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Birth of a Liberal Moment? Looking Through a One-Way Mirror at Lawyers' Defence of Criminal Defendants in China

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Criminal procedure provides a pivotal site for observing struggles surrounding advances towards or retreats from political liberalism. Both Karpik (1997, 1999) and Pue (1997) demonstrate that a leading edge of political liberalism in France and England respectively can be found in the conjunction of legal representation and criminal defence. These both derive from and require some moderation of the state, the opening of civil society, and the institutionalisation of core rights of citizenship. Several centuries of legal development in criminal law have sought to universalise these provisions.[1]

Likewise, the relaxation and retreat from protections of criminal procedure indicate transitions away from certain foundations of political liberalism, such as denial of jurisdiction, abrogation of due process, the refusal of representation and torture. That these retreats are occurring contemporaneously in countries that led historical movements towards political liberalism and are among its most vocal advocates merely underlines the fragility of liberalism when confronted with vast putative threats from an inchoate enemy, as we have seen in Britain and the United States since 9/11 (Abel, 2005). The project of political liberalism is never complete (Halliday and Karpik, 1998b).

[1] The Universal Declaration of Human Rights (1948) upholds the right to a fair trial. The International Covenant on Civil and Political Rights (1966) requires that persons detained or arrested will have prompt access to counsel who should be given access to the information on which the prosecution builds a case in order to mount an effective defence. It further provides that lawyers themselves will not be subject to harassment or sanctions for representing detained persons. The Basic Principles on the Role of Lawyers (1990) further stipulate that detained persons will be given appropriate time and opportunities to consult with their lawyers and that lawyer–client communications will be confidential. Together these implicitly assert or presume each of the three attributes of political liberalism as we have specified it.

The aspect of the liberal project that centres on crime engages a complex of actors in an incessant struggle for a balance of power which embraces the central institutions of the state. The emergence of political liberalism appears to require an equilibration of power such that police and prosecutorial authority is restrained, lawyers' defensive capacities are enabled, and judicial powers are expanded. At the heart of this project lie lawyers,[2] although they are limited liberals and too often have been impediments to liberalism (Halliday and Karpik, 1998a; Ledford, 1997). Lawyers' capacity to build or defend liberalism depends upon the emergence of a coherent profession that concomitantly champions an ideology supportive of liberalism and enables collective mobilisation in its propagation and defence. To be capable of mobilisation, a profession must emerge with an identity built around a coherent ideology, a division of labour and a community of discourse. This in turn depends upon the opening of a public sphere, the creation of sites in which discourse congeals into a system of meaning and where a common identity serves as a springboard for collective action (Halliday, 1987; Karpik, 1999).

The post-Mao period in China presents a prime and rare contemporary site for the coincidental genesis of a legal profession and the making of criminal procedure law. The successive enactments of the Criminal Law and Criminal Procedure Law over the past 25 years, together with a flurry of regulations from all the main institutions engaged in the criminal process, appear to signal a sharp disjunction with China's long history of crime control in both the imperial and Maoist periods. However, these progressive legislative cycles are concomitant with the faltering steps towards formation of a criminal defence bar. The fate of criminal defence lawyers allows us to witness the difficulties in the birth of a profession, as these lawyers struggle to mobilise their ideology of representation and practice of criminal defence in the face of systemic and entrenched resistance by China's longstanding iron triangle of law enforcement—the police, procuracy and judiciary. The struggles within the legal complex that surround criminal defence signify deeper contradictions in the Chinese Party-state that go far beyond the narrower problems of professionalisation. Paradoxically, all these disjunctions and contradictions in criminal law practice have nevertheless facilitated the emergence of liberal ideologies among Chinese lawyers. This twisted development of the legal profession and political liberalism is precisely our focus in this chapter.

We shall, first, provide a thumbnail sketch of criminal procedure in China until 1996; secondly, indicate how criminal procedure reforms in China can be framed in terms of the broad contours of political

[2] Lawyers exist without liberalism, but liberalism without lawyers is a contradiction in terms.

liberalism; thirdly, describe our rare data source from within the All China Lawyers Association; and fourthly, analyse lawyers' self-descriptions of criminal practice and their emerging ideologies around issues of liberalism.

I. UNPROPITIOUS FOUNDATIONS: LAWYERS AND THE CRIMINAL JUSTICE SYSTEM IN CHINA

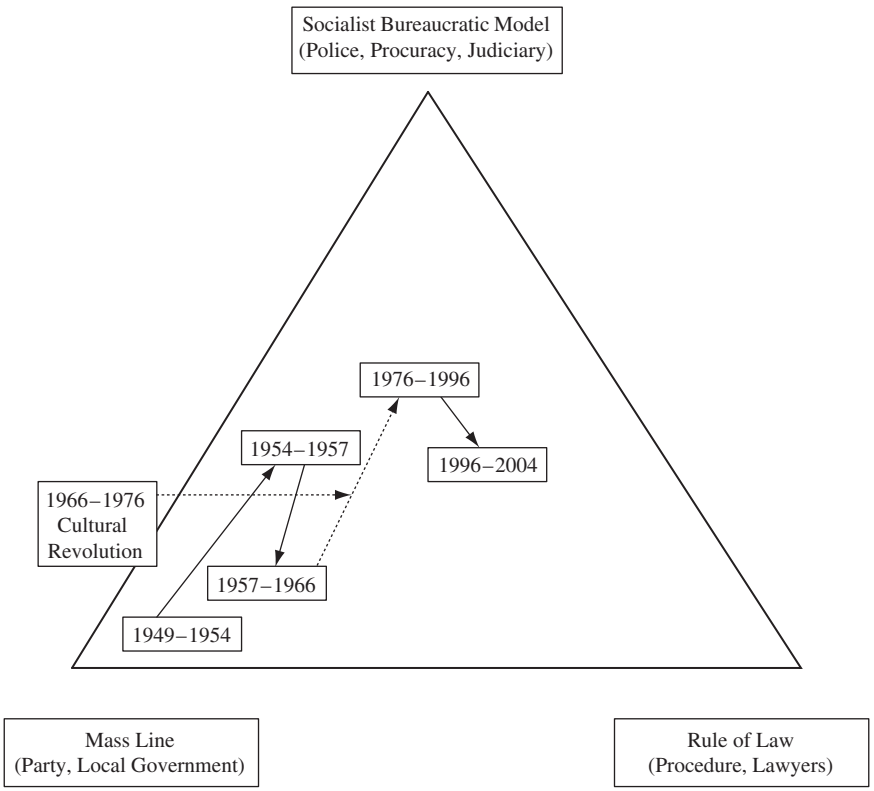
The seeds of contemporary China's encounter with legal liberalism spring from very rocky soil. Traditional Chinese culture has no concept of rights or their institutional protection. Restraint on imperial executive power relied more upon the ethical behaviour of the enlightened ruler rather than any check and balance of power. Public law was an instrument for guiding society and 'indisputably a tool to serve the interests of the state' (Pereenboom, 2001: 41). Criminal law and penal codes were retributive and relied on punishment. A primitive legal profession (the so-called 'litigation masters') not only was never established as a major player in politics, but was often suppressed and fragmented by the government (Macauley, 1998).

Following the collapse of imperial China, a brief window of legal liberalism opened up in the Republican period (1912–49) with the establishment of a nascent legal profession, the opening of law schools, and the founding of courts to interpret statutes that reflected something of a Western turn (Xu, 1998). Yet these initiatives sprouted mostly in major urban centres where they had too short a time to become institutionalised, and the fractiousness of wars and internal conflicts in China never permitted a full flowering of the seeds planted by republican reformers.

The dislocations that the Revolution brought in 1949 carried over into the legal field. Lubman (1999) has argued that the PRC criminal law has swung between two rival conceptions that arguably continue to the present: (1) the *mass line,* a largely arbitrary criminal process that relied on shifting Party priorities and local cadre discretion; and (2) the *bureaucratic model,* the Soviet model of criminal justice in which a professionalised staff (ie, police officers, procurators and judges) administer a somewhat orderly and predictable rule-governed system.[3] The 'alternation and competition' between these two models from 1949 to the Cultural Revolution were played out in the relationships among the law-enforcement triumvirate—police, procuracy and judiciary. However, in either model the process has no place for independent actors who might

[3] Yet this second model of routinised criminal justice confronted revolutionary cadres whose practice during the revolutionary struggle owed much to resisting law, fomenting disorder, breaking rules and mobilising masses without too much concern for harms.

Figure 3.1. Temporal Changes in Criminal Law Policy, 1949–2004



defend the accused against abuses committed by those who administer it (Cohen, 1968), though lawyers were formally tolerated and briefly cultivated in certain periods.

As Figure 3.1 demonstrates, following this logic, from 1949–53 the mass line dominated and most legally-trained personnel held over from the Nationalist period were purged. However, beginning in 1954 the pendulum swung towards regularisation, including the passage of legislation to organise the procuracy and courts, statutes to set some guidelines for criminal procedure, policies to differentiate functions among the police, procuracy and judges, and tentative steps towards creating a defence bar. This brief turn towards what was essentially a Soviet model of criminal process was reversed sharply in 1957 when mounting criticism of the Party provoked it to strike back in a severe 'anti-rightist' campaign that reverted to the mass line, and called upon the police, procuracy and judiciary to act as a unified

force to implement Party policy.[4] The Cultural Revolution (1966–76) swept away even the mass line: the formal criminal process ceased to exist and the activities of police, procuracy and judiciary were variously suspended, reorganised, and disbanded, depending on the location and time. Lawyers disappeared altogether.

But the Cultural Revolution left a powerful residue. Its destructive and pervasive effects for the breakdown in law enforcement, collapse of public order, and the abandonment of any kind of regularised institutions of social control led many leaders in subsequent years to value regularised legal administration and restraints on arbitrary power so that such devastations might never recur.[5] The rise of Deng Xiaopeng to power in the late 1970s signified a revival of law, lawyers and legal institutions. But much began de novo. The bar needed to be 'invented as a profession without any guidance from Chinese tradition or China's recent history' (Lubman, 1999: 158). Taking effect in 1982, the National Peoples Congress adopted the Provisional Regulations on Lawyers that styled lawyers as 'legal workers of the state', organised in state-controlled offices and called concomitantly to 'serve the cause of socialism' and protect 'the legitimate rights and interests of citizens' (Lubman, 1999: 154). The 1997 Lawyers Law reflected the progressive expansion of civil and commercial legal practice and signalled some 'unhooking' of the profession from the state[6] (Michelson, 2003). Licensed lawyers are directly regulated by the All China Lawyers Association (ACLA), which is under close control of the Ministry of Justice. Thus slowly a revived legal profession has emerged, although it remains relatively small, highly fragmented, and of enormous variability in quality (Michelson, 2003; Liu

[4] A Chinese judge aptly summarised the relationships of the law-enforcement triumvirate in 1956 as 'three workshops in one factory', a pattern of enforcement solidarity that prevailed through the beginning of the Cultural Revolution (Lubman, 1999: 84). Meanwhile, offices of defence lawyers that had been founded in the previous 3 years were largely dismantled in this period.

[5] Cf the impact of Peng Zhen, whose suffering during the Cultural Revolution is thought to have impelled his championing of a legal system in its wake (Potter, 1998). Deng Xiaopeng similarly supported a legal system not only to aid economic development but in reaction to his persecution during the Cultural Revolution. The most dramatic sign of this shift in the Party's orientation was evident in the assignment of defence counsel to the defendants in the widely publicised trial of the Cultural Revolution's much vilified Gang of Four, including Mao's widow. There is a sharp difference of opinion about whether the appearance of obviously ineffectual defence counsel helped or hindered. Those who say it helped point to the novel concept of defendants being protected by counsel, even if the protection was minimal and ultimately ineffectual. Those who say it hindered note that the association of defence counsel with embodiments of evil may have sullied the image of criminal defence for many years.

