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Exercising Freedom of Speech behind the Great Firewall: A Study of Judges' and Lawyers' Blogs in China

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In order to better understand the relationship between the power of the Internet and the exercise of free speech in China, this study has chosen to examine the blogs of 42 judges and 13 public interest lawyers in the period between January 1, 2007 and December 31, 2008. Both judges and lawyers represent two unique groups of professionals, where the former are often perceived to be government representatives while the latter are seen as guardians of people's welfare. The focus of the study, therefore, is on an analysis of these two groups of legal elites and how they have made use of their unique roles to open up a professional public sphere on the Internet and to act as a go-between in coordinating a match between the state and the people. Through passing on messages of contention and dissatisfaction from the people to the ruler, and in

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reminding both of them of the significance of law, the legal and political boundaries set by the authorities are being pushed, challenged, and renegotiated. Drawing on existing literature on boundary contention and the Chinese cultural norm of fencun *(decorum), this study highlights the paradox of how one has to fight within boundaries so as to expand the contours of the latter for one's ultimate freedom. Judging from the content of the collected postings, one finds that, in various degrees, critical voices can be tolerated. What emerges is a responsive and engaging form of justice which endeavors to address grievances in society, and to resolve them in unique ways both online and offline.*

I. INTRODUCTION

The Internet is a fascinating terrain. Much literature has been devoted to depicting its liberating democratic power in fostering active citizenry, and arguably, an equal number of articles have been written that describe attempts by various states to exercise control.[1] China has provided a ready example to illustrate this tension.[2] And this study focuses on the blog postings by judges and public interest lawyers in order to understand better how the legal elites in China have deployed routine and regular legal discussion in the virtual world to form their own unique public sphere, not only as an assertion for their own autonomy but also as a subtle yet powerful form of contention against the legal and political boundaries in an authoritarian state.

Chinese authorities are notorious for their determination to stamp out dissenting voices both online and offline. Apparently, they have succeeded to a large extent in sealing off cyberspace to many living behind China's Great Firewall.[3] Yet, since 1997, the China Internet Network Information Society (better known as CNNIC) has been boasting of a steady increase of Internet users in its biannual reports.[4] The latest figure revealed that by the end of 2010, the number of Internet users in China had reached 457 million with a penetration rate of 34%, constituting one quarter of the world's netizens.[5] And among these there is the striking phenomenon of the number

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[1] For a review of literature, see R. Kelly Garrett, *Protest in an Information Society: A Review of Literature on Social Movements and New ICTs*, INFO, COMM. & SOC. 202 (Apr. 2006).

[2] For a collection of essays on the Internet in China and other countries, including Latin America, Saudi Arabia, and other Asian countries, see ACCESS DENIED (Ronald Deibert et al. eds., 2008).

[3] China has successfully maintained, to a large extent, the walling off of the "domestic cyberspace" and "foreign cyberspace" through its technological infrastructure. Virtual censorship is common). *See* Jack Linchuan Qiu, *Virtual Censorship in China: Keeping the Gate between the Cyberspaces,* 4 INT'L J. OF COMM. L. & POL'Y 1–2 (Winter 1999/2000).

[4] CNNIC, 27TH STATISTICAL REPORT ON INTERNET DEVELOPMENT IN CHINA 12 (2011), http://research.cnnic.cn/img/h000/h12/attach201101211728520.pdf (in Chinese).

[5] *Id.*

of bloggers, which has hit 294 million,[6] nearly a ten-fold increase within a period of four years.[7] This shows that a large and increasing portion of Chinese netizens are using the Internet to share their thoughts, an essential application of communication. Mostly, they are actively contributing content to the Internet. But behind this rosy picture of online activism lurks the constant fear that the Chinese one-party state is watching outspoken comments closely, always ready to tighten its iron grip on freedom of expression as it thinks fit.[8]

Although much of the above may be true, it will do no favors to the development of the Chinese Internet story if the story is reduced to a mere binary plot of oppression and resistance. Guobin Yang, a sociology scholar studying online activism in China, has pointed out that the Internet is an arena of intense struggle, full of complex dynamics, participatory and contentious in nature.[9] In our later discussion, the study of judges' and lawyers' blogs will reveal a difficult dance of advance and retreat with curious twists and turns, constantly alternating between voice and silence. In China, judges are civil servants and lawyers are defined under the law as those providing legal services to the state (rather than to individual clients).[10] The conventional image of Chinese judges is that they are "bureaucratic automatons"[11] in China's weak court system of one-party rule. But as we will see later in our discussion in Part III and IV, one of the pressing concerns of judges is their own judicial independence. Many of them are not satisfied to play a mere subservient role to the executive. In contrast, the group of lawyers that were studied in this project was public interest lawyers (*weiquan* lawyers, literally meaning "rights defense" lawyers). In their work on public interest lawyers, Fu and Cullen define *weiquan* lawyers to be those protecting the rights and interests of the weak and the vulnerable groups in society against official abuses, and contributing to the advancement of the rule of law in their respective field of legal

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[6] *Id.* at 31.

[7] In comparison with 2010, the number of bloggers had increased by 33% within a year. *See id.* at 31. In 2006, there were only 33 millions of bloggers in China. *See* CNNIC, A REPORT ON BLOGGERS IN CHINA 4 (2006), http://www.cnnic.net.cn/uploadfiles/pdf/2006/9/28/182836.pdf (in Chinese).

[8] According to Reporters San Frontiers, the world's largest netizen prison is in China. With its elaborate Internet control and repression strategies, netizens are being arrested and targeted in China. Internet users and cyber-dissidents are locked behind bars for having expressed themselves online. Lucie Morillon & Jean-Francois Julliard, *Web 2.0 versus Control 2.0*, REPORTERS WITHOUT BORDERS FOR PRESS FREEDOM (Mar. 12, 2010), http://en.rsf.org/web-2-0-versus-control-2-0-18-03-2010,36697.

[9] GUOBIN YANG, THE POWER OF THE INTERNET IN CHINA 2 (2008).

[10] LAWYERS COMMITTEE FOR HUMAN RIGHTS, LAWYERS IN CHINA 50 (1998). STANDING COMM. OF THE NAT'L PEOPLE'S CONG., LAW OF THE PEOPLE'S REPUBLIC OF CHINA ON LAWYERS, arts. 2, 26, 28 (2008), *available at* http://en.chinacourt.org/public/detail.php?id=100.

[11] Rachel E. Stern, *On the Frontlines: Making Decisions in Chinese Civil Environmental Lawsuits,* 32 LAW & POL'Y 79, 84 (2010).

practice.[12] Despite this bold and courageous outlook, one key characteristics of most public interest lawyers, as pointed out by the two scholars, is that they "accept the legitimacy of the existing political system and largely seek to protect and improve rights of citizens with the constitutional constraints and legal framework" in China.[13] Conscious of their unique roles, their limitations, the legal and political constraints, these two groups of elites are developing their "tactical good sense" to fight for the unrealized state commitments of rule of law including judicial independence and better protection of human rights.[14]

In contrast with the perception of Western media, Chinese society does not necessarily function under a simplistic form of authoritarian Communist rule, but neither does it survive on the Western notions of democracy or a robust public sphere. In Habermas' famous theory, the public sphere is a unique, open, and independent space, free from government control and commercial domination; the public sphere allows the interaction of citizens as equals to debate the formation of civil society and the regulation of state conduct, and enables the crystallization of public opinion, which will have an impact on the governance of society.[15] While many have high hopes that cyberspace will deliver this ideal form of public sphere,[16] what emerges in the Chinese Internet and the blogosphere is, arguably, a responsive, engaging form of justice that endeavors to address grievances in society, and to resolve them in a unique way by bringing in public opinion and blending it with a heavy dose of law. Judges and public interest lawyers may have more in common than one might have thought. In their own way, judges and lawyers advocate an informed and rational public discussion, constantly reminding the authorities that law must be upheld in substance, form, and spirit. This reference to law, rules, and regulations in Chinese society is part of a larger contemporary discourse toward juridification, that is, of framing potential conflict and controversies in legal terms, and subjecting them to judicial resolution. And this must be understood to be part of a larger social and legal discourse in China, which is gaining momentum with the consistent help of the Internet. Mary Gallagher, in her study of the labor movement in China, observes that there is a growing recourse to legal institutions despite the fact that the rule of law may remain "at best a long-off goal of an overstretched central leadership and at worst a cynical attempt by the party-state to buttress its own monopoly on power

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[12] Fu Hualing & Richard Cullen, *Weiquan (Rights Protection) Lawyering in an Authoritarian State: Toward Critical Lawyering,* 59 CHINA J. 1, 2, 4 (2008).

[13] *Id.* at 2.

[14] Kevin J. O'Brien, *Neither Transgressive Nor Contained: Boundary-Spanning Contention in China,* 8 MOBILIZATION 51, 59 (2003).

[15] JURGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY (Thomas Burger & Frederick Lawrence trans., MIT Press 1991) (1962).

[16] *Cf.* Peter Dahlgren, *The Internet, Public Spheres, and Political Communication: Dispersion and Deliberation*, 22 POL. COMM. 147 (2005).

with a patina of legitimacy."[17] Nevertheless, laws are becoming significant in China in developing citizenship norms, shaping expectations in society, and placing blame.[18]

The invoking of law or the principles of rule of law in public debate may be contentious, but the bloggers are careful to avoid confrontation. Rather than breaking the boundary of freedom of expression set by the authorities, the key to their strategy is to adjust and negotiate constantly the boundary limits, responding to the forever changing written codes and unwritten norms without losing their balance or decorum. Meanwhile, the state is also legitimating the basis of its political rule, in allowing room for these voices to be heard.

Our discussion begins by drawing on the literature of boundary setting and contention, with particular reference to Chinese cultural norm of *fencun* (decorum) in Part I. This is followed with the laying down of the fixed boundary of ground rules by the Chinese authorities for the exercise of freedom of expression in Part II, including the constitutional rules and specific regulations for the Internet. Other than black letter law, China is also governed by a set of practices, some of which are well-known, while the rest could be deduced from what may be considered as harmful materials by the authorities. Part III will map out the background of the judges and the lawyers who blogged. We will identify where they came from and the general topics they talked about. This is followed by Part IV of the paper, which is a closer examination of how both the judge and lawyer bloggers commented on prohibitive, sensitive and controversial topics. Overall, throughout the discussion and analysis, it will become evident how a professional legal public sphere is being opened up, which brings legal discussion and public opinion together in a relatively autonomous terrain.

A. Methodology

To capture this distinct dynamic of privileged judicial groups within or close to the ruling system, and the seemingly unique group of public interest lawyers who are entrusted to fight for and uphold justice, a total 1356 postings from 42 blogs of judges and 1995 postings from 13 public interest lawyers blog postings, covering the period between January 1, 2007 and December 31, 2008, were analyzed. The purpose of this study is to analyze the comments and the nature of the discussions, so as to find out how far the judges and lawyers could go in expressing their opinions, and to what extent the Chinese authorities would allow such dissenting speech.

The blogs of judges and lawyers were studied and selected mainly according to the verifiability of the bloggers' professional identities and the regularity of blog postings

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[17] Mary E. Gallagher, *"Use the Law as Your Weapon!" Institutional Change and Legal Mobilization in China*, *in* ENGAGING CHINESE LAW: STATE, SOCIETY, AND POSSIBILITIES FOR JUSTICE, 54, 75 (Neil J. Diamant et al. eds., 2005).

