Book Review

Who Will Find the Defendant if He Stays with His Sheep? Justice in Rural China

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Song fa xiaxiang: Zhongguo jiceng sifazhidu yanjiu [*Sending Law to the Countryside: Research on China's Basic-Level Judicial System*]. By Zhu Suli.* *Beijing: The Chinese University of Law and Politics Press*, 2000. Pp. 466. Renminbi 29 [$3.50].

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* Dean, Beijing University Law School. He used the pen name "Su Li" (his given name) in writing this book. In this Review, I follow East Asian order for Chinese and Japanese proper names, family name first, except in citations to works in English.

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INTRODUCTION

According to Zhu Suli, the dean of Beijing University Law School, the rule of law has replaced Maoist revolution as the blind faith of the Chinese masses. Like most faiths, its popularity rests on a fair amount of ignorance and superstition, but Zhu is convinced that it will remain China's secular religion for some time to come. To address that ignorance, to expose what he considers vast gaps in the Chinese people's knowledge of their own society and law, and to provide empirical and theoretical insights into legal reform in modernizing societies, Zhu wrote *Sending Law to the Countryside: Research on China's Basic-Level Judicial System*, an empirical study of the lowest levels of the Chinese judiciary.[1]

Despite its origins in a Ford Foundation rule-of-law grant, the book is a polemical attack on orthodox thinking on the rule of law and the direction of Chinese legal reform. Zhu attacks Chinese legal scholars as enamored of trendy Western theory and ignorant of the role of law in Chinese society outside of Beijing and Shanghai. His critique and his colleagues' responses provide a window into contemporary Chinese legal scholarship, but the relevance of his analysis extends beyond China to include the entire rule-of-law movement and the conventional wisdom on the role of legal institutions in social modernization. His rhetorical style exudes complete confidence despite data that might be considered selective and anecdotal, and his tone swings from a preachy "I am more of the people than you" populism to a pedantic combination of Western theorists from Foucault to Posner. In other words, *Sending Law to the Countryside* is irritating and fun. It is also important.

Zhu's call to China to emphasize its "native resources" rather than Western models in building its legal system has been controversial within China, where borrowing from the West is conventional wisdom. Unlike many opponents of westernization, however, Zhu is neither xenophobic nor romantic. He does not essentialize China, and he emphatically rejects

1. ZHU SULI, SONG FA XIAXIANG: ZHONGGUO JICENG SIFAZHIDU YANJIU [SENDING LAW TO THE COUNTRYSIDE: RESEARCH ON CHINA'S BASIC-LEVEL JUDICIAL SYSTEM] (2000). It is likely that Zhu chose the phrase "send to the countryside" to refer to the practice during the Cultural Revolution of sending intellectuals and other perceived opponents of Mao to the "countryside" for reeducation. Just as westernized intellectuals were "restructured" [*gaizao*] during the Cultural Revolution, Zhu suggests that the Western-based legislation of contemporary China is restructured once it reaches the basic courts of the countryside. To call *Sending Law to the Countryside* an empirical study does not imply that it is necessarily a rigorously social scientific investigation of Chinese basic courts. Zhu never fully explains his methodology, so it is impossible to judge fairly the rigor of his work. From references dispersed more or less casually throughout the book, it appears that he relied on a mixture of direct observation of court proceedings, interviews with basic court judges, and surveys. *See, e.g.*, *id.* at 92-103 (explaining the methodology used in researching the adjudication committee). Zhu does, on the other hand, describe in his final chapter the political, financial, and personal difficulty of conducting empirical research in contemporary China. *See id.* at 425-44.

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appeals to Chinese tradition, "Asian values," or *guanxi*.[2] Thus, Zhu does not resort to the usual tactic of rule-of-law critics—an all-too-easy dismissal of Western law as unsuited to Chinese (or African or Latin American) conditions followed by a hopelessly vague call for homegrown solutions. Instead, he gives a detailed picture of how rural judges operate in particular disputes; tries to determine what makes them do what they do; and reaches tentative judgments about which practices are valuable, which objectionable but temporarily unavoidable, and which fundamentally inimical to ongoing legal reform. Although Zhu never talks of the value of his research beyond China, it is likely that at least some of the problems, practices, and techniques of rural Chinese judges are repeated in poor societies elsewhere. At its best, *Sending Law to the Countryside* gives us both an in-depth look at contemporary Chinese society and a case study in legal modernization.

It does so, however, within the political limits of the People's Republic of China (PRC) as set by the Communist Party. There is little attention to the influence of the Party on the courts or, conversely, to the role of the courts in maintaining the communist regime. Although the book is not a paean to communist rule, it is virtually silent on the role of political power. It is possible that Zhu's silence is a reflection of the general lack of attention to power's role in legal scholarship everywhere, but it seems more likely that he is deliberately avoiding the subject.[3] Whatever his reasons, the absence of politics from the analysis is a serious shortcoming that detracts from both the academic value and the policy relevance of the work.

Part I of this Review summarizes Zhu's data and analysis and presents his main arguments. With few exceptions, the descriptions, conclusions, and normative judgments are Zhu's, not mine. Part II places *Sending Law to the Countryside* in the context of comparative law scholarship. After discussing Zhu's theoretical framework and his failure to deal adequately with the role of political power, it relates the situation of Chinese judges to the assumptions of the contemporary law-and-development movement and

2. *Guanxi* essentially means the use of interpersonal relationships for personal or institutional advantage. As such, it exists everywhere, but China is often portrayed as uniquely dependent on *guanxi* for social cohesion, and observers frequently use *guanxi* to explain social phenomena. Pitman Potter, for example, refers to *guanxi* to explain the tendency of Chinese judges to favor one party over another when actual bribery is not involved. *See* Pitman B. Potter, Guanxi *and the PRC Legal System: From Contradiction to Complementarity*, *in* SOCIAL CONNECTIONS IN CHINA: INSTITUTIONS, CULTURE, AND THE CHANGING NATURE OF *GUANXI* 179, 188 (Thomas Gold et al. eds., 2002). *See generally* Thomas Gold et al., *An Introduction to the Study of* Guanxi, *in* SOCIAL CONNECTIONS IN CHINA, *supra*, at 3 (discussing *guanxi* and scholarship about *guanxi*). Zhu, on the other hand, rarely uses the term and never relies on it to explain social phenomena.

3. Zhu is also silent on the relevance of courts to social control in the Chinese countryside. He assumes that courts already play a significant role in social life in village China and that their role will increase. Whether this assumption is accurate is beyond the scope of this Review, but there is room for skepticism. *See* Ethan Michelson, Causes and Consequences of Grievances in Rural China 22-23 (Mar. 28, 2004) (unpublished manuscript), *available at* http://www.indiana.edu/~emsoc/Publications/Michelson_Dickinson.pdf.

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uses scholarship on antidiscrimination litigation in the United States to suggest that the role of law and judges in Chinese rural society may not be as unique as Zhu assumes.

I. DATA AND ANALYSIS

Zhu begins with the 1996 story of a judge in a remote village of Shaanxi Province. The county credit union had lent RMB200 [$24] to a local farmer ten years before. Repeated efforts to collect had failed, but under the aegis of a "Use the Law To Recover Loans" movement, the credit union filed suit in the local branch of the county people's court. The president of the court borrowed a van from the local authorities, gathered up a policeman and a representative of the plaintiff (and the Beijing University research team), and headed for the defendant's village. On arrival, the judge and his entourage found a village cadre and, with the cadre in tow, went to the defendant's home.[4] The defendant had taken his sheep to pasture, but the cadre volunteered to find him and bring him back. Although some in the judge's party feared that the cadre would warn the defendant away, such was not the case, and on his return the defendant invited the group in for tea on the *kang*, the brick platform used for sitting and sleeping in traditional homes in northern China.

Once all were seated and tea served, the judge opened the proceedings—what Zhu takes great pleasure in referring to as "justice on the *kang*"—with a statement of the defendant's debt and an inquiry into his failure to pay. The defendant replied that he had no money and, in any case, that he had heard that the government was forgiving all loans made to farmers. The judge scolded the defendant for relying on such rumors, referred instead to the "Use the Law To Recover Loans" movement, and made a great show of adding up precisely what the defendant owed, which amounted to over RMB900 [$109], once ten years' interest, penalties, and court costs were included. At this point, the cadre abruptly intervened, criticized the defendant for not paying his debts, and proposed a compromise whereby the defendant would repay the principal and interest if the other costs and penalties were forgiven. The judge acquiesced but warned that he would be forced to bring the full force of the law to bear if

4. The village cadre [*ganbu*] is the lowest-level representative of the Party-state. Sociologist Yan Yunxiang describes their original role as that of a "tyrannical 'local emperor' ruling the village as the agent of the party state," but the economic reforms of the past two decades have weakened the Party's control over resources and strengthened the hand of farmers, so that Yan characterizes their current role as that of "prudent middlemen who negotiate between the state and village society." Yun-xiang Yan, *Everyday Power Relations: Changes in a North China Village*, *in* THE WANING OF THE COMMUNIST STATE: ECONOMIC ORIGINS OF POLITICAL DECLINE IN CHINA AND HUNGARY 215, 238 (Andrew G. Walder ed., 1995).

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the defendant did not comply. The defendant demurred momentarily, then borrowed enough money to pay on the spot.[5]

As Zhu points out, the mobilization of judicial power in this manner may puzzle those Westerners who believe that the PRC is all-powerful within its borders. The Chinese Code of Civil Procedure anticipates the use of compulsory process to bring litigants to the court and allows for holding court off premises only in exceptional circumstances. Furthermore, government policy has long emphasized standardization and professionalization within the judiciary, from judicial dress to courtroom procedures to education requirements. Frequent departure from this trend demands an explanation, and Zhu considers several, including the village background of many rural judges, the bureaucratic demands of local government, and even the lingering effect of Mao's efforts to bring law closer to the people. He eventually finds his answer in the dynamics of institutional power. Judges hold court on the *kang* because they and the state they serve are too weak to do anything else. If Chinese judges do not bring the law to the countryside, the countryside will ignore the law, and it is crucial to the construction of a modern state that the central government be able to project its power down to the levels where the majority of its citizens live.[6]

When the court president and his entourage arrived in the village, therefore, it was an admission of weakness as well as a show of strength. It did not erase the fact that the judge was a stranger in a tightly knit community or make it possible to collect the debt by sending subpoenas to the relevant parties, waiting for the default judgment to be served, and so on. Nor could the cadre's sincere assistance be assumed simply because he was at the bottom of the formal governmental hierarchy. The cadre derives his power from the villagers as well as from the government, and the judge knew that approaching him for assistance would bolster the cadre's power within the village. Even with the elaborate entourage, therefore, the judge did not come into the village holding all the cards.

For Zhu, it is the tenuousness of central government power in the village that explains the meaning and nature of sending law to the countryside. He does not see it as merely an attempt to collect debts or strengthen the legal system but as a step in the projection of bureaucratic power into the margins of Chinese society. Building the state in this manner, however, is risky—it can fail and leave the state even weaker. It is also, in China's case, deeply ironic. Seventy years ago, the Chinese Communist Party built its power in the countryside, from which it successfully isolated and eventually conquered the cities. That the process

5. ZHU, *supra* note 1, at 28-30.
6. *Id.* at 30-35.

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has been reversed, and that the Party-government is now forced to use judges to establish its power in the countryside from a relatively secure base in the cities, shows how much has changed in the last thirty years of market reforms, rapid economic growth, and urbanization.[7] For Zhu, it also shows that the process of building a state that can reach the rural areas is both incomplete and contingent.