[6] Although more progressive reformers had urged that lawyers be labelled as 'independent professionals', the NPC settled for a shift in concept from lawyers as state workers to lawyers 'as personnel who have obtained a business license for setting up practice of a lawyer in accordance with the law and who provide legal services for the public' (Art 2 of the 1997 Lawyers Law).

and Michelson, 2004).[7] A growing market for legal services has followed the tremendous wave of law-making that has been unleashed across the spectrum of public and private law, beginning in an initial cycle since 1978 and continuing in more expansive reforms since the mid-1990s.[8]

Yet the legal reforms have failed to realise many of their original goals. Until today, courts have remained clearly subservient to the Party and readily coopted by local political authorities (Lubman, 1999: 3). Lawyers have faced severe competition from several occupational groups and all kinds of unauthorised practitioners in the market for legal services (Liu and Michelson, 2004). Even in criminal defence work where no other occupations are permitted to practise for profit, the defendant still has the option of choosing a non-lawyer to represent him in the criminal process.[9] Because Chinese lawyers are usually generalists, it is hard clearly to differentiate a criminal defence bar from other sectors of the legal profession.[10]

Interwoven with the transformation of the legal profession have been cycles of reform of the criminal justice system that directly affect the capacity of criminal lawyers to present any kind of restraint on enforcement agencies. Over the past 25 years, China has enacted legislation that registers a sharp turn from its criminal law practice in history by intimating at prospects of state moderation, an autonomous bar, and rights for citizens. These ideals seemed progressively advanced through the Criminal Law (1979, 1997), the Criminal Procedure Law (1979, 1996), the Lawyers Law (1997), and numerous state regulations and notices.[11] The Criminal Procedure Law is slated for revision again within the next several years during the life of the current National Peoples Congress.

[7] Deng Xiaopeng estimated in 1980 that China would need some 100,000–200,000 to sustain his proposed law reforms (Pereenboom, 2002: 348). In reality, China went from 21,546 lawyers in 1986 to 117,212 by 2000 (Michelson, 2003) and over 130,000 by the end of 2003 (Liu and Michelson, 2004).

[8] From 1979 to 1997, the National People's Congress and its Standing Committee had passed 328 laws, amended laws or decisions. The State Council had issued about 770 administrative regulations, and the provincial and local governments had formulated over 5,200 provincial regulations (Cai, 1999: 136).

[9] According to Art 32 of the 1996 Criminal Procedure Law, besides lawyers, criminal suspects and defendants can also appoint relatives, friends or people recommended by their organisations as the defenders.

[10] Although a large number of lawyers consider criminal defence to be the most challenging legal work and often start their careers from criminal cases, many choose to switch to more profitable civil and commercial work after gaining a certain reputation from their criminal defence work. However, for those who stick to criminal law practice, their work and identity are inevitably politicised and are thus distinct from those of commercial lawyers working in large corporate law firms, which have become an increasingly powerful sector of the Chinese bar (Liu, 2006). As the division of professional labour becomes more specialised, this commercial versus political distinction in the Chinese bar is likely to sharpen in coming years.

[11] Major regulations since 1996 include the following: Regulation on the Lawyer's Involvement of the Criminal Process in the Phase of Investigation (Ministry of Public Security, 10 Dec 1996); Regulation on Several Issues in the Implementation of the Criminal Procedure Law

The 1979 Criminal Procedure Law, while it re-established the basic legal institutions for criminal justice, nevertheless permitted the police to detain persons indefinitely before they were charged with a crime.[12] Lawyers got access to their clients only once a case was brought before the court and they were given no more than seven days' notice before trial to prepare a case. The purpose of the defence lawyer was considered well-served if he could help the court to render a just verdict, and thus his defence was often confined to pleading for leniency without challenging the prosecution or exercising such rights as cross-examining government witnesses and calling witnesses of his own as provided by the law (Leng, 1985: 93–5). Trials were usually not open to the public and the right of appeal was strictly limited. Not surprisingly, the great majority of defendants remained unrepresented by lawyers and, for those who did get legal representation, lawyers' pleas for innocence were rarely found and highly restricted by the government (Lawyers' Committee for Human Rights, 1993).

The revision of the Criminal Procedure Law in 1996 seemed a great step forward with its goals of expanding adversarial proceedings, increasing rights of defendants, and widening the role of defence lawyers (Chen, 1995). Several procedures that severely violate proceduralism (eg, detention for investigation, exemption from prosecution, etc) were abolished, rights of appeal were expanded, and a legal aid system was established. Defendants could now obtain legal advice and begin preparation of a defence as soon as cases reached the procuracy,[13] while criminal suspects remained unable to obtain substantive representation during police investigation where most abuses occurred, although lawyers were given the right to meet the defendant as a 'representative' in the investigation phase.[14] Defendants might apply for bail. Defence lawyers had the right to collect their own evidence, inspect the prosecutor's evidence, bring their own witnesses, and cross-examine state witnesses at trial. Yet the reality of criminal defence practice

(Supreme People's Court, Supreme People's Procuracy, Ministry of Public Security, Ministry of State Security, Ministry of Justice, NPC Legal Work Committee, 19 Jan 1998); Interpretation on Several Issues in the Implementation of the Criminal Procedure Law (Supreme People's Court, 2 Sept 1998); People's Procuracy's Rules for Criminal Procedure (Supreme People's Procuracy, 18 Jan 1999); Regulation on the Protection of Lawyers' Legal Practice in the Criminal Procedure (Supreme People's Procuracy, 10 Feb 2004). There have also been a large number of notices by the 6 state and judicial agencies regarding the 1996 Criminal Procedure Law.

[12] A series of small reforms of the criminal procedure in the early 1980s weakened procedural safeguards at the same time as the government strengthened police powers and the Party initiated a series of 'strike-hard' anti-crime campaigns (Lubman, 1999:163).

[13] Art 33 of the 1996 Criminal Procedure Law stipulates: 'A criminal suspect in a case of public prosecution shall have the right to entrust persons as his defenders from the date on which the case is transferred for examination before prosecution'.

[14] Art 96 of the 1996 Criminal Procedure Law stipulates: 'After the criminal suspect is interrogated by an investigation organ for the first time or from the day on which compulsory measures are adopted against him, he may appoint a lawyer to provide him with legal advice

indicates that several provisions in the legislation may in fact have been regressive. The central contradiction in these statutes—that the Party-state would become complicit in its own self-constraint—has required cycles of clarifying regulations and notices by multiple state agencies, which generated new conflicts and ambiguities in the law. Most importantly, defence lawyers are at considerable jeopardy in criminal cases, as the sharp drop in the proportion of cases with legal representation signifies (Yu, 2002).

II. AN INTERIOR VIEW OF LAWYERS AND THE QUEST FOR LIBERALISM

Studies of lawyers and liberalism characteristically take the long view since the major reconfigurations in political regimes and the legal complex can be more readily discerned (cf Karpik, 1999; Guarnieri, 2005; Scheppele, 2005). A complementary approach observes closely those instances when a shift appears to be occurring, whether this be at the point of revolutionary transition, or constitutional reconstruction, or a regression from liberalism. In this chapter we explicate the travails of the legal complex and political liberalism through a precise focus on specific provisions in the Criminal Law and Criminal Procedure Law and their implementing institutions that are most aggravating and threatening to criminal lawyers. Two issues in particular affect defence lawyers' ability to exercise in practice the due process provisions enacted in law. The 'Three Difficulties' refer to the practical difficulties of lawyers (1) in meeting criminal suspects, (2) in obtaining access to case files, and (3) in collecting evidence to defend criminal defendants and cross-examining witnesses at trial. Together these issues encompass many of lawyers' incapacities to provide effective representation and thus stand at the front line of criminal defence against arbitrary state power. 'Big Stick 306' refers to Article 306 of the 1997 Criminal Law that makes lawyers subject to arrest and imprisonment if they are complicit with their defendants in tampering with evidence or encouraging defendants to commit perjury.

Theoretically, these two sets of issues offer empirical indicators of the general concepts of political liberalism we engage on this project. As Table 3.1 indicates, the broad contours of political liberalism as we have defined it (Halliday and Karpik, 1998) fall into four classes: the commitment of the moderate state to the rule of law and proceduralism; the structural differentiation of power within the state, most importantly through a measure of independence of courts from executive and legislative control; the opening of civil society; and the basic legal rights of citizenship. In criminal procedure law each of these four aspects of political liberalism can be specified more precisely.

and to file petitions and complaints on his behalf. If the criminal suspect is arrested, the appointed lawyer may apply on his behalf for obtaining a guarantor pending trial. If a case involves State secrets, the criminal suspect shall have to obtain the approval of the investigation organ for appointing a lawyer.'

Table 3.1. Political Liberalism and Problems of Criminal Procedure

Major Themes of Political Liberalism	Major Issues in the Criminal Procedure	Major Problems in the Implementation of the CPL
1. Moderate State I (rule of law, proceduralism)	1.1 Meeting criminal suspects	1.1.1 Restrictions from the police and the procuracy
		1.1.2 Conditions of meeting
	1.2 Collecting evidence	1.2.1 Limitations on the rights of lawyers to collect evidence
		1.2.2 Difficulties in calling witness and cross-examining evidence at trial
	1.3 Obtaining access to case files	1.3.1 Access to evidence collected by the police and procuracy
		1.3.2 Access to case files at court
	1.4 Protection from prosecution	1.4.1 Crime of perjury in criminal defence work
		1.4.2 Leaking state secrets
2. Moderate State II (separation of power, judicial independence)	2.1 Judicial independence from Party-state influences	2.1.1 'Strike Hard' campaigns
	2.2 Power relations among the police, the procuracy, and the judiciary	2.2.1 The procuracy's supervisory power over both the police and the court
		2.2.2 Jurisdictional conflicts among the three agencies
3. Civil Society	3.1 Autonomous professional associations for lawyers	3.1.1 The Ministry of Justice's control over the ACLA
		3.1.2 Powerlessness of the lawyer associations
4. Basic Legal Freedoms	4.1 Right to legal counsel	4.1.1 (=1.1.1+1.1.2) Restrictions and conditions from the police and the procuracy
		4.1.2 Lawyers' unwillingness to represent
	4.2 Due process of law	4.2.1 Confession by torture
		4.2.2 Extended detention
		4.2.3 Sentence before trial
		4.2.4 No presumption of innocence

Key: Light grey = Three Difficulties. Dark Grey = Big Stick 306.

1. *Moderate State I*. The rule of law and proceduralism generally prescribe the representation by lawyers of individuals detained by officials of public security. Specifically, these involve access by lawyers to meet criminal suspects (see cell 1.1 in Table 3.1), the ability of lawyers to collect evidence on behalf of their clients (1.2), the right of lawyers to obtain access to case files collected by the police or procuracy (1.3), and the protection of lawyers themselves from retribution by executive authorities (1.4). Each of these aspects of criminal defence under a rule of law regime has been severely tested in China's implementation of its criminal procedure law and regulations. The 'Three Difficulties' confronted by Chinese criminal defence lawyers are exemplified by specific problems that arise from deformities in the implementation of the law (see 1.1.1, 1.1.2, 1.2.1, 1.2.2, 1.3.1, 1.3.2 in Table 3.1). Relatedly, the threat of 'Big Stick 306' directly abrogates the right of lawyers themselves to be free from arrest in court by the prosecution (1.4), which in practice has been occurring when lawyers have been accused of encouraging their clients to commit perjury (1.4.1) or of leaking state secrets (1.4.2).
2. *Moderate State II*. The separation of powers in the concept of the moderate state imply in the criminal law that a judiciary at once will obtain some degree of autonomy from the Party-state apparatus (cell 2.1) and more precisely that power relations among the police, procuracy and judiciary will re-equilibrate to enable functional and structural differentiation among these roles (2.2). In China's criminal justice system, however, the procuracy continues to hold supervisory power over the police and the court (2.2.1) and the norms formalised in the Criminal Procedure Law and subsequent regulations trigger conflicts among the three justice agencies (2.2.2). Furthermore, the Party control over the judicial agencies is not only reflected in routine activities, but strengthened during 'strike-hard' campaigns aiming at striking crimes (2.1.1).
3. *Civil Society*. In criminal law, as in law more generally, lawyers potentially anchor institutions of civil society. They do so to the extent that their own professional associations are self-governing and can mobilise a profession against the state, or ally with other groups in civil society, or variously ally with the judiciary or restrain and critique it. Autonomy of the bar is particularly acute in the criminal law, for it is here that lawyers confront most directly the coercive and potentially repressive arms of the state (cell 3.1). In China such autonomy has not been realised in general and the powerlessness of the criminal bar is manifest both in the general control exercised over the ACLA by the Ministry of Justice (3.1.1) and the ineffectiveness of the ACLA in particular instances where lawyers have been arrested for falling foul of 'Big Stick 306' (3.1.2).
4. *Citizenship*. A fundamental protection for citizens under political liberalism relies on representation by legal counsel (cell 4.1). Yet it

> is exactly this primitive right that has been removed de facto from Chinese citizens because the conditions under which criminal defence lawyers are expected to serve are so threatening that they either have withdrawn altogether from criminal defence or proceed with a timidity that effectively nullifies their efficacy (4.1.1).