[18] *Id.*

being uploaded during the period of study.[19] Both of the postings from judges and lawyers were divided into five general categories, according to their type of content: (1) case study, (2) legal issue, (3) social issue, (4) legal research, and (5) others. Each post is counted exclusively for one single category, depending on the dominant theme. A breakdown of the postings could be found at Tables 1 and 2. The overview of legal issues postings can be viewed at Appendix II. We have chosen the topics on Judicial Independence, Judicial Fairness & Judicial Reform (50.6% of legal issue postings); and Rule of Law and Rights Protection in Practice (23.7%) to be further studied. On social issues, there were fifteen social events that were discussed by the lawyer-bloggers during the selected period. The list could be viewed at Appendix III. We have chosen to study eight topics related to corruption, arbitrary urban house demolition, Shanxi black kiln scandal, 3/14 Tibetan accident in Lhasa in 2008, 2008 Beijing Olympic Games, Sanlu milk powder scandal, and Internet censorship and online participation for content analysis. The above topics were chosen based on their impact at national and international level, or its potential for public interest litigation. Topics on legal research and miscellaneous issues are found at Appendix IV.

In addition, 395 postings from judges, and 661 postings from lawyers on legal and social issues were selected and closely scrutinized due to potential of the topics for public interest litigation and the likely impact for society at large. In total, the 1356 blog postings which, using the method of content analysis, were further studied to determine the attitude of the judges and lawyers.[20] Though another research paper will be required to do justice to the analysis of the two groups of bloggers, the preliminary findings of judges' attitude in blogging are that they did not express their stance in 56.2% of the postings, while showing their disapproval in 30.4%, and their approval in 13.4% of the postings. In parallel, lawyers did not express their stance in 53.3% of postings, while showing their approval in 34.2% and their disapproval in 10.1% of the postings. This may indicate that the bloggers in this study are cautious to express a clear stance though matters of legal and social significance are raised and discussed.

The study for our following discussion in Part III focuses largely on qualitative analysis on selected blog postings. Moving along a scale of outright prohibition and

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[19] We have chosen judges' blogs where either the blogs' authors had used their real names as judges, or the authors had claimed to be judges and the content of their blogs had revealed a lot of information of daily court room events, rendering them highly credible.

[20] The content of blog postings were categorized in accordance to the sensitivity of the subject matter discussed, including the Chinese Communist Party (CCP), Taiwan, Tibet, the seniority of leaders, and the type of government bureaus. Attitude of each post was measured against six different sets of binary criteria. They were clear vs. uncertain; firm and consistent vs. reserved and inconsistent; direct vs. indirect; conservative vs. open minded; subjective vs. objective; balanced vs. judgmental. Two independent researchers were assigned to read through each blog post to reach a decision. The study on content analysis was then coordinated by a third researcher.

tolerance, we focus, first, on posts that had been censored; second, on posts that discussed the Chinese Communist Party (CCP), a subject known to be sensitive and even dangerous to criticize; finally, on posts covering two controversial cases: one related more to the livelihood of ordinary citizen (*Xu Ting* case) and another with larger political ramifications (*Yang Jia* case). We also found that while there was censorship of lawyers' blog postings, none of judges' postings were deleted. In the rest of this analysis, the judges who blogged are referred to as J-Bloggers and the lawyers, as L-Bloggers.

II. THE ART OF *FENCUN*: PUSHING BOUNDARIES WITHIN BOUNDARIES

Expressing one's opinion can be a delicate and risky business in China. The rules of censorship set by the rulers are often "fuzzy" and broad so as to hold the subjects under constant fear and uncertainty.[21] Scholars have argued that this regime of unpredictability is essential for the exercise of state power and control, which often has a paralyzing effect on the subjects leading to self-censorship in speech and action.[22] However, judging from the content of postings, one finds that critical voices are tolerated to varying degrees.

To a great extent, the blog posts of judges and lawyers in this study remind us more of the literature on resistance of the weak and boundary contention by James C. Scott and Kevin J. O'Brien respectively. In his study on domination and resistance in various societies including serfdom and colonies, Scott observes that "most of the political life of subordinate groups is to be found neither in overt collective defiance of power holders nor in complete hegemonic compliance,"[23] but in the vast in-between territory of constant struggle between the two polar opposites. He further argues that it is in the last social site that the subjects could share their "hidden transcript"[24] of "private opinion"[25] off-stage. In front of the powerful, the subjects would adopt and use the "official transcript" that the rulers approved.[26] On a similar topic, but writing specifically on popular protest in China, O'Brien has observed that there often exists a middle-ground of contention between radical revolution and a tame form of participation in the everyday life of citizens.[27] He describes this as

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[21] *See* Jonathan Hassid, *Controlling the Chinese Media: An Uncertain Business*, ASIAN SURV., May/June 2008, 414, 428 (2008).

[22] *See id. See also* Perry Link, *China: The Anaconda in the Chandelier*, N.Y. REV. OF BOOKS, Apr. 11, 2002, *available at* http://www.nybooks.com/articles/15258.

[23] JAMES C. SCOTT, DOMINATION AND THE ARTS OF RESISTANCE: HIDDEN TRANSCRIPTS 136 (1990).

[24] *Id.* at 14.

[25] *Id.* at 23

[26] *Id.* at xi.

[27] O'Brien, *supra* note 14, at 53. *See also* KEVIN J. O'BRIEN & LIANJIANG LI, RIGHTFUL RESISTANCE IN RURAL CHINA 2 (2006).

"popular contention" of "rightful resistance," where the popular classes are making use of "approved channels of influence" to express their dissenting voices.[28]

Both Scott and O'Brien have highlighted the important social and political phenomenon of struggle and contention in an in-between zone. But what is perplexing in this study of blogging is not only whether online blogging is qualified as a form of "off-stage" private sharing mentioned in Scott's model, but that the blogging sites of judges and public interest lawyers have illustrated the intricate dynamics of a triple paradox, with blogging sites being spheres of public statements of private opinions, involving judges as mutually privileged but constrained; and public interest lawyers as being defiant but compliant.

First, blogging is a unique form of online expression, which, by its nature, is meant to be personal, confessional and reactive, like diaries, rooted in everyday life. Moreover, there is often a close affinity among blog writers within the insider group.[29] Hence, blogging by judges and lawyers is a closed club elite activity catering largely for its own members, and arguably is a form of "hidden transcripts" in Scott's model of resistance. The study by Terence Halliday and Sida Liu on online forum by criminal defense lawyers in China also supports the above proposition.[30] They found that the Chinese authorities have been more tolerant to online speech by lawyers, and that lawyers themselves were often direct and critical compared with their expressions in professional magazines, which were restrained and contained no direct criticism.[31] They described the online forum to be the "private face" of the legal profession whereas the magazine was the "public face."[32] Perhaps, also due to this very nature, the authorities have displayed a high degree of tolerance for expression "within the relative privacy of a dedicated electronic space" compared with printed expression.[33] Through the professional blogosphere, the judges and lawyers have built their collective identity behind a private legal elite club, and attempted to defend their zones of relative autonomy, insulated from the tight control of the state. Does this all mean, therefore, that we can safely conclude that the sharing of private opinion of judges and public interest lawyers is contributing to the formation of a virtual civil

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[28] O'Brien, *supra* note 14, at 51.

[29] In Taiwan, blogs are translated into *bulege* in Chinese. Literally, *bule* means a tribe, and *ge* refers to a square, thus *bulege* has the meaning of a square for a tribe or a particular group.

[30] Terence C. Halliday & Sida Liu, *Birth of a Liberal Movement? Looking Through a One-Way Mirror at Lawyer's Defence of Criminal Defendants in China*, *in* FIGHTING FOR POLITICAL FREEDOM: COMPARATIVE STUDIES OF THE LEGAL COMPLEX AND POLITICAL LIBERALISM 65 (Terence C. Halliday et al. eds., 2007).

[31] *Id.* at 101.

[32] *Id.* at 102.

[33] *Id.* at 100.

society, and the ultimate "public sphere" which Habermas envisioned?[34] The answer is unclear because the public sphere, as discussed earlier, should be free from the immediate control of the state, and citizens of a civil society should be autonomous individuals disengaged from the state.[35]

Furthermore, much like blogging to off-stage private expression, blog postings in this study are public and visible to anyone. The Chinese authorities are well aware of the immense power of the Internet and how disadvantaged social groups have utilized the Internet for online social activism.[36] They are eager to control the Internet, to shape it into a "'healthy and orderly' online environment" mainly for dynamic economic entrepreneurship, but not for political activities that may breach the political foundation of the CCP.[37] From this perspective, the tolerance that the authorities have shown to judges' and lawyers' blogs makes it worth noting. For instance, the Chinese authorities may not want to kill the blogs of public interest lawyers, but rather to keep them under their control, as they did in the case of Xu Zhiyong, a prominent public interest lawyer.

What makes Xu a fascinating case study is that he is a hybrid of an official and a rebel. He is an elected legislator, a legal scholar, and the founder of an Open Constitution Initiative.[38] He blogged extensively on the plight of citizens who came to Beijing to lodge their complaints to the authorities, but who ended up detained in secret jails by local officials.[39] Xu's blogs on Sohu.com were shut down without explanation in 2010,[40] but at the time of writing, he has discussions posted directly on Law Blog

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[34] For discussion of Habermas' theory on civil society and its relation to China, see Richard Madsen, *The Public Sphere, Civil Society and Moral Community: A Research Agenda for Contemporary China Studies*, MODERN CHINA 183 (Apr. 1993).

[35] *See* Guobin Yang, *The Internet and Civil Society in China: A Preliminary Assessment*, J. CONTEMP. CHINA 453, 455 (2003).

[36] Guobin Yang, *Contention in Cyberspace, in* POPULAR PROTEST IN CHINA 126, 131 (Kevin J. O'Brien ed., 2008).

[37] Chin-fu Hung, *The Politics of China's Wei-Quan Movement in the Internet Age*, 1 INT'L J. CHINA S., 331, 343 (2010).

[38] Evan Osnos, *Where is Xu Zhiyong?*, THE NEW YORKER, July 31, 2009, *available at* http://www.newyorker.com/online/blogs/evanosnos/2009/07/where-is-xu-zhiyong.html.

[39] QIAN GANG, CHINA'S SUPER BLOGS (2009) (in Chinese).

[40] *Dozens of Blogs Shut in China*, ASSOCIATED PRESS,, July 15, 2010, *available at* http://www.guardian.co.uk/technology/2010/jul/15/china-blogs-shut-down. Xu's former blog postings could be found in a website called Yam, hosted by a Taiwan company at http://blog.yam.com/xuzhiyong. More important, Xu's supporters have been "moving" or forwarding his articles to Yam and other blogs in a systematic way, so that the Chinese overseas can read them together with as many as possible within China. So we are witnessing a phenomenon of "twin blogs" or multiple postings on Xu's work. It is a dynamic process of spreading the message between the speaker and the audience. Also, the authorities seem to be tolerating this indirect method, at least for the time being.

(http://xuzhiyong.fyfz.cn/),[41] a blog that caters to the legal community. This blog website is a sub-site of http://www.jcrb.com/, which is hosted by the Procuratorate Daily, directly under the Supreme People's Procuratorate. The fact that the authorities continue to allow Xu to write—but only on a blog catering to the legal community and under the direct control of an official institution—shows that they are eager to capture dissent and channel it toward building legitimacy for their rule. In addition, this does not preclude the possibility that government officials would continue to allow Xu's blogging because they are curious about what legal professionals are thinking because they may well see public interest lawyers as a convenient form of social barometer, which can be used to reflect social opinion and attitudes.

In other words, we are seeing the carving out of a space for public discussion by those associated closely with state power on the state's own terrain. The blogosphere has been transformed into both a private and public sphere at the same time. In such circumstances, perhaps the frame of reference to the public sphere should be reset to reflect the general fascination with oppression and resistance. The legal blogosphere has become a form of public space that has not shaken off completely the shackles of state control, but manages to play a critical and transformative role in being a go-between that could channel public opinion and call for accountability, while simultaneously being a social barometer that the authorities would tolerate.