Governmental weakness transforms judicial power. Once the court has to rely on the village cadre, it has left the world of individual legal actors envisioned by modern legislation—what Zhu calls the modern world of strangers—and entered a community of enduring relationships where the court and the plaintiff are outsiders and must depend on others' cooperation. In that world, formal adjudication is impossible. Who will find the defendant if he stays with his sheep? Where is the court going to get the information—the evidence—needed to make a judgment? How will it enforce an unpopular judgment? It is institutional weakness, therefore, not tradition or rural values, that explains the judge's willingness to turn formal adjudication into informal bargaining. Holding court on the *kang* is not an expression of premodern romanticism but the contrary: an ambiguous step in the direction of modernity and centralized power.[8]

A. *The Judicial System*

The informality of holding court on the *kang* notwithstanding, Chinese judges operate within a bureaucracy that significantly constrains their freedom of action, and much of the first section of *Sending Law to the Countryside* is directed at two controversies related to the nature and structure of the judicial system. First is the meaning of judicial independence and the propriety of the adjudication committee, which has been blamed for a form of collective judging where judges who hear cases are often not the ones who decide them. Unlike most reformers, Zhu mounts what he calls a "moderate but forceful" defense of the committee.[9] Second is the nature of judicial personnel in rural courts and, specifically, the suitability of former military personnel to serve as judges. Again, Zhu disagrees with many of his academic colleagues not only in favoring former soldiers for the immediate future but also in arguing that rapid professionalization of rural judges, even if possible, would entail costs that more ardent reformers do not foresee.

7. *Id.* at 35.

8. *Id.* at 36-40. Zhu uses Foucault to analyze the center/periphery power relationship exemplified by this incident.

9. *Id.* at 143.

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1. *Judicial Independence and the Adjudication Committee*

Adjudication committees typically consist of about ten judges, including the president, the vice presidents, and the heads of the divisions.[10] A case reaches the adjudication committee only if a judge or panel cannot resolve it through consultation with immediate superiors. The adjudication committee hears precisely the cases one would expect it to hear: serious criminal cases, doctrinally complex cases, cases involving local institutions or powerful figures or their interests (which means virtually all administrative cases), and cases that are likely to be difficult to enforce without (or even with) the imprimatur of the entire court on the judgment. In practice, all controversial or important cases end up in the committee. Even so, the numbers are modest: The committee reportedly hears less than one percent of all cases and up to fifteen percent of criminal cases.[11]

Once a case reaches the committee, discussion follows a set pattern, with judges familiar with the issues usually talking first and the president remaining silent until the end. Court presidents are usually bureaucrats with little formal legal background who are brought in from other government entities; going last can help disguise their ignorance. Equally important, remaining silent allows the president to evaluate the discussion without prejudicing it or influencing individual members' views. Although a majority is all that is required, unanimity is prized, and the court presents a united front for external purposes. Internally, however, everyone knows who took which position, and if the case is eventually reversed, judges taking a mistaken position face possible fines, loss of bonus, or even dismissal.[12]

When Zhu and his team asked whether the adjudication committee should be abolished, judges recounted instances where committee members had too little legal knowledge, where certain members had disproportionate power, where the committee had succumbed to external pressure, and where they had participated in decisions that violated their conscience. But not a single judge advocated elimination.[13] They argued that the types of cases

10. Chinese courts are organized into separate divisions [*ting*] to handle cases falling under different subject matter categories (e.g., administrative, civil, criminal, and economic) and to enforce judgments. STANLEY B. LUBMAN, BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO 252-53 (1999).

11. ZHU, *supra* note 1, at 103-06.

12. Zhu mentions one court where the judges had RMB50 [$6] deducted from their bonus for each "wrong case." *Id.* at 106; *see also* RANDALL PEERENBOOM, CHINA'S LONG MARCH TOWARD RULE OF LAW 294 (2002).

13. ZHU, *supra* note 1, at 107. Zhu acknowledges that many observers will doubt these answers, but he trusts the judges' candor and sincerity. Scholarly criticism of the system is well established, and the survey team went to great lengths to put the judges at ease, so he does not think they were intimidated. He admits that judges may have a vested interest in the status quo, but the judges were quite critical about other aspects of the judicial system and in many instances

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now going to the committee are precisely those where bribery and illegitimate pressure are most likely. Although they acknowledged that the committee is useless when the court president is willing to be openly arbitrary or when Party or government pressure is extreme, in ordinary times the relatively open procedure serves both to constrain the president and create a united front against external demands.[14] The committee also institutionalizes supervision, which can help limit corruption—it is cheaper to bribe one or two judges than six or seven. Furthermore, the committee contributes to consistency in adjudication within a jurisdiction, a role that may be particularly important in China, where cases are rarely published and legislation is often broadly programmatic in nature. Finally, the committee compensates for the low level of professional sophistication of many judges by bringing the specialized knowledge and experience of the committee members to bear on difficult cases.[15]

Zhu finds these arguments reasonable and also points to the more mundane support the committee can provide. Most basic court judges serve in small towns where they grew up and where they are institutionally and personally dependent on other government officials they see daily. They serve in a bureaucracy that is constantly urged to become one with the people and that always demands professional devotion to the latest policy goal, whether it is "using the law to recover loans" or "striking hard" at crime. This is not an environment conducive to autonomous judgments, and the lack of a jury, which can help American judges avoid controversial decisions, exacerbates the situation.[16] Zhu offers two stories to illustrate how the adjudication committee can provide social and institutional support under these conditions.

The first involves the prosecution of policeman Wang for the death of a college graduate in a motorcycle accident.[17] The decedent and two other young men had been drinking and were joyriding around midnight. They had run two consecutive police checkpoints, and when they approached the third, Wang fired two warning shots. After the motorcycle failed to stop, Wang fired again and hit one of the passengers (not the decedent) in the leg. The motorcycle continued for more than a kilometer until it collided with another vehicle and the decedent was killed.

Zhu claims that the law was clear: Wang had fired in the legitimate

cited precisely the same problems and advocated the same reforms as do academic critics of the adjudication committee. If judges were willing to take a critical stance toward these issues, he sees no reason for them to be less forthright with regard to the adjudication committee. *Id.* at 109.

14. Zhu admits that the official rationale for the adjudication committee (to aggregate judicial experience and research important or difficult cases) was a pretext to give the Party a systematic means to control the judiciary. *Id.* at 94.

15. *Id.* at 110-14.

16. *Id.* at 122-23.

17. *Id.* at 127-31.

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performance of his duties, and there was no legal causation between the shot and the subsequent crash. Circumstances, however, demanded a response. The decedent had been the younger of two sons. The elder had drowned not a year earlier. The younger son's death left their mother distraught, and she demanded Wang's arrest. When the Public Security Bureau refused to arrest him, she committed suicide in protest. That inflamed the local population, who were already distrustful of the police because of earlier instances of police misconduct and who, according to Zhu, demanded that someone in authority answer for such a death. The remaining family members then organized a sit-in by more than 200 people, which paralyzed local government operations. The county Party committee demanded that action be taken to restore order, and the prosecutor eventually indicted Wang.[18]

A simple case had become a treacherous one for the court. A traffic accident had been transformed into a morality play, and the law had to respond on the same level. If the court followed the legal path, it would offend the local population and incur the wrath of the local Party committee. Nor was it solely an institutional issue. All the judges lived in the area, and an acquittal would have meant not only social condemnation but also danger to themselves and their families. As a result, referral to the adjudication committee was a no-brainer. As it turned out, the committee was unable to fully resist the dual pressures from the people and the Party. Although all members agreed that there had been no crime, they found Wang guilty and gave a suspended sentence of one year. As if to confirm that there was no easy answer, the local Public Security Bureau then went on strike for several days.[19]

Zhu's second case is a tort suit brought by a farmer who had lost a leg while helping the farm secretary [*nongchang mishu*] bring a tractor across a river.[20] The secretary was legally responsible, but he was both recalcitrant and judgment proof. Because any judgment would be unenforceable, the panel referred it to the adjudication committee, and the president took it upon himself to resolve the situation. He arranged a package of relief for the farmer, involving six local agencies, that included a job as a school guard, a tax exemption for his fields, a bank loan to the defendant to enable him to pay for an artificial leg for the plaintiff, and monetary compensation from the farm and the ferry company. All of these maneuvers, Zhu implies, were legally groundless, but they meant not only that all parties were fully satisfied—the previously stubborn defendant cried with joy when he heard

18. *Id.* at 129.

19. *Id.* at 131 n.51.

20. *Id.* at 131-32. It is not entirely clear what type of office was occupied by the *nongchang mishu* in this story. Because Zhu describes him as judgment proof, he was likely not the Party secretary but only a low-level clerk.

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the news—but also that the court could avoid the loss of prestige that would have resulted from an unenforceable judgment.

Zhu sees both these cases as illustrative of the constructive role the committee can play. Legal reformers who might interpret the first case as a failure of judicial independence would be making the fundamental mistake of importing foreign norms without realizing that the social and institutional resources that support judicial independence in the West do not exist in rural China.[21] The basic courts are deeply dependent on local government, which controls their budgets, their personnel (judges are local civil servants), the courthouse and judicial offices, and even the judges' housing. But it was not solely the courts' lack of fiscal and bureaucratic autonomy that were in play; social and moral norms were also involved. A wrong had been done by the government; it had to be redressed, and rural Chinese have little patience for legal justifications or judgment-proof defendants.

In these circumstances, individual judges cannot be expected to withstand strong pressure. The adjudication committee has a better shot, if not at rigidly enforcing applicable statutes then at least at successfully defusing social tensions. As we see with the first example, the committee cannot stand up to determined pressure, but that is not to say that in slightly different circumstances the committee might not have been able to acquit the policeman or that the result might not have been worse without the committee's intervention. In the second example the contribution is less speculative. Junior judges could not have achieved the success of the president, and it was precisely his nonlegal experience and relationships that made the outcome possible. It is through such settlements that the court gains social recognition and bureaucratic clout, and the capacity to achieve such results demands a powerful entity (the adjudication committee) or official (the president) whenever resolution requires more than mediating between the parties. Rather than being condemned as violations of judicial independence, these interactions should be seen as judicial techniques necessary to resolve contentious disputes and maintain social stability.[22]

Recognizing the need for the adjudication committee's role does not mean that the committee performs satisfactorily, however. On the contrary, China's empirical reality should be a guide to effective reform of the adjudication committee in particular and of the bureaucratic flaws of the judiciary in general. For the former, Zhu claims that in today's rural courts, a reformed committee could contribute to judicial independence. True judicial independence may eventually require the committee's elimination, but in the meantime, no theoretical abstraction can overcome existing social realities. On the pervasive bureaucratization of the judiciary, the key is

21. *Id.* at 136; *see also id.* at 140.
22. *Id.* at 131.

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eliminating the rigid hierarchy within the courts, separating administration from adjudication, and granting courts a degree of autonomy from local governments. Once social conditions change, the market transforms rural society, and judges' professional standards improve, the adjudication committee may no longer be desirable. In the meantime, it should be strengthened so that it can perform its legitimate roles more effectively.[23]

2. *Who Makes a Good Basic Court Judge?*

Another controversial position has been Zhu's defense of the use of former military personnel as basic court judges. As one would expect of an institution that has grown manyfold in twenty years, the Chinese judiciary is a mixed lot, and judges' level of technical competence is a major obstacle to the development of the rule of law in China. At least through the 1990s judges overwhelmingly came from nonlegal backgrounds and included many former military and police officers with little training for their judicial roles. The situation is changing, and newly appointed judges in urban or suburban areas are likely to be legally trained at some level, but the pace of and necessity for change remains a contentious issue.

The most prominent advocate of rapid professionalization has been Zhu's Beijing University colleague He Weifang, who argues that the role of China's courts has evolved in the last thirty years from an instrument of the dictatorship of the proletariat to a professional institution responsible for the resolution of disputes and the provision of justice.[24] While a celebration of the hard work and discipline of military personnel may have been appropriate to the judicial role of the 1970s, continuing to emphasize personal qualities hinders the development of the judiciary and impedes the establishment of the rule of law in China. Zhu agrees that a legally sophisticated judiciary is important and that the importation of untrained military officers is inconsistent with the ultimate goals of the Chinese legal system, but he disagrees on both the possibility of and the need for judicial professionalization in the immediate future. Part of the disagreement comes from Zhu's stress on the distinctive nature of the work of basic court judges, part from his appraisal of the likelihood of professionally trained personnel accepting positions in local courts, and part from a different appreciation of the personal abilities and attitudes of former military

23. *Id.* at 140-45.