In practice, the 'Three Difficulties' and 'Big Stick 306' subvert each element of a legal liberalism that lies at the heart of a liberal political system. They do not exhaust the tensions between the law and practice nor the inherent difficulties in the criminal procedure statutes and the contradictions that animate them. But they do enable us to dissect in detail one part of a conflict that lies at the heart of legal liberalism's prospects in contemporary China.

Because we have access to data that are unusual, if not exceptional, in the history of any profession, we explicate the critical conjunction for liberalism between the constitution of a legal profession and the constitution of a moderate state and citizenship. We shall show that there is a curious synergy that has arisen in the confrontation of criminal lawyers with the rest of the criminal law legal complex. That synergy fuels movement towards that phase of professionalisation that is conventionally taken for granted in scholarship on lawyers and other professions—the formation of professional identity as a cornerstone of professional community and a condition of professional mobilisation. We seek to find evidence from our data in the interior of the profession of moves towards the creation of a professional identity that puts pressure on the bar association to separate itself from the controlling arm of the state.

III. NATURAL HISTORY OF A PROFESSIONAL PUBLIC SPHERE[15]

We approach the sites of criminal defence lawyers' everyday practice through a unique source—discussions of Chinese lawyers among themselves as they are recorded in the online forum of the All China Lawyers Association (ACLA). The forum was established in August 2002 and has been developed into a large internet community of lawyers, law students and other legal professionals in China. By March 2005, the forum had over 34,000 registered users who had posted 271,925 messages on 25 discussion boards with divergent topics for each board, including discussions on different legal areas, consulting services to the public, professional issues in lawyers' practice, the bar examination, local lawyer communities, and general comments on the rule of law. Messages relating to criminal

[15] This chapter is drawn from a larger study of criminal procedure law-making in China. The study relies upon (a) extensive interviews with law-makers, academics, practitioners and government officials, (b) primary and secondary materials, such as the publications of the criminal justice legal complex, and (c) foreign commentary and secondary research.

procedure law and the work of defence lawyers have been among the central topics and most heavily trafficked discussion sites since the beginning of the forum. Through this data source we can overhear, without contamination by outside observers, the spontaneous exchanges among lawyers about their problems in the implementation of the criminal procedure law that purport to institutionalise basic elements of political liberalism.

The online discussions are organised by threads of messages, ie, every thread contains multiple messages on the same topic. The typical length of the threads we collected is between two and 30 messages, but the longest threads on the forum sometimes contain more than 100 messages. Issues related to both the 'Three Difficulties' and 'Big Stick 306' are discussed extensively on the forum, from which we collected the most relevant 60 threads.[16] Messages take multiple forms, including: (1) descriptions of problems; (2) stories; (3) analysis of situations; (4) proposals for remedies and solutions; (5) 'voting' to support or disagree with other people's opinions; (6) emotional encouragement; and (7) explicit promotion of collective action by the lawyer community.

Participants in the forum discussions include both lawyers and non-lawyers. On the basis of some systematic evidence and qualitative analysis of content, it appears that the great majority of the forum users are lawyers and other legal professionals. As best we can tell, their geographical distribution is largely representative of the Chinese legal profession.[17] Over time, the discussion participants have differentiated into regular versus occasional users. Regular users have posted hundreds or even thousands of messages, whereas occasional users often join the forum at one time to post messages for help or participate in some specific topics and do not make many subsequent visits. Lawyers are much more frequently found among regular users than among occasional users.

In its brief three-year history, the forum has already undergone striking changes which in themselves signify the travails of an emerging professional public sphere for debate over professional identity, community and politics.

[16] Among the 60 threads, there are 9 threads (77 messages) directly on the difficulty in meeting criminal suspects, 12 threads (118 messages) on the difficulty in collecting evidence and cross-examining witnesses at trial, 4 threads (51 messages) on the difficulty in getting access to case files, and 22 threads (382 messages) on 'Big Stick 306' and persecution of defence lawyers. We do not claim that these 60 threads include all relevant discussions on the forum, but they provide sufficient data for the purposes of our research.

[17] According to an address book compiled by the forum administrator on 9 February 2004, there were 206 users who provided information on their real name, gender, occupation, location and contact means. Among these 206 users, 71.3% are lawyers working in law firms, 9.8% are legal scholars and law students, 5.3% work in the government (including the judiciary and the procuracy), another 5.3% work in enterprises, and the remaining 6.8% work in the bank, the military or unspecified occupations. Geographically, the 206 users are roughly proportionally distributed in China's 32 provinces according to the lawyer population, with users from only 4 provinces missing. These 4 provinces are Qinghai, Hainan, Hong Kong and Macau. There are even 3 users from Inner Mongolia and one user from Tibet, all of them lawyers.

In the first several months (August–December 2002), the discussions were among a relatively small number of users and were very loosely regulated. Around the 2003 Chinese New Year (in February), when the forum administrators were on vacation, some politically sensitive messages were posted in large numbers on one discussion board.[18] At the time, the administrators were quite benign to the users and deleted only those very radical messages that endangered the survival of the forum. There were also hot debates among the users on whether politically sensitive messages should be discussed on the lawyer forum. By summer 2003, the regulation of the forum was largely stabilised with relatively clear publicised rules of discussion.[19] Sanctions were put in place. For instance, user IDs now could be held inactive for a while as a punishment for breaking the rules of discussion. A 'Recycle Bin' was also established in 2003 for the administrators and board managers to remove inappropriate posts,[20] including a large proportion of politically sensitive messages.

Control over the discussions has been gradually tightened since then. During the 2004 Chinese New Year and the subsequent NPC meetings (February–March 2004), the forum became read-only to avoid the surge of radical posts as had happened in 2003. In June 2004, the IDs of some very active regular users were permanently deleted due to their radical posts. This generated a large number of debates on the freedom of speech in forum discussions. In September 2004, the forum was closed for about a month due to the government inspection of major internet forums.[21] At the same time, the forum administrators created an ID named 'Forum Government' to post messages for regulation, notices, and other administrative messages. They also created a discussion board named 'Forum Court' to handle disputes on deleting messages, deleting IDs, etc. From then on, forum administrators used these two IDs instead of their personal IDs for managing the forum. In short, the forum regulation was substantially formalised.

In early February 2005, the forum was read-only for about two weeks due to the Chinese New Year and then resumed. In contrast to the previous year, when the shutdown for new messages only lasted a brief time, from

[18] There has been no formal definition of what constitutes 'political sensitivity', but messages that criticise the Party or the central government, messages that mention banned topics like the 1989 Tiananmen incident, messages that reveal the corruption or abuse of power by the leading officials, messages that promote Taiwan independence, and messages that make radical comments on democracy or human rights are all considered 'politically sensitive'.

[19] Eg, no direct personal attack on other users, no politically sensitive comments, no duplicate posts, etc.

[20] As the second author is the board manager on the 'Legal Theory and Constitutional Law' board of the forum, we have access to this 'Recycle Bin' to observe the control of the forum. In fact, the establishment of the 'Recycle Bin' enables politically sensitive posts to be preserved from permanent deletion. Users who post such messages have the right to retrieve the messages from the administrator or the board manager.

[21] This large-scale government inspection was caused by the crackdown on a famous Bulletin Board System of Peking University because of its political sensitivity.

25 February the forum became read-only again as part of the heightened government crackdown on Bulletin Board Systems throughout the country. This time the pause period lasted for six months until 29 August 2005, a fact which generated tremendous concern among the forum participants regarding the survival of the forum. A message approval procedure was added in order to control politically sensitive posts, ie, every message needed to be approved by either the forum administrator or the board manager before being posted.[22] In spite of the long pause and strict regulatory method, most of the regular users quickly came back after the forum was resumed. A strong professional collectivity has been formed on the forum during its three-year development, which makes the users persist in their pursuit of public discourse, even when the discussions are under increasingly strict government control.

To explore the underlying reasons for the increasingly strict regulation of the forum, two informal interviews with the forum administrators were conducted in July 2004 and August 2005, respectively. During the interviews, the administrators admitted that, from time to time, they received telephone calls and orders from the Ministry of Public Security and other relevant state agencies regarding information control of the forum. Around the Chinese New Year, the annual NPC meetings and some politically sensitive dates, information control over the forum discussions would be highly strengthened. The forum's read-only periods were the direct results of such government control. In normal conditions, the administrators also have the responsibility to delete politically radical posts, but the level of control is much lower. In other words, the forum administrators assume a very delicate position between the government and the profession, which makes their work both important and difficult in maintaining the forum as a public sphere.

Overall, the ACLA forum not only provides Chinese lawyers with an unparalleled site for public discourses and the development of professional identity, but also constitutes a political site in itself. Its own history, struggles and development are indicative of the capacity of lawyers to form their intra-professional microcosm of civil society. In this sense, the institutionalisation of the discussion rules and the formalisation of forum regulation reflect the conflicts between the powerful authoritarian state and the burgeoning professional community (and civil society).

IV. DEFENCE LAWYERS IN DANGER: THREE CASES OF LAWYER PERSECUTION

Three stories capture the vulnerability of Chinese lawyers. These were reported on the ACLA forum during 2003–4 and aroused heated

[22] The original objective of this procedure is to establish an automatic filtre that is able to screen messages with politically sensitive key words, yet the result is a manually controlled approval system that relies on the discretion of the administrators and board managers.

discussions among the forum users. One case (the Ma Guangjun case) was also widely reported in mainstream public media, while the other two cases remained a subject of debate within legal circles only.

(a) The Lawyer SOS Case

No case has been more passionately and thoroughly discussed on the forum than the case of a defence lawyer from Anhui Province who fled from the police and posted an SOS message on the forum. The message generated 134 responses by 99 distinct users from at least 21 provinces. Here is the full text of the original message:

> I am a lawyer in Anhui Runtian Law Firm (Lawyer License Number: 128901110309). On February 15, 2004, my colleague Lawyer Yu Huakun and I were appointed by the law firm to provide legal help to the criminal suspect of a case of death by malicious injury which was investigated by the police of the Changping section of the Dongguan City Police Department of Guangdong Province. Lawyer Yu Huakun was already detained by the Dongguan City Police Department for obstructing testimony, and now I am fleeing and cannot go home.
>
> On reflection of the process in this case, we did not violate the Article 306 or 307 of the Criminal Law on the crime of obstructing testimony at all. If we indeed violated the law and committed a crime, we would have nothing to say about this situation. In fact, during the process of the case, we strictly obeyed the relevant laws, rules and regulations, not even taking half a step to the bombing area, but now the result is that one of us is in jail and the other is fleeing. I must say this is a huge grievance of the Chinese legal profession! Although this might only be an exceptional phenomenon, it clearly happened in reality. If we let things go like this, won't China's lawyers and legal system be trashed by anyone? The tragedy that happened to me and Lawyer Yu Huakun today might also happen to other lawyer colleagues tomorrow.
>
> The role of lawyers in the development of the socialist legal system cannot be substituted. Lawyers provide legal service to criminal suspects, defending their legal rights, which is the responsibility and right that the law endows to lawyers. If lawyers' right to practice according to the law could be violated, then how could the legal rights of the represented party be guaranteed? Therefore, protecting lawyers' right to practice according to the law and increasing lawyers' status in criminal cases are urgent matters.
>
> Now the ACLA is holding a conference in Huangshan, Anhui Province. I, also representing Lawyer Yu Huakun, send this message for help to all of you, please save us save yourselves, and save China's lawyers and legal system. SOS, SOS, SOS…
>
> The person crying for help: a lawyer at Anhui Runtian Law Firm (anonymous). April 8, 2004.[23]

[23] #440419, 8 Apr 2004, 22:56, Anhui.

The last reply to this SOS message was posted in January 2005, nine months after the original message was posted. However, the fate of the fleeing lawyer remains unknown.