Second, if we see blogging by judges and lawyers as a form of online social activism, judges can hardly be characterized as a disadvantaged group in society, and not as full independent members in Habermas' model of the public sphere.[42] Despite the fact that courts are considered to be a weak institution within the hierarchy of China's state system,[43] judges in China are civil servants and most of them are CCP members.[44] Their affiliation with the authorities will affect not only their participation in the blogosphere, but also how they perceive their roles as judges and government workers. For instance, Wu Yulian, a judge in China commenting in his own blog, said that in asking Chinese judges to be not only judges but also civil servants and CCP members all at the same time has posed particular challenges to many of his colleagues[45] He further admitted that his colleagues would often perform in accordance with the civil servant rules to get a promotion rather than to play by the rules of judicial professionalism.[46] He also maintained that a judge in that special environment required special psychological adjustments if the interest of the Party

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[41] Xu Zhiyong, LAW BLOG: COLLECTED WORKS OF XU ZHIYONG, http://xuzhiyong.fyfz.cn.

[42] HABERMAS, *supra* note 15.

[43] Stern, *supra* note 11, at 80.

[44] Posting of Wu Yulian, *The Three Roles of Chinese Judges*, LAW'S LAND: WU YULIAN (Dec. 12, 2008), http://www.yadian.cc/blog/77521 (in Chinese).

[45] *Id.*

[46] *Id.*

was to be a top priority, while also keeping in mind the rights protected under the Constitution and the interests of the people.[47] Clearly, Wu Yulian was torn between the three roles that he was required to fulfill. Taking his words to be representative of the shared sentiment of many judges in China, it is not hard to understand the eagerness of the J-bloggers to assert their independence by expressing their views, while being careful not to go overboard in their criticisms at the same time. (As will be further discussed in Part III, the most discussed legal issue by the judges in this study is judicial independence and reform, which constituted 36% of their posts.)[48] Despite the judges' criticism of various aspects of the legal and social system, the official rhetoric of "social harmony"[49] is commonly invoked. In a sense, the hidden transcript that the J-bloggers are fighting for is the recognition of their own judicial independence, understood both at a personal and collective level,[50] yet mindful of the very lack of it.

Third, in parallel to judges, public interest lawyers are a group of equally interesting hybrids. Public interest lawyers build their reputation on being defenders of human rights and fighters against abuse of government power. On the other hand, they urge others to accept the legitimacy of the existing regime. The rise of public interest lawyers can be traced back to the "rights defense" (*weiquan*) movement beginning in early 2000, in which ordinary citizens took action against party officials or government bodies to protect their basic rights and interests afforded under the law.[51] As part of this legal awakening, private lawyers have been helping the vulnerable to push for government accountability, especially on cases with real social impact.[52] They see it as their legal and moral obligation to expose and challenge the irregularities of the legal and political system. For doing so, some public interest lawyers are punished harshly by the authorities.[53] Despite this stance of defiance, most

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[47] *Id.*

[48] *See* Appendix I.

[49] Maureen Fan, *China's Party Leadership Declares New Priority: 'Harmonious Society' Doctrine Proposed by President Hu Formally Endorsed*, WASH. POST., Oct. 12, 2006, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/10/11/AR2006101101610_pf.html.

[50] Randall Peerenboom, *Judicial Independence in China: Common Myths and Unfounded Assumptions*, *in* JUDICIAL INDEPENDENCE IN CHINA 71–73 (2009).

[51] Hung, *supra* note 37, at 334.

[52] Fu & Cullen, *supra* note 12, at 1–2.

[53] For a discussion of the fate of Gao Zhisheng for helping Falungong members, see Eva Pils, *Asking the Tiger for his Skin: Rights Activism in China,* 30 FORDHAM INT'L L.J. 1209 (2007). At the time of writing, Chen Guangcheng, the blind barefoot lawyer, is under house arrest and is allegedly badly beaten by the authorities. *See* Jo Ling Kent & Jaime Florcruz, *Rights Groups: Prominent Chinese Activist and Wife Beaten*, CNN.COM (Feb. 11, 2011), http://edition.cnn.com/2011/WORLD/asiapcf/02/11/china.activists.beaten/?hpt=T2. The term "barefoot lawyer" is used to describe those who provide legal advice without a lawyer license.

public interest lawyers are rather tamed in the sense that they realize they have to fight "'their corners' within the one-party system."[54] They adopt a law-based and court-centric approach to conflict resolution, limiting their action to what is permissible in law, and channeling their grievances and demands through the court system.[55] Xu Zhiyong, the lawyer mentioned earlier in this section, himself has emphasized the legitimate exercise of his rights as a citizen and the use of lawful means to advocate for the public interest.[56] In a way, one possible hidden transcript behind this group of legal activists is that the authorities and the CCP should also abide by the law.

Whether or not the analogies to the in-between zone of contention and the formation of public sphere are aptly drawn, both groups of bloggers are, indisputably, skillful actors and players in the Internet game. In Chinese society and culture, there is much emphasis on behaving with proper decorum: one should act and speak with *fencun*, literally meaning mastering every instance like a skillful craftsman. In the social context, Huang and Hu remind us that acting and speaking within one's boundaries and mastering the skills of *fencun* are essential for one's social survival in Chinese society.[57] While *fencun* maybe a distinct Chinese cultural norm, Western culture has similar matching concept of decorum and rules of etiquette, which are considered to be a strategic pose with practical dimensions.[58] Referring to the work of the leading French sociologist Pierre Bourdieu, Scott characterizes the rules of etiquette to be a kind of "grammar of social intercourse, imposed by the guardians of taste and decorum," which allows its users to safely navigate in the terrain of the powerful.[59] "Failure to observe the rules of politeness is taken as an act of insubordination."[60] Bourdieu himself writes that "the concession of politeness always contains political concessions."[61]

Hence, the art of *fencun* requires our bloggers to not only criticize in seemingly innocuous terms to avoid upsetting the rulers, but also to win support from their own peers and catch the attention of the masses. They have to move imaginatively in and beyond the legal and political boundaries without transgressing any of the same. As will be further elaborated in Part III and IV of this article, they explore arguably legal and permissible ways and involve the "innovative use of law, policies and other

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[54] Fu & Cullen, *supra* note 12, at 2.

[55] *Id.* at 6–8.

[56] Interview with Xu Zhiyong, in Beijing (Mar. 17, 2010) (notes on file with author).

[57] K. K. HWANG & H. C. HU, FACE: POWER GAME OF CHINESE PEOPLE 75 (2004) (in Chinese).

[58] SCOTT, *supra* note 23, at 47–48.

[59] *Id.*

[60] *Id.* at 48.

[61] PIERRE BOURDIEU, OUTLINE OF A THEORY OF PRACTICE 95 (Richard Nice, trans., Cambridge University Press, 1977).

officially promoted values"[62] in their contention. This skill has been remarkably played out with regard to boundary setting on the Internet. Judges and lawyers are eager yet cautious to push the boundary within the boundary. Despite these professionals' general concern and lament at the lack of the rule of law in the system, they are, nonetheless, careful not to break the rule of law, urging others not to do so, while actually using the laws as a weapon to fight for social and legal justice. Thus, if the rule of law is about the ability of the legal system to impose meaningful restraints on the state and on individual members of the ruling elite,[63] the Internet has provided a platform for this e-version of rule of law to permeate at various levels of Chinese society, which constitutes as part of juridification in China.

III. II. THE GROUND RULES OF FREEDOM OF SPEECH

A. The Written Law

The exercise of freedom of speech is enshrined under Article 35 of the Chinese Constitution. Bearing in mind that any guarantee and practice of freedom should not stop short at one single legal provision, Article 35 must be read in relation to other constitutional provisions and other legal codes. In doing so, we find that the Preamble of the Constitution stipulates clearly that China must be under the leadership of the Chinese Communist Party (CCP). In addition, under Article 105 of the Criminal Code,[64] it is a heinous crime for anyone to attempt to overthrow the socialist system or to engage in any subversive and seditious activities, which includes the spreading of rumors and slander. Again under Article 103 of the Criminal Code,[65] it is a crime for anyone to "organize, plot, or act to split the country or undermine national unification." The penalty for both offences can be up to life imprisonment. However, it comes as no surprise that the definition of what constitutes subversion and sedition under the Criminal Code proves to be both vague and all-encompassing.[66]

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[62] O'Brien, *supra* note 14, at 53.

[63] RANDALL PEERENBOOM, CHINA'S LONG MARCH TOWARD RULE OF LAW 8 (2002).

[64] The Criminal Code (Criminal Code of the People's Republic of China, adopted at the Second Session of the Fifth National People's Congress on July 1, 1979, and revised at the Fifth Session of the Eighth National People's Congress on March 14, 1997).

[65] For further discussion, see WEI LUO, THE 1997 CRIMINAL CODE OF THE PEOPLE'S REPUBLIC OF CHINA: WITH ENGLISH TRANSLATION AND INTRODUCTION (1998).

[66] H.L. Fu, *Sedition and Political Dissidence: Towards Legitimate Dissent in China?,* 26 HONG KONG L. J. 210 (1996).

Internet regulation mirrors closely the above regulatory framework.[67] The Chinese authorities have an elaborate scheme of Internet control. Other than installing a nationwide filtering system known as China's Firewall, all Internet intermediaries have to shoulder the duties of monitoring, filtering, and reporting.[68] In addition, China has its own Internet police to patrol the Internet and its army of Internet commentators to influence public opinion.[69] On Internet content regulation, the basic framework of is laid out in Article 5 of the *Computer Information Network and Internet Security Protection and Management Regulations*.[70] Essentially, the list for forbidden Internet publication is the same as for the printed media,[71] despite subsequent changes to Internet regulations.[72] The production, duplication, release, and dissemination of content in the nine categories below are absolutely forbidden.[73] They are, namely, information that:

1. is contrary to the basic principles that are laid down in the Constitution, laws or administration regulations;
2. is seditious to the ruling regime of the state or the system of

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[67] For content regulation of printed, offline media and the Internet, see HE QINLIANG, THE FOG OF CENSORSHIP: MEDIA CONTROL IN CHINA (Paul Frank trans., 2008). For impact of the Internet on legal regulation, see Jianlan Zhu, *Roadblock and Roadmap: Circumventing Press Censorship in China in the New Media Dimension*, 30 U. LA VERNE L. REV 404 (2009).

[68] Anne S.Y. Cheung, *The Business of Governance: China's Legislation on Content Regulation in Cyberspace,* 38 N.Y. U. J. INT'L L. & POL. 11 (2006).

[69] David Bandurski, *China's Guerrilla War for the Web*, 171 FAR EASTERN ECONOMIC REV. 41 (Jul./Aug. 2008).

[70] Approved by the State Council on December 11, 1997 and issued by the Ministry of Public Security on December 30, 1997.

[71] For instance, Article 300 of the 1997 Criminal Code of the People's Republic of China (adopted at the Second Session of the Fifth National People's Congress on July 1, 1979, and revised at the Fifth Session of the Eighth National People's Congress on March 14, 1997) stipulates that whoever utilizes superstition is to be sentenced to not less than three years and not more than seven years of fixed-term imprisonment. It is a crime to subvert the government or to overthrow the socialist system under Article 105 of the Criminal Code. Articles 363 and 364 criminalize the dissemination of obscene materials.

[72] *See The Interim Provisions on the Administration of Internet Culture*, art. 17 (adopted at the ministerial affairs meeting of the Ministry of Culture on March 4, 2003 and promulgated on July 1, 2003), *available at* www.lawinfochina.com. *See also Measures for the Administration of the Publication of Audio-Visual Programs through the Internet or other Information Network*, art. 19 (adopted by the State Administration of Radio, Film and Television on June 15, 2004 and came into force on October 11, 2004), *available at* www.lawinfochina.com.

