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## Innovation Through Intimidation: An Empirical Account of Defamation Litigation in China

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# Innovation Through Intimidation: An Empirical Account of Defamation Litigation in China

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Benjamin L. Liebman \*

## INTRODUCTION

Consider two recent defamation cases in Chinese courts. In 2004, Zhang Xide, a former county-level Communist Party boss, sued the authors of a best selling book, *An Investigation into China's Peasants*. The book exposed official malfeasance on Zhang's watch and the resultant peasant hardships. Zhang demanded an apology from the book's authors and publisher, excision of the offending chapter, 200,000 yuan (approximately U.S.\$25,000)<sup>1</sup> for emotional damages, and a share of profits from sales of the book. Zhang sued in a local court on which, not coincidentally, his son sat as a judge.<sup>2</sup>

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1. During the period covered by this Article, the exchange rate between the Chinese renminbi, or yuan, and the U.S. dollar was US\$1 = 8.3 yuan.

2. See *infra* Appendix B, Case 180; Philip Pan, *In China, Turning the Law into the People's Protector*, WASH. POST, Dec. 28, 2004, at A1. Zhang's request that the authors cease publication was unnecessary: In March 2004, while the case was underway, the Communist Party's Central Propaganda Department banned the book. The Propaganda Department also banned media coverage of the case, although reports and discussion continued on the Internet, and a few media outlets covered the court hearings. As of August 2005, the first-instance court had yet to decide the case. See *infra* Appendix B, Case 180. In a statement submitted to the intermediate court on July 11, 2005, the defendants' lawyer, Pu Zhiqiang, criticized the court for violating procedural requirements in its handling of the case, argued that the delay in resolving the case demonstrated that external forces were influencing the court's handling of the dispute, and questioned the pressure being placed on defendants by the court to settle the case. *Id.*; see also Bentai Dujia Huode "Zhongguo Nongmin Diaocha" An Bianbu Liusi Pu Zhiqiang Zhi Shenpanzhang Yi Xin [Exclusive: Letter to the Chief Judge from Pu Zhiqiang, Lawyer for the Defendants in the "Investigation into China's Peasants" Case], RADIO FREE ASIA, July 11, 2005, <http://www.rfa.org/mandarin/shenrubadao/2005/07/11/puzhiqiang/>.

In 2000, Song Dianwen, a peasant, sued the *Heilongjiang Daily*, the official paper of the Communist Party, in his home province for defamation after it published an article reporting that, during a village disturbance, Song had lit a fire that killed two people. He won a judgment from a local court, affirmed on appeal, for 3,500 yuan (approximately U.S.\$430) in emotional damages.<sup>3</sup>

The cases exemplify two different tracks of defamation litigation in present-day China. Track-one cases, like Zhang's, are brought by local public officials, government and Communist Party entities, or corporations to punish and control the increasingly aggressive Chinese media. In these cases, courts serve as state institutions at the local, as opposed to central, level to restrict and retaliate against the media and to block central oversight. On the second track, persons without power or Party-state ties sue the media, which, despite widespread commercialization, virtually all continue to be linked to the Chinese Party-state. Many such cases are brought by ordinary persons against Communist Party mouthpiece newspapers. Track-two cases thus represent a deployment of the courts by ordinary citizens against state entities. Empirical evidence from 223 defamation cases studied in this Article indicates that the media lose the overwhelming majority of cases on both tracks.<sup>4</sup>

The conventional wisdom, taking track-one powerful plaintiff suits as the paradigm, perceives defamation litigation in local Chinese courts as yet another lever of state control over the increasingly autonomous Chinese media.<sup>5</sup> Track-one developments in China correspond to experiences in other contemporary single-party states,<sup>6</sup> where libel laws often serve to restrict individual rights, and to the use of defamation law to preserve state authority in Western legal history. By neglecting track-two cases, however, this popular view shortchanges the extent to which defamation litigation in China also serves a countervailing function: the use of courts by ordinary persons to challenge state authority. The conventional wisdom also overlooks the degree to which defamation litigation reflects growing use of the formal legal system by local authorities to resist central Party-state control.

The development of defamation litigation, on both tracks, illustrates the complex and evolving roles of courts, media, and civil litigation in China. Analysis of the claims and outcomes in 223 defamation cases suggests that

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3. The court found that the report was false. *See infra* Appendix B, Case 68.

4. The empirical evidence is set out in full in the Appendices to this Article. Appendix A, *infra*, details the parties and other relevant information for each case analyzed for this Article. Appendix B, *infra*, includes citations to the sources relied on for each case.

5. *See, e.g.*, Committee to Protect Journalists, *China (including Hong Kong)*, in *ATTACKS ON THE PRESS IN 2004* 101, 103 (Bill Sweeney ed., Committee to Protect Journalists 2005) (noting the use of libel suits in China "to bring [journalists] to heel"); H. L. Fu & Richard Cullen, *Defamation Law in the People's Republic of China*, 11 *TRANSNAT'L LAW.* 1, 20 (1998) (arguing that "[t]he use of the civil law of defamation by citizens is encouraged by the authorities to help tighten media control, thus supplementing the existing criminal, administrative, bureaucratic and political control systems"); *cf.* Freedom House, *China, in FREEDOM OF THE PRESS 2005: A GLOBAL SURVEY OF MEDIA INDEPENDENCE* 57, 57 (2005) (noting the tight control of the Chinese media by Communist Party authorities).

6. *See infra* note 384.

use of defamation litigation by track-one plaintiffs for repressive purposes is encouraging both ordinary persons to use such cases to protect their own interests and courts to become increasingly important arbiters of individual rights. Through these processes, instrumental use of the courts to protect local interests is legitimizing the role of courts in Chinese society. Defamation litigation serves to intimidate and restrain the Chinese media, but in a system in which the media are not free of state control, such cases may also increase state accountability. This story is not as simple as commonly believed, but, better understood, it adds significant insight into the nature of legal innovation and institutional development both in China and in other developing legal systems.

In prior work I have shown how close Party-state ties give the media extensive power both to influence the courts and to resolve disputes, power that has increased even as the media have become increasingly commercialized and have begun to assert new autonomy.<sup>7</sup> A high rate of media defeats in defamation cases does not alter that conclusion. The fundamental fact is that the media often have far more real authority and power in the Chinese legal system than the courts. China's courts remain institutionally weak and subject to extensive external influence, particularly from the local Party-state.<sup>8</sup> The media continue to exert influence across a range of cases, and the total number of defamation cases brought against the media is relatively small when compared to the total volume of civil litigation in China.

Still, defamation cases are worthy of independent study. These cases represent an area in which the media frequently are a weak party, in particular when sued by courts, judges, and other local officials and state entities. Such cases suggest that courts are increasingly able to challenge the media's broader authority and influence. Understanding the media's strong position in the Chinese system helps explain why courts and other local officials and state entities have turned to litigation to combat media oversight: They possess few other tools to challenge media verdicts. Yet defamation cases also show that courts are not always swayed by the relative power of litigants before them. In cases brought by ordinary persons, court verdicts in favor of plaintiffs often reflect judicial willingness to rule against powerful entities.

This Article proceeds in three Parts. Part I sets out the methodology of the study, the legal framework governing defamation law, and the early development of plaintiff-favoring defamation cases in the 1980s and 1990s. Part II analyzes 223 defamation cases brought in China in the past decade, with particular attention to who sues and is sued, the nature of defamation claims, and plaintiffs' goals. Part III places the empirical findings from Part II in a larger context, showing that although defamation law has become a significant tool by which to control the newly commercialized Chinese media, defamation litigation cannot be understood solely in terms of restraints on the press.

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

8. *Id.* at 67–68.

Cases by ordinary and famous persons reflect the increased willingness of those without Party-state ties to challenge the Party-state. The courts' growing role in resolving defamation disputes may have the effect of encouraging both greater use of the courts and greater innovation by the courts.

## I. BACKGROUND

### A. Methodology

This Article analyzes 223 defamation cases brought in China's courts between 1995 and 2004.<sup>9</sup> Information on cases derives primarily from Chinese media reports, although in some cases details were obtained from court opinions, academic articles, Internet postings, and interviews.<sup>10</sup> The overwhelming majority of reports were from media not directly involved in the cases; however, in eighteen cases reports on cases ran in the newspaper or magazine that was the target of the lawsuit.<sup>11</sup>

Materials were collected through Internet searches conducted at various times between 2002 and 2004.<sup>12</sup> Searches yielded different results depending upon when they were carried out, reflecting the fact that much news on Chinese websites is available for only a limited period. Although repeat searching did not ensure that all available reports were obtained, it did permit development of a larger case sample than would have been collected by searching at only one moment.<sup>13</sup> This Article also relies on more than 100 interviews

9. The 223 cases include cases from each year between 1995 and 2004, with the largest number of cases appearing after 2000. The total number of cases for each year was: 1995–8; 1996–5; 1997–5; 1998–8; 1999–27; 2000–31; 2001–40; 2002–40; 2003–31; and 2004–24. In four cases the year was unclear. The larger number of cases beginning in 1999 most likely reflects the growth of the Internet from the late 1990s, rather than an overall increase in the number of defamation cases. The drop in cases in 2004 reflects the fact that searching for cases was concluded in the summer of 2004.

Because of my reliance on media sources for most case information, the specific date of a case filing or judgment was often unclear. I rely on the date of first-instance judgment, when available. When not available, I rely on dates of case filings or of media reports concerning cases to estimate the year in which the case was heard. The relatively small number of cases in the early years of the survey and uncertainty regarding specific dates on which cases were decided mean that attempts to analyze case trends within the ten-year timeframe of this Article would be unreliable. I thus do not attempt to do so.

10. Most of the cases came from online media, generally news reports reprinted from traditional media. In addition, twenty-five cases came from academic articles available online or in online databases; *see infra* Appendix B, Cases 1, 28, 30, 39, 41, 42, 43, 60, 61, 67, 70, 82, 102, 105, 113, 115, 148, 150, 157, 159, 169, 170, 215, 216, 222; seventeen cases came from summaries of cases on court websites; *see infra* Appendix B, Cases 9, 10, 34, 75, 76, 77, 78, 83, 94, 96, 97, 155, 189, 190, 197, 202, 203; sixteen came from actual court opinions located online (generally not at court websites); *see infra* Appendix B, Cases 12, 22, 23, 47, 62, 66, 68, 72, 90, 93, 118, 121, 179, 195, 209, 217; and one case came from what appeared to be the personal website of a party to the case; *see infra* Appendix B, Case 89.

11. *See infra* Appendices A, B, Cases 14, 29, 31, 32, 45, 55, 97, 105, 108, 123, 141, 146, 161, 162, 183, 201, 206, 212. In one case information came from a plaintiff's report.

12. A total of 230 defamation cases were collected. Seven of these cases dated from before 1995 and thus were omitted from the analysis in this Article and the accompanying appendices. Earlier drafts of this Article analyzed 228 cases, and thus Chinese media reports on my findings, *see infra* note 15, refer to 228 cases.

13. Later searches were run from August to October 2005 to confirm and update case information in the originally selected cases. As a result, it was discovered that one case classified as a 2004 case (based on

with legal and media studies academics, journalists, judges, and lawyers about the development of defamation litigation in China<sup>14</sup> and on Chinese academic writings by media studies and legal scholars.<sup>15</sup>

Reliance on media reports of cases presents obvious problems. The media are more likely to report on cases they view as egregious than on cases in which the media use their own power to affect outcomes. The media are also likely to highlight the most extreme or sensational cases. Some media avoid covering cases in which they are defendants. Others highlight cases involving their commercial rivals or attempt to use coverage of defamation litigation in which they are defendants to affect outcomes.<sup>16</sup> Not all newspapers and magazines are available online, and online searches thus yield reports from only selected Chinese media. Those available online, in particular in the late 1990s, tend to be concentrated in the more developed cities of eastern China. Media available online also are more commercialized, and perhaps more innovative, than those not so available. Although relying on Internet searches may risk overlooking some media reports, one benefit of the proliferation of news websites in China is that they facilitate obtaining information about developments nationwide, as many sites include reports from media from across China. The sample included cases from twenty-eight of mainland China's thirty-one provinces, autonomous regions, and provincial-level municipalities, as well as five or more cases from eighteen different provinces or provincial-level regions.<sup>17</sup>

In addition, many defamation cases are not newsworthy. Thus, the sample of cases may inform more about the types of cases that interest the media than the types of cases that are actually brought. Media reports may also be

filing date) was actually decided in 2005.

14. The interviews on which I rely were conducted as part of my ongoing research into the role of the media in the Chinese legal system. All interviewees were promised anonymity. In some cases, interviewees requested that the date and location of the interview, as well as the name of their employer, not be disclosed. Such concerns reflect the sensitive nature of research into the Chinese media. In order to guarantee confidentiality, I cite only to the year in which interviews took place and to an interview number. In all cases I rely on interviewees in areas in which they have specific expertise or experience.

15. This Article has attracted significant coverage in the Chinese media, with two of China's leading legal newspapers carrying reports on my findings. See Jiang Anjie, *Zhongguo Chuanmei Yu Sifa: Yu Yiwei Waiguo Faxue Xuezhu De Duibua* [*Chinese Media and Judiciary: Dialogue with a Foreign Legal Scholar*], FAZHI WANG [LEGAL DAILY WEBSITE], July 30, 2005, [http://www.legaldaily.com.cn/misc/2005-07/30/content\\_175408.htm](http://www.legaldaily.com.cn/misc/2005-07/30/content_175408.htm); Liu Hui, 228 *Li Meiti Mingyu Qinquan An Jieshi Le Shenme?* [*What Do 228 Media Defamation Cases Reveal?*], JIANCHA RIBAO [PROCURATORATE DAILY], July 25, 2005, available at <http://www.jcrb.com/n1/jcrb840/ca396658.htm>.

16. Confidential Interview 76 (2004). In only four of the cases analyzed in this Article, however, did reports run in media that appeared to be direct rivals of a defendant.

17. The largest number of cases was from Beijing, which had forty-seven cases, more than three times the number of cases in Shanghai, which, with fifteen cases, had the second most. The total number of cases in each province, provincial-level municipality, or autonomous region was as follows: Anhui—8; Beijing—47; Chongqing—8; Fujian—4; Gansu—3; Guangdong—12; Guangxi—9; Guizhou—2; Hainan—6; Hebei—5; Heilongjiang—5; Henan—9; Hubei—7; Hunan—10; Inner Mongolia—2; Jiangsu—15; Jilin—3; Liaoning—2; Ningxia—1; Qinghai—2; Shaanxi—5; Shandong—8; Shanghai—15; Shanxi—2; Sichuan—11; Xinjiang—4; Yunnan—6; Zhejiang—7. In five cases the location of the case was unclear. See *infra* Appendices A, B.

inaccurate. There appear to be few general restrictions on the media's ability to report on defamation cases, but in a small number of sensitive cases, central or local Communist Party Propaganda Departments may ban reporting.

The cases this Article examines thus cannot be assumed to be representative of defamation cases nationwide. Nonetheless, reliance on media reports yields insights not available through other sources. Chinese court opinions are generally not publicly available except to parties or to persons with connections to particular courts. There is no comprehensive—or even moderately comprehensive—database of Chinese court opinions. Reliance on media reports allows examination of decisions from a range of courts—data that otherwise would be unobtainable.

Collecting a sample of court opinions in defamation cases from a single court or small number of courts might be possible, but it would not be representative of cases nationwide, and it might reflect court and regional biases. For example, review of defamation cases heard in the Dongcheng District Court—a first-instance court in Beijing—between February 2002 and August 2004 shows defendants prevailing in thirty-three out of forty-five cases.<sup>18</sup> The media success rate in such cases is strikingly higher than that in my sample, where the media lost sixty-eight percent of all cases.<sup>19</sup> The cases from Dongcheng District, however, are not representative of cases nationwide: The district has a high concentration of media outlets, and the court is known as having well-trained judges with expertise in defamation litigation.<sup>20</sup>

Reliance on diverse sources for case information permits an understanding of the development of defamation litigation broader than would be possible through the examination of an individual court's docket. Many media reports contain details of parties' arguments in court, information that is sometimes, but not always, included in opinions. More importantly, as scholars of Chinese law have long observed, court opinions themselves may give little indication of the actual reasons that cases have been decided in a particular way.<sup>21</sup>

Given the challenges that confront most attempts at empirical research into the Chinese legal system, looking to a broad range of traditional and non-traditional sources may provide insights not otherwise available.<sup>22</sup> There has been a small number of recent attempts by both Chinese and Western schol-

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18. The Dongcheng cases are not included in the 223 cases in my sample unless they were reported on in the media. The cases are on file with the Harvard International Law Journal.

19. See *infra* Table Two.

20. The outcomes in the Dongcheng cases are, however, consistent with what the analysis of the larger sample would predict: Media defendants fare much better when sued in their home jurisdiction. See *infra* Part II.

21. See, e.g., Fu Liqing, *Fayuan Panjueshu: Ni Weishenme Bu Shuoli?* [Court Opinions: Why Don't You Specify Your Reasons?], FAZHI RIBAO [LEGAL DAILY], Feb. 18, 2001, available at <http://www.people.com.cn/GB/shehui/46/20010218/398299.html>.

22. For a discussion of the challenges facing those seeking to engage in empirical study of the Chinese legal system, see generally Donald C. Clarke, *Empirical Research into the Chinese Judicial System*, in BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW 164, 164–92 (Erik G. Jensen & Thomas C. Heller eds., 2003).

ars at broadening empirical understandings of the Chinese legal system.<sup>23</sup> These studies have made significant contributions to our understanding of developments in China. Yet most such studies face constraints: small sample sizes, reliance on opinions either published by courts or selected by courts, or reliance on parties to cases for materials. The relative paucity of empirical work on the Chinese legal system reflects the difficulty of obtaining data that can withstand rigorous scrutiny. The difficulties faced by those seeking to engage in empirical scholarship, however, also suggest the need for Chinese and Western scholars to consider alternative sources of data and to reconsider the types of conclusions that can be drawn from data that are available.

The data in this Article do not permit broad conclusions regarding the likelihood of plaintiff or defendant success in defamation cases or the percentage of plaintiffs who are government officials or ordinary persons, nor do the data prove that defamation litigation is primarily a tool for constraining media freedom or for asserting individual rights. The data also do not inform as to how widespread knowledge of defamation cases is in China: Despite a large volume of cases and extensive attention to such cases by the media, assessing the level of awareness or concern with defamation litigation more generally is difficult. Yet the data, combined with interviews and a review of Chinese literature on defamation law, do suggest trends in the development of defamation litigation, including the use of defamation litigation by officials in response to critical coverage, the willingness of ordinary plaintiffs to challenge the official Party press, and the importance of jurisdiction in determining case outcomes. Understanding those trends, including the parties likely to be sued, the types of cases brought, plaintiffs' goals in such cases, and the media's ability to resist such claims, provides insights into the uses and meaning of defamation litigation that transcend the simple numerical data on outcomes.

The findings in this Article thus add to the emerging empirical literature on the Chinese legal system. The findings also contribute to empirical literature on the use of defamation litigation outside the United States. Although there is a significant volume of empirical literature on defamation litigation in the United States<sup>24</sup> and in England,<sup>25</sup> English-language empirical scholarship on defamation litigation elsewhere is rare.<sup>26</sup>

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23. See, e.g., Margaret Y. K. Woo & Yaxing Wang, *Civil Justice in China: An Empirical Study of Courts in Three Provinces*, 53 AM. J. COMP. L. (forthcoming 2006); Randle Peerenboom, *Seek Truth from Facts: An Empirical Study of Enforcement of Arbitral Awards in the PRC*, 49 AM. J. COMP. L. 249 (2001).

24. For examples, see RANDALL P. BEZANSON ET AL., *LIBEL LAW AND THE PRESS* (1987), and Mark Franklin, *Winners and Losers and Why: A Study of Defamation Litigation*, 1980 AM. B. FOUND. RES. J. 455 (1980).

25. For empirical studies of defamation law in England, see DAVID HOOPER, *REPUTATIONS UNDER FIRE* 484–523 (Little, Brown and Company 2000) (listing studies of damage awards in England).

26. For an example, see Michael Newcity, *The Sociology of Defamation in Australia and the United States*, 26 TEX. INT'L L.J. 1 (1991).



### B. Legal Framework

The legal framework governing defamation claims in China rests on three primary documents. The 1987 General Principles of the Civil Law (“General Principles”) provides the initial authorization for defamation claims.<sup>27</sup> Article 101 of the General Principles provides that citizens and legal persons have the right to reputation, that respect for the personal dignity of individuals shall be protected, and that insult or slander that harms citizens or legal persons is prohibited.<sup>28</sup> Article 120 provides that in cases in which reputation is harmed, citizens may demand the cessation of the tort, restoration of reputation, elimination of defamatory effects, apology, and compensation.<sup>29</sup>

Two subsequent interpretive documents by the Supreme People’s Court (“SPC”) have added detail to the framework that the General Principles established. In a 1993 Explanation, the court set forth three general circumstances under which defamation will be found: (1) where the content of news reports is “seriously mistaken” or, in the case of critical news reports, where the “basic content” of such reports is incorrect, and such mistakes or inaccuracies result in harm to reputation, (2) where insulting or slanderous language results in harm to reputation, or (3) where unauthorized revelation of personal details causes harm to reputation.<sup>30</sup> The Explanation thus suggested that, although the truth of a media report may be a defense to a claim of harm to reputation, truth is not a defense where the alleged defamation results from insulting words or from revelation of personal details. The court also stated that close relatives could bring defamation litigation on behalf of deceased persons.<sup>31</sup>

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27. MINFA TONGZE [GENERAL PRINCIPLES OF THE CIVIL LAW] (promulgated by the Sixth Nat’l People’s Cong., Fourth Session, Apr. 12, 1986, effective July 1, 1987) 2002 GENERAL PRINCIPLES OF THE CIVIL LAW 134.

28. *Id.* art. 101.

29. *Id.* art. 120. The Supreme People’s Court’s (“SPC”) 1988 Interpretation of the General Principles included one article on defamation law. The provision clarified that defamation could result from oral or written statements that reveal private details or cause insult or slander. *See* Zuigao Renmin Fayuan Guanyu Guanche Zhixing “Zhonghua Renmin Gonghe Guo Minfa Tongze” Ruogan Wenti De Yijian [Views of the Supreme People’s Court Regarding Some Questions in the Implementation of “The General Principles of the Civil Law of the People’s Republic of China”], art. 140 (Sup. People’s Ct., Jan. 26, 1988). China’s 1982 Constitution also includes provisions regarding reputation. Article 38 states that “[t]he personal dignity of citizens of the People’s Republic of China is inviolable. Insult, libel, false charge or frame-up directed against citizens by any means is prohibited.” XIANFA [CONSTITUTION] art. 38, § 2 (1982). China’s Criminal Law provides for criminal punishment in serious cases of slander or insult. *See* XINGFA [CRIMINAL LAW] art. 246 (promulgated by the Fifth Nat’l People’s Cong., July 1, 1979, effective Oct. 1, 1997) 1997 CRIMINAL LAW 61. Regulations also permit the police to detain persons for up to fifteen days for insulting or slandering another person. Zhian Guanli Chufa Tiaoli [Administrative Regulations on Penalties for Public Security] art. 22 (promulgated by the Standing Committee of the Sixth Nat’l People’s Cong., Sept. 5, 1986, effective May 12, 1994).

30. Zuigao Renmin Fayuan Guanyu Shenli Mingyuquan Anjian Ruogan Wenti De Jieda [Explanation of the Supreme People’s Court Regarding Some Questions in the Trial of Cases Concerning the Right of Reputation], arts. 7, 8 (Sup. People’s Ct., Aug. 7, 1993) [hereinafter 1993 Explanation] (on file with the Harvard International Law Journal).

31. *Id.* art. 5.

The 1993 Explanation made clear that cases could be brought either in the jurisdiction in which the tort arose (including both where the action occurred and where the results were felt) or in the home jurisdiction of the defendant.<sup>32</sup> On remedies, the court stated that courts could order defendants to restore a plaintiff's reputation, eliminate the effects of defamatory conduct, apologize, and pay compensation, including both economic and emotional damages.<sup>33</sup>

In 1998 the SPC issued an Interpretation ("1998 Interpretation") in response to issues arising in lower courts' handling of defamation cases.<sup>34</sup> The 1998 Interpretation clarified that the location of the "result of the tort" included the plaintiff's domicile, thus explicitly authorizing defamation cases to be brought in a plaintiff's home jurisdiction. Reflecting the media's special role in China, the court also stated that courts should not accept cases alleging defamation in confidential internal reports or other materials prepared for "leadership departments,"<sup>35</sup> and that persons who (actively or knowingly) provide materials to the media that result in defamation may be liable. The court clarified that the media cannot be held liable for reporting on news included in public official documents and functional acts of state, provided that the media's reports on such matters are objective and accurate.<sup>36</sup>

The 1998 Interpretation added that release of information that an individual is suffering from gonorrhea, syphilis, leprosy, AIDS, or other diseases by employees of public health authorities acting "on their own" can be the basis of a defamation lawsuit, but that courts should not accept cases resulting from the release of such information by health authorities to a patient or family members.<sup>37</sup> The court declared that criticism and commentary by

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32. *Id.* art. 4.

33. Restoration of reputation, elimination of effects, and apology can be made through oral or written statements, which are subject to the approval of the court handling the case. In cases where the defendant refuses to comply, courts may publish announcements containing the content of the opinion and may order the defendant to pay related costs. *Id.* arts. 10, 11.

34. Zuiyao Renmin Fayuan Guanyu Shenli Mingyuquan Anjian Ruogan Wenti De Jieshi [Interpretation of the Supreme People's Court Regarding Some Questions in the Adjudication of Cases Involving the Right to Reputation] (Sup. People's Ct., Sept. 15, 1998) (on file with the Harvard International Law Journal) [hereinafter 1998 Interpretation].

35. In contrast, the court stated that courts could accept cases alleging defamation in internal materials intended for circulation within government departments, social organizations, academic entities, and enterprises. The internal reports, intended for higher-ups, are more likely to carry sensitive information and are thus immunized, while general-circulation internal reports are not. For further discussion of the forms of internal reports in the Chinese system, see Liebman, *supra* note 7, at 21–23, 97–102.

36. 1998 Interpretation, *supra* note 34, art. 6. The media may be held liable if government authorities have corrected inaccuracies in such documents but the media refuse to note such correction. *Id.* Cases involving the use of official documents and internal reports are thus the only areas in which the media enjoy immunity from defamation litigation.

37. *Id.* art. 2. The 1998 Interpretation also clarified that the media may be held liable for reprinting articles that originally ran elsewhere; that courts should not accept cases claiming defamation resulting from decisions of government departments, social organizations, or enterprises regarding persons under their "management," including punishment decisions; and that accusations made to government departments may not be the basis of defamation lawsuits unless the accusations were incorrect and insulting or libelous. *Id.* arts. 3–5.

consumers on products or services cannot alone provide the basis for a suit alleging harm to reputation, but libelous or slanderous criticism that results in harm should be found to be defamatory.<sup>38</sup> Similarly, media commentary on and criticism of products and services that are basically correct and that do not include insulting comments should not be deemed defamatory, while inaccurate or insulting criticism that causes harm may be the basis of a defamation action.<sup>39</sup>

The three documents provide a framework for defamation cases but leave courts significant discretion. Despite the detail that the Interpretation and the Explanation added to the provisions of the General Principles, many in the media argue that existing legal standards are excessively vague. In particular, the provision in the 1993 Explanation stating that the media shall not be liable for critical reports that are “basically correct” has permitted courts both to overlook significant errors in reporting and to base liability on minor errors.<sup>40</sup> Journalists criticize the SPC provisions authorizing litigation in a plaintiff’s domicile for encouraging local protectionism, and argue that provisions stating that the media should not be liable when they base their reports on official government documents are not sufficiently clear.<sup>41</sup> In addition, journalists complain that courts generally place the burden of proof on the media, forcing them to attempt to prove that even small details in their reports were correct.<sup>42</sup>

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38. *Id.* art. 9.

