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### Keywords

Mass Media, European Parliament, Minors, Communications Law, Freedom of Speech

**MEDIA PRODUCTS AS LAW:  
THE MASS MEDIA AS ENFORCERS AND SOURCES OF LAW IN  
CHINA\***

TAHIRIH V. LEE\*\*

INTRODUCTION

Government propaganda so permeates Chinese society, it is impossible to escape its reach. Given this fact, the relationship between law and propaganda is an important subject for study. To my knowledge, it has not been studied before now, except in my previous examination of the relationship between the media and China's legal bureaucracy. In that study, I found that the legal bureaucracy is closely aligned with the state-run media, and that the commercialization of the last two decades of the twentieth century did not loosen this connection, at least with respect to laws that fall into a realm labeled "political."<sup>1</sup> In this study, I probe more deeply the problem of how closely bound propaganda and law are in China.

"In the People's Republic of China ("PRC"), the texts of major national statutes (*fa*) and regulations (*guiding*) are published in the primary Chinese Communist Party newspaper, *The People's Daily (Renmin ribao)*."<sup>2</sup> Clearly these publications are "law" in the sense that they are officially enacted as laws, but what about other media transmissions? Print and broadcast media operated by the state also contain reports of official interpretations of the law, and reports about the implementation of law and about matters that are regulated by PRC law. Can these media transmissions also be considered law?

This study attempts to determine whether and how the print and television media in the PRC function as law. In Part I, I survey law and media in the PRC to determine whether, as a historical and institutional matter, products of PRC media might be considered part of China's "legal system" or "sources of law." It is not difficult to make the case that state-run media are part of the legal system of China, particularly when the current apparatus is placed in historical context. It is more of a stretch, however, to argue that media transmissions are authoritative sources of law. Courts in China do not cite them in published opinions, nor do China's legal

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\* The Denver Journal of International Law and Policy expresses no opinion as to the accuracy of this article's Chinese language sources, with regard to citations, references, and translation.

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1. See Tahirih V. Lee, *The Media and the Legal Bureaucracy of the People's Republic of China*, in *POWER, MONEY, AND MEDIA: COMMUNICATION PATTERNS AND BUREAUCRATIC CONTROL IN CULTURAL CHINA* 208, 211 (Chin-Chuan Lee ed., 2000).

2. *Id.* at 208.

experts view them as authoritative in a formal sense. When Chinese law is viewed in its historical and social context, however, it becomes clear that media transmissions about law carry a great deal of authoritative weight. Mass media in China have been disseminating central policy since the Ming Dynasty.<sup>3</sup>

Though no one else has published the argument that connects media to law in this way, the theories of several sociologists provide support for the general notion that law achieves its power by the way that it is communicated in society to individuals. Emile Durkheim, Michel Foucault, Edward Epstein, and Carole Nagengast define the phenomenon of law as something that is broadcast to shape behavior.<sup>4</sup> This view helps to situate law within Chinese society and makes it easier for us to understand the authoritativeness of any type of official communication about law in China.

I use a case study to examine the hypothesis—that the mass media in China both enforce the law and provide authoritative sources of law—produced by this historical and theoretical survey of the legal role of the media in the PRC. The study is comprised of a discursive analysis of transmissions of the state-run news agency Xinhua, two major legal newspapers run by branches of the Ministry of Justice, and other official materials. Two samples of transmissions are used, each of which include popular and internal Party treatises, all of which touch on the regulation of procreation, marriage, divorce, and care of the elderly. Drawn randomly from several of the newspapers with the widest circulation in China, one sample was collected from 1984, and the other sample was collected from 1995 through the first half of 1996. Excluded are the exclusively electronic transmissions by the government that have become a part of its communication with the people of China, such as descriptions of events that appear unsolicited on cell phones. Although such transmissions use different means other than print media, their message and goal remain the same.<sup>5</sup>

The media transmissions in the second sample differed from the first sample in primarily one way. The references and language pointed to concerns of a more commercial or materialistic nature. Yet, the purpose of the transmissions did not appear to change from the period of the first sample to the second, eleven to twelve years later, suggesting that the role of media as a source of law in China is enduring and strong.

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3. See EDWARD L. FARMER, ZHU YUANZHANG AND EARLY MING LEGISLATION: THE REORDERING OF CHINESE SOCIETY FOLLOWING THE ERA OF MONGOL RULE 9-17 (1995).

4. See EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 33 (1984); MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 8-10 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977); Edward J. Epstein, *Instrumental and Ideological Forms of Law: Implications for China's Transplant of Hong Kong Law*, in HONG KONG, CHINA AND 1997: ESSAYS IN LEGAL THEORY 211, 214 (Raymond Wacks ed., 1997); Carole Nagengast, *Violence, Terror, and the Crisis of the State*, 23 ANN. REV. ANTHROPOLOGY 109, 116 (1994).

5. See, e.g., Michael Wines, *Beijing Uses New Means in its Efforts to Spin Story*, INT'L HERALD TRIB., July 8, 2009 at 5.

In both samples, the media transmissions interpreted and amplified the relevant law in ways that signaled the mid-1990s tight control of the PRC central government over “political” matters, and a new sharing of control over “economic” matters by both the PRC central government and local entities officially recognized by the government. This pattern remained consistent through the changes in format of the media transmissions heralded by the commercialization of the mass media by 1995 and 1996.<sup>6</sup>

Whether the relationship between media and law in the PRC is unique is beyond the scope of this paper. Although media in Russia and Taiwan may play a similar function, detailed evidence of this awaits future research.<sup>7</sup> In the following section I draw some basic distinctions between the United States and the PRC in this regard, but in doing so, do not rule out the legal significance of American film and televised broadcasts of trials and other media transmissions related to law.

## I. LAW AND THE PRC STATE-RUN MEDIA

When looking for law, it helps to know what to look for. In the fields of comparative law and legal history in the United States and Europe, scholars routinely struggle with this problem. Two fruits of their efforts are the concept of law as a “legal system,” and the concept of “sources of law.”

### A. Law as Legal System

The concept of “legal system” is probably a product of a passion for systems that took root in German Neo-Scholasticism in the sixteenth century, was revived by German proponents of natural law in the eighteenth century, and dominated the efforts of German jurists through the nineteenth century.<sup>8</sup> It is so ingrained in both the American and the Chinese way of thinking, that in the latter part of the twentieth century, lawyers and scholars of law do not bother to define it.<sup>9</sup> The

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6. See *infra* Part II.

7. To my knowledge, no other studies are devoted to analyzing this question. A few scholars have studied the role of the media and technology in transitions toward democracy or market economies in places other than the PRC. Frances H. Foster’s groundbreaking work on post-Soviet Russia, in which she examines the role that its press plays in the emergence of democracy there, and Daniel Katzel Berman’s study of a similar development in Taiwan, are the preeminent examples. See Frances H. Foster, *Freedom With Problems: The Russian Judicial Chamber on Mass Media*, 3 PARKER SCH. J. E. EUR L. 141, 146 (1996); Frances H. Foster, *Izvestiia as a Mirror of Russian Legal Reform: Press, Law, and Crisis in the Post-Soviet Era*, 26 VAND. J. TRANSNAT’L L. 675 (1993); DANIEL KATZEL BERMAN, WORDS LIKE COLORED GLASS: THE ROLE OF THE PRESS IN TAIWAN’S DEMOCRATIZATION PROCESS 82 (1992); Thomas Heller, *World Trends*, STANFORD LAWYER 13 (1990).

8. JAMES Q. WHITMAN, THE LEGACY OF ROMAN LAW IN THE GERMAN ROMANTIC ERA: HISTORICAL VISION AND LEGAL CHANGE 37, 48-49, 80 (1990).

9. See, e.g., Barry Weisberg, *Cure for A System In Chaos*, NAT’L L. J., Oct. 19, 1992 at 13 (decrying “[t]he chaos of our legal system” in a journalistic fashion, but not defining “legal systems” as such); see generally, e.g., Jan-Reinard Sieckmann, *Legal System and Practical Reason: On the Structure of a Normative Theory of Law*, 5 RATIO JURIS 288 (1992) (providing a more erudite example without defining the concept of a “legal system”); Jose Juan Moreso and Pablo Eugenio Navarro, *Some Remarks on the Notions of Legal Order and Legal System*, 6 RATIO JURIS 48, 49 (1993) (purporting to “clarify” the systemic nature of law,” but not defining the term “legal system”); but see Thomas D.

term connotes a sense of comprehensiveness, internal cohesion, and national boundary. In other words, the legal system contains all that pertains to law within a nation state, and all that pertains to law within a nation state operates in coordination with everything else that pertains to law in the nation state.

A methodological problem arises, which is how do you know what pertains to law and what does not? The “formalists” among these jurists solve this problem by focusing on a narrow band of enacted law, principally statutes, constitutions, and judicial opinions that are officially recognized as legal authority.<sup>10</sup> The “functionalists” among these jurists developed another widely accepted method in the field of comparative law for determining what comprises a legal system. They look at the functions of law and which societal needs or demands it fills and which it does not.<sup>11</sup> Unfortunately, functionalism also leaves unanswered the question of how we know law when we see it, because the method neither embraces the possibility that law can take infinitely various forms, nor does it identify a set of attributes of law in all cultures and all times. The method has been successful, however, in broadening the narrow, positivistic view of law that gained sway in the nineteenth century in Europe and the United States to include institutions and society.

Applying a functionalist conception of a legal system to China’s media, one role of the media is readily apparent, that is the role of media as educator of the public about the law.

### 1. Media as Legal Educator

Since at least the fourteenth century, mass media has functioned as a channel of communication between the state and society in China. China’s rulers developed devices for disseminating central policy to the populace without personal contact with them. Emperor Zhu Yuanzhang, the founder of the Ming Dynasty, used “Placards of People’s Instructions” and “Grand Pronouncements” to communicate the law *en masse* to his subjects.<sup>12</sup> The Placards were imperial decrees that contained references to the Ming Code and to the Grand

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Barton, *The Structure of Legal Systems*, 37 AM. J. JURIS. 291, 292-93 (1992) (attempting to define “legal system”); Niklas Luhmann, *Operational Closure and Structural Coupling: The Differentiation of the Legal System*, 13 CARDOZO L. REV. 1419 (1992) (attempting to define “legal system”).

10. Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decises, Legal Formalism, and the Future of Unenumerated Rights*, 9 U. PA. J. CONST. L. 155, 169-70 (2006).

11. Functionalism as a method used to research in the field of comparative law is superbly described and analyzed in Robert Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 61-65 (1984) (describing and analyzing functionalism as a method used to research in the field of comparative law); Lawrence M. Friedman, *Lawyers in Cross-Cultural Perspective*, in LAWYERS IN SOCIETY: COMPARATIVE THEORIES 1, 2-4 (Richard L. Abel & Philip S.C. Lewis, eds., 1988) (describing and analyzing functionalism as a method used to research in the field of comparative law); Stanley Lubman, *Studying Contemporary Chinese Law: Limits, Possibilities and Strategy*, 39 AM. J. COMP. L. 293, 293-294, 330-32 (1991) (describing and analyzing functionalism as a method used to research in the field of comparative law).

12. FARMER, *supra* note 3, at 15-17.

Pronouncements, and also added to the codified law.<sup>13</sup> For example, one Placard exhorted people to pay taxes and perform their corvée labor duties, both as provided in the Ming Code.<sup>14</sup> Other provisions of the Placard added to the codified law by making certain codified provisions applicable explicitly to the *lijia*<sup>15</sup> elders, and making them responsible for enforcing the law at the local level.<sup>16</sup> The Grand Pronouncements were four groups of 236 imperial instructions promulgated between 1385 and 1387.<sup>17</sup> Zhu disseminated the Placards and Pronouncements through a variety of methods. The Ministry of Revenue was responsible for “clearly publish[ing] . . . [the Placards] throughout the realm,” and students memorized the Pronouncements as assignments in school and investigated their enforcement while traveling in teams.<sup>18</sup>

Imperial programs during the period of Qing rule sent teachers and books around China to educate the peasantry about Confucian morals.<sup>19</sup> Chiang Kaishek conducted a similar program with newspapers during the Republican period, which was named optimistically “The New Life” movement,<sup>20</sup> and publicized its cultural policy and its Anti-Japan policy during the 1930s and 1940s through the press and film.<sup>21</sup>

Perhaps using the media to model Zhu Yuanzhang,<sup>22</sup> Mao Zedong and the central leadership of the CCP depended on film, radio, and print mass media during the Party’s first several decades to channel official policy both to Party loyalists at the grass-roots level and to those who had not yet allied themselves with the Party.<sup>23</sup> With the national legislature and the judicial bureaucracy disbanded, when the media transmitted Party policy to those responsible for its implementation, it functioned as the only legal system of its time. Yet, the central government characterized as “education” both the media transmissions and the personal instruction of the public by cadres, who received their instructions through the media, perhaps because Mao Zedong promoted a negative view of

13. *See id.* at 9-17.

14. *Id.* at 95.

15. *Lijia* were community structures for surveillance, security, and tax collection. Sarah Schneewind, *Visions and Revisions: Village Policies of the Ming Founder in Seven Phases*, 87 *T’OUNG PAO* 317, 332 (2001).

16. FARMER, *supra* note 3, at 98.

17. *Id.* at 53-54.

18. *Id.* at 102, Appendix Three (Jiao Min Bang Wen, *The Placard of People’s Instructions* (originally found in *Ming Studies* 7:63-72 (George Jerlang Chang trans., 1978) and revised by Edward L. Farmer and Jiang Yonglin)).

19. FARMER, *supra* note 3, at 35-36.

20. JONATHAN T. SPENCE, *THE SEARCH FOR MODERN CHINA* 414-15 (1990).

21. *See* Stephen R. MacKinnon, *Toward a History of the Chinese Press in the Republican Period*, 23 *MODERN CHINA* 16 (1997).

22. FARMER, *supra* note 3, at 105.

23. Personal contact with “the masses” was the path to membership in the Party for youthful recruits, and Mao Zedong relied on young activists to carry out the purges of 1966-1968. The official media sent signals about whom the activists should target. *See* EZRA F. VOGEL, *CANTON UNDER COMMUNISM* 55, 322 (2d ed. 1969).

law.<sup>24</sup> When legal institutions and statutes reappeared in the late 1970s, the government portrayed them as part of the government's broader effort to guide the general population morally, politically, and economically.<sup>25</sup> Legal scholars of China identify an educative role of law in the 1980s. Michael Palmer, for example, contends that the PRC central government enacted the 1980 Marriage Law with the intention to educate the public about a new purpose for adoption with its provision on adoption.<sup>26</sup>

In its function of educating the population about law, the media is a vehicle, but an indispensable one, and one that exerts its own impact upon the legal system. According to Victor Li, the Party leaders used the media to publicize the law because China did not have lawyers or other legal professionals to serve as intermediaries between the central leadership and the masses.<sup>27</sup> While the capabilities of media allowed them to disseminate the law widely, the limitations of media simplified the message about law that was transmitted. As Li concluded,

the law speaks directly to the general public through the mass media. The use of this channel affects the language of the law, which must be stated in simple colloquial terms rather than technical jargon. The specific rules cannot be very detailed or complicated, since the mass media can convey only broad ideas. By using the mass media to communicate legal norms directly to the public, China in effect has taken a path to overcoming the public's ignorance of the law that we [in the United States] have rejected. China does not subscribe to the legal fiction that everyone knows the law, but instead has carried out a massive program of public education about the law. The scope of this program is as overwhelming in Chinese terms as the number of lawyers is astounding in American terms.<sup>28</sup>

Even after the number of lawyers in the PRC grew to exceed 100,000 at the end of the twentieth century,<sup>29</sup> the central government's program to educate the masses about law showed no signs of abating. In October of 1995, attorney Zhang Yong, Deputy Division Chief of the Publicity Department of the Beijing Bureau of the Ministry of Justice, described his job as helping to formulate a five-year plan for the education of ordinary people (the *laobaixing*) about the 152 laws that will be enacted in the PRC in the next five years.<sup>30</sup> That job entailed organizing

24. See VICTOR H. LI, *LAW WITHOUT LAWYERS: A COMPARATIVE VIEW OF LAW IN CHINA AND THE UNITED STATES* 42 (1978).

25. See *id.*

26. Michael Palmer, *Adoption Law in the People's Republic of China*, in *YEARBOOK ON SOCIALIST LEGAL SYSTEMS* 9 (W.E. Butler ed., 1986).

27. Li, *supra* note 24, at 42.

28. *Id.* Li depicts in universal terms the need to educate the public about the law that governs it, and credits the PRC with doing a better job of this than the United States. See *id.* at 35-42.

29. *Number of Lawyers Rapidly Rising in China*, RENMIN RIBAO [PEOPLE'S DAILY], July 8, 2002, available at <http://www.china.org.cn/english/Life/36430.htm>.