[73] For example, the forbidden content is listed under Article 17 of the *Interim Provisions on the Administration of Internet Culture* (promulgated by the Ministry of Culture, and came into force on July 1, 2003), *available at* http://www.lawinfochina.com; and Article 19 of the *Measures for the Administration of the Publication of Audio-Visual Programs through the Internet or other Information Network* (Order of the State Administration of Radio, Film and Television (No. 39), effective on October 11, 2004), *available at* http://www.lawinfochina.com.

socialism;
3. subverts state power or sabotages the unity of the state;
4. incites ethnic hostility or racial discrimination, or disrupts racial unity;
5. spreads rumors or disrupts social order;
6. propagates feudal superstitions; disseminates obscenity, pornography, gambling; incites violence, murder or terror; instigates others to commit offences;
7. publicly insults or defames others;
8. harms the reputation or interests of the State; or
9. has content prohibited by laws or administrative regulations which is not allowed to be disseminated or expressed on the Internet.[74]

In 2005, the State Council and the Ministry of Information issued jointly a new set of regulations, adding two additional forbidden categories of information:[75] "information inciting illegal assemblies, association, demonstrations, protest, and gatherings that disturb social order" and "information concerning activities of illegal civic associations."[76] In total, therefore, there are eleven forbidden subjects which cannot be discussed under Chinese regulations. Regarding the last two categories, Yang notes that these were likely added in a government attempt to target the increasing numbers of online civil organizations and the growing phenomenon of online activism.[77]

B. The Hidden Norms and the Living Law

Translating the above legal rules into practice, well-known minefields to avoid are subjects touching on the independence of Tibet, Taiwan and Xinjiang. Equally sensitive are expressions of sympathy for Falungong (the spiritual group that has been condemned by the authorities as a cult), or the June 4, 1989 Tiananmen student

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[74] The classification of information in China depends on various pieces of legislations. For an overview on media regulation, see HE QINGLIAN, HUMAN RIGHTS IN CHINA, THE FOG OF CENSORSHIP: MEDIA CONTROL IN CHINA 46–47 (Paul Frank, trans. 2008), *available at* http://www.hrichina.org/sites/default/files/oldsite/PDFs/Reports/HRIC-Fog-of-Censorship.pdf.

[75] *Provisions of the Administration of Internet Publication* (promulgated by the General Administration of Press and Publishing of the State Council and the Ministry of Information Industry on September 27, 2005), *available at* http://www.cnnic.net.cn/html/Dir/2005/09/27/3184.htm.

[76] *Id.* art. 19.

[77] GUOBIN YANG, THE POWER OF THE INTERNET IN CHINA 50 (2008).

movement.[78] The paramount "sacred" rule is that the leadership and supremacy of the CCP should never be challenged or questioned.[79]

Other than the fundamental rules laid out in the previous section, an elaborate set of weekly internal censorship guidelines were issued by the authorities to editors of the media.[80] The list of prohibited material included publication of negative news reports on the front page of newspapers or on the headline news sections of websites and reporting of the blooming of a particular flower in southern China, which has special symbolic meaning in Buddhism. In parallel to these guidelines, a group of netizens in China has set up a blog site under the name of "The Ministry of Truth," with a daily or monthly list of prohibited topics and directives issued by the Central Propaganda Department. For instance, the directive on April 20, 2010 banned the media from focusing on the rescue work carried out by Tibetan monks and nuns during the Qinghai earthquake in China[81] in which nearly 800 people had died.[82] Of course, the term, Ministry of Truth, is a reference to George Orwell's novel *Nineteen Eighty-Four,* in which the Ministry of Truth is an organ of censorship. In fact, this term is frequently used by Chinese journalists and Internet writers as a sarcastic reference to the Central Propaganda Department, the Internet Affairs Office and all other subordinate bodies involved in propaganda controls in China.[83]

With regard to our blog study, none of the bloggers had bitten the forbidden fruit of subjects related to territorial independence, Falungong, or the Tiananmen Student Movement. Yet, what is unexpected is that a few of both sets of bloggers commented on the CCP. So before we delve further into the content of the posts, it is important to have a basic understanding of the profile and characteristics of the bloggers studied, as indicated earlier.

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[78] MICHAEL S. CHASE & JAMES C. MULVENON, YOU'VE GOT DISSENT! CHINESE DISSIDENT USE OF THE INTERNET AND BEIJING'S COUNTER-STRATEGIES 33 (2002).

[79] GUOBIN YANG, THE POWER OF THE INTERNET IN CHINA 128 (2008).

[80] *What Chinese Censors Don't Want You to Know*, N.Y. TIMES, Mar. 21, 2010, *available at* http://www.nytimes.com/2010/03/22/world/asia/22banned.html.

[81] *See* MINISTRY OF TRUTH, http://zhenlibu.wordpress.com/ (last visited Apr. 25, 2010).

[82] *China Rescue Effort Builds after Qinghai Earthquake,* BBC NEWS, Apr. 16, 2010. http://news.bbc.co.uk/1/hi/8624213.stm.

[83] *Ministry of Truth*, CHINA MEDIA PROJECT, http://cmp.hku.hk/2010/04/09/5372/ (last visited Apr. 2, 2011).

IV. THE J-BLOGGERS AND THE L-BLOGGERS

A. The J-Bloggers

As mentioned earlier, judges in China are civil servants and most of them are CCP members.[84] Since 1954, every president of the Supreme People's Court has also been put in charge of the overseeing of the CCP judicial operations.[85] Though one of the vice presidencies of the Supreme People's Court are usually held by non-Party members, these individuals are carefully selected and are trusted by the CCP.[86] The 2005 Civil Servant Law, which stipulated that judges are civil servants,[87] means that judges have both administrative and judicial duties to fulfill. For instance, the Law requires all civil servants to obey and implement directions from their seniors unless those directions are against the law.[88]

Of the 42 judges who wrote blog postings, the majority (18) came from the Basic Court.[89] Over half did not reveal their rank (23).[90] Most of them came from the East,

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[84] Wu Yulian, *The Three Roles of Chinese Judges*, *supra* note 44.

[85] Suli Zhu, *The Party and the Courts*, *in* JUDICIAL INDEPENDENCE IN CHINA 56 (2009).

[86] *Id.*

[87] Article 3 of the Civil Servant Law of the People's Republic of China (adopted at the 15th session of the Standing Committee of the Tenth National People's Congress of the People's Republic of China on April 27, 2005, promulgated and came into force as of January 1, 2006), *available at* www.lawinfochina.com (last visited Apr. 26, 2010) [hereinafter Civil Servant Law].

[88] *Id.* art. 45. *See* Rouwei Sheng & Guosheng Shi, *The Newly Introduced Civil Servant Law with Fresh New Ideas*, PEOPLE'S DAILY, Apr. 25, 2005, *available at* http://news.xinhuanet.com/newscenter/2005-04/28/content_2887028.htm.

[89] Basic Court includes courts at the level of counties, towns and municipal districts. Twelve J-bloggers were from the Intermediate court, referring to courts at the level of prefectures, autonomous prefectures and municipalities, including two special maritime courts; five J-bloggers were from the High Court, referring to court at the level of provinces, autonomous regions and special municipalities; and one J-blogger was from the Supreme People's Court.

[90] For those who had revealed their rank, five were divisional chief judges of the law court; 13 were adjudicators; and one was an assistant adjudicator. The ranking of judges include the presidents, vice-presidents, adjudicative committee members, divisional chief judges, adjudicators and assistant adjudicators of the Supreme People's Court, People's Courts at various local levels, military courts and other specialist courts. *See* Judges Law of the People's Republic of China, arts. 6, 18 (adopted at the 12th meeting of the Standing Committee of the Eighth National People's Congress, and amended according to the Decision on Amending the Judges Law of the People's Republic of China adopted at the 22nd meeting of the Standing Committee of the Ninth National People's Congress of the People's Republic of China on June 30, 2001). For further discussion, see ALBERT H.Y. CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA 134–135 (2004).

that is, the coastal and affluent areas including Beijing and Shanghai.[91] Twenty-nine judges used their real name to blog, and all were male. Consequently, out of 1354 blog postings in total, 73.6% (997) were written under a real name, while 26.4% (357) used a nickname.

Judges discussed a wide range of issues: these included comments on cases handled by the blog owner or by other judges; general legal issues; and social events (Table 1). Most cases discussed had already been decided. There was no discussion of current or pending cases being handled by either the J-bloggers themselves or other judges, except in particularly controversial cases such as the *Xu Ting* case, which will be reviewed in the latter part of this article.

Table 1. Overview of Blog Content by Judges

Content	**Number of Posts**	**Percentage (%)**
Case	197	14.5%
Legal Issue	268	19.8%
Social Issue	127	9.4%
Legal Research	459	33.9%
Others	303	22.4%
Total	**1354**	**100%**

While blogging by judges may be an unusual phenomenon in common law countries, it is not unusual in China. In fact, more than half of the bloggers in this study wrote in their real names. Most of the J-bloggers were male, non-senior judges, who came from economically well-developed regions with readily available Internet access. The most popular subjects were topics related to legal research (33.6% of the postings, Table 1), which is a subject that should be relatively safe from political censorship. By

[91] Fourteen of the J-bloggers came from the East, 11 were from the West, 13 from Central region, 3 were from the Northeast, and while we are not able to ascertain the location of court of one J-blogger.

contrast, legal and social issues, which are more likely to be controversial in nature, constituted less than 30% (Table 1) of their postings.

However, on a more careful reading, it was noted that nearly 36% of the postings on legal issues were about Judicial Independence, Judicial Fairness and Judicial Reform, issues on which nearly 60% of the J-bloggers had commented (Appendix I). Though the focus of this study is not on judicial independence in China, the emphasis on judicial independence is not only helpful for understanding the pressing concerns of the J-bloggers but is also essential for our coming analysis on selected cases and stories in Part III of this paper. Judges' perception of their own independence, or the lack of it, sheds light on how they had simultaneously positioned themselves as both bloggers and judges. As explained in the Introduction of this paper, knowing one's boundary (*fencun*) and maintaining the right decorum are critical for one's survival and exercise of free speech in China.

B. The L-Bloggers

In analyzing the blog postings of the thirteen public interest lawyers, we expected the postings to be more outspoken and contentious. Surprisingly, eleven of the L-bloggers used their real names. Again all were male and were from the affluent Eastern region.[92]

Lawyers can be roughly divided into three types, which reflects the unique situation of lawyering in China. According to the newly amended *Law on Lawyers,*[93] those who have a practitioner license are allowed to practice in a law firm. Requirements for applying for the practitioner license include obeying the Constitution of the PRC, passing the National Judicial Examination, completing a one-year internship in a law firm, and being of good character.[94] This conventional type of lawyer resembles the kind found in any civil law or common law jurisdiction. Also if a person engaging in legal education and research at a university, a college, or a research institute has satisfied all the above mentioned requirements for applying for a practitioner license, the person may apply to be a part-time practitioner after obtaining approval from his or her work unit.[95] Similarly, if a person has a bachelor degree from a qualified higher-education institute, has provided professional work for fifteen years or more in an area short of law practitioners, has obtained a senior job title or equivalent title, and

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[92] Eleven of them were from the East, one was from the West, while one's location we were not able to ascertain.

[93] The Law on Lawyers (passed by the Eighth National People's Congress Standing Committee on May 15, 1996, amended firstly on December 29, 2001 and secondly on October 28, 2007; amended law took effect from Jun. 1, 2008), *available at:* http://www.npc.gov.cn/englishnpc/Law/2009-02/20/content_1471604.htm.

[94] *Id.* art. 5.

[95] *Id.* art. 12.

has knowledge in law, he or she may also apply for the lawyer's practitioner license, subject to approval from the judicial administration of the State Council.[96] This means that in Mainland China, a law professor, a law researcher, or a citizen may be allowed to provide legal services as a lawyer under certain circumstances without having passed the National Judicial Examination or serving as a law intern. In order to differentiate these practitioners from conventional lawyers, they are called academic-lawyers or citizen-lawyers, depending on their particular identity. In our study, ten of the L-bloggers were practicing lawyers, two were academic-lawyers, while one was a citizen-lawyer.

