2001/09/01/000094946\\_01081604003748/Rendered/PDF/multiopage.pdf](http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2001/09/01/000094946_01081604003748/Rendered/PDF/multiopage.pdf); *China at a Glance*, WORLD BANK (Mar. 29, 2012), [http://devdata.worldbank.org/AAG/chn\\_aag.pdf](http://devdata.worldbank.org/AAG/chn_aag.pdf); China—Data & Statistics, WORLD BANK, <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/EASTASIAPACIFICEXT/CHINAEXTN/0,,contentMDK:20601872~menuPK:318976~pagePK:141137~piPK:141127~theSitePK:318950,00.html> (last visited June 5, 2012); *China: Data Profile*, WORLD BANK, [http://ddp-ext.worldbank.org/ext/ddpreports/ViewSharedReport?&CF=&REPORT\\_ID=9147&REQUEST\\_TYPE=VIEWADVANCED](http://ddp-ext.worldbank.org/ext/ddpreports/ViewSharedReport?&CF=&REPORT_ID=9147&REQUEST_TYPE=VIEWADVANCED) (last visited June 5, 2012); Martin Ravallion & Shaohua Chen, *China's (Uneven) Progress Against Poverty*, 82 J. DEV. ECON. 1 (2007).

<sup>2</sup> See generally STEFAN HALPER, *THE BEIJING CONSENSUS: HOW CHINA'S AUTHORITARIAN MODEL WILL DOMINATE THE TWENTY-FIRST CENTURY* 123–28 (2010); YASHENG HUANG, *CAPITALISM WITH CHINESE CHARACTERISTICS: ENTREPRENEURSHIP AND THE STATE* 10–30 (2008); IAN BREMMER, *THE END OF THE FREE MARKET: WHO WINS THE WAR BETWEEN STATES AND CORPORATIONS?* 51–54 (2010).

<sup>3</sup> World Bank & State Envtl. Prot. Admin., *COSTS OF POLLUTION IN CHINA, ECONOMIC ESTIMATES OF PHYSICAL DAMAGES* (2007); Richard McGregor, *750000 a Year Killed by Chinese Pollution*, FIN. TIMES (July 2, 2007, 10:03 PM), <http://www.ft.com/cms/s/0/8f40e248-28c7-11dc-af78-000b5df10621.html>.

<sup>4</sup> ORG. FOR ECON. CO-OPERATION & DEV., *OECD ENVIRONMENTAL PERFORMANCE REVIEWS: CHINA* (2007); John Vidal, *OECD Paints Bleak Picture of Pollution in China*, THE GUARDIAN (July 17, 2007, 5:45 PM), <http://www.guardian.co.uk/china/story/0,,2128568,00.html>.

<sup>5</sup> See Shenjieshi Huaner 3 Si, Yiqian Bu Jiance Sanjuqingan (肾结石患儿3死 以前不检测三聚氰胺) [*Three Infants Died From Kidney Stones; No Detection of Melamine In the Past*], Nanfang Zhoumo (南方周末) [S. WKLY.] (Sept. 17, 2008, 2:48 PM), <http://www.infzm.com/content/17246>.

becoming injured.<sup>6</sup> Many farmers and urban dwellers have lost land and housing without proper compensation,<sup>7</sup> and 80% of all new land development in eight major urban centers has not been done according to legal procedures.<sup>8</sup> Miners were injured or died in China's numerous, hazardous, small mines at an alarming rate.<sup>9</sup> In 2003, 80% of the world's coal mining casualties occurred in China, while China produced only 35% of the globe's coal.<sup>10</sup>

These are only a few of the headline-making manifestations of the risks accompanying China's economic development, risks that are no longer contained by China's borders. As one of the world's economic centers, risks in

<sup>6</sup> Feng Congde (封从德), Renquan Dangan: Wenchuan Dizhen Doufuzha Gongcheng Shouan Xuesheng 5213 Ren Mingdan (人权档案: 汶川地震豆腐渣工程受难学生 5213 人名单) [*List of 5,213 Students Who Died in the Doufuzha Schools in the Wenchuan Earthquake*], Duli Pinglun (独立评论) [INDEP. REV.] (May 13, 2010, 11:20 PM), <http://www.duping.net/XHC/show.php?bbs=11&post=1064974>.

<sup>7</sup> See generally CHEN XIAOJUN (陈小君) ET AL., Nongcun Tudi Falüzhidu Yanjiu: Tianye Diaocha Jiedu (农村土地法律制度研究: 田野调查解读) [RESEARCH IN THE VILLAGE LAND LEGAL SYSTEM: AN ANALYSIS ON THE BASIS OF FIELDWORK] (2003); Xiaolin Guo, *Land Expropriation and Rural Conflicts in China*, 166 CHINA Q. 422 (2001); Zongmin Li, *Women's Land Rights in Rural China: A Synthesis* (2002) (unpublished manuscript) (on file with author); Pamela N. Phan, *Enriching the Land or the Political Elite? Lessons from China on Democratization of the Urban Renewal Process*, 14 PAC. RIM L. & POL'Y. 607 (2005); Ping Li et al., *Land Reform and Tenure Security in China: History and Current Challenges*, in LAND TENURE LEGALIZATION, COUNTRY STUDIES AND CASES (Janine Ubink et al. eds., 2009); Benjamin van Rooij, *Rural Land Acquisition Conflicts in China, Illustrated by Cases from Yunnan Province*, in LEGALISING LAND RIGHTS: LOCAL PRACTICES, STATE RESPONSES AND TENURE SECURITY IN AFRICA, ASIA, AND LATIN AMERICA 409 (Janine Ubink et al. eds., 2009); Calum MacLeod, *Chinese Homeowners Fight Demolitions*, USA TODAY (Sept. 27, 2010, 1:23 AM), [http://www.usatoday.com/news/world/2010-09-27-demolition27\\_ST\\_N.htm](http://www.usatoday.com/news/world/2010-09-27-demolition27_ST_N.htm); Katherine Wilhelm, *Rethinking Property Rights in Urban China*, 9 UCLA J. INT'L L. & FOREIGN AFF. 227 (2004).

<sup>8</sup> Liu Ying & Jiang Jianqiu (刘颖 & 蒋建秋), Guanyu Woguo Tudi Zhifa yu Chengyin de Zaisikao (关于我国土地执法困境与成因的再思考) [*Rethinking the Difficulties in Enforcing Land Laws in China and Their Causes*], FAXUE ZAZHI (法学杂志) [L. SCI. MAG.], no. 6, 2009, at 121, 121.

<sup>9</sup> See Tim Wright, *The Political Economy of Coal Mine Disasters in China: "Your Rice Bowl or Your Life"*, 179 CHINA Q. 629, 632-34 (2004); Philip Andrews-Speed et al., *The Regulation of China's Township and Village Coal Mines: A Study of Complexity and Ineffectiveness*, 11 J. CLEANER PRODUCTION 185, 186-87 (2003).

<sup>10</sup> See Xiaohui Zhao & Xueli Jiang, *Coal Mining: Most Deadly Job in China*, CHINA DAILY (Nov. 13, 2004, 3:01 PM), [http://www.chinadaily.com.cn/english/doc/2004-11/13/content\\_391242.htm](http://www.chinadaily.com.cn/english/doc/2004-11/13/content_391242.htm). Recently China has reported a drop in coalmine related accidents; however, the situation is still serious. See, e.g., *Downturn Reduces Coalmine Fatalities*, CHINA DAILY (July 18, 2009), [http://www.china.org.cn/china/news/2009-07/18/content\\_18159623.htm](http://www.china.org.cn/china/news/2009-07/18/content_18159623.htm); *China Mining Toll 'Falls' in 2008*, BRIT. BROADCASTING COMPANY (Jan. 29, 2009, 1:55 PM), [http://news.bbc.co.uk/1/1/ukfs\\_news/hi/newsid\\_7850000/newsid\\_7855300/7855330.stm](http://news.bbc.co.uk/1/1/ukfs_news/hi/newsid_7850000/newsid_7855300/7855330.stm).

China have increasingly regional and global effects: the melamine milk scandal created food scares across the East Asian region and beyond.<sup>11</sup> And some days, according to data gathered by the U.S. Environmental Protection Agency, 25% of suspended air particulates in Los Angeles originate from China,<sup>12</sup> now the largest emitter of greenhouse gases.<sup>13</sup> Chinese firms have exported fake General Motors car brake linings made of wood chips and cardboard that “could burst into flames with heavy use.”<sup>14</sup> Furthermore, a recent report by the U.S. International Trade Commission estimated that the U.S. economy suffered an approximate \$48 billion loss due to Chinese intellectual property rights infringements, calculating further that if China imposed enforcement at levels comparable to the United States, American employment would increase by 923,000 jobs.<sup>15</sup>

These risks are the topic of this Article. It will address how China has been trying to control human-induced risks through regulation. China has done so by establishing an elaborate system of regulatory laws. Yet, the results of these laws on controlling environmental, health, or economic risks have been disappointing and have led to a vicious circle where weak enforcement and low compliance reinforce one another.<sup>16</sup> This Article will discuss the problem

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<sup>11</sup> Lingxi Dong (董凌汐), Dongnanya, Oumei, ji Taiwan Diqu Qianglie Fanying Wenti Naifen Shijian (东南亚、欧美及台湾地区强烈反应问题牛奶事件) [*Strong Reactions in Southeast Asia, Europe and Taiwan Against the Milk Powder Incident*], CAIJING (Sept. 21, 2008, 9:58 AM), <http://www.caijing.com.cn/2008-09-21/110014406.html>.

<sup>12</sup> Elizabeth C. Economy, *The Great Leap Backward? The Costs of China's Environmental Crisis*, FOREIGN AFF., Sept.–Oct. 2007, at 38, 44.

<sup>13</sup> Press Release, Neth. Env'tl. Assessment Agency, China Now No. 1 in CO<sub>2</sub> Emissions; USA in Second Position (June 19, 2007), available at <http://www.pbl.nl/en/news/pressreleases/2007/20070619Chinanowno1inCO2emissionsUSAinsecondposition>.

<sup>14</sup> Joann Muller, *Counterfeiting Cars in China*, FORBES (Feb. 1 2004, 10:55 PM), <http://www.msnbc.msn.com/id/4131724/ns/business-forbescom/>.

<sup>15</sup> U.S. INT'L TRADE COMM'N, USITC PUB. NO. 4226, CHINA: EFFECTS OF INTELLECTUAL PROPERTY INFRINGEMENT AND INDIGENOUS INNOVATION POLICIES ON THE U.S. ECONOMY xiv (2011), available at <http://www.usitc.gov/publications/332/pub4226.pdf>. One could be critical of the manner in which these numbers have been calculated: as enterprises were asked to estimate the impact of piracy and did so based on the full legal value of pirated goods sold, assuming that if they had not been available as pirated goods, consumers would have bought the same amount for the full legal price. This obviously is problematic. The data are included here to show how costs are perceived and represented also in the media, and thus can illustrate the perceived impact of violations of law in the United States.

<sup>16</sup> Cf. Alon Harel & Alon Klement, *The Economics of Stigma: Why More Detection of Crime May Result in Less Stigmatization*, 36 J. LEGAL STUD. 355 (2007) (arguing that the more people are detected to have violated the law and are stigmatized for such violations, the smaller the deterrent effect for such stigma is; in other words, the more violations, the harder enforcement becomes); Ogen Bar-Gill & Alon Harel, *Crime Rates and Expected Sanctions: The Economics of Deterrence Revisited*, 30 J. LEGAL STUD. 485, 486–87 (2001) (summarizing literature discussing the so-called “crowding effect” when

of how to implement regulatory law in China. First, it will look at why state law enforcement has been so ineffective, by examining problems with detecting violations and reasons why sanctions are weak. The remainder of the Article will address the possibility of involving citizens in the implementation of such laws. It will argue that to regulate the risks that have accompanied China's massive development, a "decentered approach" to regulation, where regulatory norms are no longer largely or solely implemented by state organizations, is necessary. It will demonstrate that China has made a move in this direction by creating opportunities for citizens to provide information on regulatory behavior and act directly against violations of regulatory norms. This move towards involving people as co-regulators, however, has been halfhearted, as existing and recently introduced authoritarian restrictions preclude citizens from becoming successful regulators. This Article finds that the current halfhearted approach has at its worst created a form of regulation by escalation, where ironically the exact same incentive structures used by Chinese regulatory and judicial officials to prevent unrest also stimulate citizens to create unrest as an attempt to get regulatory law implemented. Thus, China's halfhearted approach to regulatory governance with its inherent and overriding focus on stability may be ultimately destabilizing. This realization calls for a rethinking of the current approach to regulation and conflict resolution that requires courage in accepting short-term contention and conflicts in exchange for longer-term stability from which all stand to benefit.

For this Article, data were used from a variety of sources, including primary data published by Chinese authorities, secondary data collected by Chinese and foreign scholars, and my own data collected during intensive fieldwork in China on the implementation of arable land protection and environmental law. Each source of data has its own limitations, and readers should be aware that both the variety of sources and their respective biases challenge generalization, even when it is done with care, as is attempted here.

## I. UNDERSTANDING WEAK STATE IMPLEMENTATION OF REGULATORY LAW

In the 1980s and 1990s, China largely adopted a state-based model of implementing regulatory law. Even in fields such as intellectual property rights and labor, which traditionally use contract and liability norms that do not need much state implementation capacity, the state was given a large role to detect and punish violations of command and control-type norms.<sup>17</sup>

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the crime rate is higher and "fewer resources are devoted to solving each crime, thus leading to a smaller probability of detection and conviction").

<sup>17</sup> See, ANDREW C. MERTHA, *THE POLITICS OF PIRACY: INTELLECTUAL PROPERTY IN CONTEMPORARY CHINA* 133 (2005); Sean Cooney, *China's Labour Law, Compliance and Flaws in Implementing Institutions*, 49 J. INDUS. REL. 673, 676 (2007); MARTIN K. DIMITROV, *PIRACY AND THE STATE: THE POLITICS OF INTELLECTUAL PROPERTY RIGHTS IN CHINA* 144, 188-89 (2009).

Nevertheless, state institutions have had trouble implementing regulatory law, both in terms of detecting violations and in responding to stop such violations.

### A. Detecting Violations

During fieldwork in southwestern China, I learned firsthand about the difficulties that state regulators have in detecting regulatory violations. In fact, I was very lucky that the local environmental authorities had not been able to do a good job at ascertaining the compliance of local companies: what later proved to be one of the key cases in my research on environmental regulation in China was still listed as a compliant factory on the local environmental regulator's website when I first started my study in 2004.<sup>18</sup> The local enforcement authority must have truly thought that this factory was compliant when they told me: "This factory is one of our top performers, so why don't you go and study it." It was only after an enforcement campaign that same year when the inspectors began to do nightly inspections that they discovered the factory had been illegally discharging massive amounts of pollution under cover of night—a fact that local villagers had long known about and had even told me before. Had the regulators known this earlier, I would probably never have been able to carry out my research there.

Regulatory agencies in China have suffered from similar problems in detecting violations of regulatory law, including labor,<sup>19</sup> food safety,<sup>20</sup> environmental,<sup>21</sup> arable land protection,<sup>22</sup> and intellectual property rights<sup>23</sup>

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<sup>18</sup> For a more thorough account of this case study, see BENJAMIN VAN ROOIJ, *REGULATING LAND AND POLLUTION IN CHINA, LAWMAKING, COMPLIANCE AND ENFORCEMENT: THEORY AND CASES 196–202* (2006).

<sup>19</sup> Cooney, *supra* note 17, at 677; Yang Su & Xin He, *Street as Courtroom: State Accommodation of Labor Protests in South China*, 44 *LAW & SOC'Y REV.* 157, 162 (2010); Wang Yanhua (王燕华), *Laodong Jiancha Zhifa Banan* (劳动监察执法八难) [*Eight Problems in the Inspections and Enforcement of Labour Law*], *Zhongguo Renli Ziyuan Shehui Baozhang* (中国人力资源社会保障) [*HUM. RESOURCES & SOC. SECURITY CHINA*], no. 8, Aug. 2010, at 45, 45.

<sup>20</sup> Aleda V. Roth et al., *Unraveling the Food Supply Chain: Strategic Insights from China and the 2007 Recalls*, *J. SUPPLY CHAIN MGMT.*, no. 1, Jan. 2008, at 22; Liu Dong, *A Safety Net of Holes*, *GLOBAL TIMES* (May 30, 2011, 4:55 PM), <http://special.globaltimes.cn/2011-05/660197.html>.

<sup>21</sup> Benjamin van Rooij & Carlos H. W. Lo, *A Fragile Convergence, Understanding Variation in the Enforcement of China's Industrial Pollution Law*, 32 *L. & POL'Y* 14, 24–25, 30 (2010).

<sup>22</sup> VAN ROOIJ, *supra* note 18, at 271, 283, 294, 300, 352–53.

<sup>23</sup> See generally MERTHA, *supra* note 17, at 15–6, 133, 135–41; DIMITROV, *supra* note 17, at 186, 209–13, 225.

laws. Weak detection capacity is first of all a problem of workload.<sup>24</sup> The rapid growth of the economy is not matched by sufficient inspection resources, both in terms of personnel and equipment.<sup>25</sup> Sean Cooney notes, for instance, that China's 40,000 labor inspectors are supposed to inspect an estimated 30 million business entities.<sup>26</sup>

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<sup>24</sup> This is a problem evident in many emerging markets as well as in developing countries. See, e.g., David Stuligross, *The Political Economy of Environmental Regulation in India*, 72 PAC. AFF. 392 (1999); Nune Darbinyan & Hrach Ashikyan, *The Role of Environmental Enforcement in the Republic of Armenia: Steps toward Sustainable Development*, in SIXTH INTERNATIONAL CONFERENCE ON ENVIRONMENTAL COMPLIANCE AND ENFORCEMENT 131 (Jo Gerardu et al. eds., 2002), available at <http://www.inece.org/conf/proceedings1/ProceedingsBook%20131-136.pdf>; Silvia C. Nonna, *The Environment and Its Regulation in Argentina*, in SIXTH INTERNATIONAL CONFERENCE ON ENVIRONMENTAL COMPLIANCE AND ENFORCEMENT, *supra*, at 59, available at <http://www.inece.org/conf/proceedings1/ProceedingsBook%20%20%20%20%20%20%20%2059-72.pdf>; Florabelle Grenade-Nurse, *Decentralized Agencies with Overlapping Jurisdictions: A Problem for Enforcement*, in FIFTH INTERNATIONAL CONFERENCE ON ENVIRONMENTAL COMPLIANCE AND ENFORCEMENT 533 (Jo Gerardu et al. eds., 1998), available at <http://www.inece.org/5thvol1/nurse.pdf>; Victoria Ter-Nikoghosyan & Narine Karamian, *Armenian Bottleneck: Building Authorities and Public Groups Capacities for Environmental Enforcement*, in FIFTH INTERNATIONAL CONFERENCE ON ENVIRONMENTAL COMPLIANCE AND ENFORCEMENT, *supra*, at 85, available at <http://www.inece.org/5thvol1/ter-nikoghosyan.pdf>; Gil Nolet, *Environmental Enforcement in Latin American and the Caribbean*, in FIFTH INTERNATIONAL CONFERENCE ON ENVIRONMENTAL COMPLIANCE AND ENFORCEMENT, *supra*, at 535, available at <http://www.inece.org/5thvol2/nolet.pdf>; Wilson M.K. Masilingi, *Social-Economic Problems Experienced in Compliance and Enforcement in Tanzania*, in FOURTH INTERNATIONAL CONFERENCE ON ENVIRONMENTAL ENFORCEMENT 63 (Jo Gerardu & Cheryl Wasserman eds., 1994), available at <http://www.inece.org/3rdvol2/masilingi.pdf>; Ranjan K. Agarwal, *The Barefoot Lawyers: Prosecuting Child Labour in the Supreme Court of India*, 21 ARIZ. J. INT'L & COMP. L. 663 (2004); Michael Joseph McGuinness, *The Politics of Labor Regulation in North America: A Reconsideration of Labor Law Enforcement in Mexico*, 21 U. PA. J. INT'L ECON. L. 1 (2000); Nchunu Justice Sama, *Criminal Law and Environment, Prosecutors, Inspectors and Ngos in Cameroon*, in SEVENTH INTERNATIONAL CONFERENCE ON ENVIRONMENTAL ENFORCEMENT 1 (Jo Gerardu et al. eds., 2007), available at <http://inece.org/conference/7/vol1/Sama.pdf>.

<sup>25</sup> See Benjamin van Rooij, *Regulating Land and Pollution at Lake Dianchi: Lawmaking, Compliance and Enforcement in a Chinese and Comparative Perspective*, in MAKING LAW WORK: CHINESE LAWS IN CONTEXT 367, 384 (Mattias Burell & Marina Svenson eds., 2011); Cooney, *supra* note 17; Sean Cooney, *Making Chinese Labor Law Work: The Prospects for Regulatory Innovation in the People's Republic of China*, 30 FORDHAM INT'L L.J. 1050, 1066 (2006); van Rooij, *supra* note 7; CORNELIUS VAN DER MEER, WORLD BANK, CHINA'S COMPLIANCE WITH FOOD SAFETY REQUIREMENTS FOR FRUITS AND VEGETABLES: PROMOTING FOOD SAFETY, COMPETITIVENESS, AND POVERTY REDUCTION 54-55 (2006), available at [http://www.wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2007/08/02/000310607\\_20070802162742/Rendered/PDF/397660REPLACEMENT11109110703150CHINESE.pdf](http://www.wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2007/08/02/000310607_20070802162742/Rendered/PDF/397660REPLACEMENT11109110703150CHINESE.pdf).

<sup>26</sup> Cooney, *supra* note 17, at 677. See also van Rooij & Lo, *supra* note 21.

The problem of workload is compounded by resistance, obstruction, and even intimidation by the inspected enterprises. A common form of inspection resistance is what Wang Yanhua has summarized using the term 阳奉阴违 (*yangfeng yinwei*) (respectful by day, in violation at night).<sup>27</sup> This means that the firm is seemingly in compliance when there are inspections, but violations would resume as before once inspectors leave. A good example is the secret nightly discharges (偷排) (*toupai*) by factories with knowledge that environmental regulators hardly ever come to their premises at night, as in the case just discussed above. Some enterprises also obstruct inspectors by not letting them enter their premises, stalling them while they clear away evidence of violations, or sabotaging inspection possibilities.<sup>28</sup> Some inspectors have even had to fear for their safety: labor inspectors have reportedly been beaten and seriously harassed while investigating regulatory violations on site.<sup>29</sup> In one case, a milk production company in Zhuzhou, Hunan Province, first hindered food safety inspectors from entering their factory and then held them hostage for five hours.<sup>30</sup>

To deal with the high workload and limited inspection capacity, Chinese regulators, just like regulators elsewhere, have tried to prioritize inspection resources and focus on particular “bad apples.” This approach seems logical,<sup>31</sup>

<sup>27</sup> Wang, *supra* note 19, at 45.

<sup>28</sup> For examples from the field of environmental regulation, see van Rooij & Lo, *supra* note 21.