30. Zhang Yong, Deputy Division Chief of the Publicity Dept. of the Beijing Bureau of the Ministry of Justice, Speech in Minneapolis, MN (Oct. 1995) (on file with author); Zhang Yong, Resume



“special legal lectures for top Chinese leaders,” “[e]xamining and approving textbooks of specialized law which are edited by other government branches,” and “supervising the production of ‘Communication of Promotion of Mass Legal Education Magazine.’”<sup>31</sup> From Zhang’s career path thus far, propaganda work appears to be plentiful enough to offer the loyal and energetic a fast track to prominence in the PRC government. At the tender age of 30, he had already obtained a Master of Law degree, interned in a law firm, interned as a judge, worked his way up through three positions in the Ministry of Justice, and published eight articles—one entitled “Mass Legal Education: A Tough Job in China,” and another entitled “The Key to Public Legal Education Lies in Persistence and Implementation.”<sup>32</sup>

As active as the legal education program continued to be, by 1995 it had changed to become more high-tech and more oriented toward entertainment than in 1980. The Ministry of Justice assigned four of its five bureaus jurisdiction over a different medium or media industry: 1) legal publications (newspapers and books); 2) audio-visual productions; 3) entertainment programs; and 4) companies that produce publications and videos for both domestic sale and for export.<sup>33</sup>

One example of an audio-visual production aiming to educate the public about law was a television program in Shanghai in 1993 called “Society’s Classics.”<sup>34</sup> It featured a segment called “Law’s Letterbox” in which a lawyer from the Number 10 Law Firm of Shanghai answered questions about law that viewers wrote in to the program. One question was a reaction to a story the program had run earlier about a woman who abused her child, accompanied by gruesome photos. The viewer asked if there were any regulations prohibiting child abuse. The lawyer responded that there were some relevant Shanghai regulations that implemented the prohibitions in national criminal and marriage laws.<sup>35</sup>

Far from presenting the staff of the Ministry of Justice’s propaganda departments with opportunities for developing maverick interpretations of the law, this legal education program is highly official and is linked to the top leadership by the oversight of the State Council. In addition to its need to conform to the dictates of the State Council, the Ministry of Justice coordinates its legal education work with the Party’s Central Propaganda Department, as do other Ministries in Beijing.<sup>36</sup>

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(Sept. 15, 1995) (on file with author). The Ministry of Justice is the central government executive agency in Beijing that oversees a nationwide effort to educate the public about central law and policy. Apart from operating law schools in major cities throughout the PRC, the Ministry sponsors a variety of less specialized legal education programs, such as lecture circuits into remote areas by junior law professors. Ministry of Justice: The People’s Republic of China (2009), <http://english.moj.gov.cn/>.

31. Zhang Yong, *supra* note 30.

32. *Id.*

33. *Id.* A fifth bureau was responsible for investigating law enforcement. *Id.*

34. *Shehui jingzhuan--falü xinxiang*, (June 22, 1993) (viewed by the author).

35. *Id.*

36. *Carry Out In Still Better Way Activities That Enjoy Ardent Support of People*, RENMIN RIBAO

## 2. Media as Legitimizer and Enforcer of the Law

Do the media's transmissions related to law in the PRC perform functions other than an educative one? Yes; and these functions are even closer than an educative function is to what makes media part of the legal system of China. The media in China also legitimates the law of China and helps enforce it.

Scholars of Chinese law long have argued that law legitimizes the government that promulgates it and enforces it.<sup>37</sup> This notion, though a mainstream view in American scholarship on China, would appear to turn on its head the traditional Chinese doctrine of the Mandate of Heaven, where virtue and harmony in the realm signaled the legitimacy of the imperial regime, and the laws the desperate resort to, violent impositions of order used only by a usurper. The Chinese classics stressed the ruler's influence on morals throughout the realm by the sheer force of example.<sup>38</sup> Indeed, one counterargument to the legitimizing function of law in China is that law does not, and never has, legitimized its makers and enforcers in China because law must be backed up with force in order to be enforced.<sup>39</sup> This counterargument, in my view, however, has to be treated with caution. It is a relic of centuries of attempts to discredit the Chinese Legalist School of the fourth century B.C.,<sup>40</sup> and only partially reflects the way China has been ruled during the past six hundred years. The founder of the Ming Dynasty believed he was restoring the Mandate of Heaven and legitimacy to the throne by promulgating a law code.<sup>41</sup> Decades earlier, during the Yuan Dynasty, the prominent neo-Confucian group of *Jinhua* literati promoted law as a tool for

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[PEOPLE'S DAILY], Feb. 15, 1996, at 1 (*translated to English from PRC: Commentator Praises Two Mass Support Activities*, FBIS-CHI-96-039, Feb. 27, 1996) (on file with author). This Department does not appear to disseminate the most important economic regulations. Interview by the author with Shen Xiaohong, Director of the Council for Int'l Educ. Exchange Nanjing University Program, in New Haven, CT (Aug. 11, 1996) (on file with author).

37. Hilary K. Josephs, *Labor Law in a 'Socialist Market Economy': The Case of China*, 33 COLUM. J. TRANSNAT'L L. 559, 560, 581 (1995); Pitman B. Potter, *Riding the Tiger: Legitimacy and Legal Culture in Post-Mao China*, 138 CHINA Q. 325, 358 (1994) ("Efforts at legal reform . . . represent an attempt by the post-Mao regime to rest legitimacy in part on an ideology of formal law . . . [T]he post-Mao regime's decision to ride the tiger of legal reform has created an interdependency between legal culture and political legitimacy for the first time in the PRC's history--leaving a lasting legacy that will influence the relationship between law and politics for some time to come.").

38. Benjamin Schwartz, *On Attitudes Toward Law in China*, in GOVERNMENT UNDER LAW AND THE INDIVIDUAL 27, 31 (1957) (A good ruler and his ministers would, on the one hand, provide the people with an example of proper behavior according to *li* . . . , and on the other hand would educate the people in *li*).

39. See ZHENGYUAN FU, CHINA'S LEGALISTS: THE EARLIEST TOTALITARIANS AND THEIR ART OF RULING 11-13 (1996). Epstein argues that in Europe, in contrast to China, "law functions as an ideology, that is, a system and structure of legal ideas which secure compliance without the need for legitimation outside the legal system . . ." EPSTEIN, *supra* note 4, at 214.

40. For an accessible discussion of the tenets of the Legalist School, see ZHENGYUAN FU, CHINA'S LEGALISTS: THE EARLIEST TOTALITARIANS AND THEIR ART OF RULING (1996). Fu's portrayal of Chinese legalism itself builds a case against this tradition.

41. FARMER, *supra* note 3, at 81.

restoring order and morality.<sup>42</sup> Certainly, Comrade Deng Xiaoping and his successor President Jiang Zemin have portrayed the PRC legal system as a way to restore order and morality after the Cultural Revolution and the infiltration of foreign influences during the Open Door era.<sup>43</sup>

In the latter part of the twentieth century, legal comparativists and historians commonly viewed the enforcement of law as a part of a legal system. Comparativists Mary Ann Glendon, Michael Wallace Gordon, and Christopher Osakwe view the social context of the law in any country to hold important clues about how the law is enforced.<sup>44</sup> Leading scholars in the field of Chinese law build into some of the most influential studies in the field, the assumption that the implementation or enforcement of the law is an integral part of the PRC's legal system.<sup>45</sup>

It is not readily apparent how media transmissions about law might help either to legitimize the government or to enforce law. Political legitimacy seems to imply some agreement between ruler and ruled, whereas print and broadcast media permit only a one-way communication. Enforcement seems to imply some sort of coercion or threats backed up with violence, while the media simply convey messages and images. It is difficult to see how dispensing information, with its passive connotations, can enforce law, which is something with active connotations. Law enforcement also conjures up images of personal knowledge and contact, such as police officers arresting suspects, and prosecutors arguing for the conviction of criminal defendants, whereas media permit communication without personal contact. Yet both functions of the media in China's legal system are apparent in the use of various media by China's rulers since the fourteenth century. For at least six hundred years, the state-run media have attempted to legitimize the ruler by showing him to be in sync with the values of the Chinese population. The same media also attempted to enforce the ruler's values by inculcating in the public his models for behavior.

Zhu Yuanzhang's approach to governing was populist according to Edward Farmer, in the sense that the written instructions upon which Zhu's reform

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42. *Id.* at 27-28.

43. See *Deng Xiaoping*, CHINA DAILY, June 25, 2004, available at [http://www.chinadaily.com.cn/english/doc/2004-06/25/content\\_342508.htm](http://www.chinadaily.com.cn/english/doc/2004-06/25/content_342508.htm); Zhaohui Hong & Yi Sun, *In Search of Re-ideologization and Social Order*, in *DILEMMAS OF REFORM IN JIANG ZEMIN'S CHINA*, 42-46 (Andrew James Nathan, Zhaohui Hong, & Steven Smith eds., 1999).

44. See MARY ANN GLENDON, MICHAEL WALLACE GORDON & CHRISTOPHER OSAKWE, *COMPARATIVE LEGAL TRADITIONS* 11 (2nd ed., 1994).

45. See, e.g., William P. Alford, *Don't Stop Thinking About . . . Yesterday: Why There Was No Indigenous Counterpart to Intellectual Property Law in Imperial China*, 7 J. CHINESE L. 3, 11-18 (1993); Donald C. Clarke, *What's Law Got To Do With It? Legal Institutions and Economic Reform in China*, 10 UCLA PAC. BASIN L.J. 1, 30-36 (1991); Sharon Hom, *Female Infanticide in China: the Human Rights Spector and Thoughts Towards (an) other Vision*, 23 COLUM. HUM. RTS. L. REV. 249, 263-73 (1992); Pitman Potter, *Riding the Tiger: Legitimation and Legal Culture in Post-Mao China*, 138 CHINA Q., (June 1994).

programs depended were disseminated directly to the people.<sup>46</sup> Yet the messages in the “Placards of the People’s Instruction” and “Grand Pronouncements” were populist in the additional sense that they were designed to restore widely admired Han Chinese ideology and customs after centuries of rule by foreigners; and thus, they showed Zhu’s solidarity with his subjects.<sup>47</sup> For example, one placard provided that the *lijia* elders should discipline “rowdies” and urge the people “to do good” and endure minor conflicts without resort to litigation.<sup>48</sup> This last exhortation, in particular, rung with a sense of the Mandate of Heaven, which valued harmony over the airing of disputes. The placard further provided that six times a month, children were to guide blind, physically disabled, or old people through the village streets to ring a bell and shout “be filial to your parents, respect superiors, maintain harmony with neighbors, instruct and discipline sons and grandsons, live and work in peace and contentment, do no wrongful acts.”<sup>49</sup>

Using these placards and pronouncements to exhort his subjects to follow traditional Chinese models of inter-generational behavior was also part of an authoritarian approach to governing, in that Zhu attempted to change his subjects by enforcing standards that he selected and formulated.<sup>50</sup> He delegated to the *lijia* elders the responsibility to supervise all the farming in their locality, and he exhorted each person, particularly those in Henan and Shandong Provinces, to produce more food and cloth of silk and cotton.<sup>51</sup>

Although the imperial governments during the Qing Dynasty, the regime of Yuan Shikai during the early Republic, and the republican government led by Chiang Kaishek’s Guomindang were never able to take control of the most widely circulating newspapers in order to funnel their own messages through them, these governments censored newspapers with impunity and the Guomindang’s Ministry of Central Propaganda dispensed central policy to the public through its own newspapers such as the “Central Daily.”<sup>52</sup> The Guomindang censored even the “small newspapers,” a term

46. FARMER, *supra* note 3, at 105.

47. *Id.* at 104-06.

48. *Id.* at Appendix Three ¶¶ 14, 16, 18 (Jiao Min Bang Wen, *The Placard of People’s Instructions* (originally found in *Ming Studies* 7:63-72 (George Jerlang Chang trans. 1978) and revised by Edward L. Farmer and Jiang Yonglin)).

49. *Id.* ¶ 19.

50. *See id.* at 13-17.

51. *Id.* at 195, 203-05; *see also id.* at 110-13 (discussing Zhu Yuanzhang’s efforts to both reflect and to change Chinese social norms with the law he promulgated). The neo-Confucian doctrines that Zhu Yuanzhang made the foundation of his government were popular in the sense that private teachers and scholars during the Tang and Song dynasties propagated them before they were made part of the state’s ideology. *See id.* at 25-32.

52. *See* QIN ZHAODE, *A HISTORY OF SHANGHAI’S MODERN PRESS* 59-100 (1993) (on file with author); DANIEL K. BERMAN, *WORDS LIKE COLORED GLASS: THE ROLE OF THE PRESS IN TAIWAN’S DEMOCRATIZATION PROCESS* 100-21 (1992); Stephen R. MacKinnon, *Toward a History of the Chinese Press in the Republican Period*, 23.1 *MOD. CHINA* 3, 15-17 (1997); Sophia Wang, *The Independent Press and Authoritarian Regimes: The Case of the Dagong bao in Republican China*, 67.2 *PAC. AFF.* 216, 221, 229, 233, 240 (1994); *see also* Zhiwei Xiao, *Film Censorship in China, 1927-1937* 134-170

coined as early as 1917 in Shanghai, where the genre was born. At that time, the term reflected both the short length of the pieces published and the amusing nature of their content.<sup>53</sup> Although many of the papers specialized in popular topics of particular interest to Shanghainese of the time, such as late Qing art, the Guomindang feared the potential of these papers for political resistance, and enacted regulations that limited their content to simple and trivial topics, such as celebrity gossip, and prohibited them from publishing on foreign or domestic affairs.<sup>54</sup>

The Chinese Communist Party [quickly] took advantage of the capabilities of the new electronic media of the 1920s and expanded the scope of both the legitimizing and enforcing functions of the state-run media. [In its early years,] the Party focused on solidifying its control of the press, radio, and film, and in sending messages through these media that showed its solidarity with the people. To these ends, in the 1930s, a vibrant period for both the press and Shanghai's film industry, the Chinese Communist Party ran its own newspapers<sup>55</sup> and organized China's first film society.<sup>56</sup> In the 1930s and 1940s, Communists produced films designed to show the Party's patriotism by emphasizing its anti-Japan stance.<sup>57</sup> By 1953, the Chinese Communist Party had banned foreign films and turned China's film industry into a mouthpiece for Soviet and Chinese communism.<sup>58</sup> At the same time, the Party closed or assumed control of the radio stations and of the hundreds of newspapers that had flourished in Shanghai, Canton, and other cities during the Republican era.<sup>59</sup> In the 1940s and early 1950s, these publications publicized the Party's widely heralded efforts to give land to poor farmers.<sup>60</sup>

During the important political movements of the 1950s and 1960s, the Party used the media under its control to attempt to influence public behavior. Mao Zedong and other top leaders sent signals through the

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(1994) (unpublished Ph.D. dissertation, University of California, San Diego) (on file with author).

53. Lee, *supra* note 1, at 239, citing ZHAODE, *supra* note 52.

54. *Id.* at 133-134.

55. *Id.* citing MacKinnon, *supra* note 52, at 3, 4-5, 7, 16; ALAN P. L. LIU, MIT CTR. FOR INT'L STUD., *The Press and Journals in Communist China* 8-12 (1966).

56. Lee, *supra* note 1 at 133, citing CINEMA AND CULTURAL IDENTITY: REFLECTIONS ON FILMS FROM JAPAN, INDIA, AND CHINA 161 (Wimal Dissanayake ed., 1988).

57. *Id.* citing PAUL CLARK, *The Sinification of Cinema: The Foreignness of Film in China*, in CINEMA AND CULTURAL IDENTITY: REFLECTIONS ON FILMS FROM JAPAN, INDIA, AND CHINA 177-80 (Wimal Dissanayake ed., 1988).

58. *Id.* citing CINEMA AND CULTURAL IDENTITY: REFLECTIONS ON FILMS FROM JAPAN, INDIA, AND CHINA, *supra* note 57, at 161-63; *see also* VOGEL, *supra* note 23, at 83-84; MA QIANG, *Chinese Film in the 1980s: Art and Industry*, in CINEMA AND CULTURAL IDENTITY: REFLECTIONS ON FILMS FROM JAPAN, INDIA, AND CHINA 166-67 (Wimal Dissanayake ed., 1988); CLARK, *supra* note 57, at 177-80.

59. Lee, *supra* note 1, citing VOGEL, *supra* note 23, at 83-88.

60. *Id.* citing VOGEL, *supra* note 23, at 111, 152; *see* LIU, *supra* note 56, at 34-36.

press and radio to political activists about whom to target, how vigorously to implement Party programs, and which sanctions to mete out to those who resisted.<sup>61</sup> Local-level cadres followed the instructions they received through the media to enforce central campaigns through personal contact with the people in their jurisdiction.<sup>62</sup> Personal contact with “the masses” was the path to membership in the Party for youthful recruits, and Mao Zedong relied on young activists to carry out his most radical programs, such as land reform and the purges of 1966-1968.<sup>63</sup> In official terms, the central leadership by the end of the 1970s, had a commitment to “mass participation and mass control,” which it accomplished through “communication with the masses” directly by media or by way of cadres informed by media.<sup>64</sup>

Where the media communicates the law to those responsible for enforcing the law, the media plays a clear role in law enforcement. But how do media transmissions legitimize the law-maker where the law-maker is not present to obtain the public’s endorsement? And how do media transmissions sent directly to the public enforce the law that is being communicated? In other words, where no human being is present to enforce the acceptance of the message, how might the media achieve the kind of transformation in the viewer that would lead to voluntary compliance with the law? Two prominent sociological theories of law enforcement help to explain both of these processes. In one theory, Emile Durkheim maintained that the state reinforces society’s values when it punishes criminals.<sup>65</sup> In the other, Michel Foucault argued that the state inculcates norms when it punishes criminals.<sup>66</sup>

Durkheim’s theory of punishment emphasized its communitarian nature. When the state subjects an individual to its penal institutions, he asserted, the state expresses the outrage of the “collective conscience,” with the result that society grows healthier and more unified.<sup>67</sup> As David Garland interprets Durkheim, punishment is a ritual, “directed less at the individual offender than at the audience of impassioned onlookers whose cherished values and security had been momentarily undermined by the offender’s actions.”<sup>68</sup>

Foucault demonstrated that the state valued its subjects’ labor and physical submission, even when those punishments were done within the hidden confines of

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61. Lee, *supra* note 1, *supra* note 23, at 55-59.

62. *Id.* citing VOGEL, *supra* note 23, at 55-59, 200.

63. *Id.* citing VOGEL, *supra* note 23, at 55, 111, 152, 200, 202, 208, 211, 321-23 (documenting clear examples of path to membership in the Party).

64. *Id.* citing LI, *supra* note 24, at 42.