Although the above description makes it seem that one could easily qualify as a lawyer in China, in reality practicing law can be a tricky business. Before 1993, lawyers were considered to be workers of the state.[97] Though this is no longer the governing ideology, the paramount duty of lawyers in sensitive cases or collective action that involves more than ten people, as defined by the All China Lawyers Association, is the maintenance of social harmony, social stability, and economic prosperity.[98] Clients' interests would hence become secondary. Given the fact that the Association is the extension of the Ministry of Justice, its documents and guidelines have de facto binding force.[99] This can pose particular challenges to those who would like to practice criminal and public law. For example, Teng Biao, a public interest lawyer identified in this project, suggested in an article that the system of annual renewal of lawyers' licenses has effectively put many lawyers at the mercy of the authorities. This structure partly explains why so many lawyers are reluctant to take criminal or administrative cases.[100] Teng also pointed out that, though the Bar Association is supposed to protect the rights of lawyers, it is in reality a government organ under the Justice Bureau. In the same article, Teng cited an example of a lawyer who had advocated the independence of the Bar Association and the reform of its election rules—as a result, he was denied his annual law license renewal and was not permitted to work at any other office or locality. A similar punishment was meted out to two

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[96] *Id.* art. 8.

[97] LAWYERS COMMITTEE FOR HUMAN RIGHTS, LAWYERS IN CHINA 50 (1998). *See also* CHEN, *supra* note 90, 166–67.

[98]The meaning of "sensitive case" is not legally defined. *See All China Lawyers Association Amending Its Guideline on the Handling of Sensitive Cases*, CHINA NEWS AGENCY, Feb. 5, 2010, *available at* http://news.xinhuanet.com/legal/2010-02/05/content_12936276.htm (in Chinese); *Guideline on the Handling of Collective Action*, ALL CHINA LAWYERS ASSOCIATION, Mar. 20, 2006, *available at* http://www.chineselawyer.com.cn/pages/2006-5-15/s34852.html (in Chinese).

[99] *See* Ministry of Justice of the People's Republic of China, *Affiliated Association*, http://www.legalinfo.gov.cn/english/AboutMOJ/aboutmoj_2-1.htm (last visited Mar. 22, 2011) (in Chinese).

[100] Teng Biao, *A Person of the Law's Dignity Lies in Their Independence*, CHINA NEWSWEEKLY, Mar. 15, 2010, at 48 (translation in English on University of Washington's CHINALAW discussion board, Apr. 28, 2010).

other criminal defense lawyers who, in May 2010, were debarred by the authorities for representing members of Falun Gong, the spiritual group which has been condemned as an evil cult.[101] The allegation was that the lawyers had not only disobeyed the judge's prohibition against discussing the nature of Falun Gong but they had also left the courtroom before the trial had concluded.[102] Given the political reality, public interest lawyers face particular challenges before their voices can be heard. These concerns extend to blog writing as well, making it a task that requires certain political sophistication and care.

Table 2 reveals that the most popular topics for the L-bloggers were social issues (44% of the 1,995 posts). Their blog posts targeted a number of important events which occurred between 2007 and 2008, with a particular focus on public interest litigation and the development of rights protection (*weiquan*) in China. Other popular issues included the relation between democracy and the Beijing Olympic Games; the Sanlu milk powder scandal, in which around 300,000 children fell ill with kidney stones and other complications caused by the toxic chemical melamine; a further scandal in the Shanxi brick kiln in which young boys had been kidnapped and forced into slave labor (see Appendix III for a full list). In the subsequent legal discussions, all the thirteen L-bloggers wrote about the lack of judicial independence in China and the lack of rule of law. Similar to the J-bloggers, many of the L-bloggers (eleven) expressed great concern about their own profession. As we saw earlier, while many judges commented on the need to promote judicial independence, the lawyers emphasized concerns about their professional independence.

Table 2. Overview of the Blog Contents by Lawyers

Content	**Number of Posts**	**Percentage (%)**
Case	151	7.6%
Legal Issue	595	29.8%
Social Issue	880	44.1%

[101] They are Tang Jitian and Liu Wei. *See* Alexa Olesen, *2 China Rights Lawyers Slapped with Lifetime Ban,* ASSOCIATED PRESS, May 8, 2010, *available at* http://www.newsvine.com/_news/2010/05/08/4257065-2-china-rights-lawyers-slapped-with-lifetime-ban.

[102] Jerome A. Cohen & Yu-Jie Chen, *Don't Argue*, SOUTH CHINA MORNING POST, Apr. 29, 2010, *available at* http://www.cfr.org/china/dont-argue/p22007.

Legal Research	103	5.2%
Others	266	13.3%
Total	**1995**	**100%**

V. THE GAME OF SILENCE AND VOICE

A. Topics Completely Off-Limits: The Censored Posts of L-Bloggers

From the coming analysis, it is clear that both judges' and lawyers' blogs have underlying themes of advancing social harmony, which in fact parallels the official rhetoric. Both groups are eager to implement reforms within the law and to make those changes within lawful parameters. What marks the distinction, shown earlier, between the two sets of blogs is that only the lawyers were censored—on the order of twenty-five posts—by removal notification had been sent by the Internet service providers (ISPs). This number may look insignificant in comparison with the total number of postings, but these examples of censorship cast a long dark shadow over the blogs. These examples say much about the tolerance level of the authorities and the extent to which L-bloggers were willing to go to stretch the boundaries of free speech. What is more, the actual number of posts censored is likely to be more than twenty-five because our study only counted the number of removal notifications given by ISPs. For instance, one L-blogger protested that at least fifty-nine of his posts had been censored by Sohu.com and Sina.com.[103] Furthermore, of the most censored posts, six were criticisms on Internet censorship by those ISPs—they would allow the expression of foul language but not rational debate on serious topics like the relation, indicated earlier, between the Olympics and democracy, and the abuse of police power. Of the remaining censored posts, seven were about a case known as the *Yang Jia* case, three were about aforesaid allegations of abuse of police power, and three were about the call to end death penalty. The rest were on single isolated topics.[104]

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[103] The blog post was written by Liu Xiaoyuan (2008). *See* Liu Xiaoyuan, *Sohu Blog Got Tightened, A Massive Cleansing on Postings*, LIU XIAOYUAN'S BLOG (Oct. 25, 2008, 20:32), http://blog.sina.com.cn/s/blog_49daf0ea0100bao0.html (in Chinese). Liu protested that his postings about the *Yang Jia* case had been deleted by the ISPs. The *Yang Jia* case will be discussed in part IV of this paper.

[104] The topics were as follows: the Olympics and democracy, a conflict between local authorities and residents, a corruption case involving a senior official in Shanghai, the relation

The censorship of only lawyers' posts suggests that the lawyers had failed to master the art of *fencun*. Evidently, public interest lawyers had forgotten the proper decorum for the exercise of free speech. Sadly, one illustrating example is that of He Weifang, one of the L-bloggers in this study. He was an eminent professor at the prestigious Peking University and known for his outspoken, sharp, and humorous comments against the authorities.[105] But in 2009, He was removed from this teaching position and instead sent to the little-known Shihezi University in Xinjiang (the northwest of China) for two years.[106]

There are many possible reasons why He was punished in this way. At least, given that his posts that were censored, He had probably violated the cardinal rule of blog writing in China that one could be contentious but not confrontational. Well-known for his stance against capital punishment, He's arguments on the abolition of the death penalty were allowed to be published,[107] but the posts in which he "called' for others to join him in his fight were censored.[108] However, it was not only his blog posts in which He seemed to overstep the boundary set by the ruling regime. It is generally believed that when He joined 303 other Chinese academics and commentators, in signing the Charter 08, it sealed his fate as an exile.[109] The Charter listed the failings of the Communist rule in China and called for radical political reforms including the end of the one-party rule of the Communist Party leadership. The Charter's leading architect, Liu Xiaobo, was sentenced to eleven years imprisonment for inciting subversion against the state,[110] whereas He was exiled.

In his work on online activism in China, Yang reminds us again that, undoubtedly, contention exists in various forms and degrees.[111] In the eyes of the Chinese authorities, registering a mere note of disagreement is different from organizing a petition, or from organizing collectively to challenge the leadership of the

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of privatization and corruption, the election result of the Central Committee, and last, an unexplained title of "The Bright Dance in the Dark."

[105] Peter Foster, *Leading Chinese Dissident Claims Freedom of Speech Worse than Before Olympics*, TELEGRAPH, Apr. 27, 2009, http://www.telegraph.co.uk/news/worldnews/asia/china/5230707/Leading-Chinese-dissident-claims-freedom-of-speech-worse-than-before-Olympics.html.

[106] *Id.*

[107] He Weifang, *Public Opinion Determining Death Penalty? A Reply to Southern Metropolis Weekly Journalist Chen Jianli,* HE WEIFANG'S BLOG (Apr. 20, 2008, 23:48), http://blog.sina.com.cn/s/blog_4886632001009bmy.html (in Chinese).

[108] He Weifang, *A Group of Photos, As Chilling as Three Winters,* HE WEIFANG'S BLOG (Nov. 1, 2007, 14:47), http://blog.sina.com.cn/s/blog_4886632001000c5d.html (in Chinese).

[109] *Id.*

[110] *Chinese Dissident Liu Xiaobo Jailed for Subversion,* BBC NEWS, Dec. 25, 2009, http://news.bbc.co.uk/1/hi/world/asia-pacific/8430409.stm.

[111] YANG, *supra* note 9, at 4.

Chinese Communist Party (CCP)—inciting collective action is a sin not easily pardoned.[112] He, in making a bold move by violating both, was inevitably banished.

B. Covering a Sensitive Topic: Criticizing the Chinese Communist Party

If we assume that the Chinese Communist Party leadership is of a high enough order not to be challenged, it becomes more intriguing to note that both the judges and lawyers in this study managed to have their voices heard while commenting on the leadership of the CCP.

Of the 395 posts written by judges,[113] five touched on the topic of the CCP, and none was written in a critical or negative tone. Rather, all of them praised the positive efforts of the Party. However, perhaps the most interesting piece from our perspective is that of an anonymous judge, using the pen name of A Seeker[114] (Qiu Suozhe), who, responding to the official rhetoric of social harmony, wrote that the best way to enhance social harmony and the effective rule of the CCP was to build a society which abided by the rule of law and to strengthen the effectiveness of the judiciary.[115] The piece was carefully crafted. The tone remained positive. It began by saying "[f]ostering social harmony under socialism is a noble goal of the Party . . . to strengthen the leadership of the Party is fundamentally essential."[116] After reaffirming the Party's leadership and echoing the official rhetoric of social harmony, the J-blogger continued,

> President Hu Jintao has pointed out that the harmonious society of socialist style that we need to build is a society of democracy, governed by rule of law, fairness and justice, sincerity and benevolence, vibrancy, stability and order . . . In other words, the harmonious society that we need to build is a society of rule of law.[117]

On rule of law, the J-blogger listed the three criteria to be (i) all decision makers should be bound by law; (ii) all decisions should be based on legal principles; and (iii) all decisions should comply strictly with legal procedures.[118] The post neither said anything negative about the CCP nor used any Western concepts of judicial

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[112] *Id.*

[113] The total number of postings written by judges were 1354. Only 395 posts written on the topics of legal and social issues were selected for content analysis and in depth studies.

[114] Posting of A Seeker (Qiu Suozhe), *Enhancing the Leadership of the Courts for the Promotion of Social Harmony, A Perspective from Judicial Capability*, LAW BLOG: QIU SUOZHE (Nov. 5, 2007, 12:29), http://blog.chinacourt.org/wp-profile1.php?p=81807&author=12476 (in Chinese).