<sup>29</sup> See Laodong Jiancha Zhikun: Renyuan Jingfei Buzu Xianzhi Zhifa Jianguan Nengli (劳动监察之困: 人员经费不足限制执法监管能力) [*Troubles in Labour Inspections: A Lack of Staff and Resources Limits Enforcement and Inspection Capacity*], Sina Xinwen Zhongxin (Sina 新闻中心) [SINA NEWSCENTER] (Feb. 26, 2011, 6:30 PM), <http://news.sina.com.cn/c/sd/2011-02-26/183022019877.shtml>.

<sup>30</sup> An Rongda (安容达), Taizinai Wan Teshu Daiyu, Sizi Cagai Shengchan Riqi (太子奶玩特殊待遇, 私自篡改生产日期) [*Taizi Milk Plays a Game of Special Treatment, Secretly Changes the Production Date*], Jiankang Zhishi Wang (健康知识网) [HEALTH INFO. NET], <http://www.jk3721.com/html/jiankangzixun/200901/05-918.html> (last visited Aug. 4, 2012); You Changqiao (游昌乔), Junenggai “Shuangyangshui” Weiji Gongguan de Sida Shibai—2004 Weiji Gonggan Anli Pandian Zhi San (巨能钙“双氧水”危机公关的四大失败—2004年危机公关案例盘点之三) [*Four Major Failures in Juhua Gai’s “Oxyful” Public Relation Crisis—An Overview of Major Public Relation Crises in 2004, Part Three*], Quanqiu Pinpai Wang (全球品牌网) [GLOBRAND] (Feb. 24, 2009), <http://www.globrand.com/2009/162809.shtml>. For examples of environmental inspectors, see van Rooij & Lo, *supra* note 21.

<sup>31</sup> For more discussion on this type of approach to enforcement, see Peter J. May & Sören Winter, *Regulatory Enforcement and Compliance: Examining Danish Agro-Environmental Policy*, 18 J. POL’Y ANALYSIS & MGMT. 625 (1999); Eric Helland, *The Enforcement of Pollution Control Laws: Inspections, Violations and Self-Reporting*, 80 REV. ECON. & STAT. 141 (1998); EUGENE BARDACH & ROBERT A. KAGAN, *GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS* (1982); WORLD BANK, *GREENING INDUSTRY: NEW ROLES FOR COMMUNITIES, MARKETS AND GOVERNMENTS* (2000).

but it fails in practice if regulators lack sufficient information to properly distinguish between the good, the average, and the bad apples.<sup>32</sup> For instance, the aforementioned factory I studied during my fieldwork was incorrectly listed as being “in compliance” and was therefore not subject to extra inspections, because the regulator did not know about its violations and was unlikely to subject it to greater scrutiny in the first place. More importantly, as Cheng Xiang has shown, street level agents in everyday enforcement practice do not rank inspection targets based solely on who the worst violators are but rather on which cases are the ones that, if not handled, will create the most trouble for the agents involved, which unfortunately are not always the worst violators.<sup>33</sup>

### B. Reacting to Violations Through Sanctions

Regulatory enforcement in China has been weak due to not just a lack of knowledge about violations, but also a lack of action against regulatory transgressions. Regulators often issue mild sanctions against detected illegal activities, with the average environmental fines in 2006 only amounting to 10,000 RMB.<sup>34</sup> Sanctions are weak, in part, because regulatory agencies have insufficient legal authority. The maximum statutory fines in many regulatory areas are still rather low. This is especially the case for laws that provide for a set fine level with a specific maximum. For instance, the highest

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<sup>32</sup> Cf. May & Winter, *supra* note 31, at 629 (explaining that prioritization of inspections at particular high-risk categories of firms can indeed enhance the effectiveness of regulatory law enforcement, but “the difficulty is establishing in advance what constitutes these categories”); Benjamin van Rooij, *Greening Industry Without Enforcement? An Assessment of the World Bank’s Pollution Regulation Model for Developing Countries*, 32 LAW & POL’Y 127 (2010) (arguing that setting the right priorities in advance is difficult, as regulatory agencies often lack sufficient information about the regulated behavior to identify where the highest risks actually are, especially in developing countries).

<sup>33</sup> Based on Ph.D. research by Cheng Xiang and currently being prepared for a series of publications, available on file with the author. See also Cooney, *supra* note 25, at 1064.

<sup>34</sup> Guojia Huanjing Baohu Zongju (国家环境保护总局) [STATE ENVTL. PROT. ADMIN.], *Zhongguo Huanjing Tongji Nianbao 2006* (中国环境统计年报 2006) [CHINA ENVIRONMENT STATISTICAL REPORT 2006] (2007). Unfortunately, no data on the average fine have been made public after 2006.

administrative fine is 1 million RMB for water pollution violations,<sup>35</sup> 20,000 RMB for labor violations,<sup>36</sup> and 2 million RMB for mining violations.<sup>37</sup>

Recently, there have been some improvements. Chinese legislators have started to introduce a more flexible scheme, under which the fine at least approximates the damage. For instance, the highest fines for food-related violations are set at ten times the value of the food produced.<sup>38</sup> And for illegal land sales, the maximum fine is 50% of the illegal income from the transaction.<sup>39</sup> For pollution-related violations, the 2008 Water Pollution Prevention and Control Law similarly stipulates that the fine for irregular usage of environmental installations is one to three times the amount of pollution discharge fees that the company would normally have to pay.<sup>40</sup> Even more striking is a new rule in the same law that allows environmental regulators to fine an amount equal to between 20 to 30% of the damages caused by environmental accidents. This law boldly goes beyond existing environmental legislation such as the 2005 Solid Waste Pollution Prevention

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<sup>35</sup> Shui Wuran Fangzhi Fa (水污染防治法) [Law of Prevention and Control of Water Pollution] (promulgated by the Standing Comm. Nat'l People's Cong., Feb. 28, 2008, effective June 1, 2008) art. 75, 2008 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 215 [hereinafter Water Pollution Law], available at [http://www.gov.cn/flfg/2008-02/28/content\\_905050.htm](http://www.gov.cn/flfg/2008-02/28/content_905050.htm).

<sup>36</sup> Laodong Baozhang Jiancha Tiaoli (劳动保障监察条例) [Regulation on Labor Security Supervision] (promulgated by the St. Council, Nov. 1, 2004, effective Dec. 1, 2004) art. 30, ST. COUNCIL GAZ., Dec. 20, 2004, at 7, available at [http://www.gov.cn/banshi/2005-08/05/content\\_20619.htm](http://www.gov.cn/banshi/2005-08/05/content_20619.htm); Laodong Hetong Fa Shishi Tiaoli (劳动合同法实施条例) [Regulation on the Implementation of the Employment Contract Law] (promulgated by the St. Council, Sept. 18, 2008, effective Sept. 18, 2008) art. 35, ST. COUNCIL GAZ., Oct. 10, 2008, at 4, available at [http://www.gov.cn/zwgk/2008-09/19/content\\_1099470.htm](http://www.gov.cn/zwgk/2008-09/19/content_1099470.htm).

<sup>37</sup> Meikuang Anquan Jiancha Tiaoli (煤矿安全监察条例) [Regulation on Coalmine Security Supervision] (promulgated by the St. Council, Nov. 1, 2000, effective Dec. 1, 2000) art. 46, ST. COUNCIL GAZ., Jan. 20, 2001, at 26, available at [http://www.gov.cn/zwgk/2005-06/06/content\\_4375.htm](http://www.gov.cn/zwgk/2005-06/06/content_4375.htm).

<sup>38</sup> Shipin Anquan Fa (食品安全法) [Food Safety Law] (promulgated by the Standing Comm. Nat'l People's Cong., Feb. 28, 2009, effective June 1, 2009) art. 85, 2009 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 159 [hereinafter Food Safety Law], available at [http://www.gov.cn/flfg/2009-02/28/content\\_1246367.htm](http://www.gov.cn/flfg/2009-02/28/content_1246367.htm).

<sup>39</sup> Tudi Guanli Fa 2004 Xiuzheng (土地管理法 [2004 修正]) [Land Administration Law (2004 Amendment)] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 29, 1998, effective Jan. 1, 1999, revised Aug. 28, 2004) art. 73; 2004 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 566, available at [http://www.gov.cn/banshi/2005-05/26/content\\_989.htm](http://www.gov.cn/banshi/2005-05/26/content_989.htm); Tudi Guanli Fa Shishi Tiaoli (土地管理法实施条例) [Regulation on the Implementation of the Land Administration Law] (promulgated by the St. Council, Dec. 27, 1998, effective Jan. 1, 1999, revised Jan. 8, 2011) art. 38, <http://www.sxjs.gov.cn/DepartRead.aspx?CatalogId=226&refId=1816>.

<sup>40</sup> Water Pollution Law, *supra* note 35, art. 73. See also *id.* art. 74 (providing a similar fine, this time up to five times the discharge fee for discharging beyond the standards).

and Control Law, which also provides for a fine based on 30% of the damages but sets a maximum at 500,000 RMB.<sup>41</sup>

Regulators themselves have also started to test the boundaries of maximum fines. In 2009, the Ministry of Environmental Protection issued a notice directing authorized local enforcement agents to impose a new fine for each day that a regulated company remained in non-compliance.<sup>42</sup> The notice seems to violate the *ne-bis-in-idem* principle forbidding repeated sanctions for one violation of the law laid down in Article 24 of the 1996 Administrative Sanctions Law by stretching the rule under Article 51 of the same law, which allows an additional penalty of 3% of the original fine for each day that a fined enterprise fails to pay the original fine.<sup>43</sup> One noted example of the effect of these new rules is the record fine of almost 30 million RMB on Zijin Mining Company following a major pollution spill, imposed under the new rule that allows for a 30% fine of the 90 million RMB damages involved.<sup>44</sup>

But the problem of weak sanctions is more complex than the mere lack of legal authority to punish violations sternly. Even within current legal boundaries, regulators often do not use their existing sanction authority to its fullest extent. In environmental and land-related violations, for instance, my local research results have shown that agents usually would not charge more than 33% of the maximum fine.<sup>45</sup> The primary reason is that local regulators are mostly locally paid and managed, and thus do not want to disturb local economic development and industry.<sup>46</sup> This form of “local protectionism” (地

<sup>41</sup> Gutu Feiwu Wuran Huanjing Fangzhi Fa (固体废物污染环境防治法) [Law of Prevention and Control of Solid Waste Pollution to the Environment] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 29, 2004, effective Apr. 1, 2005) art. 69, 2005 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 5 [hereinafter Solid Waste Pollution Law], available at [http://www.gov.cn/flfg/2005-06/21/content\\_8289.htm](http://www.gov.cn/flfg/2005-06/21/content_8289.htm).

<sup>42</sup> Guanyu Huanjing Baohu Bu Yinfa “Guifan Huanjing Xingzheng Chufa Ziyou Cailiangquan Ruogan Yijian” de Tongzhi (关于环境保护部印发《规范环境行政处罚自由裁量权若干意见》的通知) [Notice on the Publication of “Several Opinions on Regulating the Discretion in Environmental Administrative Sanctions” by Ministry of Environmental Protection] (promulgated by the Ministry of Env'tl. Prot., Mar. 11, 2009, effective Mar. 11, 2009) art. 16, [http://www.gov.cn/gongbao/content/2009/content\\_1425346.htm](http://www.gov.cn/gongbao/content/2009/content_1425346.htm).

<sup>43</sup> Xingzheng Chufa Fa (行政处罚法) [Administrative Sanctions Law] (promulgated by the Nat'l People's Cong., Mar. 1, 1996, effective Oct. 1, 1996) arts. 24, 51, 1996 SUP. PEOPLE'S CT. GAZ. 75, available at [http://www.law-lib.com/law/law\\_view.asp?id=307](http://www.law-lib.com/law/law_view.asp?id=307).

<sup>44</sup> Zijin Fined US\$4.5m for Deadly Toxic Spill, CHINA.ORG.CN (Feb. 1, 2011), [http://www.china.org.cn/environment/2011-02/01/content\\_21859382.htm](http://www.china.org.cn/environment/2011-02/01/content_21859382.htm).

<sup>45</sup> VAN ROOIJ, *supra* note 18, at 300.

<sup>46</sup> For further discussion on regulators' reluctance to interfere with local economic development, see generally 2 LYNN T. WHITE, III, UNSTATELY POWER: LOCAL CAUSES OF CHINA'S INTELLECTUAL AND GOVERNMENTAL REFORMS (1999); RONALD C. KEITH & ZHIQIU LIN, NEW CRIME IN CHINA, PUBLIC ORDER AND HUMAN RIGHTS (2006); LIU RENWEN (刘仁文), Xingshi Zhengce Chubu (刑事政策初步) [INTRODUCTION TO CRIMINAL POLICY] (2004);

方保护主义) (*difang baohu zhuyi*) is one of the most common complaints about existing law enforcement practices.<sup>47</sup> Good examples have been detailed in my research on the enforcement of pollution and arable land protection laws in southwest China, where local enforcement agents did not act against polluting enterprises and illegal construction because enforcement conflicted with powerful local interests and was otherwise too difficult to carry out with the lack of resources and local support.<sup>48</sup> Scholars studying law enforcement against regulatory offenses such as piracy and intellectual property rights violations,<sup>49</sup> operation of illegal mines,<sup>50</sup> corruption,<sup>51</sup> and occupational health

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MICHAEL DUTTON, *POLICING CHINESE POLITICS: A HISTORY* (2005); Flora Sapio, *Implementing Anticorruption in the PRC: Patterns of Selectivity* (Ctr. for E. and Se. Asian Studies, Lund Univ., Working Papers in Contemporary Asian Studies No. 10, 2005); Xie Moqian (谢模乾), *Guanyu Gongan Jiguan Zhifa Huodong zhong Difang he Bumen Baohuzhuyi Wenti ji Zhili Duice* (关于公安机关执法活动中地方和部门保护主义问题及治理对策) [*Problems and Governance Solutions About Local and Bureau Protectionism in Public Security Enforcement*], *Zhongguo Dangzheng Ganbu Luntan* (中国党政干部论坛) [CHINESE CADRES TRIB.], no. 7, 1997, at 24; VAN ROOIJ, *supra* note 18; Li Ling, *The Sky Is High and the Emperor Is Far Away: The Enforcement of Intellectual Property Law in China*, 36 *BOLETIN MEXICAO DE DERECHO COMPARADO* 951 (2003), available at <http://www.ejournal.unam.mx/bmd/bolmex108/BMD10807.pdf>; Eric Priest, *The Future of Music and Film Piracy in China*, 21 *BERKELEY TECH. L.J.* 795 (2006); Andrews-Speed et al., *supra* note 9; Tim E. Pringle & Stephen D. Frost, "The Absence of Rigor and the Failure of Implementation": *Occupational Health and Safety in China*, 9 *INT'L J. ENV'T & HEALTH* 309 (2003).

<sup>47</sup> Zhang Yizhong (张义忠), *Zhifa zhong Baohuzhuyi Chengyin yu Fangfan* (执法中保护主义成因与防范) [*Causes and Countermeasures of Protectionism in Law Enforcement*], *Zhongguo Gongshang Guanliyanjiu* (中国工商管理研究) [STUDY ON CHINA ADMIN. FOR INDUSTRY & COM.], no. 5, 2003, at 18; Li Chaohui (李朝晖), *Gongan Zhifa Huodong zhong de Difang Baohuzhuyi Bumen Baohuzhuyi de Weihai Chengyin ji Duice* (公安执法活动中的地方保护主义部门保护主义的危害成因及对策) [*The Causes and Countermeasures for the Harm Done by Local and Departmental Protectionism in Public Security Law Enforcement Work*], *Shanxi Jingguan Gaodeng Zhuanke Xuexiao Xuebao* (山西警官高等专科学校学报) [J. SHANXI POLICE ACAD.], no. 4, 2001, at 24; Li Shiyuan & Cui Wei (李世源 & 崔巍), *Shi Nian lai Woguo Difang Baohuzhuyi Yanjiu Zongshu* (十年来我国地方保护主义研究综述) [*Overview of Ten Years of Research on China's Local Protectionism*], *Xueshu Jie* (学术界) [ACADEMICS CHINA], no. 2, 2006, at 249; Liu and Jiang, *supra* note 8, at 121–22.

<sup>48</sup> VAN ROOIJ, *supra* note 18, at 272–79, 299–300.

<sup>49</sup> DIMITROV, *supra* note 17, at 212–13; Li, *supra* note 46, at 982; Priest, *supra* note 46, at 823–24; Mertha, *supra* note 17; Zhang, *supra* note 47.

<sup>50</sup> Andrews-Speed et al., *supra* note 9, at 194–95.

<sup>51</sup> Flora Sapio argues that selective anti-corruption efforts stem from local interests. Flora Sapio, *Implementing Anticorruption in the PRC: Patterns of Selectivity* 37 (Ctr. for E. & Se. Asian Studies, Lund Univ., Working Paper No. 10, 2005).

and safety violations<sup>52</sup> have reached similar conclusions. This problem of weak enforcement is exacerbated by insufficient central level support. Despite increased support and investment in environmental and social issues since the Ninth Five-Year Plan, the central government has maintained economic growth targets that, in practice, are incompatible with the enforcement of economic, health, and environmental regulations at the local level.<sup>53</sup>

Enforcement agents, in addition to the resistance they face when conducting inspections, may also encounter harassment or threats from local industries when executing sanctions.<sup>54</sup> Martin Dimitrov provides telling examples where armed locals threatened tobacco regulators who had arrived to destroy locally produced illegal cigarettes and wrecked the inspectors' car with local police standing by. And in another case, a regulator working undercover was "blindfolded and abandoned in a mountain cave," while his four colleagues were surrounded by a mob of villagers.<sup>55</sup>

Perhaps the worst aspect of all is that sanctions have had a limited deterrent effect on the regulated behavior of enterprises. Unfortunately, we lack systematic data on the perception among company managers or workers towards sanction probability and severity, factors necessary for determining the deterrent effect.<sup>56</sup> But there is scattered evidence, as discussed above, of cases where there are structurally limited chances of being caught, and cases where even if caught, sanctions would only have a minor impact on the enterprise. A revealing example of how little deterrent effect some state enforcement practices have is a recent development I learned about from China's national environmental regulators: some companies had made paying fines for pollution-related violations of the law a part of their standard operating budget.<sup>57</sup> And thus violations of the law, even when met with fines and sanctions, become a normal aspect of business.

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<sup>52</sup> Tim E. Pringle & Stephen D. Frost, "The Absence of Rigor and the Failure of Implementation": *Occupational Health and Safety in China*, 9 INT'L J. OCCUPATIONAL & ENVTL. HEALTH 309 (2003).

<sup>53</sup> Van Rooij & Lo, *supra* note 21, at 20–21.

<sup>54</sup> They also do so against courts executing judgments. See Xu Xin & Tian Lu (徐昕 & 田璐), *Fayuan Zhixing zhong de Baoli Kanfa: 1983–2009* (法院执行中的暴力抗法: 1983–2009) [*Acts of Violent Resistance Against Judicial Enforcement: 1983–2009*], *Fazhi yu Shehui Fazhan* (法制与社会发展) [L. & SOC. DEV.], no. 1, 2011, at 3.

<sup>55</sup> DIMITROV, *supra* note 17, at 212.

<sup>56</sup> Cf. Dorothy Thornton, Neil A. Gunningham & Robert A. Kagan, *General Deterrence and Corporate Environmental Behavior*, 27 L. & POL'Y 262 (operationalizing general deterrence as the combination of perceptions by the regulated enterprise about the risk of being caught violating the law, the risk of being punished, and the severity of such punishment).

<sup>57</sup> Interview with anonymous inspector, Ministry of Env'tl Prot., in Beijing (July 17, 2009).

### C. Campaigns to Improve Enforcement

One way to deal with weak enforcement has been the organization of crackdowns and enforcement campaigns. Examples include campaigns against fake products, unsafe food, forced labor, illegal land usage, or industrial pollution.<sup>58</sup> As I have elaborated in detail in my earlier work, these campaigns have produced only short-term, stopgap effects and have become ritualized shows of effort rather than vehicles for sustained impact.<sup>59</sup> My fieldwork in southwest China traced the effects of an enforcement campaign against arable land protection law violations and another against pollution law violations. Being directly on site as the campaigns unfolded in the villages where the violations had taken place, I was able to trace how they were organized and what effects they had. In both campaigns, I saw that extra pressure on curbing particular violations forced regulators and local governments to increase their detection capacity and thereby unearthed violations that had gone unnoticed until then. Nevertheless, neither campaign had much long-term impact, as the underlying causes for violations—e.g., lack of structural regulatory capacity, local protectionism, and weak sanctions—were left unchecked. In the anti-pollution campaign, one heavily polluting firm was fined a mere 10,000 RMB, although it was found to have lied to inspectors for years. And in the arable land protection campaign, widespread illegal building practices were not punished at all. Instead, a plan for legalization was made but was never executed, as local companies did not have the funding to bear the costs of legalizing their land rights.<sup>60</sup> These findings are fully in line with studies of other campaigns, including those against corruption<sup>61</sup> and pirated goods,<sup>62</sup> and

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<sup>58</sup> For an overview, see Benjamin Van Rooij, *The Politics of Law in China: Enforcement Campaigns in the Post-Mao PRC* (Leiden Univ., Working Paper no. 25, 2009), available at <http://ssrn.com/paper=1368181>.

<sup>59</sup> For an in-depth study of these different campaigns and their effects, see *id.* For particular campaigns, see Andrews-Speed et al., *supra* note 9; MERTHA, *supra* note 17; Benjamin van Rooij, *Implementing Chinese Environmental Law Through Enforcement, the Shiwu Xiao and Shuangge Dabiao Campaigns*, in *THE IMPLEMENTATION OF LAW IN THE PEOPLE'S REPUBLIC OF CHINA* 149, 149–78 (Jianfu Chen et al. eds., 2002); Benjamin van Rooij, *Implementation of Chinese Environmental Law: Regular Enforcement and Political Campaigns*, 37 *DEV. & CHANGE* 57, 65–69 (2006) [hereinafter van Rooij, *Implementation of Chinese Environmental Law*]; VAN ROOIJ, *supra* note 18, at 306–51.

<sup>60</sup> VAN ROOIJ, *supra* note 18, at 331–32.

<sup>61</sup> MELANIE MANION, *CORRUPTION BY DESIGN: BUILDING CLEAN GOVERNMENT IN MAINLAND CHINA AND HONG KONG* 169–99 (2004).

<sup>62</sup> See sources cited *supra* note 17.

even the massive Strike Hard (严打) (*yanda*) campaigns against crime in general.<sup>63</sup>

Academics have questioned the simplicity of campaign-type law enforcement mentality that sees swiftness and harshness as a uniform solution to a wide range of problems.<sup>64</sup> As Sun Guoxiang has commented:

[Strike Hard] promotes the idea that all social problems should be dealt with using “severity”. . . . Why in the three main [Strike Hard] campaigns [organized in 1983, 1996, and 2001] have we been unable to break out of the cycle that crime cannot be completely defeated nor can it be completely prevented? It’s simple. Attacking crime does not eliminate crime. The ebb and flow in crime rates are connected closely to social contradictions, so significant reductions in crime cannot come about simply through the efforts of the criminal justice agencies.<sup>65</sup>

Similarly, Wang Mingliang has noted that there is no scientific evidence that the harsh approach against crime during Strike Hard paid off and helped reduce crime, as criminal behavior is too complex to be addressed through harsh punishment.<sup>66</sup> As An Congcong has argued, campaigns against crime can only be effective if their harshness is combined with other measures.<sup>67</sup> In the words of Dimitrov from his studies on campaigns against pirated goods: “Campaigns deliver high-quantity, but not necessarily high-quality enforcement.”<sup>68</sup>

Scholars have shown that even for enforcement campaigns where success was reported, the reported data were highly questionable. Murray Tanner

<sup>63</sup> LIU, *supra* note 46, at 346–80; WANG MINGLIANG (汪明亮), *Yanda de Lixing Pingjia* (严打的理性评价) [AN ANALYSIS OF THE RATIONALITY OF THE STRIKE HARD POLICY] 59–80 (2004).