(b) The Wen Zhicheng Case

The second case concerns the persecution of Wen Zhicheng, a 61-year-old defence lawyer in Ruijin City, Jiangxi Province, by the local police and procuracy. The message was posted by a lawyer from Sichuan Province in December 2004. The message started with a long case description said to be written by Wen Zhicheng himself. Here is an excerpt:

> I am a licensed lawyer in Huarui Law Office in Jiangxi Province, my name is Wen Zhicheng, and I am 61 years old this year. I was appointed by our law office to defend Zeng Hailin, the defendant of a suspected corruption case. … Zeng Hailin was set free on September 11 this year, but I, the defender, have still been obtaining guarantor pending trial (*qu bao hou shen*)[24] as a criminal suspect. ...
>
> Zhu Dexin, the section chief of the Bureau of Anti-corruption of Ruijin Procurator's Office invited me to have a talk in the law office at 5pm on June 5 (Saturday). But at that time he promptly detained me in the name of the Ruijin City Bureau of Public Security, and then made a search of my body and my office desk. … The alarm whistle of the police car resounded before I walked to the police car, so the crowd built up of thousands of people. …Yang Xiaoshan, the deputy section chief of the Anti-Corruption Bureau ordered the driver to put down all the window glasses of the police car. And then the police car drove me slowly to the Procuracy with the alarm whistle resounding. It was actually to use a police car to make a parade and pillory of a lawyer under escort.
>
> Arriving at the Procuracy, two police officers and four officers of the Anti-Corruption Bureau used torture to coerce a statement from me for a period of up to 8 hours, in the 'Interrogation Room' of the Procurator's Office. … I asked to pee for three or four times. They said: 'You may pee. But you cannot be allowed to do it until you confess the crime.' … They forced me to confess the criminal facts of forging evidence and obstructing testimony for Zeng Hailin in the process of the Zeng Hailin corruption case. I said: 'I have practiced as a lawyer for more than 20 years, and have never forged any evidence or obstructed

[24] Obtaining guarantor pending trial is similar to the bail system in Western countries, Art 56 of the 1996 Criminal Procedure Law stipulates: 'A criminal suspect or defendant who has obtained a guarantor pending trial shall observe the following provisions: (1) not to leave the city or county where he resides without permission of the executing organ; (2) to be present in time at a court when summoned; (3) not to interfere in any form with the witness when the latter gives testimony; and (4) not to destroy or falsify evidence or tally confessions. If a criminal suspect or defendant who has obtained a guarantor pending trial violates the provisions of the preceding paragraph, the guaranty money paid shall be confiscated. In addition, in light of specific circumstances, the criminal suspect or defendant shall be ordered to write a statement of repentance, pay guaranty money or provide a guarantor again, or shall be subjected to residential surveillance or arrested. If a criminal suspect or defendant is found not to have violated the provisions in the preceding paragraph during the period when he has obtained a guarantor pending trial, the guaranty money shall be returned to him at the end of the period.'

testimony for any client. And similarly I have not forged any evidence or obstructed any testimony for Zeng Hailin this time. On the contrary, it is you the Procuracy who detained Zhu Jingfu, the defending party's witness on the court day of Zeng Hailin case, and detained Yang Haiping, the defending party's witness on the following day. And now you are detaining and extorting a confession by torture from the defender [me]. Your actions will be accused by the law sooner or later.' … They afflicted me bodily, insulted me personally, and frightened me mentally, in order to compel the lawyer to surrender to their orders.

This detention and interrogation lasted from 6pm, June 5 to 2:40am, June 6. … At 7am I was committed into No.17 prison room of the Ruijin City Detention Center and began a life living with the criminal suspects of intentional homicide, robbery, rape, theft and racketeering. … From 9am to 11am on June 7, the Deputy Chief Procurator Zou Yuansheng picked me out of the prison room. … He said, 'For a bad guy rotten from head to feet, why would you defend him? What you antagonise is against the nation, the laws of the nation, and the powerful state judicial agencies. If you had cooperated with the Procuracy in the evening of June 5, maybe you could have gone back home to sleep that night. But you had a hard head so you are still here today. Now if you cooperate with our Procuracy, maybe you can go back this afternoon.' I said, 'What is the responsibility of the lawyer as a defender for the criminal suspect? Do you know? This lawyer [me] practiced according to the law, but you detained lawyers. Have you estimated the outcome of this behaviour?' The talk ended in displeasure.

The Public Security Bureau stated that my criminal detention was extended to June 13. … At 5pm of June 20, the Public Security proclaimed to me the decision of obtaining guarantor pending trial. … Thus I had been detained for 15 days altogether.[25]

There was no further information on whether the lawyer was later prosecuted or not.

(c) The Ma Guangjun Case

In the preceding cases, the defence lawyer was either chased by the police or detained for interrogation, but neither of them was reported to be arrested or prosecuted. In Ma Guangjun's case he was prosecuted and detained for 210 days before finally being acquitted by the court. After the acquittal, the case was widely reported in local and national media. Three of these media reports were posted on the ACLA forum, including two newspaper articles from the *Southern Metropolitan News* (*Nanfang Dushi Bao*) and the *Inner Mongolia Legal System News* (*Neimenggu Fazhi Bao)*, as well as a long interview with Ma Guangjun by the CCTV, the official central television station in China.

Ma Guangjun is a 50-year-old lawyer in Ningcheng County, Inner Mongolia, who defended Xu Wensheng, an impotent patient, in a rape

[25] #620344, 4 Dec 2004, 11:07, Jiangxi.

case in 2003. On 23 May, the next day after the court proceedings, seven key witnesses who testified in court were detained and coerced to confess that the defence lawyer advised them to commit perjury. Soon after, Ma Guangjun, the defence lawyer, was arrested for the crime of obstructing testimony and detained in the local detention centre from 22August 2003 to 20 March 2004.[26] During his trial process, the Inner Mongolia Lawyers Association investigated the case and appointed two prominent lawyers in the province to defend Ma Guangjun.[27]

After being released, Ma was interviewed by CCTV and the programme was broadcast internationally. During the interview, Ma described the difficult situation he faced when handling the rape case:

> He [the defendant] said he had confessed three times, but all were against his will. I asked him, why did you confess against your will? He said that every time he confessed it was because the policemen had made him confess through torture for more than 20 hours. He could not put up with the torture. In order to preserve himself he had no choice but to confess. … I didn't believe him entirely at the beginning. … I knew that if I, as a lawyer, obtained the most crucial evidence in order to reverse the testimony in this case, I would take the risk of being caught up for committing perjury, so I decided not to take evidence by myself. … I think that was my habit. At present it is the situation in my area that you cannot see anything, and the procuracy does not allow you to see. It only tells you that this case involves the crime of rape. … You can only wait until the case files are transferred to the court, then you can go and see it. We have no ability, and no other means.[28]

He then proceeded to talk about his experience as a subject of the charge of perjury, starting from the moment he heard from a villager that seven witnesses had been detained by the procuracy on 23 June, the second day of the court proceedings:

> I was shocked at that moment, and I told him that the procuracy had the power to check the evidence, but if it captured someone without releasing them, at that time I absolutely would not believe it was true, because the procuracy was not only the agency for implementing the law, but also the supervisory agency. How could it do such an illegal thing? I could not believe then so I said that you had to wait in patience, they would surely be released in the evening. But in the end they had not been released by the evening of the 24th. He called me the same night and then I had the hunch that the procuracy had put its hand on the witnesses and the purpose was not only the witnesses, but also pointing at me. … Because when we were in the court, the prosecutor and I debated very harshly. I was so aggressive and consolidated my argument step by step. So in terms of the effect in court, I think I did quite well and the prosecutor from the procuracy was placed in a very passive position. … If the witnesses did not appear in court, nothing would happen. … I had a feeling that, although I was clear in my mind where the trap

[26] #536452, 12 July 2004, 01:19, Inner Mongolia.
[27] #536448, 12 July 2004, 01:02, Inner Mongolia.
[28] #536452, 12 July 2004, 01:22, Inner Mongolia.

> was, I had no choice but to jump into it. … Because I had to maintain my dignity, I am a lawyer, so I could not escape. … I was very ill-treated in the detention centre, and my every word and action was watched out every day. … I got rheumatoid arthritis when I was young, and my disease was quite severe. The heating was not good in my room so my legs began to jerk when I was in bed at night. Also I was not permitted to have two cotton-padded mattresses, only one was permitted and the cotton clothes sent by my family I was not permitted to wear. ….[29]

At the moment of his own defence he wept. The moment he saw the two defence lawyers appointed by the lawyers' association to represent him in the detention centre:

> I was very sad then. So I cried, really. As the defence lawyer for Xu Wensheng, I was sitting outside to meet with Xu Wensheng half a year ago, hoping to defend his innocence. I didn't expect that, half a year later, I would be sitting in the position of Xu and the Inner Mongolia Lawyers Association would have appointed two lawyers to defend my innocence. I was changed from the defence lawyer into the defendant. This kind of feeling was impossible for anyone to accept. But in front of the fact, you had no choice but to accept it.[30]

The case ended with a verdict of not guilty and Ma Guangjun's story was widely disseminated across the country. His account vividly expresses the ultimate fears of all criminal defence lawyers in China.

(d) Criminal Defence in Practice

The three cases, albeit extreme, nevertheless symbolise the yawning gap that exists between the aspirational norms promulgated in the statutes and the murky practices of everyday criminal defence. The iron triangle that has existed for 50 years among the police, procuracy and judges has proved immensely difficult to fracture and to rebalance. A culture of law-enforcement collusion that is resistant to legal representation proves highly resistant to modification. The struggles for criminal defence are pungently illustrated by lawyers' expression of their grievances with the 'Three Difficulties' and 'Big Stick 306' on the forum.

(i) Three Difficulties: 'Don't Let Lawyers Dance with their Hands "Cuffed"'[31]

Chinese lawyers complain vigorously about their difficulties in (1) meeting the criminal suspect, (2) getting access to case files, and (3) collecting evidence and cross-examining witnesses at trial.[32]

[29] #536452, 12 July 2004, 01:22, Inner Mongolia.

[30] *Ibid*.

[31] The headline of an article on the troubles of criminal defence lawyers in *Legal Daily*, quoted in #556167, 8 Aug 2004, 23:11, Sichuan.

[32] These problems are not only discussed within the lawyer community, but also frequently observed by legal scholars (Qi et al., 1997; Li, 1998) and media reports, including in the newspapers of the procuracy and the judiciary. See, eg: *Chinese Lawyers* (*zhongguo lüshi*), Nov 1995, Dec 1997, May 2001; *People's Daily* (*renmin ribao*), 7 Apr 2004;

Meeting the Criminal Suspect. The 1996 Criminal Procedure Law seemed to offer a significant advance in the protection of criminal suspects because it broadened the scope of legal representation from the trial phase to the phase of investigation.[33] Article 11 of the 1998 Joint Regulation on Several Issues in the Implementation of the Criminal Procedure Law by six state agencies prescribes that, except for some special occasions (eg, involving state secrets), the lawyer's application for meeting the criminal suspect should be arranged within 48 hours. In reality, lawyers complain vociferously that delay is the order of things as 'lawyers' right of meeting is often restricted "layer by layer"'.[34] Said a defence lawyer from Chongqing:

> According to my own experience, this Article [Article 11] is equal to nothing. It often happens that after the lawyer's application, the police officer would make all kinds of excuses. 48 hours is impossible, and you are a lucky dog if you can make it within 480 hours. Even if the lawyer is really pushy and can finally get the meeting settled, the officer is still reluctant.[35]

Another indicated that 'this regulation promulgated and implemented by the six agencies of authority has become a mere scrap of paper: three days, five days, ten days, a hundred days…the agencies for investigation find all kinds of reasons to refuse the lawyer's meeting'.[36]

One tactic is to broaden the exception that exists in the law and regulations: '[s]ome police agencies wilfully expand the meaning and scope of "state secret," often by rejecting the lawyer's meeting on grounds of involving state secrets'.[37] Or police will:

> Postpone the meeting with all kinds of methods, e.g., the lawyer comes and the police officer says 'I have to report to my superior but my superior is out of town,' so 2 days later he is back and the police officer says 'I have to report to the division chief and he is in a meeting.'[38]

If a meeting does take place it may be restricted to a single occasion and for only a few minutes, frequently in spaces which make conversation difficult.[39]

> During the meeting, the police officer is not just 'present at the meeting,' but sometimes 'intimidates' the criminal suspect like 'What did you say in the police

Procuratorial Daily (*jiancha ribao*), 24 July 2002; *People's Court News* (*renmin fayuan bao*), 22 July 2002.