65. DURKHEIM, *supra* note 4, at 105-10.

66. FOUCAULT, *supra* note 4, at 92-101.

67. See DURKHEIM, *supra* note 4, at 80, 102-105, 108-109.

68. David Garland, *Sociological Perspectives on Punishment*, 14 CRIME & JUST. 115, 123 (1991) (referring to Durkheim’s view of punishment).

a prison.<sup>69</sup> The rigorous discipline of timetables and work meted out onto the bodies of prisoners inside the prisons induced the self-discipline of work regimens and productivity among the middle classes by modeling something less offensive and closer to the daily lives of people than public corporal punishment would have. In this way, penal servitude “insert[ed] the power to punish more deeply into the social body” than did public punishment.<sup>70</sup> Sexual behaviors are regulated with a similar system. He observed that, in classical Greece and Rome, leading authorities wrote popular treatises that prescribed regimens for the body that helped instill self-discipline.<sup>71</sup> Spiritual or philosophical masters or directors helped people “train” their habits to avoid pleasure.<sup>72</sup>

Although they opened our eyes to the vital role played by communication from law-giver to subject, neither Durkheim nor Foucault specified the exact means of communication by the state to the populace. Needless to say, media do not figure into their visions of the relationship between legal enforcement and society, but their theories are consistent with media serving as the means of communicating the state’s norms. In fact, each author so stresses the importance of this communication in the criminal justice systems of Europe, that the next question really is “by what means?” Durkheim does not explain whether the healing and unifying effects of official punishment can occur without society knowing about the act of punishment. It is possible that Durkheim had in mind a kind of invisible channeling that did not depend on actually informing society about the punishment. The church played a role, in Durkheim’s view, in inculcating morals, and in so doing performed the communication about punishment that would otherwise been left to the state. In the absence of the church, however, the beneficial effects of punishment that Durkheim envisioned are felt when the state communicates to society the fact of its law enforcement. Thus, when the media disseminate information about retributive acts performed by the state, they provide a means for satisfying deeply felt needs of society.

By pointing us to the vindication felt by observers of criminal punishments, Durkheim’s framework helps explain how the media helps to legitimize China’s law. This dynamic can be seen by analyzing televised footage of criminal convicts being led to their execution, and of criminal trials that were broadcast on the evening news in the mid-1990s.<sup>73</sup> The convicts were rarely allowed to speak, were not allowed to sit, their heads were bowed, and their hands were bound with rope.<sup>74</sup>

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69. FOUCAULT, *supra* note 4, at 28, 104-112; *see also* Garland, *supra* note 68, at 138-39.

70. *Id.* at 82 (referring to 18<sup>th</sup> Century penal reforms).

71. *See* MICHEL FOUCAULT, *THE CARE OF THE SELF: VOLUME 3 OF THE HISTORY OF SEXUALITY*, 99-147 (Robert Hurley trans., 1986).

72. *See id.* at 39-45.

73. Shanghai Evening News (television broadcast in Mandarin June 25, 1993) (a criminal trial in the Pudong People’s Court broadcast on the evening news in Mandarin in Shanghai) (viewed by the author).

74. *Id.* An American reporter observed that “Mass trials are a fixture on TV news, showing prisoners bound with rope, their heads bowed.” George Wehrfritz, “*Crime: ‘You Die, I Live,’*” *NEWSWEEK*, July 22, 1996, at 67. The footage of criminal convicts being led to their execution was

Footage of the capture of criminals in the act was also broadcast. On one news show, for example, a reporter in a live broadcast had staked out a brothel and surprised a prostitute and her client at some point during their transaction.<sup>75</sup> As the police restrained the hapless couple and hurried them into the police car, the reporter asked them what they were doing and how they arranged it.<sup>76</sup> Fictional stories depicted criminal behavior in a negative light, and the official response to it in a positive light. One television drama broadcast in Shanghai showed petty corruption by a cafe owner. Police, impervious to his little bribes, carefully investigated, nailed him in the act, and gave him a citation.<sup>77</sup> Privately, the cafe owner was unrepentant, and this portended future trouble for him.<sup>78</sup>

In appealing to the viewers' sense of social face and propriety, these broadcasts laid the foundation for the kind of communion between state and society envisioned by Durkheim.<sup>79</sup> It was a communion of mutual reinforcement. These broadcasts of criminal behavior and punishment appealed to the viewer's sense of social face and propriety by inviting the viewer to distance himself or herself from the actions portrayed as illegal and the punitive consequences of those actions, and by depicting the illegal behavior in a negative light and the official action in a positive light. Those who were charged with criminal offenses appeared to be ashamed, and were treated as though they had done something offensive and had to be separated from society. The enforcers of the law never appeared to act impetuously or violently, but instead led to punish only those who had done something flagrantly shameful; and so the state appeared to respond to wrongful acts with forbearance and good cause. The broadcasts also appealed to the viewer's sense of vulnerability and need for protection by portraying the purpose of government intervention as the protection of society from criminal deviance.

Durkheim does not shed light upon how vindicating the media consumer's sense of social face and propriety or stimulating his sense of need for state punishment of others might lead to the consumer's own voluntary compliance with the law, but Foucault's theory of the relationship between the state and society does shed light upon the law-enforcing function of state-run media in the PRC.<sup>80</sup> Just as he observes that the state communicates to society through the operation of prison discipline, the desirability of voluntary discipline, and backs it up with the

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broadcast in Hong Kong and recounted in an interview by the author with Professor Joseph Man Chan, of the Department of Journalism and Communication, Chinese University of Hong Kong. Interview with Professor Joseph Man Chan, Department of Journalism and Communication, Chinese University of Hong Kong, in Minneapolis, MN (June 29, 1996) (on file with author).

75. Shanghai Evening News (television broadcast in Mandarin June 25, 1993) (viewed by the author).

76. *Id.*

77. Shanghai Television Drama Series (television broadcast in Mandarin May 28, 1993) (viewed by the author).

78. *Id.*

79. See DURKHEIM, *supra* note 4, at 105-10.

80. See FOUCAULT, *supra* note 4, at 23, 137-38, 195-228.



threat of forced compliance, the state may transmit through the media images to which the state attaches its approval, and thereby exhort the public to follow these as models.<sup>81</sup> The exhortation comes packaged with the threat that the state will force reeducation upon the individual who does not conform his behavior, on his own, to the model.

The television broadcasts described above aimed to instill in the viewer a kind of self-discipline, which was a part of the submission by the individual to the state envisioned by Foucault.<sup>82</sup> They implied that the viewer did not have a choice about whether to accept the message about these actions. They encouraged the audience to identify with those who were caught and punished because they embedded these messages in stock characters and in situations that were familiar to viewers. The broadcasts appealed to the viewer's sense of shame by exposing the plight of an offender who has been caught. They also appealed to the viewer's sense of fear by portraying the government's punishment of offenders as swift and strict, thereby conditioning the expectations of the viewer about the likelihood and the type of correction, if the viewer defied the official interpretation of the law. By showing people caught in the act, the broadcasts also undermined the viewer's sense of privacy and strengthened the suggestion of surveillance of the viewer.

Although Durkheim and Foucault supply conceptual frameworks that reveal how communication of the fact of law enforcement both legitimizes the law and attempts to enforce the law, Durkheim focuses on criminal punishments and Foucault on prisons. Can media transmissions play a role in areas of the legal system that do not deal with criminal law? The essential element of criminal law, upon which Durkheim and Foucault focus, is coercion. In Durkheim's model of criminal punishment, the state metes out coercive violence against the convict in order to appease the collective conscience.<sup>83</sup> To Foucault, the communication to society of legal punishments is itself coercive.<sup>84</sup> By communicating a model for behavior along with the threat of forced compliance if voluntary compliance is not forthcoming, the state co-opts the individual to, in essence, coerce himself or suffer the consequence of coerced restraint and retraining.

To grasp the scope with which media operates within China's legal system, then, it is necessary to understand whether coercion is limited to criminal sanctions. Legal scholar Edward Epstein argues that all law in the PRC is enforceable only with the threat of coercion,<sup>85</sup> and according to anthropologist

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81. *See id.*

82. *See id.*

83. DURKHEIM, *supra* note 4, at 80-81, 102-05.

84. *See generally* FOUCAULT, *supra* note 4.

85. Epstein argues that in the PRC, coercion is necessary to make law constrain behavior. He goes so far as to identify coercion as the essential difference between the enforcement of Chinese law and of European law. Epstein, *supra* note 4, at 214. In Europe, he argues, law does not need coercion for its enforcement, because "law is accepted into consciousness because of its ideological impact," Edward J. Epstein, *Law and Legitimation in Post-Mao China*, in *DOMESTIC LAW REFORMS IN POST-MAO CHINA* 19, 30 (Pitman B. Potter, ed., 1994). Under this theory, state-run media would have to

Carole Nagengast, coercion includes subtle forms of emotional manipulation, or threats of acts other than "direct violence."<sup>86</sup> She identifies various manifestations of coercive violence that go beyond the "practical, physical, visible, and personal," to include the "symbolic," the "emotional," the "invisible (as in witchcraft)," and "from the forces of society."<sup>87</sup> States can perpetrate all of these forms of violence, she argues, and they often use images of "work" to describe such violence in a way that mollifies concern about or wins support for it.<sup>88</sup>

In the PRC, there is abundant evidence that many norms, for many people, have been enforced with means other than physical violence. The government of the PRC in the 1950s and 1960s developed rituals symbolic of the state's control over the individual and methods of emotional persuasion, which were refined in millions of "mass criticism pronouncement meetings" and small group "struggle" or "education" sessions throughout the PRC.<sup>89</sup> The officials who conducted these events arranged the participants so that government officials were at the center, the representatives of the People's Liberation Army were in a ring around them, and the other participants were in a larger ring around them.<sup>90</sup> This pattern reinforced the message that the Chinese Communist Party was the primary surveyor of behavior, the People's Liberation Army provided the secondary ring of surveillance, and the masses formed the tertiary ring of surveillance. Rural cadres in the 1950s, 1960s, and early 1970s were instructed by the central government in the communication techniques and the terminology of the hour, so that the cadres could personally "educate" the masses.<sup>91</sup> This process turned the cadres into channels of communication not just of the current policy from the central leadership to the masses, but also of the behavior of the masses to the central leadership.<sup>92</sup>

Whether such efforts to enforce central policy went so far as to brainwash the public, at least in the cities, is debatable,<sup>93</sup> but it nonetheless aimed to instill values through time-honored Chinese techniques of rote memorization and recitation of pithy texts.<sup>94</sup> The PRC government has used a variety of devices to control

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serve as an instrument of coercion if it were to function as a part of the legal system of the PRC. Epstein does not identify what coercion is, however, and so does not illuminate how messages transmitted by media might coerce.

86. Carole Nagengast, *Violence, Terror, and the Crisis of the State*, 23 ANN. REV. OF ANTHROPOLOGY 109, 114 (1994).

87. *Id.* at 111.

88. *Id.* at 123-24.

89. MICHAEL R. DUTTON, POLICING AND PUNISHMENT IN CHINA: FROM PATRIARCHY TO "THE PEOPLE" 262-70 (1992); see Lung-Sheng Tao, *Politics and Law Enforcement in China: 1949-1970*, 22 AM. J. OF COMP. LAW 713, 744-45 (1974).

90. DUTTON, *supra* note 89, at 269.

91. *See id.* at 269-70.

92. *See* Lung-Sheng Tao, *supra* note 89, at 745.

93. Yuefeng Wang, *Informal Behaviour Control has Never Dominated in China*, 1 ASIA PAC. L. REV. 104, 107-08 (1992).

94. William Alford skillfully identifies this approach to education in his work on intellectual property law in China. WILLIAM P. ALFORD, TO STEAL A BOOK IS AN ELEGANT OFFENSE:

individuals, including not just incarceration, where representatives of the state could exert physical control over individuals, but also neighborhood intelligence operations, which facilitated the socialization of individuals who lived in government-subsidized housing.<sup>95</sup>

In the PRC, then, disseminating messages from the center through centrally orchestrated media to broad swathes of the population is one method of communicating to the public central interpretations of law, but also a method that is designed to accomplish a variety of goals. These communications are delivered to educate the public about the correct interpretations of the law, to legitimate the law by portraying the lawmakers as reinforcing widely held public values, and to enforce the law by persuading about the merits of adhering to the correct interpretations of the law and threatening forced reeducation if these interpretations are not adhered to. While the personal application of social and psychological pressure helps to achieve all three goals, there can be little doubt that, given the PRC government's vast program to communicate central law to its subjects and to shape public behavior in conformity to that law, the media form an additional and important component of the Chinese government's legal system.

### *B. Media as Sources of Law*

Though media transmissions function as an integral part of the PRC legal system, can they also be considered "sources of law"? In other words, can a lawyer discern the law in the PRC from media transmissions? This is more difficult to show than to show that media transmissions form a part of the legal system of the PRC because the concept of "sources of law" is narrower than the concept of "legal system."<sup>96</sup> The concept of "sources of law" was developed by law scholars in continental Europe, where law tends to be conceived in greater abstraction than it tends to be in the United States,<sup>97</sup> but it is a concept with practical implications because lawyers need to know where to look for the law in order to advise clients in an accurate and fully-informed fashion, and legal scholars too need to know which materials contain authoritative articulations of the law.<sup>98</sup>

There is no consensus about the meaning of the concept of "sources of law," but it is nonetheless an important concept in the field of comparative law and perhaps one of growing importance to the field of statutory interpretation. The major comparative law textbooks in the United States and Germany use "sources of law" as a basic, organizing concept.<sup>99</sup> On the question of what constitutes

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INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION 22, 27-29 (1995).

95. See DUTTON, *supra* note 89, at 189-245.

96. JOHN HENRY MERRYMAN, DAVID S. CLARK & JOHN O. HALEY, *THE CIVIL LAW TRADITION: EUROPE, LATIN AMERICA, AND EAST ASIA* 50-51 (1994).

97. See KONRAD ZWIEGERT & HEIN KOTZ, *INTRODUCTION TO COMPARATIVE LAW* 70 (1992).

98. This point forcefully comes across in THOMAS O'MALLEY, *THE ROUND HALL GUIDE TO THE SOURCES OF LAW* 1-8 (1993); see also PETER DE CRUZ, *COMPARATIVE LAW IN A CHANGING WORLD* 28 (1995).

99. See MERRYMAN ET. AL., *supra* note 96, at 937-944, 1276; RUDOLF B. SCHLESINGER, *COMPARATIVE LAW* xxviii-xxvix, 222, 494-653 (4th ed., 1980); ZWIEGERT & KOTZ, *supra* note 97, at

"sources of law," comparative legal scholars in the west divide into two camps, the formalists, and their counterpoints, the functionalists.<sup>100</sup> Formalists view enacted law as the predominant and primary source of law in "civil law countries," supplemented by custom and by judicial and academic interpretations of the law.<sup>101</sup> Almost as an afterthought, formalist comparativists classify constitutions as enacted law also.<sup>102</sup> Formalists would expand the concept of "primary sources of law" in the United States and other "common law countries" to include judicial opinions along with enacted law, but would add little else.<sup>103</sup> To the formalist, all of these sources of law wherever they appear, are written and publicly published, and contain precisely articulated rules, which constrain public behavior and eviscerate the discretion of judges.<sup>104</sup> To the formalist, the test of whether something qualifies as a source of law might be whether a judge would be influenced by the document.

The functionalist seems less interested in whether something is a source of law, but rather places emphasis on whether law solves a problem in society.<sup>105</sup> Still, it is fair to say that the functionalist looks to find and understand the sources of law, only he looks to society more broadly, to "politics, sociology, psychology" and elsewhere.<sup>106</sup> Legislative history—the record of the process of a statute's enactment—is a classic example of a source of law, which functionalists recognize more readily than do formalists.<sup>107</sup> Law, as a tool of the government to engineer

71; GLENDON ET. AL., *supra* note 44, at xv, 192. For a comment about the lack of consensus about a definition of "source of law," and the importance of the concept, see CRUZ, *supra* note 98, 28-29 (1995).

100. The classic identification and explanation of the distinction between formalism and functionalism is in Robert Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 59-67 (1984).

101. See CRUZ, *supra* note 98, at 28.

102. See *id.*

103. See *id.* at 28, 44.

104. Comparative legal scholars Mary Ann Glendon, Michael Wallace Gordon, and Christopher Osakwe count "enacted law," "custom," and "general principles of law" (developed by judges in their published decisions), as the "primary sources of law" in civil law countries, and consider judicial and academic interpretation of the law as lesser sources of law. GLENDON ET. AL., *supra* note 44, at 193-214. A traditional legal authority in the United States defines sources of law as the origins from which particular positive laws derive their authority and coercive force. See BLACK'S LAW DICTIONARY *Source of Law* (9th ed. 2009).

105. See Gordon, *supra*, note 100, at 64-71. A notable example of the functionalist focus on solving societal problems is the six-step method for comparative legal research outlined in Mauro Cappelletti, *Comparative Law Teaching and Scholarship: Method and Objectives*, ASIA PAC. L. REV. 1, 2-5 (1994).

106. The renowned legal comparativist Rene David epitomizes this approach. Rene David, *Sources of Law*, in THE LEGAL SYSTEMS OF THE WORLD: THEIR COMPARISON AND UNIFICATION 3 (Rene David ed., 1984). Comparativist Peter de Cruz draws generally on David's work, when he states, "Ideally, one would need to examine politics, sociology, psychology and many other areas to seek a definitive answer to the problem of defining a 'source of law.'" CRUZ, *supra* note 98, at 28.

107. For explanations of what constitutes legislative history and commonly used techniques for interpreting it, see WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 698-776 (1988). The authors mention that Justice Scalia does not view as helpful reports of legislative committees responsible for drafting or overseeing the passage of a bill. *Id.* at 715. By all accounts, Justice Scalia is a formalist, in that he

society or exert control over society, is an example of a functionalist conception of law.<sup>108</sup> Tests of a source of law for the functionalist would include whether it fits into the “legal landscape,”<sup>109</sup> is meant to shape behavior, or actually exerts an impact on society.