39. *Id.* The 1998 Interpretation stated that in cases in which defamation is found, based on criticism of products and services, harm may be measured based on such factors as returned products and cancelled product orders. *Id.* art. 10.

40. See Zhang Ya, *Meiti Jiandu Xianru Falü Kunjing* [Media Oversight Encounters Legal Difficulties], SHANGWU ZHOUKAN [BUSINESS WATCH], July 17, 2004, available at <http://www.businesswatch.com.cn/ArticleShow.asp?ArticleID=443> (arguing that it is very easy for media to be sued by officials, famous persons and corporations, and that the media are often found liable for slight errors); Confidential Interview 17 (2003) (stating that Chinese journalists cannot make any mistake or else they will be sued); Confidential Interview 46 (2003) (complaining that the media will lose if their articles include “any mistakes”).

41. Wei Yongzheng, *Xunqiu Xinwen Yu Falü De Gongsbi* [Seeking Consensus Between News and Law], ZHONGGUO JIZHE [CHINA REPORTER], June 1999, available at <http://www.zjonline.com.cn/node2/node26108/node30205/node30212/node30213/userobject7ai1691.html>; Confidential Interview 49 (2003).

42. Many in China compare Chinese defamation law to that in the United States. But China is not alone in placing the burden of proof on defendants. See, e.g., HOOPER, *supra* note 25, at 4–5 (noting that plaintiffs often choose to sue in English courts to take advantage of libel laws where they do “not have to prove actual damage . . . and [where] the burden of proving that what is said is true . . . rests . . . on the defendant”).

Some in the media also complain that the cost of bringing suit is extremely low. Filing fees for defamation cases range from fifty yuan to one hundred yuan for cases not involving claims for financial damages. Renmin Fayuan Susong Shoufei Banfa [People’s Court Measures for the Collection of Court Filing Fees] art. 5 (Sup. People’s Ct., Sept. 1, 1989) (on file with the Harvard International Law Journal). The Measures are ambiguous as to the appropriate fees in cases involving financial claims. On one reading of the Measures, the fifty to one hundred yuan fee applies in defamation cases regardless of the amount in controversy. On another reading of the Measures, fees in cases involving financial claims would proceed according to the standards for financial claims, where fees are a percentage of the amount sought, ranging from four percent for cases involving 1,000 yuan to 50,000 yuan to one-half percent for cases involving more than one million yuan. *Id.* In practice, some courts apply the fifty to one hundred yuan standard, while others charge a percentage of the amount in controversy. *Susong Fei Buneng “Sui Hang Jiu Shi”* [Court

Other regulations also impose obligations on the media to report truthfully and to correct mistakes. Regulations governing the print media state that if publications include content that is incorrect or unfair and that causes harm to legal rights of citizens or legal persons, the media are obligated publicly to correct such mistakes, eliminate their effects, and assume civil liability.<sup>43</sup> In the case of inaccuracies or unfair reports in newspapers or magazines, parties who are harmed have the right to request that the offending publication publish a correction or a reply from the harmed party.<sup>44</sup> Regulations governing the broadcast media, by contrast, require reports to be true and fair, but do not impose a corresponding obligation to correct such reports or grant a right of reply.<sup>45</sup>

There have been efforts to draft new provisions regarding reputation rights as part of China's development of a comprehensive civil code. For example, a draft Tort Law prepared by scholars included defamation provisions, but those provisions were removed from the draft under consideration by the Standing Committee of the National People's Congress.<sup>46</sup> Provisions regarding defamation have proven to be sensitive, reflecting unease regarding provisions touching on freedom of speech and over whether legislation should provide explicit protection for media criticism of officials. Of particular concern have been proposals that would distinguish between ordinary persons and well-known, or "public," persons.<sup>47</sup>

### C. Evolution of Defamation Litigation

China's first civil defamation cases were brought prior to the adoption of the General Principles. Suits for libel were filed against *People's Daily* as early as 1982, and against the official *Democracy and Law* magazine in 1985.<sup>48</sup>

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*Fee Should Not Float with the Market*], SHICHANG BAO [MARKET NEWS], Feb. 27, 2002, available at [http://www.sztj.com/pub/sztjpublic/tjkw/tjyxx/scwj/t20020801\\_0512.html](http://www.sztj.com/pub/sztjpublic/tjkw/tjyxx/scwj/t20020801_0512.html) (criticizing courts for charging fees based on the amount in controversy instead of the fifty to one hundred yuan standard set by the Measures); Confidential Interview 36 (2003) (criticizing courts for only charging fifty to one hundred yuan in defamation cases).

43. Order No. 343, Chuban Guanli Tiaoli [Regulations Regarding the Management of Publications] art. 28 (promulgated by the State Council, Dec. 25, 2001, effective Feb. 1, 2002) (on file with the Harvard International Law Journal); see also Baokan Kanzai Xujia Shishi Baodao Chuli Banfa [Provisions Regarding the Handling of Publications that Publish False or Inaccurate Reports] arts. 2, 3 (promulgated by the General Administration of Press and Publications, July 8, 1999, effective July 8, 1999), available at <http://www.people.com.cn/zcxx/1999/08/082756.html> (providing for a right to request a correction or reply) [hereinafter Shishi Baodao Chuli Banfa].

44. Chuban Guanli Tiaoli, *supra* note 43, art. 28; see also Shishi Baodao Chuli Banfa, *supra* note 43, art. 3. The right of reply has rarely, if ever, been exercised. Confidential Interview 72 (2004).

45. Order No. 228, Guangbo Dianshi Guanli Tiaoli [Regulations Regarding the Management of Broadcasting and Television] art. 34 (promulgated by the State Council, Aug. 11, 1997, effective Sept. 1, 1997) (on file with the Harvard International Law Journal).

46. Confidential Interview 6 (2003); Confidential Interview 18 (2003).

47. Confidential Interview 49 (2003); see also *infra* Part III.C (discussing recent cases in which Chinese courts have appeared to adopt a public person standard).

48. Wei Yongzheng, *Yulun Jiandu He "Gongzhong Renwu"* [Media Oversight and "Public Figures"], JIANCHA RIBAO [PROCURATORATE DAILY], Jan. 9, 2001, available at <http://www.jcrb.com.cn/ournews/asp/>

Even in the early days of defamation litigation, some in the media complained that such cases discouraged the media from reporting critically.<sup>49</sup> Defamation cases of any type were nonetheless rare, and not until the General Principles became effective in 1987 did plaintiffs begin to bring significant numbers of cases.<sup>50</sup> Since 1987, defamation cases against the media have fallen into roughly four categories, which Xu Xun, one of China's leading observers of the relationship between the media and the courts, has referred to as the "four waves" of defamation litigation.<sup>51</sup>

Most cases against the media in the 1980s were brought by ordinary people suing the Party-state media for mistakes or insults—the first wave.<sup>52</sup> In the early 1990s, the growth of China's commercialized press was accompanied by a "second wave" of cases brought by celebrities against commercialized, often tabloid-style, newspapers.<sup>53</sup> Success by plaintiffs in such cases was followed in turn by a "third wave" of cases: those brought by commercial legal persons, often in response to negative or critical coverage of businesses.<sup>54</sup>

Beginning in the mid-1990s, a "fourth wave" of defamation litigation began in China: suits by public officials or government entities against the media. As Xu Xun has argued, these cases were distinct from their predecessors because they involved suits not only for alleged inaccuracies in factual news accounts but also for alleged defamatory content in editorials, commentaries, letters from readers, and live broadcasts. In many such cases, plaintiffs sued after having been sanctioned by legal or Party authorities for wrongdoing.<sup>55</sup>

China's courts heard a total of 5596 defamation cases in 2003.<sup>56</sup> As Table One shows, the number of cases was nearly double the 3138 defamation cases courts heard in 1993, the first year for which such statistics are available.<sup>57</sup> Although the number of cases generally increased each year during the decade, the number peaked in 2001 at 7182 before dropping modestly in 2002

readNews.asp?id=19299 (unavailable as of Nov. 9, 2005) (on file with the Harvard International Law Journal); Confidential Interview 49 (2003).

49. Liu Weidong, *Tamen De Tian: Yu Yulun Jiandu Youguan* [Their Draft Proposals: Related to Popular Opinion Supervision], available at <http://www.jc.gov.cn/personal/ysxs/fzhm/fzhm171.htm> (unavailable as of Nov. 9, 2005) (on file with the Harvard International Law Journal).

50. SUN XUEPEI, AN ORCHESTRA OF VOICES 103–04 (2001); Fu & Cullen, *supra* note 5, at 7.

51. XU XUN, ZHONGGUO XINWEN QINQUAN JIUFEN DISICI LANGCHAO [THE FOURTH WAVE OF CHINA'S NEWS TORT DISPUTES] (2002) [hereinafter XU, FOURTH WAVE]; Xu Xun, *Xinwen Qinquan Jiufen De Disi Ci Gaofeng Qi* [The Fourth Wave of News Torts Disputes], ZHONGGUO QINGNIAN BAO [CHINA YOUTH DAILY], Feb. 11, 2002, at 7 [hereinafter Xu, YOUTH DAILY]; see also Hilary K. Josephs, *Defamation, Invasion of Privacy, and the Press in the People's Republic of China*, 11 UCLA PAC. BASIN L.J. 191, 193–94 (1993) (arguing that libel litigation in the late 1980s and early 1990s developed as a means of constraining the media).

52. Xu, YOUTH DAILY, *supra* note 51. Numerous cases were also brought by ordinary persons against non-media defendants. See Fu & Cullen, *supra* note 5, at 8.

53. Xu, YOUTH DAILY, *supra* note 51.

54. *Id.* A small number of defamation cases were also filed in the early 1990s by dissidents in response to political attacks by the Party press. See William P. Alford, *Double-Edged Swords Cut Both Ways: Law and Legitimacy in the People's Republic of China*, 122 DAEDALUS 2, 45, 48–49, 51 (2003).

55. Xu, YOUTH DAILY, *supra* note 51.

56. 2004 ZHONGGUO FA LÜ NIAN JIAN [LAW Y.B. CHINA] 123.

57. 1994 ZHONGGUO FA LÜ NIAN JIAN [LAW Y.B. CHINA] 99.

and again in 2003.<sup>58</sup> The seventy-eight percent increase in defamation cases between 1993 and 2003 was significantly above the forty-eight percent increase in the total number of civil cases in China during the same period.<sup>59</sup>

TABLE ONE  
DEFAMATION CASES 1993–2003<sup>60</sup>

Year	Total Number of Defamation Cases Accepted	Growth Percentage from Prior Year
1993	3138	
1994	3543	12.91
1995	3843	8.46
1996	4418	14.96
1997	4652	5.30
1998	5040	8.34
1999	5936	17.78
2000	6665	12.28
2001	7182	7.76
2002	6693	-6.81 <sup>61</sup>
2003	5596	-16.39

In both 1993 and 2003, defamation cases constituted a tiny percentage of the total number of civil cases: 0.11 % of all civil cases in 1993, and 0.13 % in 2003. Based on interviews conducted for this Article, judges report that

58. For 2001 data, see 2002 ZHONGGUO FA LÜ NIAN JIAN [LAW Y.B. CHINA] 149. For 2002 data, see Wang Wei, 2002 *Nian Shenpan Gongzuo* [Judicial Report of 2002], available at <http://www.china.org.cn/chinese/zhuanti/fzbg/577958.htm>. For data on 2003, see 2004 ZHONGGUO FA LÜ NIAN JIAN [LAW Y.B. CHINA] 123.

59. The total number of civil cases—including economic cases—increased from 2,983,667 in 1993 to 4,410,236 in 2003. 1994 ZHONGGUO FA LÜ NIAN JIAN [LAW Y.B. CHINA] 1028; 2004 ZHONGGUO FA LÜ NIAN JIAN [LAW Y.B. CHINA] 1054. The 1993 figure includes cases from both the economic and the civil divisions of China's courts, as, at the time, such cases were classified separately. The economic and civil divisions were later merged, and the economic division abolished, and thus the 2003 figure of cases heard by the civil division likewise includes both economic and other civil cases.

60. Data in this table are taken from the annual *China Law Yearbooks* from 1994 to 2004. 1994–2004 ZHONGGUO FA LÜ NIAN JIAN [LAW Y.B. CHINA].

61. The 2003 volume of the *China Law Yearbook* does not include detailed statistics on defamation cases; the total number of cases for 2002 is taken from an official news report. Wang, *supra* note 58. With the exception of the data on defamation cases, which was omitted from the *Yearbook*, the statistics in the news report are identical to those in the *Yearbook* for 2003, strongly suggesting that the data are from the same source.

defamation cases constitute a small portion of their civil dockets. For example, a judge in a district court in a major coastal city that handles thousands of civil cases each year estimated that the court hears only six or seven defamation cases against the media annually.<sup>62</sup> Judges elsewhere likewise report that their courts hear only a small number of defamation cases each year.<sup>63</sup> Viewed comparatively, however, the number of defamation cases in China is significant. The more than 5000 cases brought in China in 2003 appears large when viewed in the light of studies that have found very small numbers of defamation cases in the United States,<sup>64</sup> Korea, and Japan.<sup>65</sup>

The growth in defamation litigation reflects the recent development of the Chinese news media. The Chinese media have undergone rapid commercialization over the past fifteen years, with the number of publications increasing dramatically.<sup>66</sup> As a result, news in China is much more widely disseminated than it was in the early 1990s, and many in the media are engaged in fierce competition. The media, however, remain closely linked to the Party-state, with virtually all commercialized media being offshoots or subsidiaries of traditional Party media. Traditional Party media continue not only to issue public reports but also to write internal reports, or *neican*, which are circulated to leadership at each level of the Party-state, and which include material not deemed appropriate for public dissemination.<sup>67</sup>

62. Confidential Interview 61 (2004).

63. The number of cases brought is higher in areas with a high concentration of media outlets, most notably in certain districts in Beijing. Confidential Interview 26 (2003); Confidential Interview 73 (2003); Confidential Interview 154 (2003).

64. See BEZANSON, *supra* note 24, at 96 (finding a total of only 712 published defamation cases tried in the United States between 1974 and 1984); MEDIA LAW RESOURCE CENTER, BULLETIN NO. 3, 2004 REPORT ON TRIALS AND DAMAGES 4 (Feb. 2004) (reporting that 503 libel cases proceeded to trial in the United States between 1980 and 2003). Even accounting for the fact that most libel cases in the United States do not proceed to trial, the number of cases in China appears significant. A Media Law Resource Center study that examined all published decisions available in the Media Law Reporter on Westlaw found 661 cases involving motions to dismiss in the U.S. courts between 1983 and 2003. 2004 MLRC Motion to Dismiss Study, 2004 MLRC BULLETIN No. 3 (Oct. 2004); see also MEDIA LAW RESOURCE CENTER, BULLETIN NO. 3, 2001 SUMMARY JUDGMENT SURVEY 32–83 (Aug. 2001) (examining 296 reported defamation cases against the media resolved at summary judgment between 1997 and 2000); David A. Logan, *Libel Law in the Trenches: Reflections on Current Data on Libel Litigation*, 87 VA. L. REV. 503, 519 (2001) (noting that libel actions in the United States are “very rare”).

65. See Masao Horibe & John Middleton, *Japan*, in INTERNATIONAL MEDIA LIABILITY: CIVIL LIABILITY IN THE INFORMATION AGE 6.18–6.19 (Christian Campbell ed., 1997) (noting that defamation litigation in Japan has been “comparatively rare”—with nineteen defamation judgments in 1991 and sixty-two in 1993—but that the number of cases increased significantly during the 1990s); Jeffrey A. Ourvan, Note, *Damage Control: Why Japanese Courts Should Adopt a Regime of Larger Libel Awards*, 21 N.Y.L. SCH. J. INT'L & COMP. L. 307 (2002) (reporting only nineteen defamation judgments in 1990 in Japan, and sixty-two in 1993); Kyu Ho Youm, *Libel Laws and Freedom of the Press: South Korea and Japan Reexamined*, 8 B.U. INT'L L.J. 53, 78 (1990) [hereinafter Youm, *Libel Laws and Freedom of the Press*] (noting that one study found that there were only thirty-five libel cases in total over a thirty-year period from the 1950s to the 1980s in Korea, and that only one-third of such cases “were related to the Korean press”); *id.* at 80 (discussing the rarity of libel litigation in Japan).

66. See Liebman, *supra* note 7, at 23–28.

67. For a discussion of the continuing importance of internal reports, see *id.* at 21–23, 97–102.

Commercialized offshoots of official Party publications enjoy greater autonomy over content than do their parent publications and, accordingly, are at times more willing to stretch the boundaries of permissible content. Yet these offshoots remain subject to Communist Party Propaganda Department oversight. These links to the Party-state, however, also provide a level of protection and influence to the media: The Chinese media's traditional role as the mouthpiece and the "eyes and ears" of the Party also means that the media are often as powerful as, or more powerful than, the institutions or individuals that they cover.<sup>68</sup>

The rise in defamation cases has paralleled this expansion of the commercialized media. The growth in cases brought by celebrities, for example, tracked the increased coverage—often sensational—of sports and the arts in the early 1990s as the media began to commercialize. The growth in cases brought by legal persons, officials, and government entities in the middle to late 1990s followed the growth of critical reporting, in particular by newspapers, during the same period. Finally, although the ability of the media to engage in critical reporting has expanded dramatically over the past fifteen years, over the past two years the Central Propaganda Department has acted to rein in critical reporting. Some journalists argue that the recent crackdown has resulted in a decreased volume of defamation litigation over the past one to two years: With fewer critical reports there are fewer potential plaintiffs.<sup>69</sup> The growth in conflicts between the media and the targets of reports may also reflect increased competition among the media, in particular newspapers: In a fiercely competitive market, newspapers appear more likely to publish a broader range of news and to do so without verifying their reports.<sup>70</sup>

The increase in the number of defamation cases has also mirrored the expansion of civil litigation more generally in China over the past decade. China's courts accepted 4.3 million first-instance civil cases in 2004,<sup>71</sup> an increase of thirty percent from 1994, when courts accepted 3.4 million cases.<sup>72</sup> Much of this growth has resulted from an increase in contract disputes. But courts have also heard a range of new cases, from environmental disputes to securities fraud claims. Courts have likewise come to play more important roles in resolving labor and property disputes.<sup>73</sup>

The growth of litigation reflects the evolution of China's courts on an institutional level. Courts have taken significant steps toward reform over the past fifteen years including strengthening training of judges and replacing older judges not trained in law with younger legally trained judges. Courts have

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68. *Id.* at 118–21.

69. Confidential Interview 39 (2005); Confidential Interview 57 (2004); Confidential Interview 72 (2004).

70. See Xu, *FOURTH WAVE*, *supra* note 51, at 36.

71. Xiao Yang, *Zuigao Renmin Fayuan Gongzuo Baogao* [Work Report of the Supreme People's Court] (Mar. 9, 2005), <http://www.court.gov.cn/work/200503180013.htm>.

72. 1995 ZHONGGUO FA LU NIAN JIAN [LAW Y.B. CHINA] 1064.

73. See generally Xiao Yang, *supra* note 71; Xiao Yang, *Zuigao Renmin Fayuan Gongzuo Baogao* [Work Report of the Supreme People's Court] (Mar. 10, 2004), <http://www.court.gov.cn/work/200403220012.htm>.



also cracked down on corruption and have tried to discourage judges from contact with those outside the courts. Along with hearing more cases and increasing the quality of the judiciary, courts have become more assertive and innovative.<sup>74</sup>

Despite these efforts, courts continue to be subject to extensive external oversight and interference. Courts remain linked to local governments, with local Party-state officials controlling court appointments and finances. Party intervention in cases persists, both formally and informally, often with the goal of protecting the financial interests of local authorities or elites.<sup>75</sup> Similarly, local courts continue to refer potentially controversial or sensitive cases to higher-level courts or to Party officials prior to issuing decisions.<sup>76</sup> As a result, local courts often find it difficult to issue decisions against the interests of the Party-state or influential persons.<sup>77</sup>

Courts have also come under increased scrutiny from the news media in recent years. Media compete to provide details on high-profile cases—often with sensational coverage. Media, in particular the print media, often expose cases of perceived injustice and frequently criticize courts that act unfairly. Despite these trends, however, most reports about the courts remain positive.<sup>78</sup>

## II. EMPIRICAL ANALYSIS

### A. Overall Trends: Plaintiffs, Protectionism, and Power

Observers in China and the West have emphasized that the Chinese media lose a large majority of cases brought against them.<sup>79</sup> The results from the 223 cases reviewed for this Article are fully consistent with this claim. As

74. Liebman, *supra* note 7, at 66, 132–36, 153.

75. Liebman, *supra* note 7, at 67–69; Qiang Shigong & Zhao Xiaoli, *Shuangcong Jiegoubua Xia De Falü Jieshi—Dui Shiming Zhongguo Faguan De Diaocha* [The Legal Interpretation Under Dual Structures—An Investigation into 10 Chinese Judges], in *FALÜ JIESHI WENTI* [ON LEGAL INTERPRETATION] (Liang Zhiping ed., 1998), available at [http://www.usc.cuhk.edu.hk/wk\\_wzdetails.asp?id=1690](http://www.usc.cuhk.edu.hk/wk_wzdetails.asp?id=1690); see also Wang Xu, *Lun Sifaquan De Zhongyanghua* [Discussing Centralization of Judicial Authority], *ZHANLUE YU GUANLI* [STRATEGY AND MANAGEMENT], May 2001, at 28.

76. Liebman, *supra* note 7, at 67–69; Qiang & Zhao, *supra* note 75.

77. See generally Liebman, *supra* note 7, at 66–69 (discussing problems and progress in China's judiciary).

78. Confidential Interview 111 (2003); see also Liebman, *supra* note 7, at 113–18 (discussing court efforts to ensure positive coverage).

79. See, e.g., Chen Zhiwu, *Meiti Yanlun De Falü Kunjing* [The Legal Difficulties for Media Speech], *ZHONGGUO FALÜ REN* [THE CHINESE LAWYER], Oct. 2004, at 41, 44 (finding in a review of 210 cases from a sixteen-year period that the media lost sixty-three percent of all defamation cases against them in the first-instance); Yang Ziyun, *Shichang Meiti Zenyang He Falü Tiaowu* [How Marketplace Media Dance with the Law], *ZHONGGUO FALÜ REN* [THE CHINESE LAWYER], Oct. 2004, at 67, 68 (arguing that if legal and procedural standards governing defamation are not changed, China's media will not be able to cope); see also Xu Xiaoying, *Dang Xiucai Yudao Guan: Guanyuan Mingyu Quan Yu Meiti Jiandu Quan De Boyi* [When Intellectuals Meet Officials: Officials' Reputation Rights vs. the Media's Right to Supervise], *SHANGWU ZHOUKAN* [BUSINESS WATCH], Jan. 21, 2005, available at <http://media.163.com/05/0121/18/1ALOCKQB00141818.html> (reporting that the media won only one of fifteen defamation cases in the Beijing First Intermediate Court in 2004).

Table Two shows, plaintiffs prevailed in 133 of the 197 cases in which a first-instance winner was identified—a success rate of sixty-eight percent.<sup>80</sup> The results from the cases also show two additional important trends: The jurisdiction in which a case is brought often determines the outcome, and the relative power or influence of the parties is an important determinant of who prevails.

Plaintiffs in each of four categories—officials and state entities, businesses and corporations, ordinary persons, and famous persons—prevailed in more than sixty percent of the cases, with official and corporate plaintiffs most likely to succeed.<sup>81</sup> Comments from Chinese judges, lawyers, and journalists support the impression that the media lose most defamation cases. In Beijing's Haidian district, judges estimate that the media lose more than half of all defamation cases.<sup>82</sup> In Shenzhen, a judge estimated that the media lose seventy percent of cases.<sup>83</sup> Journalists and lawyers for the media argue that they lose more than half of all cases brought against them.<sup>84</sup> Regardless of the actual figure, the media generally argue that their rate of defeat is far too high.<sup>85</sup>

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80. Plaintiff victories include both court judgments in favor of plaintiffs and settlements pursuant to which defendants agreed to pay damages to plaintiffs or apologize. Cases are classified as plaintiff victories where the plaintiff received a verdict against at least one of the defendants. Cases are classified as defendant victories when the court issued a ruling of no liability, where the court dismissed the case, or where the court refused to accept the case. No information on the outcome was available in twenty-five cases. In one case the parties settled with no clear winner: The parties agreed "not to stir up further trouble." See *infra* Appendices A, B, Case 149.

Cases where information on outcomes was not available may reflect cases where the media carried initial reports on a case but then did not report on the outcome (or where any such reports are not available online). But they may also reflect cases that are simply not resolved: One journalist interviewed noted a growing trend of cases being brought but never decided. See Confidential Interview 38 (2005).

81. See *infra* Table Two.

82. Confidential Interview 156 (2003).

83. See Confidential Interview 61 (2004).

84. See, e.g., Confidential Interview 71 (2004) (stating that *Legal Daily* loses approximately fifty percent of defamation cases); Confidential Interview 76 (2004) (arguing that the media lose sixty percent of cases); Confidential Interview 22 (2003) (stating that journalists lose more than half of all cases against them).

85. See Confidential Interview 76 (2004). Many of those unhappy with the high rate of media defeats contrast the experience of the Chinese media with that of the media in the United States, noting that the media prevail in the overwhelming majority of defamation cases in the United States. Cf. BEZANSON, *supra* note 24 (finding, in a study conducted in the 1980s, that plaintiffs succeed in thirteen percent of all defamation cases in the United States). Few commentators compare China to other countries, such as England, where defamation law is less favorable to the media.

TABLE TWO  
TOTAL CASES AND PLAINTIFF SUCCESS RATE BY TYPE OF PLAINTIFF

	Officials and State Entities	Businesses and Corporations	Ordinary Persons	Famous Persons	Total—All Categories
Total Cases	62	52	57	52	223
Plaintiff First-Instance Victories	33	34	34	32	133
Defendant First-Instance Victories	15	12	20	17	64
Settled, No Clear Victor	1	0	0	0	1
Outcome Unknown	13	6	3	3	25
Plaintiff Success Rate in First-Instance Cases <sup>86</sup>	69%	74%	63%	65%	68%

As interviews conducted for this Article evidence, others involved in defamation cases contest such claims, arguing that media success rates are far higher than either comments by journalists or reports in the media suggest. Lawyers say that media reports often overstate the number of cases the media lose. Indeed, in many cases where the media prevail, in particular in cases with little “social impact,” the media do not report case outcomes.<sup>87</sup> Defamation cases on which the media do report may be cases where the media or individual lawyers are seeking to use such coverage to affect the outcomes.<sup>88</sup> In some unreported cases the courts may be biased in favor of the media—in particular in cases brought against the media in the media’s own jurisdiction.<sup>89</sup> Thus, for example, one Shanghai lawyer estimated that the Shanghai media win seventy-five percent of all cases against them.<sup>90</sup> Likewise, in Beijing’s Dongcheng district, home to numerous prominent media outlets, de-

86. Success rates were calculated as percentages of cases with reported outcomes.

87. Confidential Interview 67 (2004); Confidential Interview 111 (2003).

88. Confidential Interview 67 (2004).

89. *Id.*

90. Confidential Interview 74 (2004). High success rates for the Shanghai media reflect both the fact that many plaintiffs in cases against the Shanghai media are ordinary persons, and that critical reports by the Shanghai media are relatively scarce. Confidential Interview 75 (2004).

defendants prevailed in thirty-three of forty-five defamation cases brought against them between February 2002 and August 2004. Defendants were ordered to pay money damages in just two cases; in the remaining ten cases, they were ordered either to only apologize or to apologize and pay court fees. In addition, it may be difficult even to file suit against some particularly influential media outlets: Courts may be reluctant to accept cases against powerful official, and especially central, media.<sup>91</sup>

Success rates also overlook high settlement rates, which might affect the degree to which defamation cases impose significant burdens on the media. The media settle many defamation cases.<sup>92</sup> In Shanghai, for example, one lawyer estimated that the media settle half the defamation claims against them.<sup>93</sup> Other cases are resolved through mediation by Party propaganda departments.<sup>94</sup>

Behind-the-scenes activity also may influence court decisions. In some cases results are dictated by higher-up Party officials—sometimes in favor of plaintiffs, but in other cases in favor of the media.<sup>95</sup> A journalist at a leading Shanghai paper noted that when ordinary individuals sue the paper, the paper will virtually always win—in part because “we have the Party behind us.”<sup>96</sup>

Although data from the sample, as shown in Table Three, do not permit clear conclusions regarding likelihood of plaintiff success in defamation cases, the data do demonstrate that extreme statements on both sides of the argument are invalid. Focusing solely on outcomes also risks overlooking other noteworthy trends. Understanding the types of suits, the characteristics of plaintiffs, and the varied goals plaintiffs pursue through defamation litigation yields greater insight into the role of defamation litigation in China than does analysis of overall success rates.