24. He Weifang's criticism did not go unnoticed. His article, He Weifang, *Fuzhuan junren jinfayuan* [*Demobilized Soldiers in the Courts*], NANFANG ZHOUMO [SOUTHERN WEEKEND], Jan. 2, 1998, *available at* http://mylaw.myrice.com/fali/fali0030-heweifang.htm, became a political issue, and *Southern Weekend* was forced to apologize and immediately write an article praising the use of officers, *see* LUBMAN, *supra* note 10, at 256-58.

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officers as compared to the alternatives.[25]

As seen in the next Section, Zhu argues that the role played by basic court judges in rural society is fundamentally different from that assumed by most rule-of-law reformers and legal academics, and he is deeply skeptical that Chinese law schools prepare their graduates for service at this level. Despite his status as dean of China's leading law school and an eminent insider in the world of legal education, Zhu's litany of complaints about legal education is unrelenting: an exaggerated emphasis on legal reasoning at the cost of fact-finding and investigation, a curriculum more suited to advanced urban economies than rural societies, and a stress on neutrality and process when the job frequently requires proactive intervention to help the weaker party. The result is a very poor fit between university legal education and the needs of basic courts.[26] Although he admits that the few university graduates he encountered in the basic courts were successful, he claims that law school graduates have been conditioned to want a type of work they will seldom find in the rural courts. It is natural for them to want to find buyers for their talents, and the residents of village China are not in the market for the narrowly legal knowledge and skill that law school graduates possess.[27]

For Zhu, therefore, the relevant question is what kinds of substitutes for professional jurists can best resolve disputes in a way that satisfies the contradictory demands of basic court judges' many masters: the parties before it, other residents, local government agencies, and the judicial hierarchy. This task requires skills that more resemble the talents of a generalized administrator like the county magistrate of imperial China[28] or an American justice of the peace than those of the professional judge. Zhu finds justices of the peace attractive because they are drawn from the pool of respected local citizens and have the necessary local sensibility. In the case of contemporary Chinese courts, however, local connections come with heavy baggage. One of the overriding issues in Chinese civil justice is the tendency of the courts to protect their own financial and social well-being by favoring local interests, and one of the central government's most

25. ZHU, *supra* note 1, at 322-86.

26. The disjuncture between Zhu's contemptuous portrayal of legal education and his own role in shaping it is striking. One wonders why his own law school continues to fail to address the needs of the legal system as he sees them. If he believes that Beijing University graduates will never go to rural courts because the incentives are inadequate, why not advocate for enhancing the stature of basic courts? If he believes that Beijing graduates are too urbanized for the basic courts, why not admit more rural Chinese? Of course, Zhu is not writing a prescription for the reform of legal education, but the incongruity between his dismissive tone and his position of influence in Chinese legal education makes these questions unavoidable.

27. *See* ZHU, *supra* note 1, at 369, 369-76 (discussing one university graduate working in a basic court who declared that he would "return all he learned in university to his teacher" because it was of no value to him professionally).

28. *Id.* at 380.

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pressing problems is the vast gap in sophistication and technical knowledge between the coastal cities and the rural interior. For this reason, judicial reformers face a perplexing choice: Transferring local bureaucrats to the courts would exacerbate local protectionism, might weaken any check on abuse by local cadres, and would do nothing to bring rural villages closer to the modern world. Bringing in outsiders on the model of the imperial magistrate, however, might sacrifice the local knowledge necessary to resolve disputes effectively.

For Zhu at least, former military officers are part of the answer. Like local bureaucrats, they have ties to the area and can understand the population's values and needs, but they also have three characteristics that may help courts resist local pressures. First, during their military service their personal networks and allegiances weaken and are replaced by an openness to strangers and new ideas that may be rare among local officials. Their relative lack of local connections also makes them more dependent on the court. Transferees from other parts of the bureaucracy, by contrast, have institutional ties that dilute their loyalty to the court and give them more incentives and resources to resist court discipline. Second, the military is largely a merit-based organization, and its officers are more likely to have succeeded in a competitive environment than most local officials. Third, they are more devoted to their jobs. After years of military service, they have to start from scratch in a new environment and are eager to learn new skills. By contrast, local bureaucrats often consider transfer to a court as just another step in their careers as local officials, a way station or even a demotion rather than a new vocation.[29]

For these reasons, Zhu believes that the best alternative for rural courts in the short-to-medium term is to continue to accept military officers. Zhu emphatically agrees with He Weifang that the judiciary must be professionalized in the long term. Until that point, however, an effective judiciary cannot be built on Western models. It makes no sense to impose a highly professional judiciary on a society that neither needs one nor is ready to accept its modern premises and values. In thinking about rural courts, therefore, Zhu urges his colleagues and the government not to start with the image of what a judge needs to know but to ask what rural society and grass-roots communities need. Knowledge is useful only when it can be used to address a specific problem. The day will come when rural societies need the knowledge and technical skills of professional judges, but the timing should depend on the needs of rural residents, not on the hopes of legal reformers.

29. *Id.* at 348-55.

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B. *Judicial Knowledge and Techniques*

Zhu's second section continues the themes of the first, including the inadequacy of Western models for Chinese reforms and the gap between China's modern legislation and the customs and traditions of rural villages, but it shifts the focus from institutional structure to the specific techniques that judges use to resolve disputes. To illustrate his points, Zhu again uses case narratives, two of which I repeat here. I then look at the distance between rural society and the formal legal system and the strategies and tactics used by basic court judges to bridge the gap.

1. *Two Judicial Narratives*

a. *The Field Ox Case*

In 1984 farmer *A* borrowed RMB300 [$36] from his neighbor farmer *B* and purchased a field ox for RMB600 [$72].[30] Three years later, *B*'s ox died, and for the next nine years *A* allowed *B* to use *A*'s ox without further payment by the latter. During that time, *A* traded or sold several oxen without objection from *B*. In 1995 one of these oxen calved, and in 1996 *A* sold the calf for RMB1000 [$121]. In none of these transactions did *A* either inform *B* beforehand or give him any of the proceeds. One month after the sale of the calf, *B* came to *A*'s house and said that he needed an ox for plowing. *B* took an ox and sold it for RMB1400 [$169] without *A*'s knowledge. Thereafter *A* sued *B* for the entire amount, on the basis that their original deal had created a financial arrangement known locally as *dahuo* that gave *B* usufruct rights in the ox but made *A* the sole owner. *B* countered that their arrangement was a partnership and that he deserved part of the proceeds.

The trial judge found a partnership but gave *B* only RMB360 [$43] because he had failed to pay any of the partnership expenses. *B* appealed. The intermediate people's court found the facts to be unclear and remanded to the trial court with instructions to determine whether *B* had purchased partial ownership of the ox or solely a usufruct right and whether the parties had set a price or what the market price had been. On remand, the trial court, this time sitting as a panel, declared the ox jointly owned property and increased *B*'s share to RMB650 [$79] without taking any further evidence or giving any reason for this particular division of the proceeds. Farmer *A* expressed dissatisfaction, but neither party appealed.[31]

For Zhu this is a simple case. The parties agreed on the only facts

30. *Id.* at 201-04.
31. *Id.* at 203.

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relevant to resolving the dispute: Both had invested a significant sum at the beginning, and *B* had paid nothing thereafter. Anyone using common sense, intuition, a sense of justice, or reason would reach the same conclusion—*A* deserved more from the sale than *B*. Neither legal rules nor legal professionals were necessary to figure this out. Only a law professor pursuing the "legal essence" of the parties' rights in the ox would have difficulty with this case. As for the courts' finding of a partnership, it had nothing to do with the law, facts, or the parties' intent. *A* and *B* were partners because partnership [*hehuo*] was codified in the civil law and *dahuo* was not.[32] Similarly, the amount of the award was entirely within the discretion of the judges. In this instance, the panel on remand knew that they would have to "give the appellate judges some face,"[33] so they increased the amount, but there was nothing in the law guiding their choice. Cases like this rest on practical choices, not legal technique, and Zhu claims that everyone "from Roberto Unger to Richard Posner" would agree that legal reasoning is merely a specialized form of practical wisdom.[34] Only a believer in Dworkin's "right answer" would think otherwise.[35] It would not matter how extravagantly legal professionals analyzed the case or whether they cited Holmes or Rawls, Lord Denning or von Jhering; the answer would always be within the discretion of the judges.

b. *The Irate Husband Case*

In the second case, wife *W* and neighbor *N* had an affair while husband *H* was working in the city.[36] The husband returned, discovered the relationship, and threatened *N* and his family, claiming that the incident had made it impossible for him to live in the village. The village committee tried to mediate, and *N* offered *H* RMB7000 [$846], but *H* refused and continued to threaten *N*, who, at the suggestion of the village secretary, then filed suit for an injunction against the threats. *H* counterclaimed for RMB10,000 [$1208]. The court ordered *N* into "protective" custody in the village jail and, after much cajoling and threatening of both sides, eventually mediated a settlement by which *N*, after spending thirteen days in the local jail, paid *H* RMB8000 [$967]. Because adultery is not a crime, and because *H* had persistently threatened physical harm to *N* and his family, there was no basis for either the neighbor's detention or for the RMB8000 payment. Nonetheless, everyone was satisfied with the result, and there was no further legal action.

32. *Id.* at 210.
33. *Id.* at 204.
34. *Id.* at 204 n.9.
35. *Id.* at 204.
36. *Id.* at 241-53.

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Zhu spends some time detailing the judges' handling of the case. Despite the legal norms supporting the neighbor's position, the court could neither accept his request for an injunction nor ignore *H*'s groundless demand for compensation. Instead, the judges took the contradictory course of persuading the neighbor to accept short-term incarceration while simultaneously calming *H* down to the point where he would accept a reasonable amount of compensation and promise to leave *N* and his family alone. Throughout this process, the judges never considered using the statutory law as the normative basis for an agreement, but that did not mean that the law was not useful, as the following ex parte exchanges between judges and the parties illustrate. One judge said to *H*,

> I understand your feelings and the reasons for your excessive behavior. . . . You have been emotionally assaulted and your reputation damaged. . . . [*N*] should give you some compensation, but things have reached an intolerable point. Think it over. You can't ask for too much or act unreasonably. In this situation, RMB10,000 is high. Think about it carefully and remember that your wife was also in the wrong. Now that [*N*] has brought the matter to this court, you should not bother him any more. If you act excessively again, the law will punish you.[37]

At the end of the process, the judge assured *H* that "[t]he law has been carried out and [*N*] has been legally punished,"[38] although of course the only legal violation had been *H*'s own threats to *N* and his family.

The judges treated the law in the same loose manner in dealing with *N*. One judge said to *N*,

> You shouldn't blame the other side . . . , you started the whole thing. It is on your shoulders because you broke the law. You have severely affected another person's family and the couple's emotional relationship, and you've hurt society. You should look at your behavior from the point of view of breaking the law, look at the results—the responsibility is yours and that makes your illegal behavior even more serious.[39]

Zhu characterizes the judges' behavior in these encounters as "lawless," but, as he is quick to add, not in a derogatory sense.[40] The majority of Chinese, indeed even the adulterer himself, would likely have thought that a serious wrong had been committed and that "the law" should vindicate the husband's rage and repair the damage to village society.

37. *Id.* at 246.
38. *Id.*
39. *Id.* at 247.
40. *Id.*

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In both these cases, basic court judges ignored or distorted statutory norms to reach a decision that would accord with village morality. Although in the Field Ox Case the panel on remand had to deal with an attentive appellate court, the positive law was not a guide to the ultimate resolution; in the adultery case the settlement went directly counter to the law. Zhu does not interpret either of these two stories as the triumph of substantive justice, however, with law functioning only as a *deus ex machina* to threaten bewildered peasants into submission. As we see in the next two Subsections, he uses these (and other) stories to illustrate the techniques and strategies that judges have developed to bridge the gap between the formal norms and procedures of the legal system and the social conditions of rural China.