[33] Art 96 of the 1996 Criminal Procedure Law.
[34] Article from *Legal Daily*, quoted in #556167, 8 Aug 2004, 23:11, Sichuan.
[35] #618182, 27 Nov 2004, 11:13, Chongqing.
[36] #256600, 28 Sept 2003, 19:39, Jilin.
[37] Article from *Legal Daily*, quoted in #556167, 8 Aug 2004, 23:11, Sichuan.
[38] Interview B0515.
[39] #555662, 8 Aug 2004, 05:13, Shandong.

> office? Why say such confusing words to the lawyer?' This is not the lawyer's meeting with the criminal suspect, but the police officer's investigation with the assistance of the lawyer.[40]

Lawyers commonly report that in meetings they may do no more than provide emotional support for the detainee and possibly inform the detainee of the suspected offence and some relevant statutes. While Article 96 of the Criminal Procedure Law states that the lawyer can 'interview the detained criminal suspect to understand the circumstances and details related to the case', as soon as the lawyer begins to do so 'the investigation officials present in the interview would immediately stop it'.[41] Lawyers across China complain that these facts-on-the-ground nullify the law. Agents of investigation use 'illegal behaviours to deal with lawyers who obey and loyally implement the law'.[42] Despite the advances in the statutory law and subsequent regulations, the meeting of lawyers with detainees remains a site of police resistance, often with substantial public support,[43] and implementation has lagged badly.

Getting Access to Case Files. The 1996 Criminal Procedure Law requires that when the procuracy decides to prosecute the case it should transfer to the court its case files with the charges and evidence which should then be made available to the lawyer for the accused.[44] Yet two policy goals in the law partially contradict each other. In order to combat a long-standing practice of police, procurators and judges agreeing on the outcome of a case before it came to court, the law reforms sought to make the trial an authentic forum in which judges heard evidence and made their decisions after the prosecution and defence could present their respective cases. A way to restrain judges from premature decision-making is to restrict the evidence they see until the trial takes place. As a result, the law reforms led to a thinning of evidence in the files transferred by the procuracy to the court. Since the evidence in these files effectively amounts to the totality of evidence available to defence lawyers, they find themselves actually in a worse situation after than before the legislation.[45]

Access to case files is also a matter of practicality. A lawyer reported that he was denied the access in a criminal case merely because the court charged a high price for xeroxing case files before and was criticised by the higher level court, so it decided not to let lawyers xerox case files any

[40] #618182, 27 Nov 2004, 11:13, Chongqing.
[41] #256602, 28 Sept 2003, 19:41, Jilin.
[42] *Ibid.*
[43] Interview 05B01, 05X05, 05B14, 05B15, etc.
[44] Art 150 of the 1996 Criminal Procedure Law.
[45] In the Nincheng County rape case, for instance, Ma Guangjun claimed that no information at all was in the case file from the police interrogation of Xu Wensheng, the defendant (#536452, 12 July 2004, 01:22, Inner Mongolia) Also see Interview B0501, B0503, B0510, etc.

more—ie, lawyers had no choice but to take extensive notes from several volumes of files, even if they got the access to them.[46] A report of the NPC's investigation on the implementation of the 1996 Criminal Procedure Law in 2000 indicates that, despite the stipulation in Article 36(1) of the law,[47] both the time and extent of the defence lawyers' access to case files are highly restricted in practice (Song, 2001).

Nevertheless, the law reforms may be producing a useful by-product. Since lawyers face significant dangers in relying on any evidence other than case files (see below), they are becoming increasingly artful in examining written materials. As a distinguished criminal defence lawyer in China picturesquely commented, 'the cross-examination in court is living people examining dead papers'.[48] Leading criminal defence lawyers report success in inducing the procuracy to withdraw charges or in persuading the court to impose lighter sentences by demonstrating inadequacies, contradictions, missing information and fabrication in the case files. Some leading defence lawyers report that this close scrutiny of police and procuracy evidence may be producing compelling investigation agencies to obtain better quality evidence.[49]

Collecting Evidence, Bringing Witnesses. The 1996 Criminal Procedure Law gives lawyers limited rights to collect evidence.[50] In practice, lawyers cannot easily gather their own evidence because they must get the permission of the procuracy or the court in order to collect evidence from victims or witnesses; and they have insufficient powers to compel the provision of evidence (there are no sanctions for failure to comply with a court subpoena) (Sheng, 2003, 2004; Yu, 2002). Collecting evidence from the victim's side needs the consent of the witnesses. And lawyers may not hire private investigators.

Witnesses are easily intimidated by authorities and are usually loath to appear in court and contradict official testimony. The Ma Guangjun case vividly illustrates the extremes of witness coercion by public security and the procuracy. As Xu Wensheng's defence lawyer, Ma Guangjun, managed to persuade several witnesses to give their testimonies in support of Xu Wensheng in court. When those testimonies contradicted the police account, the witnesses were detained by the police soon after they left the court; some

[46] #619075, 1 Dec 2004, 12:44, location unknown.

[47] According to Item 1 of Art 36 of the Criminal Procedure Law, 'From the date when the people's procuracy brings an indictment, the defence lawyers may look up, extract, and duplicate the bill of the indictment and the materials verified by technical experts, and may interview or communicate with the criminal suspects who are detained.'

[48] Interview B0507.

[49] Interview B0507, B0508, B0510.

[50] Art 37 of the Criminal Procedure Law prescribes: 'With the consent of witnesses, or other units and individuals concerned, defence attorneys may collect evidence concerning the case from such persons.'

were beaten, tortured and compelled to retract their testimony.[51] Witnesses may even be compelled to incriminate themselves by stating they forged evidence on the advice of defence lawyers, as Wen Zhicheng alleged in Ruijin City.[52] Because witnesses are rarely present in court proceedings, the defence lawyer has almost no chance to cross-examine on the evidence collected by the police and the procuracy.[53] It is not surprising, therefore, that the acquittal rates in criminal cases remain less than 1 per cent (Michelson, 2003: 100) and the lawyer's presence in criminal proceedings has almost no effect on case outcome (Lu and Miethe, 2002).

As a result, some of China's leading defence lawyers report that they do not even attempt to obtain evidence from witnesses or bring them into court.[54] Above all, however, they are deterred by the enactment of a draconian provision in the 1997 Criminal Law, Article 306.

(e) 'Big Stick 306'

Lawyers are at considerable jeopardy in criminal court—they confront risk to their persons, their liberty, their careers and their finances. These risks arise from a combination of provisions in the law. The reforms in the 1996 Criminal Procedure Law gave lawyers increased powers to protect their clients in the investigative phase of a criminal case. As a political tradeoff intended to meet objections of the police and procuracy, the Law prohibited lawyers from assisting their clients by concealing or destroying or forging evidence or allowing defendants to collude with each other. It further prohibited counsel from threatening witnesses or getting witnesses to commit perjury.[55] A year later the NPC yielded to intense law enforcement pressure by incorporating Article 306 of the Criminal Law, which provides that lawyers are subject to criminal penalties if they persuade witnesses either to change their testimony or to commit perjury.[56] While these provisions seem consistent with many rule-of-law norms, in practice they open up avenues for abuse which are regressive. The law itself inadequately clarifies what constitute these crimes and thus their meaning can be stretched to suit the

[51] #536452, 12 July 2004, 01:22, Inner Mongolia.
[52] #620344, 4 Dec 2004, 11:07, Jiangxi.
[53] #572387, 1 Sept 2004, 17:35, Chongqing.
[54] Interview B0502, B0514.
[55] Art 38 of the 1996 Criminal Procedure Law (Yu, 2002:853-54).
[56] Art 306 of the 1997 Criminal Law stipulates: 'During the course of a criminal trial, any defense lawyer or trial representative who destroys or falsifies evidence, or threatens or induces witnesses to lie, changes testimony or makes false testimony, shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention. If the circumstances are serious, the sentence shall be fixed-term imprisonment of not less than three nor more than seven years.'

interests of police and prosecutors. Neither is there a satisfactory system of precedent where courts can settle the meanings of the statutory terms or where courts will hold police and prosecutors accountable.

The existence of this so-called 'Big Stick 306' makes criminal defence work in China not only frustrating but dangerous. Because the procuracy is both the opposing party of defence lawyers in court proceedings and a major executor of the criminal law, it has the unlimited power to use Article 306 to punish defence lawyers who present different evidence from that collected by the police and the procuracy. By 2002, over 100 defence lawyers all over the country, including some nationally-renowned lawyers from Beijing (eg, Zhang Jianzhong), had been prosecuted for the crime of perjury. According to Professor Zhao Bingzhi at Renmin University, 70–80 per cent of all complaint cases that the lawyers' associations have received in recent years are related to Article 306. The ACLA conducted a statistical analysis on 23 such cases and found that about half of the lawyers were wrongly detained and sentenced.[57] Li Kuisheng, a Henan lawyer, was detained for 26 months before his innocence verdict; Huang Yabin, a Fujian lawyer, was similarly wrongly detained for more than a year; Wang Yibing, a Yunnan lawyer, even decided to become a monk after being wrongly detained and tortured for two years.[58]

Not surprisingly, discussion on the persecution of defence lawyers has been one of the hottest topics on the forum. A message posted on 3 October 2002 on 'Big Stick 306' generated 73 responses from 60 users in the following five months.[59] Many cases are cited in the Forum and the ACLA magazine as first-hand testimony of the immediacy and pervasiveness of this provision:

> Last week, during the court proceeding of a criminal case at the Gansu Province Jingtai County People's Court, the defendant overthrew a confession. … But the prosecutor immediately left his seat and made a phone call outside the courtroom. During the adjournment, two policemen held up Lawyer Hu and had him hand cuffed, announcing detention for the crime of perjury.[60]

No case has been more passionately and thoroughly discussed on the forum than the SOS message from the defence lawyer from Anhui Province who fled from the police. In view of the fact that his lawyer-colleague, Yu Huakun, had already been detained by the police for obstructing testimony,

[57] Article from *Legal Daily*, quoted in #556167, 8 Aug 2004, 23:11, Sichuan.
[58] Article from *Chinese Lawyers*, July 2002.
[59] #268, 3 Oct 2002, 18:15, Beijing. This message is one of the earliest messages on the forum. The contrast between the relatively small number of users at the time and the large number of responses suggests the wide and deep concerns about this problem among Chinese lawyers.
[60] #39466, 15 Jan 2003, 13:29, Gansu.

this attorney rejected the charge that he had violated the same law, and fled his city.[61] Eminent lawyers have also found themselves vulnerable. In a cause célèbre:

> [T]he famous lawyer Zhang Jianzhong, the director of Beijing Gong He Law Office, who once defended Cheng Kejie and Li Jizhou,[62] was sentenced to imprisonment for two years because of the crime of assisting in the forgery of evidence in the first instance of trial.[63]

The logic of Big Stick 306 is quite straightforward. A witness gives testimony to the police. When questioned by the lawyer, the witness changes his testimony. Police allege that the change in testimony shows that the lawyer induced the witnesses to lie or present false testimony, and as a result it follows that the lawyer is obstructing justice. Or as prominent defence lawyer, Wang Haiyun, put it, when a lawyer brings evidence rebutting the police or procuracy, they may collect further evidence that leads witnesses to retract their statements on grounds that '"it was the lawyer who let me say this," or "I didn't say this, the lawyer wrote it himself"'.[64]

It is for this reason that Ma Guangjun, defence lawyer in the Ningcheng County rape case, refused to take statements from his illiterate witnesses on behalf of the defendant. He insisted that they come to court and give oral testimony. 'If I made notes and signed them, then two [witnesses] who were not able to write could break their words and say that [the statement] was written by me the lawyer. … So I chose not to take any notes and let witnesses appear in court ... .'.[65] Even then, as we have seen, Ma Guangjun did not escape Article 306 because the police forced the witnesses to retract their in-court statements and this opened the way to detention and charges of perjury and obstruction. Similarly, Wen Zhicheng in Ruijin City was detained for forging evidence and obstructing testimony in the course of his defence of the corruption case. Moreover this older lawyer with heart trouble was forced to confess to these charges under duress.[66]

One lawyer captured the sentiments of many peers with his observation that 'Article 306 … makes the legal profession tremble'.

> ... if you want to practice law, don't become a lawyer; if you want to become a lawyer, don't do criminal work; if you want to do criminal work, don't collect

[61] #440419, 8 Apr 2004, 22:56, Jiangxi.
[62] Two famous high-ranked officials who were prosecuted for corruption and sentenced to death in 2000–1.
[63] #368312, 16 Jan 2004, 16:01, Shanghai.
[64] #256602, 28 Sept 2003, 19:41, Jilin.
[65] #536452, 12 July 2004, 01:22, Inner Mongolia.
[66] #620344, 4 Dec 2004, 11:07, Sichuan.