Despite uncertainty over success rates, two conclusions emerge regarding general trends in defamation litigation. First, the relationship of the jurisdiction in which a case is brought to the parties often determines the outcome.<sup>97</sup> In

91. Confidential Interview 67 (2004).

92. Confidential Interview 69 (2004); Confidential Interview 72 (2004); Confidential Interview 74 (2004); Confidential Interview 75 (2004); Confidential Interview 22 (2003); Confidential Interview 39 (2003); Confidential Interview 46 (2003); Confidential Interview 93 (2003). High settlement rates in China are not unique to defamation litigation. *See, e.g.*, Minxin Pei, *Citizens v. Mandarins: Administrative Litigation in China*, CHINA Q., Dec. 1997, at 832 (discussing settlement rates in administrative litigation).

93. Confidential Interview 74 (2004).

94. Confidential Interview 76 (2004); Confidential Interview 77 (2004); Confidential Interview 39 (2003).

95. Guo Daohui, *Shixing Sifa Duli Yu Ezhi Sifa Fubai* [Implementing Judicial Independence and Controlling Judicial Corruption], FALÜ KEXUE [LEGAL SCIENCE], Jan. 1999, at 5, 5–15; *cf.* Confidential Interview 67 (2004).

96. Confidential Interview 84 (2004).

97. Lawyers representing the media say they are increasingly challenging courts' jurisdiction in cases brought in plaintiffs' home jurisdictions. *See, e.g.*, Confidential Interview 69 (2004); Confidential Interview 74 (2004). Although the SPC's 1998 Interpretation makes clear that such cases may be brought in plaintiffs' domicile, *see* 1998 Interpretation, art. 1, and 1993 Explanation, art. 4, media lawyers state that, in many cases, plaintiffs do not challenge efforts to move the case to the media's locale. In cases in which plaintiffs do object, raising a jurisdictional challenge at a minimum results in the case being delayed. Confidential Interview 69 (2004); Confidential Interview 75 (2004); *see also* Confidential Interview

cases involving local plaintiffs and non-local media, local plaintiffs will have an advantage.<sup>98</sup> In cases brought by non-local plaintiffs in the media's jurisdiction, the media will be in the stronger position.<sup>99</sup> In the 223 cases, plaintiffs prevailed in eighty-two percent of cases brought in their home jurisdiction, compared to only fifty-one percent of cases brought in the defendant's home jurisdiction and fifty-five percent of cases brought in a jurisdiction that was home to both parties.<sup>100</sup> Evidence from individual newspapers supports such findings. For example, the *Beijing Youth Daily* prevails in about eighty percent of the cases it faces—most of which are brought in Beijing.<sup>101</sup> When, on the other hand, the paper is sued outside of Beijing, it always loses.<sup>102</sup> The paper sometimes does not bother to send lawyers to represent it in suits brought outside of Beijing, knowing that doing so will be of little use.<sup>103</sup> Given the importance of jurisdiction, one might wonder why any non-local plaintiff would bother to sue a media defendant in the defendant's home jurisdiction.<sup>104</sup>

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74 (2004) (stating that lawyers will also challenge the jurisdiction of a local court in order to send a message to the court that they have doubts about its fairness).

98. Confidential Interview 111 (2003).

99. Confidential Interview 75 (2004); Confidential Interview 93 (2003); Confidential Interview 111 (2003).

100. See *infra* Table Three.

101. Confidential Interview 101 (2003).

102. *Id.*

103. *Id.*

104. It is possible that such non-local plaintiffs may do so hoping that it will be easier to enforce a judgment or simply because they do not realize they can sue in their home jurisdiction. Plaintiffs may also believe that they will obtain larger damage awards by suing in defendants' jurisdiction, as courts in major cities may award larger verdicts than those in rural or less-developed areas. Confidential Interview 27 (2005). A SPC Interpretation explicitly states that the living standard in the locale of the court in which the case is heard is one factor courts can consider in awarding emotional damages. Zuigao Renmin Fayuan Guanyu Queding Minshi Qinquan Jingshen Sunhai Peichang Zeren Ruogan Wenti De Jieshi [Interpretation of the Supreme People's Court Regarding Some Questions in Fixing Liability for Emotional Damages for Civil Torts] art. 10 (Sup. People's Ct., Mar. 10, 2001) (on file with Harvard International Law Journal). Thus, awards may tend to be higher in areas with higher living standards.

TABLE THREE  
 PLAINTIFF AND DEFENDANT VICTORIES BY JURISDICTION IN WHICH  
 CASE BROUGHT<sup>105</sup>

	Home Jurisdiction of Plaintiff Only	Home Jurisdiction of Defendant Only	Home Jurisdiction of Both Parties	Unclear Relationship of Court to Parties	Total
Plaintiff First- Instance Victories	74	18	26	15	133
Defendant First- Instance Victories	16	17	21	10	64
Plaintiff Success Rate in First- Instance Cases <sup>106</sup>	82%	51%	55%	60%	68%

Data from the cases reviewed, however, also show that statements regarding either the impossibility of the media winning a non-local case, or the difficulty ordinary persons face suing local media,<sup>107</sup> are overstated. There are examples where courts rule for either non-local plaintiffs or non-local media defendants.<sup>108</sup> The fact that such outcomes exist suggests that understanding defamation litigation solely as a manifestation of local protectionism is misguided.

Moreover, even if judges favor local parties—be they powerful plaintiffs or media defendants—judges may seek to minimize the impact of their decisions.

105. Determining the relationship of the court to the parties is difficult, due to a lack of information in many of the case reports. Nevertheless, an assessment of jurisdiction was possible in 199 of the 223. *See infra* Appendices A, B. In cases involving parties not from the same municipality, a court is considered to be the home court of one party if it is in the same municipality as that party, including, in a small number of cases, where the party resides in a different district or county from the court. In cases in which a plaintiff and defendant are from the same municipality, a court is considered to be local only if it is in the same district or county as the plaintiff. A case is also considered to be local to a plaintiff or defendant if it is clear that the case is in the party's home jurisdiction but the relationship of the jurisdiction to the other party is not apparent. I make such classifications so as to attempt to obtain a rough measure of the influence of jurisdiction. For example, in the case of a powerful plaintiff suing media from outside the plaintiff's home municipality, the powerful plaintiff is likely to have influence throughout its home municipality.

106. Success rates were calculated as percentages of cases with reported outcomes.

107. One lawyer who has handled numerous defamation cases commented that when ordinary people sue the media, the media win ninety percent of cases; when stars sue the media, the media lose eighty percent of cases; and when officials and powerful enterprises bring suit, the media lose one hundred percent of cases. Confidential Interview 49 (2003).

108. *See infra* Appendices A, B.

Courts may have little option but to rule for a local plaintiff, but they often issue awards that are largely symbolic and only a fraction of the amount demanded by plaintiffs.<sup>109</sup> Local protectionism also is not equally problematic across all jurisdictions: Some in the media comment that they are far less concerned about being sued in major cities, even in other provinces, than they are about being sued in rural county courts.<sup>110</sup>

Second, observers generally agree that understanding the power dynamics behind defamation litigation is crucial to explaining outcomes.<sup>111</sup> Despite the Chinese media's role since 1949 as an arm of the Party-state—responsible both for disseminating propaganda and for collecting information for Party-state leaders—the media often find themselves in a weak position when they are sued in local courts by officials, government entities, or corporations. In contrast, the media have significant advantages when facing suits by persons without strong Party-state links, be they ordinary persons or celebrities. Viewing defamation litigation in the context of such power dynamics helps illuminate the twin tracks along which defamation litigation is developing.

Evidence from the cases reviewed for this Article supports the argument that power dynamics are important determinants of outcomes. Although the media lost the majority of cases brought by officials, corporations, ordinary people, and famous persons, defendants were most likely to lose when sued by officials or Party-state entities or corporations. Likewise, in cases involving all four categories of plaintiffs, the media were most likely to lose when they were sued in plaintiffs' home jurisdictions. Media victories occurred predominately when cases were brought in defendants' jurisdictions or in jurisdictions common to plaintiffs and defendants.

To be sure, not all outcomes comport with such trends. Variance in outcomes, in particular a significant number of victories by ordinary persons in cases brought against the official media, demonstrates that defamation litigation in China cannot be understood solely in terms of attempts to restrict media freedom or in terms of the power and influence of the media when compared to ordinary persons. Defamation litigation, like the legal system more generally, is developing on twin tracks, in which the media face new restraints and in which individuals are increasingly able to pursue their grievances through law.

### B. Defendants

Virtually all media outlets in China, from the official *Xinhua News Agency* to racy local tabloids, have been sued at some point for defamation.<sup>112</sup> A hi-

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109. Confidential Interview 98 (2003); *see infra* Part II.E.3.

110. *See* Confidential Interview 71 (2004).

111. Confidential Interview 73 (2004); Confidential Interview 76 (2004); *see also* Zhang Xinbao & Kang Changqing, *Mingyuquan Anjian Shenli De Qingkuang, Wenti Ji Duice* [*The Situation, Problems and Strategies for Trying Defamation Cases*], XIANDAI FAXUE [MODERN LAW], Mar. 1997, at 4.

112. Confidential Interview 49 (2003); Confidential Interview 103 (2003).

erarchy of defendants exists, however, with suits against commercialized subsidiaries of the official Party press, in particular commercialized local newspapers, being more common than suits against official Party mouthpiece newspapers or television stations.<sup>113</sup> The higher-ranking the paper, the more likely it is that the paper will be able to use its ties to the Party-state to affect outcomes. Moreover, given the powerful position of official Party papers, many plaintiffs choose to avoid suing such media, instead focusing their efforts on less-influential commercialized papers.<sup>114</sup> At the Communist Party's flagship paper, *People's Daily*, for example, reporters and editors state that only two suits have ever been brought against the paper, because potential plaintiffs know that doing so will likely be futile.<sup>115</sup>

Table Four details the targets of defamation lawsuits and the outcomes of such suits based on defendant type or rank.<sup>116</sup> Evidence from both the sample and from interviews reveals five trends in the targets of libel suits. First, defamation cases are overwhelmingly brought against the print media. Of the 223 cases, 188 were suits against magazines or newspapers.<sup>117</sup> In comparison, only six of the cases were suits against television stations,<sup>118</sup> and only two were suits against a radio station.<sup>119</sup>

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113. Confidential Interview 76 (2004); Confidential Interview 87 (2003); Confidential Interview 93 (2003).

114. Virtually all commercialized media in China are subsidiaries of official media or belong to the same corporate group as an official Party paper. Most official Party papers have numerous commercialized subsidiaries that subsidize their official parent publications, meaning that the total number of commercialized papers exceeds the number of official papers. Despite links between the commercial media and their official parents, most commercial media are far less influential than their parent publications, as the Party-state continues to rely on traditional Party media to disseminate propaganda and inform leadership of local developments. See Liebman, *supra* note 7, at 23–41 (discussing commercialization of the Chinese media and the development of critical reporting).

115. Confidential Interview 67 (2003). *People's Daily* won one of the two cases and lost the other. *Id.* Likewise, suits against *Xinhua* are relatively rare. Confidential Interview 103 (2003); see also Confidential Interview 69 (2004) (stating that courts generally will not accept a case against *Xinhua*); Confidential Interview 72 (2004) (stating that plaintiffs know that suing powerful central media such as *Xinhua* will be futile and thus do not bring such suits); Confidential Interview 73 (2004) (stating that it is rare for plaintiffs to sue major central media).

116. All media in China have an official rank, which corresponds to the rank of the government or Party entity to which they are attached. See Liebman, *supra* note 7, at 20–21. Suits against commercialized newspapers and magazines could also be differentiated based on the rank of their parent publications. Commercialized newspapers generally have far less influence than their parent publications, and thus the impact of the rank of the commercialized press is less significant than it is for official Party papers.

117. See *infra* Appendices A, B.

118. See *infra* Appendices A, B, Cases 34, 83, 165, 167, 169, 200.

119. See *infra* Appendices A, B, Cases 78, 157.



TABLE FOUR  
CASES CLASSIFIED BY DEFENDANT<sup>120</sup>

Defendant Type	Commercial Newspapers	Magazines	Official Newspapers			Newspapers—Unclear Rank <sup>121</sup>	TV and Radio Stations	Book Publishers	Websites	Others (individuals, government entities, companies)	Total
			Central	Provincial	Local						
Number of Cases	74	29	20	32	23	10	8	8	6	13	228
Plaintiff Victories, First-Instance	47	18	9	22	8	6	4	5	5	9	135
Defendant Victories, First-Instance	15	8	10	9	12	2	2	2	1	3	64
Case withdrawn	0	0	0	0	1	0	0	0	0	0	1
No outcome or Outcome Unknown	12	3	1	1	2	2	2	1	0	1	28
Plaintiff First-Instance Success Rate <sup>122</sup>	76%	69%	47%	71%	40%	75%	67%	71%	83%	75%	68%

120. Cases with multiple defendants are classified according to the status of the highest-ranking defendant. One case brought against both a television station and a number of newspapers and websites, see *infra* Appendices A, B, Case 83, for example, is classified as a suit against a television station, as television stations are generally more influential than are newspapers of equal rank. Defendants are classified according to the newspaper in which the allegedly defamatory article appeared; in many cases parent publishers or Party or government departments or entities are in fact the named defendants in lawsuits. I measure cases as plaintiff victories where they prevailed against any one of the defendants. In five cases, plaintiffs' claims against newspapers failed, but plaintiffs prevailed against other defendants. In order to preserve consistency among the tables in this Article, such cases are counted as plaintiff victories.

121. "Unclear rank" refers to cases in which the rank of the defendant could not be ascertained, generally because case reports did not name the particular outlet that was sued.

122. Success rates were calculated as percentages of cases with reported outcomes.

Newspaper reports are likely to focus on lawsuits against the print media, and thus the sample may overstate the prevalence of such suits. Similarly, the media are unlikely to report on routine defamation cases brought against individuals.<sup>123</sup> The finding that the print media are more likely than others to be litigation targets is, however, consistent with comments by journalists and lawyers, who note that newspapers are much more likely to be sued than are the broadcast media.<sup>124</sup> Suits against television stations and programs are infrequent, reflecting more direct state links and control, and the corresponding greater authority of the broadcast media.<sup>125</sup> Plaintiffs are unlikely to sue China Central Television, for example, because they know that success in such a case is unlikely.<sup>126</sup>

Second, within the print media, commercialized newspapers and magazines are the most likely targets of defamation actions. As Table Four shows, the largest number of cases—seventy-four—were brought against commercialized newspapers. An additional twenty-nine cases were brought against magazines.<sup>127</sup> Although some magazines in China serve traditional mouthpiece roles, most have commercialized and are thus less closely linked to the Party-state than are official newspapers. The finding that the commercialized media are most likely to be sued is consistent with evidence from journalists.<sup>128</sup> Commercialized papers and magazines that are well known for aggressive, critical reports have been particularly prone to lawsuits, sometimes facing large damages awards. *Southern Weekend*, for example, long regarded as China's most daring newspaper, has been a frequent target of lawsuits,<sup>129</sup> as has *Caijing Magazine*, China's most outspoken financial magazine.<sup>130</sup>

Third, plaintiffs bring a significant number of cases against official Party-state mouthpiece newspapers, suggesting that many plaintiffs are not intimidated by the media's official position. Although the largest category of cases in the sample was suits against commercialized papers, more than a third of all of the cases were against official papers.<sup>131</sup> These official papers include na-

123. Media reports may also overlook cases in which only individual journalists—and not the media for which they work—are sued. Confidential Interview 21 (2005).

124. Studies on U.S. defamation litigation in the 1980s found the same trend. See John Soloski, *The Study and the Libel Plaintiff: Who Sues for Libel?*, 71 IOWA L. REV. 217, 219 (1985) (finding that daily papers are much more likely to be sued in the United States than are the broadcast media, despite broadcasting stations greatly outnumbering the print media).

125. Confidential Interview 87 (2003).

126. See Confidential Interview 67 (2004); Confidential Interview 83 (2003).

127. See *infra* Appendices A, B, Cases 4, 12, 13, 24, 28, 33, 36, 54, 62, 74, 80, 103, 110, 118, 126, 139, 140, 163, 164, 170, 185, 189, 191, 193, 195, 197, 202, 213, 217.

128. See, e.g., Confidential Interview 46 (2003).

129. See, e.g., Ding Dong, *Cong Jizhe Chi Guansi Tanqi* [Discussion Stemming from the Phenomenon of Reporters Being Sued], XINHUA WANG HUNAN PINDAO [XINHUA NET HUNAN CHANNEL], Apr. 23, 2001, <http://www.hn.xinhua.org/news/2001-4-23/01423171505.htm> (unavailable as of Nov. 5, 2005) (on file with the Harvard International Law Journal) (discussing how a *Southern Weekend* report on the misappropriation of funds from a state-owned factory by the factory manager resulted in a 240,000 yuan award against the paper).

130. Confidential Interview 17 (2003).

131. See *infra* Appendices A, B.

tional Party publications, such as *People's Daily*, *China Youth Daily*, and *Legal Daily*, as well as the official newspapers of provincial and municipal Party committees and newspapers belonging to provincial or local government departments. This finding contrasts with claims by some observers in China that official papers, in particular the local Party press, are rarely the targets of suits.<sup>132</sup>

Still, local and provincial Party papers were more likely to be sued than were central Party-state papers.<sup>133</sup> Twenty-three of the cases brought against official papers—of the total of seventy-five cases for which rank was clear—were against local (municipal) Party papers.<sup>134</sup> Another thirty-two were against provincial papers,<sup>135</sup> and twenty were brought against newspapers with a central Party-state rank.<sup>136</sup> Other factors may explain the distribution of cases: There are far more local and provincial papers in China than there are central papers, and the media may be more reluctant to report on suits against central papers. The number of cases brought against official central media may in fact *overstate* the willingness of plaintiffs to challenge powerful central media. The sample includes one case against *People's Daily*, as well as suits against relatively influential central papers including *China Youth Daily*, *Workers Daily*, and *Legal Daily*.<sup>137</sup> A number of cases, however, were brought against less well-known or powerful central media, including such papers as *China Consumer News*, which is attached to the National Consumers Association, and *China Old Age News*, attached to the Ministry of Civil Affairs.<sup>138</sup>

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132. See Confidential Interview 18 (2004) (commenting that local people in a medium-sized town in central China “would not think” to sue the local media); Confidential Interview 76 (2004) (stating that it is rare for local papers to be sued); Confidential Interview 83 (2004) (noting it is rare for official Party papers to be sued). *But see* Confidential Interview 32 (2005) (stating that it is not surprising that ordinary persons bring and win cases against the official media, because such cases will only be brought when the harm suffered has been serious). Six cases in the sample were suits by ordinary persons against local official Party newspapers (not including suits against official Party papers in provincial-ranking cities, such as Beijing and Shanghai). See *infra* Appendices A, B, Cases 11, 18, 39, 41, 52, 204.

133. See Confidential Interview 46 (2003).

134. See *infra* Appendices A, B, Cases 11, 18, 19, 39, 41, 47, 50, 52, 65, 81, 88, 101, 104, 105, 109, 116, 128, 133, 134, 136, 149, 173, 204. In one additional case both a local official paper and a television station were sued; that case is classified according to the defendant television station. See *infra* Appendices A, B, Case 83.

135. See *infra* Appendices A, B, Cases 6, 9, 22, 25, 27, 29, 37, 38, 43, 56, 60, 68, 70, 82, 90, 94, 95, 98, 99, 102, 106, 111, 121, 124, 144, 147, 159, 160, 168, 177, 221, 222. Provincial papers include official papers in municipalities with a provincial rank, such as Beijing and Shanghai.

136. See *infra* Appendices A, B, Cases 5, 16, 30, 46, 61, 72, 84, 115, 127, 129, 130, 135, 138, 141, 145, 150, 166, 192, 207, 209.

137. See *infra* Appendices A, B, Cases 5, 61, 127, 150.

138. See, e.g., *infra* Appendices A, B, Cases 145, 207. The same phenomenon is apparent at the provincial and municipal levels. Although some of the lawsuits were brought against the mouthpiece papers of provincial or municipal Communist Party committees, see, e.g., *infra* Appendices A, B, Cases 19, 22, 47, 222, in other cases, plaintiffs sued newspapers belonging to provincial or municipal trade unions, see, e.g., *infra* Appendices A, B, Cases 81, 105, women's associations, see, e.g., *infra* Appendices A, B, Case 11, or government departments, see, e.g., *infra* Appendices A, B, Cases 52, 221. Although such papers are official, they are generally less influential than are the papers directly linked to provincial or municipal Party committees.

Fourth, a significant number of cases were brought against defendants not in the traditional print or broadcast media. In the sample, eight lawsuits were brought against book publishers,<sup>139</sup> three against government entities,<sup>140</sup> eight against individuals,<sup>141</sup> six against websites,<sup>142</sup> one case against a film production company,<sup>143</sup> and one against the national soccer association.<sup>144</sup> Further, some judges report that many defamation cases are brought by individuals against individuals<sup>145</sup> and thus attract little media attention. The prevalence of such cases is a reminder that understanding defamation actions solely in terms of their effect on newspapers and magazines is a mistake.

Fifth, case outcomes suggest that defendant type has an effect on likelihood of a plaintiff victory. In particular, cases against central newspapers were less likely to succeed than were cases against other defendants. In the sample, plaintiffs prevailed in more than half of all cases in each category except for cases against official central and local newspapers.<sup>146</sup> Plaintiffs won only nine of twenty cases brought against official newspapers with a central Party-state rank.<sup>147</sup> This finding is consistent with evidence from lawyers, journalists, and scholars.<sup>148</sup>

These trends reflect the underlying structure and influence of China's media. Commercialized media more frequently engage in the type of reporting that results in defamation lawsuits: critical reports, reports on private or scandalous details of the lives of stars and individuals, and reports on corporations and the financial sector. Plaintiffs are apt to perceive the commercialized media as lacking the power and influence of official media. In contrast, plaintiffs may be conscious of the power and influence of—and thus the difficulty of prevailing in cases brought against—central Party-state media and television stations. Yet the number of cases brought against the official media, in particular against central Party media, demonstrates that the rank and influence of plaintiffs and defendants cannot alone explain either decisions to sue or outcomes in defamation litigation. That plaintiffs are challenging—and sometimes winning against—influential Party mouthpieces shows that defamation

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139. See *infra* Appendices A, B, Cases 49, 53, 66, 91, 113, 180, 211, 215.

140. See *infra* Appendices A, B, Cases 76, 182, 208.

141. See *infra* Appendices A, B, Cases 1, 125, 151, 152, 176, 187, 199, 216. These include two cases in which the author of a novel, but not the publisher, was sued, and four against journalists in which the reporter, but not the publication, was sued. See *infra* Appendices A, B, Cases 125, 151, 166, 176, 199, 223.

142. See *infra* Appendices A, B, Cases 15, 48, 73, 117, 205, 210.

143. See *infra* Appendices A, B, Case 114.

144. See *infra* Appendices A, B, Case 85.

145. See Confidential Interview 18 (2004); Confidential Interview 19 (2003).

146. See *infra* Appendices A, B.

147. See *infra* Appendices A, B, Cases 5, 30, 84, 115, 129, 135, 141, 150, 207.

148. The small number of cases brought overall against television stations makes evaluating claims against television stations difficult but may also reflect the rarity of such actions. See, e.g., Confidential Interview 67 (2004) (stating that, in many cases, courts are biased in favor of television stations); Confidential Interview 76 (2004) (stating that it is difficult to prevail against central media); Confidential Interview 83 (2003) (noting that it is rare to sue the central media or television stations, because it is difficult to prevail in such cases).

litigation is a tool for challenging authority, not merely a tool for restricting the newly commercialized Chinese media.

### C. Plaintiffs

Plaintiffs in the 223 cases studied for this Article fell into four categories: officials and government entities, businesses and corporations, ordinary persons, and famous persons. These categories are, of course, rough; not all plaintiffs in the reviewed cases fit easily into any category, and some could be classified in several categories. Nevertheless, most cases clearly fit into one of the categories. Examining who sues and their reasons for doing so reveals both the diversity of reasons for which cases are brought and that the media's likelihood of success depends on who is bringing suit and the nature of their claims. Cases brought by officials and Party-state entities or by corporations highlight the use of defamation litigation to restrict and retaliate against critical coverage. In contrast, the fact that ordinary people bring, and prevail in, a significant number of cases against the official media reveals that defamation litigation also reflects increased willingness by those without power to use the legal system to advance their own interests.

#### 1. Officials and Party-State Entities

Cases brought by officials and Party-state entities most clearly show the use of defamation litigation to restrict China's media. Plaintiffs in sixty-two of the cases were either Party-state entities or officials.<sup>149</sup> These cases ranged from a village Communist Party committee that sued a newspaper after the paper ran articles exposing misuse of funds and misappropriation of land by the committee,<sup>150</sup> to hospitals that sued after media reports that they overcharged or harmed patients,<sup>151</sup> to three officials in Chongqing who sued after a magazine report linked them to a scandal involving the collapse of a bridge in the municipality.<sup>152</sup> Forty-three of the cases were brought by officials, seventeen were brought by government or Party entities, and two were brought by both officials and entities.<sup>153</sup>

Most striking, however, are those who were not plaintiffs: high-ranking officials. In the sixty-two cases, the highest-ranking officials to sue for defamation were county Party-secretaries and a former mayor of a mid-sized city.<sup>154</sup>

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149. See *infra* Appendices A, B. Whether a plaintiff should be classified as "official" is not always clear. For example, I have grouped one school and two hospitals into this group, due to their direct state links, although arguably they could be classified also as enterprises or businesses. Likewise managers and officials at some corporations and businesses could be classified as officials. I categorize state schools as government plaintiffs, and private schools as businesses. State enterprises are classified as corporate plaintiffs.