<sup>64</sup> Susan Trevaskes, *Severe and Swift Justice in China*, 47 BRITISH J. CRIMINOLOGY 23, 38 (2007) (citing Sun Guoxiang [孙国祥], *Xingshi Yitihua Shiye xia “Yanda” de Lixing Sikao* [刑事一体化视野下“严打”的理性思考] [A Rational Reflection on Implementing an Integrated Vision of Criminal Justice Work into the Yanda Campaign], *Jiangsu Jingguan Xueyuan Xuebao* [江苏警官学院学报] [J. JIANGSU POLICE ACADEMY], no. 4, 2004, at 97); An Congcong (安聪聪), *Cong “Yanda” Kan Xingfa de Weixie Xiaoying* (从“严打”看刑罚的威慑效应) [Studying the Deterrent Effect of Penalties Under The “Strike Hard” Policy], *Shanghai Daxue Xuebao* (上海大学学报) [J. SHANGHAI UNIV.], no. 1, 2004, at 19; VAN ROOIJ, *supra* note 18, at 351, 355; WANG, *supra* note 62, at 42–44, 73.

<sup>65</sup> Trevaskes, *supra* note 63, at 38–39.

<sup>66</sup> WANG, *supra* note 63, at 73.

<sup>67</sup> An, *supra* note 64, at 22–23.

<sup>68</sup> DIMITROV, *supra* note 17, at 227.

describes, for example, how data had been doctored in the first Strike Hard campaign, quoting sources published in China that officials had “contrived numerous ways to artificially improve their statistics” to show satisfying results to superiors.<sup>69</sup> Tanner further notes that the high percentage of criminal cases solved during the early Strike Hard was the result of selecting cases that were easily solved rather than the severe and difficult cases that the campaign sought to address.<sup>70</sup> Even worse, during this early crackdown, people were arrested and cases labeled as solved, even when in fact the “key criminal offender” had never been apprehended.<sup>71</sup> Michael Dutton has also pointed out how police in the 1980s began to underreport crimes because of the extensive pressure they were under to clean up cases, thereby achieving 85 to 95% solution rates.<sup>72</sup>

Similar questions about the trustworthiness of data exist in regulatory campaigns as well. The anti-pollution violations campaigns serve as an example. State Environmental Protection Administration (SEPA) officials in Beijing have reported that they have had difficulty getting trustworthy local information and have been actively obstructed in doing so by local authorities.<sup>73</sup> As a result, they have resorted to conducting verification inspections and soliciting public involvement.<sup>74</sup>

Data are also untrustworthy because the local enforcement agents lack sufficient information on compliance behavior in the first place. Enforcement authorities therefore have no way of knowing exactly what percentage of violations they are addressing, nor are they able to verify whether the situations investigated are in compliance or not. In addition, there can be collusion between local enforcement agents and business enterprises to fabricate results. A good example is how during crackdowns on pirated goods in 2004, local shops in Kunming closed for a couple of days, so that inspectors could report them as being in compliance (or at least as being “not in violation”).<sup>75</sup> Right after the crackdown, shops reopened. One such shop was located right next to a local police station involved in the crackdown.

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<sup>69</sup> Murray Scot Tanner, *State Coercion and the Balance of Awe: The 1983–1986 “Stern Blows” Anti-Crime Campaign*, 44 CHINA J. 93, 123 (2000).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 124.

<sup>72</sup> DUTTON, *supra* note 46, at 282.

<sup>73</sup> Interview with a SEPA official, Beijing (Dec. 17, 2000).

<sup>74</sup> *Id.*

<sup>75</sup> Personal observation and interviews with shop owners in Kunming (2004).

#### D. Recentralization to Improve Enforcement

Another effort to improve enforcement has been to recentralize enforcement authority via top-down “vertical management” (垂直管理) (*chuishiguanli*), a more structural solution to end local protectionism. This reform began in the late 1990s in bureaucracies such as the Industry and Commerce Administration Bureau (1998),<sup>76</sup> the Bureau of Quality Technical Supervision (1999),<sup>77</sup> the Securities Regulatory Commission (1999),<sup>78</sup> the Drug Administration Bureau (2000),<sup>79</sup> the State Statistics Bureau (2004)<sup>80</sup>, and the Management Bureau of the Ministry of Land and Resources (2004).<sup>81</sup> These reforms were initiated from the center and assigned budget and management authority over sub-provincial bureaus to provincial-level bureaus in question.<sup>82</sup>

Another way that the central government has tried to reassert power over local-level enforcement has been the establishment of branch offices directly overseeing enforcement work in certain regions. This first began in 1998 with the People’s Bank of China establishing branch offices in nine regions across various provinces to strengthen regional macro-control and to foster greater

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<sup>76</sup> He Zhongzhou & Tang Jianguang (何忠洲 & 唐建光), “Chuishiguanli” Fengqi Yangdi Boyi: Quanli Bianjie Shangdai Qingxi (“垂直管理”风起 央地博弈: 权力边界尚待清晰) [“Vertical Management Reform” Starts a Game of Chess Between the Center and the Local: Boundaries of Authority Remain to Be Clarified], *Zhongguo Xinwen Wang* (中国新闻网) [CHINA NEWS] (Nov. 28, 2006, 9:46 AM), <http://www.chinanews.com.cn/gn/news/2006/11-28/828249.shtml>; Andrew C. Mertha, *China’s “Soft” Centralization: Shifting Tiao/Kuai Authority Relations*, 184 *CHINA Q.* 791, 794 (2005); Chen Zewei (陈泽伟), *Lengguan Zhengfu Chuishiguanli: Ying Heli Huafen Zhongyang Difangjian Zhize Quanxian* (冷观政府垂直管理: 应合理划分中央地方间职责权限) [A Disinterested Look at Vertical Management Reform: We Need to Rationally Divide Responsibilities and Competences Between the Center and the Local], *Xinhua Wang* (新华网) [XINHUA NET] (Nov. 14, 2006, 10:44 AM), [http://news.xinhuanet.com/politics/2006-11/14/content\\_5327315.htm](http://news.xinhuanet.com/politics/2006-11/14/content_5327315.htm).

<sup>77</sup> See sources cited *supra* note 76.

<sup>78</sup> See sources cited *supra* note 76.

<sup>79</sup> Mertha, *supra* note 76, at 795; He & Tang, *supra* note 76.

<sup>80</sup> He & Tang, *supra* note 76; Chen, *supra* note 76.

<sup>81</sup> Ye Hongling (叶红玲), Zui Yange de Gengdi Baohu Zhidu Shi Shenmo—Cong Bashi Nian de Tudi Guanlishi Kan Woguo Tudi Guanli Tizhi, Zhengce de Fazhan Bianhua yu Hexin Qushi (最严格的耕地保护制度是什么—从十八年的土地管理史看我国土地管理体制、政策的发展变化与核心趋势) [What Is the Strictest System to Protect Arable Land—Looking at Developments, Changes and Core Trends in China’s Land Management System and Policies from an Historical Perspective from the 1980s], available at *Zhongguo Tudi* (中国土地) [CHINA LAND], no. Z1, 2004, at 5, 6; Chen, *supra* note 76.

<sup>82</sup> Mertha, *supra* note 76.

independence from provincial governments.<sup>83</sup> In 2006, SEPA established five branches overseeing law enforcement work and six branches overseeing nuclear pollution law regulation in each of several provinces, all directly funded by and controlled from the center.<sup>84</sup> Other examples include plans by the Ministry of Land and Resources to set up nine inspectorate branch offices and the establishment of six inspectorates by the Ministry of Construction, all to be directly paid for and managed by the central-level ministries.<sup>85</sup>

Whether these recentralization efforts have been or will be successful in overcoming protectionism or weak law enforcement remains to be seen. And even after recentralization, the new non-local authorities would still face obstruction by local governments.<sup>86</sup> In some aspects, the reforms may have made matters worse. First of all, recentralization may cause chaotic coordination of law enforcement among bureaucracies, with departmental protectionism and fragmentation along vertical instead of horizontal lines.<sup>87</sup> Second, centralized bureaus may become stand-alone units with little exchange with central-level bureaus or local bureaus, as they are unlikely to exchange or rotate leadership or personnel.<sup>88</sup> Moreover, recentralized bureaus are in danger of being even more pressed for resources than local units<sup>89</sup> and may have to partly rely on local governments.<sup>90</sup> In some cases, the salaries of recentralized personnel have remained lower than those of personnel working in locally paid bureaucracies.<sup>91</sup> This last point has led to corruption concerns and doubts about whether the recentralized administrations will be effectively supervised, especially since they are far away from their direct managers and local people's congresses do not have the authority to supervise such recentralized units.<sup>92</sup> Finally, questions remain on how the vertical management reforms can solve the basic conflicts of interests between regulation and economic development, such as those between arable land

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<sup>83</sup> He & Tang, *supra* note 76.

<sup>84</sup> Chen, *supra* note 76. Note that the SEPA was converted into the Ministry of Environmental Protection in 2008.

<sup>85</sup> He & Tang, *supra* note 76.

<sup>86</sup> Mertha, *supra* note 76, at 804, 807.

<sup>87</sup> Mertha, *supra* note 76, at 806; DIMITROV, *supra* note 17, at 49–50.

<sup>88</sup> Mertha, *supra* note 76, at 806.

<sup>89</sup> *Id.* at 807.

<sup>90</sup> VAN ROOIJ, *supra* note 18, at 273.

<sup>91</sup> Mertha, *supra* note 76, at 791–80. In other cases, Chen Zewei actually observes salaries of centralized personnel may be much higher and this may create unfairness in the bureaucracy. See Chen, *supra* note 76, at 31–32.

<sup>92</sup> Mertha, *supra* note 76, at 805–06; Chen, *supra* note 76, at 31–32.

protection and economic development, that have in turn hampered law enforcement in certain areas.<sup>93</sup>

## II. CAN SOCIETY-BASED IMPLEMENTATION IMPROVE REGULATION?

All of this paints a bleak picture for the implementation of risk regulation in China. Low compliance and weak state enforcement have become mutually reinforcing, creating a vicious circle that undermines the implementation of regulatory law.<sup>94</sup> Such a vicious circle is embedded in and facilitated by a governance structure susceptible to the capture of state regulatory institutions by business elites.<sup>95</sup> Capture is fostered by unclear demarcation between state and market institutions,<sup>96</sup> the state's lack of steering and coordinating capacity,<sup>97</sup> and the dominance of informal networks over formal legal structures.<sup>98</sup> This creates a particularly challenging environment that undermines the capacity and independence of state enforcement authorities.

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<sup>93</sup> Chen, *supra* note 76, at 32.

<sup>94</sup> See Harel & Klement, *supra* note 16; Bar-Gill & Harel, *supra* note 16. Cf. Gjal Huppel & Robert A. Kagan, *Market-Oriented Regulation of Environmental Problems in the Netherlands*, 11 L. & POL'Y 215 (1989) (detailing how in the regulation of Dutch agricultural non-point pollution, the difficulties in monitoring compliance enhanced non-compliance and decreased the legitimacy of the regulation and its enforcement).

<sup>95</sup> See Clifford Russell & William Vaughan, *The Choice of Pollution Control Policy Instruments in Developing Countries: Arguments, Evidence and Suggestions*, in 7 INTERNATIONAL YEARBOOK OF ENVIRONMENTAL AND RESOURCE ECONOMICS 331 (Henk Folmer & Tom Tietenberg eds., 2003).

<sup>96</sup> See generally TONY SAICH, GOVERNANCE AND POLITICS OF CHINA (2001); KELLE S. TSAI, CAPITALISM WITHOUT DEMOCRACY: THE PRIVATE SECTOR IN CONTEMPORARY CHINA (2007); HUANG, *supra* note 2.

<sup>97</sup> See generally Mertha, *supra* note 76; Kenneth G. Lieberthal, *Introduction: The "Fragmented Authoritarianism" Model and Its Limitations*, in BUREAUCRACY, POLITICS, AND DECISION MAKING IN POST-MAO CHINA 1 (Kenneth G. Lieberthal & David M. Lampton eds., 1992).

<sup>98</sup> For discussion on the workings of *guanxi* in China, see generally Mayfair Yang, *The Resilience of Guanxi and Its New Development: A Critique of Some New Guanxi Scholarship*, 170 CHINA Q. 459 (2002); Yanjie Bian, *Guanxi and the Allocation of Urban Jobs in China*, 140 CHINA Q. 971 (1994); Pitman B. Potter, *Guanxi and the PRC Legal System: From Contradiction to Complementarity*, in SOCIAL CONNECTIONS IN CHINA: INSTITUTIONS, CULTURE, AND THE CHANGING NATURE OF GUANXI 179 (Thomas Gold ed., 2002); Ling Li, *Legality, Discretion and Informal Practices in China's Courts: A Socio-Legal Investigation of Private Transactions in the Course of Litigation* (June 29, 2010) (unpublished Ph.D. dissertation, Leiden University) [hereinafter Li, *Legality, Discretion and Informal Practices in China's Courts*], available at <https://openaccess.leidenuniv.nl/handle/1887/15737>; Ling Li, *Corruption in China's Courts*, in JUDICIAL INDEPENDENCE IN CHINA: LESSONS FOR GLOBAL RULE OF LAW PROMOTION 196 (Randall Peerenboom ed., 2010) [hereinafter Li, *Corruption in China's Courts*]; Ling

Is the whole situation hopeless then in China? Is any attempt to analyze the problems to find a path towards improvement just a “rearranging of the deck-chairs on the Titanic?” Or, to stay with the analogy, can we create some lifeboats to save as many passengers as we can?

#### A. Regulatory Governance and “Decentered” Regulation

Well, a first reassurance is that China is not unique nor the worst<sup>99</sup> in many of these problem areas. Many countries worldwide have found that state-centered systems to implement regulation are challenging and have also encountered problems with respect to effectiveness, efficiency, accountability, coordination, professionalization, and integrity. There is a large body of literature about regulation in member countries of the Organization for Economic Co-operation and Development (OECD) showing how difficult it is for state regulators to implement regulation, whether through deterrence,<sup>100</sup>

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Li, *Performing Bribery in China: Guanxi-Practice, Corruption with a Human Face*, 20 J. CONTEMP. CHINA 1 (2011) [hereinafter Li, *Performing Bribery in China*].

<sup>99</sup> Comparing China’s environmental regulation with Indonesia’s, for instance, one cannot but admit that China at least is making some effort and having some success with administrative sanctions against polluting industry. In contrast, Indonesia’s regulators have hardly been able to take any stern action at all. See John McCarthy & Zahari Zen, *Regulating the Oil Palm Boom: Assessing the Effectiveness of Environmental Governance Approaches to Agro Industrial Pollution in Indonesia*, 32 L. & POL’Y 153 (2010).

<sup>100</sup> There are mixed findings in criminological literature on the general deterrent effect of sanctions. While studies until the 1960s have found little deterrent effect in sanctions, later studies have found that certain kinds of sanctions for certain kinds of crimes and criminals can in fact have a deterrent effect. A common empirical finding in the criminological deterrence literature is that the perception of probability is more important than the perceived sanction severity. The same body of works has also found that persons that have been punished are more likely to offend again. For an overview, see Bruce A. Jacobs, *Deterrence and Deterrability*, 48 CRIMINOLOGY 417 (2010). See also Harold G. Grasmick & George J. Bryjak, *The Deterrent Effect of Percieved Severity of Punishment*, 59 SOC. FORCES 471 (1980); Harold G. Grasmick & Robert J. Bursik, Jr., *Conscience, Significant Others, and Rational Choice: Extending the Deterrence Model*, 24 LAW & SOC’Y REV. 837 (1990). In the regulatory literature, we encounter mixed findings similar to those in the criminological studies. We see, for instance, that sanction probability is more important than sanction severity and that there are certain kinds of regulatory norms that are complied with even when there are low perceptions of deterrence. In addition, scholars have questioned the reasonableness and feasibility of a deterrence approach to law enforcement and compliance. See Raymond J. Burby & Robert G. Paterson, *Improving Compliance with State Environmental Regulations*, 12 J. POL’Y ANALYSIS & MGMT. 753 (1993); Wayne B. Gray & John T. Scholz, *Analyzing the Equity and Efficiency of OSHA Enforcement*, 13 L. & POL’Y 185 (1991); Michael P. Vandenberg, *Beyond Elegance: A Testable Typology of Social Norms in Corporate Environmental Compliance*, 22 STAN. ENVTL. L.J. 55 (2003); Thornton, Gunningham & Kagan, *supra* note 56; David B. Spence, *The Shadow of the Rational Pollutor: Rethinking the Role of Rational Actor Models in Environmental Law*, 89 CALIF. L. REV. 917 (2001);

collaboration,<sup>101</sup> or mixed strategies.<sup>102</sup> In addition, there has been much criticism in OECD countries of state-led regulation burdening businesses with

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Richard Lempert, *Organizing for Deterrence: Lessons from a Study of Child Support*, 16 L. & SOC'Y REV. 513 (1981–1982); DANIEL NAGIN, GENERAL DETERRENCE: A REVIEW OF THE EMPIRICAL EVIDENCE (1975); BARDACH & KAGAN, *supra* note 31; Keith Hawkins, ENVIRONMENT AND ENFORCEMENT: REGULATION AND THE SOCIAL DEFINITION OF POLLUTION (1984); Marius Aalders & Ton Wilthagen, *Moving Beyond Command and Control: Reflexivity in the Regulation of Occupational Safety and Health and the Environment*, 19 L. & POL'Y 415 (1997); John Braithwaite & Toni Makkai, *Testing an Expected Utility Model of Corporate Deterrence*, 25 LAW & SOC'Y REV. 7 (1991); Kirk R. Williams & Richard Hawkins, *Perceptual Research on General Deterrence: A Critical View*, 20 LAW & SOC'Y REV. 545 (1986).

<sup>101</sup> On the other hand, cooperation-type enforcement has also been criticized. Critics have worried about how close ties between the regulator and the regulated can lead to lax compliance. See generally Neil Gunningham, *Negotiated Non-Compliance: A Case Study of Regulatory Failure*, 9 L. & POL'Y 69 (1987); BARDACH & KAGAN, *supra* note 31; May & Winter, *supra* note 31, at 646. Already in the 1950s, Marver Bernstein's book on independent commissions raised this issue when discussing how agencies can become captured by their regulated actor. See MARVER H. BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION (1955). A recent study on agro-environmental law enforcement in Denmark by May and Winter has also revealed that cooperative enforcement was undermined by capture-like effects. May & Winter, *supra* note 31, at 646. We can also add that a high degree of discretion in compliance-style enforcement, coupled with a monopoly on sanctions and issuing permits for sanctioned acts, can also have corruptive effects. This effect is especially salient for countries high on Transparency International's Corruption Perception Index. Robert Klitgaard has summarized this point in a formula: Corruption = Monopoly + Discretion - Accountability. ROBERT KLITGAARD, CONTROLLING CORRUPTION 75 (1988). See also Anthony Ogus, *Corruption and Regulatory Structures*, 26 L. & POL'Y 341 (2004).

<sup>102</sup> There has been much writing proposing to address the defects of the deterrent and the cooperative strategies through a pragmatic and responsive form of implementation, in which the regulator adapts its response to the behavior and attitude of the regulated actor. See, e.g., Robert Baldwin & Julia Black, *Really Responsive Regulation*, 71 MOD. L. REV. 59 (2008); IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION, TRANSCENDING THE DEREGULATION DEBATE (1992); John Braithwaite, RESTORATIVE JUSTICE AND RESPONSIVE REGULATION (2002); John Braithwaite, *Responsive Regulation and Developing Economies*, 34 WORLD DEV. 884 (2006) [hereinafter Braithwaite, *Responsive Regulation*]; Valerie Braithwaite, *Responsive Regulation and Taxation: Introduction*, 29 L. & POL'Y 3 (2007); Lars P. Feld & Bruno S. Frey, *Tax Compliance as the Result of a Psychological Tax Contract: The Role of Incentives and Responsive Regulation*, 29 L. & POL'Y 102 (2007); Laura I. Langbein, *Responsive Bureaus, Equity and Regulatory Negotiation: An Empirical View*, 21 J. POL'Y ANALYSIS & MGMT. 449 (2002); Sagit Leviner, *An Overview: A New Era of Tax Enforcement—From "Big Stick" to Responsive Regulation*, 2 REG. & GOVERNANCE 360 (2008). Recently, scholars have also been discussing the limits to this approach, as it is regarded as difficult if not impossible to implement and may, even when well implemented, not yield the expected effects of improving compliance. See Peter Mascini & Eelco Van Wijk, *Responsive Regulation at the Dutch Food and Consumer Product Safety Authority: An Empirical Assessment of Assumptions Underlying the Theory*, 3 REG. & GOVERNANCE 27 (2009); Vibeke Lehmann Nielsen & Christine Parker,

ineffective and unreasonable regulatory rules.<sup>103</sup> This has led to a search for alternative forms of regulation. Solutions were sought in the form of industry self-regulation,<sup>104</sup> co-regulation,<sup>105</sup> or enforced self-regulation<sup>106</sup> through voluntary instruments (sometimes combined with state regulation) or indirect economic incentive structures (instead of direct command and control norms that are deemed inefficient and ineffective).<sup>107</sup> At the same time, scholars have proposed engaging citizens in regulation, standard setting, information gathering on regulatory behavior, and behavior modification of regulated actors, i.e., influencing the behavior of regulated actors to comply with the regulatory norms.<sup>108</sup> Julia Black has summarized this move away from state-

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*Testing Responsive Regulation in Regulatory Enforcement*, 3 REG. & GOVERNANCE 376 (2009). Christine Parker has argued that while a mixed strategy of responsive regulation, using both formal sanctions as well as shaming techniques, might be effective to create stronger deterrence, it may also send the wrong moral message in cases where there is little support for the law that is being enforced, leading to reactance, resistance, and political action to change the law. See Christine Parker, *The "Compliance" Trap: The Moral Message in Responsive Regulatory Enforcement*, 40 LAW & SOC'Y REV. 591 (2006).

<sup>103</sup> See, e.g., BARDACH & KAGAN, *supra* note 31; ALBERT WEALE, *THE NEW POLITICS OF POLLUTION* (1992); NEIL GUNNINGHAM & DARREN SINCLAIR, *LEADERS AND LAGGARDS, NEXT-GENERATION ENVIRONMENTAL REGULATION* (2002); AYRES & BRAITHWAITE, *supra* note 100; *REGULATING FROM THE INSIDE: CAN ENVIRONMENTAL MANAGEMENT SYSTEMS ACHIEVE POLICY GOALS?* (Cary Coglianese & Jennifer Nash eds., 2001) [hereinafter *REGULATING FROM THE INSIDE*]; BENJAMIN HUNT, *THE TIMID CORPORATION: WHY BUSINESS IS TERRIFIED OF TAKING RISK* (2003).