Although they may differ about how far beyond enacted law they are willing to look for sources of law, both formalists and functionalists view authoritative interpretations of the law as sources of law. Neither formalists nor functionalists, however, name media transmissions as authoritative interpretations of the law, or as any other type of “source of law.” Instead, both take for granted that only judges and scholars publish authoritative interpretations of the law, with the possible addition of the legislators who enact the statutes.

Should the focus by legal comparativists on the interpretations of law published by judges and legal scholars, and the omission by comparativists of any mention of media transmissions, be taken as a definitive exclusion of media from what are considered sources of law? No, it should not be. The fact that European and American comparativists have not considered media transmissions sources of law is more a function of inattention to the question and to the underdevelopment in comparative legal discourse of the definition of sources of law than of a reasoned exclusion of them.

Inattention to the question among western comparativists may be explained by their assumptions about the scale and importance of the dissemination of official information. In the American paradigm of positive law, with its emphasis on transparency and the fiction that its subjects are on notice about what the law contains, law is a kind of information. Given the rarity of any mention of government in the work of social scientists that study the dissemination of information in the United States,<sup>110</sup> government in the United States appears to

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favors the strict construction of legislative texts. In *Nat'l Labor Relations Bd. v. Catholic Bishop of Chicago* and *United Steelworkers of Am. v. Weber*, the formalists on the United States Supreme Court showed themselves more skeptical of the pertinent legislative history than was the more functionalist wing of the Court. See *id.* at 70-84, 676-86 (citing to *United Steel Workers of Am. v. Weber*, 443 U.S. 193 (1979) and *Nat'l Labor Relations Bd. v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979)). Judges known as legal realists or “legal process scholars” favor the use of legislative history. See *id.* at 593-94 (citing Patricia Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 195, 199 (1982)).

108. See Gordon, *supra* note 100, at 74-75 (1984); Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L. J. 805, 814 (Richard Terdiman trans., 1987).

109. See ESKRIDGE, JR. & FRICKEY, *supra* note 107.

110. For prominent examples of studies of the dissemination of information and knowledge in the United States that contain virtually no mention of government, see RONALD G. HAVELOCK ET AL, PLANNING FOR INNOVATION THROUGH DISSEMINATION AND UTILIZATION OF KNOWLEDGE (1971) (especially Chapters 3 and 9); EVERETT M. ROGERS, DIFFUSION OF INNOVATIONS 293-309, 364-70 (4th ed. 1995); ORGANIZATION OF KNOWLEDGE IN MODERN AMERICA, 1860-1920 (Alexandra Oleson & John Voss, eds., 1979); RONALD G. HAVELOCK, THE CHANGE AGENT'S GUIDE TO INNOVATION IN EDUCATION 210-211 (1973); DIANA CRANE, INVISIBLE COLLEGES: DIFFUSION OF KNOWLEDGE IN SCIENTIFIC COMMUNITIES (1972). See also Nathan Reingold, *National Science Policy in a Private Foundation: The Carnegie Institution of Washington*, in ORGANIZATION OF KNOWLEDGE IN MODERN

play a relatively minor role in the dissemination of information. The United States government does not even publish its own statutes and judicial opinions, but rather contracts with private companies to handle this job.<sup>111</sup>

Comparative legal study at its best endeavors to uncover the special features of the subject of study,<sup>112</sup> but this approach generally has not been applied to the question of sources of law. On the contrary, the predominant comparative treatments of sources of law have used the characteristics of the “production of law”<sup>113</sup> in Europe to develop models for all of the world’s legal systems. Thus, all legal systems are either code-based systems or case law systems, which are called respectively, “Civil Law” or “Common Law” systems, terms that are historically and geographically specific to Europe.<sup>114</sup> Where deviations from the two types are recognized, the degree of deviation is the measure of the immaturity or the “lack of penetration” by one of the European legal systems of the legal system in question.<sup>115</sup>

In the true spirit of comparative analysis, China’s methods of producing law should be examined *tabula rasa*, free from preconceptions about what a source of law looks like. At least two characteristics of law in China call for the inclusion of media transmissions in the sources of law. One characteristic is the close connection between positive law and central policy, which makes formal enactments only one of many emanations of state authority. The other characteristic, a lack of transparency of legal regulations, is a symptom of a system in which official interpretations of the regulations may be publicized in lieu of their texts.

Under the formalist approach, where sources of law are defined as that which binds judicial decisions, media transmissions in China serve as a source of law in

AMERICA, 1860-1920, 313-41 (Alexandra Oleson & John Voss eds. 1979) (discussing the role of government and the founding of the Carnegie Institution of Washington); A. Hunter Dupree, *The National Academy of Sciences and the American Definition of Science*, in ORGANIZATION OF KNOWLEDGE IN MODERN AMERICA, 1860-1920, 342-63 (Alexandra Oleson & John Voss, eds. 1979) (discussing the role of government and the founding of the National Academy of Sciences).

111. Noel Cox, *Copyright in Statutes, Regulations, and Judicial Decisions in Common Law Jurisdictions: Public Ownership or Commercial Enterprise*, 27 STAT. L. REV. 185, 185 (2006).

112. This approach is advocated in the most learned assessments of the methods for researching Chinese Law. See William P. Alford, *On The Limits of 'Grand Theory' In Comparative Law*, 61 WASH. L. REV. 945, 947 (1986); Sharon Hom, *Engendering Chinese Legal Studies: Gatekeeping, Master Discourses, and other Challenges*, 19 SIGNS 1020, 1023 (1994); Stanley Lubman, *Studying Contemporary Chinese Law: Limits, Possibilities and Strategy*, 39 AM. J. COMP. L. 293, 293-95, 339-40 (1991).

113. This is the English translation of a phrase used by the French sociologist Pierre Bourdieu. Bourdieu, *supra* note 108, at 806; see also Lucille A. Jewel, *Bourdieu and American Legal Education: How Law Schools Reproduce Social Stratification and Class Hierarchy*, 56 BUFF. L. REV. 1155, 1155-59 (2008) (discussing Pierre Bourdieu’s work).

114. See GLENDON ET. AL., *supra* note 44, at 44-64, 438-454 (discussing the history, culture, and distribution of civil and common law).

115. For discussions relating to this topic, see ZWEIGERT & KOTZ, *supra* note 97, at 63-73; Kensie Kim, *Mixed Systems in Legal Origins Analysis*, 83 S. CAL. L. REV. 693 (2010).

several ways. The *People's Daily* publishes "the full texts of statutes enacted by the National People's Congress," which bind all judges in the PRC.<sup>116</sup> The *People's Daily* also publishes "official versions of legislative history, official interpretations of the statutes, reports of current bills under consideration by the National People's Congress and by congresses below it, and notices of new policies of central administrative agencies," as do the official legal newspapers, namely the national *Legal System Daily*, and the regional versions, such as the *Shanghai Legal System News*.<sup>117</sup> These legislative histories, interpretations of statutes, reports of bills, and notices of administrative policies are "either not published elsewhere, and therefore [are] the only [authoritative] versions of these [authoritative] statements available to judges, or [are] replicas of the documents that the Chinese Communist Party sends all judges in the PRC for study in Tuesday afternoon "political study" (*zhengzhi xue*) sessions."<sup>118</sup>

The overlap between the publishers of these journals and those who decide on promotions of judges is nearly complete. Both of these legal newspapers are published by entities that are responsible for educating judges about Party policy. "The Ministry of Justice and the Chinese Communist Party's Central Politics and Law Commission supervise the publication of the *Legal System Daily*."<sup>119</sup> The Ministry of Justice is in charge of educating judges, and the Commission is now headed by Ren Jianxin, the President of the Supreme People's Court, which is in charge of disseminating to all judges presumably binding advisory opinions.<sup>120</sup> The *Shanghai Legal System News* is published by the Shanghai Bureau of Justice, which is a local arm of the Ministry of Justice and is overseen by the Chinese Communist Party's important body, the Shanghai Politics and Law Committee. Both are entities that supervise the conformity of judicial opinions to Party policy.<sup>121</sup>

Serving another function as a source of law,

the legal newspapers communicate official delegations of legislative authority by notifying local governments about their authority to enact implementing regulations for specific statutes or policies. When the *Legal System Daily* published a notice of a new policy by two central

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116. Wei Luo, *How to Find the Law of the People's Republic of China: A Research Guide and Selective Annotated Bibliography*, 88 L. LIBR. J. 402, 406-08, 423 (1996); Lee, *supra* note 1, at 210.

117. Lee, *supra* note 1, at 210.

118. *Id.*

119. Lee, *supra* note 1, at 212; Margaret Y. K. Woo, *Adjudication Supervision and Judicial Independence in the P.R.C.*, 39 AM. J. COMP. L. 95, 110 n.87 (1991).

120. Susan Finder, *The Supreme People's Court of the People's Republic of China*, 7 J. CHIN. L. 145, 150, 171 (1993).

121. See Lee, *supra* note 1, at 210; see also Timothy A. Gelatt, *Legal and Extra-legal Issues in Joint Venture Negotiations*, 1 J. CHIN. L. 217, 230-31 (1987); SHANGHAI FAZHI BAO [SHANGHAI LEGAL SYSTEM NEWSPAPER], Mar. 25, 1996, at 1 (China) (on file with author) (providing an example of a report about a bill concerning two national real estate laws under consideration by the Shanghai People's Congress; Philip Baker, *Party and Law in China*, in STATE AND LAW IN EASTERN ASIA 17, 17-19 (Leslie Palmier ed., 1996) (providing a brief description of the Political-Legal Commission).

departments, for example, it authorized all local governments to draft implementing measures for it.<sup>122</sup>

The close connection between law and policy in the PRC makes it difficult to argue that sources of law in the PRC include only legal interpretations published by judges, scholars, or legislators.

Judges and bureaucrats throughout China rely on and are dependent on frequent communications of uncodified policy from the central leadership, who occupy the top Party positions and the top executive positions of President, Premier, and Vice Premier, or head the sixty-some administrative ministries and agencies headquartered in Beijing.<sup>123</sup> Each court in the four-tiered court system of the PRC is [officially] linked to the Chinese Communist Party [by the] practice of recruiting judges from the ranks of the Party and the People's Liberation Army, [and by] a procedure called "adjudication supervision" or "trial supervision" (*shenpan jiandu*), which permits certain officials to reopen an otherwise final civil or criminal judgment.<sup>124</sup> Each court must work with these officials, who are designated by the Party through the Standing Committee of the People's Congress at the same level as the court, [a procedure that] subjects judges to pressures to implement central policies in their decisions.<sup>125</sup> In a comprehensive examination of the Supreme People's Court since the legalization campaign began in 1979, Susan Finder concludes that in all of its work, the Court is 'still subject to Party leadership. The Court implements Central Political-Legal Committee and other Party initiatives and clears important policy decisions and other critical decisions with the Party leadership.'<sup>126</sup>

Where the power to appoint judges resides undermines the ability of judges to make law in China. That appointment process is as follows:

the Party leaders at each administrative level, not the courts, appoint the most powerful judges in China, [the president of each court, who] in turn, nominate for appointment all the judges in [his] court, [and] the People's Congress at each level approves the appointments.<sup>127</sup> This makes courts beholden to local political interests and lessens their interest in following judicial precedent. Even the Supreme People's Court, which sits atop the national court system, does not appoint judges

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122. Lee, *supra* note 1, at 213; see *Junren chengche goupiao youxian de tongzhi* [Notice About Military Personnel's Priority for Purchasing Train Tickets], FAZHI RIBAO [LEGAL SYSTEM DAILY], Oct. 4, 1995, at 3 (China) (on file with author).

123. Lee, *supra* note 1, at 214; see Finder, *supra* note 120, at 148, 151; Woo, *supra* note 119, at 107, 115.

124. Lee, *supra* note 1, at 214; see Woo, *supra* note 120, at 97.

125. Lee, *supra* note 1, at 214; Woo, *supra* note 120, at 102, 116-117, 119.

126. Lee, *supra* note 1, at 214; Finder, *supra* note 121, at 222.

127. Lee, *supra* note 1, at 215; Finder, *supra* note 121, at 149.



and has been relatively powerless to change the appointment process.<sup>128</sup> The Court came closest to influencing appointments when it submitted to the National People's Congress draft legislation for upgrading the professional standards of the judiciary, one of the provisions of which attempted to shift the power of appointment to the court system.<sup>129</sup> The NPC passed the law in 1995 after dropping the provision.<sup>130</sup>

The relatively low status of legal scholars in the PRC further undermines their ability to contribute authoritative interpretations of the law. Courts take cognizance of academic articles on relevant legal issues, but they do not accord them as much weight as Supreme Court opinions or Party documents.<sup>131</sup>

PRC officials and China law scholars advance views about policy that are consistent with its status as a source of law. Some view policy as the driving force behind the law, with law functioning to cloth policy in a legitimate form.<sup>132</sup> Others depict policy as a supplement to enacted law, particularly where enacted law leaves gaps to be filled.<sup>133</sup> Another sees law as an expression of policy, but stresses that the power to turn this policy into law "is fragmented among numerous individuals and organizations."<sup>134</sup> The official position of the PRC central government is that policy is a source of authority, and that law is closely related to policy.<sup>135</sup> A popular legal treatise specifies that "where the legal structure is incomplete, policy must function as law,"<sup>136</sup> while two articles of the Organic Law of the Local People's Congresses and Local People's Governments of the PRC rank policy as co-equal with law as a source of authority.<sup>137</sup>

Although law reflects policy, the articulations of policy are not limited to formal legal enactments. Policy is expressed in the words of the top leadership, even those words that lack formal enactment. The dispensability of formal enactment derives from the concentration of authority at the center of the PRC

128. Lee, *supra* note 1, at 215; see Finder, *supra* note 121, at 224.

129. Lee, *supra* note 1, at 215; Finder, *supra* note 121, at 224.

130. Lee, *supra* note 1, at 215.

131. Lee, *supra* note 1, at 214; see Interview with a PRC law professor (Nov. 1996) (on file with author).

132. For a path breaking study, see Frances Hoar Foster, *Codification in Post-Mao China*, 30 AM. J. COMP. L., 395, 413-14 (1982).

133. For Proponents of this view, see Tao-tai Hsia & Constance Johnson, *Lawmaking In China, Part IV*, E. ASIAN EXECUTIVE REP., Aug. 15, 1987, text at notes 57-58.

134. A proponent of this view is Murray Scot Tanner, *Organizations and Politics in China's Post-Mao Law-Making System*, in DOMESTIC LAW REFORMS IN POST-MAO CHINA 87, (Pitman B. Potter ed. 56, 87 (1993).

135. See Hsia & Johnson, *supra* note 133.

136. *Id.*

137. Article 8 requires the local people's congresses to enforce "policies" along with "the Constitution, laws, . . . decrees, and orders of the state . . ." while Article 27 prohibits municipal law that contradicts "policies" or "the Constitution, laws, . . . decrees, or administrative orders of the state . . ."

" Quoted and cited in Tao-tai Hsia and Constance Johnson, "Lawmaking In China, Part IV," 1987 EAST ASIAN EXECUTIVE REPORTS, Aug. 15, 1987, text at notes 64-65.

government, where it resides in the paramount leader, and then in descending degrees to the individuals who occupy key posts in the Chinese Communist Party and in the Executive Branch of the government headed by the State Council. Power resides in the person of the ruler, and therefore, as a popular saying goes "whatever Deng Xiaoping says is the law."

The point that law in the PRC is not limited to formal enactments can perhaps be grasped more easily by considering that the enactment of words of authority may have less to do with their enforcement than would the publicity of those words. As a lover of classical Greek poetry puts it, Agamemnon's "communications officer said, 'Sorry, King, but the world will forget [the lesson you taught Paris in the Trojan War] overnight unless you let me sign up the blind poet Homer to write the authorized version.'"<sup>138</sup> A modern Chinese equivalent is Deng Xiaoping's trip to Shenzhen during his southern tour in 1992, the home of one of China's two stock markets.<sup>139</sup> These stock markets had been operating in China in some form since the early 1980s, and centrally approved local legal regulations had been enacted to govern them, but the stock markets languished in a dearth of confidence by potential investors.<sup>140</sup> On the force of Deng's statements about opening the economy, publicized in the press and studied throughout China in Tuesday afternoon "political study" sessions, the value of many stocks on the Shenzhen stock market doubled and tripled within a few weeks, and lawyers opened private law firms pursuant to a heretofore little-used regulation.<sup>141</sup>

Law is also articulated

without formal enactment in the 'documents' (*wenjian*) issued by party organs and the central ministries and agencies of the PRC government.<sup>142</sup> Those internal documents (*neibu wenjian*) that are 'secret' are not released to anyone outside the party, while others which are for public consumption (*zhongyao wenjian*) are released directly to all judges and law professors, to a selected group of law firms and consulting firms, and to the public through the print and broadcast media.<sup>143</sup>

Judges are more likely to study the public documents than the published regulations.<sup>144</sup>

138. Russell Baker, *Homer's First Yuppie*, N.Y. TIMES, Aug. 15, 1996, at A17.

139. See Andrew Xuefeng Qian, *Riding Two Horses: Corporatizing Enterprises and the Emerging Securities Regulatory Regime in China*, 12 UCLA PAC. BASIN L. J. 62, 66-68, 84 (1993) [hereinafter Qian, *Riding Two Horses*].

140. See *id.* at 66-69; see also Andrew Xuefeng Qian, *Why Does Not The Rising Water Lift the Boat? Internationalization of the Stock Markets and the Securities Regulatory Regime in China*, 29 INT'L LAW. 615, 615-18 (1995) [hereinafter Qian, *Internationalization of the Stock Markets*].