150. See *infra* Appendix B, Case 188.

151. See, e.g., *infra* Appendix B, Case 145.

152. See Xie, *infra* Appendix B, Case 126, at 2.

153. See *infra* Appendices A, B.

154. See *infra* Appendices A, B, Cases 143, 159, 175.

None of the lawsuits involved claims by provincial or national officials. In the entire set of 223 cases, the most influential or powerful plaintiffs appear to have been corporations. Such findings reflect norms that govern the media: The media rarely criticize officials above the county or municipal level and have significantly more discretion to criticize corporate misdeeds than they have to criticize official misconduct.<sup>155</sup>

Three trends in cases brought by officials and Party-state entities are of particular note and reveal how defamation litigation is being used to curtail the media: (1) the frequent use of defamation litigation to retaliate against critical reporting, in particular critical reporting by papers from outside the plaintiff's home jurisdiction, (2) the filing of defamation cases by officials who have already been subject to Party, administrative, or criminal sanctions, and (3) the use of defamation litigation by courts and judges in response to critical coverage of their activities.

#### *a. Litigation as Retribution*

Local officials or entities brought numerous defamation claims against either national media or media from outside the local area. As Table Five shows, of the sixty-two cases brought by officials or Party-state entities, local plaintiffs brought thirty against non-local defendants.<sup>156</sup> An additional sixteen cases were filed in courts in the home jurisdiction of both the plaintiff and at least one of the defendants.<sup>157</sup> Only five cases were brought in a defendant's home jurisdiction in cases in which the plaintiff and defendant did not share a domicile.<sup>158</sup>

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155. Party regulations also explicitly ban the media from reporting on central leadership without permission from the Central Propaganda Department. *Guanyu Fabiao He Chuban Youguan Dang He Guojia Zhubao Lingdaoren Gongzuo He Shengbuo Qingkuang Zuopin De Buchong Guiding* [Supplementary Rules Regarding Distribution and Publication of Work Concerning the Life Situation of Important Party and National Leaders] (promulgated by Zhongyang Xuanchuan Bu [Central Propaganda Department], effective Feb. 15, 1993), available at <http://www.people.com.cn/electric/ffg/d2/930215.html>; *Guanyu Chuban Fabiao Mao, Zhou, Liu, Zhu, Ren, Deng, Chen He Xianren Zhongyang Changwei Zhuzuo De Jixiang Buchong Guiding* [Supplementary Rules Regarding Publication and Distribution of Works Concerning Mao, Zhou, Liu, Zhu, Ren, Deng, Chen and Incumbent Members of the Standing Committee of the Politburo] (promulgated by Zhongyang Xuanchuan Bu, Zhongyang Wenxian Yanjiu Shi, Xinwen Chuban Shu [Central Propaganda Department, Central Document Research Center, and State Press and Publications Office], effective Aug. 21, 1990), available at <http://www.bjpress.cn/zczx/cbwgl/zh/cbzh7.htm>.

156. See *infra* Appendices A, B, Cases 1, 85, 90, 98, 100, 102, 106, 108, 120, 121, 123, 126, 132, 141, 143, 149, 153, 154, 160, 161, 162, 164, 165, 166, 170, 175, 180, 191, 192, 222.

157. See *infra* Appendices A, B, Cases 19, 104, 109, 111, 116, 128, 156, 157, 158, 163, 167, 168, 171, 173, 174, 177.

158. See *infra* Appendices A, B, Cases 103, 113, 130, 145, 188. In eleven of the cases brought by officials, the jurisdiction or the relationship of the jurisdiction to the parties was not clear. See *infra* Appendices A, B, Cases 8, 65, 70, 86, 155, 159, 169, 172, 189, 216, 218.

TABLE FIVE  
CASES BROUGHT BY OFFICIALS AND PARTY-STATE ENTITIES

	Home Jurisdiction of Plaintiff Only	Home Jurisdiction of Defendant Only	Home Jurisdiction of Both Parties	Unclear Relationship of Court to Parties	Total
Total Cases	30	5	16	11	62
Plaintiff First-Instance Victories	22	1	6	4	33
Defendant First-Instance Victories	3	3	7	2	15
Settled with No Clear Victor	1	0	0	0	1
Outcome Unknown	4	1	3	5	13
Plaintiff Success Rate in First-Instance Cases <sup>159</sup>	88%	25%	46%	67%	69%

Three cases highlight the use of defamation litigation by local officials or entities in response to critical reports by external media. In Shaanxi Province, a village Party committee and village officials successfully sued the national *China Youth Daily* for defamation after a report in the paper detailed how local officials had neglected to investigate an acid attack on a local woman.<sup>160</sup> The plaintiffs claimed that the article defamed the officials and the village itself; in court they contended that, since the article had appeared, the fruit orchards had suffered a decline in yield because villagers had lost their motivation to tend them.<sup>161</sup> A local court awarded plaintiffs 90,000 yuan and ordered an

159. Success rates were calculated as percentages of cases with reported outcomes.

160. See Minshi Panjue Shu (1999) Xian Min Er Chu Zi Di 01 Hao [Civil Decision (1999) Xian Civil Second No. 1] (Xianyang Shi Zhongji Renmin Fayuan [Xianyang Mun. Interm. People's Ct.], May 25, 2000), available at [http://www.ciol.net/gb/content/2000-08/24/content\\_63683.htm](http://www.ciol.net/gb/content/2000-08/24/content_63683.htm); Liu Xiaoyan, *Jizhe De Hefa Quanli Shei Lai Weibu [Who Can Protect Journalist's Legal Interests]*, ZHONGGUO QINGNIAN BAO [CHINA YOUTH DAILY], Nov. 9, 2001, available at RENMIN WANG [PEOPLE'S NET], <http://www.people.com.cn/GB/shizheng/19/20011109/601476.html>.

161. Shaanxi Province Civil Decision, *supra* note 160.

apology from the defendant; the Shaanxi Province High People's Court affirmed the decision.<sup>162</sup> Although external and international media highlighted the case in reports that left little doubt that local protectionism had played a role in the outcome,<sup>163</sup> such reports appeared to have little effect on the Shaanxi courts.

In other cases the effort to target external media is more explicit. In Henan Province, for example, a member of a local joint defense team<sup>164</sup> brought suit after three newspapers reported that he had been detained on charges of torturing a detainee.<sup>165</sup> The article, entitled "These Three Rotten Apples Really Have No Ethics," had run originally in the *Dabe News*, the leading commercialized paper in Zhengzhou, the capital of Henan. Other papers subsequently carried the report. Later, after the local procuratorate dropped the charges, the plaintiff brought suit, arguing that the original reports erred in stating that he had been detained on suspicion of torture, when in fact he was suspected of illegally detaining a suspect. Yet the plaintiff sued only the *Yangcheng Evening News*, a paper in Guangzhou, and did not sue the local paper that had originally carried the report. The court in plaintiff's hometown ordered the non-local paper to pay 35,000 yuan.<sup>166</sup>

Similarly, after *Southern Weekend* carried a report exposing corruption and "bloody conflict" at a state-owned factory in Qiqihar, in Heilongjiang Province, the head of the factory brought suit.<sup>167</sup> A court in Harbin, the provincial capital, ordered the paper, the article's author, and five other papers that reprinted the article to pay a combined total of 240,000 yuan in damages to the head of the factory. Although the court rejected a claim for one million yuan in emotional damages brought by the government department responsible for the factory, the court ordered the seven defendants to apologize to the government, noting that the seven defendants had "seriously influenced social stability as well as the image of the Party and government in Qiqihar."<sup>168</sup> A journalist for *Southern Weekend* who was present at the trial reported that the judge had told the defendants that the court had no power to decide the case on its own; the reporter also claimed that the suit was brought after the local Party-secretary gave written orders for a defamation case to be filed.<sup>169</sup>

The results of the sample cases show that plaintiffs are far more likely to prevail when they sue in their home jurisdiction. As Table Five shows, plaintiffs

162. See Liu Xiaoyan, *supra* note 160.

163. See, e.g., Terry McCarthy, *Taking on the System*, TIMEASIA, Oct. 9, 2000, available at <http://www.time.com/time/asia/magazine/2000/1009/cover1.html>; "Wang Baojing Deng Su Zhongguo Qingnian Bao Mingyu Qingquan An" Yantao Hui Fa Yan [Collection of Speeches at the "Symposium on the Case of Wang Baojing et al. Suing China Youth Daily for Defamation"], NANFANG ZHOUMO [SOUTHERN WEEKEND], June 22, 2004, available at [http://news.xinhuanet.com/newmedia/2004-06/22/content\\_1539597.htm](http://news.xinhuanet.com/newmedia/2004-06/22/content_1539597.htm).

164. Joint defense teams are auxiliary police, often with little training. They have been blamed for widespread abuses.

165. See Zhou Ze, *Zhe Qi Xinwen Qinquan An Pan De Dui Ma* [Was This News Defamation Case Correctly Decided?], FAZHI RIBAO [LEGAL DAILY], July 14, 2001, at 7. A local appellate court affirmed the decision.

166. See *id.*

167. See *infra* Appendix B, Case 123, at 5.

168. *Id.*

169. *Id.*



prevailed in eighty-eight percent of the thirty cases brought in the plaintiff's home jurisdiction against non-local media, while defendants prevailed in three of four cases, or seventy-five percent, brought by plaintiffs against media in a jurisdiction that was the home of the defendant but not the plaintiff. In cases brought in a jurisdiction that was home to both parties, plaintiffs and defendants fared roughly equally, with plaintiffs winning six cases and defendants winning seven.<sup>170</sup>

*b. Post-Punishment Litigation*

A smaller number of cases involved claims brought by officials who sued after having been subject to criminal or administrative punishment or after having been removed from office. Such cases show that criminal convictions of targets of media coverage do not insulate the media from litigation, in particular when defamation cases are brought in the plaintiff's local court. Thus, in Hubei Province, for example, the former vice-mayor of Zaoyang Municipality, Yin Donggui, was sentenced to five years in prison for accepting bribes. While Yin was in prison her husband brought a defamation suit on her behalf, arguing that a report in a Wuhan paper on the case had harmed her reputation by overstating the alleged amount she had accepted in bribes.<sup>171</sup> The suit also alleged that claims in newspaper reports that, for several years, Yin had used her position to have sex with numerous men, including her driver, were defamatory. A Hubei court awarded Yin 200,000 yuan in damages.<sup>172</sup> The court stated that the media "should be objective and correct" even if their reports cannot be as precise as legal findings.<sup>173</sup> The court found that the newspaper had overstated the amount of bribes, had suggested prior to trial that the outcome was fixed, and had used "incorrect language" to describe the case.<sup>174</sup>

Yin Donggui was not the only target of media criticism to sue even after having been punished for wrongdoing while in office. A total of seven cases involved claims brought by officials who had been convicted of crimes, or sanctioned by the Party discipline commission, or had lost their jobs as a result of critical media reports.<sup>175</sup> Plaintiffs prevailed in three of these cases.<sup>176</sup> Some such cases may be in response to sensational reporting by the media. But they also suggest efforts by local officials to contest sanctions already taken

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170. See *infra* Appendices A, B, Cases 111, 158, 163, 167, 171, 177 (for plaintiff); Cases 19, 104, 109, 116, 128, 157, 168 (for defendant).

171. Reports stated she had accepted 80,000 yuan in bribes; she was convicted of accepting 43,000 yuan. Zhai, *infra* Appendix B, Case 175.

172. *Id.*

173. *Id.*

174. *Id.* Media coverage and academic discussion of the case questioned how Yin could have prevailed given the criminal conviction, apparently believing that the reports could do little to add to the harm to her reputation already resulting from the criminal conviction.

175. See *infra* Appendices A, B, Cases 109, 130, 143, 153, 158, 169, 175.

176. See *infra* Appendices A, B, Cases 143, 158, 175. That other plaintiffs likewise had been sanctioned is likely; the media may not always report on decisions of the Party discipline commission, in particular where cases are sensitive.

against them: Bringing a defamation action may be easier for an official than challenging a criminal conviction or finding of Party disciplinary authorities.

*c. Courts and Judges as Plaintiffs*

A subset of cases brought by Party-state entities or officials is claims by judges or courts. Such cases demonstrate that judges and courts are using their own authority to respond to rising criticism in the media. Judges brought suit in ten cases.<sup>177</sup> Courts brought an additional two cases for reputational harm.<sup>178</sup> The twelve cases all arose in response to critical reports—or reports that judges or courts perceived to be critical. The Futian District Court, for example, in Shenzhen brought suit against the national *Democracy and the Legal System* magazine for harm to the court's reputation after the magazine carried an article in 1994 that was critical of the court.<sup>179</sup> The article, entitled “A Case That Is Difficult to Bear and Causes People to Reflect,” described another defamation case involving a Shenzhen company and the national *Workers Daily*. The article stated that there were some “not very difficult to understand behind-the-scenes activities” in the case and quoted the defendant's lawyer as directly questioning the fairness of the decision. The Shenzhen Intermediate Court—the court directly superior to the Futian District Court—heard the case, and found for the plaintiff.<sup>180</sup> The intermediate decision, noting the magazine's national importance, stated that if the magazine was unhappy about a court decision, it could “use other routes” to express its views; it also opined that the offending article should not have been run without having obtained the approval of the district court.<sup>181</sup> The intermediate court found that the article had caused “severe harm” to the Futian District Court's reputation and ordered the magazine to apologize in print and pay 5,000 yuan in economic damages. The Guangdong Province High People's Court rejected an appeal in the case after the magazine-appellant failed to appear in court.<sup>182</sup>

The case against *Democracy and the Legal System*, brought in 1995, was a relatively early example of courts and judges suing the media. Subsequent cases have continued the trend, although, in most cases, claims have been brought by individual judges rather than by courts as institutional plaintiffs. A court in Urumqi, the capital of Xinjiang, for example, awarded 10,000 yuan to a judge following a series of critical reports in the *Xinjiang Business News*. The articles suggested that a judge on the Urumqi Intermediate Court had colluded with one of the parties in a case arising out of a contract dispute to transfer 1.72 million yuan in bad debt to a state-owned company.<sup>183</sup>

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177. See *infra* Appendices A, B, Cases 8, 163, 166, 167, 168, 170, 171, 172, 173, 174.

178. See *infra* Appendices A, B, Cases 164, 165.

179. See *infra* Appendix B, Case 164.

180. *Id.*

181. *Id.*

182. *Id.*

183. See *infra* Appendix B, Case 171.

The judge brought suit in Urumqi's Tianshan District People's Court—a court directly below his own—which ordered the defendant newspaper to apologize and pay 80,000 yuan to the judge.<sup>184</sup> On appeal, the Xinjiang High People's Court ordered the case transferred out of Urumqi to an intermediate court in another area of Xinjiang, presumably to avoid the plaintiff's own court hearing the appeal. The intermediate court affirmed the decision. The paper's travails, however, did not end with the verdict; the editor-in-chief of the paper was subsequently detained for fifteen days. Although the charges stemmed allegedly from the editor's failure to repay a debt in an unrelated case, online commentators speculated that the detention was directly related to the defamation case and to the court's unhappiness with the paper's reports.<sup>185</sup>

Not surprisingly, judges and courts win most cases brought against the media. The total number of cases brought by courts or judges is difficult to assess. One Chinese journalist who has studied the phenomenon identified fourteen such cases brought between 1994 and 2001. All fourteen resulted in defeats for the defendant, with the media outlet being ordered either to apologize or to pay compensation.<sup>186</sup> The cases surveyed for this Article are largely consistent with these findings, with plaintiff judges or courts prevailing in six of eight cases for which outcomes are available.<sup>187</sup> The results of the other two cases, rejecting judges' defamation claims, reveal that judges do not always win such cases.<sup>188</sup> A district court in Chongqing, for example, rejected a defamation claim brought by a judge in another court in the same city against *China Youth Daily* and *Southern Metropolitan Daily*. The dispute stemmed from a report on an economic case, originally carried in *China Youth Daily*, that stated that the sitting judges hearing the case had "repeatedly clearly violated adjudication procedures in hearing the case" and that government officials involved in the case had fabricated evidence.<sup>189</sup> The trial court found

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184. *Id.* One media report stated that the judge who headed the tribunal in the district court was a former colleague of the plaintiff. *Id.*

185. "Xinjiang Shangbao" Zongbian Weibe Beiju [Why Was "Xinjiang Commercial News" Editor-in-Chief Detained], BEIJING QINGNIAN BAO [BEIJING YOUTH DAILY], Dec. 2, 1999, at 7.

186. XU XUN, FOURTH WAVE, *supra* note 51, at 12; Xu Xun, *Zhongguo Meiti Yu Sifa Guanxi Xianzhuang Pingxi* [Analysis on the Current Circumstances of Media-Judicial Relations in China], 2001 FAXUE YANJIU [LEGAL STUDIES] NO. 6, 149, 154 (this journal is alternatively known as CASS L.J.) [hereinafter Xu, FAXUE YANJIU]; Xu Xun, *Dao Yan: Meijie Ren De Falü Guan Yu Falü Ren De Meijie Guan: Jianlun Xinwen Fa De Ruogan Lilun He Shijian Wenti* [Introduction: Journalists' Law Outlook and Lawyers' Media Outlook: Several Theoretical and Practical Problems of China's Media Law] (unpublished manuscript, on file with the Harvard International Law Journal) (stating that the media's defeat rate in cases brought by the courts is 100%); *see also* Confidential Interview 44 (2004) (stating that the media lose 100% of cases brought by courts or judges).

187. *See infra* Appendices A, B, Cases 8, 163, 164, 167, 170, 171. In one of the cases counted as a plaintiff victory, the defendant settled with the plaintiff. *See infra* Appendices A, B, Case 167.

188. *See infra* Appendices A, B, Cases 166, 168.

189. For the original article, see Xu Yongheng, *Zhengfu Shexian Zaujia, Fayuan Weizhang Ban'an: Chongqing Jianke Yuan Mianlin Jieti* [Suspected Fabrication of the Government and Violation of Procedures of the Court: Chongqing Construction Science Institution Faces Dissolution], ZHONGGUO QINGNIAN BAO [CHINA YOUTH DAILY], Jan. 4, 2000, at 2.

that the papers' reports were basically correct and did not include "attacking" or libelous language.<sup>190</sup>

Cases brought by judges and courts demonstrate that courts are beginning to resist media oversight and are using their own authority to do so. Litigation is one of a number of tools the courts have to restrict coverage. Others include banning reporting on cases or requiring that all reports on court activities be pre-screened by judges. Some Chinese commentators have criticized defamation actions brought by judges and courts, arguing that courts undermine the legal system when they bring such cases and that such cases should not be considered civil disputes.<sup>191</sup> Judges, in response, argue that they have little other recourse when media frequently err in the coverage of court proceedings and lack basic knowledge of law.<sup>192</sup> Given the weak position of courts in the Chinese system and the growth of aggressive critical reporting by the media on court activities, courts' use of defamation litigation to curtail critical reporting is not surprising. Courts elsewhere have responded to the growth of critical reporting with similar sanctions.<sup>193</sup> Yet, along with revealing courts' attempts to restrict the media, such cases may also reflect the increasing autonomy and authority of the courts. Such factors may make courts attractive to ordinary litigants as well as to officials and corporations.

Not all cases brought by judges or other officials involve plaintiffs seeking retribution. Lawyers who represent defamation plaintiffs contend that such suits are necessary to curtail erroneous and unfair media coverage, and they note that, in many such cases, the media are the powerful party.<sup>194</sup> Like judges, these lawyers maintain that defamation litigation may be the only route of redress available to officials who have been criticized by the media.<sup>195</sup> Party-state superiors often view media reports as final determinations of fact, making it difficult for targeted officials to contest critical reports. Moreover, official plaintiffs are not necessarily powerful. Litigation may be used by officials who have already lost their positions.<sup>196</sup> Yet evidence from cases brought by officials and Party-state entities demonstrates that defamation litigation has become a mechanism for restricting media freedom. Weak legal protections for the

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190. See *infra* Appendix B, Case 166.

191. See, e.g., Xu, FAXUE YANJIU, *supra* note 186, at 154 (summarizing arguments); Yang Lixin & Yang Fang, *Shu Shi Shu Fei Li Ci Cun Zhao* [Keep a Record of Who is Right and Who is Wrong], MINZHU YU FAZHI [DEMOCRACY AND THE LEGAL SYSTEM], Aug. 6, 2001, at 52.

192. Xu, FAXUE YANJIU, *supra* note 186, at 151. Although critical of the practice of courts and judges bringing defamation lawsuits, Xu argues that they will sue only in cases in which they have in fact suffered negative effects from press coverage.

193. See *infra* Part III.A.

194. Confidential Interview 67 (2004).

195. That officials bring many defamation actions is not surprising. In the United States, where legal standards make it much more difficult for officials or corporations to recover against the media, such "public persons" account for the majority of defamation actions. See BEZANSON, *supra* note 24, at 10 (finding that office holders and corporations account for sixty percent of the plaintiffs in defamation actions in the United States).

196. Confidential Interview 36 (2005) (stating that only relatively weak officials will sue for defamation, because influential officials will be able to block negative reporting before it is published or aired).

media, legal standards that restrict personal criticism, and local protectionism in the courts combine to make the Chinese media easy targets for those seeking redress or retribution.

## 2. *Business or Corporate Plaintiffs*

Business and corporate plaintiffs likewise use defamation litigation to restrict and retaliate against critical media coverage. Such cases may pose a greater threat to the media than suits by officials pose, as amounts in controversy are often far larger in cases brought by corporations. Corporate or business plaintiffs brought 52 of the 223 cases surveyed in this Article.<sup>197</sup> Plaintiffs ranged from the owner of a karaoke bar in a small town in Sichuan<sup>198</sup> to major national corporations,<sup>199</sup> and included property developers,<sup>200</sup> computer manufacturers,<sup>201</sup> a mooncake producer,<sup>202</sup> and a soccer club.<sup>203</sup> In most of these cases, plaintiffs were either local or regional enterprises or businesses. In some cases, however, the plaintiffs were nationally or internationally recognized brands.<sup>204</sup>

Most claims resulted from negative coverage of a company's products or business practices. For example, a factory in Nanyang brought suit against the local Party mouthpiece paper after the paper had reported that the factory had produced leaflets that included explicit sexual content.<sup>205</sup> In Shanghai, the organizers of the Shanghai International Film Festival brought suit after a newspaper alleged "black box" manipulation of awarding prizes at the festival.<sup>206</sup> Two of the cases involved apparently accurate reports about *other* companies mistakenly attributed to plaintiffs. The plaintiffs alleged that the media had misled consumers into thinking that the plaintiffs had engaged in illegal conduct or other wrongdoing (in one case due to a typographical error, and in another due to a paper's failing to print the entire name of the company alleged to be the wrongdoer).<sup>207</sup>

197. See *infra* Appendices A, B.

198. See *infra* Appendix B, Case 183.

199. See *infra* Appendix B, Case 152.

200. See, e.g., Zhang Honglei & Guan Jindong, *Mingjietai Fangdichan Yu Yunnan Ribao Duibu Gongtang* [*Mingjietai Real Estate and Yunnan Daily Confront Each Other in Court*], YUNNAN RIBAO DIANZI BAN—DAGUAN ZHOUKAN [ELECTRONIC VERSION OF YUNNAN DAILY—DAGUAN WEEKLY], June 15, 2000, available at <http://www.yndaily.com/zl/daguan/0615/dg06152.htm>. (unavailable as of Nov. 9, 2005) (on file with the Harvard International Law Journal).

201. See *infra* Appendix B, Case 182.

202. See *infra* Appendix B, Case 138.

203. *Zuqiu Bao Xiang Shenzhen Pingan Daoqian* [*Soccer News Apologizes to Shenzhen Pingan Soccer Club*], HEBEI RIBAO WANG [HEBEI DAILY NET], Apr. 26, 2001, available at <http://www.hebnet.net/mag1/20180426/colart14411.htm>.

204. See, e.g., *infra* Appendix B, Case 131.

205. Hong Jun & Lin Juan, *Xinxi Fuwu Bianwei Fayuan Panjue Meiti Puguang Zhengdang* [*Stink Over Information Service, Court Vindicates Media's Right to Expose*], Henan Sheng Nanyang Shi Wanchengqu Renmin Fayuan [Henan Province Nanyang City Wancheng District People's Court], Aug. 29, 2002, <http://www.nhshs.edu.sh.cn/xinxizhenghe/zhengzhi/contents/main/lm06/lm0608/Myweb/anli/24.htm>.

206. See *infra* Appendix B, Case 122.

207. See *infra* Appendix B, Case 117 (suit alleging that website changed one character in the name of

Two examples highlight the use of such cases to retaliate against negative coverage or to prevent further critical reporting. In March 2002, Shenzhen Fountain Corporation, a real estate and financial data services company listed on the Shenzhen Stock Exchange, brought suit against Beijing-based *Caijing Magazine*, widely regarded as China's most outspoken financial publication. The suit was in response to an article in *Caijing* that questioned the firm's accounting practices. Fountain demanded more than three million yuan, arguing that the article had severely harmed its reputation.<sup>208</sup>

Fountain brought suit in the Luohu district court in its hometown of Shenzhen. In a lengthy opinion, the court found that, although most of the article was correct, certain facts were untrue. In its opinion, the court recognized *Caijing's* "right to supervise," "right to report," and "right to criticize,"<sup>209</sup> and also determined that the article was neither insulting nor libelous. As a result, the court found that no "news tort" had been established.<sup>210</sup> Stating that "truth is the life of news," however, the court did find that certain facts in the article were not correct, that the magazine had failed to make a sufficient effort to confirm such facts, and thus that the defendants were liable for defamation.<sup>211</sup> The court awarded Fountain 300,000 yuan and ordered *Caijing* to apologize. The Shenzhen Intermediate People's Court affirmed the decision.<sup>212</sup> There were widespread allegations that local government involvement in the case was responsible for the outcome.<sup>213</sup> The court, however, contended that its handling of the case was not affected by any external pressure.<sup>214</sup>

Also in 2002, the Haier Group, China's leading producer of household appliances, sued freelance commentator Chen Yicong.<sup>215</sup> The case arose after Chen speculated in an online commentary that some of Haier's new product lines would not succeed and also questioned Haier's finances. After the report was picked up by foreign media,<sup>216</sup> Haier sued Chen in Haier's hometown of Qing-

a company alleged to have engaged in criminal conduct, thus leading readers to believe that plaintiff was the wrongdoer).

208. The company originally demanded 1,080,000 yuan, but increased its demand to 3,080,000 yuan after Hu Shuli, the magazine's editor-in-chief, published an editorial criticizing the lawsuit. See *infra* Appendix B, Case 140.

209. Minshi Panjue Shu Shen Luo Fa Minyi Chu Zi Di 1120 Hao [Civil Case Court Opinion Shen Luo Civil First No. 1120], YANGGUANG XIA DE CAIPAN: LUOHU FAYUAN FALÜ WENSHU XUANPING [JUDGMENTS UNDER SUNSHINE: SELECTED DOCUMENTS AND JUDGMENTS OF THE LUOHU COURT] 153, 154–55 (Jiang Hongyan ed., 2004) (Shenzhen Shi Luohu Qu Renmin Fayuan [Shenzhen Municipality Luohu District People's Court], 2002).

210. *Id.* at 170–71.

211. *Id.* at 173; Confidential Interview 64 (2004).

212. *ST Xingyuan (000005): Shengsu "Caijing" Mingyu Qinquan An* [ST Xingyuan (000005): Wins the Defamation Case Against "Caijing"], Sept. 30, 2003, <http://finance.sina.com.cn/s/20030930/0824462006.shtml>.

213. Chen, *supra* note 79, at 51.

214. Confidential Interview 61 (2004).

215. See *Chen Yicong Yu Haier An Hejie, Chen Yicong Fabiao Dujia Shengming* [Chen Yicong v. Haier Case is Settled, Chen Yicong Publishes Exclusive Announcement], GUIGU DONGLI [ENET.COM.CN], Aug. 19, 2002, available at <http://tech.tom.com/Archive/1121/1015/2002/8/19-39939.html> [hereinafter *Chen Yicong*].