[115] *Id.*

[116] *Id.*

[117] *Id.*

[118] *Id.*

independence or separation of powers. Rather, it suggested that, in order to reinforce the CCP's anti-corruption efforts, there needed to be an efficient and effective judiciary that the people could trust. Reading between the lines, we find the message that a genuine harmonious society will not exist until China has an independent judiciary, ready to tackle corruption problems committed by powerful CCP members who often ignore the law.

In parallel, out of the 661 posts written by the L-bloggers and selected for further analysis,[119] only seven touched on the subject matter of the CCP. Two posts were clearly written in a positive tone, supporting the one-party rule of the CCP and arguing that single-party rule was necessary from a historical perspective and for the stability of the country. An anonymous writer in a letter, whom one L-blogger quoted, said "I still think the Party's interest should be supreme. This is the outcome of recent historical development in China, and the recent development in our country."[120] He argued that "It is indeed true that the ultimate goal of societal development is to protect the people's interest but we need a means. In China, we have leadership of the Party, in the West, they have constitution and the rule of law." If there is a conflict of interests between the Party and the people, the writer argued, the Party should prevail because "without the Party, people's interests are empty." The L-blogger did not comment on the letter but only said he hoped this would raise awareness by publishing the letter.[121] Many replied with sarcastic comments.[122]

Another L-blogger named Legal Knight (Faxiaye) praised the CCP, but criticized certain CCP members.[123] He started one post by saying that the message by the Central Political Bureau in 2008 had significant meaning to the Party and the country from a historical perspective.[124] On the issues of the leadership of the CCP and its executive position, in his opinion, some people had wasted the efforts of the CCP in the "removal of the three big mountains" (referring to imperialism, feudalism and authoritarianism). He asked, "is it still necessary to be lenient to give another chance of 'education' to those members, especially those corrupted Party members, who have benefitted for so many years from the education and training of the Party?" From the above perspective, the two blog posts by L-bloggers who seemingly praised the CCP

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[119] In total, there were 1995 blog posts written by the L-bloggers. Only 661 touching on social and legal issues were further analyzed.

[120] Posting of Old Crane (He Weifang), *A Letter,* HE WEIFANG'S BLOG (Sept. 12, 2008, 11:29), http://blog.sina.com.cn/s/blog_488663200100aym5.html (in Chinese).

[121] *Id.*

[122] *Id.*

[123] The blogs of Legal Knight can be viewed at http://blog.chinacourt.org/wp-profile1.php?author=11816.

[124] Posting of Legal Knight, *Suggestions for the Big Discussion of Political Legal Team*, LAW BLOG: LEGAL KNIGHT (Mar. 21, 2008, 19:44), http://blog.chinacourt.org/wp-profile1.php?p=93845&author=11816 (in Chinese).

have hidden messages. The first piece begs us to reflect on the rationality of supremacy of the Party, and the second piece is in fact a harsh criticism of CCP members.

The other five pieces criticized the CCP's governance; three of these pieces were written by Legal Knight. Regardless of whether the L-bloggers were either praising or criticizing the CCP, only two posts were written using real names. Yet, surprisingly, those posts did not heap praise on the ruling party. There is a Chinese saying: challenging the powerful is a business as risky as "striking a flea on the tiger's head."[125] So in the context of this study, how did the L-bloggers attempt to strike the flea? Those who criticized the CCP seemed to arrive at their criticism in a roundabout way, taking plenty of time to discuss seemingly non-relevant issues. For instance, they talked about the problem of corruption, the style of a famous CCP leader in convening meetings, or the concept of legitimacy in Max Weber's literature.[126] Bloggers would often choose to offer advice midway or toward the end of their discussions, for example, suggesting that not tackling the problem of corruption satisfactorily would amount to a form of political suicide for the CCP. In another example also analyzing the problem of corruption, one of Legal Knight's posts attributes corruption to the fact that corrupt party members were disciplined not by courts, but by the CCP.[127] In other words, the CCP had put itself above the law by rejecting accountability through the court system. In yet another piece written by Legal Knight on the issue of rule of law, he reiterated the argument that the CCP should abide by the constitution; but he was also cautious to point out that when Peng Zhen was the chairman of the Standing Committee of the National People's Congress (NPC), he always started national meetings by reading aloud Article 57 of the Constitution, which states that the NCP is the highest legislative body in the country,[128] and thereby implying that no one, including the CCP, should be above the law. Legal Knight's reference to Peng's invocation of Article 57 seems to couch his criticism in a traditional, accepted principle. A different piece written by Liu Xiaoyuan

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[125] Perhaps a close English equivalent is "a bold mouse to nestle in a cat's ear."

[126] *See* Posting of Fan Yanfeng, *From Self-Withdrawal to Self-Defence: A Discussion on Why the "Three Supremes" Are Worrying*, THE CHINESE THEOLOGY BLOG OF FAN YANFENG (Sept. 15, 2008, 17:28), http://blog.sina.com.cn/s/blog_53921dbb0100b0ws.html (in Chinese) (discussing the evolution of societies and exploring the concepts of legitimacy and authority in the Chinese society context with reference to the survival of the CCP).

[127] Posting of Legal Knight (Faxiaoye), *If the Officials Do Not Have 'Double Rules', Will the Procurators Dare to Investigate?*, LAW BLOG: LEGAL KNIGHT (Sept. 4, 2008, 19:05), http://blog.chinacourt.org/wp-profile1.php?p=107317&author=11816 (in Chinese).

[128] Posting of Legal Knight (Faxiaoye), *The Opening Speech of Peng Zheng*, LAW BLOG: LEGAL KNIGHT (Sept. 24, 2008, 21:27), http://blog.chinacourt.org/wp-profile1.php?author=11816&p=109040 (in Chinese).

also discussed the problem of corruption.[129] It started by praising the CCP for disciplining sixteen senior members over five years, but it ended with questioning why China has such an endless supply of corrupt party officials. The answer, according to Liu, was due to the monopoly of power held by the CCP, devoid of any effective system of checks and balances.[130]

Again, it comes as no surprise that the comments on the CCP were never pitched in a brash tone. Bloggers kept a careful distance from any direct mention of a sensitive subject matter by taking the kind of subtle detours on other issues described above before addressing the core matter of CCP leadership. In this way, they seemed to attempt to hold in check contentious impulses and to thereby avoid confrontation. Despite this obvious restraint, the attempt to temper the supreme rule of not challenging the CCP is in itself a cause of triumph in the exercise of free speech.

C. A Tale of Two Cases

Moving away from the center of the warring zone, the discussion will now focus on those grey areas that are outside forbidden territory. This is where bloggers are unlikely to know whether they are overstepping the boundary of free speech. In order to illustrate the intricacies of the game, two controversial legal cases in 2007 have been selected for comparison with material that bloggers would freely discuss and topics that would make bloggers exercise restraint. We will see that in the *Xu Ting* case, both the J-bloggers and L-bloggers felt confident to freely comment on the case, while in the other story of *Yang Jia*, only one J-blogger posted a comment on the case. One possible explanation is that the targets of public criticism in the first case were the banks and the judiciary, while the targets in the second case were the police and the CCP. Though the first case had wide economic and social implications, the second case was loaded with political sensitivity.

1. The Case with Economic and Social Significance: Xu Ting and the ATM Machine

Xu Ting was a young man, who gained a windfall from a faulty ATM machine and was subsequently sentenced to life in prison. In 2006, Xu went from the north of China to work as a security guard in the southern province of Guangzhou. One day Xu discovered that for every 1000 yuan he withdrew from the bank ATM machine, his bank statement only recorded a deduction of 1 yuan. Thinking this was his remarkable good luck, as he only had 170 yuan in his account, he completed 171 transactions, withdrawing in total the amount of 174,000 yuan (approximately US$24,000). He shared this secret with his good friend and then fled the south. After

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[129] Posting of Liu Xiaoyuan, *On the Issue of Corruption, Focus Should Not Merely be on the Number of Corrupted Officials Dismissed*, LIU XIAOYUAN'S BLOG (Aug. 20, 2007, 8:58), http://blog.sina.com.cn/s/blog_49daf0ea01000b30.html (in Chinese).

[130] *Id.*

a year of escape, he turned himself in to the Guangdong police, and was duly charged. In the first trial in November 2007, the Guangzhou Intermediate People's Court sentenced Xu to life imprisonment under Article 264 of the Criminal Code, which states that anyone who steals an extraordinary large amount of property from a financial institution will face life imprisonment. The general understanding on judicial sentencing at that time, in fact based on a ten-year-old guideline, was decided that any amount between 30,000 and 100,000 yuan was considered to be an extraordinary large amount.[131]

The sentence sparked a public outcry in the media and on the Internet and struck an immediate chord with many who perceived it to be grossly unjust. Many in the public viewed the case as an example of courts sternly punishing the little guy while letting off the powerful.[132] This sentiment was especially pronounced in relation to the relatively light sentences given to government officials, including the former head of Shanghai's social security, who was sentenced to a mere eighteen years of imprisonment despite his involvement in corrupt activities, as well as those officials found guilty in the Shanxi's brick kiln slavery scandal who only received three years imprisonment.[133] It was against this background of lenient sentences for government officials that there was an outpouring of public sympathy for Xu, whom the public seemed to view as a subject of human frailty who had acted as many people would in a similar situation. Many also pointed out that the bank should bear part of the responsibility for having a faulty ATM system.[134]

However, within a month, Xu's trial experienced a dramatic turn. In December 2007, the Guangzhou Provincial High People's Court directed the Intermediate People's Court to hold a retrial. In March 2008, a new sentence of five years was handed down to Xu. Gan Zhengpei, the presiding judge of the case, noted that media and public opinion had been taken into consideration in sentencing.[135] The Court justified the reduction in sentence by emphasizing that Xu's offence was not pre-meditated.

Between the time of first sentencing and the second trial, legal debate on the Internet was robust. Eight lawyers had filed petitions to the National People's Congress (the highest legislative body in China) in January 2008, asking for an amendment to the

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[131] Tze-wei Ng, *Ugly Reality Puts Paid to Talk of Rule of Law; Miscarriages of Justice Mock Official Rhetoric*, SOUTH CHINA MORNING POST, Feb. 2, 2008, at 7.

[132] Posting of He Weifang, *Xu Ting Case: Judges Can Reason,* HE WEIFANG'S BLOG (Jan. 24, 2008, 14:22), http://blog.sina.com.cn/s/blog_4886632001008iaa.html (in Chinese).

[133] Tze-wei Ng, *supra* note 131.

[134] Posting of Xia Zhiyang, *Tough Law Will not Help Building Civility*, JUDGE XIA ZHIYANG'S BLOG (Dec. 26, 2007, 11:40), http://www.bloglegal.com/blog/cgi/shownews.jsp?id=1450004541 (in Chinese).

[135] Fiona Tam & Tze-wei Ng, *Life Sentence for ATM Withdrawal Cut to Five Years*, SOUTH CHINA MORNING POST, Apr. 1, 2008, at 7.

Criminal Code regarding the particular article at issue.[136] In our study, there were four blog postings on the Xu case from four different J-bloggers and ten postings from four L-bloggers. The discussion was rational, often with detailed legal analysis.