141. See Qian, *Riding Two Horses*, *supra* note 139, at 84, 94; Qian, *Internationalization of the Stock Markets*, *supra* note 140, at 617-18.

142. Lee, *supra* note 1, at 212.

143. *Id.*

144. As do all government officials and teachers at every level, judges and law professors study the

The variety of channels through which law is disseminated in the PRC suggests, on the one hand, the irrelevance of formal enactment to authoritativeness, and on the other hand, a spectrum of transparency.<sup>145</sup>

The variety of channels allows the Party to target different audiences, both within and without Chinese officialdom, in part to tailor its interpretations of the law to the intended audience, and also in part to withhold information successively from larger segments of the population. The interpretations intended for high-level Party members are enacted and published in the media less frequently than are the interpretations destined for low-level Party members, which in turn are published in the media less frequently than are the interpretations destined also for groups within the public at large. [T]he legal interpretations intended for Chinese audiences outside of China and foreign audiences are published in overseas arms of the party press agency and by the Foreign Languages Press in Beijing.<sup>146</sup>

The policy articulations and official legal interpretations which pass through print or broadcast media do so by virtue of the central government's control over the output of print and broadcast media, a control that extends beyond censorship to orchestration.<sup>147</sup> In such a context, virtually whatever the state-controlled media transmits carries authoritative weight, from written or oral pronouncements of the top leaders, which are printed in the *People's Daily* but not formally enacted into law, to statements on television by an official of the Supreme People's Procuracy,<sup>148</sup> to a speech of the Vice-President of the Supreme People's Court published by the Court,<sup>149</sup> to anecdotes in a legal newspaper about children failing to care for their elderly parents.<sup>150</sup>

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important neibu wenjian during some of their weekly staff meetings every Tuesday afternoon. Interview by the author with Professor Zhao Jianzhuang, Professor, Henan Cadre College of Politics and Law, (Nov. 1996) (on file with author). Meanwhile, filing cabinets full of published regulations in the chambers of the Shanghai Intermediate Court collect dust. Remarks by Pitman Potter at the Association for Asian Studies, (March 1994) (on file with author). The most important policy documents on economic affairs issued by the central government now emanate from such institutions as the People's Bank, the Ministry of Foreign Trade and Economic Cooperation [MOFTEC], and the Economic Planning Commission. The Central Propaganda Department is losing influence within the central government, however, particularly over matters deemed to be economic. Interview by the author with Shen Xiaohong, Director of the Council for International Educational Exchange Nanjing University Program, in New Haven, Conn. (Aug. 11, 1996) (on file with author).

145. The lack of transparency of Chinese law is widely acknowledged. See, e.g., Hsia & Johnson, *supra* note 136, at 134, n.56, n.57; Timothy A. Gelatt, *supra* note 118, at 231.

146. Lee, *supra* note 1, at 212-13.

147. See Judy Polumbaum, *Striving for Predictability: The Bureaucratization of Media Management in China*, in CHINA'S MEDIA, MEDIA'S CHINA 113, 119-21 (Chin-Chuan Lee ed., 1994).

148. For an example, an official of the Supreme People's Procuracy staff spoke to a television broadcast in Beijing. Susan V. Lawrence, *Speaking Up For Their Rights*, U.S. NEWS & WORLD REP., June 10, 1996, at 50, 52.

149. In a speech at a press conference in 1988, Vice President Ma Yuan articulated the Supreme People's Court's position on civil matters arising between parties of PRC citizenship, on the one hand,

It is not surprising, then, that the most powerful people in the PRC are directly linked to those in charge of the state-run media.

The vice-president of the central ministry of foreign affairs, Zhou Nan, is also the chief of the Hong Kong bureau of the Xinhua News Agency, the official mouthpiece of the Party in Hong Kong, and the PRC government's premier representative there before the selection of Tung Chee-hua as chief executive of the Hong Kong Special Administrative Region (SAR) in 1996. [U]ntil then, . . . the Chinese equivalent of Governor Christopher Patten, [Zhou Nan] agreed in 1996 to remain in this post until 1999 in a bid to help minimize the disruption attending Hong Kong's transition to Chinese sovereignty.<sup>151</sup>

#### On the Mainland,

the party permits and encourages the public to contact the press in order to give the party feedback about its policies and to report transgressions of the law.<sup>152</sup> The editors of the *People's Daily* are known to be among the conduits to government for support of local causes [in 1996]. An American journalist reported the story of a forty-six-year-old local party boss and farmer from northeastern China, near the Russian border, whose village employs him as a full-time lobbyist in Beijing.<sup>153</sup> As part of his lobbying efforts, Tian Chunshan visited editors of the *People's Daily*.<sup>154</sup>

Given that un-codified versions of CCP policy and official interpretations of law are sources of law in the PRC and are regularly disseminated through the media, media transmissions function as sources of law. Such transmissions fit within even the narrowest conception of "sources of law" because, in some form, they influence judicial decisions. Although the dissemination of Party policy flows

and of Taiwanese citizenship on the other. The Supreme People's Court published the speech in a collection of "guiding instructions." Ma Yuan, Vice President of the Supreme People's Court, First News Conference Held by the Supreme People's Court: Some Legal Issues of the People's Court Dealing With Civil Cases Relating to Taiwan (Aug. 9, 1988), reprinted in COLLECTION OF THE LAWS OF THE PRC 369 (Wang Huaian, Gu Min, Lin Zhun & Sun Wanzhong eds., 1989) as cited in Tung-Pi Chen, *Bridge Across the Formosa Strait: Private Law Relations Between Taiwan and Mainland China*, 4 J. CHINESE L. 101, 115 n. 65 (1990). Chinese law scholar Tung-Pi Chen maintains that "the policy statement may safely be regarded as quasi-law because it came from such a senior official." *Id.* at 115.

150. Tangji Yue, *Fayu jiating: jiehunfa 'xi' le sanjia 'huo'* [*Marriage Law 'Extinguishes' the Three Families 'Fire'*] FAZHI RIBAO [LEGAL SYSTEM DAILY], Dec. 10, 1995, at 3 (China) (on file with author).

151. Lee, *supra* note 1, at 238-39 n.3 (citing Interview by the author with Shen Xiaohong, *supra* note 142 (on file with author)).

152. *Id.* at 214 (citing Judy Polumbaum, *To Protect or Restrict? Points of Contention in China's Draft Press Law*, in DOMESTIC LAW REFORMS IN POST-MAO CHINA 247, 256-57 (Pitman B. Potter ed., 1994)).

153. *Id.* (citing Lawrence, *supra* note 148, at 52).

154. *Id.*

directly to courts through their adjudication, supervision committees<sup>155</sup> receive their guidance from the same body that directs the nationwide legal education campaign, the Ministry of Justice. At the same time, the Ministry of Justice falls under the authority of the State Council, which oversees the issuance of ministerial and agency “documents.” The interpretations and policies broadly disseminated through the media from the Ministry of Justice’s legal education program and from the ministerial “documents” may also satisfy a broader, societal conception of “sources of law,” although it is beyond the scope of this paper to determine whether any of these interpretations actually succeed in changing people’s behavior.<sup>156</sup> To exclude from what are considered the sources of law, un-codified official interpretations of the law, and the written or oral pronouncements of a leadership whose words, gestures, and symbols carry a great deal of weight in the courtroom, in administrative offices, and in society at large, simply because in some form they are made known to the public through media, is to ignore a major source of legal authority simply for the sake of sounding correct according to the paradigms of American or European jurisprudence.

## II. FAMILY LAW: A CLOSER LOOK AT THE MEDIA’S ROLE IN THE PRC LEGAL SYSTEM

A discursive study of two samples of newspaper articles and official broadcasts reveals that media in the PRC channel to the public official messages about legally correct behavior in the ways described by Durkheim and Foucault-Nagengast.<sup>157</sup> As Victor Li found in his study of Chinese law, the media used simple language and avoided elaborate explanations.<sup>158</sup> In these samples too, simple paraphrases of statutes screened out technical legal terms, such as a summary in a legal newspaper by a mediator of the Marriage Law provision governing the care of the elderly. The images of women mentioned in the legal newspapers, who were involved in financial scams, were one-dimensional. Despite this simplicity of language and character portrayal, however, the messages throughout these samples also attempted to legitimize the government and to enforce the law in the complex, psychological ways theorized by Durkheim and Foucault-Nagengast. Thus, the messages appeared to try to assuage deeply felt societal needs and to project models for behavior coupled with the threat of coerced enforcement. The transmissions functioned as sources of law in the formalist sense by being all that was available to the public by way of authoritative elaborations of the lightly codified family planning program and the Marriage

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155. See Margaret Y.K. Woo, *Adjudication Supervision and Judicial Independence in the P.R.C.*, 39 AM. J. COMP. L. 95, 96 (1991).

156. Certainly it is plausible that media transmissions do not always have their intended effect. Frances Foster, in her impressive study of theories of information in the Russian media in the 1990s, uncovers a wealth of examples of this in Russia. Frances H. Foster, *Information and the Problem of Democracy: The Russian Experience*, 44 AM. J. COMP. L. 243, 289-90 (1996).

157. See DURKHEIM, *supra* note 4, at 80-81, 90, 109; FOUCAULT, *supra* note 4; Nagengast, *supra* note 4, at 116.

158. VICTOR H. LI, *LAW WITHOUT LAWYERS: A COMPARATIVE VIEW OF LAW IN CHINA AND THE UNITED STATES* 42 (1978).

Law. The transmissions in the sample also served as sources of law in the functionalist sense of aiming to exert an impact on society.

The two samples of transmissions are drawn from the Xinhua news agency publications in Chinese and English; the premier national legal newspaper, the *Legal System Daily*; and a major regional legal newspaper, the *Shanghai Legal System News*, whose purpose is to inform city dwellers about the Party's position on topics related to law; and official treatises.<sup>159</sup> The two samples are related to family law, an area of law that is useful for examining the role of media in the legal system and their function as sources of law, in part because the media is governed by broadly-worded legal enactments, and yet, as a centerpiece of the government's vision for China's prosperity at the dawn of the twenty-first century, is subject to intensive government regulation. Therefore, if the media transmit and supplement enacted law, they would do it in this area. Furthermore, the great importance of this area of law ensures a rich sample of material that is likely to be aimed at strengthening the legitimacy of the government. In Deng Xiaoping's regime and after, family law is the rubric for decreasing the growth of China's population, a cornerstone of the regime's effort to promote prosperity.<sup>160</sup> Yet another advantage is that family law is not a part of China's criminal law, and thus, it will help to gauge whether the media help the state carry out retribution and project behavioral models outside the criminal contexts to which Durkheim and Foucault described.

Why two samples for each area of law? The two samples from each legal topic were published about twelve years apart. This time gap strengthens conclusions about the role of media transmissions in China's legal system because it rules out some of the risk of idiosyncrasies that arises when a single snapshot is taken.

Family law in the PRC is comprised largely of the 1980 Marriage Law (*Hunyin fa*), related regulations, and a lightly codified family planning program.<sup>161</sup> Michael Palmer has persuasively argued that newspapers play an important role in the formation and dissemination of family law in the PRC.<sup>162</sup> It is important to stress, however, that newspapers and other media transcend the function of vehicles for the texts of enacted law.

The Xinhua news agency publishes articles in the "big newspapers" about marriage, single life, and family planning.<sup>163</sup> Media transmissions about family in the PRC project images of family relationships and relations between the state and

159. See Lee, *supra* note 1, at 208-212.

160. See Michael Palmer, *The Re-Emergence of Family law in Post-Mao China: Marriage, Divorce and Reproduction*, 1995 CHINA Q. 110, 125 (1995).

161. *Id.* at 111-13 (1995); Michael Palmer, *The People's Republic of China: More Rules But Less Law*, 29 J. FAM. L. 325, 327 (1990-1991).

162. Michael Palmer, *The People's Republic of China: More Rules But Less Law*, 29 J. FAM. L. 325, 325, 328, 334 n.40, 337 (1990-1991).

163. For example, F.B.I.S. Reports in June and July of 1984 included a few press stories on singles over 30 years old and marriage.

families that illustrate good behavior and bad behavior in situations that are regulated by central law and policy. These images are as important a part of the government's message to the subjects of the law as are the texts of the laws themselves, many of which are not published, particularly in the case of family planning directives.

#### A. Family Planning

From January through July of 1984, by far the majority of the articles on family matters collected by the Foreign Broadcast Information Service focused on family planning. These articles often used a government meeting or speech, or the issuance of a Party circular as the pretext for a fervent pitch to both government officials and "the masses" to add more energy to their implementation of birth quotas. The language was the familiar vocabulary developed by the Party in the days of civil war campaigns, one that mixed military concepts with Soviet-style teleology: the "masses" had to be "mobilized," "family planning work" in the provinces was "arduous" though "progressing," the provinces and "departments at all levels" were "called" to "add to achievements . . . and make new contributions to continuous, vigorous, and better fulfillment" of the family planning program.<sup>164</sup> Assessments of the program did not mention the already noticeable worsening of China's traditional phenomenon of widespread killing of female fetuses and infants.<sup>165</sup>

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164. See, e.g., *National Family Planning Meeting Ends 7 Mar.*, F.B.I.S., Mar. 12, 1984, at K20 (translation into English of Xinhua Domestic Service report, Mar. 7, 1984 (China)) (on file with author); *Family Planning Commission Notes Fewer Births*, F.B.I.S., Mar. 8, 1984, at K19, transcription of Xinhua report in English, Mar. 7, 1984 (on file with author); *Qinghai Reports Success in Family Planning*, F.B.I.S. (translation into English, Mar. 5, 1984, at T3, of Qinghai Provincial Service report, Mar. 3, 1984 (China)) (on file with author); *Hunan Reports Success in Family Planning*, F.B.I.S. (translation into English, Jan. 26, 1984, at P2, of Hunan Provincial Service report, Jan. 24, 1984 (China)) (on file with author); *Hebei Holds Conference on Family Planning Work*, F.B.I.S., Jan. 20, 1984 (on file with author); *Hainan Circular Stresses Family Planning*, F.B.I.S. (translation into English, Mar. 22, 1984, at 2, Hainan Island Service, Mar. 20, 1984 (China)) (on file with author); *Shanxi Holds Public Health, Family Planning Meet.*, F.B.I.S. Jan. 3, 1984, at R3-R4 (translation into English of Shanxi Provincial Service report, Dec. 30, 1983 (China)) (on file with author); *Urumqi PLA Holds Family Planning Meeting*, F.B.I.S., Jan. 4, 1984, at T4 (translation into English of Urumqi Xinjiang Regional Service Report, Jan. 2, 1984 (China)) (on file with author); *Yunnan Family Planning Work Plan Announced*, F.B.I.S., Jan. 19, 1984, at Q1-Q3 (translation into English of Yunnan Provincial Service report, Jan. 19, 1984 (China)) (on file with author); *Shaanxi Holds Conference on Family Planning Work*, F.B.I.S., Jan. 24, 1984, at T2-T3 (translation into English of Shaanxi Provincial Service report, Jan. 17, 1984 (China)) (on file with author).

165. See, e.g., *National Family Planning Meeting Ends 7 Mar.*, F.B.I.S., Mar. 12, 1984, at K20 (translation into English of Xinhua Domestic Service report, Mar. 7, 1984 (China)) (on file with author); *Family Planning Commission Notes Fewer Births*, F.B.I.S., Mar. 8, 1984, at K19, transcription of Xinhua report in English, Mar. 7, 1984 (on file with author); *Qinghai Reports Success in Family Planning*, F.B.I.S. (translation into English, Mar. 5, 1984, at T3, of Qinghai Provincial Service report, Mar. 3, 1984 (China)) (on file with author); *Hunan Reports Success in Family Planning*, F.B.I.S. (translation into English, Jan. 26, 1984, at P2, of Hunan Provincial Service report, Jan. 24, 1984 (China)) (on file with author); *Hebei Holds Conference on Family Planning Work*, F.B.I.S., Jan. 20, 1984 (on file with author); *Hainan Circular Stresses Family Planning*, F.B.I.S. (translation into

Twelve years later, the transmission of images of compliance with the family planning program continued to use official reports, rules, and announcements as the ostensible newsworthy item, from which flowed the vocabulary of military campaigns and Soviet-style production targets about the program in general.<sup>166</sup> One title of a *People's Daily* article discussing rates of population growth contained the stirring slogan "Carry Forward the Cause, Forge Ahead Into the Future, Perform Feats Again."<sup>167</sup> An event that generated a great deal of press coverage was the "Chinese Population Award," a sum of 20,000 yuan, a medal, and a certificate that the State Council awarded to ten "winners."<sup>168</sup> The recipients were government enforcers of the birth quotas who had achieved "success" in their "work."<sup>169</sup> First presented in 1993, this was "China's highest award in the field of population and family planning,"<sup>170</sup> and a commentator noted that at that time, they "had a very positive impact at home and abroad."<sup>171</sup> More statistics were reported, but in offering interpretations of the statistics, the side effects of the widespread preference for male offspring went unmentioned, as in 1984. Evaluations of the statistics were relatively simplistic, bespeaking either "success" or "failure."<sup>172</sup>

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English, Mar. 22, 1984, at 2, Hainan Island Service, Mar. 20, 1984 (China) (on file with author); *Shanxi Holds Public Health, Family Planning Meet*, F.B.I.S. Jan. 3, 1984, at R3-R4 (translation into English of Shanxi Provincial Service report, Dec. 30, 1983 (China)) (on file with author); *Urumqi PLA Holds Family Planning Meeting*, F.B.I.S., Jan. 4, 1984, at T4 (translation into English of Urumqi Xinjiang Regional Service Report, Jan. 2, 1984 (China)) (on file with author); *Yunnan Family Planning Work Plan Announced*, F.B.I.S., Jan. 19, 1984, at Q1-Q3 (translation into English of Yunnan Provincial Service report, Jan. 19, 1984 (China)) (on file with author); *Shaanxi Holds Conference on Family Planning Work*, F.B.I.S., Jan. 24, 1984, at T2-T3 (translation into English of Shaanxi Provincial Service report, Jan. 17, 1984 (China)) (on file with author).