216. See, e.g., Susan Lawrence, *Gagged by Big Business*, FAR E. ECON. REV., Aug. 1, 2002, at 24; Dexter Roberts, *Baby Steps for a Chinese Giant*, BUS. WK. ONLINE, July 17, 2002, <http://www.businessweek.com/>

dao. Haier demanded 300,000 yuan, an amount Chen stated was equivalent to more than ten times his annual salary.<sup>217</sup> Overseas media covered the case in detail, noting in particular how the dispute pitted the giant Haier against Chen, who eked out a living writing online while living at home with his parents.<sup>218</sup> Domestic media, on the other hand, were largely silent. Scattered reports noted the dispute, but most avoided any coverage, apparently due to explicit instructions from the Central Propaganda Department not to cover the matter and to concerns that Haier would sue any domestic media that repeated the allegations.

Haier and Chen eventually settled the case, with Chen issuing an online apology stating that his allegations had been false and that he had failed to investigate the facts prior to publishing his analysis.<sup>219</sup> Domestic online media reported Chen's apology.<sup>220</sup> Although some observers questioned why Haier would bother to sue a relatively obscure online commentator, the case appeared to serve twin goals: publication of Chen's allegations in the domestic media ceased, and Haier made clear that it would aggressively pursue future critics.

It is hardly unusual for corporations or businesses to bring suit for harm to their reputations. Yet examination of the outcomes in China demonstrates the degree to which corporate defamation claims in China appear to be part of the larger phenomenon of local protectionism. Although both the Shenzhen Fountain and Haier cases involved high-profile corporations, most corporate libel suits involve less well-known plaintiffs, often local businesses. As Table Six shows, corporate plaintiffs overwhelmingly bring defamation claims in their home jurisdiction—with twenty-seven of the claims being brought by local corporate plaintiffs against non-local media<sup>221</sup> and only four being brought in a jurisdiction that was home to the defendant but not the plaintiff.<sup>222</sup>

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bwdaily/dnflash/jul2002/nf20020717\_8966.htm.

217. Roberts, *supra* note 216.

218. *See, e.g., id.*

219. *Chen Yicong, supra* note 215.

220. *See, e.g., "Pojie Zhang Ruimin De Haier Faze" [Decoding Zhang Ruimin's Haier Conduct], BEIHAI LUYOU ZHI CHUANG [BEIHAI TRAVEL WINDOW], Oct. 13, 2003, available at <http://0779.cn/bzhlm/printpage.asp?id=6750>.*

221. *See infra* Appendices A, B, Cases 83, 84, 91, 97, 101, 107, 117, 122, 124, 125, 127, 131, 135, 137, 138, 139, 140, 142, 152, 178, 179, 183, 185, 186, 187, 190, 202.

222. *See infra* Appendices A, B, Cases 87, 115, 148, 219.

TABLE SIX  
 CASES BROUGHT BY CORPORATIONS OR BUSINESSES, BY JURISDICTION

	Home Jurisdiction of Plaintiff Only	Home Jurisdiction of Defendant Only	Home Jurisdiction of Plaintiff and Defendant	Unclear Relationship of Court to Parties	Total
Total Cases	27	4	17	4	52
Plaintiff First- Instance Victories	19	3	9	3	34
Defendant First- Instance Victories	5	0	6	1	12
Outcome Unknown	3	1	2	0	6
Plaintiff First- Instance Success Rate <sup>223</sup>	79%	100%	60%	75%	74%

Plaintiffs prevailed in all of the cases with known outcomes brought in the home jurisdiction of defendants, as well as in seventy-nine percent of those brought in the plaintiffs' home jurisdictions, results suggesting caution in assuming that local protectionism alone explains outcomes.<sup>224</sup> High success rates also reflect legal standards that favor plaintiffs. As with suits by officials and Party-state entities, however, evidence from journalists and lawyers supports the conclusion that corporate defamation cases are often attempts by plaintiffs to use local courts as a means to retaliate against the media.

Not all business and corporate plaintiffs are equally powerful. In one case, for example, the owner of a karaoke bar in Sichuan's Emei County sued after being criticized by a provincial media outlet for charging five yuan for a glass of plain boiled water.<sup>225</sup> That karaoke bar owner clearly was not as powerful as a company helping develop the giant Three Gorges Dam, a company whose general manager sued both a Hong Kong paper and a Guangzhou paper for harm to its reputation and that of the entire project following a report that suggested the company had used shoddy materials in its construction

223. Success rates were calculated as percentages of cases with reported outcomes.

224. See *infra* Appendices A, B. The small number of defendant victories overall in this category—just twelve of the forty-six cases with results, or twenty-six percent—also impedes drawing firm conclusions.

225. See *infra* Appendix B, Case 183, at 8a.



work on another dam.<sup>226</sup> Given the degree to which local Party-state interests so often overlap with local business and corporate interests in China, many corporate or business plaintiffs likely have strong ties to the local Party-state, and thus influence over the local courts. Corporate plaintiffs' seventy-nine percent success rate in cases brought in their home jurisdictions against external media supports the conclusion that corporations are attempting to use the local courts to silence critical media reports.<sup>227</sup>

### 3. Ordinary Persons

Much recent discussion of defamation litigation in China centers on suits brought by official plaintiffs or corporations. Despite the media's traditionally powerful position as an arm of the Party-state, in many such suits, the media are the weaker party. Yet cases brought by plaintiffs without clear ties to, or influence with, the Party-state suggest that defamation litigation is not merely a manifestation of local protectionism or of efforts to restrict media autonomy. Defamation litigation is also a mechanism for contesting official decisions and challenging state authority.

Cases brought by those without Party-state ties divide into two groups: those brought by ordinary persons and those brought by famous persons (including artists, academic commentators, authors, singers, athletes, and actors). This Part discusses cases brought by ordinary persons; the following Part examines those brought by famous persons. Given the traditional influence of the media, the power dynamics of such cases would appear to favor the media. The media do fare better in suits brought by non-powerful plaintiffs but nevertheless lose the majority of the time.

Fifty-seven of the cases surveyed were brought by ordinary persons.<sup>228</sup> These cases fell into four categories: (1) claims by persons wrongly accused of criminal conduct, (2) claims by persons convicted of crimes, (3) claims resulting from reports alleging non-criminal misconduct, and (4) claims resulting from the publication of private details regarding the plaintiff. Although most cases arose from media reports about a specific plaintiff, some cases in

226. See *infra* Appendix B, Case 101.

227. See *infra* Appendices A, B.

228. See *infra* Appendices A, B. I classified plaintiffs as "ordinary" when they had no obvious official status and did not appear to have significant public notoriety prior to the alleged defamatory incident. Classifications of plaintiffs as "ordinary" are particularly difficult to verify. Some Chinese commentators and lawyers have questioned whether any ordinary persons bring suit, arguing that, in many such cases, plaintiffs have connections that allow their cases to be brought and to be noticed by the media. See, e.g., Confidential Interview 36 (2005). Although it is possible that some of the cases I classify as "ordinary" involve parties with connections to the media or the courts, the large number of such cases without any such apparent ties suggests that persons without connections also bring a significant volume of cases.

A few cases classified as being brought by ordinary plaintiffs did not strictly fit into the category, but were classified as such because plaintiffs did not appear to be weaker than defendants. Such cases included a single case brought by a foreigner, see *infra* Appendices A, B, Case 80, and a suit brought by a minor magazine against a clearly more influential official Party newspaper, see *infra* Appendices A, B, Case 110. I classified these as "ordinary plaintiffs" because such plaintiffs appeared to be weak when compared to their adversaries and because they had no particular notoriety prior to the cases.

each of the four categories involved claims that a report had caused harm by referring to a person other than the plaintiff who had the same or similar name as the plaintiff.

First, plaintiffs prevailed in all eleven cases brought by individuals who claimed to have been harmed by inaccurate reports suggesting that they or a family member had been involved in criminal conduct or had been detained on suspicion of wrongdoing.<sup>229</sup> Plaintiffs in such cases contended that the reports were erroneous, either because they had not been detained or were not in fact suspects, or because they had subsequently been cleared of any wrongdoing.<sup>230</sup> For example, an individual named Duan Xuanliang in Hunan Province brought suit against a local paper claiming that he had been defamed by an article suggesting that he was a chicken thief. An article had referred to a thief from his village with a similar name; in fact, however, there was no such person. Duan alleged that the article led his fellow villagers to believe that he was in fact the thief. A local court awarded him 2,000 yuan and ordered the paper to apologize. On appeal, however, the intermediate court found that the article had in fact referred to a person other than Duan.<sup>231</sup>

Second, ten cases were brought by ordinary persons or the family members or persons who were actually convicted of crimes or sentenced to administrative punishment, or where the allegedly defamatory report led to criminal or administrative charges against the plaintiff.<sup>232</sup> Plaintiffs in such cases included a doctor convicted of faking medical records;<sup>233</sup> the owner of a private coal mine who had been convicted of leading a criminal organization and causing intentional injury;<sup>234</sup> and a peasant who had been exposed (and was subsequently jailed) for making fake rat poison.<sup>235</sup> In Qinghai Province, a doctor sued after a newspaper erroneously reported that he had been sentenced to reeducation through labor for killing a patient.<sup>236</sup> In fact, while the doctor had been found to be at fault, he had not been subject to administrative detention. The court rejected the doctor's claim after the paper ran a correction, and the local procuratorate subsequently brought criminal charges against the doctor.<sup>237</sup> In most of these cases plaintiffs' claims failed: Plaintiffs prevailed in only two such cases,<sup>238</sup> while defendants won seven.<sup>239</sup>

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229. See *infra* Appendices A, B, Cases 5, 11, 30, 34, 35, 45, 67, 68, 76, 77, 78.

230. See, e.g., *infra* Appendix B, Case 45 (plaintiff prevailed after article stated that he had been detained for carrying a knife).

231. See *infra* Appendix B, Case 11.

232. See *infra* Appendices A, B, Cases 6, 13, 33, 43, 46, 54, 63, 75, 95, 200.

233. Lü Lifeng & Wu Yincui, "Mingyu Quan" Jiuchan Yulun Jiandu [Public Opinion Supervision Entangled with "Right of Reputation"], JIANCHA RIBAO [PROCURATORATE DAILY], Jan. 15, 2003, available at <http://review.jcrb.com.cn/ournews/asp/readNews.asp?id=135446>.

234. See *infra* Appendix B, Case 13.

235. See *infra* Appendix B, Case 54.

236. See *infra* Appendix B, Case 46, at 3.

237. See *infra* Appendix B, Case 46, at 3.

238. See *infra* Appendices A, B, Cases 33, 54.

239. See *infra* Appendices A, B, Cases 6, 13, 43, 46, 65, 75, 95, 200.

Third, twenty-one cases involved claims by individuals who were the target of reports that criticized or exposed wrongdoing, but where the individuals do not appear to have been subject to criminal prosecution.<sup>240</sup> Such claims included a suit brought by a monk who a newspaper had alleged was a “fake monk,”<sup>241</sup> a claim by an English teacher who a paper reported could not speak English,<sup>242</sup> and a claim by a woman who a report suggested was a prostitute.<sup>243</sup> Also included in this group were two successful suits by journalists against persons who publicly disparaged the journalists after being criticized in print, suggesting that, in some cases, journalists are able to use defamation litigation as a defensive weapon.<sup>244</sup> Plaintiffs prevailed in twelve of the cases in this category;<sup>245</sup> defendants won nine.<sup>246</sup>

Fourth, fifteen plaintiffs brought suit alleging that they had been harmed by reports that had a stigmatizing effect on or that exposed unflattering details of their private lives.<sup>247</sup> These included a husband and wife who sued after a newspaper incorrectly stated that their son was mentally disabled;<sup>248</sup> a lawyer who sued after a newspaper reported details of an affair;<sup>249</sup> a woman who sued after a newspaper report accused her of not looking after her elderly father;<sup>250</sup> a man who sued after a book identified him as being gay;<sup>251</sup> and persons who sued following reports that stated or suggested that they had sexually transmitted diseases, including AIDS.<sup>252</sup> For example, one case arose from a newspaper’s report on an individual who contracted a sexually transmitted disease from an unlicensed doctor.<sup>253</sup> The paper used a fake name to conceal the patient’s identity, but another person with the same name brought suit against the paper and the local health and anti-epidemic station, claiming that the article had led many people to believe he was the person identified. A local court awarded the plaintiff 10,000 yuan; the decision was reversed on appeal.<sup>254</sup> At the trial level, plaintiffs prevailed in nine such cases;<sup>255</sup> courts ruled for defendants in four cases.<sup>256</sup>

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240. See *infra* Appendices A, B, Cases 7, 10, 18, 29, 39, 42, 44, 52, 60, 71, 79, 80, 93, 110, 150, 198, 201, 206, 207, 209, 211.

241. See *infra* Appendix B, Case 198.

242. See *infra* Appendix B, Case 206.

243. See *infra* Appendix B, Case 205.

244. See *infra* Appendix B, Cases 79, 211.

245. See *infra* Appendices A, B, Cases 10, 18, 42, 60, 71, 79, 80, 93, 150, 198, 207, 211.

246. See *infra* Appendices A, B, Cases 7, 29, 39, 44, 52, 110, 201, 206, 209.

247. See *infra* Appendices A, B, Cases 22, 26, 38, 41, 49, 62, 64, 96, 195, 199, 204, 205, 212, 213, 215.

248. See *infra* Appendix B, Case 41.

249. See *infra* Appendix B, Case 52. The affair became public knowledge after the lawyer lost his license and subsequently filed suit against the local justice bureau. *Id.*

250. See *infra* Appendix B, Case 60.

251. See *infra* Appendix B, Case 49.

252. See *infra* Appendix B, Case 62.

253. See *infra* Appendix B, Case 64, at 4–6.

254. *Id.*

255. See *infra* Appendices A, B, Cases 26, 49, 64, 195, 199, 204, 205, 212, 215.

256. See *infra* Appendices A, B, Cases 22, 38, 62, 96.

The four categories of cases, summarized in Table Seven, suggest that ordinary persons are using defamation litigation to pursue multiple goals. In cases challenging erroneous reports, plaintiffs appear to be seeking to restore their reputation in the local community and, in some cases, to challenge erroneous determinations by Party-state entities. In cases involving reports concerning criminal and non-criminal misconduct, suing the media may be the only vehicle available for contesting the charges against plaintiffs. In cases in the fourth category, plaintiffs are seeking to enforce their privacy rights.

Ordinary plaintiffs were most likely to prevail in cases involving erroneous reports about criminal conduct and those involving reports that revealed stigmatizing or private information. Such findings are consistent with comments by observers in China, who note that ordinary persons actually involved in wrongdoing often lose their cases, as they are unlikely to be sympathetic plaintiffs.<sup>257</sup>

TABLE SEVEN  
CASES BROUGHT BY ORDINARY PERSONS, BY TYPE OF CLAIM

	Reports on Criminal Conduct—Incorrect or Plaintiff Cleared	Reports on Criminal Conduct—Plaintiff Convicted	Criticism of Plaintiff for Non-Criminal Conduct	Revelation of Personal Details	Total
Total Cases	11	10	21	15	57
Plaintiff First-Instance Victories	11	2	12	9	34
Defendant First-Instance Victories	0	7	9	4	20
Outcome Not Available	0	1	0	2	3
Plaintiff First-Instance Success Rate <sup>258</sup>	100%	22%	57%	69%	63%

Regional dynamics also play a role in cases brought by ordinary persons, despite the lack of obvious links between plaintiffs and the Party-state. As

257. See, e.g., Confidential Interview 69 (2004).

258. Success rates were calculated as percentages of cases with reported outcomes.

Table Eight shows, plaintiffs prevailed in fifteen cases brought in a plaintiff's home jurisdiction against non-local defendants,<sup>259</sup> while defendants prevailed in only three such cases.<sup>260</sup> In contrast, defendants prevailed in seven of thirteen cases brought by non-local plaintiffs in the defendant's locale.<sup>261</sup> Defendants also fared better in cases brought in jurisdictions that were common to both plaintiffs and defendants, with defendants winning six cases and losing seven.<sup>262</sup>

The importance of jurisdiction in cases brought by ordinary persons suggests that local protectionism may not be exclusive to cases involving powerful plaintiffs: Courts may be acting to protect even local plaintiffs who lack ties to the local Party-state. To be sure, some of the plaintiffs classified as "ordinary" may actually have such ties or develop them in the course of litigation. Also, legal standards that strongly favor plaintiffs may facilitate decisions in favor of local persons. Nevertheless, the data suggest the possibility that courts are acting to protect local parties against external media, even when plaintiffs do not appear to have strong connections to local authorities.

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259. *See infra* Appendices A, B, Cases 5, 11, 18, 33, 35, 49, 54, 64, 68, 79, 93, 198, 205, 207, 211.

260. *See infra* Appendices A, B, Cases 38, 46, 201.

261. *See infra* Appendices A, B, Cases 6, 13, 22, 29, 42, 43, 45, 76, 80, 150, 195, 206, 209.

262. *See infra* Appendices A, B, Cases 26, 30, 34, 39, 44, 52, 60, 62, 71, 110, 200, 204, 212.

TABLE EIGHT  
 CASES BROUGHT BY ORDINARY PERSONS, BY JURISDICTION

	Home Jurisdiction of Plaintiff Only	Home Jurisdiction of Defendant Only	Home Jurisdiction of Plaintiff and Defendant	Unclear Relationship of Court to Parties	Total
Total	18	14	13	12	57
Plaintiff First- Instance Victories	15	6	7	6	34
Defendant First- Instance Victories	3	7	6	4	20
Outcome not available	0	1	0	2	3
Plaintiff First- Instance Success Rate <sup>263</sup>	83%	46%	54%	60%	63%

Lawyers who handle defamation cases comment that the media often do not report on actions brought by ordinary persons.<sup>264</sup> A more comprehensive survey of defamation cases brought by ordinary individuals might show a higher success rate for the media. But the findings that ordinary plaintiffs prevailed in more than half of the cases in the sample, and that they did particularly well in cases brought against non-local media,<sup>265</sup> are consistent with overall trends in defamation litigation.

Given the traditional position of China's media as an arm of the Party-state, what is most striking is that cases are brought by ordinary persons at all. Lawyers and journalists contend that ordinary persons are the weak party when they sue the media and that it is rare for ordinary persons to win defamation cases, in particular against local media.<sup>266</sup> Yet evidence from actual cases suggests that, in a significant number of cases, plaintiffs win, including when they are suing official Party papers. Ordinary persons brought twenty cases

263. Success rates were calculated as percentages of cases with reported outcomes.

264. See, e.g., Confidential Interview 82 (2004).

265. See *infra* Appendices A, B.

266. Confidential Interview 68 (2004); see also Confidential Interview 154 (2003) (explaining the success of ordinary plaintiffs by noting that only seriously aggrieved people will dare to sue).

against official Party papers; plaintiffs won nine cases, defendants won ten, and information on the outcome was unavailable in one case.<sup>267</sup>

Such outcomes suggest that power dynamics alone cannot explain results in defamation cases. For in most such cases the media appear to be the powerful party. Defamation litigation by ordinary plaintiffs reveals willingness by individuals to assert their rights and challenge authority and to use the legal system to do so.<sup>268</sup> That courts have proven to be receptive to such claims suggests that courts are also increasingly able and willing to adjudicate rights-based claims.

#### 4. Famous Persons

Fifty-two cases involved claims brought by famous plaintiffs or persons related to famous persons.<sup>269</sup> As with the other categories, determining precisely who fits into this category poses difficulties, as plaintiffs ranged from relatively minor authors to nationally famous actresses and sports figures. In general, however, this category includes authors, musicians, sports figures, and other non-officials who were (or were seeking to be) in the local or national spotlight or who were responding to critical evaluations of their work.

As with ordinary plaintiffs, famous plaintiffs' claims were divided into four categories. First, plaintiffs brought twelve cases in response to direct criticism of their work.<sup>270</sup> For example, prominent author Han Shaogong won a judgment against an author and paper that referred to a work of his as being a "complete copy."<sup>271</sup> In another case, a well-known singer brought suit after a website listed him as a candidate for a competition to choose China's ten ugliest singers.<sup>272</sup> Not all such claims result from criticism published in the media. In a case in Shandong Province, a television host won a suit against a local government. The dispute arose after the local government responded to a critical report on the provincial television station by writing to the provincial propaganda department and the head of the television station alleging that the host had violated ethical standards of journalism.<sup>273</sup>

Second, eleven cases resulted from media reports that revealed incorrect, private, or scandalous details of a person's life.<sup>274</sup> For example, the farmer who discovered the terracotta warriors outside Xi'an won a defamation lawsuit

267. See *infra* Appendices A, B, Cases 5, 6, 11, 18, 22, 29, 30, 38, 39, 41, 43, 46, 52, 60, 68, 95, 150, 204, 207, 209. In addition, ordinary persons brought two cases against television stations; plaintiffs won one and lost one. See *infra* Appendices A, B, Cases 34, 200.

268. Many persons who have grievances against the media will air their complaints via other channels before resorting to litigation. For example, a person who is unhappy with a particular media report may first raise the complaint informally with the media. Confidential Interview 67 (2004). Litigation thus may also reflect lack of success through less formal channels.

269. See *infra* Appendices A, B.

270. See *infra* Appendices A, B, Cases 3, 15, 21, 37, 47, 48, 51, 72, 81, 193, 208, 210.

271. See *infra* Appendix B, Case 81, at 1.

272. See *infra* Appendix B, Case 15.

273. See *infra* Appendix B, Case 208.

274. See *infra* Appendices A, B, Cases 2, 24, 25, 40, 50, 57, 176, 196, 197, 203, 214.

against a magazine that reported that he was illiterate and thus unable to do more than draw a few circles when Bill Clinton visited and asked for his autograph.<sup>275</sup> Other claims in this category included a suit brought by a famous person after a newspaper incorrectly reported that he had died<sup>276</sup> and a suit following reports that blamed a prominent singer for the suicide of another singer who, according to the media, had been in love with the plaintiff.<sup>277</sup>

Third, twenty cases resulted from reports that suggested that the plaintiff was involved in misconduct.<sup>278</sup> A well-known national television presenter prevailed in a defamation action against a newspaper and journalist following a report that fans seeking an autographed copy of his book were required to buy an expensive pair of shoes in order to obtain his signature.<sup>279</sup> Other cases included a claim by a well-known consumer advocate whom a paper had accused of bringing complaints regarding fake products in order to make money and find a wife<sup>280</sup> and a suit by an actor over newspaper reports that claimed he had fought a taxi driver.<sup>281</sup> Five cases in this category were brought by soccer players or referees whom media reports implicated in corruption scandals.<sup>282</sup>

Fourth, nine cases were brought by family members of deceased well-known persons.<sup>283</sup> Although a few “defamation of the dead” cases are brought on behalf of officials or ordinary persons, most such cases appear to be brought on behalf of famous persons. Claims in the sample included a suit against the author of a biography of a plaintiff’s uncle that contained unflattering details regarding the plaintiff’s deceased father.<sup>284</sup> Likewise, the daughter of a famous researcher brought suit against a magazine that had suggested that her father had engaged in political struggles against his colleagues during the Cultural Revolution.<sup>285</sup>

As Table Nine shows, famous persons prevailed in a majority of cases in each of the four categories, except for cases involving defamation of deceased family members. Plaintiffs fared particularly well—winning ten of eleven cases—in cases involving claims that the media had exposed inaccurate, private, or scandalous information.<sup>286</sup>

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275. See *infra* Appendix B, Case 57.

276. See *infra* Appendix B, Case 203.

277. See *infra* Appendix B, Case 214.

278. See *infra* Appendices A, B, Cases 14, 16, 17, 20, 23, 31, 32, 36, 55, 56, 58, 59, 61, 69, 73, 82, 89, 92, 181, 194.

279. See *infra* Appendix B, Case 51.

280. See *infra* Appendix B, Case 89.

281. See *infra* Appendix B, Case 17.

282. See *infra* Appendices A and B, Cases 23, 31, 32, 69, 137.

283. See *infra* Appendices A, B, Cases 4, 9, 12, 27, 53, 66, 74, 114, 217.

284. See *infra* Appendix B, Case 53.

285. See *infra* Appendix B, Case 12.

286. See *infra* Appendices A, B, Cases 2, 24, 25, 40, 50, 57, 176, 196, 197, 203, 214.



TABLE NINE  
CASES BROUGHT BY FAMOUS PERSONS, BY COMPLAINT TYPE

	Negative Commentary About Work	Private/ Scandalous Details	Criticism for Wrongdoing	Defamation of Deceased Relatives	Total
Total Cases	12	11	20	9	52
Plaintiff First- Instance Victories	8	10	10	4	32
Defendant First- Instance Victories	4	1	7	5	17
Neither/ No Result	0	0	3	0	3
Plaintiff First- Instance Success Rate <sup>287</sup>	67%	91%	59%	44%	65%

Jurisdiction again was important, with plaintiffs and defendants doing better in cases brought in their own jurisdictions, although not to the same degree as in cases involving the other categories of plaintiffs. Famous plaintiffs prevailed in thirty-two of the forty-nine decided cases, or sixty-five percent.<sup>288</sup> Of these victories, eighteen were in the home jurisdiction of the plaintiff,<sup>289</sup> eight cases were brought in the home jurisdiction of the defendant,<sup>290</sup> and four were brought in a jurisdiction that was home to both parties.<sup>291</sup> Defendants prevailed in seven cases brought in their home jurisdiction,<sup>292</sup> five brought in the plaintiffs' jurisdiction,<sup>293</sup> and two cases brought in a common jurisdiction.<sup>294</sup> The lesser impact of jurisdiction in cases involving famous persons may reflect a large number of cases brought in Beijing and Shanghai, where courts may be less subject to local pressures, as well as the fact that many

287. Success rates were calculated as percentages of cases with reported outcomes.

288. See *infra* Appendices A, B.

289. See *infra* Appendices A, B, Cases 2, 3, 4, 20, 24, 25, 27, 32, 37, 48, 51, 57, 59, 69, 81, 193, 197, 208.

290. See *infra* Appendices A, B, Cases 9, 15, 36, 47, 50, 73, 181, 203.

291. See *infra* Appendices A, B, Cases 12, 40, 89, 214. In two additional plaintiff victories the relationship of the parties to the jurisdiction was unclear. See *infra* Appendices A, B, Cases 194, 196.

292. See *infra* Appendices A, B, Cases 14, 21, 23, 31, 53, 61, 176.

293. See *infra* Appendices A, B, Cases 16, 55, 66, 72, 92.

294. See *infra* Appendices A, B, Cases 74, 114. In three defendant victories, the relationship of the parties to the jurisdiction was unclear. See *infra* Appendices A, B, Cases 82, 210, 217.

such cases are brought against commercial papers, which lack the influence of their non-commercial official parents.<sup>295</sup>

Famous persons generally lack the power and influence of government or corporate plaintiffs, but likely have greater influence—or at least resources—than ordinary persons. The willingness of famous persons to sue is thus not as striking as that of ordinary persons. Yet the number of cases brought by famous plaintiffs supports the argument that defamation litigation can be an effective tool for those without obvious Party-state links. Such cases also show that courts are playing increasing roles in determining whether reputation rights have been violated, and that courts, in so doing, may be further defining their own roles as legitimate fora for resolving a broadening range of claims.