<sup>104</sup> Marius Aalders, *Self-Regulation and Compliance with Environmental Law from a Global Perspective*, in *TOWARDS INTEGRATED ENVIRONMENTAL LAW IN INDONESIA* 21 (Nicole Niessen & Adriaan Bedner eds., 2003); Richard N. L. Andrews, *Environmental Regulation and Business 'Self-Regulation'*, 31 POL'Y SCI. 177 (1998); Andrew A. King & Michael J. Lenox, *Industry Self-Regulation Without Sanctions: The Chemical Industry's Responsible Care Program*, 43 ACAD. MGMT J. 698 (2000); Darren Sinclair, *Self-Regulation Versus Command and Control? Beyond False Dichotomies*, 19 L. & POL'Y 529 (1997); Anthony Ogus, *Rethinking Self-Regulation*, 15 OXFORD J. LEGAL STUD. 97 (1995).

<sup>105</sup> GUNNINGHAM & SINCLAIR, *supra* note 103, at 27.

<sup>106</sup> See, e.g., Robyn Fairman & Charlotte Yapp, *Enforced Self-Regulation, Prescription, and Conceptions of Compliance within Small Businesses: The Impact of Enforcement*, 27 L. & POL'Y 491 (2005).

<sup>107</sup> See, e.g., NEIL GUNNINGHAM ET AL., *SMART REGULATION, DESIGNING ENVIRONMENTAL POLICY* (1998); DANIEL J. FIORINO, *THE NEW ENVIRONMENTAL REGULATION* (2006); *REGULATING FROM THE INSIDE*, *supra* note 101.

<sup>108</sup> See, e.g., Bridget M. Hutter & Joan O'Mahony, *The Role of Civil Society Organizations in Regulating Business* (London Sch. of Econ. & Political Sci., Ctr. for Analysis of Risk & Regulation, Discussion Paper Series No. 26, Sept. 2004), available at <http://www2.lse.ac.uk/researchAndExpertise/units/CARR/pdf/DPs/Disspaper26.pdf>; Bridget M. Hutter, *The Role of Non-State Actors in Regulation* (London Sch. of Econ. & Political Sci., Ctr. for Analysis of Risk & Regulation, Discussion Paper Series No. 37, Apr. 2006),

based regulation mandating what economic actors should do to a broader mix of actors and instruments as a move towards “decentered regulation.”<sup>109</sup> John Braithwaite, Cary Coglianese, and David Levi-Faur have used the term “regulatory governance” to capture a similar historical process.<sup>110</sup> Meanwhile, Neil Gunningham, Peter Grabovsky, and Darren Sinclair have used the term “smart regulation” to indicate hybrid constellations of state, market, and societal regulatory instruments and implementation mechanisms.<sup>111</sup>

## B. Society-based Regulation

To improve regulation in China, citizens can play an important role by aiding implementation of regulatory law, as well as by assisting and supplementing government enforcement work.<sup>112</sup> Unlike state and enterprise actors, societal actors are less directly caught in the close state-enterprise relations that undermine current regulatory implementation.

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available at <http://eprints.lse.ac.uk/36118/1/Disspaper37.pdf>; Bridget M. Hutter & Clive J. Jones, *From Government to Governance: External Influences on Business Risk Management*, 1 REG. & GOVERNANCE 27 (2007); CHRISTOPHER HOOD et al., THE GOVERNMENT OF RISK: UNDERSTANDING RISK REGULATION (2001).

<sup>109</sup> Julia Black, *Critical Reflections on Regulation*, 27 AUSTL. J. LEGAL PHIL. 1 (2002).

<sup>110</sup> John Braithwaite et al., *Can Regulation and Governance Make a Difference?*, 1 REG. & GOVERNANCE 1 (2007).

<sup>111</sup> GUNNINGHAM ET AL., *supra* note 107, at 376–77.

<sup>112</sup> Of course, self-regulatory, voluntary, and market-based instruments are also relevant for China. In the field of environmental regulation, China has used pollution discharge fees since 1979. More recently it has started using tradable emission permits that are deemed more efficient and effective forms of regulation. It has also experimented with self-regulatory environmental management systems, clean production audits, and Corporate Social Responsibility systems for labor and social rights protection. And recently, the Chinese Ministry of Commerce has encouraged Chinese enterprises to adopt internal compliance management systems. These systems are beyond the scope of this Article, and I have addressed them in a comparative perspective in a different paper. See van Rooij, *supra* note 32. For more on this topic, see also WORLD BANK, *supra* note 31; Hua Wang, *Pollution Charge, Community Pressure and Abatement Cost: An Analysis of Chinese Industries* (World Bank, Policy Research Working Paper No. 2337, Nov. 2000), available at <http://web.worldbank.org/archive/website01004/web/images/pollutio.pdf>; Hua Wang & David Wheeler, *Pricing Industrial Pollution in China: An Econometric Analysis of the Levy System* (World Bank, Policy Research Working Paper No. 1644, Sept. 30, 1996), available at <http://go.worldbank.org/1UW2BXGQTo>; Hua Wang & David Wheeler, *Endogenous Enforcement and Effectiveness of China's Pollution Levy System*, (World Bank, Policy Research Working Paper No. 2336, May 31, 2000), available at <http://go.worldbank.org/DLTR46OIRo>; Hua Wang et al., *Environmental Performance Rating and Disclosure: China's Greenwatch Program* (World Bank, Policy Research Working Paper No. 2889, Sept. 30, 2002), available at <http://go.worldbank.org/WA7ETDNDDo>.

It is hopeful to know that OECD research shows that such societal forms of regulatory implementation can be effective. Robert Kagan, Neil Gunningham, and Dorothy Thornton have used the term “social license pressures” to show that apart from regulatory and economic licenses, firms also need a social license, i.e., support from local communities, to continue operations.<sup>113</sup> Their study of environmental regulation has shown that these state, market, and social forces can interact to develop and implement regulation.<sup>114</sup>

In non-OECD countries, there is a separate tradition of looking at the role of citizens as regulators. This tradition is not so much one of seeking an alternative to a state regulatory system deemed overly intrusive and inefficient, but rather an alternative to a non-functioning or even non-existent system of state regulation. Most of these studies, including those from Vietnam, Bangladesh, Mexico, and Indonesia, show that citizens can play three core regulatory roles—standard setting, information gathering, and behavior modification—even in contexts where the state has failed to do so.<sup>115</sup> As Braithwaite has concluded for developing countries in general, “[b]y utilizing NGOs and local social pressure, developing countries might develop a ‘regulatory society’ model, bypassing the regulatory state. Where capacity remains limited, private bounty hunting (such as fees for successful private prosecutions) may become an appealing tool for achieving certain regulatory objectives.”<sup>116</sup>

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<sup>113</sup> Robert A. Kagan et al., *Explaining Corporate Environmental Performance: How Does Regulation Matter?*, 37 LAW & SOC'Y REV. 51 (2003); NEIL GUNNINGHAM ET AL., *SHADES OF GREEN: BUSINESS REGULATION AND ENVIRONMENT* (2003); Neil Gunningham et al., *Social License and Environmental Protection: Why Businesses Go Beyond Compliance*, 29 LAW & SOC. INQUIRY 307 (2006).

<sup>114</sup> See sources cited *supra* note 113.

<sup>115</sup> See, e.g., Mainul Huq & David Wheeler, *Pollution Reduction Without Formal Regulation: Evidence from Bangladesh* (World Bank, Policy Research Working Paper #1993-39, Jan. 1993), available at <http://infohouse.p2ric.org/ref/22/21748.pdf>; Shakeb Afsah et al., *How Do Public Disclosure Pollution Control Programs Work? Evidence from Indonesia* (Res. for the Future, Discussion Paper No. 00-44, Oct. 2000), available at <http://rff.org/rff/Documents/RFF-DP-00-44.pdf>; Shakeb Afsah et al., *Controlling Industrial Pollution: A New Paradigm* (World Bank, Policy Research Working Paper No. 1672, Oct. 1, 1996), available at <http://go.worldbank.org/RQDLSI6M2o>; Shakeb Afsah et al., *Regulation in the Information Age: Indonesian Public Information Program for Environmental Management* (Mar. 1997) (World Bank, New Ideas in Pollution Regulation Working Paper), available at <http://siteresources.worldbank.org/NIPRINT/Resources/RegulationInTheInformationAge.pdf>; Allen Blackman & Geoffrey J. Bannister, *Pollution Control in the Informal Sector: The Ciudad Juarez Brickmakers' Project* (Res. for the Future, Discussion Paper No. 98-15, Feb. 1998), available at <http://www.rff.org/rff/Documents/RFF-DP-98-15.pdf>; DARA O'ROURKE, *COMMUNITY-DRIVEN REGULATION: BALANCING DEVELOPMENT AND THE ENVIRONMENT IN VIETNAM* (2004).

<sup>116</sup> Braithwaite, *Responsive Regulation*, *supra* note 102, at 884.

However, these studies also suggest that citizens are more successful as regulators if they are sufficiently educated, wealthy, and independent from the regulated industry, and if they are supported by state regulatory and judicial institutions.<sup>117</sup> My own work has demonstrated that social pressures play a very important role in the implementation of pollution and land regulation in southwestern China. Similar to Kagan, Gunningham, and Thronton,<sup>118</sup> I found that once there is a positive interaction or convergence of social, economic, and regulatory forces, a sustained implementation of regulation can be achieved.<sup>119</sup> However, I also found, similar to Allen Blackman's research on pollution control in Mexico,<sup>120</sup> that a converse interaction with economic and social forces against regulation can undermine implementation, in cases where both society and state actors are captured by economic interests opposed to regulation.<sup>121</sup>

In China's challenging context of implementing regulatory law, citizens can at least play two important roles: gathering and sharing information on the behavior of regulated actors, and taking legal and factual action to influence the behavior of these actors towards compliance with regulatory norms.<sup>122</sup> Chinese citizens seem to be rather well equipped to play the role of regulators, being reasonably well-educated with rising income levels and having a state that has a relatively strong regulatory and judicial capacity when compared to many other non-OECD countries. Admittedly, it may seem counterintuitive to look at the role of citizens in the implementation of regulatory law in China. Is China not an authoritarian state with limited freedom of speech, limited freedom of press and organization, and thus a highly constricted citizenry and civil society? At the same time, however, we should note that China is an authoritarian state where an embedded form of civic organizations has grown rapidly, especially in the fields of labor, health, and environment.<sup>123</sup> It is an authoritarian state with a commercialized state media, which reports increasingly on popular local injustices and scandals.<sup>124</sup>

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<sup>117</sup> O'ROURKE, *supra* note 115; van Rooij, *supra* note 32.

<sup>118</sup> GUNNINGHAM ET AL., *supra* note 113.

<sup>119</sup> VAN ROOIJ, *supra* note 18, at 376–77.

<sup>120</sup> Blackman & Bannister, *supra* note 115, at 21–23.

<sup>121</sup> VAN ROOIJ, *supra* note 18, at 245.

<sup>122</sup> Of course, citizens can also play a role in making regulatory norms. There are clear indications that they have started to do so, e.g., university professors acting as NGO leaders and legislative consultants, or lawmakers now having to stimulate public consultations upon publishing legislative drafts. As this Article focuses on implementation and not on lawmaking, this will not be discussed further here.

<sup>123</sup> See, e.g., CHINA'S EMBEDDED ACTIVISM: OPPORTUNITIES AND CONSTRAINTS OF A SOCIAL MOVEMENT (Peter Ho & Richard L. Edmonds eds., 2008).

<sup>124</sup> For a recent good overview of this development, see Susan Shirk, *Changing Media, Changing China*, in CHANGING MEDIA, CHANGING CHINA 1 (Susan L. Shirk ed., 2011);

And it is an authoritarian state that attempts to tightly control an increasingly growing, activist, and creative group of online netizens sometimes able to thwart or resist or mock such controls.<sup>125</sup> Moreover, it is an authoritarian state that has at times promoted media and popular supervision of local authorities and enforcement agencies failing in their duties.<sup>126</sup> In short, China may have become a post-totalitarian authoritarian state,<sup>127</sup> where citizens have developed and have been able to obtain some room to assume a regulatory role, albeit within the strong confines of the party-state.

Thus, it seems in theory that citizens in China can add inspection capacity to state regulators and potentially act more independently without being caught in the captured state-enterprise relationship. In addition, involving society is politically attractive: as the responsibility for regulation becomes a shared one, the blame is shared as well if things go wrong. Society-based implementation of regulation may therefore be just the medicine to cure China's regulatory failures. The question then becomes how citizens can do so in China's authoritarian context. The remainder of this Article will discuss how over the last decade China has increased opportunities for citizens to gather and share information on regulatory violations and initiate action to stop such violations. It will discuss these developments and evaluate the merits and limits of this new approach. First, it will analyze how citizens can assist in detecting violations of law. It will then address how they can take action against violations themselves, both through litigation as well as through collective action.

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Benjamin L. Liebman, *Changing Media, Changing Courts*, in CHANGING MEDIA, CHANGING CHINA, *supra*, at 150; JUDY POLUMBAUM & XIONG LEI, CHINA INK: THE CHANGING FACE OF CHINESE JOURNALISM (2008).

<sup>125</sup> See generally GUOBIN YANG, THE POWER OF THE INTERNET IN CHINA (2009); Xiao Qiang, *The Rise of Online Public Opinion and Its Political Impact*, in CHANGING MEDIA, CHANGING CHINA, *supra* note 124, at 202; Johan Lagerkvist, *Legal Legitimacy in China: The Case of "Black Internet Cafés"*, in MAKING LAW WORK: CHINESE LAWS IN CONTEXT, *supra* note 25, at 291–92; Han Li et al., *Understanding Compliance with Internet Use Policy from the Perspective of Rational Choice Theory*, 48 DECISION SUPPORT SYS. 635 (2010); Lokman Tsui, *The Panopticon as the Antithesis of a Space of Freedom, Control and Regulation of the Internet in China*, 17 CHINA INFO. 65 (2003).

<sup>126</sup> Deng Xiaobing & Feng Yuanyuan (邓小兵 & 冯渊源), *Xibu Xingzheng Zhifa Huanjing yu Yulun Jiandu Hudong Huanxi Yanjiu* (西部行政执法环境与舆论监督互动关系研究) [*Research on the Interaction Between Administrative Enforcement and Supervision by Public Opinion in Western China*], *Xingzheng Faxue Yanjiu* (行政法学研究) [ADMIN. L. REV.], no. 1, 2009, at 69, 70–73.

<sup>127</sup> EDWARD S. STEINFELD, PLAYING OUR GAME: WHY CHINA'S RISE DOESN'T THREATEN THE WEST 6–7 (2010).

### III. CITIZENS AS “BAREFOOT INSPECTORS”

Reliable information on the behavior of regulated actors, including *who* does *what* and *where*, is a precondition for regulation and “regulability.”<sup>128</sup> A lack of this information is perhaps the Chinese regulatory system’s most important Achilles heel: even if regulators want to regulate, they cannot do so due to a lack of trustworthy information about the *who*, *what* and *where* of regulatory transgressions. A promising turn is that reforms of the last decade or so may enable Chinese citizens to start acting as “barefoot inspectors,” gathering and sharing information on regulatory violations and the behavior of regulated enterprises.

#### A. Potential, Form, and Impact of Society-based Information

My fieldwork in southwest China has taught me about the potential of citizens as informants of regulated behavior. As discussed in Part I.A, local authorities were confident enough of a local factory’s compliance not only to list it on their website but even to send me, a foreign researcher, to study it. Following a couple of weeks of building trust in the locality, I slowly began to learn what the villagers knew was happening in the factory. They told me that the factory was operating mainly at night and very little during the day. They also told me that at night there were sometimes large discharges that gave off a strong, penetrating smell. I learned that, following several illegal spills, the villagers’ fish had died and their crops had turned red. And during all this time, regulators that I was also interviewing knew nothing about it.<sup>129</sup>

Chinese citizens have several means to share information on regulated actors. They can directly turn to state regulatory authorities, through written complaints, visits, or calls to various hotlines set up locally and nationally. Submitting such complaints to the government has become an important channel for citizens use to deal with grievances. In 2004, there were 13 million petitions, as compared to 4 million first instance court cases.<sup>130</sup> Over the last decade or so, there has been a rapid increase of environmental complaints,

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<sup>128</sup> Cf. LAWRENCE LESSIG, *CODE: AND OTHER LAWS OF CYBERSPACE*, VERSION 2.0, at 23 (2006). Lessig uses the term “regulability” to denote the “capacity of a government to regulate behavior within its proper reach.” This requires knowledge about who is regulated, where they are, and what they are doing.

<sup>129</sup> For details, see VAN ROOIJ, *supra* note 18.

<sup>130</sup> Ethan Michelson, *Justice from Above or Below? Popular Strategies for Resolving Grievances in Rural China*, 193 *CHINA Q.* 43, 49 (2008). It is difficult to compare national numbers since 2005, as the counting mechanism has changed and no longer counts multiple complaints for the same grievance to different organs. See Benjamin L. Liebman, *A Populist Threat to China’s Courts?*, in *CHINESE JUSTICE: CIVIL DISPUTE RESOLUTION IN POST-REFORM CHINA* 269, 275–76 (Margaret Y. K. Woo & Mary E. Gallagher eds., 2011).

rising steadily to approximately 700,000 in 2010.<sup>131</sup> Similarly, there has also been a rise of complaints to the labor inspectorates about labor-related transgressions, resulting in over 600,000 complaints in 2010.<sup>132</sup>

Another channel through which citizens address regulatory violations is the media. The commercialized state media is increasingly interested in reporting local injustices.<sup>133</sup> Highly popular investigative journalism programs produced by CCTV, the national television station, regularly feature reports concerning labor, pollution, land, mining, and food safety issues, often based on tips from locals. In one recent example, CCTV aired a show about the adverse effects of fake traditional cures, based on a mother's eight-month-long investigation after she discovered that her son had fallen ill from such treatment. Following the program, the chain of bathhouses involved was ordered shut down by relevant governmental regulators.<sup>134</sup> Another example of the positive impact of information sharing through the media is the efforts taken by civic organizations over the last year to draw attention to

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<sup>131</sup> For the growth in the number of complaints from 1999 to 2009, compare STATE ENVTL PROT. ADMIN., *Zhongguo Huanjing Tongji Nianbao 1999* (中国环境统计年报 1999) [ANNUAL STATISTIC REPORT ON ENVIRONMENT IN CHINA 1999] (2000), with STATE ENVTL PROT. ADMIN., *Zhongguo Huanjing Tongji Nianbao 2010* (中国环境统计年报 2010) [ANNUAL STATISTIC REPORT ON ENVIRONMENT IN CHINA 2010] (2011) [hereinafter ENVIRONMENTAL STATISTIC REPORT 2010].

<sup>132</sup> Guojia Tongji Ju (国家统计局) [NAT'L BUREAU OF STATISTICS] et al., *Zhongguo Laodong Tongji Nianjian 2010* (中国劳动统计年鉴 2010) [CHINA LABOUR STATISTICAL YEARBOOK 2010] 369 (2011).

<sup>133</sup> Informal media are also increasingly important. Citizens have shared information online concerning cases of corruption or injustice, sometimes organizing themselves as so-called "human flesh search engines" (人肉搜索) (*renrou sousuo*) through which they publish information online about officials or businessmen perceived to have engaged in unjust or corrupt behavior. For an example of how such online action has helped to regulate corruption, see Wangluo "Renrou Sousuo" Fawei, Chou Tianjiayan Juzhang Xiama (网络"人肉搜索"发威, 抽天价烟局长下马) [*Internet Human Flesh Search Engines Shows Its Power, Bureau Chief Who Smokes Exorbitantly-Priced Cigarettes Resigns*], Xinhua Wang (新华网) [XINHUA NET] (Dec. 30, 2008, 3:29 PM), [http://news.xinhuanet.com/video/2008-12/30/content\\_10581169.htm](http://news.xinhuanet.com/video/2008-12/30/content_10581169.htm) (discussing the resignation by a Chengdu bureau chief after photos of him smoking expensive cigarettes and wearing designer watches surfaced online); Che Hui (车辉), Nanjing "Tianjiayan" Shijian: Renrou Sousuo Kaoyan Xiangguan Bumen Lixing, (南京"天价烟"事件: 人肉搜索考验相关部门的理性) [*Nanjing "Exorbitantly-Priced Cigarette" Case: Human Flesh Engine Tests the Rationality of Departments*], Xinhua Wang (新华网) [XINHUA NET] (Dec. 24, 2008, 1:16 PM), [http://news.xinhuanet.com/politics/2008-12/24/content\\_10552697.htm](http://news.xinhuanet.com/politics/2008-12/24/content_10552697.htm) (same).

<sup>134</sup> Sichuan Yansu Chachu "Tianpopo Xijiutang" Daliang Guke Shangmen Tuikuan (四川严肃处理"田婆婆洗灸堂"大量顾客上门退款) [Sichuan Province Strictly Deals with the Tian Grandma Bubble Shop, Many Customers Demand Refund], Chengdu Quan Sousuo (成都全搜索) [CHENGDU SEARCH] (Mar. 17, 2011, 7:07 AM), [http://news.chengdu.cn/content/2011-03/17/content\\_670153.htm](http://news.chengdu.cn/content/2011-03/17/content_670153.htm).

occupational health and pollution violations at Apple's sub-contractors. These contractors had been using the poisonous chemical substance n-hexane to clean iPhone and iPad screens, resulting in severe illnesses among workers. A report published by an alliance of NGOs in January 2011 and subsequently published in China<sup>135</sup> and the international media<sup>136</sup> compelled Apple to acknowledge the problem, name the sub-contractors involved, and promise to address the issue.<sup>137</sup>

## B. Promotion of Barefoot Inspectors

Given a high workload and limited inspection capacity, Chinese regulators have had to rely on a reactive enforcement style, detecting violations of law through citizen complaints.<sup>138</sup> Over the last decade, regulators have started to directly encourage citizens to come forth with their complaints. For example, environmental authorities in Zhejiang Province, facing secret nightly discharges of factories that they could not inspect themselves, offered rewards to local citizens for valid tips.<sup>139</sup> As a result, local peasants became full-time quasi-inspectors, spending night after night on their mopeds moving from factory to factory to catch illegal discharges. This local experiment became part of the national environmental enforcement policy when enforcement campaigns introduced public participation hearings, hotlines, and rewards for successful information.<sup>140</sup> And with the introduction of the 2005 State Council Regulations on Letters and Visits,<sup>141</sup> the party-state introduced a general

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<sup>135</sup> Pingguo de Lingyimian (苹果的另一面) [*The Other Face of Apple*], Gongzhong Huanjing Yanjiu Zhongxin (公众环境研究中心) [INST. OF PUB. & ENVTL. AFFAIRS] (Jan. 20, 2011), [http://www.ipe.org.cn/Upload/file/%E8%8B%B9%E6%9E%9C%E7%9A%84%E5%8F%A6%E4%B8%80%E9%9D%A2\\_Final-2011019-2.pdf](http://www.ipe.org.cn/Upload/file/%E8%8B%B9%E6%9E%9C%E7%9A%84%E5%8F%A6%E4%B8%80%E9%9D%A2_Final-2011019-2.pdf).