166. See, e.g., Gu Yining, *Zhejiang Population Control Achievements Affirmed*, ZHEJIANG RIBAO [ZHEJIANG DAILY], Feb. 1, 1996, at 1 (China) (on file with author); *Hebei Issues Family Planning Regulations*, HEBEI RIBAO [HEBEI DAILY], Feb. 22, 1996 (China) (on file with author) [hereinafter *Hebei*]; *Qinghai Releases 1995 Statistical Communique*, QINGHAI RIBAO [QINGHAI DAILY], Feb. 16, 1996 (China) (on file with author) [hereinafter *Qinghai*]; Yang Ximing & Song Youping, *Wang Maolin Addresses Family Planning Meeting*, HUNAN RIBAO [HUNAN DAILY], Dec. 31, 1996, at 1 (China) (on file with author) [hereinafter *Wang Maolin*]; *Family Planning Long-Term State Policy* (Xinhua broadcast Feb. 9, 1996) (on file with author) [hereinafter *Family Planning*]; *Li Peng on Population Control, Environmental Protection* (Xinhua broadcast Mar. 5, 1996) (on file with author) [hereinafter *Li Peng*].

167. *Commentator Hails 'Chinese Population Awards'*, RENMIN RIBAO [PEOPLE'S DAILY], Feb. 9, 1996, at 5 (China) [hereinafter *Awards*] (reporting a discussed proposal for formulating the 9th Five-Year Plan and the long-term targets for the year 2010 where the goal is to bring the population below 1.3 billion in the year 2000 and below 1.4 billion in 2010) (on file with author).

168. Ai Xiao, *'Chinese Population Awards' Ceremony Reported*, RENMIN RIBAO [PEOPLE'S DAILY], Feb. 9, 1996, at 5 (China) (on file with author); *Family Planning*, *supra* note 166.

169. See Ai Xiao, *supra* note 168; *Family Planning*, *supra* note 166.

170. Ai Xiao, *supra* note 168.

171. *Id.*

172. For reports of "successes" at the provincial level, see Gu Yining, *supra* note 166 (discussing Zhejiang's successes in population control during the Eighth Five-Year Plan); *Wang Maolin*, *supra* note 166 (discussing Hunan Province's record during the Eighth Five-Year Plan: "[T]he number of babies born decreased by 1,635,000 and the range of decrease in the birth rate ranked at the forefront among other provinces and municipalities of the country.").



For example, family planning was viewed as successful because of the slowdown in the growth of population in Zhejiang, and because the percentage of planned births went up.<sup>173</sup>

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For statistical reports which emphasize positive "achievements" at the national level, see Ai Xiao, *supra* note 168 ("Peng Peiyun was pleased to report on marked results achieved in population and family planning work during the Eighth-Five Year Plan: The population growth rate dropped from 14.39 percent in 1990 to a relatively low level in 1995, and the momentum of the entire country's overly rapid population growth rate has been effectively brought under control."); *Awards, supra* note 167 ("Over the past 20 years or more, China's population and family planning work has scored tremendous achievements which have been universally recognized. . . [P]arty committees and governments at all levels and a vast number of cadres and the masses painstakingly attained marked results in population and family planning work; completed the population plan in a better way; achieved a steady decrease in birth rate . . ."); *Census Indicates Population Growth Slowing* (Xinhua broadcast Feb. 14, 1996) (viewed by author) (reporting State Statistical Bureau data that the P.R.C.'s population growth slowed "to an annual rate of 1.21 percent during the past five years" which was "0.34 percentage points less than in the previous five years").

Ethnic minorities and migrants were linked to the major "failures of the one-child policy." A report made public by the State Statistical Bureau sounded a pessimistic note when it concluded that the population of ethnic minorities grew more quickly. For reports of the "failures," see *Urban Problems Created by Floating Population*, LIAOWANG [OUTLOOK], Nov. 27, 1995, at 20-23 (China) (on file with author) (discussing how the difficulties of monitoring changes in the size of families of migrants complicated the "work" of "administrative leaders" to "control" the growth of the "floating population" of migrants which and "impaired enforcement of the planned parenthood policy"); Xie Kang & Zhang Hongchang, *Shanxi Survey Shows One Child Policy Not Working*, RENKOU YANJIU [POPULATION RESEARCH], Sept. 29, 1995, at 72-73 (China) (on file with author) (discussing village survey in Shanxi province that revealed 72.3 percent of women between the ages of 20 and 40 had two or more children each and that the failure of the population program was related to peer pressure and fear of loss of security in old age discussing a survey conducted in February, 1995, which revealed a reproductive profile for women ages 20-40 in Xiejiaying village in Shanxi province. 72.3 percent had two or more children each. The report concluded that the failure of the population program was related to peer pressure and fear of loss of security in old age. There was no mention of a desire for sons as a cause of the failure.).

173. Gu Yining, *supra* note 166.

For reports of "successes" at the provincial level, see *PRC: Zhejiang Population Control Achievements Affirmed*, FBIS-CHI-96-037, Feb. 23, 1996, at 9 (translation into English of report by Gu Yining, ZHEJIANG RIBAO [ZHEJIANG DAILY], Feb. 1, 1996, at 1 (China)) (on file with author); *Wang Maolin Addresses Family Planning Meeting*, FBIS-CHI-96-015, Jan. 23, 1996, at 18, (translation into English of report by Yang Ximing & Song Youping, *Provincial Family Planning Meeting Puts Forward New Trend of Thought for the Ninth Five-Year Plan*, Dec. 31, 1995, at 1 (China)) (on file with author) (discussing Hunan Province's record during the Eighth Five-Year Plan: "[The] number of babies born decreased by 1,635,000 and the range of decrease in the birth rate ranked at the forefront among other provinces and municipalities in the country.").

For statistical reports, which emphasize positive "achievements" at the national level, see *Census Indicates Population Growth Slowing*, FBIS-CHI-96-032, Feb. 1, 1996 (translation of Xinhua report, Feb. 14, 1996 (China) (on file with author) (The national population growth of the PRC slowed to an annual rate of 1.21 percent during the previous five years. The rate held steady at 1.55 percent in the preceding five years)); *PRC: 'Chinese Population Awards' Ceremony Reported*, FBIS-CHI-96-037, Feb. 23, 1996, at 9 (translation into English of report by Ai Xiao, *The Second 'Chinese Population Awards' Presented*, RENMIN RIBAO [PEOPLE'S DAILY], Feb. 9, 1996, at 5 (China) (on file with author) ("Peng Peiyun was pleased to report on marked results achieved in population and family planning work during the Eighth Five-Year Plan: The population growth rate dropped from 14.39 percent in 1990 to a relatively low level in 1995, and the momentum of the entire country's overly rapid

Mixed in with the rhetoric of campaigns and statistical goals were new images that highlighted economic growth and the standard of living as reasons for complying with the family planning program.<sup>174</sup> One Xinhua report began with the

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population growth rate has been effectively brought under control.”)). *See also, PRC: Commentator Hails 'Chinese Population Awards'*, FBIS-CHI-96-037, Feb. 23, 1996, at 10 (translation into English of report entitled, *Carry Forward the Cause, Forge Ahead Into the Future, Perform Feats Again--Congratulating Presentation of Second 'Chinese Population Awards'*, RENMIN RIBAO [PEOPLE'S DAILY], Feb. 9, 1996, at 5 (China) (on file with author) (“Over the past 20 years or more, China's population and family planning has scored tremendous achievements which have been universally recognized . . . [P]arty committees and governments at all levels and a vast number of cadres and the masses painstakingly attained marked results in population and family planning work; completed the population plan in a better way, achieved a steady decrease in the birth rate.”).

Ethnic minorities and migrants were linked to the major “failures” of the one-child policy. A report made public by the State Statistical Bureau sounded a pessimistic note when it concluded that the population of ethnic minorities grew more quickly. *PRC: Shanxi Survey Shows One Child Policy Not Working*, FBIS-CHI-96-032, Feb. 15, 1996, at 14-15 (translation into English of report by Xie Kang of the Population and Employment Statistics Office of the State Statistics Bureau, with Zhang Hongchang of the Population Institute at China People's University, *One Child Policy Not Working in Two Villages*, RENKOU YANJIU [POPULATION RESEARCH], Sept. 29, 1994, at 72-73 (China) (on file with author) (discussing a survey conducted in February, 1995, which revealed a reproductive profile of women ages 20-40 in Xie Jiaying village in Shanxi province. 75 percent had 2 or more children each. The failure of the population program was related to peer pressure and fear of loss of security in old age, the report concluded. No mention of a desire for sons as a cause of the failure.); *PRC: Urban Problems Created by Floating Population*, FBIS-CHI-96-029, Feb. 12, 1996, at 20, 23 (translation into English of report entitled *Thoughts That the Congregation of Migrants From Elsewhere in the Country Evoke*, LIAOWANG, Nov. 27, 1995, at 20 (China) (on file with author) (Difficulties of monitoring changes in the size of families of migrants complicated the “work” of “administrative leaders” to “control” the growth of the “floating population” and “impaired enforcement of the planned parenthood policy.”).

174. *See e.g., Awards, supra* note 167 (“The population problem is in essence a question of development. China has a big base population figure and high population growth rate, which results in relatively inadequate per-capita resources. . . Contradictions among population, farmland, food, resources, and environment will be sharper. Without strict population control or improvement in population quality, it will be impossible to realize population growth in coordination with that of the economy, society, resources, and environment; still less can sustained, rapid, and healthy national economic development or social progress be achieved.”); Bian Qingguo, *Declining Role of Village Committees in Population Control Work*, RENKOU YU JINGJI [POPULATION AND ECONOMICS], Sept. 25, 1995, at 33-35 (China) (on file with author) (stating that village committees should help convey and emphasize the economic reasons, for population control such as “per capita income” and “national consumption, for family planning”); *Family Planning, supra* note 168 (“The family planning program is intended . . . to enhance the quality of the nation's life and it should be integrated with work to improve living standards . . . .”); *PRC: Family Planning Long-Term State Policy*, FBIS-CHI-96-028, Feb. 9, 1996, at 37 (transcription of Xinhua report, Feb. 9, 1996 (China)) (on file with author) (“The family planning program is intended . . . to enhance the quality of the nation's life and it should be integrated with work to improve living standards . . . .”); *PRC: Commentator Hails 'Chinese Population Awards'*, FBIS-CHI-96-037, Feb. 23, 1996, at 10 (translation into English of article entitled *Carry Forward the Cause, Forge Ahead Into the Future, Perform Feats Again--Congratulating Presentation of Second 'Chinese Population Awards'*, RENMIN RIBAO [PEOPLE'S DAILY], Feb. 9, 1996, at 5 (China) (on file with author) (“The population problem is in essence a question of development. China has a big base population figure and high population growth rate, which results in relatively inadequate per-capita resources . . . Contradictions among population, farmland, food, resources, and environment will be sharper. Without strict population control or improvement in population quality, it will be impossible to realize population growth in coordination with that of the economy, society, resources, and

statement of a grocery store owner in Guangdong Province: “I don’t want to have a son as long as I can earn enough money.”<sup>175</sup> The change in his attitude toward family planning was attributed to a new mechanism for implementing the one-child policy: the local and city family planning associations or committees provided capital and labor to families who abided by the local birth quotas so that the obedient families could start businesses, which would later become profitable enough for the families to buy pensions from the state.<sup>176</sup> The opportunity to purchase pensions alleviated a concern about security in old age, a major barrier to limiting births.<sup>177</sup> Xinhua reported that Peng Peiyun, a State Councilor and Minister of the State Family Planning Commission, made remarks in Beijing when she presented the second-ever “Chinese Population Awards.”<sup>178</sup> She explained that the larger goals of the family planning program were to raise the status of women, meet economic targets, slow down population growth, and raise the quality of life—goals that incidentally provided positive incentives for people in every family in the PRC to comply with the program.<sup>179</sup> To emphasize the economic benefits of the program, Peng stated: “The final goal is to co-ordinate population development with sustainable development of economic, social and natural resources . . . .”<sup>180</sup> Furthermore,

The purpose of instituting this award was to increase the entire society’s awareness of population and the concept of developing population in coordination with economy and society; arouse a broad spectrum of actual workers and scientific workers in the field of population and family planning to have a sense of honor and mission and a spirit of dedication; and mobilize the initiative of all relevant departments and social organizations in tackling the population problem in a comprehensive way.<sup>181</sup>

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environment; still less can sustained, rapid, and healthy national economic development or social progress be achieved.”); *PRC: Declining Role of Village Committee in Population Work*, FBIS-CHI-96-032, Feb. 15, 1996, at 15-17 (translation into English of report by Bian Qingguo of the Hangzhou City Family Planning Commission in Zhejiang Province, *Declining Role of Village Committees in Population Control Work*, RENKOU YU JINGJI [POPULATION AND ECONOMY], Sept. 25, 1995, at 33-35 (China) (on file with author) (Village committees should help convey and emphasize the economic reasons, such as “per capita income” and “national consumption,” for family planning).

175. *Local PRC Family Planning Groups Seen Breaking Barriers* (Xinhua broadcast Jan. 18, 1996) (viewed by author).

176. *Id.*

177. *Id.*; *Local PRC Family Planning Groups Seen Breaking Barriers*, FBIS-CHI-96-014, Jan. 22, 1996, at 26 (transcription of Xinhua report in English, Jan. 18, 1996 (China)) (on file with author).

178. Ai Xiao, *supra* note 168; *Family Planning*, *supra* note 166.

179. *Family Planning*, *supra* note 166.

180. *Id.*; *PRC: Family Planning Longterm State Policy*, FBIS-CHI-96-028, Feb. 9, 1996, at 37 (transcription of Xinhua report in English, RENMIN RIBAO [PEOPLE’S DAILY], Feb. 9, 1996 (China)) (on file with author).

181. Ai Xiao, *supra* note 168; *PRC: ‘Chinese Population Awards’ Ceremony Reported*, FBIS-CHI-96-037, Feb. 23, 1996, at 9 (translation into English of report by Ai Xiao, *The Second ‘Chinese Population Awards’ Presented*, RENMIN RIBAO [PEOPLE’S DAILY], Feb. 9, 1996, at 5 (China)) (on file with author).

In the mid-1990s, the emphasis on economic incentives flowed from the central administration not just to the public, but also to all government officials through internal channels of the state-run media. The central government's State Family Planning Commission's Policy and Law Department publishes treatises for use by government officials only, as does the Family Planning Commission of the Party propaganda department of each provincial government. Such treatises in 1993 and 1995 contained major policy announcements and statistical reports by leading officials and recent cases of enforcement of birth quotas, each written by "reporters" from either the propaganda department or from Xinhua news agency.<sup>182</sup>

Of the nineteen articles from the legal newspapers in this sample, only two addressed the family-planning policy. In one, the statistics on the results of implementing district birth quotas were presented in the form of a travelogue through Sichuan province: on October 15 the reporter arrives at the "first stop" of his tour, a district whose demography, living standards, and history with family planning he describes.<sup>183</sup> In the afternoon of October 17, he arrives at another district that he describes in similar terms, and so on, until he has covered four districts. The article discussed the experimentation in selected places of the "Three Unities" policy, which was encapsulated in the slogan: "The party and the government are responsible for directing the path, one enterprise put first takes the first step, relevant departments take it by the hand and help, few births make for outstanding family planning, happiness, and prosperity" (*Dangzheng fuze zhilu, yiye weizhu qibu, bumen xieshou bangzhu, shaosheng youyu kuaifu*).<sup>184</sup> The slogan and the quotas associated with it in Sichuan were designed to combine the family planning policy with economic policy and with spiritual enrichment. The theme throughout the article was that through hard and persistent "work" on limiting births, the people of Sichuan were raising their living standards and ensuring a peaceful, happy, cultured, and prosperous future for themselves.<sup>185</sup> The other article described in greater depth the "Three Unities" policy.<sup>186</sup> The policy was described as "a new compass and a new path for family planning work," and as having been derived from a Marxist perspective that was holistic in its combined stress on "social life, government life, and spiritual life."<sup>187</sup>

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182. See, e.g., SHAOSHENG KUAIFU XINGFU ZHILU [THE ROAD OF FEWER BIRTHS SPEED PROSPERITY AND HAPPINESS] (Beijing: State Family Planning Commission, Policy and Law Department, 1993) (on file with author); HAO XINWEN, 1991-1994 [GOOD NEWS, 1991-1994], (Zhengzhou: Chinese Communist Party Henan Province Propaganda Department, Henan Province Family Planning Commission, 1995) [hereinafter GOOD NEWS, 1991-1994].

183. Li Jia, *Zouxiang wenming fuyu zhilu--sichuansheng jihua shengyu gongzuo caifang zhaji* [Walking the Road Toward Civilization and Prosperity--Notes From Covering the Family Planning Work in Sichuan Province], FAZHI RIBAO [LEGAL SYSTEM DAILY], Nov. 21, 1995, at 5 (China) (on file with author).

184. *Id.*

185. *Id.*

186. Li Chunmin, *Xiwang zhilou* [The Wished For Path], FAZHI RIBAO [LEGAL SYSTEM DAILY], Nov. 21, 1995, at 5 (China) (on file with author).