#### D. Appeals and Rehearings

Data on appeals supports the conclusion that local protectionism is a significant factor in first-instance cases. Information on appeals was available for 86 of the 223 cases.<sup>296</sup> As Table Ten shows, a majority of these, 51 cases, were affirmed without change on appeal. Yet when appellate courts changed or reversed the first-instance decision, the appellate courts' actions overwhelmingly favored defendants. Eight of the 12 cases in which appellate courts affirmed but altered the damage award resulted in reduced damages to the plaintiff;<sup>297</sup> in only 4 cases did an appellate court order an increase in the award to the plaintiff.<sup>298</sup> Likewise, 11 of the 14 cases that appellate courts reversed were cases in which the first-instance court had ruled for the plaintiff.<sup>299</sup> This suggests that defendants fare better in higher-level courts, where local protectionism is less acute than in many first-instance courts. Of the 11 plaintiff verdicts that were reversed, 4 were decisions in first-instance courts that were local only to the plaintiff,<sup>300</sup> 3 were from courts that were in jurisdictions home to both parties,<sup>301</sup> and 2 were from courts in the defendant's jurisdiction.<sup>302</sup>

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295. Twenty-two cases were brought against commercialized newspapers, eight against magazines, and twelve against official newspapers. See *infra* Appendices A, B, Cases 2, 3, 14, 17, 20, 21, 23, 31, 32, 40, 51, 55, 58, 59, 69, 89, 92, 181, 194, 196, 203, 214 (against commercialized papers); *infra* Appendices A, B, Cases 4, 12, 24, 36, 74, 193, 197, 217 (against magazines); *infra* Appendices A, B, Cases 9, 16, 25, 27, 37, 47, 50, 56, 61, 72, 81, 82 (against official newspapers). Similarly, any pro-plaintiff bias in cases brought in plaintiffs' home jurisdictions may be weak given the fact that many famous persons lack influence with local authorities. Although most observers in China state that famous people generally are not particularly powerful and lack influence in the courts, others maintain that, in some cases, in particular those involving sports stars, famous persons may have strong local ties. See, e.g., Confidential Interview 77 (2004).

296. See *infra* Appendices A, B. The total number appealed was almost certainly higher than 86, as it is likely that in some cases the media did not carry follow-up reports on appeals.

297. See *infra* Appendices A, B, Cases 4, 60, 66, 97, 100, 105, 118, 144.

298. See *infra* Appendices A, B, Cases 69, 81, 83, 139.

299. See *infra* Appendices A, B, Cases 11, 36, 55, 64, 87, 102, 146, 158, 199, 212, 215.

300. See *infra* Appendices A, B, Cases 11, 55, 64, 102.

301. See *infra* Appendices A, B, Cases 146, 158, 212.

302. See *infra* Appendices A, B, Cases 36, 87. In two cases the relationship of the court to the parties was unclear. See *infra* Appendices A, B, Cases 199, 215.

TABLE TEN  
OUTCOMES ON APPEAL

	Affirmed, No Change	Affirmed, Reduced Damages	Affirmed, Increased Damages	Reversed	Other <sup>303</sup>	Total Cases Appealed
Total	51	8	4	14	9	86
First-Instance Verdict for Plaintiff	33	8 <sup>304</sup>	4	11	5	61
First-Instance Verdict for Defendant	18	0	0	3	2	23
No information	0	0	0	0	2	2

Eight cases were subject to rehearing, or *zaishen*, procedures.<sup>305</sup> All of the cases involved first-instance judgments for plaintiffs, six of which were subsequently affirmed on appeal.<sup>306</sup> Of the cases that were reheard, two were

303. "Other" includes one case in which defendants appealed but subsequently had their case dismissed when they failed to appear in court, *see infra* Appendices A, B, Case 98; one case in which the parties settled but in which the terms of the settlement were not reported, *see infra* Appendices A, B, Case 85; two cases in which information of the appellate, but not first, outcome was available, *see infra* Appendices A, B, Cases 28, 41; and five cases where reports stated that the case had been appealed but provided no additional information, *see infra* Appendices A, B, Cases 119, 160, 161, 162, 210.

304. Cases affirmed but with reduced damage awards include one case where the parties settled for a reduced amount under court-supervised mediation. *See infra* Appendices A, B, Case 202.

305. *See infra* Appendices A, B, Cases 1, 55, 84, 124, 141, 143, 163, 221. Chinese law permits parties to civil cases to request that courts rehear a case for up to two years after a final decision is issued. Procuratorates may also request that courts rehear cases; in such cases courts must rehear the case. Such requests are issued by the procuratorate's filing an objection to the original court decision. Courts also have the power to decide to rehear a case absent a request from a Party or the procuratorate. No time limitation applies to procuratorate requests or court-initiated rehearings. RENMIN FAYUAN ZUZHIF FA [ORGANIZATION LAW OF THE PEOPLE'S COURTS] arts. 12, 14, 15 (promulgated by the Fifth Nat'l People's Cong., amended Sept. 2, 1983, effective Jan. 1, 1980).

306. The two cases that were not affirmed on appeal included one in which the appellate court issued a verdict for the defendant. *See infra* Appendices A, B, Case 55. In the other case the defendant initiated rehearing procedures through the procuratorate without first appealing the case. *See infra* Appendices A, B, Case 84.

affirmed,<sup>307</sup> one was reversed in favor of the plaintiff,<sup>308</sup> and three were reversed in favor of the defendant.<sup>309</sup>

The results of cases on appeal support claims by journalists that appellate courts are more likely than first-instance courts to rule in favor of the media.<sup>310</sup> Although most cases were affirmed, when decisions were changed, they were more often than not altered in favor of defendants. According to one judge, defamation cases are more likely than other civil cases to be appealed and are more likely to have the judgments reversed or altered on appeal.<sup>311</sup> Although this may be due in part to the vagueness of the governing legal standards,<sup>312</sup> this trend also suggests that appellate courts are less prone to local protectionism than are first-instance courts.<sup>313</sup>

#### *E. Goals: Honor, Power, and Money?*

The range of goals mirrors the diversity of plaintiffs. Most defamation plaintiffs seek monetary damages, cessation of tortious activity, and an apology. Yet their goals also include stopping critical media coverage, retaliating against the media, restoring personal honor, and seeking an official decision different from one already rendered. Additionally, the reputation of the media itself is also often at stake—a fact that explains the media's strong reluctance to apologize even when ordered to do so.

Chinese and Western scholars and observers have linked China's strong protection of reputation rights to Chinese culture and to Chinese history.<sup>314</sup> In particular, the inclusion of provisions in the General Principles of the Civil Code protecting reputation rights has been attributed in part to the desire to avoid a return to the personal attacks of the Cultural Revolution, when media criticism was often tantamount to a criminal conviction.<sup>315</sup> The media's continued authoritative position, and the fact that the media often speak with an official voice, increases such concerns: There is heightened sensitivity to the possi-

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307. See *infra* Appendices A, B, Cases 84, 124.

308. See *infra* Appendices A, B, Case 55.

309. See *infra* Appendices A, B, Cases 1, 163, 221. Information was not available on the outcome in two of the cases that were reheard. See *infra* Appendices A, B, Cases 141, 143. In one of the cases that was affirmed on rehearing, the court reduced the damages payable to the plaintiff. See *infra* Appendices A, B, Case 124.

310. See, e.g., Confidential Interview 22 (2003).

311. See Confidential Interview 19 (2003).

312. *Id.*

313. Local protectionism may also be a problem on appeal: In some cases newspapers have paid first-instance judgments rather than appealing the case, believing that local protectionism meant that appealing would be useless. Confidential Interview 46 (2003). But local protectionism is generally less pronounced in intermediate and provincial high courts than in basic-level courts. Relative to their lower-level counterparts, judges in higher-level courts tend to be better trained and better positioned to resist external pressure.

314. See, e.g., Confidential Interview 72 (2004) (noting that China's history of political attacks on individuals explains its heightened concern with the protection of reputation rights).

315. See, e.g., Confidential Interview 38 (2005) (arguing that the legacy of the Cultural Revolution was a primary concern in 1986, when the General Principles were drafted).

bility that criticism may unfairly tarnish individuals. Personal honor also plays a significant role in defamation litigation. In some cases, plaintiffs appear to sue primarily in order to improve their reputation in their communities.<sup>316</sup>

Yet concern with reputation and recent history alone do not explain current trends in defamation litigation. This Part discusses four goals pursued by litigants in defamation litigation: (1) stopping critical coverage and retaliating against the media, (2) obtaining an alternative judgment to one already rendered, (3) obtaining money, and (4) receiving an apology. None of these goals is unique to Chinese defamation plaintiffs. In China, however, these goals highlight the twin tracks on which defamation litigation is developing. Powerful plaintiffs use the threat of defamation litigation and of potentially large damage awards to intimidate the media. But defamation litigation also serves other goals: Both persons in positions of power and the general populace use defamation litigation to contest media verdicts on wrongdoing—sometimes as a substitute for challenging other state actors. In addition, newspapers are fiercely sensitive to their own reputations when they are sued, reflecting the media's continued position as an arm of the Party-state.

### 1. Retaliation and Resistance

Defamation litigation resulting from critical coverage often serves to block additional coverage and to retaliate against the media.<sup>317</sup> Journalists and lawyers state that once an individual files suit for defamation, the media are more careful in reporting on the matter and will avoid reprinting the original article that gave rise to the lawsuit.<sup>318</sup> Although some media, most notably *Caijing Magazine* and *Southern Weekend*, have responded to adverse rulings in defamation cases with aggressive criticism of such cases and have used coverage of pending cases to highlight perceived injustices, others shy away from covering cases in which they are defendants.<sup>319</sup>

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316. Confidential Interview 74 (2004); *see also* Confidential Interview 35 (2005) (arguing that one reason for strong defamation standards is that the ability of individuals in China to accept criticism is generally weak).

317. *See, e.g.*, Zhang Sizhi, Meijie Zai Shenpan Xi Qian De Kangbian—Dai Huang Yu “Nanfang Zhoumo” Deng Meiti Beisu Mingyu Qinquan An Lu (Xia) [Defending the Media when Sued for Defamation—A Record of the Case of Dai Huang Suing “Southern Weekend” and other Media for Defamation (Part II)], 1 ZHONGGUO LÜSHI [CHINESE LAWYER], Jan. 2001, at 37 (arguing that lawsuits are a major obstruction to media “popular opinion supervision”); Zhang Sizhi, *Meijie Zai Shenpan Xi Qian De Kangbian—Dai Huang Yu “Nanfang Zhoumo” Deng Meiti Beisu Mingyu Qinquan An Lu* (Shang) [*The Defense of Media at the Court—A Record of the Case of Where Dai Huang, “Southern Weekend” and Other Media Were Sued for Defamation* (Part I)], ZHONGGUO LÜSHI [CHINESE LAWYER], Dec. 2000, at 30; Fang Yuan, *Rujin Shixing Gao Meiti* [Suing the Media Becomes Fashionable], CHINA NEWS AGENCY, Nov. 23, 2001, available at <http://www.chinanews.com.cn/2001-11-23/26/141309.html> (unavailable as of Nov. 9, 2005) (on file with the Harvard International Law Journal) (stating that targets of critical reports use defamation litigation to block further reporting).

318. *See* Confidential Interview 36 (2005); Confidential Interview 69 (2004); Confidential Interview 71 (2004); Confidential Interview 72 (2004) (stating that once a suit is filed other media will be reluctant to run follow-up articles).

319. There is widespread coverage of defamation litigation in the Chinese media, but some of China's leading newspapers find it difficult to cover pending cases when the plaintiff is well connected. *See* Confidential

Commentators likewise argue that targets of critical reports use defamation suits to retaliate against the media.<sup>320</sup> As one commentator noted, defamation lawsuits have “become a measure of power,” as those whom the media have portrayed negatively bring suit to punish the media.<sup>321</sup> The time, money, and reputation costs to the media can be significant; litigants know that, even if they are unsuccessful, they may be able to cause their adversaries significant problems.

The use of defamation litigation to silence critical reports is not unique to China. Commentators on defamation litigation elsewhere, including the United States, have noted the use of defamation litigation to silence criticism.<sup>322</sup> But such strategic use of litigation is particularly noteworthy in China, where the media have only recently begun to commercialize and enjoy significant autonomy over content, and where the most significant critical reporting is done by non-local media. The fact that defamation cases in China are largely brought by local interests suggests that such cases are not only attempts to restrict the media, but also are a manifestation of center-local tensions.

## 2. Alternative Judgments

Plaintiffs in defamation cases, in particular those plaintiffs who have been criticized or sanctioned for wrongdoing, also use litigation to seek an alternative judgment to that already issued by the media or other authorities. Both officials and ordinary persons may sue in order to obtain an alternative evaluation of their conduct from the courts.<sup>323</sup> The goal in such cases appears to be

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Interview 46 (2003). Additionally, widespread coverage of defamation cases may be encouraging further litigation. One journalist complains that plaintiffs sue after reading reports that suggest that prevailing in such cases is easy. See Confidential Interview 17 (2003). Thus, although some journalists say they will report on defamation cases against their publication in an attempt to influence the outcome, Confidential Interview 22 (2003), others avoid covering their own cases so as not to encourage additional litigation. Confidential Interview 17 (2003); Confidential Interview 93 (2003). The media elsewhere have similarly confronted the possibility that reporting on defamation cases may encourage further litigation. See Kyu Ho Youm, *Libel Law and the Press: U.S. and South Korea Compared*, 13 UCLA PAC. BASIN L.J. 231, 263 & n.9 (1995) [hereinafter Youm, *Libel Law and the Press*] (quoting Timothy W. Gleason, *The Libel Climate of the Late Nineteenth Century: A Survey of Libel Litigation, 1884–1899*, 70 JOURNALISM Q. 893, 894 (1993) (noting that growing coverage of cases in Korea may encourage others to sue and drawing a parallel to similar developments in England in the late nineteenth century, when media agreed to a “conspiracy of silence” on pending cases to discourage such suits)).

320. See, e.g., Confidential Interview 145 (2003); Tao Guofeng, *Shilun Xinwen Mingyuan Anjian Shenpan Zhong De Qige Wuqu* [On Seven Mistakes in Judging News Defamation Cases], XINHUA WANG [XINHUA NET], May 27, 2003, [http://news.xinhuanet.com/newmedia/2003-05/27/content\\_888725.htm](http://news.xinhuanet.com/newmedia/2003-05/27/content_888725.htm).

321. Ding, *supra* note 129.

322. See, e.g., DONALD M. GILLMOR, *POWER, PUBLICITY, AND THE ABUSE OF LIBEL LAW* ix (1992) (stating that “[l]ibel litigation has become a devastatingly effective weapon for silencing those who dare to challenge the morality of power, privilege, and prestige”); Edmond Costantini & Mary Paul Nash, *Slapp/Slappback: The Misuse of Libel Law for Political Purposes and a Countersuit Response*, 7 J.L. & POL. 417, 423–24 (1991) (criticizing “strategic lawsuits against political participation” in the United States as being “legally meritless suits [that are] designed . . . to intimidate and harass political critics into silence and not to achieve the purposes for which libel law exists”); see also *infra* note 384 (discussing defamation litigation in Singapore and Malaysia).

323. Confidential Interview 5 (2003) (stating that targets of critical reports use defamation litigation

to obtain a court opinion that can be used to argue, formally or informally, for a reduction in the sanctions already assessed against the plaintiff,<sup>324</sup> or to use the lawsuit to attempt to prove one's innocence in the eyes of the local community. As with attempts to silence or retaliate against the media, the use of defamation litigation to obtain an alternative judgment is not unique to Chinese plaintiffs.<sup>325</sup> But this is a function particularly important in China, where directly contesting such sanctions is often difficult.

For officials who have already been sanctioned for misconduct, lawsuits are a mechanism for resisting such sanctions. Litigation may also represent the only means available to continue to protest one's innocence.<sup>326</sup> Suits are often brought by officials trying to protect their political future. Obtaining a favorable defamation verdict may be the sole mechanism available for maintaining one's standing in the local community and in the Party-state hierarchy. Bringing suit may allow a plaintiff to highlight inaccuracies in the media's reports that would otherwise be taken as fact by superiors, and also demonstrates to superiors that the plaintiff contests the charges against him or her.<sup>327</sup> A plaintiff's goal may not be actually to win a judgment against the media, but only to demonstrate publicly that he or she contests the allegations.<sup>328</sup> There is, however, a risk in doing so: Bringing suit also may highlight alleged misconduct and give a bad impression to superiors.<sup>329</sup> Given the risks involved, defamation litigation appears most likely to serve as a defense against rising pressure, not as a strategic tool for career advancement.

Non-powerful plaintiffs also use defamation litigation to protest their innocence and seek alternative judgments. Defamation litigation may serve as a proxy for an ordinary person's struggle against local authorities.<sup>330</sup> The goal of plaintiffs in such cases may be the symbolic value of a favorable court opinion rather than money.<sup>331</sup> Litigation may help to combat a perceived injustice against the plaintiff. For example, for an ordinary person wrongly detained and then released, suing the police may not be possible; suing the media for reporting on the detention, however, offers a measure of redress. Strong tra-

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to clear their names).

324. Confidential Interview 72 (2004).

325. Cf. BEZANSON, *supra* note 24, at 162 (stating that, in the United States the "act of suing, itself, represents a public and official form of response and denial, legitimating the plaintiff's claim of falsity"); James J. Nelson, *Culture, Commerce and the Constitution, Legal and Extra-Legal Restraints on Freedom of Expression in the Japanese Publishing Industry*, 15 UCLA PAC. BASIN L.J. 45, 54 (1996) (noting an emphasis in Japan on restoring an individual's reputation).

326. Confidential Interview 77 (2004).

327. Confidential Interview 155 (2003).

328. Confidential Interview 71 (2004); see also Chi Tian & Xue An, *Tanguan De "Mianzi Guan"* [*Corrupt Official's "Outlook Based on Face"*] (on file with the Harvard International Law Journal) (stating that the point of such suits is often to reduce pressure from the media).

329. Cf. Confidential Interview 69 (2004) (stating that officials who bring suit are careful to make sure that doing so will be beneficial to them).

330. Confidential Interview 55 (2005); Confidential Interview 71 (2004).

331. See, e.g., Confidential Interview 71 (2004) (discussing a case in Guizhou against *Legal Daily* in which the plaintiff demanded one yuan in compensation).

ditional emphasis on maintaining one's reputation may also play a role in the degree to which plaintiffs persevere in bringing defamation cases.<sup>332</sup> Challenging the media in court allows individuals to maintain their claim to innocence in the eyes of the local community—and may permit plaintiffs to blame the courts if they do not prevail. The choice to pursue such grievances through the formal legal system also suggests that ordinary persons see the courts as legitimate and credible fora for pursuing such claims.

### 3. *Money*

Obtaining money damages is also a goal of both powerful plaintiffs and ordinary persons, and it supports the joint goals of retaliating and resisting the media. For the powerful, in particular for corporate plaintiffs, the threat of large damage awards is an important tool for silencing and punishing the media. For ordinary persons, damage awards serve financial interests and also to vindicate plaintiffs' claims.

Journalists, judges, and lawyers argue that many litigants act primarily in the pursuit of monetary damages.<sup>333</sup> Although most awards are small, the risk of large awards can be significant, particularly in cases brought by corporations. As a result, some in the media are beginning to alter how they operate, placing greater emphasis on accuracy and on preserving evidence. The threat of large damage awards may be the most significant factor leading the media to change how they cover the news.<sup>334</sup>

Virtually all of the plaintiffs in the 223 cases reviewed sought monetary damages.<sup>335</sup> The median plaintiff demand was 190,000 yuan.<sup>336</sup> Actual awards were significantly lower. The median first-instance award in cases resulting in plaintiff victories was 15,000 yuan, or about eight percent of the median amount demanded.<sup>337</sup>

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332. Chinese commentators equate protecting reputation with saving "face." See, e.g., Tao Hui, *Mianzi, Mingyu, Mingyu Quan [Face, Reputation, and the Right to Reputation]*, CHINALAWINFO, Nov. 24, 2002, <http://chinalawinfo.com/weekly/pastpub/flzk42-academic.htm> (unavailable as of Nov. 9, 2005) (on file with the Harvard International Law Journal). Traditional concern with reputation in Chinese society does not, however, appear to have played a significant role in the debate leading up to the adoption of legal provisions regarding defamation.

333. Confidential Interview 65 (2004); Confidential Interview 76 (2004); Confidential Interview 77 (2004).

334. At least some publications now require potentially controversial articles to be reviewed by lawyers. Confidential Interview 14 (2003). Most major papers have also established legal departments to deal with the wide range of legal issues they now confront. Confidential Interview 46 (2003). Journalists say that experience in defamation litigation has made them more attentive to factual reporting and to avoiding biased or overly emotional reporting. Confidential Interview 19 (2003); Confidential Interview 23 (2003). Journalists have also united—in conferences and on websites—to discuss the rising threat of defamation litigation and to discuss strategies for combating such cases.

Chinese lawyers who represent or work for media outlets state that insurance against defamation claims is not available in China. Confidential Interview 67 (2004).

335. See *infra* Appendices A, B.

336. See *infra* Appendices A, B. Information on the amounts that plaintiffs demanded was available in 146 cases. See *infra* Appendices A, B.

337. See *infra* Appendices A, B. Information regarding the size of first-instance awards was available in



There have, however, been some large awards, including a first-instance judgment of 5.8 million yuan to a company that sued after reports incorrectly stated that one of the company's key patents was invalid. Nearly the entire award was levied against the rival company that had supplied the information to the media rather than against the media. The case was affirmed on appeal, but the SPC subsequently reheard the case and reduced the judgment to 900,000 yuan.<sup>338</sup> Two other cases that resulted in first-instance judgments of one million yuan or more were likewise brought by corporate plaintiffs claiming harm to their businesses.<sup>339</sup>

The largest first-instance award to an individual plaintiff was a judgment of 639,563 yuan to the wife of a reporter against a newspaper in Hainan Province. A court in the plaintiff's home province of Hunan found that the newspaper had falsely reported that the plaintiff's husband was a "fake reporter."<sup>340</sup> As a result of the report, the husband had been severely beaten while carrying out an investigation in Hainan.<sup>341</sup> The largest first-instance award to an official plaintiff was a first-instance judgment of 420,000 yuan to a prison that sued following a report regarding a prison sex scandal that the prison argued had harmed its reputation.<sup>342</sup>

Courts have extensive discretion in awarding damages, particularly emotional damages, in defamation cases.<sup>343</sup> Such discretion facilitates granting large damage awards in some cases. In awarding emotional damages in tort cases, courts generally look to a range of factors, including the seriousness of the harm; whether the harmed person was a "weak" or vulnerable person (and thus deserving of additional compensation); the ability of the defendant to pay an award; the degree to which the defendant profited from his or her actions; how similar cases have been handled; and the amount of emotional damages given for other tort claims in the same jurisdiction or region.<sup>344</sup> For example, the award of 300,000 yuan in favor of real-estate and financial-data-services company Fountain in its action against *Caijing Magazine* was justified

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120 cases. Total amounts awarded include economic and emotional damages and also, where specified by a court decision, lawyer fees. Court fees are not included in damage calculations. *Id.*

Even when plaintiffs do not obtain large awards, there may be economic value in bringing suit. In some cases, ordinary people may bring suit in order to make themselves famous. Confidential Interview 69 (2004). Likewise, lawsuits brought by businesses may be designed to raise the profile of the plaintiff and its products. Confidential Interview 22 (2003); Confidential Interview 101 (2003). In some cases, reporters or publications attempt to use defamation litigation to increase their own profiles. Fang, *supra* note 317; Confidential Interview 98 (2003).

338. *See infra* Appendix B, Case 124. The first-instance court had ordered the two defendant newspapers to pay 100,000 yuan each and the defendant company to pay 5.8 million yuan. On appeal, the SPC increased the amount to be paid by the papers to 330,000 yuan each but reduced the award against the defendant company to 240,000 yuan. *Id.*

339. *See infra* Appendix B, Case 105; *infra* Appendix B, Case 147.

340. *See infra* Appendix B, Case 79.

341. *Id.*

342. *See infra* Appendix B, Case 100. The award was reduced to 11,858 yuan on appeal. *Id.*

343. Confidential Interview 64 (2004).

344. *Id.*; Confidential Interview 67 (2004).

by *Caijing's* widespread distribution, the magazine's ability to pay the award, and the magazine's profit.<sup>345</sup>

Some in the media say that the risk of large damage awards now has a significant impact on decisions whether to carry certain stories, especially for aggressive media outlets such as *Southern Weekend* and *Caijing Magazine*.<sup>346</sup> Demands by corporate plaintiffs often run into the millions of yuan.<sup>347</sup> Journalists likewise comment that the threat of defamation litigation has altered their reporting.<sup>348</sup> In the past, journalists were primarily concerned with political risks associated with publishing articles, in particular critical reports; in recent years, economic concerns have come to be nearly as significant.<sup>349</sup> Yet although the economic consequences of an adverse defamation judgment can be significant,<sup>350</sup> these economic risks are rarely "life-threatening" to publications, as political mistakes can be.<sup>351</sup>

Others in the media, however, contend that economic disincentives are not as important for defendants as they are for plaintiffs. Media defendants will be more concerned with their reputation than with the financial risk of losing a case.<sup>352</sup> Lawyers for the media state that awards against the media are generally modest and are only a fraction of the amount demanded.<sup>353</sup> In Shanghai, for example, judgments rarely exceed 50,000 yuan,<sup>354</sup> and lawyers state that the financial risk of defamation judgments is minor.<sup>355</sup> Lawyers elsewhere comment that, even in cases where courts act unfairly to protect local plaintiffs, the amounts awarded will generally be only a fraction of the amount demanded by the plaintiff.<sup>356</sup> In most cases, courts are careful not to grant awards that are excessively large, in part to avoid encouraging additional litigation.<sup>357</sup>

Even if awards are modest, the cost and time associated with defamation cases can be significant. One journalist for a national magazine commented that the magazine spent 40,000 yuan on legal fees in a case it eventually won.<sup>358</sup>

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345. Confidential Interview 65 (2004). The court did not explicitly mention these factors in its decision; instead, it said that the award was justified by the specific circumstances of the case. Luohu District Court Opinion, *supra* note 209, at 173.

346. Confidential Interview 77 (2004).

347. *See id.* (stating that, when claims are brought by corporations for reports about misconduct, there is a significant potential for a large award against the media).

348. Confidential Interview 10 (2003).

349. Confidential Interview 14 (2003).

350. Confidential Interview 93 (2003).

351. Confidential Interview 14 (2003).

352. *See* Confidential Interview 76 (2004).

353. *See* Confidential Interview 74 (2004).

354. *Id.*

355. *See* Confidential Interview 75 (2004).

356. *See* Confidential Interview 71 (2004); Confidential Interview 101 (2003) (stating that, in many cases the amount in dispute is only a few thousand yuan).