One judge wrote about the danger of turning public opinion into a media trial, and gave his own opinion about the relevant law despite being fully aware that the retrial was pending.[137] The J-blogger argued strongly against using public opinion as a benchmark.[138] Instead, in his opinion, Xu Ting should be guilty of theft. The remaining issue was whether the sentence was too harsh.[139] If that was the case, he believed the best solution was to ask the Supreme People's Court to exercise its discretion under the Criminal Code to reduce the sentence.[140] Interestingly, another judge called for a halt in discussion about a case, reminding his colleagues and other lawyers that a trial was scheduled.[141] The other two posts by J-bloggers followed similar lines, with one expressing the dangers of a media trial and of the impropriety of senior judges expressing their views on the *Xu Ting* case while a retrial was pending.[142] The last post by a J-blogger was a legal discussion, exploring the possibility of holding Xu responsible only for civil liabilities to the bank.[143]

Similarly, the postings by L-bloggers on the *Xu Ting* case were also geared toward a legalistic tone, exploring in detail various legal provisions of the Criminal Code. Notwithstanding this legalistic focus, the distinctive feature of the L-bloggers' posts, which set them apart from the J-bloggers' posts on the same issue, was that the L-bloggers' criticisms were often directed at the judiciary. For instance, He Weifang wrote about the slavish technical interpretation of legislation by judges, and viewed the sentence as reflecting the judiciary's stubborn belief that tough law was the best way to rule.[144] He pushed the argument further, maintaining that this judicial culture was due to historical and institutional constraints, which often led to inconsistency

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[136] Tze-wei Ng, *Worker Given Life Sentence for ATM Windfall May Get Retrial*, SOUTH CHINA MORNING POST, Jan. 19, 2008, at 4.

[137] Posting of Zhang Tianning, *The Cold Law and Its Sensible Implementation – My Opinion on the Xu Ting Case*, JUDGE ZHANG TIANNING'S BLOG (Jan. 27, 2008, 11:14), http://www.bloglegal.com/blog/cgi/shownews.jsp?id=1500006943 (in Chinese).

[138] *Id.*

[139] *Id.*

[140] *Id.*

[141] *See* Posting of Liuyunwuhen, *Silence! Silence! Please Give Xu Ting Case a Peaceful Judicial Environment*, LAW BLOG (Feb. 29, 2008,14:42), http://blog.chinacourt.org/wp-profile1.php?p=92131 (in Chinese). Liyunwuhen is a pen name, meaning "floating clouds without leaving any traces."

[142] Posting of Gao Yifei, *A Clarification on the Misunderstanding of 'Media Trial'*, LAW BLOG (Mar. 19, 2008, 21:32), http://pzx.fyfz.cn/art/325267/htm (in Chinese).

[143] Posting of Xia Zhiyang, *supra* note 134.

[144] Posting of He Weifang, *Xu Ting Case: Judges Can Reason,* HE WEIFANG'S BLOG (Jan. 24, 2008, 14:22), http://blog.sina.com.cn/s/blog_4886632001008iaa.html (in Chinese).

and unpredictability of judicial interpretations of the law.[145] Similarly, Legal Knight also evaluated the mechanical way of interpreting law and sentencing,[146] while Xu Zhiyong lamented the failure, over a period of ten years, to make progress toward judicial reform or to bring any significant changes in China.[147]

2. The Case with Political Ramification: Yang Jia—The Police Killer that Won Public Sympathy

An equally sensational case in the same period was the *Yang Jia* case, but the outcome for Yang was markedly different; it was a case on which few dared to comment. In 2008, Yang Jia was twenty-eight years old. He had been brought up in Beijing by divorced parents and lived with his mother for most of his life. On July 1, 2008, armed with a long knife of twenty-eight centimeters, he arrived at a Shanghai police station. According to the official version of events, Yang had tear gas, hammers, a hiking stick, plastic gloves, and eight gasoline-filled beer bottles with him. He started a fire at the front gate of the police station, slipped inside, and stabbed six police officers to death; he climbed twenty floors in five minutes, seriously wounded four more police officers before finally being held down by seven other police officers.[148] Yang was convicted of murder and was executed by lethal injection in November of the same year.

Nevertheless, this seemingly brutal story won much public sympathy for Yang. The public discovered from Yang's blogs that he was an unemployed former supermarket clerk, with many popular hobbies like hiking, reading, and photography.[149] More to the point, the public found that Yang had previously been a victim of police abuse. Two years before the murder, Yang had been badly beaten by policemen in Shanxi province where he was accused of jumping a line in a train station. For this, Yang lost three teeth and sustained a concussion. A year later in Shanghai, Yang was falsely accused of stealing a bicycle that he had rented. Again, he was beaten and insulted by the police. Eventually, Yang got some meager compensation of $210 without any

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[145] *Id.*

[146] Posting of Legal Knight (Faxiaoye), *The Turning Point and the Future of the Xu Ting Case*, LAW BLOG: LEGAL KNIGHT (Jan. 11, 2008, 21:06), http://blog.chinacourt.org/wp-profile1.php?p=88286&author=11816 (in Chinese).

[147] Posting of Xu Zhiyong, *Reflections on 10 Years Reform by Xiao Yang*, XU ZHIYONG'S BLOG (Mar. 11, 2008, 23:38), http://blog.yam.com/xuzhiyong/article/23267434 (in Chinese).

[148] Maureen Fan, *Confessed Police Killer Lionized by Thousands in China: Crime Seen as Blow Against Oppression,* WASH. POST, Nov. 14, 2008, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/11/13/AR2008111304384.html.

[149] Yang Jia has set up two blogs in MySpace and Sohu [http://club.sohu.com/read_user.php?userCN=feichanglvcheng@sohu], but the latter has been shut down. For old files, see http://hi.baidu.com/jubuyi/blog/item/d5c522f3c54f0455342accf0.html (last visited Apr. 15, 2011).

explanation or apology. He refused to take the money and filed numerous complaints against the police officers involved but to no avail.[150]

Interactions with the police have often proved to be a frustrating problem for many people in China. People are often aggravated by the police's heavy-handed tactics and see the police as the ruthless instrument of the ruling regime. Understandably, many viewed Yang's act to be more than a mere act of violent revenge against the police, but as a potentially heroic act of resistance. They saw him as a loner, risking his own life, to fight for justice. More than 4000 people signed an online open letter urging that Yang's life be spared; the letter was quickly taken down by the website host.[151] Hundreds of protesters gathered outside the court room during Yang's trial to support him, carrying signs that read "Long Live the Killer," and "Down with the Communist Party."[152]

Other than capturing the pent-up anger and helplessness of many citizens at the hand of the police, the Yang case exposed the numerous procedural irregularities in the criminal justice system in China. First, Yang's defense lawyer (appointed by the government), Xie Youming, had previously worked closely with the local police force, and was a consultant to the local government at that time.[153] Thus, an obvious conflict of interest existed. Second, Yang's mother was detained by the police shortly after Yang's arrest and was confined to a mental hospital until Yang's execution, so she never had a chance to comfort or to say farewell to her son.[154] The detention of Yang's mother was apparently done in the name of assisting the police investigations; however, she was never called to be a witness in court, despite the fact that she was the most likely source of information on the mind and motivation of Yang Jia. Third, Yang's father was not allowed to hire an independent lawyer for his son's trial, and he was only allowed to visit his son once during the entire legal process;[155] it was only in the appellate stage that Yang was represented by independent lawyers hired by his father.[156] Fourth, although the trial was supposed to be conducted in open court, it

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[150] Fan, *supra* note 148.

[151] *Id.*

[152] *Id.*

[153] Zhang Hong, *Chronicle of a Death Foretold*, GUARDIAN, Sept. 5, 2008, *available at* http://www.guardian.co.uk/commentisfree/2008/sep/05/china.humanrights.

[154] Yang Jia's mother, Wang Jingmei, has detailed the account in her blog. *See, e.g.*, Posting of Wang Jingmei, *31st October 2008: Detention, Judges, Credibility, Lies*, WANG JINGMEI'S BLOG (Oct. 31, 2009, 18:30), http://blog.sina.com.cn/s/blog_5f5b1f210100fvve.html (in Chinese). Apparently, some of the posts by Wang have been removed. *See* Wang Jingmei, *Where Are My Blog Posts?,* WANG JINGMEI'S BLOG (Aug. 28, 2009, 22:27) http://blog.sina.com.cn/s/blog_5f5b1f210100ewkl.html (in Chinese).

[155] David Barboza, *Police Officers' Killer, Hero to Some Chinese, Is Executed*, N.Y. TIMES, Nov. 27, 2008, at A18, *available at* http://www.nytimes.com/2008/11/27/world/asia/27shanghai.html.

[156] *"Yang Jia Attacked Police Case" Still Waiting Result from the Appellant Court,* BBC NEWS, Oct. 13, 2008,

was conducted through closed door hearings at the trial stage, and at the appellate stage all the seats in the court room were reserved for family members of the police. Not even the official media had access to report on the case.[157]

As the case progressed, sensitivity intensified and comments on the Internet were censored. One person who posted a message questioning what drove Yang into such a state of rage and madness was arrested for disseminating false information and had his note quickly removed.[158] The writer had suggested that the Shanghai police's handling of Yang's case was utterly flawed and that the police had falsely accused him of stealing a bicycle.[159]

This climate of censorship seemed to extend to legal discussion as well. The judges' and lawyers' blogs showed that only one judge (out of forty-two J-bloggers) had posted a comment on the *Yang Jia* case.[160] It was not, in fact, his own writing but a copy of another blog post by an anonymous lawyer praising the authorities' handling of the *Yang Jia* case. It argued that, in the interest of the CCP, the public, and the Constitution, it was necessary to deal with the case swiftly and behind closed doors in order to keep stability and maintain a good image of both the CCP and the police. In contrast, of our thirteen L-bloggers, four had written about the case, but some of their posts had been censored. As mentioned earlier in our discussion of censored posts under Part II, out of the twenty-five removal notices sent by the ISP, seven were related to the *Yang Jia* case; one L-blogger, Liu Xiaoyu, protested that of the posts he wrote on *Yang Jia*, at least fifty-five posts had been removed.[161]

Liu himself was heavily involved in the *Yang Jia* case; he was one of the eight lawyers who traveled to Shanghai to offer his free legal assistance to Yang's father.[162] Indeed, the case had caused a huge outcry from the legal profession. Sixteen lawyers from eight different law firms in Beijing jointly petitioned the Central Judiciary, the

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http://news.bbc.co.uk/chinese/simp/hi/newsid_7660000/newsid_7666700/7666791.stm.

[157] Posting of Teng Biao & Xu Zhiyong, *Comment from Gongmeng: Only Wish Procedural Justice Could Start from the Yang Jia Case,* BANNED POSTS (Sept. 5, 2008), http://live1984.tumblr.com/post/477147066 (in Chinese) (reposting of a banned post).

[158] *Id.*

[159] Hong, *supra* note 153.

[160] *See* Posting of Cengjinshiren, *The "Three Supremes" in Yang Jia Case – My Own Reflections,* PENG ZHIXIN'S BLOG (Nov. 3, 2008, 10:50), http://pzx.fyfz.cn/art/398251.htm (in Chinese). Cengjingshiren is a pen name, meaning "Once A Poet." Though the judge uses a pen name, he uses his full name as his blog title and has put his photo on his blog. The real identity of this J-blogger is Judge Peng Zhixin from Hainan province. The original piece was written by one under the name of "Internet Lawyer" (in Chinese), at http://www.fatianxia.com/blog/48669 (in Chinese).

[161] Posting of Liu Xiaoyuan, *Sohu Blog Got Tightened, A Massive Cleansing on Postings*, *supra* note 103.

[162] Xu Zhiyong, *Reflections on 10 Years Reform by Xiao Yang*, *supra* note 147.