187. *Id.*

How did these transmissions aim to facilitate the enforcement of the family planning policy? None of the transmissions on family planning depicted the punishment of a failure to comply with the policy, and thus did not invite its readers into a Durkheimian catharsis. Instead, the transmissions highlighted examples of compliance and held those up as models for the rest of society. The theme of coerced compliance sounded only obliquely evoked by the frequent use of the imagery of self-discipline and surveillance, incarnations of coercion according to Foucault, and of “work” and production targets, markers of state-sponsored violence, according to Nagengast. True to Foucault’s framework of relations between state and society, the ideal promoted by the transmissions was one where top officials encourage low-level officials to discipline themselves to enforce the birth quotas with vigor, the low-level officials inspire the people to discipline themselves to comply with the birth quotas, and the people encourage their local leaders to remain vigilant in their surveillance of compliance with the birth quotas. “Failure” occurred when monitoring of migratory populations proved difficult. This is an ideal where everyone’s procreation plans are watched, detected, and known. The emphasis on the positive incentive to improve one’s standard of living played upon widespread fears of being left behind in the rush to amass wealth in the 1980s and 1990s and, therefore, contained an implicit threat of impoverishment for failure to limit the births in one’s family.

### *B. The Marriage Law*

In contrast to the family planning transmissions, a Durkheimian catharsis seemed to be the point of many of the transmissions pertaining to the 1980 Marriage Law. Several articles projected a Durkheimian vision of the state as the upholder of the values cherished by society. Four of the nineteen articles in the Legal System Daily focused on the statute, two of which appeared in a regular column entitled “Informal Discussions About the Marriage Law” (*Hunyin fa mantan*).<sup>188</sup> A message common to some of these articles was that the 1980 Marriage Law protects women, children, and the elderly from harm when they are most vulnerable. In some, the law is portrayed as protective without any resort to punishment. One article addressed the question of whether married couples could divorce while expecting a child.<sup>189</sup> The article followed a format that went from the general to the detailed. It began with the quotation of the text of the provision of the Marriage Law that prohibits divorce during pregnancy and the first year of the child’s life, and a general explanation of that rule.<sup>190</sup> Following this were

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188. Chen Fengzhi & Yan Fei, *Hunyinfa mantan: Zhei dui jing chengji jiehun de fugi weihe bei pan zhonghunzui?* [Informal Discussions About the Marriage Law: Why Did the Judge Declare as Bigamists This Couple That Registered Their Marriage?], FAZHI RIBAO [LEGAL SYSTEM DAILY], Dec. 3, 1995, at 3 (China) (on file with author) [hereinafter *Bigamists*]; Zheng Jing, *Hunyinfa mantan: yunfu, chanfu de teshu falu*, [Informal Discussions About the Marriage Law: Concerning the Special Legal Protection of Pregnant and Nursing Women], FAZHI RIBAO [LEGAL SYSTEM DAILY], Sept. 10, 1995, at 5 (China) (on file with author) [hereinafter *Pregnant and Nursing Women*].

189. *Pregnant and Nursing Women*, *supra* note 188 (discussing article 27 of the 1980 Marriage Law, which prohibits divorce when the wife is pregnant and during the year after she gives birth).

190. *Id.*

several hypotheticals that raised detailed and difficult questions about the judicial application of that rule.<sup>191</sup> This was not a discussion of the policy ramifications of the rule. For example, there was no mention about why judicial protection of women's financial support did not extend to single mothers or mothers of infants and young children. The message was that the law provides for benevolent interference by the state in marriages in situations where the wife is deemed to be especially vulnerable to harm. The law appears to care enough about these women to offer a judicial way out of divorces that they do not want.<sup>192</sup> Thus, the law embodies the values presumed to be cherished by society, and offers people a procedure for triggering interference by the state to uphold those values.

The Marriage Law is part of a larger policy of the PRC government to divert the purposes of marriage toward the strengthening of the government, the maximizing of the self-sufficiency, and the cohesiveness of the family, in order to minimize the government's welfare obligations.<sup>193</sup> Three of the legal newspaper articles in the sample that did not mention the Marriage Law lauded the merits of the state-sponsored matchmaking centers, one of the Party's programs for implementing its larger policy on families. Adopting the format of a report on the work of the centers, one such article highlighted the contrast between the matchmaking centers and the businesses springing up throughout China's major cities by describing the centers as "serving the masses."<sup>194</sup> The government thus

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191. *Id.*

192. Zheng Jing, *Hunyinfa mantan: yunfu, chanfu de teshu falu*, [An Informal Discussion About the Marriage Law: Concerning the Special Legal Protection of Pregnant and Nursing Women], FAZHİ RIBAO [LEGAL SYSTEM DAILY], Sept. 10, 1995, at 3 (China) (on file with author) (discussing article 27 of the 1980 Marriage Law, which prohibits divorce when the wife is pregnant and during the year after she gives birth).

193. See Michael Palmer, *The Re-emergence of Family Law in Post-Mao China: Marriage, Divorce, and Reproduction*, 141 CHINA Q. 110, 110, 113, 115-16 (1995) [hereinafter *Re-emergence of Family Law*]. Palmer explains that the "rapid codification of family law" was due to Party "leadership's concern to ensure stability, order" and to place family as the "basic unit of social life." The various Marriage Law provisions shaped the Chinese family in order to make it more consistent with "new economic and social orders." The Marriage Law links sexual conduct with marriage, thus making marriage is the only legally permissible way to reproduce. Additionally, the Marriage Law makes the family the "primary agent of socialization" and parents are expected to "pass on appropriate social and culture values to their children . . . so that they become fully socialized members of Chinese society." The Marriage Law also obligates PRC families with responsibility to care for the "elderly and the infirm." *Id.* at 110-116; see also Michael Palmer, *The People's Republic of China: More Rules but Less Law*, 29 J. FAM. L. 325, 325-26 (1991) [hereinafter *More Rules*] (discussing the passage of new family and marriage disciplinary regulations "designed to remedy the deviant conduct of party members who violate norms of socialist morality" in light of Party attempts to urge the people to "emulate socialist heroes such as Lei Feng" who devoted himself to "China, work, the people and the Party."); Annelise Riles, *Spheres of Exchange and Spheres of Law: Identity and Power in Chinese Marriage Agreements*, 19 INT'L J. SOC. L. 501, 507 (1991) (explaining that the Marriage Law of 1950 was created to "abolish arranged marriages and attack the power of the lineages" and that the government "liberated the citizen from the lineage system so that he or she may dedicate him or herself to the state, not so that he or she may indulge in individualism").

194. Palmer argues that the matchmaking offices attempt to weaken the authority of the parents in finding spouses for their children. *More Rules*, *supra* note 193 at 325-242; *Re-emergence of Family*

stood for selfless service, a value which it assumed was cherished by society despite the trend toward unscrupulous profit-making alluded to in the article.

Despite the good intentions portrayed in the press behind the government's provision of matchmaking services, seeking marriage partners has become a risky affair in the PRC, according to two of the other articles in the sample.<sup>195</sup> One recounted a story about two women who ran a scam by asking for loans from people they met through the matchmaking centers and not repaying them.<sup>196</sup> One of the women got ten years in prison, the other got six and a half years.<sup>197</sup> Another article, written by a member of a village government in Henan province, described the dangers of answering personal ads for marriage partners.<sup>198</sup> Personal ads began to appear in 1981 with the advent of the advertizing industry in the PRC, and have proliferated since then.<sup>199</sup> In both articles, blame for the matchmaking scams is not placed on the government who runs the only officially-approved matchmaking program, but on greedy and unscrupulous women without an affiliation with the government. The government matchmaking services were portrayed as valuable and dependable if clients steered clear of women who rushed into financial arrangements before marriage.

The state's assumption of the role of defender of deeply felt values also appears in the articles that illustrate contraventions of the Marriage Law that brought decisive punishment by the state. The Marriage Law requires that marriages be registered with the local government where the couple lives.<sup>200</sup> One article sent the message that marriage registration was such a serious matter that even a delay in registering brought serious penal consequences. It described a harsh court judgment against a young couple that lived together before registering their marriage with the authorities, as required by the Marriage Law.<sup>201</sup> The article went through the facts of the case in order to explain why a six-month prison sentence was the correct punishment for this couple.<sup>202</sup> The couple fell in love and, following local customs in their village, held a marriage ceremony and set up house together.<sup>203</sup> Their failure to register was discovered by a mediator to whom they went for help in resolving a "contradiction" that developed in their

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Law, *supra* note 193 at 142.

195. Wang Yusong & Hu Guiming, *Zhenghun Pianhun Nu* [*The Woman Who Looks For Mates and Swindles Them*], FAZHI RIBAO ZHOUMO BAN [LEGAL SYSTEM DAILY, WEEKEND EDITION], Mar. 15, 1996, at 7 (China) (on file with author); Gong Si, *Liushen 'Zheng Hun'* [*Be Aware of Those Looking for Mates*], FAZHI RIBAO [LEGAL SYSTEM DAILY], Apr. 23, 1996, at 7 (China) (on file with author).

196. Wang Yusong & Hu Guiming, *supra* note 195.

197. *Id.*

198. Gong Si, *supra* note 195.

199. *Id.*

200. See Marriage Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 10, 1980, effective Jan. 1, 1981), art. 8 (China).

201. *Bigamists*, *supra* note 188, at 3.

202. *Id.*

203. *Id.*

relationship.<sup>204</sup> About a month after they had resolved the problem, they registered their marriage in the local government office.<sup>205</sup> The authors of the article cited and quoted from three legal provisions that shed no light on the question of why their act should be deemed a serious criminal offense.<sup>206</sup> One of the provisions cited, however, did support a finding that their marriage had no effect.<sup>207</sup>

The author drew another conclusion from this provision, which was that the couple "did not love protecting the law."<sup>208</sup> The implication was that the man and woman should have desired, on their own, to uphold the law. This message places on the reader the responsibility of registering his or her own marriage, and even beyond this, of reporting failures to register out of a desire to see the law upheld. It is an exhortation to self-discipline and surveillance à la Foucault, appearing alongside the Durkheimian vision of the state as reinforcing society's values.

Other articles about the Marriage Law emphasized surveillance. Deviations from requirements in the Marriage Law were portrayed as serious and shameful and would be detected and addressed by a mediator from the local mediation committee, a grass-roots organ of the state with a pyramid structure set up to keep tabs on all family disputes, even those that families do not report. One such article told a story about a ninety-year-old woman who had three sons, each of whom had established a separate household.<sup>209</sup> For various reasons, the members of these households would not allow her to live with any of them. A mediator from the village mediation committee appeared while the family was gathered together and

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204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.* See also Criminal Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Jul. 6, 1979, effective Jan. 1, 1980), art. 180 (China), available at [http://www.novexc.com/criminal\\_law.html](http://www.novexc.com/criminal_law.html). Article 180 in the Criminal Law merely provided for a maximum sentence of two years in prison for "serious marital offenses" committed with knowledge. An undated Supreme People's Court opinion interpreting the 1986 Marriage Registration Measures, merely stated the circular proposition that if a couple lives together without registering their marriage, and if the masses regard them as married, and if one member of the couple sues for a divorce in the People's Court, and if when they set up house both parties followed the marriage regulations, then the marriage is valid; but if one or both people fail to abide by the Marriage Law when they set up house, then they may be regarded as violating the Marriage Law. *Bigamists*, *supra* note 188, at 3.

208. *Bigamists*, *supra* note 188, at 3. See also Regulations on Control of Marriage Registration (promulgated by the Ministry of Civ. Affairs, Feb. 1, 1994), art. 24 (China). A 1994 regulation issued by the *Minzhengbu* provided that if a couple below the legal age for marriage sets up house together, or if an otherwise legally eligible couple sets up house without registering a marriage, their marriage has no effect and the couple "does not love protecting the law." *Id.*; Regulations on Control of Marriage Registration (promulgated by the Ministry of Civil Affairs, Feb. 1, 1994), art. 24 (China), available at [http://www.gov.cn/english/2005-07/29/content\\_18376.htm](http://www.gov.cn/english/2005-07/29/content_18376.htm); Chen Fengzhi and Yan Fei, *Hunyinfa mantan: Zhei dui jing chengji jiehun de fuqi weihe bei pan zhonghunzui?* [Informal Discussions of the Marriage Law: Why did the judge declare as bigamists this couple that registered their marriage?], FAZHI RIBAO [LEGAL SYSTEM DAILY], Dec. 3, 1995, at 3. (China) (on file with author).

209. Yue Tangji, *Fayu jiating; jiehunfa 'xi' le sanjia 'huo,'* [The Marriage Law 'Extinguishes' the Three Families 'Fire'], FAZHI RIBAO [LEGAL SYSTEM DAILY] Dec. 10, 1995, at 10 (China) (on file with author) [hereinafter *Three Families Fire*].



paraphrased to them, in simple language (and did not cite), a provision of the Marriage Law which provided that children must care for their parents.<sup>210</sup> Then the mediator gently chastised them for failing to care for the woman, and all of them hung their heads in shame and vowed to carry out their duty.<sup>211</sup> Here the message was, if you do not support your elderly relatives, the state will intrude and shame you, but not punish you as a criminal if you restructure your household in conformance with the law.

Some of the articles set up models, both negative and positive, to illustrate central interpretations of provisions of the 1980 Marriage Law. The Marriage Law regulates divorce, and the nine articles in the sample that treated issues related to divorce relayed examples of unanticipated problems that plague divorcing couples. Underlying all of the articles was the message that divorce is a nasty business and raises lots of unanticipated problems. Only one of the articles attempted to put a positive spin on the climbing divorce rate by speculating that the rate would not prevent the typical Chinese family, in the twenty-first century, from having the following ideal attributes: limited to four grandparents, two parents, and one child; a stronger role for love in the selection of marriage partners; and higher quality marriages.<sup>212</sup>

Another type of article that used models to promote the government's policies about the family was the personal advice article. Without mentioning the Marriage Law, these models offered suggestions about how to deal with difficulties in family relationships, such as what to do if your spouse does not share any of your interests,<sup>213</sup> or what to do if you fall in love later in life.<sup>214</sup> These articles were lively and entertaining, and created a friendly image for the legal newspaper in which they appeared. At the same time, they sent messages that supported the policies that lay behind the Marriage Law. The preventative work and the repair to family relationships that these articles aimed to illustrate was the type that would help to keep three generations of a family together. Keeping this unit of a family from breaking apart is imperative in the PRC today, with a shrinking pension program, a shortage of housing space in the cities, and a shortage of arable land in the countryside, which puts a premium on the cost of expanding housing there.

Urban dwellers with a decent education read the official legal newspapers, but do media products with a broader distribution function differently? A sampling of

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210. *Id.*; see also Marriage Law of the People's Rep. of China (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 10, 1980, effective Jan. 1, 1981), art. 21 (China), available at <http://www.lawinfochina.com/law/display.asp?db=1&id=1793&keyword=marriage%20law>.

211. *Three Families Fire*, *supra* note 209, at 3.

212. Chen Hong, *Zhongguo jiating de zhoushi* [*Trends in Chinese Families*], FAZHI RIBAO [LEGAL SYSTEM DAILY] Dec. 31, 1995, at 3 (China) (on file with author).

213. Su Dianyuan, *Xingqu butong: Neng jiehe chengmei de kangli ma?* [*Different Interests: Can Married Couples Be United?*], FAZHI RIBAO [LEGAL SYSTEM DAILY] Dec. 10, 1995, at 3 (China) (on file with author) [hereinafter *Different Interests*].

214. Wu Ailing, *Wanlian: Bu dengyu xinli biantai* [*Falling In Love Late in Life: Doesn't Mean Mental Problems*], FAZHI RIBAO [LEGAL SYSTEM DAILY] Oct. 1, 1995, at 3 (China) (on file with author).

popular treatises on family law published between 1985 and 1992 suggests not. The treatises are published by a variety of popular presses run by the Ministry of Justice, one targeting the members of the PLA, one targeting the "masses," one for women, and another targeting rural villages. These treatises use models of positive behavior to promote the central government's policies. From the texts of all of these treatises, it is apparent that their purpose was to reinforce a sense of the sufficiency of the Marriage Law for solving routine problems related to inheritance, property, and marriage encountered by ordinary families. On the other hand, the statutory provisions that were cited never supplied the entire solution to the family problems that are illustrated. The recommendations offered in two of the treatises emphasized a common sense solution to each conflict recounted, with the statutory rule, or even just a reference to the constitution's protection of the freedom to marry or a simple invocation of the name of the Marriage Law, tacked on at the end.<sup>215</sup> Rather than offering a way to reason from the statutory provision that provides the solution to these problems, then, the treatises offered official models that needed to be internalized.<sup>216</sup>

Surveillance provided the subtext of some of the treatises. Another treatise was a collection of letters from people in the countryside who had questions about whether various activities of their neighbors complied with the law.<sup>217</sup> It was a sort of "Dear Abby" for rural busybodies or those who might watch and report on their neighbors in a modern-day incarnation of the *baojia* system. Although this book reveals much about the creative ways in which villagers must try to evade the positive family law enacted by the central government, the author presumes that neighbors have the responsibility to help each other internalize the official models.<sup>218</sup>

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215. See GAO YAYUN, XIANDAI SHENGHUO FALU [THE MODERN LIVING LAW] (Beijing: Rural Village Reading Materials Press eds., 1987) (on file with author); CHEN XINGBO, HUNVIN, JIATING, CAICHAN JICHENG JIEYI [EXPLAINING MARRIAGE, FAMILY, AND THE INHERITANCE OF PROPERTY] (Beijing: People's Liberation Army Press eds., 1985) (on file with author). See also HUNYIN JIATING JICHENG 90 WEN [90 QUESTIONS ON MARRIAGE, THE FAMILY, AND INHERITANCE] (China Women's Press eds., 1985); HUYIN JICHENG FA XINLUN [A NEW DISCUSSION OF THE MARRIAGE AND INHERITANCE LAWS] (Beijing: The Masses Press eds., 1992) (on file with author); ZHANG XIAN, HUNYIN JIATING FALU CHANGSHI [COMMON KNOWLEDGE ABOUT THE MARRIAGE AND INHERITANCE LAWS] (Shanghai: Xuelin Press eds., 1988) (on file with author).