<sup>136</sup> See, e.g., *Chinese Workers Urge Apple to Act on N-Hexane Poisoning*, THE GUARDIAN (Feb. 22, 2011, 4:50 AM), <http://www.guardian.co.uk/world/2011/feb/22/chinese-workers-apple-nhexane-poisoning>.

<sup>137</sup> See David Barboza, *Workers Sickened at Apple Supplier in China*, N.Y. TIMES, Feb. 23, 2011, at B1, available at <http://www.nytimes.com/2011/02/23/technology/23apple.html>; Stanley James & Adam Satariano, *Apple Opens Suppliers' Doors to Labor Group After Foxconn Worker Suicides*, BLOOMBERG (Jan. 13, 2012, 4:54 PM), <http://bloomberg.com/news/2012-01-13/apple-opens-suppliers-doors-to-labor-group-after-foxconn-worker-suicides.html>.

<sup>138</sup> VAN ROOIJ, *supra* note 18, at 283–88.

<sup>139</sup> *Id.* at 341.

<sup>140</sup> *Id.*

<sup>141</sup> The most important mechanism by which the party-state supports and institutionalizes citizens to report regulatory transgression is the letters and visits petitioning system (信访) (*xinfang*), through which citizens can lodge complaints. Relied upon by the state since the 1950s, the petitioning complaints system has served

reward system for citizens who submit valid complaints and comments that “aid national economic and social development or that help the functioning of governmental institutions or the protection of social public interests.”<sup>142</sup>

Higher levels of the state have also encouraged citizen participation and information gathering as a form of additional oversight of local governments, in an effort to prevent state actors from protecting local industry and shirking their enforcement duties. A good example is what a central-level Ministry of Environmental Protection Official told me more than a decade ago. He stated that when he visited provinces for inspections, local governments would arrange visits to model factories and provide highly positive reports of local improvements. To get more reliable information, he organized public hearings and established hotlines to collect information independently of the local authorities.

Such citizen-based oversight has a longer history. We can find it in the contemporary “letters and visit” complaints petition system that, according to Carl Minzner, has served an important governance function of enabling higher authorities to check local government behavior through citizens.<sup>143</sup> It is also evident in Article 41 of the 1982 Chinese Constitution, which gives citizens the right to criticize and comment on the government and government officials.<sup>144</sup> Moreover, it is discernable in major national speeches and policy documents. For instance, in 2005, Prime Minister Wen Jiabao stated: “Only when the people supervise the government can we prevent that the government slackens.”<sup>145</sup> And in the same year, the national work report included a broader policy to stimulate media oversight of governmental authorities and bureaus.<sup>146</sup>

The adoption of open government information regulations, most notably the 2007 Regulations on Open Government Information and the 2008 Measures on Open Environmental Information,<sup>147</sup> have further enabled

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as a channel for the state to obtain better information on lower levels of administration, which have often willingly tried to fool their superiors. See Carl F. Minzner, Xinfang: *An Alternative to Formal Chinese Legal Institutions*, 42 STAN. J. INT’L L. 103 (2005).

<sup>142</sup> Xinfang Tiaoli (信访条例) [Regulations on Letters and Visits] (promulgated by the St. Council, Jan. 5, 2005, effective May 1, 2005) art. 8, ST. COUNCIL GAZ., Mar. 20, 2005, at 4, available at [http://www.gjxfj.gov.cn/2005-01/18/content\\_3583093.htm](http://www.gjxfj.gov.cn/2005-01/18/content_3583093.htm).

<sup>143</sup> Minzner, *supra* note 141, at 117–18.

<sup>144</sup> XIANFA art. 1, § 41 (1982).

<sup>145</sup> Deng & Feng, *supra* note 126, at 70.

<sup>146</sup> *Id.*

<sup>147</sup> Zhengfu Xunxi Gongkai Tiaoli (政府信息公开条例) [Regulations on Open Government Information] (promulgated by the St. Council, Apr. 5, 2007, effective May 1, 2007), ST. COUNCIL GAZ., May 30, 2007, at 15, available at [http://www.gov.cn/zwgk/2007-04/24/content\\_592937.htm](http://www.gov.cn/zwgk/2007-04/24/content_592937.htm); Huanjing Xunxi Gongkai Banfa (Shixing) (环境信息公开办法 [试行]) [Measures on Open Environmental Information (Test)] (promulgated by the Ministry Env’tl. Prot., Apr. 11, 2007, effective May 1, 2007), <http://www.gov.cn/flfg/2007->

citizens to gather and share information on regulatory behavior and enforcement. The 2002 Environmental Impact Assessment Law has instituted a public participation system allowing citizens to come forward with information on future construction and planning projects.<sup>148</sup> Other existing Chinese laws also contain clear provisions under which the party-state acknowledges the importance of citizens in supplementing information on regulatory and governmental behavior, in areas including soil conservation, dangerous chemicals, and housing demolition regulation.<sup>149</sup> A recent and

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04/20/content\_589673.htm. Implementation of these regulations has had mixed results, as will be discussed in more detail below. See also Jamie P. Horsley, CHINA LAW CTR., YALE LAW SCH., *Update on China's Open Government Information Regulations: Surprising Public Demand Yielding Some Positive Results*, FREEDOMINFO.ORG (Apr. 23, 2010), <http://www.freedominfo.org/2010/04/update-on-china-open-government-information-regulations>; ARTICLE 19 & CTR. FOR LEGAL ASSISTANCE TO POLLUTION VICTIMS, *ACCESS TO ENVIRONMENTAL INFORMATION IN CHINA: EVALUATION OF LOCAL COMPLIANCE* (2010), available at <http://www.article19.org/data/files/pdfs/reports/access-to-environmental-information-in-china-evaluation-of-local-compliance.pdf>.

<sup>148</sup> Li Boyong (李伯勇), Vice Chairman, Quanguo Renda Falü Weiyuanhui (全国人大法律委员会) [Law Comm. of the Nat'l People's Cong.], Guanyu "Zhonghua Renmin Gongheguo Huanjing Yingxiang Pingjia Fa (Caoan)" Shenyi Jieguo de Baogao (关于《中华人民共和国环境影响评价法(草案)》审议结果的报告) [Report on the Review Results of the "Environmental Impact Evaluation Assessment Law (Draft)"], STANDING COMM. NAT'L PEOPLE'S CONG. GAZ., Nov. 15, 2002 at 501, available at <http://www.law-lib.com/fzdt/newshtml/20/20050822192455.htm>; Jiujie Quanguo Renda Changweihui di Sanshi ci Huiyi Fenzu Shenyi Huanjing Yingxiang Pingjia Fa (Caoan) de Yijian (九届全国人大常委会第三十次会议分组审议环境影响评价法(草案)的意见) [*Opinions on the Environmental Impact Assessment Law (Draft) by the Standing Committee of the Ninth National People's Congress, Thirtieth Subpanel Discussion*], in *Zhonghua Renmin Gongheguo Huanjing Yingxiang Pingjia Fa Shiyi* (中华人民共和国环境影响评价法释义) [GUIDE AND EXPLANATION TO THE ENVIRONMENTAL IMPACT ASSESSMENT LAW] (Bian Yaowu [卞耀武] ed., 2003).

<sup>149</sup> Examples of such other laws include: (1) Xingzheng Jiancha Fa (行政监察法) [Law on Administrative Supervision] (promulgated by Nat'l People's Cong, June 25, 2010, effective June 25, 2010) art. 6, 2010 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 468 ("Supervision shall rely on citizens. Supervision department shall establish reporting system: citizens, legal persons and other organizations have right to sue or report officials' discipline transgressions to supervision department. Supervision department shall accept the reporting and investigate . . ."); (2) Shuitu Baochi Fa (水土保持法) [Water and Soil Conservation Law] (promulgated by Nat'l People's Cong, Dec. 25, 2010, effective Mar. 1, 2011) art. 8, 2011 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 4 ("Any units and individuals . . . have the right to report behaviors which cause water and soil resources destroyed or soil erosion."); (3) Weixian Huaxuepin Anquan Guanli Tiaoli (危险化学品安全管理条例) (Measures for the Safety Management of Hazardous Chemicals) (promulgated by the State Council, Mar. 2, 2011, effective Dec. 1, 2011) art. 9, ST. COUNCIL GAZ., Mar. 20, 2011, at 5 ("Any units and individuals . . . have the right to report transgressions to the department responsible for the safety management of hazardous chemicals. Such department shall duly deal with the reporting after receiving a report; for a report for which the receiving department does not have jurisdiction, it shall be

noteworthy example is a new local regulation in Guangdong Province rewarding citizens who report foreigners that outstay their visa or carry out illegal labor.<sup>150</sup>

### C. Limitations of Society-based Data Gathering and Sharing

There are, however, severe limitations to the role that citizens can play as barefoot inspectors. First, citizens do not always have information about the regulated behavior. This is not surprising, since one of the basic arguments for regulation and intervention in markets is to overcome information asymmetry.<sup>151</sup> The more visible and simple the regulated behavior, the more likely citizens will have information about it. While citizens have easier access to information about contractual labor affairs (such as payment arrears and working hours) and noise pollution, they have less information on occupational health, food safety, and water pollution. Citizens also often lack ex-ante information about regulated behavior and only find out about it once the negative effects of such behavior have manifested, as in the case of the melamine milk powder incident. Also, the more complex the linkage is between the cause and the effect of the violation, the less likely it is that citizens will be able to get timely information. In some cases of environmental health hazards, realization that local pollution was causing cancer among the locals took decades.<sup>152</sup> As a result, the collection and supply of information to relevant government actors were stalled.

Second, limits on the type of information available to citizens and the types of citizens who have access to information create a bias in the potential effects of citizen-based regulation. Consider, for instance, that 37% of all environmental complaints in 2010 concerned noise pollution, while only 13%

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duly transferred to related.”); (4) Guoyou Tudishang Fangwu Zhengshou yu Buchang Tiaoli (国有土地上房屋征收与补偿条例) (Regulation on the Expropriation of Building on State-owned Land and Compensation) (promulgated by the St. Council, Jan. 21, 2011, effective Jan. 21, 2011) art. 7, ST. COUNCIL GAZ., Jan. 31, 2011, at 17 (“Any units and individuals have the right to report transgressions to the relevant government, housing expropriation department and other related departments. The recipient government, department, housing expropriation department and other related departments shall duly inspect and address the report.”).

<sup>150</sup> Mimi Lau, *Guangdong Rule Urges Residents to Flush out Foreigners Who Overstay*, S. CHINA MORNING POST (Mar. 31, 2011), <http://www.scmp.com/portal/site/SCMP/menuitem.2af62ecb329d3d7733492d9253a0a0a0/?vgnnextoid=eb875782217of210VgnVCM100000360a0a0aRCRD>.

<sup>151</sup> ROBERT BALDWIN & MARTIN CAVE, UNDERSTANDING REGULATION: THEORY, STRATEGY AND PRACTICE 12 (1999); Friedrich A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REVIEW 519 (1945); STEPHEN BREYER, REGULATION AND ITS REFORM 26–28, 161–64 (1982).

<sup>152</sup> For examples, see Benjamin van Rooij, *The People vs. Pollution: Understanding Citizen Action against Pollution in China*, 19 J. CONTEMP. CHINA 55, 59–60 (2010).

were about water pollution.<sup>153</sup> Also, there is a clear correlation between income levels and complaints,<sup>154</sup> thereby indicating that a system of regulation that relies too heavily on citizens for its implementation could strengthen income inequalities, causing additional social and environmental injustice.

Third, even when citizens have sufficient information and have developed grievances, they may not necessarily share that information with those outside their immediate community despite being asked by the state or the media to do so. For example, only 4.7% of Chinese farmers who have lost their land without proper compensation have submitted a complaint petition to the authorities.<sup>155</sup>

One reason underlying their reluctance to come forward with information on regulatory violations, even those from which they have suffered harm, is that citizens need to think it is beneficial to share that information. In the cases of labor violations, workers may be unwilling to cooperate with labor inspectors out of fear of losing their job or income altogether.<sup>156</sup> And at one of my fieldwork sites, during nearly three decades of pollution with severe financial and health consequences, local citizens only tried to complain to local regulators *once*. They did so in 1985, when they contacted the township authorities, the lowest level of government. That this complaint resulted in nothing at the time—except that the factory sent two cars, allegedly packed with gifts for the township cadre—may explain why later no further action was taken. By 2009, the locals felt: “If the EPB comes to fine Linchang [the polluting company] and takes their money, is it not better that this [money] stays here and villagers can get it?”<sup>157</sup> Thus, citizens need to have a certain amount of trust in the institutions they contact and perceive that information sharing is useful for them before they would come forward. Here, it is interesting to note that local environmental authorities in the case above never managed to encourage such trust. When completing local environmental impact assessments, for instance, they never actually consulted with local villagers as mandated by law. Instead, they simply wrote in each assessment the same single line that the local villagers welcomed the factory’s expansion plans for economic growth and were not concerned with possible risks.<sup>158</sup> There is no indication that they ever communicated with local citizens about their inspections or about the few times that they did issue a fine.

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<sup>153</sup> Air pollution also made up about 35% of the complaints, with solid waste receiving only about 2%. See, e.g., ENVIRONMENTAL STATISTIC REPORT 2010, *supra* 131.

<sup>154</sup> Van Rooij & Lo, *supra* note 21, at 15.

<sup>155</sup> Li et al., *supra* note 7, at 425.

<sup>156</sup> Wang, *supra* note 19 at 45.

<sup>157</sup> Benjamin van Rooij et al., *The Compensation Trap: Chinese Lessons About the Limits of Community Based Regulation*, 29 PACE ENVTL. L. REV. 701, 734–35 (2012).

<sup>158</sup> *Id.* at 716.

Likewise, before citizens are willing to share information with the media, they must also think that doing so is beneficial. While many citizens probably think that media coverage may help advance their cause, unscrupulous reporters in some cases have elicited reporting fees for coming down to the locality and reporting on the violations.<sup>159</sup> In other cases, citizens have been less willing to share information with the media. After an explosion in a factory in southwestern China killed several workers in 2008, local citizens refused to talk to the media that had come to their locality. They explained that after watching investigative journalism programs concerning local injustices for more than a decade, they did not believe that those shows had led to any real change: "If you live here [in this polluted village], it is not like on T.V. where just one airing on central television can solve your problem."<sup>160</sup>

#### D. Governmental Limits on Information Gathering and Sharing

The important lesson here is that mere knowledge about the regulated behavior that has caused grievances<sup>161</sup> is not enough for citizens to play a successful role as barefoot inspectors. Instead, citizens must also perceive that sharing information is beneficial, which is in part a strategic decision<sup>162</sup> and in part a matter of trust in state institutions and the media. But trust in state institutions and the media is not promoted by a government that, while encouraging citizens to help detect violations, also obstructs them in getting and sharing relevant information. Although some laws and policies have prompted citizens to make complaints, other laws have restricted their ability to do so. For example, the 2005 Regulations on Letters and Visits have limited the ways for citizens to voice their complaints to higher levels of government by requiring that they present their complaint to the corresponding or the next higher level of government and that higher-level authorities refuse petitions that are still being handled at lower levels.<sup>163</sup> The regulations restrict

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<sup>159</sup> Kathinka Fürst, *Access to Justice in Environmental Disputes: Opportunities and Obstacles for Chinese Pollution Victims* (Dec. 6, 2008) (unpublished M.A. thesis, University of Oslo), available at <http://www.duo.uio.no/sok/work.html?WORKID=79072&lang=en>.

<sup>160</sup> Interview with Baocun villager (May 12, 2009).

<sup>161</sup> Cf. William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming*, 15 LAW & SOC'Y REV. 631 (1980-1981) (arguing that the process of disputes involves claimants first *naming* their grievance, before finding someone to *blame* and thus making a *claim*; the naming part involves knowing that one has suffered a cause for complaint and thus knowledge about a violation of a legal norm).

<sup>162</sup> Anna Lora-Wainwright, *An Anthropology of "Cancer Villages": Villagers' Perspectives and the Politics of Responsibility*, 19 J. CONTEMP. CHINA 79, 84 (2010).

<sup>163</sup> Regulations on Letters and Visits, *supra* note 142, art. 16.

the number of citizens allowed to present their complaints in person at a specific government office to no more than five.<sup>164</sup> They further introduce stricter punishment for irregular or illegal complaints, including the broadly worded behavior of “inciting, colluding with, coercing or enticing others with money or things of value to write letters or make visits, or manipulating others from behind the scenes into doing so.”<sup>165</sup> The regulation is careful, however, to prevent strong government responses against petitioners submitting complaints. Article 47, for instance, provides that in dealing with irregular petitions, officials must first try persuasion, criticism, and education, and to engage the public security bureaus only if those other measures fail.<sup>166</sup> In addition, Article 46 imposes criminal sanctions on government actors that criminally retaliate against petitioners.<sup>167</sup>

Moreover, China still operates an authoritarian system of information control that seeks to regulate in detail what citizens can and cannot know. The China Digital Times website provides a regular account of how Chinese propaganda authorities tightly control the media. In a section called “The Latest Directives from the Ministry of Truth,” the website shows how Chinese censorship works in detail, with week by week reports of the various news that may not be reported and the detailed instructions on how certain national and international news items are to be communicated.<sup>168</sup> Chinese citizens thus live, and grow up, in a context with tightly controlled news. This can severely undermine not only their access to information, but also their trust in governmental information and their willingness to share information with the government and the government-controlled media.

It is not just information about the government that is controlled, but any information deemed sensitive for whatever reason by the authorities involved, whether central or local. Topics subject to restrictions on information collection may include construction safety, food safety, pollution, and land usage. Such cases often concern local enterprises and sometimes local governments, but rarely do they involve matters of national security or the Chinese Communist Party (CCP). Local authorities have, for instance, obstructed parents of children poisoned by metal pollution from gathering information on the pollution and its effects on their loved ones.<sup>169</sup> Another example is how Tan Zuoren, a citizen activist, was arrested and sentenced to five years in jail for seeking to find out why so many schools collapsed in the

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<sup>164</sup> *Id.* art. 18.

<sup>165</sup> *Id.* art. 20.

<sup>166</sup> *Id.* art. 47.

<sup>167</sup> *Id.* art. 46.

<sup>168</sup> See Xiao Qiang, *Ministry of Truth: Reporting Wen Jiabao’s Speech*, CHINA DIGITAL TIMES (Mar. 14, 2012, 3: 26 PM), <http://chinadigitaltimes.net/china/ministry-of-truth>.

<sup>169</sup> HUMAN RIGHTS WATCH, “MY CHILDREN HAVE BEEN POISONED”: A PUBLIC HEALTH CRISIS IN FOUR CHINESE PROVINCES 5 (2011), available at <http://www.hrw.org/node/99451>.

2008 Sichuan Earthquake and whether their construction had followed the safety regulations.<sup>170</sup>

Willingness to come forward with information and trust in state institutions have also been eroded by the risks of retaliation. Although by law, Chinese citizens have the right to share information about regulatory violations and enforcement with the relevant authorities, and have at times been encouraged directly to do so, those that file complaints about violations or sub-standard enforcement practices cannot do so without risk. Dangers they face include arrest, harassment, prosecution, and in the worst cases, detention in black jails or psychiatric wards, sometimes for years.<sup>171</sup> In one case in Hebei, local police arrested citizens seeking to file a collective complaint about pollution on charges of instigating public turmoil and detained them for six weeks. Following their release, the petitioners initiated an administrative lawsuit and reached a settlement with the local government on compensation. Nonetheless, after the administrative suit was dropped, the activists were again arrested, prosecuted, and tried for blackmail and instigating acts of turmoil against social order. In the first instance, the defendants were found guilty and sentenced to three to four years in prison. They later won on appeal, and the case was retried. In the second trial, this case drew national media attention, but this media attention did not affect the retrial verdict. Three of the representatives again received similar prison sentences, in addition to fines and even compensation to the factory that had been operating illegally.<sup>172</sup>

Complaints about land-related regulatory transgressions provide further examples of the risks of sharing information on regulatory violations. In Qincun, a village some two hundred kilometers south of Kunming, Yunan Province, local authorities unlawfully took some 100 Mu of arable land from villagers for the benefit of a landscape theme park development project without adequate compensation. Dissatisfied, one of the local villagers bought some legal books and found that their rights had been violated. When a second batch of land was to be taken, he tried to file a complaint with municipal and provincial-level governments to stop the local township and district authorities from taking the land illegally without full payment. The district authorities reacted by arresting this villager, whom other local villagers had started calling their own "Deng Xiaoping."<sup>173</sup>

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<sup>170</sup> Profile: Tan Zuoren, BRIT. BROADCASTING COMPANY (Feb. 9, 2010, 5:12 PM), <http://news.bbc.co.uk/2/hi/8506763.stm>.

<sup>171</sup> Sharon LaFraniere & Dan Levin, *Assertive Chinese Held in Mental Wards*, N.Y. TIMES, Nov. 12, 2010, at A1, available at <http://www.nytimes.com/2010/11/12/world/asia/12psych.html>; Jane Parry & Weiyuan Cui, *China's Psychiatric Hospitals Collude with Officials to Stifle Dissent, Say Civil Rights' Groups*, BRIT. MED. J. BMJ (June 25, 2010), <http://www.bmj.com/content/340/bmj.c3371.extract>; HUMAN RIGHTS WATCH, "WE COULD DISAPPEAR AT ANY TIME": RETALIATION AND ABUSES AGAINST CHINESE PETITIONERS (2005), available at <http://www.hrw.org/reports/2005/china1205/china1205wcover.pdf>.

<sup>172</sup> Van Rooij, *supra* note 152, at 67.

<sup>173</sup> Interviews during fieldwork in Kunming, China (July 2006).

The Qincun petition-related arrest is not an isolated event in China. In the Shishan village of Fujian Province, Lin Zengxu, who had for years tried to stop illegal land grabbing without just compensation and had recently filed a complaint about illegal land practices, was arrested by a local police squad of twelve men as he napped one afternoon.<sup>174</sup> The police gave Lin a severe beating and wanted to take him away to jail. At the time, family, neighbors, and friends were able to fight off the police and rescue him, and Lin later escaped to Beijing. And in Qingkou, another town in Fujian, Xiao Xiangjin, another leader of a peasant protest movement against illegal land seizures who had filed a petition with higher level authorities, tried to escape the police when they came to arrest him in the middle of the night. Although he was able to flee initially, he was detained and questioned in Fuzhou, Fujian's capital, when boarding a plane to Beijing to file a petition with the central government. He was later arrested and sent to a "re-education through labor" (劳教) (*laojiao*) camp "for having entertained prostitutes four times in his home and office at Qingkou."<sup>175</sup> That only the provincial-level authorities would have been able to detain Xiao at Fuzhou airport goes to show how high up the local protectionism in these kinds of cases can run.