2. *Caught Between Society and Law*

Zhu portrays basic court judges as beholden to two contradictory worlds, both of which are changing fast: the urban world of strangers and arm's-length dealings and the village world of enduring and multilevel personal relationships, where everyone knows each other and where there is no such thing as an arm's-length deal. Every dispute, even one as seemingly commercial as the Field Ox Case, threatens to bring into play social networks that have developed over generations, and every possible resolution threatens to affect the social fabric of the community. Zhu does not, however, consider these to be two wholly independent systems. Urban China does not float abstractly over the countryside. Basic court judges do not mediate between two separate and static systems in a recapitulation of the way colonial judges were supposed to discover native customary law and apply it within the metropolitan system as a kind of foreign law. Basic court judges are agents of the central government acting to bring the state's authority to the villages, but they are agents with limited power who must devise means to survive personally and institutionally in a setting that is not ready to accept national authority and in the face of national norms drafted with indifference to the varieties of behavior the judges encounter.[41]

To illustrate the gap between village life and urban law, Zhu contrasts a hypothetical dispute over the purchase of steel products to the Field Ox Case. The former is easy to resolve because of a variety of features that are absent in Chinese villages. First, the relationship is wholly commercial, and the parties have alternatives. Second, property rights are, by definition, clear. If the parties did not know their relative rights, there would not have been a deal. Third, the interests involved are prospective, unrelated to daily necessities, and easy to quantify. Fourth, again by definition, modern

41. *Id.* at 216-22.

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commercial activities are specialized and standardized—otherwise, market competition would be impossible—and dispute resolution processes can rely on such standardization. Fifth, urban Chinese are comfortable with the significance of documents and their potential impact on their interests. Finally, there exist interlocking institutions like banks, insurance companies, and corporations that structure and reduce the risk of commercial activities and standardize their procedures. As a result, a court can readily identify the legally relevant behaviors and relate them to legally determined consequences.[42]

By contrast, rural disputes have none of these characteristics. As relatives or neighbors, parties to rural disputes are situated in a web of obligations and expectations that constrains the bargaining process and narrows the range of acceptable outcomes. The nature of rural markets limits bargaining in another way. Competitors are scarce and the standardization of goods and services has not progressed far enough to provide alternatives. The result is dealings that should not be forced into legal categories meant for transactions between parties who are conscious of legal ramifications and who have multiple options in forming economic relationships. The parties to the Field Ox Case, for example, likely never had a clear idea of who "owned" the ox, much less the legal niceties of partnership versus *dahuo*. These ambiguities and complexities are compounded by a lack of documentation.[43] Weber long ago noted that the rule of law depends on written records to perform two functions: to standardize transactions and to provide reliable evidence.[44]

Even in a static society with adequate resources, these conditions would present problems, but Chinese rural society is changing rapidly, and the basic courts face a dire lack of resources. As a consequence, for the foreseeable future law will be a creature of commerce and of the cities, where events and actions are more readily understood in terms of legal categories, where there is more probative evidence available, and where the economic importance of disputes justifies the expenditure of significant judicial resources. Zhu does not mean that rural Chinese consider the ramifications of their actions less thoroughly than urban Chinese or that

42. *Id.* at 219. Although Zhu cites Stewart Macaulay's classic article, Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963), to demonstrate that he is not as naive as he seems, ZHU, *supra* note 1, at 219 n.24, he has clearly fallen into the trap of comparing an actual event, the Field Ox Case, to a hypothetical one pulled from the world of idealized abstractions. This is a classic mistake of sociolegal scholarship that Zhu is appropriately scornful of when committed by others. His treatment of property rights is particularly problematic given that China has prospered economically with vaguely defined property rights. *See generally* PROPERTY RIGHTS AND ECONOMIC REFORM IN CHINA (Jean C. Oi & Andrew G. Walder eds., 1999).

43. ZHU, *supra* note 1, at 225.

44. 1 MAX WEBER, ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY 217-20 (Guenther Roth & Claus Wittich eds., Bedminster Press 1968) (1914).

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rural life is simpler than urban life, only that law takes urban commerce as the norm and thus assumes the processes and institutions that create the common legal understandings necessary to a rule-of-law legal system.[45]

Despite this gap, the relationship between village life and metropolitan law is fluid and dialectical, not static and dichotomous. Every encounter changes both and contributes to the modernization of rural China. Zhu's analysis of the impact of the Field Ox Case illustrates the point. He does not claim that farmers will now be patterning deals with close attention to the court's interpretation of *A* and *B*'s arrangement. Rather, the use of the court in and of itself puts everyone in the village on notice that there is another institutional actor in town that residents can call on in a dispute. Even if they find the court's result arbitrary and want to avoid its involvement, they will be aware of its presence and will take action to protect themselves.[46]

This new consciousness of law points inexorably toward modernity. Rural Chinese will no longer be able to rely on the mutual deference and personal relationships that have historically protected their interests. Words and actions that always had one meaning can now mean something different, and villagers will have to take account of legal rituals and institutions like documents, signatures, notaries, and registries, which can become evidence in a trial. As Zhu puts it, they will begin to put more weight on the future and less on the past, because what must now be proven is not moral character but compliance with a set of abstract concepts.[47] The shift is profoundly important:

> It means the abandonment of social control through traditional values and its replacement by an amoral system of social control. In law, the world does not emerge from, and evolve in touch with, life itself but is instead determined ahead of time via legally recognized concepts. In this world, people's daily life retreats from center stage to become merely the background that illuminates legal concepts, topics, and key words. Life becomes more and more like a play where the law is the script and the people play legally defined roles. The play no longer imitates life, but the reverse. The world no longer acquires its meaning from events and actions but from abstract symbols, concepts, and propositions without which events and actions have no meaning.[48]

Many people will gain power and freedom as they develop the skill of using law to advance and secure their interests. The adulterous neighbor *N* in the Irate Husband Case attempted to do so. Farmer *A* did so after farmer

45. ZHU, *supra* note 1, at 219.
46. *Id.* at 232-37.
47. *Id.* at 236.
48. *Id.*

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B had sold the ox, and both farmers are more likely to use the law the next time they enter into a financial relationship. But as rural Chinese begin to use law strategically, they will also lose the freedom to act in any other way. The customary forms of social relations will no longer be available, not because village Chinese will have been suddenly liberated from the social ties and values of the rural countryside but because individuals will begin to use formal law to vindicate customary values.

The husband's demand that his neighbor pay damages even though the neighbor had committed no legal wrong is an eloquent example of the instrumental use of law for traditional purposes, but Zhu cautions against assuming that this case represents the triumph of traditional values over modern law. Just as legal norms will not fully displace informal ones, custom will not overwhelm law. No matter how much judges may sympathize with local values, they remain agents of the state. If ignoring the positive law to satisfy local grievances harms the state, judges will answer for it professionally. The result of the dialectic between rural society and urban law will not be a triumph of one set of norms over the other—culture, after all, has always molded the state while in turn being created by it—but the absorption of the self-reliant rural society into the standardized universe of municipal law. This will take time, people will resist, and the process may occur more quickly in commercial matters than in others, but unless he is ready to be mocked by law every time he encounters it, a rural Chinese person has no choice but to adjust. As with most of the issues that his research raises, Zhu professes to hold no normative view on this one—what will be will be, and nothing is served by agonizing over what is lost—but he does note that, while some will see modernization through the rosy glasses of the rule of law, others (in the manner of Foucault and Weber) will see rose as the color of blood.[49]

3. *Judicial Craft at the Basic Level*

As both agents of the modernizing state and servants of the local population, basic court judges find themselves in deeply contradictory roles. In countries like the United States, where the gap between cultural and legal norms is smaller, where judges' tenure is generally more secure, and where judges can call on greater material and institutional support, these roles are complementary. In rural China, they often are not. If Chinese judges do not satisfy their judicial superiors by correctly processing a large number of cases, their careers suffer. If they are not attentive to the concerns of their colleagues in other local bureaucracies, they face resource constraints and constant interference. If local residents are unhappy, they can express their

49. *Id.* at 237.

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dissatisfaction in a number of ways, ranging from appealing the judgment to fomenting social unrest. The former goes on the judge's record and may mean the loss of a bonus or the job itself; the latter gets the court in trouble with the local government and police.[50]

Zhu identifies several strategies and techniques developed by basic court judges to maximize success and minimize vulnerability. One strategy is to address what matters to the parties rather than its legal manifestation. With ongoing disputes that involve neighbors and relatives, a narrow legal result can leave untouched the underlying problem, with a nontrivial chance of tragic results like murder, suicide, or family violence. The first priority, therefore, is to address the core of the dispute, an approach that Zhu illustrates with the story of a woman who asked a court to dissolve her relationship with her son, who was beating and robbing her.[51] Because there is no such thing as the legal dissolution of the parent-child relationship, the judge could have dismissed the case and referred the woman to the police. Instead, he discovered that her husband had long ago disappeared and devised a novel remedy—that she get a divorce and remarry, thus bringing another male into the household. The next step was to escort her to the local legal services center where the judge personally asked the legal worker to draw up the documents requesting a divorce.[52]

A second common technique is to minimize formal fact-finding and procedure. The parties are interested in the result, not the legal process that leads to it, and anything beyond the bare minimum of process unnecessarily exposes the judge to appellate review. Thus in the Field Ox Case, once the court got a basic grasp on the parties' original deal, it took no further steps to gather evidence or investigate and went directly to cajoling a settlement. Similarly, in a case brought by parents for support from their children, the court did not bother to bring all the children formally into the action, but instead simply suggested a resolution. Although bureaucratic efficiency is also a factor, judges are primarily interested in protecting themselves on appeal. The simpler the facts and the shorter the record, the easier it is to wrap pragmatic decisions in the cloak of doctrine. Zhu's point is not that basic court judges are inattentive to the facts or that the process is quick or simple. Reaching a resolution that satisfies all parties requires a command of the factual and social context that likely goes well beyond what is legally relevant, but as long as the facts are not officially recognized, they remain invisible to appellate courts.[53]

A third frequent practice is the use of every possible resource of the

50. *Id.* at 272-95.
51. *Id.* at 178-80.
52. *Id.* at 178.
53. *Id.* at 276-77.

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system to protect judges' interests. Thus when Beijing attempted to reduce judicial mistakes with the "Eradicate Wrong Decisions" campaign, judges tried to avoid individual responsibility by referring more cases to the adjudication committee. They do the same whenever the local government, the Party, or "the masses" bring pressure in order to avoid responsibility in what is often a no-win situation. Even when a case is not so troubling that it merits referral to the committee, a judge is likely to ask the advice of senior judges or the court president. Judges are also very conscious that any decree or result must be enforceable and frequently engage local authorities in fashioning the remedy,[54] as we saw with the Shaanxi debt collection case and the court president's efforts in the tractor accident case.

Zhu also notes that judges commonly avoid social responsibility for unpopular decisions by exaggerating the severity of the law.[55] Doing so makes any decision less harsh than the inflated maximum seem like the result of the judge's personal compassion for the parties and is particularly common in debt and divorce cases. We saw it in the court's litany of potential penalties in the Shaanxi case, and it was even more flagrant in the treatment of the adulterous neighbor in the Irate Husband Case. Despite being jailed and forced to pay compensation without any legal basis whatsoever, at the end of the day the neighbor was effusively grateful that the judge had let him off so lightly.

Zhu emphasizes that these judicial techniques are not manifestations of Chinese culture or tradition.[56] Quite the contrary: They result from the arrival of the formal legal system in the villages and represent a transitional stage between historical practices and the marketization of rural society. The judge's primary goal may be party satisfaction, but if a judicial decree is necessary, it must be in coherent legal form and consistent with fundamental principles and procedures. The judge must mold the facts of the parties' behavior and intentions into a narrative that complies with the language and logic of the law, emphasizing what is legally significant and downplaying what is not. In doing so, the judge may distort the law and mislead the residents as to its content, but the end result will be the triumph of (legal) language over historical practice.[57]

These techniques may be steps toward modernity and the rule of law, but the road ahead is hardly straightforward, and arrival at some Western-style legal system seems far from certain. The same strategies and techniques that allow rural judges to serve their diverse masters simultaneously—betraying legal norms to preserve social stability or to

54. *Id.* at 282-83.
55. *Id.* at 278.
56. *Id.* at 270-71.
57. *Id.* at 282-83.