357. Confidential Interview 76 (2004).

358. *See* Confidential Interview 10 (2003); *see also* Confidential Interview 17 (2003) (discussing the high cost of legal fees in defamation cases); Confidential Interview 39 (2003). Lawyers in some defamation cases operate on contingency fees; in others, lawyers may seek to have their fees covered by the op-

In many cases, the costs of litigation exceed the size of the award against the media.<sup>359</sup> As a result, in some cases—in particular where the media believe that local protectionism means they have little chance of success—defendants do not bother to attend the trial, choosing instead to rely on written submissions to the court.<sup>360</sup>

Defamation judgments have a significant effect on individual journalists as well. In addition to any personal liability that journalists may face, internal rules at newspapers generally require journalists to pay a percentage of defamation judgments against the paper resulting from their articles, ranging from ten percent at *Workers Daily*, to twenty or thirty percent at some municipal papers, to fifty percent at the *Beijing Youth Daily*.<sup>361</sup> Journalists who lose defamation cases may also face difficulties finding work as a journalist in the future.<sup>362</sup> Some reporters have been convicted of criminal slander, including in cases where they have refused to settle a civil defamation claim.<sup>363</sup>

#### 4. Apology

Plaintiffs are not the only parties whose reputations are at stake. Most plaintiffs in defamation cases demand an apology from the defendant, and courts that rule in favor of plaintiffs generally order defendants to apologize. The media's strong aversion to complying with such orders demonstrates that the media too have strong reputational interests at stake in defamation litigation. In a system in which the media remain accountable to higher level officials,

posing party. Confidential Interview 111 (2003); *see also* Confidential Interview 69 (2004) (stating that lawyers representing plaintiffs in defamation cases generally do so on a contingent basis). Others, however, handle cases for free in order either to boost their own profile or to ensure good relations with the media. Confidential Interview 72 (2004) (stating that, in some cases, lawyers represent defamation plaintiffs for free in the hope that the case will enable the lawyer to become famous); Confidential Interview 76 (2004); Confidential Interview 67 (2004) (stating that lawyers sometimes undertake defamation cases pro bono to obtain positive media coverage of their own work, or out of a sense of social responsibility); Confidential Interview 69 (2004) (stating that one lawyer undertakes defamation cases in exchange for free advertising from the media); Confidential Interview 36 (2005) (arguing that it is impossible for lawyers to make money in defamation cases).

359. Confidential Interview 67 (2004); Confidential Interview 69 (2004).

360. Confidential Interview 71 (2004). U.S. literature on the financial risk to the media of defamation litigation presents a mixed picture. Compare Logan, *supra* note 64, at 517, 523 (stating that “media defendants end up paying out only a tiny fraction of the damages claimed by aggrieved plaintiffs, and only a small portion of that awarded by juries” and that “the chance that a libel plaintiff [in the United States] will bring a broadcaster or publisher to its knees approaches zero”), with Brian C. Murchison et al., *Sullivan's Paradox: The Emergence of Judicial Standards of Journalism*, 73 N.C. L. REV. 7, 11 & n.9 (1994) (arguing that, “[w]hile the incidence of judgments against the press [in the United States] is very low . . . the cost to the press of obtaining favorable judgments is crushing”).

361. Confidential Interview 75 (2004); Confidential Interview 22 (2003); Confidential Interview 23 (2003); Confidential Interview 101 (2003).

362. Wei Yongzheng, *Shixian Yulun Jiandu He Baobu Mingyu Quan De Pingheng* [Balancing Protection of Freedom of Speech and Protection of Reputation Rights], ZHONGGUO XINWEN CHUANBO XUE PINGLUN [CHINA JOURNALISM REVIEW], <http://www.cjr.com.cn/node2/node26108/node30205/node30212/node30213/userobject7ai1689.html> (last visited Nov. 11, 2005).

363. *See, e.g.*, Wang Rujin & Zeng Zepei, *Xinwen Gongzuo Zhe Yu Xinwen Jiufen* [Journalists and News Disputes], 9 XINWEN ZHANXIAN [NEWS FRONTLINE] (2001), available at <http://www.people.com.cn/GB/paper79/4307/493946.html>.

apologies carry political costs: Adverse judgments may undermine both popular and Party-state confidence in the media.

In cases in which plaintiffs prevail, courts generally order defendants to publish a court-approved apology in the same position in the paper as the offending article.<sup>364</sup> Yet in many cases, the media ignore court instructions that they apologize,<sup>365</sup> complying only if plaintiffs request that the court compel enforcement.<sup>366</sup> Judges comment that the media will pay defamation judgments, but rarely apologize.<sup>367</sup>

The media take a variety of steps to avoid apologizing. Newspapers sometimes publish corrections that do not include an apology.<sup>368</sup> Doing so allows the paper to downplay its errors. For example, after a court in Hubei ordered the media to apologize for a report that detailed a student's affair with an older man, the defendant ran a short correction instead of an apology.<sup>369</sup> Editors and journalists also try to persuade plaintiffs to drop demands that they apologize. Journalists state that, at times issuing a correction is sufficient to persuade a plaintiff to drop a demand for an apology. In other cases, media defendants will agree to pay a plaintiff a greater sum than that specified in the judgment in return for agreement that the plaintiff will not require an apology<sup>370</sup> or will issue a written apology to the plaintiff but will refuse to print the apology in the paper.<sup>371</sup> In cases brought by corporations, the media may offer, in

364. Confidential Interview 64 (2004).

365. In contrast, the media generally do pay monetary awards against them. Confidential Interview 60 (2004); Confidential Interview 75 (2004) (stating the media will pay rather than apologize). This appears to be partially due to the fact that most awards are not large and partially because the media have a more difficult time hiding their financial resources and bank accounts than do other defendants. *Id.* This finding contrasts with other areas of civil litigation, where enforcement of judgments remains a major problem. See, e.g., Qu Xuezhong, *Xiao Yang: Jiejue Zhixing Nan Yi Kao Zhidu Er Kao Lifa* [Xiao Yang: Resolving Problems in Enforcing Judgments Requires Consideration of the System and of Legislation], RENMIN WANG [PEOPLE'S NET], Mar. 13, 2005, <http://legal.people.com.cn/GB/42735/3239650.html>; *Zhixing Nan (Benqi Huati)* [The Difficulty of Enforcement (Topic of This Edition)], RENMIN RIBAO [PEOPLE'S DAILY], Dec. 3, 2003, at 13, available at <http://www.people.com.cn/GB/paper464/10785/979733.html> (discussing the difficulty of enforcing judgments).

366. Confidential Interview 67 (2004); Confidential Interview 76 (2004); see also Confidential Interview 69 (2004) (stating that media will apologize only if they are compelled to do so); Confidential Interview 74 (2004).

367. Confidential Interview 65 (2004). One judge estimated that only ten to twenty percent of media defendants ordered to apologize actually do so. Confidential Interview 62 (2004).

368. Confidential Interview 62 (2004); Confidential Interview 68 (2004); Confidential Interview 69 (2004). Although regulations governing the media explicitly authorize a right of reply for the plaintiff, see *supra* Part I.A, in practice, such a right has rarely, if ever, been enforced. Confidential Interview 72 (2004); Confidential Interview 76 (2004).

369. Confidential Interview 68 (2004).

370. Confidential Interview 76 (2004); see also Confidential Interview 74 (2004) (commenting that the media will attempt to find a way to negotiate a settlement rather than apologize).

371. Confidential Interview 66 (2004). The media may also have interests other than reputation and money that encourage them to resolve cases amicably. The media may be concerned that defamation cases, in particular those resulting from criticism of official action, may harm their relationships with official actors and institutions—on whom they rely on for news—more generally. Confidential Interview 76 (2004).

lieu of an apology, to run a positive article about the plaintiff, or to publish a free advertisement for the plaintiff.<sup>372</sup>

Even when the media do issue an apology, they often take steps to lessen its impact. In some cases the media will apologize but make clear that they are being forced to do so.<sup>373</sup> In cases in which they do apologize, the apology will be terse<sup>374</sup> or located in an obscure position in the paper.<sup>375</sup>

Courts have the power to publish an announcement of the full court decision in a prominent newspaper and to force the defendant to pay related costs, but they rarely do so.<sup>376</sup> The lack of enforcement of orders to apologize is in part explained by plaintiffs' reluctance to pursue such enforcement. As one judge explained, plaintiffs generally will not seek to compel enforcement of a judgment if the defendant pays the monetary judgment; many plaintiffs are more interested in money damages than in a printed apology.<sup>377</sup>

The media's reluctance to apologize reflects its continued dependence on the Party-state. Observers say that newspapers' concern with their own image explains their reluctance to apologize.<sup>378</sup> Such concern may be due in part to worries that apologizing will harm the newspapers' market position, as readers will not trust a media outlet that seems to make mistakes.<sup>379</sup> Yet even more important are concerns that apologizing will result in problems for the media with those in the higher part of the Party-state hierarchy. As one journalist explained, the media are concerned that admitting errors will "give a bad impression" to officials who oversee them.<sup>380</sup> If the media pay damage awards to plaintiffs, such actions are likely to go unnoticed. But media that are perceived frequently to commit errors risk harming relations with the Party-state, and such relationships are more important than money to the media's long-term interests.<sup>381</sup>

The observation that more than money is at stake in defamation actions is not unique to China.<sup>382</sup> In China, however, the goals of both plaintiffs and defendants reflect the institutional backdrop against which such cases arise. Media concerns reflect their official status; likewise judgments in favor of individu-

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372. Confidential Interview 83 (2004).

373. Confidential Interview 60 (2004).

374. Confidential Interview 65 (2004).

375. *See, e.g.*, Confidential Interview 68 (2004); Confidential Interview 75 (2004); Confidential Interview 76 (2004).

376. Confidential Interview 65 (2004).

377. Confidential Interview 62 (2004).

378. *See* Confidential Interview 60 (2004).

379. Confidential Interview 76 (2004).

380. Confidential Interview 74 (2004); *see also* Confidential Interview 76 (2004) (stating that, if the media are frequently sued, Party-state leaders will criticize the media for having "problems").

381. Confidential Interview 76 (2004) (stating that the "economic incentive is not important [in defamation cases]; it is the relationship"). Concern with the media's own reputation also explains why the media often refuse to settle frivolous cases, even when doing so would be far cheaper than litigating. *See* Confidential Interview 69 (2004); Confidential Interview 74 (2004).

382. *Cf.* BEZANSON, *supra* note 24, at 80, 93 (stating that most U.S. libel plaintiffs sue for "reputation-related reasons" or to obtain an apology, not money).

als may serve to vindicate personal struggles against authority in ways that distinguish defamation actions in China from defamation litigation in the West. The fact that plaintiffs are able to win defamation cases in China—and that the odds of winning appear high—may give incentives to those with grievances against the media to pursue such actions in court. As a result, courts may play roles in addressing such grievances that other official actors—be they prosecutors, propaganda departments, or local governments—either will not or cannot undertake.

### III. INTIMIDATION AND INNOVATION

Comparative discussions suggest two dominant perspectives for understanding the role of defamation law and litigation. In Western legal history (most notably in the doctrine of seditious libel), as in many single-party states today, defamation litigation served as a tool for maintaining the authority of the state. In modern democratic societies, in contrast, defamation litigation is most often understood as reflecting a legal system's attempt to balance the interests of a free press and vigorous criticism of government with individuals' reputational rights.<sup>383</sup>

The data in Part II reveal similarities between the recent evolution of defamation litigation in China and experience elsewhere. But such evidence also suggests that defamation litigation is playing additional roles in China. In China, defamation litigation serves also as a manifestation of the instrumental use of law in local-center conflicts, as a reflection of the increased willingness and ability of individuals to use the legal system to pursue rights-based grievances, and as a mechanism for enhancing the authority and importance of the courts.

#### A. *Imposing Control and Respect*

Part II shows that defamation litigation is a tool for restraining critical media coverage, in particular of officials, Party-state entities, and businesses. So understood, defamation litigation serves to counterbalance the expansion of editorial autonomy that has followed from rapid commercialization of the Chinese media. The development of defamation litigation into a tool to restrict the media suggests parallels between China and other single-party states in which defamation litigation is used to target dissident voices and political opponents. For example, parallels can be drawn between defamation litigation in China and in Singapore.<sup>384</sup>

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383. Cf. Frederick Schauer, *Social Foundations of the Law of Defamation: A Comparative Analysis*, 1 J. MEDIA L. & PRAC. 3, 3 (1980) (“[T]he law of defamation in a society reflects . . . the assumptions of that society respecting the relative importance of an untarnished reputation . . . and an uninhibited press.”).

384. Rafael X. Zahraiddin-Aravena, *Chile and Singapore: The Individual and the Collective, A Comparison*, 12 EMORY INT'L L. REV. 739, 775 (1998) (discussing the use of defamation law to curtail the media in Singapore); see also Scott L. Goodroad, *The Challenge of Free Speech: Asian Values v. Unfettered Free Speech, an Analysis of Singapore and Malaysia in the New Global Order*, 9 IND. INT'L & COMP. L. REV. 259, 278, 287

Recent trends in China also resemble the historical development of libel law in England as a tool for maintaining state control, as well as the development of the “seditious libel” doctrine in the United States.<sup>385</sup> The growth of defamation cases in China following the development of commercialized media in the 1990s appears akin to the aggressive use of libel laws in seventeenth-century America in response to the development of the printing press.<sup>386</sup> The use of litigation by judges to respond to criticism also parallels the development of the “scandalizing the court” doctrine in English law<sup>387</sup> and the use of contempt powers by U.S. judges prior to the 1940s.<sup>388</sup>

Defamation litigation in China reflects concern that critical reporting may undermine the authority of, and popular confidence in, the Party-state. These concerns resonate with concerns in early English libel law with preventing a decline in public respect for authority, as well as with maintaining the “good names of England’s commercial elite.”<sup>389</sup> Faced with criticism that risks un-

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(1998) (discussing the use of contempt-of-court provisions to limit criticism of the state in Singapore and Malaysia).

385. See NORMAN L. ROSENBERG, *PROTECTING THE BEST MEN: AN INTERPRETIVE HISTORY OF LAW AND LIBEL* 4 (1986) (discussing the development of libel law in England as a tool for targeting political enemies and for blocking risks to the King’s peace); Michael Newcity, *Libel Law Then and Now: A Review Essay*, 1989 WISC. L. REV. 359, 389 (1989) (noting the early nineteenth-century consensus view among U.S. leaders “that restrictive libel laws encouraged virtuous men to seek public office and protected public opinion from corruption by licentious publications”); see also David Riesman, *Democracy and Defamation: Control of Group Libel*, 42 COLUM. L. REV. 727, 735–37 (1942) (noting the use of defamation law in England to limit “criticism of the reigning powers,” as well as nineteenth-century French laws concerning “contempt against the government”).

Similar arguments have been made regarding the importance of provisions in China’s imperial codes regarding insult and false accusation in maintaining social order. See ZHANG XINBAO, MINGYU QUAN DE FALÜ BAOHU [LEGAL PROTECTION OF REPUTATION RIGHTS], 52–53 (1997) (stating that one purpose of ancient Chinese “defamation law” was to maintain the “feudal hierarchy and governing order”).

386. See ROSENBERG, *supra* note 385, at 17 (discussing seventeenth-century defamation litigation in the American colonies).

387. Although the doctrine has been unused in England for most of the past century, it continues to play a role in other common law jurisdictions. See, e.g., *In re Patrick Anthony Chinamasa*, 2000 (2) ZLR 322 (Zimbabwe Supreme Court) (holding that the offence of scandalizing the court is still justifiable because “unlike other public figures, judges have no other proper forum in which to reply to criticisms”); *Attorney-General v. Lingle*, [1995] 1 SLR 696 (Sing.) (finding author, editor, publisher, printer, and distributor of a newspaper guilty of contempt for publishing an article imputing bias to the judiciary); *Chokolingo v. Attorney General of Trinidad and Tobago* (1980) 1 All E.R. 244, 248 (UKPC) (stating that the doctrine of “scandalizing the court” is used against publications that are “calculated to undermine the authority of the courts and public confidence in the administration of justice”); see also GEOFFREY ROBERTSON & ANDREW NICOL, *MEDIA LAW* 389–91 (2002) (describing the doctrine as “anachronistic” and nearly obsolete in English law but noting that the doctrine “has been invoked as an instrument of oppression to silence honest criticism of biased judges” in other Commonwealth countries); *Barfod v. Denmark*, 149 Eur. Ct. H.R. 14 (1989) (stating that restrictions on criticism of judges were “necessary in a democratic society,” and that the state had a “legitimate interest in protecting” judges from “a defamatory accusation against the lay judges personally, which was likely to lower them in the public esteem and was put forward without any supporting evidence”).

388. See *Bridges v. California*, 314 U.S. 252, 263–68 (1941) (tracing the history of contempt by publication in the United States); see also Walter Nelles & Carol Weiss King, *Contempt by Publication in the United States—To the Federal Contempt Statute*, 28 COLUM. L. REV. 401, 406 (1928) (tracing the history of contempt by publication in the United States and noting that “[c]ontempt by publication often comes very close to seditious libel”).

389. ROSENBERG, *supra* note 385, at 5.

dermining popular confidence, China's local elite have likewise turned to defamation litigation as a mechanism for curtailing threats to their authority. Despite the central Party-state's concern with curbing local malfeasance, defamation litigation is consistent with a policy of not permitting excessive media criticism.

Yet defamation litigation in China cannot be explained simply as an attempt by an authoritarian regime to restrict press freedom. For four principal reasons, parallels with the use of defamation litigation to constrain the media elsewhere may not be as deep as first impressions indicate. First, although defamation law may comport with other state controls imposed on the media in China, defamation litigation is not a necessary tool for doing so. As Haier's case against Chen Yicong shows, many in the Chinese media are wary of criticizing even prominent corporations. The central Chinese Party-state does not use defamation litigation to constrain the media; it has other mechanisms for doing so, including a strict licensing system that limits new media entrants and a system of severe sanctions for publications and journalists who overstep the bounds of permissible content.<sup>390</sup> The dearth of reports critical of high-ranking officials and government entities does not stem from the threat of defamation litigation. Instead, it reflects a system in which editors, journalists, and media outlets risk closure or jail if they engage in such reporting.<sup>391</sup> Thus, although defamation litigation has grown in response to the commercialization of the media, it does not reflect a loosening of direct state controls on the media.<sup>392</sup>

The possibility that the General Principles' provisions on defamation law were adopted in part because of their usefulness in controlling speech cannot be completely discounted. Proposals considered at the same time to protect the media explicitly through a media law were not adopted. The enactment of the General Principles coincided with official steps to reign in media that had become increasingly open in the 1980s, in particular by cracking down on those

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390. See, e.g., Confidential Interview 69 (2004) (commenting that high-ranking officials rely on other mechanisms to block unfavorable coverage—and do not need to rely on defamation litigation to do so); Confidential Interview 72 (2004) (stating that any decrease in critical reports in the Chinese media in recent years is unlikely to be the result of defamation litigation, because there are other more-important factors at work, and that the primary concern of journalists and editors with publishing critical reports about high-ranking officials is not that they will be sued as a result, but instead that they will be punished in other ways); see also Overseas Press Club of America, *Journalists in Jail—and How to Help Them* (2003) (listing journalists in jail in China); cf. Dennis L. Wilcox, *Black African States*, in *PRESS CONTROL AROUND THE WORLD* 209, 226 (Jane Lefwich Curry & Joan R. Dassin eds., 1982) (noting that libel laws are used to constrain the media in many African nations but that “nations with a wholly owned government press saw no relevance” of libel laws being used in that manner).

391. Some in China discount the degree to which defamation litigation is an impediment to effective media oversight, noting that high-ranking officials do not rely on defamation litigation to stop critical reporting by the media. Wei, *supra* note 362.

392. That defamation law in China has developed despite a lack of weakening of other forms of state control suggests an important difference from the evolution of defamation law in Anglo-American law. Cf. Philip Hamburger, *The Development of the Law of Seditious Libel and the Control of the Press*, 37 *STAN. L. REV.* 661, 665 (1985) (arguing that seditious libel developed in English law only after other means of restraining the press, such as licensing and treason, became unusable).



publishing without authorization. Nevertheless, these concerns do not appear to have been prominent. Most discussions of the rationales behind the inclusion of reputation rights in the General Principles focus on the need, as noted, to avoid a return to the personal attacks of the Cultural Revolution<sup>393</sup> as well as on concern with bringing China into line with international practice.<sup>394</sup> There was little reason for drafters to be concerned with aggressive media coverage undermining state authority. China's media had yet to commercialize, and controlling local officials was likely of greater concern than was controlling the media.

Second, defamation litigation in China has emerged as an important weapon for powerful local interests to resist either external or higher-ranking oversight. In China, the media, in particular central Party-state media, are a crucial tool for state oversight of local officials. Defamation litigation by local officials and state entities is a manifestation of tension between the media, which, in the process of commercialization, have also become more aggressive, and local targets of such criticism.<sup>395</sup> The drafters of the General Principles almost certainly did not envision that defamation litigation would develop so quickly into a tool for local interests to resist oversight; neither aggressive criticism of local authorities nor the use of formal law to resist central oversight was common in 1987.

Third, the use of defamation law in Western legal history and in contemporary single-party states to constrain the media has in general reflected efforts to prevent nonstate actors from challenging state authority. Despite commercialization, the Chinese media remain an arm of the Party-state. Hence, defamation litigation in China reflects rival claims to authority rather than attempts to constrain nonstate media (or to balance the interests of competing nonstate actors). The Chinese media cannot be understood as representing the speech rights of society against the state. In China, the growth of the commercialized media has presented local officials with direct challenges to their authority—which were previously rare. But the willingness of targets of critical reports to sue is also a challenge to the media, and thus to their traditional authoritative position.

Fourth, Chinese defamation litigation is also a manifestation of attempts to increase the authority of China's courts—both by restraining criticism of the courts and by encouraging a greater range of disputes in the courts. Such actions contrast with the efforts of their earlier counterparts in the United States,

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393. WANG LIMING ET AL., *RENGE QUAN YU XINWEN QINQUAN* [PERSONAL RIGHTS AND NEWS TORTS] 82 (2000), XU, *FOURTH WAVE*, *supra* note 51, at 34.

394. *See, e.g.*, ZHANG, *supra* note 385, at 84–85, 227–30 (discussing Soviet influence on the General Principles of Civil Law). Defamation law was not an entirely imported concept: Chinese scholars have argued that China's imperial codes included provisions analogous to modern defamation law. Provisions on defamation were also included in a draft civil code prepared in the final years of the Qing Dynasty; the provisions were not adopted, but they were used as a basis for similar provisions in the Republican-era code. *Id.* at 227; WANG, *supra* note 393, at 82.

395. XU, *FOURTH WAVE*, *supra* note 51, at 19–33.

England, and the Commonwealth countries that adopted the “scandalizing the court” doctrine. In such countries, court actions were justified by the need to preserve authority; in China, courts are attempting to construct authority. To be sure, the distinction between constructing and preserving authority is a rough one. It is no coincidence that the “scandalizing the court” doctrine appears most important in countries or periods in which judicial authority is or has been weak. But the doctrine developed in systems in which courts were recognized as having important historical claims to authority. In China, in contrast, judges have only recently begun to assert claims to authority and respect; historically they have been weak actors. Defamation litigation, like restrictions on media coverage of the courts, can thus be understood as part of an effort to construct popular (and media) respect for the courts. Such actions may be one of the few routes available to courts to exert their own authority and to express displeasure with their low status and with external criticism.<sup>396</sup>

Chinese judges argue that such cases must be understood in light of what they perceive to be widespread disrespect for their work. According to judges, critical media reports encourage such disrespect, and articles that fan such disrespect are often inaccurate.<sup>397</sup> Judges complain that they have limited contempt powers because their ability to take action against those who fail to respect the court is restricted to those persons who actually disrupt court procedures.<sup>398</sup> In addition, judges note that existing law clearly permits both individuals and legal persons, including officials, to bring defamation suits.<sup>399</sup>

The use of defamation litigation to restrict oversight of local misconduct suggests a significant diversion from the original goals that defamation law was designed to address—in particular, protecting the reputations of individuals. Viewed in comparative context, however, such a development is not surprising: Defamation litigation elsewhere has likewise often served the interests of the powerful. Moreover, although defamation litigation is a tool for local elites to resist scrutiny, it is also consistent with state concerns that an increasingly critical media will undermine confidence in the Party-state.

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396. *Id.*

397. Confidential Interview 64 (2004); Confidential Interview 13 (2003); see also Xiaoshuo “*Songli Guaizhao*” Yinlai Guansi: *Rube Lijie Fagnan De Mingyu Quan* [Litigation Caused by the Novel “An Odd Trick of Gift”: Understanding Judges’ Right of Reputation], FAZHI RIBAO [LEGAL DAILY], May 15, 2002, at 6, available at [http://www.legaldaily.com.cn/gb/content/2002-05/15/content\\_36679.htm](http://www.legaldaily.com.cn/gb/content/2002-05/15/content_36679.htm).

398. Confidential Interview 61 (2004); Confidential Interview 65 (2004). China currently lacks provisions regarding contempt of court, Xu, YOUTH DAILY, *supra* note 51, although some judges have been arguing for such powers, Confidential Interview 5 (2003). The Civil Procedure Law permits courts to sanction persons who violate court rules or disrupt court procedures, including those who do so by insulting or slandering judges or court officers. MINSHI SUSONG FA [CIVIL PROCEDURE LAW], arts. 101–02 (promulgated by the Seventh Nat’l People’s Cong., Fourth Session, Apr. 9, 1991, effective Apr. 9, 1991), 2000 LAWS 669. In practice, however, judges rarely take such actions. See Confidential Interview 16 (2003).

399. See Confidential Interview 65 (2004). The reputation of both courts and individual judges is of particular importance in a system in which judges do not enjoy tenure and in which career advancement is determined by how superiors inside the court system and in the Party-state more generally perceive one’s actions.

Courts' own concerns with constructing authority and mandating respect, as well as their links to local authorities, have made courts receptive fora for such claims.

*B. Overprotecting Individual Rights?*

Defamation litigation in China cannot, however, be understood solely in terms of efforts to restrict or respond to critical coverage of official actors. As Part II shows, ordinary persons and celebrities bring a significant portion of defamation litigation, including numerous cases in which they directly challenge official Party media outlets. The use of defamation litigation to challenge authority suggests an additional difference from experiences elsewhere, where defamation litigation developed as a tool to protect state authority. The lack of concern with balancing speech rights and reputation rights facilitates courts' receptiveness to claims by individuals. But the growth of defamation litigation also demonstrates individuals' increased willingness to use the formal legal system to pursue grievances against the state.

The willingness of ordinary persons to challenge the official media suggests the need to broaden existing understandings of litigation as a tool for challenging authority. Much recent literature on administrative litigation in China, for example, has noted the modest volume of administrative cases filed each year, suggesting that the Administrative Litigation Law is not a primary tool for individuals seeking redress against the state.<sup>400</sup> Although the total number of administrative cases brought in China rose throughout the 1990s, reaching a high of 100,921 cases in 2001, the number of new cases brought dropped by twenty percent in 2002.<sup>401</sup> New cases appear to have increased modestly since then,<sup>402</sup> but the volume of administrative cases remains small when viewed alongside the number of complaints raised through the "letters and visits" system for citizen complaints.<sup>403</sup> Although many complaints raised through the letters and visits system likely would not be justiciable, the large number of complaints handled through that system suggests that it nevertheless remains far more important than administrative litigation as a channel for popular grievances.

The prevalence of defamation cases by individuals against the official media shows that cases pitting individuals or groups of individuals against the

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400. The 1989 Administrative Procedure Law permits ordinary persons to bring suit challenging concrete administrative actions. XINGZHENG SUSONG FA [ADMINISTRATIVE LITIGATION LAW] art. 2 (promulgated by the Seventh Nat'l People's Cong., Second Session, Apr. 4, 1989, effective on Oct. 1, 1990), 2002 ADMINISTRATIVE LITIGATION LAW 7. At the time of enactment, the law was hailed as a major development.

401. 2002 ZHONGGUO FA LÜ NIAN JIAN [LAW Y.B. CHINA] 156. There were 80,728 new cases filed in 2002. 2003 ZHONGGUO FA LÜ NIAN JIAN [LAW Y.B. CHINA] 149.

402. Statistics on the number of administrative cases concluded—which includes data on appeals as well as first-instance cases—show an increase of 4.7% in 2004 as compared to 2003. Xiao, *supra* note 71.