When even provincial-level authorities are involved in protecting and covering up local land abuses, the central government in Beijing becomes the last resort. Given the flood of petitioners turning to the national capital, it is not surprising that many have been detained in Beijing or sent straight back to their hometown, in an effort to control central-level complaining.<sup>176</sup> Local governments nowadays have special agents that specifically track and escort petitioners back to their locality.<sup>177</sup> From all this, we can conclude that China's stimulation of citizens to act as barefoot inspectors is increasingly halfhearted; at worst, the role of citizens as barefoot inspectors is directly obstructed by the same governmental authorities that promoted and theoretically needed it in the first place.

#### **E. How Incentive Structures Obstruct Information Sharing and Cause Destabilization**

The institutional design of the complaints system, designed to unearth official misconduct, paradoxically fosters such misconduct. As Carl Minzner

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<sup>174</sup> Edward Cody, *China's Land Grabs Raise Specter of Popular Unrest, Peasants Resist Developers and Local Officials*, WASH. POST, Oct. 5, 2004, at A1.

<sup>175</sup> *Id.*

<sup>176</sup> See HUMAN RIGHTS WATCH, *supra* note 169, at 46–60; Phan, *supra* note 7, at 607–08.

<sup>177</sup> Flora Sapio has a paper in progress that is not yet out for publication but provides an excellent overview of this practice. Flora Sapio, *Legal Erosion and the Policing of Petitions* (Apr. 11, 2011) (unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1815830](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1815830).

and Benjamin Liebman have noted, there is an inherently contradictory incentive structure in place: increasingly, government authorities, even judges, are negatively evaluated if their decisions lead to complaints, and especially if those complaints involve larger groups, go to higher levels, or are combined with other forms of action.<sup>178</sup> Cheng Xiang's research has also shed light on the effects that complaints can have on local officials. In X city in southeastern China where Cheng conducted his research, local agents could lose up to twenty points in their performance evaluations for each petition to provincial-level authorities related to the agents' duties. A loss of sixty points, or three provincial level petitions, could lead to termination under the local cadre evaluation system.<sup>179</sup>

As a result of these incentive structures, some authorities have sought to hush citizen complaints and keep them as local as possible. But the same incentive structures also stimulate citizens to do just the opposite, as citizens soon learn that moving up to higher levels and acting in larger groups are more likely to solicit a greater response to their grievances. By making more trouble for the local authorities with their complaints in a system that punishes local authorities for social unrest, citizens can create a better bargaining position vis-à-vis these authorities.<sup>180</sup> Nevertheless, doing so may also increase the sensitivity of their case and the chances of repression from the local authorities that stand to lose much if the complaints reach their superiors. This may in turn cause new local grievances that reach even higher levels. Alternatively, this risk of escalation may dissuade citizens from complaining at all and sharing valuable information that state regulators need.

#### IV. CITIZENS AS REGULATORY LITIGATION PLAINTIFFS

If providing information about regulatory violations does not prove to be sufficiently effective, Chinese citizens can also try more direct courses of action to influence the regulated behavior and implement regulatory law. One such course of action is going to court and suing regulated actors to end their violations.

##### A. Stimulating Regulatory Litigation Possibilities

The good news is that over the last fifteen years, the possibilities for Chinese citizens and civic actors to take legal action directly against regulatory

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<sup>178</sup> Liebman, *supra* note 130, at 301-06; Minzner, *supra* note 141, at 151-54.

<sup>179</sup> Based on Ph.D. research by Cheng Xiang and currently being prepared for a series of publications, available on file with the author.

<sup>180</sup> YONGSHUN CAI, COLLECTIVE RESISTANCE IN CHINA: WHY POPULAR PROTESTS SUCCEED OR FAIL 9 (2010).

violations through litigation have increased. There has been a move away from the state-dominated model of implementation of the 1980s and the early 1990s towards one that uses broader civil law instruments such as property, contract, and tort law. Specifically, there has been a marked change in the liability (责任) (*zeren*) sections of Chinese regulatory laws, which set forth the legal consequences of violations. This shift has opened up extended and easier tort action possibilities for plaintiffs: reduced burden of proof for citizen plaintiffs (especially for proving causation),<sup>181</sup> no-fault liability,<sup>182</sup> quasi-punitive damages,<sup>183</sup> prioritization of payment of civil compensation over payment of administrative or criminal fines,<sup>184</sup> and collective litigation.<sup>185</sup>

Labor law exemplifies this shift of emphasis from state institutions to citizens in the implementation of regulatory law as well. The Labor Law of 1995 mostly provided for implementation mechanisms that rely on state labor authorities or the criminal justice system.<sup>186</sup> For example, failure to pay wages is addressed chiefly by the labor inspectorate ordering payment, rather than allowing workers to take action in the courts themselves.<sup>187</sup> Civil liability is largely described as secondary to administrative and criminal enforcement.<sup>188</sup> The Labor Contract Law of 2008, in contrast, has provisions that enable participation by workers whose rights are violated. Article 82, for instance, provides that for every month that a company fails to enter into a signed contract with its workers (or a tenured contract if legally obliged to do so), the company has to pay the worker double salary.<sup>189</sup> Article 87 requires a payment of double salary for illegal termination of contract.<sup>190</sup> These new rules stand in stark contrast to Article 98 of the old law, which stated that if an employer

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<sup>181</sup> See, e.g., Solid Waste Pollution Law, *supra* note 41, art. 86; Water Pollution Law, *supra* note 35, art. 87.

<sup>182</sup> See, e.g., Solid Waste Pollution Law, *supra* note 41, art. 84; Water Pollution Law, *supra* note 35, art. 85.

<sup>183</sup> See, e.g., Food Safety Law, *supra* note 38, art. 96; Laodong Hetong Fa (劳动合同法) [Labor Contract Law] (promulgated by the Standing Comm. Nat'l People's Cong., June 29, 2007, effective Jan. 1, 2008) arts. 82, 87, 2007 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 410 [hereinafter Labor Contract Law].

<sup>184</sup> See, e.g., Food Safety Law, *supra* note 38, art. 97.

<sup>185</sup> Water Pollution Law, *supra* note 35, art. 88 (reaffirming a rule for collective litigation in China's Civil Procedure Law).

<sup>186</sup> See Laodong Fa (劳动法) [Labor Law] (promulgated by the Standing Comm. Nat'l People's Cong., July 5, 1994, effective Jan. 1, 1995) arts. 89–93, 94–96, 98, 100–01, 1994 SUP. PEOPLE'S CT. GAZ. 91 [hereinafter Labor Law].

<sup>187</sup> *Id.* art. 91.

<sup>188</sup> The exception is void contracts, for which only civil liability is mentioned.

<sup>189</sup> Labor Contract Law, *supra* note 183, art. 82.

<sup>190</sup> *Id.* art. 87.

illegally terminates a contract or deliberately refuses to enter into a contract, relevant administrative authorities shall order the employer to rectify this situation, and only secondarily stated that the employer shall be liable to the worker when there are damages.<sup>191</sup>

Another field evidencing this legal shift is land law. The 1998 Land Administration Law codified thirty-year land use rights and collective property rights for farmers but primarily focused on the role of state authorities in policing the law's norms on illegal transfers, sales, usage, requisitions, and expropriations.<sup>192</sup> It further provided that governmental authorities responsible for allowing illegal requisitions and land usage should be liable for any damages.<sup>193</sup> But aside from these implementation norms, which are mainly about the protection of collective ownership as a whole and the regulation of land usage, the 1998 law did not elaborate on the remedies available to farmers themselves when their land use rights are violated. In contrast, the 2003 Rural Land Contract Law sets forth an implementation system that chiefly operates on civil liability, by establishing civil liability for violation of farmers' land use rights in general,<sup>194</sup> as well as for other unlawful actions such as illegal land reallocations, violations of land production sovereignty rights, and forced land transfers.<sup>195</sup> The law provides that such unlawful transactions shall be void and thereby grants farmers extra rights to protect themselves without involving administrative authorities or their enforcement action.<sup>196</sup>

Apart from these substantive regulatory laws, auxiliary laws have also opened up possibilities for citizens to pressure the state to address violations and provide transparency. The 2008 Regulations on Open Government Information grant Chinese citizens the right to access governmental information, including information on the government's enforcement performance and monitoring data,<sup>197</sup> in theory making it easier for citizens to obtain evidence for their regulatory litigation.

In recent years, civic organizations have enjoyed better opportunities for taking direct action in court. This is especially true in the field of environmental protection, where newly established environmental courts have started to experiment with allowing public interest litigation in which the

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<sup>191</sup> Labor Law, *supra* note 186, art. 98.

<sup>192</sup> Regulation on the Implementation of the Land Administration Law, *supra* note 39, arts. 73-74, 76-77, 80-81.

<sup>193</sup> *Id.* art. 77, § 2.

<sup>194</sup> Nongcun Tudi Chengbao Fa (农村土地承包法) [Law on the Contracting of Rural Land] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 29, 2002, effective Mar. 1, 2003) art. 53, 2002 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 347 [hereinafter Rural Land Contract Law].

<sup>195</sup> *Id.* art. 54.

<sup>196</sup> *Id.* arts. 55, 57.

<sup>197</sup> See Regulations on Open Government Information, *supra* note 147.

plaintiffs do not need to have a special interest in the case.<sup>198</sup> Meanwhile, public interest lawyers and legal aid centers have been growing since the 1990s and are suited to supporting citizens in pursuing regulatory litigation for consumer safety, labor, or environmental issues.<sup>199</sup>

## B. Some Numbers and Positive Findings

Citizens have most clearly made use of these expanded possibilities for regulatory litigation in the field of labor and intellectual property rights (IPRs). The 2008 Labor Contract Law and the financial crisis seemed to have spurred the number of labor disputes to unprecedented heights, with an increase of 100% in 2008 and a further increase of 10% in 2009, pushing the number of labor-related court cases up to 317,000 in 2009, compared to a mere 126,000 in 2006.<sup>200</sup> In the field of IPRs, there has also been an immense growth in the number of cases.<sup>201</sup>

At the same time, other fields such as environment, land, and food safety, have seen much less litigation. For example, of the many Chinese farmers who have lost their land without proper compensation, only 0.90% have gone to court.<sup>202</sup> And while there are approximately 700,000 environmental complaints annually<sup>203</sup>—compared to around 600,000 labor complaints<sup>204</sup>—there are only about 3000 environmental court cases each year,<sup>205</sup> less than 1% of the number of labor court cases. Actually, the growth of labor and IPR litigation may be

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<sup>198</sup> Alex L. Wang & Jie Gao, *Environmental Courts and the Development of Environmental Public Interest Litigation in China*, 3 J. CT. INNOVATION 37, 43 (2010). Under Article 55 of the newly amended Civil Procedure Law, public interest standing is now recognized by law for particular types of cases, such as environmental and consumer rights cases, and for particular organizations as designated by law. As no laws have yet designated what organizations have public interest standing, the new law leaves further details to future legislation. See Minshi Susong Fa (民事诉讼法) [Civil Procedure Law] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 9, 1991, effective Apr. 9, 1991, amended Oct. 28, 2007 and Aug. 31, 2012) art. 55, <http://www.lawtime.cn/faguizt/41.html> [hereinafter Civil Procedure Law].

<sup>199</sup> See Hualing Fu & Richard Cullen, *The Development of Public Interest Litigation in China* 4–13 (Nov. 23, 2009) (unnumbered working paper), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1512085](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1512085).

<sup>200</sup> *China's Labour Dispute Court Cases Increase by over Ten Percent in 2009*, CHINA LABOUR BULLETIN (2010), <http://www.china-labour.org.hk/en/node/100706>.

<sup>201</sup> DIMITROV, *supra* note 17, at 105.

<sup>202</sup> Keliang Zhu et al., *The Rural Land Question in China: Analysis and Recommendations Based on a Seventeen-Province Survey in 2005*, 38 N.Y.U. J. INT'L L. & POL. 761, 783 (2006).

<sup>203</sup> ENVIRONMENTAL STATISTIC REPORT 2010, *supra* note 131, at 207.

<sup>204</sup> CHINA LABOR STATISTICAL YEARBOOK, *supra* note 132, at 369.

<sup>205</sup> Van Rooij, *supra* note 152, at 55.

exceptions to the rule that Chinese citizens suffering from regulatory violations generally do not go to court<sup>206</sup> given the many obstacles to successful regulatory litigation.

Although a lack of data complicates the systematic analysis of litigation outcomes and the impact of regulatory litigation, there are at least some indications of success. One can think of landmark cases, such as the class action suit in Fujian Province where 1721 plaintiffs won a case against a polluting local company, getting not only compensation but also an injunction to end the pollution.<sup>207</sup> And of the pollution compensation cases recorded by Chinalawinfo, citizen plaintiffs in about 58% of the cases were able to win part of their claim.<sup>208</sup> Additionally, in the field of labor, Yang Su and Xin He have found that courts, under pressure to prevent unrest, have responded directly to citizen demands and adjudicated cases, sometimes while the plaintiffs are still on the street protesting, through “fast-track” channels. Sometimes judges complete legal procedures “within hours,” with favorable outcomes to the workers involved.<sup>209</sup>

### C. Deciding to Go to Court

Despite these positive developments, citizens have not always fared well when going to court to enforce regulations. The road to obtaining a final legal remedy is long and full of obstacles. As we saw above, not all Chinese citizens suffering from regulatory infringements choose to go to court. Citizens seeking to initiate litigation must first convince themselves that it is useful to do so. Here, how they perceive the courts is important. Courts in China are not independent of the state, and they fulfill functions beyond mere adjudication: they are also broader governmental instruments for implementing policy, processing disputes and setting norms. Given the close relations between large enterprises and the government, it is therefore understandable that citizens do not turn to courts in cases involving such companies. Instead, citizens are likely to perceive the courts to be connected with the local government, whose interests are aligned with those of the enterprises.

From this perspective, one may wonder why Chinese citizens even go to court for regulatory violations at all. One answer may be that experience, or

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<sup>206</sup> Cf. Ethan Michelson, *Climbing the Dispute Pagoda: Grievances and Appeals to the Official Justice System in Rural China*, 72 AM. SOC. REV. 459 (2006). However, this is also similar to U.S. citizens. See Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC. REV. 525 (1981).

<sup>207</sup> Van Rooij, *supra* note 152, at 64.

<sup>208</sup> Welmoed Althena, *Judicial Decision Making in Chinese Environmental Pollution Compensation Disputes* 42 (Sept. 15, 2010) (unpublished M.A. thesis, Leiden University) (on file with author).

<sup>209</sup> Su & He, *supra* note 19, at 164–66.

the lack thereof, matters. A survey from 2001 found that Chinese citizens without any litigation experience ranked their courts higher than their counterparts in Chicago.<sup>210</sup> By contrast, experienced court users gave far lower scores than the U.S. respondents, showing that actual court experience taught litigants that the courts were much worse than they had expected<sup>211</sup>—a phenomenon that Mary Gallagher calls “informed disenchantment.”<sup>212</sup> If more experience means less trust in courts and probably less willingness to go to court, China may be facing a court legitimacy crisis. Since the survey in 2001, the number of Chinese citizens with court experience or with friends and relatives with court experience has risen dramatically, especially thanks to the growth in labor cases.<sup>213</sup> And this may well mean that Chinese citizens today have even less trust in courts than before.

#### D. Lawyers and Public Interest Lawyers

Citizens who want to take legal action must find a lawyer to represent them. Chinese lawyers, like most in the world, prefer profitable and non-risky cases,<sup>214</sup> which these regulatory cases often are not. First, it is rare that victims of regulatory violations can pay much in legal fees. Second, it is common that these cases involve sensitive issues and defendant enterprises with close governmental ties. In the lawyer’s cost-benefit calculus before taking a case, risks of economic, judicial, and physical retaliation against the lawyer and even his or her family must increasingly be taken into account.

Over the last decade or more, however, a special group of public interest lawyers that is less interested in making money and less afraid of the risks that these cases entail has emerged.<sup>215</sup> These lawyers have played a major role in stimulating regulatory litigation against pollution, unsafe products, hazardous construction, labor violations, and illegal building and land usage. But these public interest lawyers have also been subject to increasing pressure over the past couple of years. Some of the more activist and outspoken among them

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<sup>210</sup> Ethan Michelson & Benjamin L. Read, *Public Attitudes Toward Official Justice in Beijing and Rural China*, in CHINESE JUSTICE: CIVIL DISPUTE RESOLUTION IN POST-REFORM CHINA, *supra* note 130, at 169, 182, 193.

<sup>211</sup> *Id.*

<sup>212</sup> Mary Elizabeth Gallagher, *Mobilizing the Law in China: “Informed Disenchantment” and the Development of Legal Consciousness*, 40 LAW & SOC. REV. 783, 785–86 (2006).

<sup>213</sup> *Id.* at 799–801, 807–09.

<sup>214</sup> Ethan Michelson, *The Practice of Law as an Obstacle to Justice: Chinese Lawyers at Work*, 40 LAW & SOC. REV. 1, 15–21 (2006).

<sup>215</sup> For an overview of the emergence of public interest lawyers in China, see Hualing Fu & Richard Cullen, *Weiwan (Rights Protection) Lawyering in an Authoritarian State: Building a Culture of Public Interest Lawyering*, 59 CHINA J 111 (2008) [hereinafter Fu & Cullen, *Lawyering in an Authoritarian State*]; Fu & Cullen, *supra* note 199.

have gotten into trouble, for instance, after taking on housing demolition cases related to the Beijing Olympics, after initiating legal action on behalf of the parents of victims of the melamine milk scandal, or after representing parents of schoolchildren killed or injured in the collapsed schools during the Sichuan earthquake.<sup>216</sup> More recently in 2011, following the political reforms in the Middle East, Chinese authorities organized a crackdown on lawyers and legal activists, many of whom had been involved in regulatory cases related to food safety, land, and construction. Lawyers who had been harassed before, including Teng Biao, Ni Yulan, and Xu Zhiyong, were detained, often without formal indictments, for weeks in the end.<sup>217</sup> Their privacy was invaded, in some cases with state security agents following their children to school.<sup>218</sup>

Of course, all of these examples are well-known. Hualing Fu and Richard Cullen have labeled these lawyers as “rights-protection” (维权) (*weiquan*) lawyers, who have maintained a strong public profile, spoken out directly against current power-holders, and taken on cases that can generate the strongest media coverage and impact.<sup>219</sup> However, their detention and harassment may have broader implications and may be a deterrent for other lawyers faced with cases involving similar regulatory problems that have yet attracted wide media coverage and scrutiny. Also, the state seems to have expanded its control and retaliation against mainstream public interest lawyers, who now also have to face frequent visits from state and public security officials to “talk about their work over a cup of tea.”

### E. Court Functioning

Finding a lawyer is but one step on the long and difficult road of acting against regulatory violations in China’s courts. The next hurdle is getting a court to accept the case. Courts, funded and managed by local governments that are often directly or indirectly involved in these cases, are not always

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<sup>216</sup> See Zhao Lianhai, *an Unlikely Hero for Children Poisoned by Melamine-Tainted Milk*, ASIA NEWS (Nov. 12, 2010, 4:24 PM), <http://www.asianews.it/news-en/Zhao-Lianhai,-an-unlikely-defender-of-children-poisoned-by-melamine-tainted-milk-19979.html>; AMNESTY INT’L, JUSTICE DENIED: HARASSMENT OF SICHUAN EARTHQUAKE SURVIVORS AND ACTIVISTS (2008), available at <http://www.amnesty.org/en/library/asset/ASA17/018/2009/en/dbf10ofd-c9f7-4675-91b4-e85e25460809/asa170182009eng.pdf>; Elizabeth M. Lynch, *Xu Zhiyong and What His Detention Means for Rule of Law in China*, CHINA L. & POL’Y (Aug. 17, 2009), <http://chinalawandpolicy.com/tag/sichuan-earthquake/>.

<sup>217</sup> Edward Wong, *Human Rights Advocates Vanish as China Intensifies Crackdown*, N.Y. TIMES, Mar. 12, 2011, at A4, available at <http://www.nytimes.com/2011/03/12/world/asia/12china.html>. See also *Lawyers and Activists Detained, Summoned, and Harassed in “Jasmine Rallies” Crackdown*, HUM. RTS. CHINA (Feb. 23, 2011), <http://www.hrchina.org/content/4896>.

<sup>218</sup> Verna Yu, *Suffer the Little Children*, S. CHINA MORNING POST, June 4, 2011, at 4.

<sup>219</sup> Fu & Cullen, *Lawyering in an Authoritarian State*, *supra* note 215, at 112–16.

sufficiently impartial. Whether it is desirable for the court to accept a case is not only determined by the extent to which cases can undermine the CCP rule as a whole, but also (and perhaps even more) by how much these cases can pose a threat or cause trouble for the local governments, courts, and judges involved. As such, cases about land, labor, or environmental disputes involving local enterprises with close ties to governments, which in turn pay and manage the courts, may be seen as too sensitive or troublesome. When faced with cases deemed sensitive or troublesome, Chinese judges have simply refused to accept them, exercising wide discretion in which cases to accept and which ones to refuse.<sup>220</sup> Some courts have, for instance, declined to accept cases on the basis that the plaintiff lacks proof on the causal relationship between the defendant's act and the plaintiff's damages, even though the law clearly places the burden of proof on the defendant.<sup>221</sup> At the same time, judges have sometimes been forced by local authorities to proactively accept cases deemed especially sensitive and threatening to local social stability, in the hope that brokering a solution in court can prevent further instability.<sup>222</sup>

Once a case is accepted, litigation fees are set at a level relative to the claim made.<sup>223</sup> This rule may deter plaintiffs in regulatory cases that involve high claims but low chances of winning from pursuing further action in court. Bringing a class action, known in Chinese as "collective litigation" (共同诉讼) (*gongtong susong*), is therefore an important option in cases that involve many victims, as it helps lower litigation costs per person. But while class actions are authorized under the Civil Procedure Law,<sup>224</sup> the Supreme People's Court in 2005 issued a notice limiting class action suits.<sup>225</sup> The notice prescribes that

<sup>220</sup> Kevin J. O'Brien & Lianjiang Li, *Suing the Local State: Administrative Litigation in Rural China*, in *ENGAGING THE LAW IN CHINA, STATE, SOCIETY, AND POSSIBILITIES FOR JUSTICE* 31 (Neil J. Diamant et al. eds, 2005). Phan, *supra* note 8, at 634.

<sup>221</sup> Based on ongoing Ph.D. research conducted by Kathinka Fürst in several Chinese provinces in 2011 and 2012.

<sup>222</sup> Su & He, *supra* note 19, at 164–65.

<sup>223</sup> For cases involving compensation, the litigation fee that plaintiffs have to pay up front is determined by the amount of compensation claimed. For cases without compensation, the litigation fee is fixed at a set rate. *Susong Feiyong Jiaona Banfa* (诉讼费用交纳办法) See 2006 [Measures on Payment of Litigation Costs] (promulgated by the St. Council, Dec. 19, 2006, effective Apr. 1, 2007) art. 13, *ST. COUNCIL GAZ.*, Feb. 10, 2007, at 4, available at [http://www.gov.cn/zwggk/2006-12/29/content\\_483407.htm](http://www.gov.cn/zwggk/2006-12/29/content_483407.htm).

<sup>224</sup> See Civil Procedure Law, *supra* note 198, arts. 54–55; Water Pollution Law, *supra* note 35, art. 88. See also Alex Wang, *The Role of Law in Environmental Protection in China: Recent Developments*, 8 *VT. J. ENVTL. L.* 195, 210–11 (2007) (discussing the use of class action in environmental claims).