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defuse village disputes without being detected by appellate courts—are also a form of "lawlessness." They are used, Zhu stresses, not only for noble purposes but also to cover up corruption, to protect local bureaucratic interests, and to camouflage other forms of self-serving judicial behavior. Although Zhu clearly admires local judges, he is not blind to the contradiction inherent in judicial practices that allow the modernization process to continue while simultaneously moving the judiciary further away from the professionalization that even Zhu recognizes is the ultimate goal.

II. INTERPRETING *SENDING LAW TO THE COUNTRYSIDE*

A full evaluation of *Sending Law to the Countryside* must await further research on the techniques, attitudes, and institutional context of Chinese rural courts.[58] For the moment, let us proceed on the assumption that the data and analysis are generally accurate and representative of at least large parts of rural China. If so, Zhu's description of the Chinese judicial system at the village level makes a significant contribution to the understanding of contemporary Chinese law and, more broadly, of the variety of potential judicial roles in contemporary societies, particularly in the developing world. In this Part, I assess Zhu's theoretical approach and scholarly contribution and what I consider the book's greatest flaw, its failure to deal with the role of political power in China's basic courts.

A. *Zhu's Theoretical Assumptions and the Absence of Politics*

Very little of *Sending Law to the Countryside* is typical of

58. I was not able to find any convincing analysis of the research team's data or methodological choices. A couple of reviewers doubted the representativeness of either Zhu's choice of cases or the regions of China that his team visited or both, but they gave no evidence to substantiate their skepticism. *See* Xiao Han, *Jiedu* "Song fa xiaxiang" [*Reading and Understanding* Sending Law to the Countryside], SOC. SCI. CHINA, Vol. 3, 2002, at 92; Ke Lan, *Song shenmeyang de fa xiaxiang?–Du* "Song fa xiaxiang" *de ji dian yiwen* [*What Kind of Law Is Sent to the Countryside?—Some Questions After Reading* Sending Law to the Countryside], http://www.gongfa.com/dusongfaxiaxiangkelan.htm (last edited June 18, 2001). The general response has been to praise the research team's methodology if not to agree with Zhu's conclusions and interpretations. *See, e.g.*, Liu Xing, *Zoujin xianshi de falu shenghuo—Ping* "Song fa xiaxiang" [*Walk into the Real Legal Life—Commenting on* Sending Law to the Countryside], SOC. SCI. CHINA, Vol. 3, 2002, at 114; Zhang Zhimei, *Zai lu shang—*"Song fa xiaxiang" *yi ge duben* [*On the Way—One Reading of* Sending Law to the Countryside], SOC. SCI. CHINA, Vol. 3, 2002, at 105. One exception is Liu Sida, whose empirical work on Qinghe Village presents a somewhat different picture of the nature of judicial personnel—he found no former military personnel joining the local judiciary after the 1990s—but is otherwise generally consistent with Zhu's account, especially when it comes to the triumph of pragmatism over formal structure. Liu emphasizes even more than Zhu the myriad influences on the courts that operate outside of the relatively clear institutional framework of the adjudication committee. Sida Liu, Transplanting and Decoupling Legal Institutions: Conflicts of Legitimacy in a Chinese Lower Court 46 tbl.1 (2004) (unpublished manuscript, on file with author).

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contemporary Chinese legal scholarship, at least if Zhu is to be believed. Empirical work of any kind is rare, and attention to rural areas virtually nonexistent. Most research has been preoccupied with the construction of an efficient market economy, the needs of commerce and industry, and the regulation of markets. Even in these areas there is little critical analysis or penetration behind the doctrinal façade of Western (or Taiwanese) codes and statutes. Zhu does not dispute the need for such research, but he argues that Chinese academics need to know the social reality of Chinese law as well as the theory of the WTO and international best practices in the taxation of dividends, if for no other reason than academic self-respect. Chinese scholars ignore the one area where they have an advantage and spend their time "warming the leftovers of Western scholarship."[59] Zhu's intent in writing *Sending Law to the Countryside* was not, therefore, merely to describe the reality of rural courts or prescribe policy for them but to make a mark on global legal scholarship by elucidating the theoretical significance of the most concrete events and practices that he encountered.

To do so, he uses an eclectic collection of theoretical and methodological tools.[60] He claims Marxist historical materialism as his basic framework, and his fundamental assumption is that judicial phenomena are better explained as functional responses to social demands than as manifestations of culture, values, or tradition.[61] His Marxism, however, is very much of the "neo" variety, and he is particularly attracted to American law and economics, which, he wryly notes, shares the basic materialist assumptions of Marxism.[62] With the exception of an occasional quote from Mao, names of Western social theorists like Bourdieu, Foucault, Geertz, and Hayek and American legal luminaries like Dworkin, Holmes, Posner, and Scalia dominate the references. In this ideological universe, he cannot claim that legal scholarship can directly produce social change, but rather that it can generate a consensus on the relationship of law and social

59. ZHU, *supra* note 1, at 15, 14-16. This debate began with ZHU SULI, FAZHI JI BENTUZIYUAN [THE RULE OF LAW AND NATIVE RESOURCES] (1996), which urged China to look primarily to its own institutions and experience in reforming its legal system rather than relying on Western models. Other scholars have criticized Zhu for heaping praise on native Chinese institutions while uncritically dismissing Western ones. *See, e.g.*, Xu Aiguo, *Weifazhi er douzheng—Xi Suli de* Fazhi ji bentuziyuan [*The Struggle for the Rule of Law: An Analysis of Suli's* The Rule of Law and Native Resources], *in* 1 PEKING UNIVERSITY LAW ANTHOLOGY 274 (2002) (referring to Zhu as a disillusioned reformer transformed into a "nativist authoritarian," whose "blind adoration of Chinese customs" and equally uncritical negation of Western models will aggravate the most recalcitrant problems plaguing the Chinese legal system). He Weifang has been more willing to engage Zhu on his own terms. *See, e.g.*, He Weifang, *Zhongguo sifa guanlizhidu de liangge wenti* [*Two Problems in China's System of Judicial Administration*], SOC. SCI. CHINA, Vol. 6, 1997, at 117, *available at* http://www.boxun.com/sixiang/000218/10.htm.

60. ZHU, *supra* note 1, at 59-60.

61. *Id.* at 19.

62. *Id.* at 187.

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life that is a necessary foundation of the rule of law.[63] To provide a sense of Zhu's own conception of this relationship, this Section looks first at his theoretical pedigree and then at one aspect of social theory that is curiously missing: the role of political power.

1. *A Realist and Modernist*

Zhu is a no-nonsense realist about judging. His basic court judges often do not know the applicable rules, much less the Dworkinian "right answer," which he treats so contemptuously. Nor need they. Their role is to resolve disputes, and while one can imagine a formalist approach to this task, Zhu engages in no such musing and cuts straight to the core of his subjects' approach: Deal with the underlying conflict, not its legal manifestations; don't make it worse; try to satisfy all parties, even if it requires distorting their understanding of the law; and be sure that you vet the proposed resolution with the necessary bureaucratic players. Doctrine plays a limited role. The court must dress up the result in appropriate doctrinal clothes, but finding suitable formulations is not difficult and has little impact on the actual result. For this reason, the additional legal sophistication of university law graduates is of dubious value and would be outright harmful if they were to allow the formalism of legal education to tempt them away from the proven techniques of pragmatic dispute resolution.

Zhu's realism reflects well his subjects' day-to-day professional life, but it coexists uncomfortably with his own uncritical acceptance of a linear version of modernization theory. This tension emerges clearly from his debates with He Weifang and other colleagues. Zhu accepts the ultimate desirability of a legal system built along Western lines, but he claims that the Chinese countryside is not yet ready for a formalist judiciary. As marketization proceeds and brings farmers' values into line with those of urban Chinese, the disjuncture between statutory law and community norms will disappear. Indeed, that is for him the primary role of basic courts: to use dispute resolution to standardize rural society as capitalism has standardized the cities. The result will be the first effective national government since the Opium War and a judiciary that is as capable of norm diffusion as the contemporary basic courts are of resolving disputes.

Unfortunately, this scenario is neither supported by Zhu's data nor consistent with his summary dismissal of rule-of-law models as guides for basic courts. Throughout his description of what courts do, he stresses the absence of unifying forces. He argues that once rural Chinese have had contact with the law, they will become aware of the courts' institutional presence and will act with the possibility of legal action in mind, but his

63. *Id.* at 14.

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data give no reason to believe that the legal action that may ensue will be any less subject to the vagaries of judicial capacity and local government (and Party) demands than at present. Without a unified legal system strong enough to withstand outside interference and judges both skilled and secure enough to discover and apply the rules neutrally, basic courts will continue to serve as administrative agents of the local government and population rather than as instruments of national unification.

Even if the resource and training issues were resolved, Zhu gives no reason other than an incongruous faith in modernization theory to believe that the "rule of law as a law of rules" model advocated by Justice Scalia[64] will reign in Chinese courts any time soon. Zhu's theoretical framework, while charmingly eclectic, lacks the clear perspective that could articulate the role law will play in the standardization of society that he claims will occur. Perhaps he believes that transformations of this type are the exclusive province of economic forces and that it is fanciful to attribute any role to the law itself, but a more likely explanation is a simple inability to imagine that China could create a modern legal system that would significantly deviate from Western models.

Like Kawashima Takeyoshi, the famous postwar Japanese legal sociologist, Zhu may be so embedded in modernization theory that he cannot see the variety of destinations that modernization can lead to.[65] Of course, Kawashima was concerned not with whether to import Western models—those decisions had already been made—but with why Japanese courts functioned so differently from their Western antecedents. Instead of Zhu's focus on how judges handle an increasing number of disputes, he tried to explain why judges handled so few. Nonetheless, Kawashima's ideological assumptions about law in developing societies have much in common with those of contemporary Chinese (and non-Chinese) scholars and may help us not only to understand Zhu better but also to gauge how much sociolegal scholarship has changed in the last fifty years.

Like Zhu, Kawashima saw a gap between legal norms and social practice and assumed that it was the product of the foreign origin of the norms and the premodern nature of native society. He acknowledged that Japanese avoided courts for many of the same reasons that people do everywhere—cost, time, and the small likelihood of a satisfactory result—but he is better known for the cultural gloss he put on Japan's legal consciousness: that litigation was antithetical to traditional Japanese values. The failure of Japanese society to live up to its Western law, therefore, was not solely an empirical fact; it was also a normative disappointment. As

64. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

65. Kawashima's best-known work is KAWASHIMA TAKEYOSHI, NIHONJIN NO HOUISHIKI [THE LEGAL CONSCIOUSNESS OF THE JAPANESE] (1967).

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long as Japanese society did not use law as Kawashima imagined the West did, Japan's legal institutions could be neither modern nor effective. Similarly, like both contemporary Chinese scholars and most law-and-development reformers, Kawashima assumed both that it was inevitable that Japanese society would evolve to fit its formal legal system and that this evolution was a good thing.

There are important differences between the two scholars' work. Kawashima focused on culture and values, what they were as well as how they interfered with legal modernization. Zhu cares about culture only as a hurdle in the basic court judges' modernizing path, not as an object worthy of study in itself. The contrasting attitudes should not, however, obscure what is similar. Despite fifty years of legal development in Japan, Taiwan, and South Korea, Zhu appears to hold without reservation the assumption that China's legal system will evolve toward models based on Western experience. When Kawashima was writing, there were few theoretical alternatives to the Western model. Certainly, there were no Asian examples. Japan's prewar legal system had been thoroughly discredited by militarism, Chinese attempts at legal modernization had failed, and what we now call the developing world was largely under colonial rule. The exotica of cultural anthropology was not a plausible option, which effectively left Western modernity as represented by the United States. While Japan's own long history of state-sponsored alternatives to litigation might have provided a model under other circumstances, it would have been politically impossible for a postwar Japanese academic, especially a leading liberal theorist like Kawashima, to invoke Japan's recent past.

Zhu Suli, on the other hand, does not inhabit a similarly limited intellectual environment. As his frequent citations to Western social scientists demonstrate, he is aware of alternatives to the classic models, and Japan, Taiwan, and Hong Kong are too frequently mentioned as sources of legal imports for Zhu not to be aware of them as potential examples for reform efforts. Of course it is possible that he is simply taking the path of least resistance. The formalist rule-of-law model with its calls for clear property rights and strict contract enforcement sets the ideological tone for law reform efforts whether undertaken by international financial institutions, the American government, or Chinese academics, and it may be too much to expect Zhu to deviate. This explanation, however, rings hollow. Zhu relishes too much the role of intellectual maverick to pass up a chance to mock the comfortable acceptance of Western orthodoxy.