403. "Letters and visits" offices exist at each level of the Party-state, and at most Party-state departments, to accept and handle popular grievances. For a detailed discussion of the system, see Carl Minzner, *Xinjang: An Alternative to the Formal Chinese Legal System*, 42 STAN. J. INT'L L. (forthcoming 2006).

state may exist outside the parameters of administrative litigation. Given the continued status of official newspapers as both the mouthpieces and the eyes and ears of the Party-state, the willingness of individuals to challenge the official media may be a significant indicator of increased willingness to challenge local authority.<sup>404</sup> Such cases also suggest the ability to circumvent the barriers to effective use of administrative litigation. Defamation cases may be more feasible than administrative cases because the media—in contrast to many defendants in administrative cases—lack the ability to take direct action against plaintiffs. In cases brought by individuals in response to inaccurate reports of personal wrongdoing, including mistaken determinations of guilt by the police, procuratorates, or courts, defamation litigation may provide the only available avenue of redress. In some cases the media are sued for accurately reporting on actions by courts or other actors—apparently because suing the media is more feasible than directly challenging such official actions.<sup>405</sup>

The willingness of individuals in China to sue the media has engendered significant criticism. Much of this is to be expected given the media's self-interest in reducing litigation. Journalists argue that existing law is unfair and encourages frivolous cases and that many such cases involve individuals "abusing the right to bring lawsuits."<sup>406</sup> Some such criticism, however, explicitly argues that, in the context of defamation law, Chinese law has become overprotective of individual rights at the expense of collective interests.<sup>407</sup>

The argument that defamation law is, in cases brought by ordinary persons, overprotective of individual rights contrasts with arguments that defamation law serves as a tool to protect powerful local interests. This dichotomy may, however, be illusory. Both phenomena reflect a system in which there are few protections for speech. Overprotection of reputation rights does not suggest excessive concern with individual rights, but rather a lack of concern with balancing rights to reputation against speech interests of the media and the public's right to information. Similarly, courts' willingness to use defamation litigation to curb critical reporting reflects a system in which media autonomy is tolerated only up to a point, and only so long as it serves state interests.

Chinese commentators explain the judicial preference for protecting reputation rights over media interests by noting that constitutional protections

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404. See Confidential Interview 69 (2003) (stating that the willingness of individuals to sue is a significant development given the traditional force of the media and popular knowledge of "who is behind the media").

405. Confidential Interview 77 (2004).

406. Confidential Interview 71 (2004); see also Confidential Interview 69 (2004) (commenting that ordinary people have a "casual attitude" toward lawsuits, and thus are more and more willing to sue the media than in the past). The willingness of Chinese litigants to sue the media also reflects increased willingness of ordinary persons to file lawsuits more generally—suggesting that claims that litigation is viewed unfavorably in Chinese society are overstated. Cf. Youm, *Libel Laws and Freedom of the Press*, *supra* note 65, at 78 (contending that Confucian values mitigate against bringing defamation litigation in Korea).

407. Confidential Interview 77 (2004).

of the right to reputation have been elaborated through the General Principles.<sup>408</sup> In contrast, no similar legislation exists implementing either the Constitution's protection of freedom of speech or the right to criticize official actors.<sup>409</sup> A more robust explanation may be that favoring reputation rights is in the state's interest. Protection of reputation rights of ordinary persons, or of officials, reflects a system in which the Party-state has encouraged greater media autonomy to increase profit and fight corruption in order to preserve the current political order. Liberalization of the media is not a goal in itself. The development of the media is a tool for reaffirming Party-state oversight, not for encouraging alternative visions of governance.

The use of defamation litigation by ordinary persons in China contrasts with developments in the American system, at least in recent decades.<sup>410</sup> Given the limited alternative routes of redress, the relatively low cost of bringing suit, the strong concerns with personal reputation, as well as a strong tradition of pursuing grievances, individuals in China may have greater incentives to bring such cases than their counterparts elsewhere.<sup>411</sup> Such incentives are amplified by the fact that defamation law is an area in which existing law offers significant protection of rights, something not always available to litigants challenging authority. In contrast to the West, defamation litigation in China often is itself a challenge to state authority. The examples set forth in Part II suggest that rather than representing attempts to establish and maintain community norms, as was the case in the early development of libel litigation involving individuals in the Anglo-American tradition, cases brought by individuals in China often represent efforts by aggrieved individuals battling against a range of official and quasi-official entities.

Cases brought by individuals are also a manifestation of the increased range and volume of grievances in China, as well as of the expanding array of vehicles for raising such complaints. Although some in China say that most persons who bring such suits are relatively well educated,<sup>412</sup> the numerous cases involving farmers and those not residing in major cities suggest that defamation litigation can also be understood as a reflection of increasing rights conscious-

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408. See, e.g., Huang Jixin, "Toupai": Meiti De Quanli Xianjin He Daode Beilun ["Secret Video-Taping": The Pitfalls and Moral Dilemma of the Media's Rights], JINGJI GUANCHAO [ECONOMIC OBSERVER], Apr. 5, 2002, available at <http://home.donews.com/donews/article/2/24257.html>.

409. Confidential Interview 72 (2004).

410. See, e.g., ROSENBERG, *supra* note 385, at 15 (arguing that the "sheer complexity of mid-twentieth century defamation law has discouraged most ordinary citizens in England from filing libel suits"). In contrast, much early defamation litigation in the American colonies involved disputes brought by and against individuals. *Id.* at 16.

411. Low filing fees for defamation cases in China combined with a relatively high probability of success contrast with the situation in the United States, where plaintiffs sue despite "overwhelming, if not insurmountable, odds against [them]." Randall P. Bezanson, *Libel Law and the Realities of Litigation: Setting the Record Straight*, 71 IOWA L. REV. 226, 226 (1985) [hereinafter Bezanson, *Setting the Record Straight*]. Likewise, the possibility of significant awards in China contrasts with the situation in other Asian countries. Cf. Youm, *Libel Laws and Freedom of the Press*, *supra* note 54, at 80 (suggesting that small damage awards in Japan partly explain the scarcity of litigation).

412. Confidential Interview 76 (2004).

ness<sup>413</sup>—a trend also reflected in the rise in complaints through the letters and visits system and in popular protests.<sup>414</sup> Just as the willingness of individuals to bring administrative litigation against state entities may be as important a development as the outcomes of such cases, the willingness of individuals to use law to challenge the state media is a significant development. Ordinary persons pursuing defamation litigation may receive both official acknowledgment of their claims and money damages. Yet the most important consequence of such cases may be to legitimize both individuals' ability to bring rights-based grievances and the role of the courts in resolving such claims.

### C. *Litigation as Institutional Evolution*

Outcomes in the cases analyzed in Part II show that protectionism plays a significant role in determining outcomes in defamation cases. The evidence also suggests, however, that defamation litigation is not merely a manifestation of the long-standing problem of local protectionism. While local interests use litigation as a tool for resisting central oversight, they are also legitimizing the role of courts as arbiters of a widening range of rights-based disputes and are encouraging individuals to challenge powerful institutions. The increased number and range of defamation cases may be encouraging the courts to innovate, and, as a direct consequence, to increase their own authority.

Local protectionism is a problem that permeates the Chinese legal system. Protectionism is particularly acute in defamation litigation, where the SPC's Interpretation explicitly authorizes cases to be brought in the plaintiff's domicile, and where vague legal standards permit extensive court discretion. Courts acting on behalf of local plaintiffs in defamation cases do not merely protect local interests; they also facilitate retribution by targets of critical reports.<sup>415</sup> Lawyers who defend the media say that, in some cases, defamation disputes become questions of Party-state policy, not of law, as local courts cannot avoid ruling without at the same time issuing a decision on the merits of the underlying report. In such cases, it is extremely difficult for the media to prevail.<sup>416</sup>

Outside the defamation context, court action to protect local interests against external interests may also represent a political challenge to central authority.<sup>417</sup> In the context of defamation litigation, such challenges may have greater significance. Such decisions are issued both against other Party-state institu-

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413. *Id.*

414. See, e.g., Lang Jinsong, *Qiantan Yulun Jianduquan Jiqi Falü Baobu* [A Brief Discussion of Legal Protection for Popular Opinion Supervision], XINWEN ZHANXIAN [NEWS FRONTLINE], Nov. 2000, available at <http://www.people.com.cn/GB/paper79/1980/318188.html>; Wang & Zeng, *supra* note 363; Confidential Interview 74 (2004); Confidential Interview 22 (2003); see also Confidential Interview 77 (2004) (stating that defamation litigation reflects a society in which ordinary persons are increasingly willing to challenge state authorities).

415. See Ding, *supra* note 129 (arguing that targets of critical reports clearly use their influence over local courts to retaliate against the media).

416. Confidential Interview 77 (2004).

417. Given Chinese courts' weak institutional position, it is not surprising that courts act to protect local interests.

tions—the media—as opposed to against non-state actors. Moreover, such decisions are also at times against official central mouthpiece media, as well as media from other regions. The willingness of local authorities and courts to issue such decisions, in particular in response to critical reports from major Party papers, reflects the degree to which local authorities view the external media as a threat. Yet the willingness to act, in some cases blatantly, to resist and retaliate against external oversight also reflects the degree to which local authorities are able effectively to resist control by the center.

The growth of defamation litigation thus shows how local authorities and powerful persons are using newly developed legal institutions to entrench their authority. Much of the literature on problems in China's courts highlights the use of courts to protect local economic interests. Defamation cases—in particular those brought by corporations and businesses—are consistent with such arguments. But cases brought by local officials also demonstrate the instrumental use of the courts to protect local political interests. Moreover, literature on local protectionism in the legal system has generally focused on the difficulty ordinary persons and other weak plaintiffs face when trying to use law to challenge local interests. Defamation litigation shows that locally powerful individuals and entities are also using the courts as an offensive—not just a defensive—tool.

Instrumental use of law and litigation is neither new nor necessarily pernicious. Local authorities' instrumental use of law may also encourage and permit experimentation and innovation, just as economic protectionism may have played an important role in China's recent economic development.<sup>418</sup> Observers of China have noted how local protectionism serves both economic and political interests; the use of defamation litigation by local authorities is a reflection of such trends. But the instrumental use of law and litigation by local authorities to combat external, and even central, oversight suggests a new dimension to local-state relations.<sup>419</sup> Defamation litigation in Western legal history has likewise at times served instrumental goals—but generally as a tool for authorities (and in particular central authorities) to maintain control, not as a mechanism for local authorities to resist central oversight.

One aspect of defamation litigation that distinguishes it from other examples of local protectionism in China is that such cases are both argued in courts and often reported on by the media. Such actions thus are exposed to an un-

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418. See ANDREW H. WEDEMAN, *FROM MAO TO MARKET* 21 (2003) (arguing that “rent seeking and local protectionism” in China have been “critically important forces for change”).

419. The instrumental use of defamation litigation also suggests that, to the degree local protectionism in defamation litigation is a problem, any solution cannot be separated from larger questions of court reform—and in particular from questions of how to separate courts from direct oversight by local authorities. Local protectionism has played an important role—both positively and negatively—in China's legal development. Local courts generally control court appointments and finances and thus exercise significant influence over court decisionmaking. Local courts have, however, also served as repositories for experimentation. Competition between local and central authorities, moreover, partially explains some important reforms in the Chinese legal system, including administrative litigation and class actions, both of which may assist efforts by central authorities to combat local protectionism.

usual level of scrutiny. Additionally, defamation litigation may permit responses by defendants that might not be possible in other cases involving local interests.<sup>420</sup> That courts have become significant fora for local-center and local-external disputes does not necessarily mean that the courts themselves are more authoritative. But the role courts are playing suggests that conflicts that formerly would have been resolved elsewhere, or not raised at all, are now being resolved through the courts, and as a result may be more open to challenge than in the past.

The data presented in Part II, moreover, show that defamation litigation may empower individuals at the same time as it serves local interests in control. The development of defamation litigation cannot be understood only in terms of local protectionism, or only as evidence of how those with power resist and retaliate against external scrutiny. Cases brought by both famous persons and ordinary individuals demonstrate that persons without obvious influence are using libel suits to advance a range of interests. Local protectionism may assist ordinary plaintiffs, but that does not explain the apparent increasing willingness of individuals to bring such cases, or the apparent receptiveness of courts to such claims.

The greater use of law and the courts as a tool to assert local interests and resolve local-center conflicts may be opening opportunities for greater use of law by others. Although defamation litigation by individuals developed soon after the General Principles of the Civil Code became effective in 1987, increased use of defamation litigation by powerful parties in recent years may also be encouraging more ordinary individuals to assert their rights.<sup>421</sup> The data in Part II do not permit detailed analysis of the development of each type of claim over time, and any spillover effect cannot be clearly established. But it appears likely that widespread coverage of defamation litigation is encouraging more such cases.

The use of courts to entrench local interests—by reference to legally protected individual rights—therefore may also be encouraging rights-based litigation by others. Using litigation to constrain the media may signal that litigation is a tool for combating other powerful actors, be they corporations or governments. Permitting such cases to be used to entrench local interests may be a necessary corollary or prerequisite to the effective use of litigation by ordinary people.

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420. In some cases, reporters who are sued for defamation have also countersued, arguing that their own reputations are harmed by frivolous defamation allegations. See, e.g., Wu Xiaohua et al., *Yulun Jiandu Zao "Eyi Susong": Cong Beigao Dao Yuangao, Hunan Yi Jizhe Kai Fansu Xianbe* [Media Supervision Results in "Malicious Lawsuit": From Defendant to Plaintiff, Hunan Reporter Brings the First Countersuit], BEIJING QINGNIAN BAO [BEIJING YOUTH DAILY], Nov. 21, 2001, available at <http://www.bjyouth.com.cn/Bqb/20011121/GB/4804^D1121B2101.htm>.

421. Cf. Liang Huixing & He Weifang, *Mingyu Quan Yao You Jiexian* [There Must Be Limitations on Reputation Rights], ZHONGGUO QINGNIAN BAO [CHINA YOUTH DAILY], Sept. 15, 1999, available at <http://www.civillaw.com.cn/weizhang/default.asp?id=12721> (noting an increase in the 1990s of defamation cases brought by ordinary persons).



Even within the context of actions designed primarily to deflect criticism of locally influential plaintiffs, the fact that courts are now battlegrounds for power interactions may be encouraging judicial innovation as well. In three recent cases, local courts have issued rulings that either explicitly or implicitly recognized the importance of media supervision and the need for persons in the public spotlight to withstand a heightened level of criticism. In the first such case, Chinese soccer star Fan Zhiyi sued the Shanghai-based Wenhui Xinmin United Publishing group after its *Oriental Sports Daily* reported on rumors stating that Fan had gambled on games. The paper contended that its article, which was one of a series reporting on the alleged scandal, had been intended to refute rumors that were widely circulating at the time and to clear Fan of any wrongdoing.<sup>422</sup> In rejecting Fan's claim, the court noted that Fan "naturally was a public person" and that the defendant had "the responsibility to carry out its right to public opinion supervision" and report on the rumors.<sup>423</sup> The court added that the paper should be protected because it was acting in the public interest and satisfying the public's "right to know" regarding a public person.<sup>424</sup> As a result, the plaintiff's reputation "was not just an ordinary matter of one person's affairs, but rather was a matter of public interest" and thus "certainly" could be a subject of news reporting.<sup>425</sup>

In the second case, Yu Qiuyu, a famous writer, brought a libel suit against a rival commentator, Xiao Xialin. Xiao had alleged that Yu received a villa from the Shenzhen government as a gift in return for serving as a "cultural consultant" to Shenzhen and for praising Shenzhen. Yu argued that he had never received any real estate as compensation from anyone in Shenzhen. The defendant made explicit reference to the Fan Zhiyi case in arguing that the concept of "public figure" had been accepted in China, and that Yu should likewise be found to be a public figure deserving of a lower standard of protection than that accorded an ordinary person.<sup>426</sup>

The Beijing Dongcheng District People's court rejected the reference to the Fan Zhiyi decision, noting that China is a civil law country and thus citations to case precedent are "not suitable."<sup>427</sup> The court also stated that the question of whether a public figure's reputation deserves a lower standard of protection was still "under academic discussion" in China.<sup>428</sup> Nevertheless, the court found for the defendant. The panel stated that rumors regarding Yu did in fact exist at the time of publication and that the defendant had believed them to be true when he wrote his commentary. The court found that the defendant

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422. See *infra* Appendix B, Case 23.

423. *Id.*

424. *Id.*

425. *Id.*; see also Xin Yi, Cong "Fan Zhiyi Mingyu Quan" An Baisu Shuoqi [Discussing the Defeat in the "Fan Zhiyi Defamation" Case], RENMIN LUNTAN [PEOPLE'S FORUM], Aug. 2004, available at <http://www.people.com.cn/GB/paper85/13064/1173473.html> (discussing the use of the public person standard in the case).

426. See *infra* Appendix B, Case 176.

427. *Id.*

428. *Id.*

had not created the story, but had merely reported on rumors that were already circulating.<sup>429</sup>

Although the court rejected direct citation to the Fan Zhiyi case and said that resolving the public figure issue was not necessary, some commentators saw the explicit discussion of the standard and the reliance of defendant's counsel on the Fan case as important breakthroughs.<sup>430</sup> Despite the court's statements to the contrary, commentators argued that the public person standard had played an important role in the outcome.<sup>431</sup> Indeed, even China's official English-language newspaper, *China Daily*, stated in its report on the case that the court found that "[a]s a public figure, Yu should show some tolerance to a certain amount of criticism in the media as long as it was not malicious or in direct violation of the law."<sup>432</sup>

In a third case, brought by Hong Kong Director Stanley Tong, also known as Tang Jili, lawyers for the defendant media contended that Tong's celebrity status meant that he should enjoy a lower level of protection for reputation and be exposed to a higher degree of public scrutiny.<sup>433</sup> The court found for plaintiff Tong, but, in an online discussion of the case posted to the court's website, one of the judges involved in the case accepted the Fan Zhiyi public person standard. The judge explained, however, that accepting the public person standard did not necessitate a finding for defendants, as even public persons have reputation rights.<sup>434</sup> In this case, the media had violated such rights when they reported that Tong had broken up with his girlfriend while she was pregnant with his child.<sup>435</sup>

The cases demonstrate the courts' willingness to contemplate expanded protection for the media even absent explicit guidance to such effect from either the National People's Congress or the SPC. Such judicial innovation is particularly striking given that neither the General Principles nor the SPC's Explan-

429. *Id.*

430. *Id.*

431. *Id.*

432. "Public Figures," *infra* Appendix B, Case 176.

433. See *infra* Appendix B, Case 196; *HK Director Sues Mainland Journalists*, CHINA DAILY, Nov. 5, 2004, available at <http://www.china.org.cn/english/2004/Nov/111316.htm>.

434. See *infra* Appendix B, Case 196.

435. *Id.* In an additional case, brought against the magazine *China Reform*, the Tiahe District Court in Guangzhou stated that in determining whether or not commentary from a news organ was fair, a court should consider whether the target of the commentary involved the public interest, whether the report was correct, and whether the report was made with sincere intent. Although the case did not explicitly involve a public person standard, some in China and in the international media argued that the case was a major breakthrough because the court explicitly discussed the importance of free speech: The court stated that "citizens and legal persons have both the legal right to have their reputations not be infringed and at the same time possess the right to freedom of speech." See Pu, *infra* Appendix B, Case 185; see also *Ruling Seen As Free-Speech Landmark*, *infra* Appendix B, Case 185; He, *infra* Appendix B, Case 185.

In the case, a state-owned real estate company, Guangzhou Huaqiao Real Estate Development Co., had sued the magazine following reports discussing the misallocation of state assets and the laying off of state workers. The court noted that the articles in question had addressed important issues—the preservation of the value of state assets and treatment of workers—and had not been incorrect. See Pu, *infra* Appendix B, Case 185. The court thus found against the local plaintiffs and in favor of the defendant magazine, which was, and still is, linked to the national State Economic Reform Commission. *Id.*

nation or Interpretation provide a basis for distinguishing between “public persons” and others, and the issue remains a sensitive point in ongoing discussions regarding draft provisions on defamation for China’s Civil Code. Yet courts have relied on such a distinction in response to arguments by lawyers, some of whom have explicitly argued with reference to defamation law in other countries. The three principal “public person” decisions have not relied on the right to criticize the government, but some scholars and journalists have justified the decisions by noting that the Constitution does protect the right of citizens to criticize the state.

Whether other courts will follow the lead of the Shanghai court and adopt a public person standard remains to be seen. Whether the SPC or the National People’s Congress will look kindly on such actions is similarly unclear. But the willingness of courts to rule in favor of defendants in such cases does suggest that courts are, in certain circumstances, willing to act innovatively to enhance protections for the media. Whether the defamation cases are unique or reflect a broader trend toward innovation by China’s courts is an intriguing topic for future study. At the very least, however, the rise in the range and number of cases in China’s courts is presenting widening opportunities for such experimentation.

Expanded protection for the media’s right to criticize would facilitate the media’s ability to engage in critical reporting, and might help insulate the media from some defamation litigation. But it would be wrong to view such provisions as likely to effect fundamental changes to the role of the media in China. Direct Party oversight of the media remains more important than defamation litigation as a tool for constraining critical reporting. In most cases, Propaganda Department sanctions are more feared than are adverse defamation standards. Increasing protection for the media from defamation litigation might reduce the ability of local officials to retaliate against the media, but it would not alter the media’s inability to criticize higher-ranking officials.

The Chinese media’s official role also suggests caution in assuming that strengthening protections for the media will further transparency and accountability. The media already plays an important official oversight role: Critical reporting serves central Party-state interests in curbing malfeasance by local officials and in combating local protectionism. Such criticism is tolerated, and at times encouraged, only because it serves central interests and not because of recognition of the value of independent media criticism of government. Thus, in contrast to the United States, where the public person standard serves to protect the media from the state, in China such provisions would serve to protect one arm of the state (the media) from other state institutions.

As this Article has shown, the media’s official role in China means that defamation litigation is a mechanism for resisting state authority and for increasing state accountability. High defeat rates for the media are forcing the media to adjust their practices and may be contributing to increased professionalism within the media. Given the media’s influence, and the Party-state’s reliance on the media as a source of information, increasing media account-

ability is a worthy goal. Indeed, Chinese observers argue that the Chinese media's official status is itself a powerful argument in favor of stringent defamation standards: In a system in which courts, Party officials, and ordinary persons often view media reports as fact, holding the media accountable for even small errors may be more desirable than would be the case in a system in which the media reflect a diversity of perspectives.<sup>436</sup> Defamation litigation is one of the few mechanisms that exist for challenging the authority of the media.<sup>437</sup> Likewise, in a society in which criticism has traditionally been muted, critical reports have particular potency, thus perhaps justifying greater constraints on the media than might be found in a democratic society.<sup>438</sup> To be sure, these claims overstate the case for restrictions on the media, but they highlight tension between the media's new and traditional roles.

Such arguments neither undercut the value of recent judicial innovations regarding public persons, nor weaken claims that the media's role in exposing wrongdoing is being hampered by repressive use of defamation litigation. These arguments do, however, demonstrate that simply transplanting defamation standards from abroad is unlikely to have immediate effect. Expanded protections for the media, and an expanded role for courts in developing and enforcing such provisions, would serve important goals. Over time, facilitating greater media criticism of official actors and other public persons may increase the state's comfort level with direct media criticism. Likewise, permitting courts to continue to develop legal standards for defamation law may encourage the courts to expand their role in adjudicating rights-based claims more generally, and may strengthen courts' ability to resist external interference. Ensuring that courts continue to play roles in adjudicating such disputes is likely more important than the substantive legal standards they apply.

#### IV. CONCLUSION

It would be tempting to explain the growth of defamation litigation in China as an example of a repressive regime using litigation to intimidate the newly vibrant media. Such trends exist in China, and many in the Chinese media do view defamation litigation primarily in terms of its implications for media freedom. The evidence presented in this Article, however, suggests that conceptualizing defamation litigation in such terms overlooks much of the

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436. Confidential Interview 84 (2004).

437. See Confidential Interview 76 (2004) (arguing that defamation litigation is a mechanism for reducing "rule by man" in Chinese society); Wei, *supra* note 362 (arguing that strong protections for individuals are justified because, absent the threat of defamation litigation, the media would face few limits on their power).

438. See Confidential Interview 78 (2004) (arguing that the media's influence and authority justify holding the media to a higher standard than would otherwise be the case). The continued links of the Chinese media to the state, and the tendency of the media to be one-sided in their reporting, may also contribute to the frequency of defamation litigation by making it difficult for targets of criticism to respond in print. Cf. ROSENBERG, *supra* note 385, at 143 (arguing that expansion of the mass media in the United States in the nineteenth century, and the resulting increased ease with which targets of criticism could respond in print, resulted in a decline in libel litigation).

significance of these cases. Defamation litigation in China reflects friction between strong concerns for the reputations of individuals and an increasingly commercialized, and difficult to control, media. But such litigation also reveals tension between state interests in increasing media oversight and state concerns with cabining criticism, as well as concerns with granting the media greater protections in a society in which the media continue to speak with the imprimatur of state authority.

This Article demonstrates that defamation litigation, originally designed to protect individuals, has been co-opted by those with power into a tool for resisting media scrutiny. Yet such use of defamation litigation may also serve to encourage greater use of litigation by ordinary individuals. This model of litigation by the powerful serving to encourage similar action by those without power carries at least three implications for our understanding of the process of legalization in China.

First, these developments highlight the degree to which China's legalization process is occurring in ways that are difficult for the central Party-state to control and that may not be easily perceived or categorized. The Chinese legal system is pulling in multiple directions, with courts and the media attempting to carve out significant autonomy within a framework of state oversight and interference. Defamation litigation by local officials may have developed because such actions are consistent with central Party-state concerns over excessive media autonomy. Yet despite the widespread media coverage of individual defamation cases, the evolution of defamation litigation into a vehicle for resisting central oversight and asserting local interests appears to have occurred largely unnoticed. Given the difficulty of imposing central authority on local courts and the likely diversity of views about the roles of the media and the courts within the Party-state, efforts to better delineate the boundaries of permissible and impermissible conduct by the media or local authorities may be difficult.

Second, this model demonstrates that efforts to use law in ways that appear to undermine legality may also be fostering greater use of law by others. Corporate and official lawsuits designed to retaliate against or repress the media through local courts may undermine confidence in the courts as fair or neutral decisionmakers. But such litigation may also be encouraging greater use of the formal legal system by ordinary persons, by suggesting the possibility both that the law offers strong protection for the reputations of individuals and that the media can be sued. By bringing such suits, corporate and official plaintiffs may also be indicating that the courts are legitimate fora for resolving such disputes.

Third, the growth of defamation litigation suggests the important space available for innovation by a range of actors in the legal system. Such cases demonstrate the increased ability of litigants—be they officials or ordinary persons—to use the legal system strategically to advance their own interests in new directions. At the same time, however, these cases also indicate that courts are also increasingly able to innovate, in some cases going out of their

way to fashion new legal doctrines. Likewise, although courts in many cases may have little choice but to rule for local powerful interests, they often issue only modest damages. The development of defamation litigation may indicate a threat to courts' efforts to increase their authority, but there are also indications that courts are increasingly assertive of their own powers and interests, as reflected by cases brought by judges and courts.

Defamation litigation is a mechanism for constraining China's media. High defeat rates in defamation cases suggest a threat to the media's expanded autonomy. The empirical analysis in Part II, however, demonstrates that understanding the development of defamation law only in those terms would be a mistake. The significance of defamation litigation in China transcends individual cases, just as it goes beyond questions of whether defamation law is being used to constrict speech. The impact for understanding the legalization of Chinese society runs deeper. The combination of defamation law and rapidly evolving media and legal institutions is fostering litigation; it is also fostering expectations.