> evidence; if you want to collect evidence, don't collect testimonies from witnesses. If you fail to follow all these, just go to the detention centre to register. … Doesn't a system like this push the lawyer to the fire hole? …[67]

Although some users believe that lawyers are sometimes culpable, the majority press for the abolition of Article 306. In the meantime, those who continue to practise criminal law have adopted highly defensive measures to minimise their exposure to the police and procuracy.[68] As a result, the quality of most defences is diminished to little more than careful dissection of evidence in incomplete case files. Article 306, in combination with the stolid resistance of the enforcement triangle, has driven many lawyers out of criminal defence work and significantly reduced the proportion of defendants who obtain legal counsel.[69]

In the view of some leading criminal defence lawyers, the combination of provisions adverse to lawyers in the Criminal Procedure Law, the Criminal Law, and the Lawyers Law, has actually worsened the situation for defence lawyers from that which prevailed under the 1979 Criminal Procedure Law.[70] A criminal defence lawyer from Shenzhen even described local lawyers' reaction to the implementation of the 1996 Criminal Procedure Law in the following way, 'January and February excited, March and April at a loss, May and June disappointed, July and August despaired, September out of business'.[71]

(f) Emergence of Liberal Ideology

The exchanges among lawyers on the Forum go beyond specific complaints about particular grievances and incidents. Frequently the language of protest emanates from underlying premises about the nature of law, professionalism and the state. These are not often articulated expressly or systematically, but a loose coherence of ideas can be perceived across a variety of discussion threads. The ideological integration of these ideas or the degree of consensus around them must not be overstated for they exist as fragments across many conversations. It is impossible to ascertain how well they either cohere in the minds of the lawyers or represent widely held views that span lawyers and reach across the provinces of China. Yet they occur with such frequency and in various combinations that they cannot be

[67] #268, 3 Oct 2002, 18:15, Beijing.
[68] Interview 05B02, 05B14, etc.
[69] In 2000, eg, all 5,495 Beijing lawyers only handled around 4,300 criminal cases, with an average of 0.78 cases per lawyer. In 1999, this average number was 2.64 cases. Data from *Chinese Lawyers*, July 2002.
[70] Interview 05B02, 05B10.
[71] Article from *Chinese Lawyers*, Jan 1998.

ignored. We see them as mutually and contingently constituted out of the interaction between the circumstances in which the lawyers find themselves and their preferences for professional autonomy and the rule of law.

(i) The Rule of Law

Most striking are rudiments of an ideology of the rule of law. On one side lawyers call for restrictions on state power and for restraints in the abuse of public power. 'As long as the phenomenon of power substituting for law exists, the law made by the state could never be properly implemented and executed.'[72] State power is illicitly manifest in corruption and judicial injustice.[73] On the other side law must protect private rights. Citizens must be tried fairly, be guaranteed a right to a defence, and prescribed punishments should be publicised for specified crimes. Academic criminal procedure specialists call for defendants to have the right of silence and to be presumed innocent before conviction.[74] Furthermore, the due process of law and its procedural meanings are frequently mentioned in the discussions of extended detention, confession by torture, judgment before trial, and the police and procuracy's obstruction of lawyers' work.[75] These concepts have an affinity with a legal ideology that emphasises proceduralism, equality and balance of power that has rarely appeared before in China's long history of criminal justice.

The rule of law stands against its opposite, 'the profound history of the rule of man' in China. In his interview on national television, lawyer Ma Guangjun from Nincheng County states repeatedly that the law, the court, cannot be reduced to the 'will of an individual person, a certain department or a certain leader'. The criminal process cannot stand 'for the face of some leader' and will not 'permit any individual to outmatch law, wilfully ride on law, or act as if human life is not worth a straw'. Says a lawyer from Suzhou City, Anhui Province, even the Law on Lawyers must be held against a higher standard for it 'goes against the ideology of rule of law in the ideal state! The right in name can deprive/threaten democracy at any moment!! This is still the society under rule of a human being, isn't it!!' The promise of law rises as a new ideal. Why did Ma Guangjun persist in proclaiming his innocence, despite months in a local jail? Because 'I believe in law … I believe that the dark clouds cannot block the sun for ever even in the small district of Nincheng County'.[76]

[72] #256611, 28 Sept 2003, 19:51, Jilin.
[73] #368312, 16 Jan 2004, 16:01, Shanghai; #536448, 12 July 2004, 01:02, Inner Mongolia.
[74] #450228, 16 Apr 2004, 16:06, Hebei; #368312, 16 Jan 2004, 16:01, Shanghai.
[75] #455014, 21 Apr 2004, 10:46, location unknown.
[76] #555785, 8 Aug 2004, 11:22, Anhui; #536452, 12 July 2004, 01:22, Inner Mongolia.

But the concept sits uneasily alongside the belief that good law comes from a pristine state. While courts should not be subject to the will of a person, the court does 'stand for the will of the state ... for the dignity and law of the state'.[77] Here and elsewhere the barrier blurs between the rule of law and rule by law. The court, while standing against one sort of power, nevertheless also expresses and executes state power, as if it is not the state itself but some perversion or transcendence of it, possibly in the form of a local leader or national figure, that is to be feared.

(ii) Professional Community and Mobilisation

More emphatically can be found the presumption among lawyers on the Forum that the rule of law is meaningless without a role for lawyers. It is not only that lawyers ensure the right of a fair trial. Most fundamentally, in the final analysis lawyers are the only weapon to fight against the abuse of state power. Indeed, the status and level of influence by lawyers in a society is indicative of the extent of democracy and the rule of law.[78]

To build the rule of law requires that lawyers must be able to defend themselves. They readily acknowledge their weakness. Ma Guangjun characterised lawyers' position in relation to the courts, procuracy and police as a 'feeble' colony-like status. 'The unity of lawyers is a feeble, vague, weak and flabby power', says a lawyer from Anhui Province.[79] Another lawyer agrees that 'in front of the powerful public power lawyers are actually too feeble'. China has never witnessed lawyers objecting collectively to injustice, he said.[80]

Yet, protecting clients demands self-protection. 'In our country, if we cannot protect the rights and interest of the lawyers themselves, how can you expect that we can protect the legal interest of the clients?' In reply to the cry of SOS, a lawyer from Shandong Province asked, 'Is it the case that Chinese lawyers only have the responsibilities to protect the rights of the clients, but no right or capacity to protect ourselves?' And with a touch of sarcasm he continues to wonder if this state of affairs is 'the goal of the socialist system of lawyers with Chinese characteristics?!':[81]

> Yes, lawyer colleagues, we should unite to protect our own legal rights. Lawyers are the protector of rights but we cannot protect our own rights, this is the tragedy of China's rule of law! ... To unite is the only way out for lawyers![82]

[77] #536452, 12 July 2004, 01:22, Inner Mongolia.
[78] Chen Ruihua, quoted in #368312, 16 Jan 2004, 16:01, Shanghai; Ma Guangjun, #536452, 12 July 2004, 01:22, Inner Mongolia.
[79] #536976, 12 July 2004, 19:17, Anhui.
[80] #537209, 13 July 2004, 08:42, location unknown.
[81] #576076, 7 Sept 2004, 00:38, Shandong.
[82] #612439, 13 Nov 2004, 10:15, Shandong.

Over and over again, lawyers call each other to collective action. In response to the SOS plea, one lawyer writes, 'What to do? There is never any Christ nor any immortal emperor. The key is our lawyers' collective cohesion and the fighting spirit.'[83] Lawyers cannot expect others to do what they will not do themselves. 'Every lawyer needs to stand up and fight to do his/her duty, otherwise they will all go down one by one.'[84] And in an echo of a classic cry from internal opponents to National Socialism:

> If we still tolerate this, the next victim might be ourselves. If lawyers cannot protect their own rights, how would you make people believe that you could protect the rights of the clients? Gentlemen, if we tolerate all this just because we haven't got hurt, just to guarantee our own good lives, then we would not be qualified as lawyers.[85]

One course of action offers little prospect. We 'can't rely on leaders of the lawyers' association because they are appointed by the government'. Lawyers' associations are 'more interested in collecting dues than 'obtaining justice for lawyers', more committed to 'collecting money' than doing anything. Lawyers' associations, the 'parental home of lawyers' must be condemned for they 'are parents who eat dishes without managing anything ... the parents did not fulfil their responsibilities, our brothers and sisters got hurt'.[86] Even the Lawyers Law regulates rather than protects.[87]

However, the rare exception proves that collective action, even by an official association, can produce dramatic results. Upon Ma Guangjun's arrest in Ningcheng County, the Inner Mongolia Lawyers Association appointed two lawyers to defend him. Hundreds of lawyers from every part of the county and Chifeng City attended the court hearing. Ma Guangjun told CCTV that he would still be in jail today if the lawyers' association had not mobilised.[88]

To protect themselves, many Forum participants propose that lawyers build a collective identity and capacity for collective action. We need to forge 'our own destiny by ourselves' in order to counter the 'powerful state machine of the public law'. 'Lawyers should unite together in consciousness and respect for other in the profession. When we meet with difficulties we should support, aid and cry for each other.'[89] A theme of mutual support

[83] #526705, 28 June 2004, 12:07, Hubei.
[84] #460363, 25 Apr 2004, 22:35, location unknown.
[85] #528094, 30 June 2004, 09:36, location unknown.
[86] #528094, 30 June 2004, 09:36, location unknown; #634726, 8 Jan 2005, 14:33, location unknown.
[87] #450228, 16 Apr 2004, 16:06, Hebei.
[88] #536452, 12 July 2004, 01:22, Inner Mongolia.
[89] #536976, 12 July 2004, 19:17, Anhui.

rings across the Forum threads. In response to the SOS appeal another lawyer stated:

> For Whom the Bell Tolls? For you, for me, for everyone of us. When we see the misfortune come to other people and feel lucky, we would eventually find out: when the catastrophe comes, there is already nobody to save us. I cry to every lawyer who still has some conscience, stand up, stand together, do our best to save our colleague.[90]

In this way a professional community, united through a common consciousness, can mobilise through their collective organisations to protect their own. And in protecting their members they will shape civil society and the consciousness of the masses since a vulnerable lawyer is 'a misfortune for China's rule of law, a misfortune for the Chinese people!'[91]. By not relying on lawyers' associations or the government, lawyers in China must 'unite together and dominate our own destiny by ourselves'.[92]

It follows that there is a direct contingency between a rule of law society and lawyers' collective action. The lawyer who posted the tragic story of lawyer Wen Zhicheng of Ruijin City understood its lessons precisely:

> Our nation should obtain the cultivation of law and establish a legal professional community. But from this case, how far away we are from the establishment of the legal professional community! How far away from the establishment of the rule of law society! Every lawyer should have the spirit of sacrifice to realize the cultivation of law. All the lawyers should unite together to protect our rights! The rights of lawyers should be respected, the social status of lawyers should be improved, the legal community should be truly established, the law practitioners should be universally respected in the society and the rule of law should be realized. It is really a multi-benefit thing. Why do I, we, and all the people not stand up to strive for this goal?![93]

Constructing a lawyers' collective consciousness can be exemplified through the individual lawyer who risks his/her safety by speaking on behalf of the collectivity. In a notable case, lawyer Shen Zhigeng defended his colleague Zhang Jianzhong, the director of Beijing Gong He Law Office, against accusations of forging evidence, with the words, 'I was here at present to defend for Zhang Jianzhong not only on behalf of myself, but also expressing the collective voice of all the lawyers'.[94] Ma Guangjun saw his trial and

[90] #460363, 25 Apr 2004, 22:35, location unknown.
[91] *Ibid*.
[92] #537209, 13 July 2004, 08:42, location unknown.
[93] #620344, 4 Dec 2004, 11:07, Sichuan.
[94] Quoted in #368312, 16 Jan 2004, 16:01, Shanghai. Zhang Jianzhong was sentenced to two years in prison.

vindication as a kind of test case: 'I think that because this case not only related to me, an individual named Ma Guangjun, but it related to the issue of a professional environment for a lawyer which was related to when a lawyer is fulfilling his duty in a justified and legal way.'[95]

Yet several lawyers acknowledge that even together they cannot stand alone against the power of the state or the arbitrariness of unrestrained local officials. Their natural allies are the media. In the SOS case, Tao Mujian from Chengdu, Sichuan Province stated that because the government was not trustworthy he recommended creating 'big publicity' and media support.[96] A persistent reporter helped vindicate Ma Guangjun's miscarriage of justice. CCTV carried his tale across China. *Southern Weekend* magazine in Guangzhou hosted a forum on lawyers and the rule of law in China in which one case after another was recounted of lawyers' travails in the justice system. Nevertheless, the media, too, is susceptible to official, Party and government control, and therefore must exercise its own restraint in order to forestall restraints on its reporting of lawyers' troubles. Government regulation rests on both their shoulders.