An alternative explanation is more interesting: He may have considered all these factors and concluded that, exceptions and limitations like Japan notwithstanding, convergence theory is correct. He may see Japan's current restructuring of legal education, its decision to dramatically increase the

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number of lawyers, and its efforts to expand the role of the judiciary as vindication of the inevitability of convergence. He may, in other words, have examined the alternatives to linear modernization theory, from American legal realism to Japanese exceptionalism, and found them to be evanescent deviations from the path that all successful societies are ordained to take. From our vantage point, it is impossible to do more than speculate about which of these explanations, if any, is operating.

2. *The Absence of Politics and Political Power*

However iconoclastic *Sending Law to the Countryside* may be in the context of Chinese legal scholarship, it is reticent to the point of timidity when it comes to politics. Aside from the small-p politics of bureaucratic infighting, power is virtually absent. Although the creation of a rule-of-law country is an official goal of the state and the Communist Party, Zhu gives no hint of how the courts would deal with politically and ideologically charged cases under such a regime. One can readily imagine that the adjudication committee would be nothing more than an ideological enforcer, routinely disciplining judges who put legal craft above Party loyalty, but it is not inconceivable that the judiciary could develop a limited autonomy that would enable judges to function as conscientious enforcers of legal norms and neutral arbiters of local conflict within the constraints of the Party's leadership. Unfortunately Zhu gives no indication of which alternative (or some third) is more likely or of his own views on the matter, and that silence renders it impossible to understand his advocacy of basic court judges either as agents of the modern state or as preservers of local social stability.

To put this point in a concrete context, we need only return to the dispute resolution that Zhu stresses is the courts' primary role. Without local knowledge and legitimacy, judges will not be able to satisfy litigants, avoid exacerbating underlying conflict, or prevent social unrest. All this makes sense, but Zhu does not tell us where the Party comes in. Is the Party affiliation of the population part of a judge's necessary local knowledge? Does the need to enforce Party mandates and ideological rectitude take precedence over gaining legitimacy? Or will basic court judges use their myriad obfuscating techniques to favor local interests and values over Party discipline?

Even if we assume that all courts will toe the Party line, as Zhu seems to imply, the question remains of who within a given court determines the relevant Party line. It is also unclear whether the Party's power will be exercised only to protect its ideological interests or institutional and personal ones as well. Does Zhu expect the adjudication committee to resist

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interference or corruption when it comes via the Party as strongly as when it comes from the local government, the police, or the populace? Similarly, can the court assume that the Party will be neutral between litigants so long as the Party as an institution is not involved? Or are we to assume that Party-supported litigants will always prevail and that Zhu's discussion relates only to the residuum of cases unrelated to the Party? Zhu argues that former officers make satisfactory judges because they have a unique blend of local knowledge and openness that distinguishes them from both university graduates and transferred local bureaucrats. Yet he discusses these sources of judicial personnel as if they were politically and ideologically identical and as if we could evaluate their potential effectiveness without knowing how they relate to the Party.

In Zhu's defense, one might argue that Party interference is so unlikely that it is not worth addressing. The stakes are low in basic courts, and there is little reason to believe that the Party is interested in how the proceeds in the Field Ox Case are divided, how fully the farmer who lost his leg is compensated, or whether an adulterous neighbor has to compensate his lover's husband. This argument, however, ignores instances like the Shaanxi debt collection case or the conviction of policeman Wang, where Party interests are obvious, and it seems to run counter to the premise of *Sending Law to the Countryside* that the judiciary's role is to stabilize rural society and extend the power of the state into the far reaches of China. If Zhu is correct in interpreting the courts' role in this way, it would seem that the Party would be very concerned with how the judiciary carried out its mission, especially at its lowest levels, including which farmers it favored, whether to indict the policeman Wangs of the world, and even whether abused mothers could find relief and protection from the courts.

A second objection to addressing the Party explicitly might be that it is virtually impossible to discuss it as a distinct entity. The Party is inextricably intertwined with governmental and commercial interests at every level of society down to the most remote village. Virtually all significant officials, including judges, are at least acceptable to the Party and are usually members. So if a local bureaucrat demands protection for a local business, does his Party membership turn his interference into an act by the Chinese Communist Party, or is it "merely" governmental interference? If the bureaucrat is bringing the pressure because the manager of the business is his brother-in-law, is it Party interference, simple corruption, or something more complex? The answer cannot be that it is Party interference only when consistent with the current ideological or policy line. As with any dynamic political entity, ideological rivalries and policy differences exist within the Party at all levels, making it less than crystal clear what course to take even if the judge is devoted to the Party

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line. When there is division, how is the judge or court president to determine which line to follow in a particular case? Does she look to the precepts of the Central Political-Legal Committee or to Party authorities closer to home? These are empirical questions that would have made any discussion of the Party complex, but Zhu's silence on the issue makes it very difficult to understand how rural courts can play the role that he assigns them.

Zhu's failure to address political power has another consequence, one that his attention to diffused power should have enabled him to avoid. He emphasizes that the cooperation of village cadres is often a key to the courts' success and recognizes that these cadres are not solely instruments of the state but also draw power from the village. Their cooperation with the court is not guaranteed and does not arise solely from their position in a governmental hierarchy. Nowhere, however, does Zhu entertain the possibility that basic courts themselves may play a similarly Janus-faced role between the center and periphery, at times an instrument of state power but at other times a means for residents to resist some forms of that power.

His treatment of the courts' external political role is strangely unidirectional and particularly disappointing given his nuanced discussion of bureaucratic politics within the judiciary and between the judiciary and other governmental entities. When it comes to the courts themselves, however, state and society are distinct—rural Chinese are on one side of the line and the courts on the other. He celebrates villagers' power to resist the courts' integrative function—that claim is the basis of much of the book—but nowhere discusses the possibility that local residents will transgress the state-society line and use the courts proactively to pursue their interests against the state and Party. He recognizes that rural Chinese realize that the judiciary's institutional power may be used against them, either by the state or by their fellow residents, but not that they may take the next step and realize that the courts may in some circumstances be available for them to use against the state as well.

It seems unlikely that he is afraid to be seen as advocating a tactic of resistance that goes beyond what the Party would find legitimate. One of the universally anticipated roles of Chinese courts is controlling corruption, local protectionism, cadre abuse, and so on, all of which potentially involve resident-initiated conflict with local authority. Zhu himself repeatedly stresses the role of the adjudication committee in resisting government pressure, and one of the reasons that he advocates the use of former military officers is their supposedly greater insulation from parochial loyalties. It is clear, in other words, that all observers expect the courts to develop independent power sufficient to withstand "illegitimate" interference, but if the courts do so, they will be available not only to the central authorities but

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also, albeit on a contingent basis, to anyone who brings his grievance to them.

This is true not because of some romantic view of judicial statesmenship but because courts are not only agents of the state but also sites for social, economic, and political conflict. A group of farmers may complain about pollution from a local business or a village about the unauthorized or undercompensated transfer of agricultural land to other uses. The conflict may initially and primarily be among citizens and its political nature of the small-p variety, but eventually some of these disputes will acquire broader meaning. This transformation is more likely in a democracy with a free press—witness the role of pollution litigation in changing political priorities in 1970s Japan[66]—but even regimes like China's depend on a sense of legitimacy that cannot be assumed, and the Chinese media amply reflect the varying strains within the regime today.[67]

In some circumstances, the courts become the locus of political conflict whatever the desires of the judges to the contrary. We saw this in the trial of policeman Wang. There the court could not avoid becoming the site of political conflict; its eventual judgment was an explicitly political act designed to pacify the local populace at the cost of an innocent police officer. Ironically, if the government is successful in building up the courts as an instrument of social control, such instances will increase, and yet Zhu gives us no way to gauge how the courts will handle them, whether they will play an active role in developing and articulating popular interests and grievances, or how the Party will try to control and exploit this role.

Like his inattention to the role of the Communist Party, Zhu's failure to consider the possibility that basic courts will become sites of popular resistance creates gaps in his discussion of the potential roles and capabilities of the basic courts, as brief speculation on his advocacy of former military officers as basic court judges illustrates. If Zhu is correct in his claim that the military stresses meritocratic advancement and openness to new ideas more than do local bureaucracies, one could imagine that staffing courts with retired officers may make courts more likely to defend popular interests. This may be particularly true given the reputation of local officials for overburdening farmers across a range of issues from taxation to land conversion. On the other hand, one could also imagine officers being more repressive. Perhaps they are accustomed to harsh discipline and more willing to condone the use of force, or their service in the military may make it difficult for them to empathize with local farmers. Or perhaps it is much simpler than all this, and former officers' views soon become the

66. *See* FRANK K. UPHAM, LAW AND SOCIAL CHANGE IN POSTWAR JAPAN 28-77 (1987).

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

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same as local officials' once they realize that their housing, salary, and general well-being are now dependent on the largesse of the local bureaucracy.

Where an observer comes down on these politically charged issues affects her appraisal of whether basic courts can play the social control role that everyone from Communist Party leaders to American law professors are eager to assign to them. Zhu puts great weight on popular legitimacy, but he limits his discussion to the courts' dispute resolution role, ignoring both the actual and potential impact of their stance on broader social and political issues.[68] While there may be excellent reasons for discreet silence on the topic of courts and political power for many Chinese scholars, the dean of Beijing University Law School would seem to be in a unique position to address such issues, even if only indirectly. It is important to reiterate that developing the Chinese legal system is not simply the dream of the U.S. State Department and the Ford Foundation; it is also the explicit policy of the PRC and is being actively pursued under the rubric of "the rule of law." While it may be unfair to ask any scholar, dean or not, to take normative positions in his scholarship, Zhu does so repeatedly in *Sending Law to the Countryside*, from his criticisms of Chinese legal education to his teasing of his colleagues for an infatuation with Western theories. Given that he clearly wants to be engaged in these issues, his silence on one this fundamental is puzzling.

B. *Chinese Basic Court Judges and Law and Development*

It is perhaps inevitable that law-and-development reformers look to the West for models. The legal systems of developed countries are by definition successful, although it is far from clear in which direction the causal connection runs. Conversely, the number of poor societies with successful legal systems is small. India may be an example, but the list is short. Furthermore, the West is where the money is. India is not funding the computerization of Ugandan courts, or dispatching its professors to lecture the Bolivians on the importance of clear property rights, or providing

68. Lurking in the background of Zhu's discussion of legitimacy, local knowledge, and dispute resolution is the concept of justice. As with *guanxi*, he studiously avoids the term, perhaps for the same reason: It is so difficult to define and so variously used that it has no social scientific bite. It is also possible that he considers conceptions of justice to be as fragmented in rural China as more mundane questions like the meaning of *dahuo*, the obligations of adulterers, or the propriety of a slap on the wrist of policeman Wang. Or he may believe that his use of legitimacy can do the analytically useful work of justice without forcing him to enter its emotive morass. I too have avoided the concept, partly for its lack of definition and partly because addressing the role of justice in China is substantially beyond my capabilities. My primary reason, however, is that I assume that Zhu includes justice in his use of legitimacy. If not, much of what he says about the courts' role in extending the Chinese state into the hinterlands makes little sense.

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scholarships for Filipinos to attend the National Law School, and it would likely not matter if it were. Even if Third World reformers doubted the applicability of Western models to their problems, they at least have to pretend to imitate Western practice because their countries will be punished if they do not. An increasing number of national governments and international financial institutions have begun to condition loans, aid, and trade access on the perceived quality of poor countries' legal systems,[69] and it will be very difficult for even the most broad-minded officials to measure quality by any metric other than the familiar institutions of America or Europe. As a consequence, the reformer's attention naturally tends toward the institutions of the developed world.

There are alternative sources of models, however. One is the legal and economic history of now-rich countries. But the problem with looking to legal history is that very little has been written with law-and-development issues in mind. There are exceptions,[70] but they are few, and there is no reason to expect either contemporary legal historians to find law and development compelling or law-and-development reformers to spend time doing serious history.