Shanghai Judicial Bureau, China All Lawyers Association and the Shanghai Lawyers' Association urging the government-appointed defense counsel to resign and asking for transparency and openness at the trial.[163]

In any event, twenty-seven posts on the *Yang Jia* case were available, although some of the posts that were censored from the lawyers' blogs were re-posted by others and could be retrieved at a later stage, consequently making it hard to determine the exact number of posts on the *Yang Jia* case that were censored. In comparing the twenty-seven posts that were easily found with the isolated number of posts that had been censored but later retrieved, we discovered that those posts chronicling the details of the *Yang Jia* case and the legal fight attempted by the civil rights lawyers had been removed. However, the posts discussing the mental state of Yang Jia were freely circulating on the Internet, which might be puzzling from a Western perspective. If Yang Jia had been diagnosed as suffering from a mental disorder, his execution would have been inappropriate.[164] At the very least, the authorities should have arranged for a psychiatric examination of his mental state. These arguments might hold true, but from the perspective of the ruling regime, they could be unacceptable. In fact, there was a reference to the *Yang Jia* case earlier in the section on the single post uploaded by a J-blogger: he had copied a piece pointing out that if Yang was in full mental health, he should be executed for intentional killing.[165] On the other hand, the J-blogger further argued, if he was suffering from a mental illness, he would no longer be considered as a member of the community, in which case he would be executed anyway.[166] The author even quoted from a government psychologist saying that Yang Jia would strike and kill sooner or later. If that were true, the author argued, the logical decision to execute Yang was the inevitable solution.[167] It is hard to conclude that this was the official stance, but the fact that this view was re-posted by a judge might have reflected a hint of judicial endorsement.

Also, the general silence from the forty-one other J-bloggers could show that they were exercising self-censorship or that they supported the way the case was handled. Significantly, while our J-bloggers felt at ease to comment freely on the *Xu Ting* case, they were clearly more cautious regarding the *Yang Jia* case. Even though both cases were controversial, the *Yang Jia* case, involving an allegation of police abuse of power, was about challenging the police force, an agency closely allied to the ruling regime and one on which the authorities have to rely to keep their power. In stark contrast,

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[163] Posting of Teng Biao, *An Open Letter from Fujian Lawyer Wang Liping Urging Lawyer Xie Youming to Resign from the Yang Jia Case*, BANNED POSTS (Aug. 4, 2008), http://live1984.tumblr.com/post/477165487 (in Chinese) (reposting of a banned post).

[164] Guo Zhiyuan, *Approaching Visible Justice: Procedural Safeguards for Mental Examinations in China's Capital Cases*, 33 HASTINGS INT'L & COMP. L. REV. 21 (2010).

[165] Cengjinshiren, *The "Three Supremes" in Yang Jia Case – My Own Reflections*, *supra* note 160.

[166] *Id.*

[167] *Id.*

the *Xu Ting* case was about a fight against a capitalist commercial bank and implied criticism against the judiciary. The case also involved a rigid technical interpretation of the legislation, which could have been interpreted in a more lenient manner: thus, there was room for negotiation and public discussion about leniency for Xu.

VI. CONCLUSION

In the exploration of online free speech in China, this investigation has followed a dusty road but one where there is often a flash of hope. The judge and lawyer bloggers have to reinvent themselves constantly, reassessing their positions while the concept and rules on acceptable behavior and speech are in a state of flux.

In this dynamic process, the bloggers in this study often involve public opinion. In adding to the interplay between the virtual and real worlds, both groups of actors have been keen to engage with the law and with legal values in their blogs, hoping not only to appeal to their fellow judges and lawyers but also hoping to appear to be less contentious and to resonate strongly with the public.

Though the bloggers may not win in every round of contention and though China is far from attaining the standard of rule of law, the notion of law, in itself, has provided a guiding principle to which one can aspire. Law, in this context, may merely mean rule by law—as in the assumption that citizens should be governed by law; however, it may also mean all the virtues of law embodied in the prized concept of the rule of law—such as accountability, fairness, and justice.[168] The critical point is that all actors, including the authorities, should be bound by the law in both substance and spirit. So, if the bloggers have to speak and act with decorum, *fencun*, their reference to legal principles has provided a yardstick for all to measure how far the ruling regime has stepped outside the boundaries of the law. This is not an easy task to achieve, let alone to do without aggravating the other side. While the L-bloggers in this study were often contentious and adversarial, the J-bloggers were relatively tempered and moderate. In a sense, the latter group has been exercising a balancing and pacifying effect on this volatile attempt to build a stronger, fairer legal regime.

Throughout this analysis, the emphasis has been on the need for bloggers to be careful, so as not to be perceived by the regime as confrontational. This remains a complex and nuanced struggle for both rulers and bloggers, with neither side gaining easy success nor complete failure. It seems that the L-bloggers especially are attempting to fulfill their roles as public intellectuals speaking truth to power and serving as witnesses to social activity and events. These writers represent the

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[168] *See* JOSEPH RAZ, *The Rule of Law and its Virtue*, *in* THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 210, 214–218 (2d ed. 2009).

persistent dissenting voices that challenge authority and discern possibilities for active intervention.[169] With the help of the Internet, they are keeping the Law center stage.

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[169] Edward W. Said, Professor of English & Comparative Literature, Columbia Univ., Deakin Lecture delivered in Melbourne: The Public Role of Writers and Intellectuals (May 19, 2001) (transcript available at http://www.acij.uts.edu.au/archives/profprac/PublicRoleofWriters.pdf).

APPENDIX I

Legal issues Discussed by J-Bloggers

	Number of Posts ***(% of Posts)***	**Number of New Subjects** ***(% of Posts)***	**Number of Judges Uploading Posts** ***(% of Posts)***
Judicial Independence, Judicial Fairness & Judicial Reform	96 *(35.8%)*	68 *(31.5%)*	25 *(59.5%)*
Court Structure & Court Reform	36 *(13.4%)*	33 *(15.3%)*	14 *(33.3%)*
Judicial Corruption	5 *(1.9%)*	5 *(2.3%)*	4 *(9.5%)*
Judges' Professional Ethics, Competence & Image[170]	52 *(19.4%)*	39 *(18.1%)*	18 *(42.8%)*
National Judicial Examination & Selection of Judges	8 *(3%)*	8 *(3.7%)*	6 *(14.3%)*
Judges' Salaries & Benefits (& Shortage of Judges)	9 *(3.4%)*	6 *(2.8%)*	4 *(9.5%)*
Relationship between Judges, Lawyers & Legal Scholars	13 *(4.9%)*	9 *(4.2 %)*	5 *(11.9%)*

[170] Professional ethics refer largely to the professional conduct and code. Professional competence refers to the issue of legal qualification. Before 1983, it was not necessary for judges to have legal training. Judges were treated as cadres of the state. Some judges were directly transferred from the military back in those days. *See* ALBERT CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA 122 (1992). Image in this study refers to etiquette in court as some judges were reported to have used their mobile phones in the court room.

Execution Difficulty (& Violent Resistance against Execution)	26 *(9.7%)*	26 *(12%)*	11 *(26.2%)*
Letters & Visits System	11 *(4.1%)*	10 *(4.6%)*	8 *(19%)*
Court Mediation	7 *(2.6%)*	7 *(3.2%)*	5 *(11.9%)*
System of People's Jury	5 *(1.9%)*	5 *(2.3%)*	3 *(7.1%)*
Total	**268**	**216**	**42****

** There exists an overlap between bloggers who uploaded posts of legal issues. That means a blogger may have uploaded several types of legal issues within his / her blogs.

APPENDIX II

Legal Issues Discussed by L-Bloggers

	Number of Posts ***(% of Posts)***	**Number of New Subjects** ***(% of Posts)***	**Number of Lawyers Uploading Posts** ***(% of Posts)***
Judicial Corruption	2 *(0.3%)*	1 *(0.4%)*	1 *(7.7%)*
Autonomy of lawyers' association	17 *(2.9%)*	7 *(2.8%)*	7 *(53.8%)*
Protection of Lawyers' Practice	44 *(7.4%)*	27 *(10.7%)*	10 *(76.9%)*
Rule of Law and Rights Protection in Practice	141 *(23.7%)*	74 *(29.2%)*	13 *(100%)*
Constitutional Development & Review of Unconstitutional Laws and Regulations	58 *(9.7)%*	39 *(15.4%)*	11 *(84.6%)*
Relationship between Judges, Lawyers & Legal Scholars	2 *(0.3%)*	2 *(0.8%)*	2 *(15.4%)*
Letters & Visits System (& Illegal Detention)	16 *(2.7%)*	8 *(3.2%)*	4 *(30.7%)*
System of People's Jury	4 *(0.6%)*	2 *(0.8%)*	2 *(15.4%)*

Court Trial & Public Opinion	10 *(1.7%)*	7 *(2.8%)*	5 *(38.4%)*
Total	**595**	**253**	**13****

** There exists an overlap between bloggers who uploaded posts of legal issues. That means a blogger may have uploaded several types of legal issues within his / her blogs.

APPENDIX III

Social Issues Discussed by J-Bloggers and L-Bloggers

Social Issues Discussed by J-Bloggers

1. "5/12" Sichuan Earthquake
2. Official accountability in major accidents
3. Tacit rules of Chinese officialdom, appointment and dismissal of officials, and public governance
4. Official corruption (reasons and solutions)
5. Arbitrary charges and fees imposed by government
6. Local protectionism
7. Government regulations on pornography business, market operation, food safety, junk messages of mobile phones, mafia-style organizations, the activity of having concubines, etc.
8. Reform of the household registration system
9. Establishment of the early-warning mechanism for public safety
10. Traffic safety and the responsibility of traffic policemen
11. Authenticity and accuracy of government statistics
12. Role and responsibility of the public media
13. Civilization and public virtue of citizens
14. Study on policies of the Chinese Communist Party of China, for example, advancement of CCP members, and the "three Supremes"
15. Difficulty and high cost of getting medical treatment
16. The lack of trust between doctors and patients
17. Vanity projects of local governments (useless and money-wasting)
18. Public housing reform;
19. The role of representatives of people's congresses in supervising government administration
20. Arrears of teachers' salaries and government corruption
21. Peasant-workers' rights protection
22. Consumers' rights protection
23. Women's rights protection

Social Issues by L-Bloggers

1. Snowstorm and difficulty in public transport during the 2008 Spring Festival travel season
2. Official corruption cases happened in 2007 and 2008
3. Arbitrary Urban House Demolitions (a typical case: Chongqing "nail household" who refused to vacate the premises despite an eviction order issued by the Chongqing Municipal Government)

4. Shangxi black kiln sandal and accountability of local governments
5. "3/14" Tibetan accident in Lhasa in 2008
6. 2008 Beijing Olympic Games
7. "5/12" Sichuan Earthquake
8. Impact of global financial crisis (e.g. unemployment, inflation)
9. Sanlu scandal: food safety and government regulations
10. Internet censorship and online public participation
11. Role and responsibility of the public media
12. Increase in property prices and high costs of medical treatment
13. Governmental responsibility of protecting the environment and natural resources
14. Living difficulties for peasant workers in cities and towns
15. Declining moral standard in society

APPENDIX IV

Common Topics of Legal Research and Other Topics by Both J-Bloggers and L-Bloggers

Legal Research

1. Copies of laws, regulations, and rules as well as comments on them
2. Comments and opinions on draft legislation
3. Criticizing the Rules of Payment of Court Fees issued by the State Council in December 2006
4. Researches on a broad range of topics, such as compensations for damages to person happened in schools, the principle of innocence, problems of the Property Law of the PRC, role of the procuratorate, land system and land reform, citizens' rights and freedom, real estate development and house transactions, labor disputes including payment of wages and salaries, and compensation for damages to accidents at work, and introduction of the spiritual compensation to civil suits collateral to criminal proceedings (some of these researches have been published in journals by the writer, blog owner)
5. Discussions on the tradition of Chinese culture and law
6. Copies of court decisions that have come to effect
7. Judicial interpretations issued by the Supreme People's Court
8. Routine work of the courts
9. Introduction of Western legal theory, thought, and practice
10. Questions and answers for various post-followers

Other

1. Information of job vacancy
2. Trivial matters of work and life
3. Relationship among colleagues
4. Personal life (including family and friends)
5. Publications of books written by the blog-owner
6. Discussions on some law professors and students
7. Composition of poem and mini-novels
8. Pictures from travel and work
9. Discussions on the transaction of shares and funds
10. Discussions with regard to the experience of opening blogs by the blog-owner
11. Copy of the inauguration speech of Ma Ying Jiu, the President of Taiwan