We must again reiterate that this portrait of the rule of law being advanced by a unified professional community, coherent in its identity and willing to act collectively, must not be overstated. Although many strong voices express these themes in one thread after another, not all lawyers agree that the government cannot be trusted. More than one person advised the fleeing SOS lawyer to go to the Ministry of Justice, to the local Bureau of Justice in Anhui Province, to 'trust the government and the Party', to rely upon the All China Lawyers Association.[97] Still, these are minority voices on the Forum, surprisingly unrepresentative given that these conversations are taking place on a site organised by the ACLA which in turn is regulated and constituted by the Ministry of Justice.

(iii) Institutional Analysis and Critique

Throughout the threads that relate to political liberalism there are direct institutional and structural critiques of the system of justice and state power more generally. These lead to calls for fundamental institutional changes that go beyond the system of justice to impinge upon the structure of state power.

The plight of Chinese defence lawyers results from the continuing imbalance of power in the PRC criminal justice system. Because the procuracy has supervisory power over the administration of justice by the judiciary,[98]

[95] #536452, 12 July 2004, 01:22, Inner Mongolia.
[96] #441476, 9 Apr 2004, 20:16, Sichuan.
[97] Various voices in the discussion of #440419, 8 Apr 2004, 22:56, Anhui.
[98] Arts 181 and 205 Criminal Procedure Law.

when the procurator gets an unfavourable result in a criminal case, he can either protest against the sentence made by the judge to the upper-level court or start a special procedure for prosecutorial trial supervision. Since the police, procuracy and judiciary regard themselves as an integrated system for striking crimes, officials and staff in these three agencies often are hostile to defence lawyers. Li Xuan, a legal scholar and experienced part-time lawyer in Beijing, put it this way:

> In fact, the judicial practice in the recent 20 years suggests that Chinese lawyers have absolutely no status facing all kinds of judicial officials. This is because in the whole judicial system, the judicial agencies [the police, procuracy and judiciary] control the state power and make final decisions for cases, and lawyers are only powerless legal service providers among citizens and speak for one party in cases. As the bad consequences of the official-centred conception and the conception of the rule of men, the judicial personnel have strong sense of superiority in status regarding lawyers. In such conditions, lawyers have to be very careful in face of judges, procurators, and police officers ... . [I]t frequently happens that the judge directly uses state coercive power to drive the lawyer out of the courtroom or charge them with crimes . ... [P]olice officers and procurators ... use the state coercive power more directly and frequently, and their tough behaviours to lawyers are sometimes even worse than the behaviour of judges.[99]

The root of this imbalance of power in the criminal process lies in the power structure of the Chinese state. The three judicial agencies (the Ministry of Public Security, the Supreme People's Procuracy and the Supreme People's Court) are more powerful actors in both legislative and administrative activities than the Ministry of Justice—the state regulatory agency for lawyers. Li Xuan argues that this power was reflected in the reform of the 1996 Criminal Procedure Law which the three judicial agencies used 'to consolidate and expand the scope of their power'. By contrast, 'lawyers had almost no opportunity to speak and protest during the legislative process'. The role of legal scholars was largely 'ornamental'.[100] Lawyers' low status in the criminal process is further undermined by the fact that the ACLA and local lawyers' associations are subject to the regulation of the Ministry of Justice and the local Bureaus of Justice and thus enjoy very limited professional autonomy.

Much criticism is directed at the courts. Lawyers defend the accused in the courtroom but the decisions are made too often in places invisible to lawyers, either before the trial, or after the court hearing by higher level judges, or the Adjudication Committee composed of court leaders, or the Political Legal Committee through which the Party exerts its influence over courts, particularly in sensitive cases. This makes lawyers 'dispensable'

[99] #551554, 2 Aug 2004, 23:28, Beijing.
[100] *Ibid*.

and calls into question how and where decisions are being made. Many lawyers support the assertion that 'if the administrative relations between the upper and lower courts have not been replaced fundamentally', then 'it is impossible to realise the so-called rule of law in China'. Too often it seems to Forum participants that decisions are made outside the courts altogether by 'powerful people' or by 'local authorities' through one channel or another.[101] The recruitment of judges also still leaves much to be desired. Too many former soldiers still occupy seats in basic-level courts. So do 'people who have entered into the court by their varied relations with some certain authorities'.[102] The implication is that personnel recruited in this way have neither the training nor the loyalty to the court as an institution.

As fundamental is the attack on the distribution of power within the legal complex. A lawyer from Zibo, Shandong Province, maintains that:

> [L]awyers have an extremely unequal position compared with the police, procuracy and judiciary. In such conditions, relying on the self realization of the police, procuracy and judiciary to promote the change in lawyers' status is like looking for fish in the forest (*yuan mu qiu yu*).[103]

Similarly, 'seen from the cases happening in every place in the whole country and in every year, lawyers have been prosecuted repeatedly, and the condition has always been that the three agencies such as the public security office, the people's procuracy, and the court all located themselves in a commanding status' over lawyers. An article posted on the Forum from *Lawyer World* (*lüshi shijie*) magazine sums up the view of many criminal defence lawyers that 'the status of the prosecutor and the defender is imbalanced. The "power for prosecution" is easy and skilful, but the right of defence is nice but hollow'. Self-restraint by the law enforcement authorities offers no solution. 'In the design of our legal system, the public prosecutor is both the athlete and the referee.' Reform of the judicial system has been talked about for years, but there will be little change unless it is 'supported by fundamental forces'.[104]

The problems for lawyers are indicative of the wider problem that the judiciary is not insulated from executive power; indeed, is embedded within it. 'There is no place for all civil rights to exist when the judicial power has not been independent of the administrative power.' Not only does the weak Ministry of Justice offer little protection from more powerful executive agencies, but it is part of the problem. Ultimately, power trumps law in China. 'It is always power that is higher than law.' Power substitutes

[101] #256574, 28 Sept 2003, 19:14, Jilin; #368312, 16 Jan 2004, 16:01, Shanghai; etc.
[102] #616652, 23 Nov 2004, 10:16, Shenzhen.
[103] #556170, 8 Aug 2004, 23:21, Shandong.
[104] #555662; 8 Aug 2004, 05:13, Shandong.

for law which is not independent. The corruption of the judiciary is only a part of the corruption of power in China. Repeatedly lawyers identify the problem as one of structural inequalities, judicial integrity and independence, and institutional imbalance. 'Unless the institutional problem is solved fundamentally, it is impossible that this kind of circumstance can be altered radically.'[105]

In part, the slow pace of reform reflects public opinion. The notion that all criminal suspects should receive legal representation, let alone presumption of innocence, has been hard for the public to swallow. 'The basic evaluation of the lawyers in the peoples' minds' is that 'lawyers are defending the bad guys ... , lawyers are opposing the judicial agencies ... , lawyers are defrauding common people for money.'[106] Tian Wenchang, a distinguished Beijing criminal lawyer, points to a 'contradiction between the professional morality of lawyers and the social morality'.[107] There is a 'vast sea of the demos mass', a 'demos ideology', that suspects must be guilty; a profession that stands between criminal suspects and their punishment offends public morality.

As a result lawyers are vulnerable on two sides. From one angle they must protect themselves from the 'Big Stick' wielded by the procuracy and police, knowing they have few defenders from the official establishment of professional regulation. From another angle they have little support from the masses and no allies in a non-existent civil society except, occasionally, the press.

(iv) The Spirit of Sacrifice

In view of this tenuous institutional position in an authoritarian society, why do lawyers take such risks? How do they sustain a vocation in the face of implacable resistance and manifest weakness? We may quickly dismiss the economic hypothesis. It is true that large numbers of lawyers take criminal work because they exist in a fiercely competitive environment and have little choice in order to make a living (Michelson, 2003; Liu and Michelson, 2004). It is also true that a handful of lawyers at the top of the criminal defence bar do well financially by representing wealthy clients in anti-corruption and other cases where the death penalty is an imminent fear.

Overwhelmingly in the Forum, however, lawyers enunciate heroic values that capture something of the revolutionary zeal of earlier generations of Chinese. There are more than a few hints that the zeal for the rule of law substitutes for the loss of faith in an earlier revolutionary ideology. The heroes of the criminal defence bar are animated by their belief that they are the last bastion between abusive public power and helpless individuals.

[105] See responses to #536448, 12 July 2004, 01:02, Inner Mongolia; #256574, 28 Sept 2003, 19:14, Jilin; #440419, 8 Apr 2004, 22:56, Anhui.
[106] #555662; 8 Aug 2004, 05:13, Shandong.
[107] Quoted in #368312, 16 Jan 2004, 16:01, Shanghai,

Reflecting on his nine-month battle with Nincheng County authorities, Ma Guangjun proclaimed that 'the only weapon to fight with and the only barrier to guard against the public power, especially the abuse of power, is the institution of lawyers':

> the fact this kind of thing could happen ... involves a problem concerning the public power of the state. When this kind of public power was out of control, when this kind of public power was abused, what would the final result lead to? In these circumstances, you must take certain risks.[108]

For this in fact he was prepared to make himself a martyr, to establish a precedent for all of China. He was the first lawyer to be arrested without preliminary procedures and the first to be held for several months before the court proceedings began. 'My example was the first for the entire country', and while it was a course of action he would not have chosen, when the challenge came he met it at great risk to himself.

Yet it was not the heroic image of the lawyer as the last redoubt against unbridled power that brought Ma Guangjun into the case, nor the 1,000 yuan[109] the poor person could pay. It was to correct one injustice and prevent another. In an interview on CCTV, he was asked what relationship he had with the defendant.

> Reporter : Have you known the defendant before?
> Ma Guangjun : I have never met him, never heard of the case before.
> Reporter : Why did you accept the case?
> Ma Guangjun : Because having been a lawyer in practice for so many years, I have adopted the principle that the more unjust the case, and the more it is the kind of case where common people are eager to receive legal aid, then the more willing I am to undertake the case. And at the same time, because this was the kind of case in which unjust judicial actions existed, I was eager to deal with it as well. This is my personal commitment.[110]

For others it is the dignity of law that has its own calling. Invoking martyrs from Chinese history, a lawyer from Anhui Province writes:

> After reading the article written by Liu Lu, I have thought of the sentence of one ancient poem that 'the wind is rustling and the river is frozen, the heroic man has gone and will not return forever!' (*feng xiaoxiao xi yishui han, zhuangshi yiqu xi bu fuhuan*) Now that we have chosen to be lawyers, we shall be prepared to devote all our lives to the dignity of law, just like the Wuxu Six Men of Honour (*Wuxu Liu Junzi*).[111]

[108] #536452, 12 July 2004, 01:22, Inner Mongolia.
[109] About $US125.
[110] #536452, 12 July 2004, 01:22, Inner Mongolia.
[111] #556732, 9 Aug 2004, 21:54, Anhui. Both the poem and the Wuxu Six Men of Honour are stories of famous martyrs in Chinese history.