A second alternative is the indigenous institutions of contemporary developing countries themselves. Here the relevance is clear, but the problems are substantial, beginning with the paucity of successful legal systems, especially ones that have functioned well over a long enough time to be sure of their long-term effectiveness. For example, the aggressive encouragement of public interest litigation by the Supreme Court of India has been widely praised, but the performance of lower courts continues to lag.[71] It is also true that empirical scholarship on contemporary

69. *See, e.g.*, Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, div. D, tit. VI, 2004 U.S.C.C.A.N. (118 Stat.) 3, 211-26 (to be codified at 22 U.S.C. §§ 7701-7718) (Millennium Challenge Act of 2003). The Millennium Challenge Corporation selected sixteen nations as eligible to propose specific projects to be financed by the Millennium Challenge Fund. Christopher Marquis, *Africans May Claim Much of $3.5 Billion in U.S. Reform Rewards*, N.Y. TIMES, May 8, 2004, at A3.

70. I have briefly speculated elsewhere about the relevance of the American legal system's treatment of technological change in the nineteenth century to that of today's developing countries. For legal histories that have direct, if inadvertent, relevance to current issues in law and development, see MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 (1977); J. MARK RAMSEYER, ODD MARKETS IN JAPANESE HISTORY (1996); and FRANK UPHAM, MYTHMAKING IN THE RULE OF LAW ORTHODOXY (Carnegie Endowment for Int'l Peace, Democracy & Rule of Law Project, Rule of Law Series, No. 30, 2002), *available at* http://www.carnegieendowment.org/files/wp30.pdf. For a direct comparison of contemporary China and nineteenth-century America in this context, see Michael W. Dowdle, *Visibilizing the Invisible Hand: Exploring for New Forms of Public Accountability*, *in* EXPLORING PUBLIC ACCOUNTABILITY: LAW, DESIGN, AND EXPERIENCE (Michael W. Dowdle ed., forthcoming 2005) (on file with author).

71. Marc Galanter & Jayanth K. Krishnan, *Debased Informalism:* Lok Adalats *and Legal Rights in Modern India*, *in* BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW 96 (Erik G. Jensen & Thomas C. Heller eds., 2003).

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modernization efforts is not plentiful. Western interest in law in poor countries has tended to be anthropological rather than aimed at the core issues of the law-and-development movement. That perspective is rapidly changing, but the norm remains the in-house evaluation of existing programs, which cannot substitute for independent scholarship.[72] Of course, if we take Zhu's emphasis on local knowledge seriously, it may not matter because it may be just as difficult to imitate developing-country models successfully as it is to imitate Western ones.

These obstacles notwithstanding, legal imitation will continue for the simple reason that there is no alternative. It may be that basic court judges in rural China have little in common with the visions dancing in senators' heads when they condition aid on progress toward the rule of law, but that does not mean that Chinese courts' situation will not be relevant to other developing countries (or vice versa), to practitioners assisting in legal reform, or to scholars trying to determine what kind of judicial systems can contribute to growth. This Section, therefore, explores ways in which the experience of Chinese basic court judges may give us insight into the major questions facing law-and-development theory and practice.[73]

1. *Chinese Basic Court Judges and the Formalist Rule-of-Law Model*

Zhu's portrait of basic court judges stands in stark contrast to the rhetoric of most First World proponents of reform. An example from the 1980s demonstrates. In an effort to increase the effectiveness of the World Bank's development loans, the Bank's general counsel, Ibrahim F.I. Shihata, identified the rule of law as crucial for economic growth and defined the rule of law as abstract rules embedded in institutions that strictly apply them to factual situations:

> Reform policies cannot be effective in the absence of a system which translates them into workable rules and makes sure they are complied with. Such a system assumes that: a) there is a set of rules which are known in advance, b) such rules are actually in force, c)

72. One exception is BEYOND COMMON KNOWLEDGE, *supra* note 71. The problem with programmatic evaluations is exemplified by MANY ROADS TO JUSTICE: THE LAW-RELATED WORK OF FORD FOUNDATION GRANTEES AROUND THE WORLD (Mary McClymont & Stephen Golub eds., 2000), the Ford Foundation's evaluation of its many rule-of-law and public interest law programs. While containing a wealth of data on the Ford Foundation's efforts, it is an unremittingly optimistic story with virtually no mention of failures or incompetence.

73. In doing so, I am taking the institutions and governments that urge developing countries to create the rule of law at face value. If, on the other hand, rule-of-law advocates are really concerned only with the legal protection of international creditors or investors, that can probably be achieved best by creating ad hoc institutions like China's International Economic Trade Arbitration Commission, designed for that specific purpose, rather than trying to build entire legal systems.

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> mechanisms exist to ensure the proper application of the rules and to allow for departure from them as needed according to established procedures, d) conflicts in the application of the rules can be resolved through binding decisions of an independent judicial or arbitral body and e) there are known procedures for amending the rules when they no longer serve their purpose.[74]

The role of law in this model is clear: Judges and courts shape primary behavior by the independent and strict enforcement of centrally created and controlled rules.

Two aspects of this model deserve elaboration in the Chinese context. First, rule formalism requires a normative and epistemological separation of courts from society. It is not sufficient that judges be honest and institutionally autonomous enough to withstand external pressure. Formalism further demands that judges be insulated from society itself, that they look only to legal rules in making decisions, that they not be managers of social conflict but appliers of rules. Second, but less frequently recognized, this form of judicial independence requires the domination of central politics over local society. In adjudication, judges are not to interpret rules in light of the values of the local population, the parties' understanding of the rules' language or meaning, or the effect of the rules' application on local expectations or interests. On the contrary, the ideal is for judges to live in the same intellectual and normative universe as lawmakers and to resist any temptation or pressure to tailor the content of the rules to fit local social reality.

This model expects much of judges, but it puts distinct demands on legislators and society as well. Legislators must create rules that are intelligible to ordinary people and that cover all foreseeable circumstances. Society, in turn, must learn the rules. Intelligible rules that anticipate all possible events are not the sole responsibility of their drafters, but rather emerge only after a process of interpretation and application by a broad range of officials from the police to the highest court. The model, therefore, is procedural as well as substantive, and the process depends on well-functioning bureaucracies linked across governmental institutions and from the center to the periphery. In the end, the process creates universal norms that can be applied uniformly whether the court is sitting in Shaanxi or

74. 1 IBRAHIM F.I. SHIHATA, *The World Bank and "Governance" Issues in Its Borrowing Members*, *in* THE WORLD BANK IN A CHANGING WORLD: SELECTED ESSAYS 53, 85 (Franziska Tschofen & Antonio R. Parra eds., 1991). It is important to note that Shihata's memorandum oversimplified the nature of law and legal systems in order to persuade the World Bank to pay attention to the quality of the legal systems of recipient countries. By using the passage above, I am not implying that contemporary legal reformers at the World Bank and elsewhere are innocent of the complicated nature of legal reform. Nonetheless, this style of rhetoric continues to dominate the public debate and is likely to be taken at face value by many if not most observers without firsthand experience in legal reform.

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Shanghai, with local variations possible only when anticipated by the norms and articulated by Shihata's "mechanisms" and "established procedures" of the model, not by ad hoc adjustments of individual judges or courts.

Whether or not this type of legal system and society is one's ideal vision for China, the current situation is very different. Instead of acting as independent appliers of abstract norms to standardized facts, basic court judges act as specialized components of local bureaucracies dedicated to defusing social conflict by the effective resolution of local disputes. Instead of being insulated from society, they bargain with it. In certain circumstances they represent local society in opposition to centralized norms, not solely or primarily in terms of illegitimate "local protectionism," but also in terms of vindicating and realizing local expectations of justice and law.

Zhu's attitude toward this process is ambivalent and ambiguous. He celebrates the flexibility and sensitivity needed to satisfy local expectations, and he claims that the courts are extending the institutional power of the state into the countryside, but he never tells us how ad hoc, fact-specific adjudication can build a unified, national institution. On the contrary, he portrays the courts' current role as a temporary, stopgap solution needed because of the judges' lack of professional skill and rural society's lack of standardization. Although he praises the judges' imagination and argues that conditions are not right for the importation of Western models, he stops far short of describing the current situation as normatively desirable or giving the reader any sense of the mechanism by which current practices contribute to the modern (and perhaps formalist) courts that he sees as part of China's distant future.

Why Zhu heaps praise on judges who he ultimately agrees are premodern and destined to be replaced by a judiciary like that advocated by the World Bank may be explained by the theoretical contradictions explored in the previous Section. Zhu is simultaneously a modernist—not so different from Kawashima, Shihata, or the Chinese imitators of the West who he loves to ridicule—and an empirical social scientist concerned with reality on the ground. Although he sees the shortcomings of the formalist model, he seems as unable to envision an alternative model as are his critics, which is unfortunate because the formalist model is hardly unchallenged either as a prescription for developing countries' courts and judiciaries or as a description of the role of First World judges. A brief digression into recent scholarship on American discrimination litigation illustrates that it is not only basic court judges in Shaanxi who adopt a proactive and administrative style in resolving disputes.

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2. *Chinese Basic Court Judges and One View of American Judges*

American judges now encounter litigation alleging race and sex discrimination where the bias is embedded in institutional structure and cultural stereotypes and may be not only unintended but also unconsciously held. The fact patterns cannot be easily understood or resolved by judges limited to the strict application of legal rules and constrained by a formal conception of civil procedure and adjudication. Just as village disputes exist within a rural society that fits imperfectly with the preconceptions of modern law, these forms of discrimination are too varied and too intertwined in social practice to be fully articulated by statute. And just as basic court judges go beyond the passive judicial role to resolve conflict in a way acceptable within their social setting, so do American judges act aggressively to understand and address these complex and culturally ambiguous issues.

Very importantly, however, they do so without sacrificing the norm-creation function of the judiciary that Zhu so quickly abandons when faced with the gap between legal rules and social reality. Recent scholarship by Susan Sturm indicates that, in functionally similar circumstances, American judges have devised ways to go outside the settings of conventional litigation to gather data and consult stakeholders and yet still use litigation to create norms that add to a general understanding of the issues:

> These processes generate learning and outcomes that are more generally applicable, even if they have less formally binding effect than a formal adjudication. These settings include determinations of the scope of and participants in resolving the legal conflict, as well as proceedings about settlement and remedy. Outside the formal law-making and enforcement process, actors participate in norm elaboration that directly contributes to the content of formal legal norms, and courts sometimes actively shape the contours of that informal norm elaboration process.[75]

American judges are not willing, in other words, to forgo the norm-diffusion function of adjudication even as they find the classic approaches incapable of resolving or even understanding these disputes. The details of how American judges in this context can both reach just settlements in specific litigation and create norms that contribute to a wider jurisprudence of equality are not of direct relevance to our inquiry. But Sturm's argument that the two functions are not mutually exclusive, even when judges are

75. Susan Sturm, *Law, Norms, and Complex Discrimination*, *in* HANDBOOK OF EMPLOYMENT DISCRIMINATION RESEARCH: RIGHTS AND REALITIES (Laura B. Nielsen & Robert L. Nelson eds., forthcoming 2005) (manuscript at 5, on file with author).

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faced with disputes that are deeply embedded in complex social relationships, may give us hope. Sturm's insights, when applied to China, suggest that seemingly idiosyncratic and fact-specific arrangements crafted by Chinese judges can contribute to a more effective and more widely applicable set of legal norms and judicial practices than would seem likely from Zhu's emphasis on local knowledge and factual contingency.

Sturm begins with the claim that there exist "problems for which some state intervention is needed" but for which "coercion through rule enforcement may not be justified or workable,"[76] language that recalls Zhu's description of the issues facing Chinese basic court judges. In these cases, Sturm advocates that courts engage in a proactive dispute resolution process both inside and outside the confines of the court. She sees American courts facilitating, rather than actively leading, these processes, but as we have seen, Chinese basic courts are likely to do this work themselves, undoubtedly because they operate in a society without many of the private institutions and administrative agencies that figure in Sturm's model. She also envisions a process that will be "collaborative, deliberative, and accountable" and linked to the creation of "collective learning and norm generation,"[77] language that brings to mind Zhu's description of the adjudication committee, with its careful speaking order and on-the-record voting. Although Zhu prefers to focus solely on dispute resolution, there may be instances where the basic courts also create "collective understandings" by consulting local authorities, village cadres, and relevant stakeholders, even if they are doing so without either intent or consciousness of doing anything beyond resolving the concrete dispute before them.