<sup>225</sup> Guanyu Renmin Fayuan Shouli Gongtong Susong Anjian Wenti de Tongzhi (关于人民法院受理共同诉讼案件问题的通知) [Notice Regarding Jurisdiction over Class Action Suits] (promulgated by the Sup. People's Ct., Dec. 30, 2005, effective Jan. 1, 2006) *SUP. PEOPLE'S CT. GAZ.*, Mar. 10, 2006, at 15, available at [http://www.law-lib.com/law/law\\_view.asp?id=149701](http://www.law-lib.com/law/law_view.asp?id=149701).

courts can split up class action suits if they find that “it is not easy to handle the case as a class action suit.”<sup>226</sup> Moreover, it redirects jurisdiction over class action suits to courts at one level lower than those initiated under normal procedures.<sup>227</sup> As Alex Wang has noted, this procedure may considerably strengthen the effects of local protectionism in these cases.<sup>228</sup> The All China Lawyers Association (ACLA) has further strengthened control over class action cases by adopting a new rule that forces lawyers to ask for the ACLA’s approval before commencing a case involving more than ten plaintiffs.<sup>229</sup> The SPC notice and the ACLA rule are examples of how the Chinese state has sought to reduce public pressure and to control and prevent social unrest.<sup>230</sup> Restrictions on class action can have important consequences for lawyers and litigants, as they increase the legal work and costs required when claims need to be made separately.<sup>231</sup>

Further, sometimes judges have misapplied the law. Such misapplication has at times favored litigants. Liebman, Su, and He have demonstrated in their studies that under the pressure of complaints and a fear of instability, courts have sometimes adjudicated cases caring less about procedural fairness or formal legality but more about substantive outcome, namely accommodating the complaining or protesting litigants.<sup>232</sup> In other cases, misapplication has had negative consequences for citizen plaintiffs. In environmental court cases, judges have denied citizen plaintiffs compensation and injunctions by requiring citizens to provide evidence for causation despite the fact that, as aforementioned, the burden of proof lies on the defendant.<sup>233</sup> In one particular

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<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> See Wang, *supra* note 224, at 214–15.

<sup>229</sup> Zhonghua Quanguo Lüshi Xiehui (中华全国律师协会) [ALL CHINA LAWYERS FED.], Quanguo Lüshi Xiehui Guanyu Lüshi Banli Quntixing Anjian Zhidao Yijian (全国律师协会关于律师办理群体性案件指导意见) [GUIDING OPINION OF THE ACLA REGARDING LAWYERS HANDLING CASES OF A MASS NATURE] (2006), available at <http://www.dffy.com/faguixiazai/ssf/200606/20060620110110.htm>. For further discussion on ACLA restrictions on class actions, see Randall Peerenboom & Xin He, *Dispute Resolution in China: Patterns, Causes and Prognosis*, 4 E. ASIA L. REV. 1, 41–43 (2009).

<sup>230</sup> Fürst, *supra* note 159, at 101.

<sup>231</sup> *Id.* at 102.

<sup>232</sup> Liebman, *supra* note 130, at 310; Su & He, *supra* note 19, at 165–70.

<sup>233</sup> This also violates a 2001 opinion by the Supreme People’s Court directing courts to reverse the burden of proof for environmental tort cases. See Guanyu Minshi Susong Zhengju de Ruogan Guiding (关于民事诉讼证据的若干规定) [Provisions on Evidence in Civil Litigation] (promulgated by the Sup. People’s Ct., Dec. 21, 2001, effective Apr. 1, 2002) art. 4, SUP. PEOPLE’S CT. GAZ., Jan. 1, 2002, at 19, available at [http://www.court.gov.cn/bsfw/sszn/xgft/201004/t20100426\\_4533.htm](http://www.court.gov.cn/bsfw/sszn/xgft/201004/t20100426_4533.htm). For more information see Van Rooij, *supra* note 152, at 69.

case, a court persisted with the wrong rule despite three higher court and procurator decisions ordering the lower court to apply the law properly.<sup>234</sup> In other cases, courts sometimes do not award damages to plaintiffs on the basis that there has not been an unlawful act violating the law justifying such damages, even though the law does not require the act to be unlawful for pollution liability to arise. In a study of all pollution liability cases published on Chinalawinfo, in 44% of all cases where plaintiffs lost their case completely, the court argued that there had not been an infringement on laws or regulations.<sup>235</sup> They may do so because of a lack of competence, but it also might be for less legitimate reasons, such as being caught in local vested interests or just plain corruption.<sup>236</sup>

A new development is that over the last five years or so, courts have increasingly refused to render a final judgment and insisted that parties resolve their differences through court-managed mediation.<sup>237</sup> Minzner shows the internal evaluation standards of judges include the number of cases resolved through court-based mediation, with higher rewards for higher percentages of cases mediated, even rewarding judges in some courts who go beyond 80% mediation rates.<sup>238</sup> Such mediation is often not voluntary and may well result in citizens accepting a settlement under pressure that is not necessarily in their favor, especially when an imbalanced bargaining position exists between weak citizen plaintiffs and defendant enterprises with strong political ties.<sup>239</sup> This type of forced mediation also does not bode well for

<sup>234</sup> See Zhang Jun (张俊), Liangci Kangsu Sici Shenli Yuangao que Meiyou Zoudao Weiquan Zhongdian: Huanjing Weiquan Shoukun Yinguo Guanxi Nan Rending (两次抗诉 四次审理 原告却没有走到威权终点: 环境威权受困因果关系难认定) [*Two Appeals, Four Adjudications, but the Plaintiff Did Not Reach the End of the Rights Protection Quest: Protection of Environmental Rights Trapped in the Difficulties of Verifying Causation*], Zhongguo Huanjing Wang (中国环境网) [CHINA ENVTL.] (July 30, 2007), [http://www.cenews.com.cn/historynews/06\\_07/200712/t20071229\\_40622.html](http://www.cenews.com.cn/historynews/06_07/200712/t20071229_40622.html).

<sup>235</sup> Althena, *supra* note 208, at 30.

<sup>236</sup> For an overview of corruption and conflicts of interest in local courts, see Li, *Legality, Discretion and Informal Practices in China's Courts*, *supra* note 98; Li, *Corruption in China's Courts*, *supra* note 98; Li, *Performing Bribery in China*, *supra* note 98.

<sup>237</sup> Carl F. Minzner, *China's Turn Against Law*, 59 AM. J. COMP. L. 935, 944–48 (2011); Hualing Fu & Richard Cullen, *From Mediator to Adjudicatory Justice: The Limits of Civil Justice Reforms in China*, in CHINESE JUSTICE: CIVIL DISPUTE RESOLUTION IN POST-REFORM CHINA, *supra* note 130, at 25, 48–53 (2011).

<sup>238</sup> Minzner, *supra* note 237, at 957–58.

<sup>239</sup> Cf. Jocelynne A. Scutt, *The Privatization of Justice: Power Differentials, Inequality, and the Palliative of Councillings and Mediation*, 11 WOMEN'S STUD. INT'L F. 503, 503, 516 (1988) (arguing that the trend towards consiliatory and mediatory forms of dispute resolution in Britain, the United States, Canada, Australia, and New Zealand is worrying because it fails to “adequately acknowledge power differentials between the parties”—through such forms of “privatized justice,” the interests of the disadvantaged are harmed as their problems are kept from the public arena and thus from public

voluntary compliance with the mediation decision. Although normally such voluntary compliance is an advantage of mediation, Minzner demonstrates that mediated judgments in China nowadays have the same legal effect as adjudicated judgments, with one Beijing court even requiring forced execution.<sup>240</sup>

Finally, even if the court decides in favor of the citizens, litigation may not have the desired effect on implementing regulatory law, since in many cases the execution of judgments, despite much effort and reform, remains difficult.<sup>241</sup> Consider, for instance, the case in Fujian where 1721 citizens successfully won a collective suit against a local polluting company, resulting in a rare injunction to clean up the pollution.<sup>242</sup> Now, years after the ruling, although compensation has been paid, the company has yet to clean up the pollution itself.<sup>243</sup> To make matters worse, efforts to execute judgments may also be met with violence by resisting parties. A recent study by Xu Xin and Tian Lu has documented a general and steady increase in such violence since 1983.<sup>244</sup> Thus, similar to regulatory enforcement agents, who have been directly obstructed by threats and violence, courts also increasingly have to be careful when enforcing the law.

#### F. The Role of Civic Organizations in Litigation

In all this, civic organizations can play a very important role in aiding citizens as they initiate, organize, and successfully carry out regulatory legal action. There is even some room for civic organizations themselves to sue enterprises in court, using the expanded legal standing provided in the environmental and other courts.<sup>245</sup> In the Fujian class action suit between 1721 plaintiffs and a polluting enterprise, for instance, the Beijing-based Center for the Legal Assistance for Pollution Victims (CLAPV) played a major role.

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scrutiny); Minzner, *supra* note 237, at 959–60 (summarizing the literature on dispute resolution that critiques mediation in contexts of unequal power, as it prevents “equal bargaining between parties”).

<sup>240</sup> Minzner, *supra* note 237, at 937.

<sup>241</sup> Donald C. Clarke, *The Execution of Civil Judgments in China*, 141 CHINA Q. 65 (1995); Benjamin L. Liebman, *China's Courts: Restricted Reform*, 191 CHINA Q. 620, 626–27 (2007). For an exception, see Xin He, *Enforcing Commercial Judgments in the Pearl River Delta of China*, 57 AM. J. COMP. L. 419 (2011).

<sup>242</sup> Van Rooij, *supra* note 152, at 64.

<sup>243</sup> Interview with the litigation lawyer involved (Mar. 9, 2011).

<sup>244</sup> Xu & Tian, *supra* note 54, at 7 (arguing that such violence can in part be attributed to the limited power, authority, and support for the court and the limited responses against court-directed violence).

<sup>245</sup> Wang & Gao, *supra* note 198, at 5.

CLAPV not only provided free legal advice to the lead plaintiffs and helped them organize a larger group, but also trained them using the court's environmental legal awareness and expertise judicial training programs.<sup>246</sup>

CLAPV has played a much broader role in stimulating environmental litigation. Since 1999, its volunteer-operated advice hotline for Chinese pollution victims has handled over 10,000 phone calls. CLAPV also helps pollution victims find representation, recently even opening its own law firm for this sole purpose. At the same time, CLAPV is engaged in training and advocacy activities seeking to influence both judicial officials and legislation and rulemaking. CLAPV founder Wang Canfa has for years lobbied to reverse the burden of proof for causation in environmental cases, succeeding first in 2004 with the Solid Waste Pollution Law, later in 2008 with the Water Pollution Prevention and Control Law, and again in 2010 with the Tort Law.

Many other Chinese legal aid organizations play similar roles. Over the last few years, we have seen the rapid development of similar organizations in the area of labor law in cities such as Shanghai,<sup>247</sup> Nanjing, Shenzhen, and Beijing.<sup>248</sup> There are also many other legal aid centers serving both the general population and vulnerable groups, such as women, children and people with disabilities. Some are run as university legal aid clinics, while others are run independently, sometimes even by former migrant workers.<sup>249</sup>

These centers have become important intermediaries supporting citizens in litigation against enterprises that have violated labor law, and often in the search for public interest lawyers wishing to take on such cases. Gallagher shows that, apart from their direct effect in supporting litigation, these legal aid centers have become important meeting places where citizens share experiences, learn from one another, and become "informed," even after being "disenchanted" with the outcomes of their cases.<sup>250</sup>

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<sup>246</sup> Interviews with CLAPV staff (2008–2011).

<sup>247</sup> An example is the employment and labor law center run by Professor Dong Baohua. For further discussion on Professor Dong's center, see Gallagher, *supra* note 204.

<sup>248</sup> See, e.g., *Xiao Xiao Niao—A Public Service Organization for Migrant Workers*, CRI Online (Nov. 24, 2011, 11:16 AM), <http://english.cri.cn/2008/2004-11-24/35@171746.htm> (discussing a migrant worker aid center founded by a migrant worker).

<sup>249</sup> For a general analysis of legal aid clinics in China, see Benjamin L. Liebman, *Legal Aid and Public Interest Law in China*, 34 *TEX. INT'L L.J.* 211 (1999); Pamela N. Phan, *Clinical Legal Education in China: In Pursuit of a Culture of Law and a Mission of Social Justice*, 8 *YALE HUM. RTS. & DEV. L.J.* 117 (2005); Michael W. Dowdle, *Preserving Indigenous Paradigms in an Age of Globalization: Pragmatic Strategies for the Development of Clinical Legal Education in China*, 24 *FORDAM INT'L L.J.* 56 (2000); Gallagher, *supra* note 204; C. David Lee, *Legal Reform in China: A Role for Nongovernmental Organizations*, 25 *YALE J. INT'L L.* 363 (2000); Arwen Joyce & Tracye Winfrey, *Taming the Red Dragon: A Realistic Assessment of the ABA's Legal Reform Efforts in China*, 17 *GEO. J. LEGAL ETHICS* 887 (2004).

<sup>250</sup> Gallagher, *supra* note 212, at 799–805.

Even the All China Federation of Trade Unions (ACFTU), an official organization of trade unions affiliated with the government, and its local branches reportedly have had a positive role in aiding worker litigation.<sup>251</sup> Feng Chen has argued that the official trade unions have “play[ed] an active role in providing legal aid to the workers and pursuing settlements in their favor.”<sup>252</sup> His study finds—in contrast to stereotypes found in most other studies of official trade unions that emphasize the unions’ lack of independence and worker representation<sup>253</sup>—that official unions use “private workers’ cases to advocate labor rights in workplaces and to call for more effective law enforcement.”<sup>254</sup>

There are, however, structural limitations to the roles that Chinese civic organizations can play in regulatory litigation, and recently their position has been restricted further. New and existing rules on foundations, social organizations, and private non-enterprise units (PNEUs) directly limit non-profit NGO organization and financing, undermining their independence and restricting the scope of their work.<sup>255</sup> Compliance with these rules has proved

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<sup>251</sup> Most other studies are not too positive about the ACFTU and its branches, finding that they act as organs of the CCP and are not independent enough from enterprise management nor accountable enough to fully represent the workers’ interests. See, e.g., Cooney, *supra* note 25, at 1072–76; Mary E. Gallagher, “Time Is Money, Efficiency Is Life”: *The Transformation of Labor Relations in China*, 39 *STUD. COMP. INT’L DEV.* 11, 26–28, 32–33 (2004); Simon Clarke et al., *Collective Consultation and Industrial Relations in China*, 42 *BRIT. J. INDUS. REL.* 235, 241–44 (2004).

<sup>252</sup> Feng Chen, *Legal Mobilization by Trade Unions: The Case of Shanghai*, 52 *CHINA J.* 27, 27 (2004).

<sup>253</sup> See sources cited *supra* note 251.

<sup>254</sup> Chen, *supra* note 252, at 29.

<sup>255</sup> See, e.g., Shehui Tuantu Dengji Guanli Tiaoli (社会团体登记管理条例) [Regulations on the Administration of Registration of Social Organizations] (promulgated by the St. Council, Oct. 25, 1998, effective Oct. 25, 1998) *ST. COUNCIL GAZ.*, Nov. 23, 1998, at 1028, available at [http://www.law-lib.com/law/law\\_view.asp?id=399](http://www.law-lib.com/law/law_view.asp?id=399); Minban Feiqiye Danwei Dengji Guanli Zanxing Tiaoli (民办非企业单位登记管理暂行条例) [Interim Regulations on the Administration of Registration of Private Non-Enterprise Entities] (promulgated by the St. Council, Oct. 25, 1998, effective Oct. 25, 1998) *ST. COUNCIL GAZ.*, Nov. 23, 1998, at 1036, available at <http://www.mca.gov.cn/article/zwgk/fvfg/mjzzgl/200709/20070900001726.shtml>; Jijinhui Guanli Tiaoli (基金会管理条例) [Regulations on Foundation Administration] (promulgated by the St. Council, Mar. 8, 2004, effective June 1, 2004) *ST. COUNCIL GAZ.*, May 20, 2004, at 18, available at [http://news.xinhuanet.com/zhengfu/2004-03/18/content\\_1372870.htm](http://news.xinhuanet.com/zhengfu/2004-03/18/content_1372870.htm). These rules provide for a dual management system that requires civil-type organizations to find a sponsor to manage them, thereby forcing them to be embedded with a state or state-aligned organization. Organizations may not establish branches outside of their designated region or work outside of their designated scope. Furthermore, only one organization of its sort is allowed per designated region. Foundations are allowed to branch out, but only upon approval by the Ministry of Civil Affairs. The Regulations on Foundation Administration made a step forward by permitting foreign organizations to

so difficult for some civic organizations that many have established themselves as quasi-enterprises, with the distinct disadvantage of a tax burden from which officially registered civil organizations are exempt.<sup>256</sup> Many legal aid civic organizations continue to experience difficulty finding sustainable funding,<sup>257</sup> as they have limited access to funds in China, and foreign assistance can easily dry up and has recently been subject to further state restrictions. Despite its many successes, CLAPV still has problems finding sufficient resources to become a more sustainable professional organization.<sup>258</sup>

And even though public interest standing in the environmental courts allows direct action by civic organizations when they cannot find suitable citizens as main plaintiffs, results in practice have been meager. Gao Jie, analyzing the first two functioning years of China's environmental courts, finds that there have been only four public interest cases, all involving either governmental or semi-governmental organizations as plaintiffs, and no involvement of real civic organizations.<sup>259</sup>

Increasingly, we also see that civic organizations that offer legal advice and assistance for regulatory litigation have been adversely regulated by governmental authorities. In 2009, Gongmeng, a civic organization that at the time was acting on behalf of the families of children affected by the melamine-tainted milk, was fined and shut down for not having paid taxes on a donation it received from Yale.<sup>260</sup> In 2010, following more than a decade of successful legal aid to women, the Beijing University Women's Legal Aid Center had to close after losing the university's sponsorship.<sup>261</sup>

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establish Chinese branches as foundations. For a good overview, see Jillian S. Ashley & Pengyu He, *Opening One Eye and Closing the Other: The Legal and Regulatory Environment For "Grassroots" NGOs in China Today*, 26 B.U. INT'L L.J. 29 (2008).

<sup>256</sup> As of 2005, there are an estimated 100,000 to 200,000 such quasi-enterprise civic organizations in China. A 2005 campaign organized in Beijing found 2,047 such enterprises. Ashley & He, *supra* note 255, at 56-57.

<sup>257</sup> While some Chinese funding does currently exist for civic organizations, as in the field of environment protection, this is not yet the case for legal aid centers as far as I am aware.

<sup>258</sup> Interviews with CLAPV staff (2008-2009).

<sup>259</sup> See Wang & Gao, *supra* note 198, at 42-44. At present, there is a new case where two NGOs, Friends of Nature and Green Anhui have filed a public interest litigation lawsuit in Yunan province following a major chromium spill. See *Lawsuit Demands 10 Million Yuan for Pollution Victims*, CHINA.ORG.CN (May 24, 2012), [http://www.china.org.cn/environment/2012-05/24/content\\_25461431.htm](http://www.china.org.cn/environment/2012-05/24/content_25461431.htm).

<sup>260</sup> Sky Canaves, *China Detains Activist Ahead of Key Observance*, WALL ST. J., July 31, 2009, at 10. For the official decision, see [http://commons.wikimedia.org/wiki/File:Legel\\_notice\\_to\\_ban\\_gongmeng.jpg](http://commons.wikimedia.org/wiki/File:Legel_notice_to_ban_gongmeng.jpg).

<sup>261</sup> *Human Rights and the Rule of Law in China: Hearing Before the Cong.-Exec. Comm'n on China* (2009) (statement of Donald Clarke, Professor of Law, George Washington University School of Law), available at <http://www.cecc.gov/pages/hearings/2009/20091007/dclarke100709.pdf>.

A document posted online by a Hong Kong labor organization offers a rare glimpse into how the Chinese authorities view legal aid organizations and legal aid workers. This internal report, made by the Guangdong Provincial CCP Committee on Politics and Law, analyses the role of legal aid organizations providing legal assistance to local workers. Listing the names of both the organizations and the individuals involved, the report alleges that these organizations use illegal means to instigate litigation and unrest. The report concludes that these organizations have caused “antagonistic contradictions and disputes,” “pushed up the cost of dispute arbitrations and complicated their resolution,” “undermined social harmony and stability,” made “labor relations worse,” “disturb[ed] public order management” and even “endanger[ed] national security.”<sup>262</sup> The last concern is accompanied by a reference to the means by which “Western anti-Chinese forces, headed by the U.S., engineer their ‘peaceful transition’ agenda in China to smear our government via the use of overseas NGOs and via collecting labor news and information on judiciary cases.”<sup>263</sup> If these published documents represent a wider view shared by authorities in China, it could well help explain recent restrictions on civic organizations involved in regulatory litigation.

### G. Compensation, Not Regulation

The discussion so far has been about the possibilities available to citizens and the obstacles they face when resorting to courts to fight against regulatory violations. However, I have not yet addressed the regulatory impact of such litigation. To what extent is litigation a good way to influence the behavior of regulated companies and to end violations of the law? Unfortunately, we do not have sufficiently systematic and detailed data about court outcomes or their effects on the enterprises involved. Case databases and media reports show only final judgments at most, and a few journalists may report on enforcement of judgments. However, little research is performed on what happens afterward. Does litigation change the behavior of the enterprises involved? And does its impact reach beyond these firms to other businesses violating regulatory law? How do managers perceive major cases reported in the news with citizens winning damages and sometimes even injunctions against companies similar to their own?

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<sup>262</sup> Zhongguo Guangdong Shengwei Zhengfa Weiyuanhui (中共广东省委政法委员会), [Guangdong Provincial Committee on Politics and Law of the Chinese Communist Party], Guanyu Guangdongsheng “Zhiye Gongmin Dailiren” Wenti de Diaoyan Baogao (关于广东省“职业公民代理人”问题的调研报告) [Investigative Report of Guangdong Province on the Question of “Professional Citizen Legal Agents”] (2009), *translated in* Investigative Report of Guangdong Province on the Question of “Professional Citizen Legal Agents,” CHINA LABOR NEWS TRANSLATIONS, [http://www.clntranslations.org/file\\_download/93](http://www.clntranslations.org/file_download/93) (last visited Aug. 14, 2012).

<sup>263</sup> *Id.*

Lacking such data, it is impossible to conduct an empirical analysis of the regulatory impact of litigation. We can, however, speculate. First of all, we know that the chances of being sued in court for regulatory violations are relatively low, especially for environmental, land, and other regulatory violations, where litigation rates are about 1% of the total number of reported grievances. Moreover, the chances that citizens will actually be able to win and enforce a judgment with sufficient strength, in terms of either the amount of compensation or the force of an injunction, are slim. So, purely from a rational-choice calculation model of the deterrent effect of regulatory litigation,<sup>264</sup> the effect of citizens suing violating enterprises on the overall implementation of regulatory law is likely to be low. Here China's near complete lack of a case law system<sup>265</sup> further complicates any analysis, since individual breakthrough cases might not impact future litigation.