Above all, lawyers are harbingers of democracy, heralds of the rule of law. From China's far west, a lawyer from Xinjiang calls upon heroes from recent democratisation movements:

> It is because the profession is filled with danger that we are the tower of strength in the society. Think about Chen Shui-bian in Taiwan who passionately defended the people of Meili Island in his early life. And think about Roh Moo-hyun in Korea who pled for the students in the democratic movement under the tyranny ruled by Park Chung-hee. So that now Taiwan and Korea have accomplished democracy and prosperity at the present time. It is just that we should pay the cost for democracy!![112]

Despite his torture and humiliation at the hands of the police, the old lawyer, Wen Zhicheng from Ruijin, could still cry, 'Every lawyer should have the spirit of sacrifice to realise the rule of law ... . Why do I, we, and all the people not stand up to strive for this goal?!'[113]

A revolutionary rhetoric can be found in many of these hundreds of messages. It is as if a fervour for an abandoned ideology is being transferred to a new set of hopes. The spirit of sacrifice, the call to unite for the common good, the responsibility to defend the weak and oppressed all have revolutionary resonance. And some find it in the rule of law. In response to the appeal, 'SOS, the fleeing lawyer is crying for help!', another lawyer appropriated the opening words of the Chinese national anthem to the plight of lawyers: 'Rise, all people who are not willing to be slaves. Use our flesh to build our new Great Wall.'[114]

(g) Public and Private Faces of the Legal Profession

The viewpoints of lawyers we have analysed were expressed within the relative privacy of a dedicated electronic space. That space, however, is created by a public professional association that is controlled by the Ministry of Justice. How then does the private expression of issues by lawyers compare to the public presentation of self by the All China Lawyers Association? We collected data from the *Chinese Lawyers* (*zhongguo lüshi)* magazine (the official professional journal of the ACLA) and conducted interviews with leading lawyers in the ACLA and the Beijing Municipal Lawyers Association (BMLA).

Reports in the *Chinese Lawyers* magazine have covered most major issues concerned with lawyers' criminal defence, including the 'Three Difficulties', 'Big Stick 306' and the hostility of judicial agencies towards

[112] #556755, 9 Aug 2004, 22:33, Xinjiang.
[113] #620344, 4 Dec 2004 11:07, Jiangxi.
[114] #546617, 27 July 2004, 12:39, location unknown.

lawyers. However, the tone of the magazine articles is much more restrained and there is almost no direct criticism of the judicial agencies or the political system. Many articles advise lawyers how to adapt to the status quo (eg, CL1999_12, CL2001_05) and some discuss the possibilities of ameliorating the conditions for defence lawyers' practice by institutional or legal changes without describing the current problems in detail (eg, CL1998_12, CL1999_01, CL2003_0224). Titles like 'Lawyers' Risks and Self-Protection in Criminal Defence' (CL1999_12) and 'The Way Out for Lawyers' Criminal Defence' (CL2003_0224) are typical for such reports. This conservative attitude of reporting the problems in criminal defence work indicates that the ACLA's caution in not offending the powerful actors in the legal complex, namely, the police, procuracy and judiciary.

In recent years, there have been a few articles in the journal that directly address the severe problems in practice and report of specific cases. A July 2002 article titled 'Chinese Lawyers Who Dare Not to Defend for Criminal Suspects' (CL2002_07), for example, started with the substantial decrease of criminal defence work for Beijing lawyers and then reported five major Article 306 cases all over the country, including three cases in which the defence lawyer was detained for over a year. It also cited comments from legal scholars, leading lawyers, and even some procurators in regard to Article 306. Generally speaking, however, such a detailed overview of the difficulties and problems in criminal defence is quite rare in the ACLA journal articles and other media reports.

Furthermore, the *Chinese Lawyers* magazine also frequently reports on symposiums held by the ACLA or other agencies on criminal procedure law and criminal defence work. Distinguished scholars, lawyers, judges and procurators were invited to these symposiums to discuss various problems in criminal defence lawyers' practice, including: (1) the impact of the 1996 CPL revision on lawyers' work (CL1996_06a, CL1996_06b); (2) the implementation of the law and the judicial interpretations (CL1998_04); (3) protection for criminal defence lawyers (CL1998_01, CL1999_01); and (4) relationship between the procuracy and the defence lawyer (CL2004_0309, CL2004_0719). Compared with the messages on the Forum, the discourse in these symposiums is highly constrained by the presence of multiple actors of the legal complex.

Furthermore, discourses regarding the weak position of the Ministry of Justice in the state structure and the powerlessness of the ACLA, both widely discussed on the Forum, have never appeared in the magazine. The tight regulation of the ACLA by the Ministry of Justice makes it impossible to state its own weakness in public channels. Moreover, while discourses of political participation and collective action are prevalent in the Forum responses to the plight of defence lawyers, we find little such discourse through public channels. There is, accordingly, also no thoughtful analysis of the political and institutional constraints on lawyers'

collective action. Even detailed descriptions of the torture and ill treatment of defence lawyers in Article 306 cases are avoided by the *Chinese Lawyers* magazine.

Interviews with bar association leaders from both the ACLA and the BMLA show similar patterns regarding the problems in criminal defence. Although all of these leading lawyers we interviewed are specialised in criminal defence, most of their cases are highly profitable white collar crimes, especially cases related to the corruption of government officials. Compared to the public writings in the magazine, the interviewees provided rich accounts and thoughtful analyses of the difficulties in criminal defence work and the underlying problems, some even strongly proposing the abolition of Article 306.[115] However, as bar association leaders they rarely mentioned the powerlessness of the ACLA or the weakness of the Ministry of Justice in the political system. Instead, a few of these leading lawyers suggested that the lawyers' associations were getting stronger and playing an increasingly important role in both law-making and implementation.[116] This is in sharp contrast to the condemnation of the lawyers' associations by the Forum users when discussing the same problems in criminal defence work. Furthermore, none of these leading lawyers indicated the importance of the profession's collective action, which is another major theme on the Forum. Instead, they prefer to use official channels (eg, the Ministry of Justice and the NPC Legal Work Commission) to push for potential changes.

Overall, although the publications of the ACLA and interviews with lawyers' association leaders treat similar topics to the Forum discussions, we find surprisingly different discourses b etween the public and private discussions of the legal profession. This difference is particularly interesting considering that the Forum administrators are also editors of the ACLA journal, and comments of those leading lawyers are frequently being posted on the Forum and followed up with discussions. This indicates that under an authoritarian political regime and facing hostile judicial agencies the legal profession has developed two faces, namely, a public face that appears obedient to the state and conservative towards sociopolitical changes, and a private face that reveals an increasingly strong collective identity and emerging liberal ideologies.

IV. CONCLUSION

We have proposed that the enactment and implementation of law to protect alleged criminals presents a key research site in any country to take the pulse of movements towards or away from political liberalism. Until

[115] Eg, Interviews INB0507, INB0510, INB0512.
[116] Interviews INB0507, INB0508.

the last 25 years, the rights of criminal detainees and defendants and the ability of lawyers effectively to represent alleged criminals advanced relatively little beyond the almost complete absence of those protections in China's long history. Since 1979 a series of law reforms and since 1996, a flurry of court interpretations and administrative rules have placed some semblance of criminal procedure law on the books. In practice, however, the struggles of Chinese criminal lawyers with the 'Three Difficulties' and 'Big Stick 306' demonstrate that practice is far removed from precept and that the much-vaunted reforms of the later 1990s provide defendants with scarcely effective legal representation.

These procedural barriers follow from barely differentiated structures of law-enforcement power, where the police, procuracy and judiciary maintain an inertia sustained by an ideology that conceives of them as a closed fist of government executive authority. In the face of sustained efforts by the police and procurators to maintain their institutionalised hold over the criminal process, a struggling criminal bar, fortified with fragments of legal liberalism, seeks to expand its domain of work and seize domains of activity from exclusive control by law enforcement authorities. The contest is waged on very narrow fronts—a gain of private audience with clients, a glimpse into police files, a right to contest the way evidence is gathered or to bring independent evidence or to enlist other witnesses—but with the prospect that a foothold might simultaneously open up a viable area of practice and create a bridgehead for legal liberalism.

Nevertheless, the combinations of Articles 38 of the Criminal Procedure Law and Article 306 of the Criminal Law effectively take away on one flank what had been gained on another. If the capacity of representation shrinks to a defence of a lawyer's own personal safety from prosecution, then the lawyer remains a hostage to the very arms of the state that representation is intended to resist. Not only does a lack of differentiation fail to fracture internally the striking power of the criminal law enforcement apparatus, but the intimidation of the only part of the legal complex that might oppose it, the criminal bar, effectively reduces the agent of a nascent liberalism to a cipher. In this struggle criminal lawyers cannot look to judges because their natural allies in other national and historical contexts are the enforcement arms of the state security apparatus in the Chinese situation.

To whom can criminal lawyers turn? Apparently only to each other. And herein lies an irony of criminal law and enforcement in contemporary China. If a civil society is to emerge in China, or if legal liberalism is to gain perceptible ground, it is arguable that lawyers might be candidates for such agency as they have been in some other societies. Emergence of a nascent profession begins with the forging of a collective identity. Since identity formation is about boundary demarcation, the coalescence of a collective 'us' is enabled by the opposition of a collective 'other'. Thus the police, procurators and judges present a formidable 'them' that at once has

cultural and organisational force. In their coordination, as state agencies and as long-standing allies, the criminal enforcement complex precipitates lawyers to forge their own forms of social organisation that will protect the vulnerable individual attorney from the clenched fist of a fused law enforcement apparatus.

It is another irony that the very organisation that criminal lawyers berate for its perceived impotence, the All China Lawyers Association, controlled as it is by the Ministry of Justice, nonetheless enables criticism by providing the Forum where criminal lawyers can forge a China-wide identity and a springboard for collective action. The ACLA Forum effectively offers an infrastructure for communication which functions as a 'public sphere' for lawyers, enabling them to discover their identity and to craft an ideology that solidifies it. This source of lawyers' experiences in criminal practice more importantly is a social structure that permits, even encourages, a national lawyerly identity to be created, that stimulates the practice of civic discourse with relative impunity, and that creates in microcosm a public square that might later be imitated by or embrace other occupations and fractions of society. In this sense, it presents an early twenty-first century analogue to the eighteenth century salons of France, the early modern Inns of Court in England, and the late-nineteenth century elite bar associations in the United States. The roots of an embryonic profession are grounded within the double shelter of a state agency and an official association.

But the semblance of an emerging professional solidarity may be illusory. The 'profession' that is regulated via the All China Lawyers Association is one of many legal occupations, several in severe competition with each other (Liu and Michelson, 2004). More significantly, however, within the ACLA-regulated profession, the success of a criminal defence bar in defining itself in terms of political liberalism may put it at odds with the commercial bar. Already, at the top end of the profession, China has flourishing and affluent commercial law firms, especially in cities that have led China's burgeoning economic development (Liu, 2006). To the extent that the criminal bar articulates a vision of political lawyering that brings it into confrontation with the Party and Party-state apparatus, the comfortable existence that commercial lawyers enjoy as they ride the economic waves to personal fortune may be threatened by closer regulation, less autonomy in the work-place or firm, and more government oversight.

This incipient cleavage returns us to inherent clashes between economic and political globalisation, economic and political lawyering, that were raised in the Postscript to our earlier studies (Halliday and Karpik, 1998b). A coincidence of interest may well unite the Party-state, in its bid to deliver economic liberalisation without political liberalisation, and the commercial bar, in its aspiration to market control without the disturbance of political engagement. The Party-state will prefer the profession, like the populace, to appreciate the benefits of economic liberalism in order to distract it from

claims for political liberalism. Ironically, again, the weakest part financially and reputationally of the Chinese profession—the criminal lawyers—may, in working against the commercial interests of their fellow professionals, endow on the profession as a whole an ideology that defines its core values. It is precisely such a relationship of ambivalence that Scheingold and Sarat (2004) find in the relationship between cause lawyers, who are deviants within a profession, and mainstream lawyers, who define themselves in part by their difference from cause lawyers and yet draw upon the ideology of engagement on behalf of the weak that animates the cause lawyers.

In view of the marginalisation of criminal lawyers within the bar, and in light of the failure of implementation to deliver the promise of procedural protections, it is easy to compare present-day China adversely to rule-of-law societies, against whose practices China compares badly, and to global norms, against whose standards China falls short. Taking the view of the *longue durée*, however, where concepts of rights and fracturing of power have never been manifest, the steps of the past 25 years seem like giant strides. In this small window of time, China has enacted criminal and procedural law which bears resemblances to legal liberalism, it has laid the foundations of a legal profession and a regulatory framework, and it has permitted lawyers an electronic space in which professional identity is being crafted and the foundations of collective action are being laid. It is surely necessary to admit that the formal law is not descriptive of practice, that professional regulation is scarcely self-regulation, or that collective action boasts major triumphs. A nascent legal profession may appear to be a hapless victim in a larger drama where long traditions, hostile ideology and powerful institutions may permit a veil of political liberalism that disguises its unreality. Yet history shows that even hollow law, which in the short term is subversive of liberal politics, may in time and changed circumstances become a solid foundation for the construction of political liberalism. We can only now observe a time of trial and await history's verdict.

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