216. See GAO YAYUN, XIANDAI SHENGHUO FALU [THE MODERN LIVING LAW] (Beijing: Rural Village Reading Materials Press eds., 1987) (on file with author); CHEN XINGBO, HUNVIN, JIATING, CAICHAN JICHENG JIEYI [EXPLAINING MARRIAGE, FAMILY, AND THE INHERITANCE OF PROPERTY] (Beijing: People's Liberation Army Press eds., 1985) (on file with author). See also HUNYIN JIATING JICHENG 90 WEN [90 QUESTIONS ON MARRIAGE, THE FAMILY, AND INHERITANCE] (China Women's Press eds., 1985); HUYIN JICHENG FA XINLUN [A NEW DISCUSSION OF THE MARRIAGE AND INHERITANCE LAWS] (Beijing: The Masses Press eds., 1992) (on file with author); ZHANG XIAN, HUNYIN JIATING FALU CHANGSHI [COMMON KNOWLEDGE ABOUT THE MARRIAGE AND INHERITANCE LAWS] (Shanghai: Xuelin Press eds., 1988) (on file with author).

217. CHEN XINGBO, HUNVIN, JIATING, CAICHAN JICHENG JIEYI, *supra* note 216.

218. *Id.*

### C. The Continuing Role of Media in Family Law

Although people outside of the CCP are now permitted to create some media transmissions, the system of family law in the PRC still involves a concerted effort to disseminate through media channels officially acceptable interpretations of law in a way that might induce the public to conform their behavior to them. Commercialization appears to have enlivened and varied the formats of the "big newspaper" articles, but not weakened the force with which they convey official interpretations of family planning policy and the Marriage Law. From 1984 to 1996, the contents of the official press releases on family planning grew longer, a signal of greater emphasis, and more varied, a signal of greater commercialization and competition for readership. The samples from two legal newspapers from September of 1995 through May of 1996 also conformed to a commercializing trend. The articles that treated legal issues involving marriage, divorce, procreation, and family life generally appeared on pages dedicated to family issues and were made to look appealing with eye-grabbing headlines in varying fonts, photos, drawings, and bold markers that labeled the broad topics of many of the articles. Many of the pieces on these pages were soap-opera-like stories about the twists and turns of family relationships. The formats of the nine pieces on divorce were lively, most taking the form of stories<sup>219</sup> or advice columns,<sup>220</sup> and opening with a provocative quotation or question. The contents varied from legal advice about common issues that arose in divorce,<sup>221</sup> to threats of prison sentences for

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219. See, e.g., Xiao Min, *Meng, bing buzongshiyuan de – guanyu lihunzu de gushi* [Dreams Are Not Always Plausible – Stories About Divorces], FAZHI RIBAO [LEGAL SYSTEM DAILY] May 12, 1996, at 3 (China) (on file with author).

220. One example of an advice column is the "letter box of the barracks lawyer" [Junying lushi xinxiang] column written by Li Mianju of the Sanzhou Military District Legal Advice Office. See, e.g., Li Mianju, *Xianyi junren yaoqiu lihun, xuyao banli naxie shouxu?* [Active Service Personnel Who Need To Divorce, Which Procedures Do They Need to Follow?], FAZHI RIBAO [LEGAL SYSTEM DAILY], Sept. 21, 1995, at 6 (China) (on file with author). Another example is the "Law enforcement and supervision post", Zhifa jiandu gang column, which published a letter from a worker with the Beijing Municipal Machine Industry Elementary School. The paper entitled the letter, an answer from the newspaper's Masses Work Bureau, and an answer from the court involved in the person's story "Bugei 'zanzhu' bupan lihun," [If you don't give 'assistance,' you don't get a divorce decree]. *Bugei 'zanzhu' bupan lihun* [If You Don't Give 'Assistance,' You Don't Get a Divorce Decree], FAZHI RIBAO [LEGAL SYSTEM DAILY], Apr. 25, 1996, at 8, (China) (on file with author) (describing how the president of the court in which the person sought a divorce told her lawyer to give U.S. \$5,000 in "assistance" to the court in exchange for a divorce decree). For a third example, see *Lihunhou yifang de sicunkun zenmo chuli?* [How To Manage One Side's Private Finances After Divorce], FAZHI RIBAO [LEGAL SYSTEM DAILY], Dec. 10, 1995, at 3 (China) (on file with author); Li Mianju, *Xianyi junren yaoqiu lihun, xuyao banli naxie shouxu?* [Active Service Personnel Who Need to Divorce, Which Procedures Do They Need to Follow?], FAZHI RIBAO [LEGAL SYSTEM DAILY], Sept. 21, 1995, at 6 (China) (on file with author); *Bugei 'zanzhu' bupan lihun* [If you don't give 'assistance,' you don't get a divorce decree], FAZHI RIBAO [LEGAL SYSTEM DAILY], Apr. 25, 1996, at 8 (China) (on file with author); *Lihunhou yifang de sicunkun zenmo chuli?* [How To Manage One Side's Private Finances After Divorce], FAZHI RIBAO [LEGAL SYSTEM DAILY], Dec. 10, 1995, at 3 (China) (on file with author).

221. See, e.g., Cheng Xiwei, *Lihunshi zhaiwu shifo geban fudan* [Is Debt After Divorce to be Shouldered Equally?], FAZHI RIBAO [LEGAL SYSTEM DAILY], Dec. 31, 1995, at 3 (China) (on file with author) (giving advice about the legal obligation for debt after divorce, given in the form of a story

falsifying divorce papers.<sup>222</sup> Each legal newspaper article that discussed provisions of the Marriage Law treated one discrete legal issue, but the format used to treat each issue varied from article to article. The variations in format appear to be an attempt to offer a range of depth in the treatment of the issues. While the quality of legal analysis varied, the quality was independent from the format chosen. The textual and hypothetical treatment of a legal provision mentioned above was less lively than the articles that told stories.

This trend was not noticeable in the popular treatises on family law, but each used a format that helped to propagate state policies in as palatable a way as possible. One book contained 78 short fact patterns, each giving rise to a dispute or a lawsuit.<sup>223</sup> Each story was followed by an explanation of how the dispute or lawsuit should be settled, then the relevant statutory provisions were quoted. The format was straightforward, replicating a longstanding format for official court documents, and the tone was lively.<sup>224</sup> Another presented simple explanations to 90 questions about legal issues of marriage, family, and inheritance.<sup>225</sup> Yet another published reports of the questionable practices of neighbors in their villages, such as not getting marriage certificates, and answers that branded the practices illegal.<sup>226</sup>

Despite the growing attention to entertaining formats, the transmissions continued to send authoritative messages. The integration of economic incentives into its models for conforming to the family planning policy echoed a general trend in official policy to stress economics, and to separate economics from politics.<sup>227</sup> In fact, the role of the state-run media in disseminating official interpretations of family grew between 1984 and 1996. The Party directed those in charge of its media channels to vary the format in order to more effectively enforce the law. In

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about the couple "Little Su" and "Ahnan"); Zhao Zhongyuan and Xu Genhua, *Lihun hou: zinu xingshi zhizheng*, [After Divorce: The Battle Over the Childrens' Surname], SHANGHAI FAZHIBAO [SHANGHAI LEGAL NEWS], May 10, 1996, at 1 (China) (on file with author) (featuring two stories which gave rise to lawsuits and statistics about whether children keep their father's last name after their parents divorce (32% did not in "recent" years), and a brief discussion of Article 16 of the Marriage Law which permits the children to have the name of either parent after divorce); Hui Wen, *Zuigao renmin fayuan jiu lihun anjian zhonggong fang shiyong, chengzu deng wenti zuo zhuanmen jue* [Supreme People's Court Makes Use of State-Owned Housing in Divorce Case: Questions About Paying Rent, etc. Generate Specialized Answers], SHANGHAI FAZHIBAO [SHANGHAI LEGAL SYSTEM NEWS], May 6, 1996, at 4 (China) (on file with author) (presenting ten questions posed to the Supreme Court and containing answers given by practicing judges based on "relevant regulations").

222. See, e.g., Zhong Yang & Lin Fa, *Ta ziji panjue lihun*, [He Gave Himself a Divorce Judgment], FAZHI RIBAO, [LEGAL SYSTEM DAILY], Sept. 29, 1995, at 6 (China) (on file with author) (containing a story about a man in Shandong Province who received a three-year prison sentence for falsifying a court document in order to obtain a divorce).

223. GAO YAYUN, XIANDAI SHENGHUO FALU, *supra* note 216.

224. See generally, *id.*

225. HUNYIN JIATING JICHENG 90 WEN, *supra* note 215.

226. HUNVIN, JIATING, CAICHAN JICHENG JIEYI, *supra* note 216.

227. Tahirih V. Lee, *The Future of Federalism in China*, in THE LIMITS OF THE RULE OF LAW IN CHINA 271, 294-95 (Karen G. Turner, James V. Feinerman & R. Kent Guy eds., 2000).

1995, the head of Henan Province's Propaganda Department wrote in an internal publication that a major change in the inculcation of a consciousness of the family planning policy to the masses was the use of multiple formats, including news dispatches, political opinions and commentaries, radio broadcasts of special visits and televised broadcasts of special topics, on-the-scene reporting, and short newsworthy stories.<sup>228</sup>

The proliferation of electronic formats for media transmissions in China does not change the role that such transmissions play in the legal system there. Government-run websites and blogs disseminate the laws and official interpretations of the laws. Just as the print and broadcast media aimed to attract readers by using lively formats, internet-based media use visually and aurally stimulating devices, such as cartoons, and interactivity to draw in readers.

#### CONCLUSION

In the PRC, media transmissions about matters that are regulated by law are an integral part of the legal system. The samples of media transmissions about family law functioned as a coordinated part of a central program to enforce a range of laws, from the largely un-codified one-child policy, to the codified and periodically amended Marriage Law. The official publicity surrounding the one-child policy and the 1980 Marriage Law steadily has worked to establish the acceptance of and compliance with these programs.

The frameworks offered by Durkheim and Foucault-Epstein-Nagengast help to explain how media transmissions function in the legal system of the PRC. The media sent messages that evoked values that might unify the audience with the PRC central government in a way symptomatic of Durkheim's vision of state and society. The positive spin put on the economic incentives for complying with family law attempted to communicate positive models for behavior in a fashion similar to that identified by Foucault in his vision of state and society. This language lauds discipline and hard work, and attaches these qualities to the state. The suggestion of negative consequences if the models were not complied with, and the portrayal as "work" of the central government, drives in family law, according to Foucault, Epstein, and Nagengast, the signal that compliance with the law, if not done voluntarily, will be forced.

As powerful as their explanatory power is, however, these frameworks do not shed light on all the facets of the relationship between media and law in China. Durkheim's government as keeper of societal values and Foucault's government as disciplinarian, do not fully capture the paternalistic self-image projected by China's rulers to its subjects for centuries. Recall the two types of messages sent in the articles about the Marriage Law. In one, the statute protected relatively defenseless people when they were most vulnerable to harm,<sup>229</sup> and in the other,

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228. GOOD NEWS: 1991-1994, *supra* note 182, at 2.

229. See, e.g., *Pregnant and Nursing Women*, *supra* note 188, at 3; *Different Interests*, *supra* note 213.

failure to comply with the Marriage Law would be detected, and if not then corrected, harshly punished.<sup>230</sup> Taken together, both types of messages communicated a parental image of the government: caring and protective,<sup>231</sup> yet strict and harsh when disobeyed.<sup>232</sup> The parental image of the PRC government echoes the paternalism of Emperor Zhu Yuanzhang, which he fostered in his public communications.<sup>233</sup> The use of media to instill in the public the models of the central ruler has deep roots in Chinese history. It has been a feature of government since at least the founding of the Ming Dynasty about 650 years ago, and was refined and expanded by Mao Zedong and the Chinese Communist Party.

To an extent, media transmissions in the PRC function as sources of law. Each item in the samples studied here filled in a gap in the formal law. Emanating from the same authority as enacted laws, these transmissions were authoritative in much the same way, despite their lesser status. The importance of the transmissions varied, depending on where in the publication they were placed and how bold was the typeface, but such a spectrum of importance for media transmissions about law does not mandate against their status or function as sources of law. On the contrary, it fits them within the sources of law in the PRC, which, as in many European countries, are officially recognized to vary along a spectrum of authoritativeness. Under the coordinated system of Party policy-making and judicial supervision, the media transmissions of stories and interpretations of the law rank second only to Supreme People's Court opinions that lawyers without Party connections can get to, which are official sources of law that bind judges.

The trend toward entertainment in the official media did not seem to necessitate a loosening of state control over the messages sent. The Party-run Xinhua news agency and the major legal newspaper continued to send the same types of messages about how the enforcers of the family laws and policies should do their work and how individuals should voluntarily comply with the law and encourage others to comply. Over the same period, the family planning transmissions increased their stress on economic incentives. Despite the enhanced appeal of the vehicle, the pervasiveness of economic incentives in the newer samples confirms that the official media did not stray from Party policy, which showed increasing stress on economic incentives in other areas of law.

The similarity between official messages about law and the legal themes treated in popular films further supports the possibility that some popular legal education is shifting to the "private" sector. Several films that were popular in the PRC in the 1990s sent official messages about law. In "Qiu Ju Goes To Court,"<sup>234</sup>

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230. See *Bigamists*, *supra* note 188, at 3.

231. Two examples were *Pregnant and Nursing Women*, *supra* note 188; *Different Interests*, *supra* note 213.

232. For example, see *Bigamists*, *supra* note 188.

233. FARMER, *supra* note 3, at 103-07.

234. THE STORY OF QIU JU, (Sony Pictures Classics 1993) (directed by Zhang yimou) (viewed by author).

the system of administrative litigation proves to be fair but ill suited to the management of permanent personal relationships in the countryside.<sup>235</sup> Qiu Ju is a peasant woman who deeply feels that the village head has dealt her family an injustice, but her aggressive pursuit of justice through higher officials and courts ends in the defeat of not one, but two, ultimately likeable and decent officials who are friends of her family.

This caution against the use of litigation to solve problems in personal relationships figures prominently in the official media. For example, a television drama about a peasant family in northern China showed a grandmother's utter horror when she learned that a family dispute was going to court.<sup>236</sup> She acted as if the end of her life and her family's fortunes were in sight. She refused to eat, walked the long distance to the People's Tribunal (*renmin fating*), and threw herself on the doorstep of the outer office inhabited by two public security officers. She wailed and pleaded that they not send her family to jail. When the family appeared in court, she sat among the plaintiffs, but did not speak. Pleasant and fair-minded people staffed the court. After hearing five people speak, the judge, a female public security officer, asked if they wanted mediation. The defendants all cried "yes," while the plaintiffs cried and said nothing. The judge then dismissed the case and everyone joined in the crying, including the three tough male defendants. At this point, the grandmother spoke, announcing that the family could find a way to reunite.<sup>237</sup>

Echoing a theme from the official legal newspapers, director Huang Jianxin uses his film "Signal Left, Turn Right," which premiered in 1996, to criticize women who use their sexuality to enrich themselves financially.<sup>238</sup> All but one of the women portrayed in the film are preoccupied with money, and all of the women lack stable and dependable relationships with men who could provide for them. The wife of the driving instructor obsesses over the family finances and waits at home for her husband to bring her his cash earnings from work, which she hungrily counts while leaving her young son to play with her husband. When a wealthy entrepreneur gives an expensive pooch to Yang Wei, a driving school student whose husband recently had left her and her young son penniless, Yang Wei sells the pet for a wad of cash even after her son grows strongly attached to it. A woman who runs a restaurant greedily pockets hundreds of yuan in a scam she devised with the driving instructor to lure his students into her restaurant and saddle them with an inflated lunch tab.

Like the legal press accounts of women who con cash out of men who use the government's marriage brokers, Huang's criticism of women who trade idealism for money, as he puts it, is simplistic and does not plumb the depths of this issue. Neither his film nor the legal newspapers explore the sources of their financial

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235. *See id.*

236. Shanghai broadcast June 22, 1993 (viewed by the author).

237. *Id.*

238. DA ZUO DENG XIANG YOU ZHUAN [SIGNAL LEFT, TURN RIGHT] (1996) (on file with author).

insecurity and anxiety, nor dwell on the societal trends which are pushing women into these kinds of compromising situations in such numbers that a new saying has been coined to describe it: "Rich men become corrupt; corrupt women become rich."<sup>239</sup>

But if films created outside the Party propaganda apparatus are reinforcing some of the Party's policies on law, they may be offering additional views of legal issues that are more complex, and even contrary to official policy. In "Qiu Ju Goes To Court," Zhang Yimou overturns some of the images of the family planning program transmitted by the official media. Far from setting an example for his neighbors, the village chief, the probable enforcer of the one-child policy in his community, has five daughters. Rather than work hard to achieve the quotas of the one-child policy and encourage the local leader to enforce them, peasant woman Qiu Ju becomes a visible symbol of defiance of the quotas. Eight to nine months pregnant, she crusades to and fro from village to town to district to city in search of revenge for a threat to her ability to be impregnated by her husband and bear more children.

On the eve of the twenty-first century, commercialization might appear to jeopardize the role of media in the legal system of China by diluting the authoritativeness of its messages, but the samples of state-run media transmissions studied here support a different conclusion. They show that, despite the growth of private media whose censored messages might contain official interpretations of law, a variety of state-run media have strengthened their role in the PRC legal system and sent messages that serve as sources of PRC law. If there has been a trend in the relationship between media and law in China during the twentieth century, it has been one where media have grown in their capacity to transmit the law.

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239. Huang Jianxin, Film Dir., Address at the Walker Art Center, Minneapolis, MN (Apr. 12, 1996) (on file with author).