One can make too much of these similarities, however. Without the openness and transparency crucial to Sturm's model, judicial resolution of the Field Ox or Irate Husband Cases may make residents aware of the courts' institutional power, but it cannot create general norms on anything but the most limited and local scale. Even if we accept Zhu's rather sanguine view of the procedures of the adjudication committee, its deliberations are not open and transparent in the sense of or to the same degree as American courts. Even more importantly, the actions of the adjudication committee represent only a fraction of informal influences on judicial decisions.

Nonetheless, the fact that American judges are engaged in roughly similar fact-sensitive and collaborative adjudications that consciously depart from the formalist rule-enforcement model opens up an array of possibilities for reform of Chinese adjudication that do not require the

76. *Id.* (manuscript at 6).
77. *Id.*

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creation of a World Bank-style judiciary. Given that the latter is arguably impossible for China any time soon, a closer look at the practices described by Sturm and similar practices in other countries and legal areas may suggest ways in which the basic courts can create general norms while remaining sensitive and responsive to their local populations.

Such a consultative process might also ameliorate a second problem inherent in the eventual modernization of the Chinese judiciary: the unnecessary or premature destruction of local norms. As we have seen, despite the informality of basic court adjudication, nationally promulgated rules are not irrelevant. Their presence and the possibility of appeal influence the way courts resolve disputes even when judges may not have either the professional training necessary to understand the legal niceties or the bureaucratic will to apply them. The result is unlikely to be the inculcation of centralized norms into local society, but the failure to establish modern norms completely does not mean that the status quo ante remains in place. Preexisting local practices that contribute to social stability and facilitate economic relationships may be irreparably harmed.

The judicial interference with the rural practice of *dahuo* in the Field Ox Case, for example, may dissuade villagers from using the *dahuo* form in the future without providing an effective and widely understood substitute.[78] In other words, the introduction of legal institutions into the countryside may have the ironic effect of disrupting the social stability that rule-of-law institutions are intended to achieve. The point is not that law reforms should aim to preserve local customary practices. There is no reason to believe that customary practices such as *dahuo* are necessarily stable and efficient, and even if they are appropriate for contemporary life in rural society, they may not remain so for long given the pace of change in China and the PRC's determination to use legal institutions to extend the reach of the state. The solution, therefore, may be to institutionalize the dialectic that Zhu describes between formal and informal, modern and customary, center and periphery in a manner designed to make the norms created more accessible to the public while also being respectful of local practices. With Sturm's portrayal of contemporary discrimination litigation in the United States as an example, such a step might even be celebrated as a move toward modernity. Chinese legal scholars could take the place that

78. The displacement of informal practices by the introduction of formal legal institutions has been amply recognized. *See* Robert D. Cooter, *Inventing Market Property: The Land Courts of Papua New Guinea*, 25 LAW & SOC'Y REV. 759 (1991); Matthew C. Stephenson, *A Trojan Horse Behind Chinese Walls? Problems and Prospects of U.S.-Sponsored "Rule of Law" Reform Projects in the People's Republic of China*, 18 UCLA PAC. BASIN L.J. 64 (2000); Frank K. Upham, *Speculations on Legal Informality: On Winn's* "Relational Practices and the Marginalization of Law," 28 LAW & SOC'Y REV. 233 (1994); William P. Alford, *Exporting "The Pursuit of Happiness,"* 113 HARV. L. REV. 1677, 1706-09 (2000) (reviewing THOMAS CAROTHERS, AIDING DEMOCRACY ABROAD: THE LEARNING CURVE (1999)).

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Zhu holds for them: not only representing the law of one-fifth of mankind but also announcing a new model for societies facing rapid change and wide gaps between urban and rural conditions.

3. *Chinese Basic Court Judges and the Bureaucratic Model*

A final area where a comparative perspective may provide insight into both the state of the Chinese judiciary and its relevance for other developing countries is reforming the courts' bureaucratic nature, particularly the role of the adjudication committee and the ubiquity of informal collective adjudication. Zhu's only reference to other judicial bureaucracies is his dismissal of the American judiciary as too dissimilar to be relevant, but he might have found something worth studying had he looked to Japan.

The Japanese judiciary is one of the most bureaucratized in the world. Judges typically enter in their twenties, and lateral entry is rare. The result is a corps of judges who, with the occasional exception of a year or two spent in a national ministry, have never done anything else in their entire working lives. They are members of a finely tuned hierarchy that is tightly supervised by the Supreme Court Secretariat, with a socialization and training program that guarantees the professional competence of virtually every judge sitting in Japan. Not only are all judges monitored and evaluated constantly, but the Secretariat also uses an intricate system of promotions and transfers to reward competence and productivity and punish mistakes and sloth. Add to this mix compensation greater than that of other public servants and tight restrictions on political activity, and you have an honest and effective judiciary that should be the envy of most countries in the First World and an obvious model for countries like China.[79]

The Japanese model remains attractive even after considering the vast differences between China and Japan. Chinese basic court judges, as we have seen, often have minimal legal training and come from a range of regional and occupational backgrounds, a diverse group by almost any standard. Japanese judges are the opposite: They are among the most highly qualified graduates of a few top law faculties, and they come largely from the same socioeconomic class in perhaps the most homogenous large country in the world. Although the higher salaries and greater professional freedom of private practice are increasingly attracting young Japanese lawyers, the bench remains a highly prestigious and well-paid post. In contrast, Chinese judges are poorly paid and enjoy little prestige. As Zhu emphasizes, the chance of a top graduate of Beijing University Law School going to a rural basic court is infinitesimally small.

Far from being reasons for shunning the Japanese experience, however,

79. *See generally* JOHN OWEN HALEY, THE SPIRIT OF JAPANESE LAW (1998).

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these differences may cut the other way. If the Supreme Court Secretariat were eliminated tomorrow and Japanese judges freed of its supervision and personnel manipulation, Japan would still enjoy a highly qualified and motivated judiciary. The Chinese judiciary, on the other hand, would appear to need the bureaucratic integrity and professional socialization of the Secretariat desperately. A tightly run administrative unit engaged in constant mentoring and monitoring of junior judges would leverage the meager supply of technical expertise of the Chinese judiciary, especially at the lower levels. Zhu might argue that a centralized entity like the Secretariat would detract from the local knowledge and unconventional judicial skills necessary at the basic court level, but he would have to admit that it would enhance the professionalization that he currently leaves to the adjudication committee. It would also strengthen the ability of the judiciary to resist external pressure and to prevent corruption within its ranks. In other words, the development somewhere within the judicial hierarchy of an oversight and training entity with the power and authority of Japan's Secretariat would improve the basic courts along precisely the technical lines in which they are now deficient even in Zhu's estimation.

There are of course many practical obstacles to further bureaucratic supervision of the Chinese courts. First is resources. Japan is a rich country that has chosen to limit litigation and provide a wide range of extrajudicial means to resolve civil disputes. Even relative to population, it has a small judiciary. China, by contrast, is poor and has chosen to rely increasingly on the courts for social control, so the amount of resources available will be substantially smaller relative to the number of courts and judges. But a lack of resources is only part of the problem. More important is the decentralization of the Chinese judiciary and its inclusion in local and provincial bureaucratic structures. One of the less-remarked-on aspects of the Secretariat is its unifying role, not only in the legal system but in the nation as well. While there are many reasons to expect that a shift to such a centralized judiciary would be a dramatic improvement over the current Chinese judicial structure, it is unlikely to occur in the near future.

But the most important reason to doubt the wisdom of a more centralized judiciary is politics. Several Japanese and American scholars have argued that the Japanese judiciary is under the political thumb of the ruling Liberal Democratic Party (LDP), which has dominated Japanese politics since World War II. They claim that the Secretariat not only controls entry into the judiciary but also punishes any judge who dares to decide even one case in a manner inimical to the partisan interests of the LDP.[80] The punishment is mild—usually limited to a stunted professional

80. For an overview of the literature on partisan political control of the Japanese judiciary, see Frank K. Upham, *Political Lackeys or Faithful Public Servants? Two Views of the Japanese*

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career and transfer to a less desirable post—but effective, so that virtually all observers of the Japanese judiciary agree that judges feel constrained to decide cases within the range of what is politically acceptable to the Secretariat.

While perhaps offensive to true believers in judicial independence, this type of political control does not appear to have had pernicious results in Japanese society. Japan remains a vigorous and competitive democracy. Despite LDP dominance, it has never been a one-party state in the authoritarian sense of that term, and Japanese enjoy the same basic freedoms to the same general extent as citizens of other industrialized democracies. Although it has only momentarily been out of power during this period, the electoral success of the LDP has waxed and waned, and it has been successful largely because it has been willing to adjust its policies radically when necessary to remain in power. There have always been, in other words, strong restraints on what the LDP could politically accomplish through the courts, and the courts have in several instances ruled against the LDP in politically charged cases.

Japanese courts exist within a vibrant democracy. That they operate within political constraints may be regrettable from the standpoint of judicial independence, but it is hardly reason to fear for the health of Japanese democracy. A similarly tightly controlled judiciary in China, however, would present a radically different picture. When viewed through a political lens, a centralized bureaucracy and intensified judicial training seem more ambiguous than when the perspective is limited to professional competence and honesty. Indeed, if we allow our imaginations to return to the model represented by the Shihata excerpt above, rule-of-law formalism takes on a darker tone. Whatever one thinks of the accomplishments and shortcomings of the Chinese Communist Party, it operates without many if not most of the political constraints present in democracies. This may not mean that the Party is all-powerful or would long survive if its policies were totally arbitrary, but it must certainly give one pause in advocating a unified judiciary along the lines of the Japanese model, even if that judiciary would be of much higher quality by standards of technical proficiency and honesty.

From this perspective, the romanticized, close-to-the-people picture of basic court judges that Zhu draws has a certain charm. Economists and rule-of-law reformers may prefer a unified system of stable universal rules consistently applied across China. Such a system might improve market function and enrich the country by accelerating Zhu's standardization process, but in a regime without strong constraints on political power it might well lead to greater repression and eventually the kind of social

Judiciary, 30 LAW & SOC. INQUIRY (forthcoming Spring 2005).

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unrest that would quickly destroy the economic gains that economists assume would flow from a more effective judiciary. If, in other words, basic court judges stopped being providers of social stability and brakes on the marketization inherent in Beijing's current policies, the result might not be exactly as anticipated by those entranced by the rule-bounded nature of rule-of-law orthodoxy.

CONCLUSION

Despite the distance between the practices of basic court judges and rule-of-law imagery, Zhu Suli's *Sending Law to the Countryside* gives us no reason to doubt those judges' general effectiveness. To the extent that the Chinese situation is repeated in other developing countries, therefore, it raises the question of whether legal reforms should aspire to create effective village judging like Zhu describes or should attempt to leapfrog that stage and develop a professional judiciary that resembles the one anticipated in Shihata's memo. The answer depends on a range of factors: whether one shares Zhu's faith in the formalist model as the ultimate destination of modern legal systems, one's estimate of the possibility and cost of creating a rule-of-law judiciary, and whether one thinks a centralizing judiciary will enhance social stability and political development. Other relevant factors include the nature and effectiveness of current modes of enforcing economic exchange and maintaining social order, their compatibility with a modern legal system, and whether one values dispute resolution or norm diffusion. A final issue, but perhaps the most important for many reformers, if not for Zhu, is the political role of the courts. Will they understand local norms and provide substantive justice to the residents, or will they be instruments of the center designed to conform local practices and behavior to national standards and define justice in the interests of faraway rulers? The resolution of these issues depends on the political goals and institutional resources of each society, but *Sending Law to the Countryside*, its flaws notwithstanding, can shed some light on the nature of the questions and the range of possible answers.

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