What we may have in the best of cases is compensation and not regulation, with citizens winning and getting compensation for damages but failing to compel other companies or even the defendant in their own case to prevent or control future harm. The recent practice of government and courts to compensate citizens, instead of the defendants that are legally obliged to do so, further promotes the emphasis on compensation rather than regulation. Su and He, for instance, detail how local governments and judges have paid workers directly out of their own pockets in cases where the employers could not be located and still owed wage arrears.<sup>266</sup> Liebman shows how some courts have even established special funds to pay off litigants, fearing the consequences of complaints about the court by disgruntled citizens.<sup>267</sup> Obviously, while this practice may be favorable to citizens and for stability, as Su and He argue, it also undermines the regulatory effect of litigation.<sup>268</sup>

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<sup>264</sup> The literature on general deterrence shows that, in short, regulated actors will comply with the law once the combined costs and benefits of compliance are more favorable than those of violation. Key aspects in this are the chances of being caught violating the law, chances of being punished for such violation, and the severity of the sanctions applied. If we translate this to regulatory litigation, it means that there will only be a deterrent effect if the chances of being sued, the chances that the defendant will lose in court, the chances that such judgment will be executed, and finally the amount of the compensation are all high. For further discussion on the rational-choice approach to general deterrence, see Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POLI. ECON. 169 (1968); Thornton, Gunningham & Kagan, *supra* note 56; Jacobs, *supra* note 100.

<sup>265</sup> Benjamin van Rooij, Falü De Weidu—Cong Kongjianshang Jiedu Falü Shibai (法律的维度—从空间上解读法律失败) [*The Dimension of Law—Legal Failure from the Perspective of Spatial Interpretation*], Sixiang Zhanxian (思想战线) [THINKING], no. 4, 2004, at 109, 114–15 (translated by Yao Yan [姚滢]).

<sup>266</sup> Su & He, *supra* note 19, at 168.

<sup>267</sup> Liebman, *supra* note 130, at 281, 292–93.

<sup>268</sup> Su & He, *supra* note 19, at 168–69.

#### H. How Judicial Accommodation Causes Escalation, Not Stability

Incentive structures revolving around social stability have made judges more concerned to maintain stability than to adjudicate cases according to the law. As previously noted, judges are under so much pressure to avoid unrest and accommodate citizens' demands that some organize their own expedited procedures and, if push comes to shove, even pay citizens out of their own pockets.<sup>269</sup> Liebman describes these developments as follows:

At present, the formal legal system appears less interested in outcomes that are fair or consistent than in outcomes that avoid instability. As one judge explained, law is less important than either economic development or social stability. Consistent application of legal rules is not viewed as a mechanism for ensuring social stability. Social stability is obtained by buying-off those who complain and by greater use of discretion, not by replacing discretion with law.<sup>270</sup>

The question is, however, whether the current approach will lead to the desired stability. First, as Su and He have also observed, by accommodating those who make complaints and trouble, the courts provide an incentive for more petitions and unrest.<sup>271</sup> Furthermore, while accommodation through compensation might provide stop-gap relief for the immediate victims of regulatory violations, accommodation in itself, especially if paid for by the state and not the violating enterprise, does not provide much incentive to end the regulatory violations that have caused the grievances in the first place.

Thus, the Guangdong CCP Committee of Politics and Law may be right to fear a threat to social stability and to complain that local legal aid organizations have incited workers to increase pressure on dispute resolution institutions by lodging complaints and organizing collective action. However, their conclusion that legal aid organizations are solely to blame is wrong: lawyers and legal aid workers have made strategic use of the incentive structures that the CCP itself has introduced in the hope of maintaining stability. The existing incentive structures give rise to escalation, with litigants trying to exert pressure on the courts through political action. This may ultimately politicize and sensitize cases that normally would not be seen as overly sensitive, as seems to have been the case in environmental, construction, land, food safety, and labor cases. It may make courts more unwilling to accept such litigation, considering these cases to require management and control. It may also make lawyers pursuing these cases look increasingly suspicious in the eyes of the state. Some general public interest lawyers, provoked by stricter

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<sup>269</sup> *Id.* at 165–70; Liebman, *supra* note 130, at 307–08.

<sup>270</sup> Liebman, *supra* note 130, at 309–10.

<sup>271</sup> Su & He, *supra* note 19, at 181.

state control, might radicalize into more politically oriented “cause lawyers” seeking broader political change,<sup>272</sup> while other lawyers and litigants may retreat, giving up on fighting these cases in the courts, in light of the risk of organizing sensitive activities in an authoritarian context with limited chances of successfully mitigating long-term risks.

## V. CITIZENS AS COLLECTIVE AGENTS

If complaining or litigation is not possible or effective, citizens can also take collective action as an ultimate means to implement regulatory law. There are two such options: exit and protests.<sup>273</sup>

### A. Exit as a Form of Regulation

“Exit” is the option of abandoning a regulated actor or product, and through such abandonment, decreasing the risks associated with such an actor or product for oneself and creating pressure on the abandoned actor or product to change its risk-causing behavior.<sup>274</sup> Exit is most potent in labor regulation in the more developed parts of China. As a recent study of three manufacturing factories in Guangdong Province by one of my students has shown, factories now have an annual staff turnover of 30 to 40%.<sup>275</sup> Replacing these workers, who mostly depart just before the Chinese New Year, can take one month, and new recruits can only learn to perform 50 to 75% of their duties during their first six months of employment. To reduce the immense costs resulting from such loss of skilled labor, companies have a strong incentive to keep their trained and skilled staff happy and prevent them

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<sup>272</sup> See Fu & Cullen, *supra* note 199, at 22–27; Fu & Cullen, *Lawyering in an Authoritarian State*, *supra* note 215, at 121.

<sup>273</sup> Another form of collective action that recently has had some success in activating regulatory rights and regulatory conditions is collective bargaining organized by workers outside of the officially mandated and employer-dominated labor unions. See, e.g., *Collective Bargaining Nets Honda Workers in Foshan a 611 Yuan Increase in Pay for 2011*, CHINA LABOR BULL. (Mar. 7, 2011), <http://www.clb.org.hk/en/node/100998>; *Migrant Worker Union Negotiates Pay Deal for Tianjin Cleaners*, CHINA LABOR BULL. (Apr. 1, 2011), <http://www.clb.org.hk/en/node/101020>.

<sup>274</sup> The idea of exit as a form of regulation was pointed out to me by Cynthia Estlund & Seth Gurgel, *China’s Labor Question: Will One Hundred Flowers Bloom This Time Around?* (2010) (unpublished manuscript) (on file with author), who again follow ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* (1970).

<sup>275</sup> Student paper written for the course “Access to Justice in China,” taught at NYU in the fall of 2011, on file with author. Due to confidentiality, the title of the paper and the name of the student are not disclosed here.

quitting. Hence, these workers have increased leverage to bargain for better working conditions and compliance with regulatory standards.

Exit or the threat of exit is not always an option, however. It requires knowing about the risks early enough to abandon the violator or threaten to abandon the violator if the risks are not controlled. In the case of food safety violations, for example, consumers will only “leave the product” after they learn about the risks, but they are often unable to determine which food is unsafe and may often require action by others first. Moreover, exit requires the capacity to actually exit. Its limitations is therefore evident in cases of environmental and land-related violations, where citizens cannot easily decide to “exit” or leave their locality. And in the field of labor, exit may only work in developed manufacturing industries in which workers can find many alternative jobs close at hand, but not in industries or regions where there is a large labor surplus and a scarcity of jobs.<sup>276</sup> One can ask, for instance, why workers keep on going to the mines in Shanxi province, when those mines are so clearly dangerous.

## B. Increased Collective Action

When the state fails to enforce the law, complaints and litigation are not helpful, and exit is also not an option, protesting may be a last resort towards change. Protests help to gain leverage both in direct negotiations with the violator and in dealing with state regulators and courts. It is thus not surprising that citizens have turned to the streets. Over the past decade, protests have become increasingly popular, rising to 78,000 large-scale protests in 2005—the last year for which we have somewhat reliable data from the Chinese authorities—and a reported 180,000 in 2011, according to an estimate by a Beijing-based sociologist.<sup>277</sup>

The Chinese party-state has shown a mixed attitude towards protesting. On the one hand, the party-state tries to align itself with disgruntled citizens in an effort to maintain legitimacy. Since 2003, protests are no longer labeled by the state as “mobbing crowds” (暴徒) (*baotu*) or “illegal associations” (非法集会) (*feifa jihui*) but instead as “mass incidents” (群体性事件) (*quntixing shijian*),<sup>278</sup> providing a symbolic condonation of protesting as a normal and neutral phenomenon. On the other hand, the party-state also fears protests and the resulting social unrest, and has therefore made tremendous efforts to “nip problems at the grassroots level in the bud” wherever they occur and hold

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<sup>276</sup> Cooney, *supra* note 26, at 1063 (arguing that in cases where there is a large labor surplus, threats to exit will have little weight on the employers).

<sup>277</sup> *China Cracks Down in Wake of Riots, Bombings*, BLOOMBERG (June 13, 2011, 5:20 AM), <http://www.bloomberg.com/news/2011-06-13/china-cracks-down-in-wake-of-riots-bombings.html>

<sup>278</sup> Su & He, *supra* note 19, at 162.

local governments accountable for causing or mishandling protests that spin out of control.<sup>279</sup>

### C. Success of Collective Action

Some protests have proved successful in bringing about the implementation of regulatory law. One example the Honda strikes of 2010. There, local legal aid groups promoted legal awareness among workers and helped organize a forum for debating labor rights. Failed negotiations between a plant and two employees sparked a broader strike in that plant that quickly spread to other plants after the media reported about it.<sup>280</sup> All this led to an increase in wages and labor conditions in similar production facilities throughout China's coastal industrial areas.<sup>281</sup>

In another example, citizens in Xiamen organized a demonstration that they called a "stroll" (散步) (*sanbu*). They did so in protest against an Environmental Impact Assessment (EIA) permit, which was granted to a new chemical factory that locals thought would severely damage local health. They were supported by academics, the media, and the local real estate sector, and succeeded in pressuring the authorities to reconsider the EIA decision and relocate the project away from Xiamen.<sup>282</sup>

Su and He's work also shows how Chinese workers have successfully organized collective action to get local governments and the courts, as mentioned above, to help accommodate their claims, most notably getting payment for wage arrears.<sup>283</sup>

### D. The Risks of Protesting

Protesting is not without danger, however. There are numerous examples where local protesters have been arrested and prosecuted for disrupting social order. Yongshun Cai's in-depth study of collective resistance shows that in more than 60% of the cases studied, protesters suffered some form of retaliation.<sup>284</sup> This includes the usage of exemplary punishment targeting

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<sup>279</sup> *Id.*

<sup>280</sup> Kan Wang, *Collective Awakening and Action of Chinese Workers: The 2010 Auto Workers' Strike and Its Effects*, 6 *SOZIAL GESCHICHTE* 9, 17–20 (2010), available at [http://links.org.au/files/WANG-Kan\\_Honda-Strike-2010.pdf](http://links.org.au/files/WANG-Kan_Honda-Strike-2010.pdf).

<sup>281</sup> Student paper on file with author, *supra* note 275.

<sup>282</sup> Van Rooij, *supra* note 152, at 62; informal discussions with Chinese academics with access to actors involved in this case (Spring 2009).

<sup>283</sup> Su & He, *supra* note 19, at 167–68.

<sup>284</sup> CAI, *supra* note 180, at 45.

protest leaders, following the central level policy of “isolat[ing] and punish[ing] the minority . . . to win over, divide and educate the majority.”<sup>285</sup> A good example is how, following the successful case of the Xiamen protest stroll, the local government issued a notice seeking to detain those behind the organization of this protest.<sup>286</sup>

Protests can also lead to violence. There have been incidents of the government using direct force against peaceful and non-threatening protesters, and in several cases, opening fire on demonstrators who resist force. In one of the worst cases so far, a group of 10,000 people in Dongzhou village in Guangdong Province were reportedly protesting the construction of a power plant on their land and the sub-standard compensation that they were allotted in exchange for their land rights. When local authorities sent in 1000 armed police officers, things got out of hand. Following an exchange of tear gas canisters, bricks, and homemade explosives, the police opened fire, shooting to wound or kill. Their live ammunition allegedly killed three to twenty villagers and wounded eight to fifty, according to different eyewitness accounts.<sup>287</sup>

Note, however, that instances of unilateral government-directed violence against protesters are exceptions and not in line with internal policies on how to respond to protesters.<sup>288</sup> Most violence comes either from thugs hired by local governments or enterprises to break up protesters, or from escalation by citizens and local officials.<sup>289</sup> But ultimately, as Catherine Baber, Deputy Asia Director at Amnesty International, has commented: “The increasing number of such disputes over land use across rural China and the use of force to resolve them suggest an urgent need for the Chinese authorities to focus on developing effective channels for dispute resolution.”<sup>290</sup>

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<sup>285</sup> *Id.* at 51.

<sup>286</sup> Xiamen Shi Gong'an Ju (厦门市公安局) [Xiamen City Public Security Bureau], Tonggao (通告) [Notice] (June 3, 2007), available at [http://zh.wikipedia.org/wiki/File:Amoy\\_announcement.jpg](http://zh.wikipedia.org/wiki/File:Amoy_announcement.jpg).

<sup>287</sup> Audra Ang, *China Seals Town After Police Kill Protesters*, SEATTLE TIMES, Dec. 10, 2005, at A1, available at [http://seattletimes.nwsourc.com/html/nationworld/2002675413\\_china10.html](http://seattletimes.nwsourc.com/html/nationworld/2002675413_china10.html); Jonathan Watts, *Chinese Militia Open Fire on Demonstrators Opposing Coal Plant*, THE GUARDIAN, Dec. 8, 2005, at 17, available at <http://www.guardian.co.uk/world/2005/dec/09/china.jonathanwatts>; Howard W. French, *Protesters Say Police in China Killed Up to 20*, N.Y. TIMES, Dec. 10, 2005, at A1, available at <http://www.nytimes.com/2005/12/10/international/asia/10china.html?pagewanted=all>; Shanwei Sanqian Jing Zhenya Weiquan Cunmin (汕尾三千警镇压维权村民) [3000 Police Officers Suppress Villagers Protecting Their Rights in Shanwei], Boxun Xinwen Wang (博讯新闻网) [BOXUN NEWS] (Dec. 7, 2005), <http://www.peacehall.com/news/gb/china/2005/12/200512070536.shtml>.

<sup>288</sup> CAI, *supra* note 180, at 51; Su & He, *supra* note 19, at 161–62.

<sup>289</sup> CAI, *supra* note 180, at 51.

<sup>290</sup> *Id.*

Environmental disputes show a similar escalation of the usage of violence in protests. Polluting enterprises, sometimes backed by local police, have resorted to violence to disperse citizen protests or blockades. In the worst cases, they did so even after the protest or blockade had ended, purely out of retaliation.<sup>291</sup> In one instance, villagers who had been protesting severe pollution caused by a local iron mine, which allegedly had led to forty cancer deaths in one township in two years, blocked the road to the mine. The enterprise running the mine then organized a team of one hundred people to harass the villagers. The villagers were severely beaten and so frightened that they spent the night on their rooftops or in the nearby hills.<sup>292</sup>

### E. Understanding the Effects of Protests

Protests organized despite these risks do not always improve the implementation of regulation. In one community where I performed my fieldwork, there have been protests for thirty years. Each time a pollution accident occurred, citizens would block the factory gates, and each time, they let their leaders negotiate a deal to get compensation for the resulting damage. Yet, this approach has never resulted in full compensation, nor has it led to a structural solution to prevent and control such pollution. And all of this has occurred while local villagers were becoming increasingly worried about their health and safety.

In this case, thirty years of protests have failed to meaningfully regulate pollution. There are several reasons why this did not happen: a dependency of the local community on the polluting enterprise, co-optation of village leaders by the local enterprise, a lack of trust in state and media institutions, a shared pessimism amongst villagers about what they can accomplish, willingness to accept small pay-offs despite knowing that they were insufficient to cover damages, and, finally, failure to shift from prevention and regulation to compensation.<sup>293</sup> This example shows that even the ultimate remedy, protesting, can fail as a way for citizens to implement regulatory law. Cai has engaged in an in-depth analysis of the conditions under which protesting citizens are able to have their demands met. By analyzing a sample of cases of collective citizen action, Cai developed a rational choice-type model of protest success. His model shows that the authorities are more likely to give in to citizens' demands if "the costs of accommodating their demands are low and their resistance is powerful."<sup>294</sup> In contrast, if their demands are high but

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<sup>291</sup> Van Rooij, *supra* note 150, at 74.

<sup>292</sup> *Id.*

<sup>293</sup> Anna Lora-Wainwright et al., *Learning to Live with Pollution: How Environmental Protesters Redefine Their Interests in a Chinese Village*, 68 CHINA J. 114 (2012); van Rooij et al., *supra* note 157, at 739-40.

<sup>294</sup> CAI, *supra* note 180, at 44.

resistance is weak, the government is mostly likely to respond with repression.<sup>295</sup> In Cai's analysis, the costs of concession include financial and political costs, such as demands on local government resources, demands that negatively impact local revenue generation and local development, and demands that require the government to discipline local state agents. Cai defines the forcefulness of resistance in terms of the number of participants (more than 500), the number of casualties (more than zero), and media coverage.<sup>296</sup> Cai further shows that Chinese citizens have been most successful when organizing forceful protests that are either peaceful or merely disruptive, but are unlikely to succeed if the collective action itself is violent.<sup>297</sup>

#### F. Why Collective Action Is Not a Sustainable Form of Regulation

With the difficulties of legal action, and even the restrictions on implementation through information provision and complaints, protests may be the ultimate remedy for citizens to invoke their rights and get the government and even the courts to respond to demands that have long been ignored. Su and He, for instance, clearly show that protesting can help workers get local authorities and courts to arrange swift accommodation of worker demands.<sup>298</sup> This is all done in the name of maintaining stability, as local officials respond to incentive structures geared to control unrest and keep things as local as possible.

However, the long-term and structural effects on stability remain questionable. Accommodating protesting citizens may be in their direct interest, but unless such accommodation entails not just financial compensation but also actions to prevent and control the behavior that caused the grievances in the first place, it cures the symptoms instead of the actual disease. Moreover, accommodating protesters fuels escalation. Accommodation signals that protesting can work, spurring others to protest as well. In addition, based on Cai's research model, we know that the likelihood of successful protesting requires forcefulness in scale, media attention, and elicited casualties that are perceived as larger than the costs of meeting the demands made.<sup>299</sup> Therefore, the current structure instigates an incentive not only for more, but also for stronger and larger protests, at least by those willing or desperate enough to bear the risks.

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<sup>295</sup> *Id.* at 45.

<sup>296</sup> *Id.* at 44.

<sup>297</sup> *Id.*

<sup>298</sup> Su & He, *supra* note 19.

<sup>299</sup> CAI, *supra* note 180, at 8–13.

## CONCLUSION

Over the last decade or so, China has made a shift towards regulatory governance, creating legal and political space for societal forces to aid state institutions in regulating environmental, health, and financial risks. This shift has been direly needed, as China's state regulatory institutions have at times been considered inherently ineffective, lacking independence and capacity. The shift has produced some positive results, with clear examples of citizens providing information or taking legal or political action to successfully implement regulatory law.

However, this shift towards regulatory governance and society-based implementation of regulatory law has also been halfhearted. The Chinese party-state has provided space for greater participation and action on the one hand, while restricting it on the other. And perhaps for that reason, there are still many examples and indications of citizens failing to effectively enforce regulatory law. Of course, due to the lack of data and the broadness of the topic discussed here, it is difficult to ascertain precisely whether there is more success or failure, or even where and when there have generally been positive or negative results.

What we can say for sure, however, is that regulation in China remains highly challenging. China's regulatory conditions, plagued with state-enterprise capture and widespread disregard for the law, have unfavorably interacted with perverse incentive structures geared towards maintaining stability. Civil servants, whether enforcement agents or judges, are told not to take risks, especially those that might undermine economic growth or social stability. Companies know that by simply paying minor fines and compensation, they can continue to earn extra profits or cut costs by violating the law. Citizens learn that they may get some compensation with limited risks, but to truly end regulatory violations and fully mitigate their effects, stronger action is necessary. While this may stir the risk-averse state officials into supporting their cause, it may also result in strong repression. This pattern shows that regulation is more likely to be strongly implemented if there is some form of escalation. Thus, China has at its worst an unhealthy system of regulation by escalation. Most cynically, this may mean that China's emphasis on maintaining stability has created and institutionalized a system that ultimately may be destabilizing.

This necessitates a fresh look at social stability and its relation to regulation in China. We should first recognize that many of the disputes that have been causing social unrest originate from regulatory violations. Second, we should acknowledge that there are structural reasons why regulatory violations occur—most importantly due to close state-enterprise relations and disregard for law and legal rules. Third, citizens and civic organizations could theoretically aid the implementation of regulation, being more independent from enterprises than state regulators. However, for civil society to play a successful role in implementing regulation, certain conditions must be met. Society regulators need a better and more complete form of freedom of

organization that empowers them and makes them less dependent on the state and regulated enterprises. They need a fuller form of freedom of information, which includes freedom of speech and freedom of the press, as well as true open government information that allows citizens to gather and share information and make well-informed judgments on how to respond to regulatory violations. They also need a more impartial and capable judiciary that provides a more accessible and independent legal channel to take action against regulatory violations, making the law—and not the street—the preferred ultimate remedy against regulatory grievances. China has of course been taking steps in this direction. At the same time, reforms have remained highly cautious as the party-state fears losing control over society and the legal system. Indeed, taking these steps more fully than is being done now requires courage to accept a decrease in control and an increase in short-term instability. Nonetheless, it seems that only by allowing such space can society aid the implementation of regulation and help improve long-term social stability.

This Article contributes to the theoretical understanding of contemporary shifts in global regulatory governance. Across the world, regulation has increasingly witnessed a trend not just of state institutions dictating what market actors must do, but also of decentered regulatory networks, with state, society, and market forces interacting to regulate risks.<sup>300</sup> At the same time, there is increased interest in how to regulate risks arising from emerging markets in Asia, Latin America, and Africa, which have so far received very little attention from regulatory scholarship.

The case of society-based implementation of regulation in China is an important example of both trends. It demonstrates that to understand non-state forms of regulation, and especially society-based regulation, regulatory studies must be expanded. This field can no longer focus solely on insights from economics, public administration, business administration, and criminology on how state sanctions shape economic behavior. It must also engage with theories and insights from studies about dispute resolution, access to justice, and contentious politics to understand the conditions for societal forces to start playing a regulatory role.

A second broader lesson is the need for a comparative approach both in regulatory studies as well as in the study of Chinese law and governance. Many of the issues discussed here are unlikely to be unique to China, and only a thorough systematic comparison with other OECD and non-OECD countries will help us understand where regulation in China is different and where it is not. Such comparative research is vital to develop a “reoriented” regulatory theory that no longer merely derives from four or five key OECD countries. At the same time, a comparative analysis will help produce a much deeper understanding of how regulation functions in countries such as China,

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<sup>300</sup> See Black, *supra* note 109; Braithwaite et al., *supra* note 110; Hutter, *supra* note 108; GUNNINGHAM ET AL., *supra* note 107.

enabling a more fruitful search for how regulatory instruments and actors can be matched successfully to control human-induced risks.